EO: 300
BYE: 201511

State of Oregon
**Employment Appeals Board**
875 Union St. N.E.
Salem, OR 97311

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VQ 005.00

# EMPLOYMENT APPEALS BOARD DECISION

**2014-EAB-0900**

*Reversed & Remanded*

**PROCEDURAL HISTORY:** On April 15, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 124825). Claimant filed a timely request for hearing. On May 8, 2014, ALJ Wyatt conducted a hearing at which the employer did not appear, and on May 16, 2014 issued Hearing Decision 14-UI-17860, reversing the Department's decision. On May 23, 2014, the Department filed an application for review with the Employment Appeals Board (EAB).

**CONCLUSIONS AND REASONS:** Hearing Decision 14-UI-17860 is reversed and this matter is remanded for further proceedings.

Claimant resigned from work because he thought that his employer, a state agency, was going to discharge him for taking a small amount scrap wood from an easement that the employer was responsible for maintaining and using that wood to burn at his home. In Hearing Decision 14-UI-17860, the ALJ determined that OAR 471-030-0038(5)(b)(F) (August 3, 2011) did not apply to disqualify claimant from benefits because, since the employer did not appear and testify at the hearing, the record did not support the conclusion that the behavior for which the employer intended to discharge claimant constituted misconduct. Hearing Decision 14-UI-17860 at 2-3. The ALJ further concluded that claimant left work for good cause under OAR 471-030-0038(4) because, at the time he resigned, he reasonably believed that the employer intended to discharge him, not for misconduct, and he reasonably believed that, with a discharge on his employment record, he would not be able to obtain future employment with a state agency.

In connection with whether the employer was going to discharge claimant for misconduct and he was therefore disqualified from benefits under OAR 471-030-0038(5)(b)(F), there is no requirement that the employer appear to present evidence at the hearing if claimant's testimony was sufficient to establish

that he was aware when he took the scrap wood that he was violating the employer's standards and his behavior was not otherwise excused from constituting misconduct under OAR 471-030-0038(3)(b) either as an isolated instance of poor judgment or a good faith error. The ALJ should have, but did not, ask claimant to explain his understanding, before he took the wood, of the employer's policy prohibiting an employee from obtaining a "personal gain" from employment and if he considered that the policy prohibited him from taking home scrap wood for personal use. Audio at ~9:28. Although the ALJ asked claimant on two occasions whether, before he took it, he was aware that taking scrap wood violated the employer's rules, claimant responded both times that he thought it was not a "big deal" and did not directly answer the ALJ's question. Audio at ~19:19, ~20:00. Since claimant had previously testified that it was a common practice for crew members to take scrap wood for personal use from the employer's stockpile, the record is not clear what claimant meant when he stated that he thought taking the scrap wood was not a "big deal." Audio at ~9:28, ~14:44, ~19:19. The ALJ should have asked claimant what he meant, specifically whether he meant that he knew taking the scrap wood violated the employer's policy but that he thought the employer would not impose such a severe disciplinary sanction as discharge for violating that policy or whether claimant meant that he thought at the time that the employer permitted taking scrap wood for personal use and would not impose any discipline. In addition, to enable EAB to determine if claimant's behavior in taking the scrap wood was excused from constituting misconduct as a good faith error, the ALJ should have inquired further into the circumstances under which the employees had been taking scrap wood for personal use, including the length of time that they had done so, if the employer knew or was reasonably aware of the employees' practice and whether claimant thought that the employer actually permitted employees to take home wood for personal use. The ALJ should also have followed up certain testimony of claimant that the employer had stopped storing scrap wood in the stockpiles from which the employees took home wood and inquired into why the employer had stopped doing so, if then or at any other time, the employer communicated to its employees that it had changed any practice of allowing them to take the scrap wood home and whether employees continued taking scrap wood home for personal use after the employer stopped storing it in stockpiles. Audio at ~9:51. Claimant further testified that, on one occasion, the employer had told its employees not to take home wood from one stockpile, but claimant stated that he had thought that this prohibition was because of issues with a particular federal entity (the Army Corps of Engineers) and not the statement of a general prohibition against taking wood. Audio at ~20:32. To allow us to gauge the plausibility of claimant's stated belief, the ALJ should have inquired into what relation taking wood from that particular stockpile might have had to the Army Corps of Engineers and, more generally the basis for claimant's belief that the employer was not generally prohibiting its employees from taking any other wood for personal use.

If the record does not support that claimant engaged in misconduct by taking the wood for personal use, the ALJ still must determine whether had good cause to leave work under OAR 471-030-0038(4). *McDowell v. Employment Department,* 348 Or 605. 236 P3d 722 (2010) holds that a claimant may have good cause to leave work to avoid a discharge that is not for misconduct if claimant's discharge is all but inevitable and a discharge in claimant's employment history would be seriously stigmatizing to claimant's future employment prospects. *Id.; see also e.g. Heather Q. Muma* (Employment Appeals Board, 2014-EAB-0520, May 6, 2014) (claimant had good cause to resign to avoid an inevitable, imminent discharge, not for misconduct, that was shown likely to be stigmatizing to her future employment prospects); *Thomas R. Bailey* (Employment Appeals Board, 12-AB-1609, June 27, 2012) (claimant had good cause to leave work to avoid a discharge, not for misconduct, when his discharge was assured and he had reason to believe it would look better on his employment record if he quit rather

than being discharged). Although claimant testified at hearing that his union representative advised him that the "best thing I could do was to probably resign," the ALJ should have followed up claimant's statement with further inquiries in order to gauge the reasonableness of claimant's stated belief that the employer intended to discharge him imminently. Audio at ~11:24. Appropriate inquiries would include whether the employer ever communicated to claimant or his union representatives that it intended to discharge claimant and when it intended to do so, the substance of any such communications from the employer and when they were made, what claimant's union representative actually told claimant when the representative advised him to resign and the basis for the advice and what, if anything the representative told claimant would happen if claimant did not resign. The ALJ also should inquire into the reasonableness of claimant's belief that if he was discharged, he would not be able to work for a state agency in the future, including the source(s) from which claimant obtained this information, how reliable it was and whether he asked the employer or his union representative about the impact of a discharge on his ability to obtain work in the future. Audio at ~10:00. The ALJ should further inquire into why it would be a reasonably grave circumstance if claimant was not able to work for a state agency in the future or if claimant had a discharge in his employment history. Absent these additional inquiries, we cannot determine whether claimant had good cause to resign to avoid a discharge, not for misconduct.

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 had good cause to resign from work, Hearing Decision 14-UI-17860 is reversed, and this matter remanded for further development of the record.

**DECISION:** Hearing Decision 14-UI-17860 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: <u>July 8, 2014</u>**

**NOTE:** The failure of any party to appear at the hearing on remand will not reinstate Hearing Decision 14-UI-17860 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.

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