

EMPLOYMENT APPEALS BOARD DECISION
2014-EAB-0879

Reversed & Remanded

PROCEDURAL HISTORY: On April 16, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 131732). Claimant filed a timely request for hearing. On May 12, 2014, ALJ Seideman conducted a hearing at which the employer did not appear, and on May 13, 2014 issued Hearing Decision 14-UI-17513, affirming the Department's decision. On May 19, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

CONCLUSIONS AND REASONS: Hearing Decision 14-UI-17513 is reversed and this matter is remanded for further proceedings.

Claimant was the only party to appear at the hearing. Claimant testified that she resigned in lieu of being discharged after representatives of the employer told her she was going to be discharged for violating the employer's confidentiality policy by a posting she had made on the website Facebook. Audio at ~ 5:15, ~5:37. Without inquiring into whether claimant had actually engaged in the misconduct by her actions, the ALJ concluded that claimant was disqualified from benefits under OAR 471-030-0038(5)(b)(F) (August 3, 2011), which states that it is not good cause to resign from work "to avoid what would otherwise be a discharge for misconduct or potential discharge for misconduct." Hearing Decision 14-UI-17513. The ALJ reasoned, "It is not appropriate to adjudicate in this proceeding whether what she [claimant] did was misconduct. It is clear from claimant's testimony that there was a potential discharge for misconduct." Hearing Decision 14-UI-17513 at 3. The ALJ's reasoning and his conclusion were in error. The relevant regulatory provision refers to a *potential discharge* for misconduct as being disqualifying, meaning that a claimant resigned to avoid what claimant thought was going to be discharge for misconduct. The language of the regulation, reasonably construed, does not eliminate the need to adjudicate whether the behavior for which the employer might discharge claimant was actually misconduct. Although it is likely that, in the employer's judgment, claimant had engaged in misconduct by violating its confidentiality policy, EAB has consistently held that to disqualify a claimant from benefits under OAR 471-030-0038(5)(b)(F), the record must support,

more likely than not, that the conduct for which the employer would discharged claimant if she did not resign was demonstrably misconduct. *See e.g. Heather Q. Muma* (Employment Appeals Board, 2014-EAB-0520, May 6, 2014). This approach requires an ALJ to assess whether, more likely than not, claimant's alleged behavior constituted a willful or wantonly negligent violation of the employer's standards as required under OAR 471-030-0038(3)(a) that was not excused under OAR 471-030-0038(3)(b) as an isolated instance of poor judgment or a good faith error. *Id.* If claimant's actual misconduct is not demonstrated, the ALJ must further determine whether the employer's intended discharge of claimant, not for misconduct, was nonetheless an objectively grave reason for claimant to leave work. *See e.g. McDowell v. Employment Department*, 348 Or 605, 236 P3d 722 (2010); *Heather Q. Muma* (Employment Appeals Board, 2014-EAB-0520, May 6, 2014); *Mark A. Sorensen* (Employment Appeals Board, 12-AB-2907, November 28, 2012). Because the ALJ did not make these necessary determinations, and did not sufficiently develop the record to allow EAB to do so, this case must be remanded for additional evidence.

