

## EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-1000

*Reversed & Remanded*

**PROCEDURAL HISTORY:** On March 31, 2014, the Oregon Employment Department (the Department) mailed notice of an administrative decision concluding that claimant failed without good cause to accept the employer's offer of suitable work (decision # 120930). On April 14, 2014, claimant filed a timely request for hearing. On April 22, 2014, the Office of Administrative Hearings (OAH) mailed notice of a hearing on decision # 120930 scheduled for May 5, 2014. On April 30, 2014, OAH mailed notice that the hearing had been rescheduled for May 15, 2014. On May 13, 2014, the Department mailed notice of cancellation of # 120930, and notice of an administrative decision concluding that claimant quit working for the employer without good cause (decision # 81804). On May 15, 2014, ALJ Sime conducted a telephone hearing on decision # 81804, and on May 19, 2014 issued Hearing Decision 14-UI-17943, affirming that decision. On June 9, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) On May 12, 2014, claimant mailed to OAH and the employer copies of documentary evidence she sought to introduce into the record at the May 15 hearing. The employer and OAH received their copies on May 13, 2014.

(2) On or about May 14, 2014, claimant learned that the May 15 hearing would address whether she quit working for the employer without good cause, and not whether she failed without good cause to accept the employer's offer of suitable work. On May 14, 2014, claimant faxed OAH a copy of additional documentary evidence she sought to introduce into the record at the May 15 hearing. Claimant also repeatedly attempted to fax the employer a copy. OAH received its copy on May 14, 2014. The employer did not receive its copy.

**CONCLUSIONS AND REASONS:** Hearing Decision 14-UI-17943 is reversed, and this matter remanded to OAH for further proceedings consistent with this order.

In written argument, claimant requested a rehearing, asserting that the ALJ erred in excluding documentary evidence she sought to introduce into the record at the hearing. We agree, and grant claimant's request.

ORS 657.270 requires the ALJ to give all parties a reasonable opportunity for a fair hearing. OAR 471-040-0015(1) (August 1, 2004) states that to afford all parties a reasonable opportunity for a fair hearing, notice of hearing setting forth the time, date, place, and issue(s) in general shall be personally delivered or mailed at least five days in advance of the hearing to parties or their authorized agents at their last known address as shown by the record of the Director.

Prior to commencement of an evidentiary hearing that is held by telephone, each party and the Department shall provide to all other parties and to the Department copies of documentary evidence that it will seek to introduce into the record. OAR 471-040-0023(4) (August 1, 2004). However, nothing in OAR 471-040-0023 precludes any party or the Department from seeking to introduce documentary evidence in addition to evidence described in section (4) during the telephone hearing and the presiding officer shall receive such evidence, subject to the applicable rules of evidence, if inclusion of the evidence in the record is necessary to conduct a full and fair hearing. If any evidence introduced during the hearing has not previously been provided to the Department and to the other parties, the hearing may be continued upon the request of any party or the Department for sufficient time to allow the party or the Department to obtain and review the evidence. OAR 471-040-0023(5). If any evidence introduced during the hearing has not previously been provided to the Department and to the other parties, the hearing may be continued upon the request of any party or the Department for sufficient time to allow the party or the Department to obtain and review the evidence.

Irrelevant, immaterial, or unduly repetitious evidence shall be excluded but erroneous rulings on evidence shall not preclude the administrative law judge from entering a decision unless shown to have substantially prejudiced the rights of a party. OAR 471-040-0025(5) (August 1, 2004). All other evidence of a type commonly relied upon by reasonably prudent persons in conduct of serious affairs shall be admissible. *Id.*

On May 12, 2014, claimant provided to OAH and the employer copies of documentary evidence she sought to offer into the record at May 15, 2014 hearing. The evidence is relevant to claimant's assertion that she did not quit work because there was no employment relationship between her and the employer when, after what she alleges was a second working interview, she refused the employer's offer of work.<sup>1</sup> The evidence also is relative to claimant's assertion that, even assuming, *arguendo*, that she quit, she did so with good cause due to the employer's allegedly unlawful practices.<sup>2</sup> The evidence therefore is

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<sup>1</sup> OAR 471-030-0038(2)(a) (August 3, 2011) provides that if the employee could have continued to work for the same employer for an additional period of time, the work separation is a quit. For purposes of that rule, however, "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. Thus, if there was no continuing employment relationship between claimant and the employer when, after a second working interview, she refused the employer's offer of work, claimant did not quit work, and cannot be disqualified from receiving benefits based on a work separation from the employer.

<sup>2</sup> A claimant who quits work is disqualified from the receipt of benefits unless she proves, by a preponderance of the evidence, that she had good cause for quitting when she 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) (August 3, 2011). The standard is objective. *McDowell v. Employment Department*, 348 Or 605, 612, 236 P3d 722 (2010). A claimant who quits work must show that no reasonable and prudent person would have continued to work for her employer for an additional period of time. Thus, if claimant quit work with good cause, she is not disqualified from receiving benefits based on her work separation from the employer.

relevant to whether claimant quit work and, if so, whether she quit with good cause. The ALJ therefore erred in excluding that evidence.

On May 14, 2014, claimant faxed OAH a copy of additional documentary evidence she sought to introduce into the record at the May 15 hearing, and repeatedly attempted to fax the employer a copy. Assuming, *arguendo*, that the employer's failure to receive a copy amounts to claimant's failure to "provide" it to the employer prior to the hearing, as required under OAR 471-040-0023(4), her failure to do so was a foreseeable result of OAH's failure to give claimant at least five days' written notice that the issues the hearing would address had changed, as required under OAR 471-040-0015(1). Claimant's additional documentary evidence is relevant to claimant's assertion that she did not quit work because there was no employment relationship between her and the employer when, after what she alleges was a second working interview, she refused the employer's offer of work. The evidence also is relative to claimant's assertion that, even assuming, *arguendo*, that she quit, she did so with good cause due to the employer's allegedly unlawful practices. The evidence therefore is relevant to whether claimant quit work and, if so, whether she quit with good cause. The ALJ therefore erred in excluding that evidence.

OAH's failure to give claimant at least five days' written notice that the issues the hearing would address had changed, as required under OAR 471-040-0015(1), and the ALJ's error in excluding documentary evidence claimant sought to introduce into the record at the hearing, substantially prejudiced claimant's right to a reasonable opportunity for a fair hearing, as required under ORS 657.270. Hearing Decision 14-UI-17943 therefore is reversed, and this matter remanded for a rehearing.

**DECISION:** Hearing Decision 14-UI-17943 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 17, 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](http://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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