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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-1306

Reversed & Remanded

PROCEDURAL HISTORY: On June 20, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant quit work without good cause (decision # 91952). Claimant filed a timely request for hearing. On July 14, 2014, ALJ R. Davis conducted a hearing, and on July 21, 2014 issued Hearing Decision 14-UI-21897, affirming the Department's decision. On August 4, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered the entire hearing record and claimant's written argument. However, claimant's argument contained information that was not part of the hearing record, and failed to show that factors or circumstances beyond claimant's reasonable control prevented her from offering the information during the hearing. Under ORS 657.275(2) and OAR 471-041-0090 (October 29, 2006), we considered only information received into evidence at the hearing when reaching this decision.

FINDINGS OF FACT: (1) Claimant started working for Prestige Senior Management LLC claimant as a medication aide on July 17, 2013.

(2) Claimant lived in Portland, Oregon, where she rented housing, and worked for the employer in Gresham, Oregon.

(3) On March 9, 2014, claimant fractured her collar bone in an automobile accident. Her three week old daughter suffered a head injury in the accident. Claimant was hospitalized for one day. Her daughter was hospitalized for two days.

(4) Claimant was unable to use her right hand, and therefore was unable to work for the employer as a medication aide. On March 10, 2014, claimant notified the employer, which allowed claimant an unpaid medical leave of absence from work.

(5) On March 18, 2014, claimant underwent surgery to repair her collar bone. Claimant's doctor prohibited claimant from lifting anything heavier than a cup of coffee for a minimum of six weeks. Claimant therefore was unable to work for the employer as a medication aide for at least six weeks, and estimated that it would be at least eight weeks before she was able to do so.

(6) Claimant determined that she could not afford to continue living in Portland during an unpaid leave of absence from work, and that she needed help caring for her child while injured. Claimant decided to move Waldport, Oregon, where she could live rent-free, with help caring for her child. Waldport is approximately 159 miles from Gresham.[1] The employer had no facilities within commuting distance from Waldport.

(7) In early April 2014, claimant moved to Waldport. In May 2014, the employer decided that claimant had abandoned her job, and processed her termination.

CONCLUSIONS AND REASONS: Hearing Decision 14-UI-21897 is reversed, and this matter remanded for further proceedings.

If the employee could have continued to work for the same employer for an additional period of time, the work separation is a voluntary leaving. OAR 471-030-0038(2)(a) (August 3, 2011). 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. OAR 471-030-0038(2)(b). "Work" means "the continuing relationship between an employer and an employee." OAR 471-030-0038(1)(a). The date an individual is separated from work is the date the employer-employee relationship is severed. *Id*.

ORS 657.176(2)(a) requires a disqualification from unemployment insurance benefits if the employer discharged the 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. In a discharge case, the employer has the burden to establish misconduct by a preponderance of evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). Isolated instances of poor judgment and good faith errors are not misconduct. OAR 471-030-0038(3)(b).

A claimant who leaves work voluntarily is disqualified from the receipt of benefits unless she proves, by a preponderance of the evidence, that she had good cause for leaving work 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 leave work.

[1] We take notice of this general cognizable fact. Any party that objects to our doing so must submit such objection to this office in writing, setting forth the basis of the objection in writing, within ten days of our mailing this decision. OAR 471-041-0090(3) (October 29, 2006). Unless such objection is received and sustained, the noticed fact will remain in the record.

OAR 471-030-0038(4). 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.

In Hearing Decision 14-UI-21897, the ALJ found as fact that claimant quit work on March 30, 2014 due to "an opportunity for better living circumstances," and therefore moved from Portland to Waldport in early April 2014, knowing that "as a result of the move she would be unable to continue to work for the employer."[2] The ALJ concluded that claimant quit work without good cause, summarily asserting that although claimant's reasoning for moving was "understandable, she did not provide evidence showing that she faced circumstances of such gravity that left her with no reasonable alternative but to leave work when she did."[3]

We first disagree with the ALJ's "findings" that claimant quit work on March 30, 2014, and knew as a result of her move to Waldport in early April 2014 that she would be unable to continue working for the employer. The record shows only that, as of March 18, 2014, claimant estimated it would be at least eight weeks before she was able to return to work for the employer, and decided to move to Waldport in early April 2014 after determining that she could not afford to continue living in Portland during an unpaid leave of absence, and needed help caring for her daughter while injured. The record does not show that claimant was unable to return to Portland and work for the employer after a leave of absence, let alone the claimant knew she would be unable to return. The ALJ did not conduct a sufficient inquiry to determine as of what date, if any, claimant was unwilling to return to work for the employer. Nor did the ALJ conduct a sufficient inquiry to determine as of what date, if any, the employer would not have allowed claimant to return to work. Absent such inquiries we cannot determine whether claimant quit work or was discharged, or even the date of the work separation, if any.

Assuming claimant was discharged, the ALJ did not conduct a sufficient inquiry to determine whether her discharge was for misconduct. Assuming claimant quit, we disagree with the ALJ's assertion that claimant failed to show she had no reasonable alternative but to move to Waldport, given that claimant could live there rent-free, with help caring for her child. However, the ALJ did not ask claimant why she quit work instead of completing her leave of absence in Waldport, and then returning to Portland and working for the employer after she was physically able to work and care for her child. Absent such an inquiry, we cannot determine why claimant quit work, let alone whether she had good cause to do so.

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

[2] Hearing Decision 14-UI-21897 at 1.

[3] *Id*. at 2.

from receiving benefits based on a work separation from the employer, Hearing Decision 14-UI-21897 is reversed, and this matter is remanded for development of the record.[4]

DECISION: Hearing Decision 14-UI-21897 is set aside, and this matter remanded for further proceedings consistent with this order.

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

DATE of Service: <u>September 9, 2014</u>

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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[4] **NOTE:** The failure of any party to appear at the hearing on remand will not reinstate Hearing Decision 14-UI-21897 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.