To assess the reasonableness of claimant's decision to resign, the ALJ should inquire into the reasons that claimant decided to quit work rather than dispute the employer's contentions that she had engaged in behavior prohibited under its confidentiality policy. To consider whether claimant's violation of the employer's confidentiality policy was willful or wantonly negligent, the ALJ should inquire about the language of the employer's policy, its scope and what it actually prohibited, how that policy was communicated to claimant before she made the Facebook posting and the aspects of the policy that claimant allegedly violated by the Facebook posting. Because the employer did not appear at the initial hearing, and may not appear at the proceeding on remand, the ALJ may be limited to claimant's testimony in making this inquiry. The ALJ should also inquire about claimant's understanding of what the employer's policy prohibited before she made the Facebook posting and the basis for that understanding. Claimant also testified at hearing that her violation of the employer's confidentiality policy entailed posting three lines from a police report on Facebook, but the evidence was not developed sufficiently to allow EAB to assess the plausibility of claimant's contention that she thought the posting did not violate the confidentiality policy because police reports are public information. Audio at ~6:00. The ALJ should develop the record about claimant's purpose when she made the posting, the substance of what she posted from the police report, the substance of any comments she made on Facebook about the posted lines from the police report and whether any personal information about the individuals mentioned in the report was revealed in any part of the posted report or any posted comments. Further, to allow a determination of whether claimant's behavior was a good faith error, the ALJ should inquire about the basis for claimant's belief that police reports obtained in the course of employment were not within the confidentiality policy, including whether claimant was aware of other employees who had previously publicly disseminated police reports or similar information and what, if any disciplinary actions the employer took as a result of this dissemination. Because claimant testified that she had received no prior disciplinary warnings from the employer, it is also necessary for the ALJ to develop the record sufficiently to determine whether claimant's behavior was an isolated instance of poor judgment, including whether the employer indicated to claimant (or her union representative) why it was discharging claimant rather than imposing a less severe disciplinary sanction. Audio at ~9:92

To the extent that the ALJ determines that claimant's conduct was not a willful or wantonly negligent violation of the employer's confidentiality policy, the evidence that the ALJ should inquire into is the likeliness of claimant's discharge, how imminent it was and the stigma of a discharge on her prospects for future employment. *See McDowell v. Employment Department*, 348 Or 605, 236 P3d 722 (2010);

Thomas R. Bailey (Employment Appeals Board, 12-AB-1609, June 27, 2012). Appropriate inquiries would include what the employer told claimant about any intention to discharge her and, if applicable, when it intended to do so, what claimant's union representatives advised her to do, what future employment opportunities claimant intended to pursue after her work separation from the employer and any information that claimant had about any negative impacts on her later search for employment if a discharge for a confidentiality violation were on her employment record. Absent the inquiries outlined above, EAB cannot determine whether claimant left work for good cause under OAR 471-030-0038(5)(b)(F) or OAR 471-030-0038(4).

ORS 657.270 requires the ALJ to give all parties a reasonable opportunity for a fair hearing. That obligation necessarily requires the ALJ to ensure that the record developed at the hearing shows a full and fair inquiry into the facts necessary for consideration of all issues properly before the ALJ in a case. ORS 657.270(3); *see accord Dennis v. Employment Division*, 302 Or 160, 728 P2d 12 (1986). Because the ALJ failed to develop the record necessary for a determination of whether claimant voluntarily left work without good cause, Hearing Decision 14-UI-17513 is reversed, and this matter remanded for further development of the record.

DECISION: Hearing Decision 14-UI-17513 is set aside, and this matter remanded for further proceedings consistent with this order.

Susan Rossiter and Tony Corcoran;
J. S. Cromwell, not participating

DATE of Service: June 30, 2014

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Hearing Decision 14-UI-17513 or return this matter to EAB. Only a timely application for review of the subsequent hearing decision will cause this matter to return to EAB.

NOTE: You may appeal this decision by filing a Petition for Judicial Review with the Oregon Court of Appeals within 30 days of the date of service listed above. *See* ORS 657.282. For forms and information, you may write to the Oregon Court of Appeals, Records Section, 1163 State Street, Salem, Oregon 97310 or visit the website at court.oregon.gov. Once on the website, click on the blue tab for "Materials and Resources." On the next screen, click on the tab that reads "Appellate Case Info." On the next screen, select "Appellate Court Forms" from the left panel. On the next page, select the forms and instructions for the type of Petition for Judicial Review that you want to file.

Please help us improve our service by completing an online customer service survey. To complete the survey, please go to <https://www.surveymonkey.com/s/5WQXNJH>. If you are unable to complete the survey online and wish to have a paper copy of the survey, please contact our office.