

EMPLOYMENT APPEALS BOARD DECISION
2014-EAB-0955

Reversed & Remanded

PROCEDURAL HISTORY: On April 21, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant quit work without good cause (decision # 95509). Claimant filed a timely request for hearing. On May 27, 2014, ALJ Clink conducted a hearing, and on May 29, 2014, issued Hearing Decision 14-UI-18635, concluding that claimant quit work with good cause. On June 3, 2014, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer failed to certify that it provided a copy of its written argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). The argument also contained information that was not part of the hearing record, and failed to show that factors or circumstances beyond the employer's reasonable control prevented it from offering the information during the hearing as required by OAR 471-041-0090 (October 29, 2006). We considered only information received into evidence at the hearing when reaching this decision. *See* ORS 657.275(2).

CONCLUSIONS AND REASONS: Hearing Decision 14-UI-18635 is reversed, and this matter remanded to the Office of Administrative Hearings (OAH) for further proceedings consistent with this order.

OAR 471-030-0038(2)(b) (August 3, 2011) states that if the employee is willing to continue to work for the same employer for an additional period of time but is not allowed to do so by the employer, the separation is a discharge. If the employee could have continued to work for the same employer for an additional period of time, the work separation is a quit. OAR 471-030-0038(2)(a). "Work" means "the continuing relationship between an employer and an employee." OAR 471-030-0038(1)(a). An individual is separated from work when the employer-employee relationship is severed. *Id.*

OAR 657.176(2)(a) requires a disqualification from unemployment insurance benefits if the employer discharged claimant for misconduct. OAR 471-030-0038(3)(a) defines misconduct, in relevant part, as a

willful or wantonly negligent violation of the standards of behavior which an employer has the right to expect of an employee, or an act or series of actions that amount to a willful or wantonly negligent disregard of an employer's interest. OAR 471-030-0038(1)(c) defines wanton negligence, in relevant part, as indifference to the consequences of an act or series of actions, or a failure to act or a series of failures to act, where the individual acting or failing to act is conscious of his or her conduct and knew or should have known that his or her conduct would probably result in a violation of the standards of behavior which an employer has the right to expect of an employee.

A claimant who quits work is disqualified from the receipt of benefits unless he proves, by a preponderance of the evidence, that he had good cause for quitting when he did. ORS 657.176(2)(c); *Young v. Employment Department*, 170 Or App 752, 13 P3d 1027 (2000). "Good cause" is defined, in relevant part, as a reason of such gravity that a reasonable and prudent person of normal sensitivity, exercising ordinary common sense, would have no reasonable alternative but to quit work. OAR 471-030-0038(4). For an individual with a permanent or long-term "physical or mental impairment" (as defined at 29 CFR §1630.2(h)) good cause for quitting work is such that a reasonable and prudent person with the characteristics and qualities of such individual, would have no reasonable alternative but to quit. *Id.* Both standards are objective. *McDowell v. Employment Department*, 348 Or 605, 612, 236 P2d 722 (2010). A claimant who quits work must show that no reasonable and prudent person would have continued to work for his employer for an additional period of time.

In Hearing Decision 14-UI-18635, the ALJ found as fact that claimant quit work due to unresolved mental health issues.¹ However, the record fails to show that claimant's work separation was a quit as a matter of law under OAR 471-030-0038(2), or that if claimant did quit work, he did so due to his mental health issues. The record shows that on or about February 20, 2014, the employer gave claimant a final written warning, in part, for missing work. Transcript at 7, 14. The record further shows that on or about February 21, 2014, claimant left work early and walked to his vehicle after the owner "yelled" at him for taking an extended lunch break. Transcript at 26-27. At hearing, however, claimant testified that he did not plan on quitting work, and sent a supervisor text messages indicating that he wanted to "keep my job," and did not want to "leave work." Transcript 27-28. Claimant further testified that he sat in his vehicle for hours waiting for the supervisor to contact him before concluding that he had been discharged for leaving work early. Transcript at 27-28, 35. Claimant did not contact the employer again to clarify his employment status. Transcript at 10-12.

At hearing, the ALJ did not ask the owner whether he was willing to continue the employment relationship after claimant left work early on February 21, 2014. The ALJ did not ask claimant any questions regarding the specific content of his text messages to the supervisor, even after claimant stated that the text messages were still stored on his cell phone. Transcript at 27-28. The ALJ did not ask the supervisor whether he received claimant's text messages, whether he attempted to contact claimant to clarify his employment status and, if not, why he did not do so. Absent such inquiries, we cannot determine whether the employer discharged claimant for leaving work early on February 21, 2014, or claimant quit work because he mistakenly believed the employer had done so. Nor, assuming the latter, can we determine whether no reasonable and prudent person with the characteristics and qualities an individual with claimant's mental impairments would have contacted the employer to clarify his employment status after the supervisor apparently failed to respond to his text messages.

¹ Hearing Decision 14-UI-18635.

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 is disqualified from receiving benefits based on his work separation from the employer, Hearing Decision 14-UI-18635 is reversed, and this matter is remanded for development of the record.

DECISION: Hearing Decision 14-UI-18635 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: July 11, 2014

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.