

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-1641

Reversed & Remanded

PROCEDURAL HISTORY: On August 19, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 92845). Claimant filed a timely request for hearing. On October 3, 2014, ALJ Seideman conducted a hearing, and on October 8, 2014 issued Hearing Decision 14-UI-26604, concluding claimant voluntarily left work with good cause. On October 15, 2014, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer submitted a written argument in which it essentially argued that, for various reasons, the hearing was unfair. Give that we have remanded this case, the objections the employer made to the ALJ's admission into evidence of claimant's documents will be mooted by the further proceedings. The second objection raised in the employer's written argument, that the employer was not reasonably aware in advance of the hearing that it "would be required to defend the decision by the Unemployment Department," is contradicted by the language of the September 17, 2014 Notice of Hearing. The Notice clearly stated that the hearing was in reference to the "Administrative Decision(s) dated August 19, 2014" and the issues to be considered at hearing were specified in bold-faced font as "**Shall claimant be disqualified from the receipt of benefits because of a separation, discharge, suspension or voluntary leaving from work? (ORS 657.176, ORS 657.190 and OAR 471-030-0038.)**" Record Document, September 17, 2014 Notice of Hearing at 1 (emphasis in original). Furthermore, the Notice also plainly stated that any evidentiary documents that either party wanted the ALJ to consider at hearing needed to be provided to the ALJ and the other parties prior to the scheduled hearing and explained that the ALJ would make an independent decision on the issues after the parties had presented all of their evidence at hearing. Record Document, September 17, 2014 Notice of Hearing at 1, 5. Based on this language, the employer should have reasonably that the ALJ's function was to determine whether the conclusion reached in administrative decision was correct, and that it needed to present at the hearing any evidence that it wanted the ALJ to consider in support of that conclusion. The employer's argument that the hearing was unfair based on its purported failure to understand the scope of the hearing issues is without merit.

In its written argument, the employer also contended that it had "further information" about claimant's alleged wrongdoing and claimant's alleged breach of a confidentiality contract, "which support[s] the original decision to deny compensation." The employer's argument did not state how this new information was relevant to the issues about claimant's work separation that were before the ALJ or will be before him on remand, and did not explain why it failed to present this new information during the original hearing. *See* OAR 471-041-0090 (October 29, 2014). On remand, we leave it to the ALJ in the first instance to decide whether this new information is relevant, and whether the employer presented sufficient justification to introduce it into evidence at that time.

CONCLUSIONS AND REASONS: Hearing Decision 14-UI-26604 is reversed and this matter is remanded for further proceedings.

In Hearing Decision 14-UI-26604, the ALJ concluded that claimant voluntarily left work with good cause on July 21, 2014 when she failed to report for work that day. The ALJ provided few reasons for his decision other than that he "concurred" with claimant's contention that "the employer was abusing her and not willing to communicate with her." Hearing Decision 14-UI-26604 at 2, 3. Regardless of claimant's subjective beliefs about how the employer treated her, the issue in determining whether she had good cause to leave work is whether she demonstrated, by a preponderance of the evidence, that no objectively reasonable and prudent person would have continued to work for her employer for an additional period of time in light of how she was treated. *See* OAR 471-030-0038(4) (August 3, 2011). The ALJ neglected to focus on whether claimant's situation, assuming that she voluntarily left work, was objectively grave rather than merely subjectively grave to her when she decided to quit work. The ALJ also did not adequately pursue the issues raised at hearing about the nature of the work separation, including whether claimant was actually discharged or whether claimant voluntarily left work as a result of an assumption that the employer had discharged her.

Claimant testified that she concluded that she was discharged on July 22, 2014 and returned her keys to the employer because she had received an email from one of the employer's two owners on July 21, 2014, which stated that the owner did not want to meet with her, and then she received an email from a third party veterinary information services on July 22, 2014, which stated that the service had been informed that claimant was no longer a part of the employer's veterinary practice group. Audio at ~8:15, ~8:56, 9:31, ~9:57. In light of claimant's testimony, the ALJ should have inquired further of claimant to determine if the proximate cause of her leaving work was because of the owner's behaviors that she found objectionable or whether she left because she thought she had been discharged. In this connection, the ALJ should also have inquired of claimant if she disagreed with the testimony of the owner that she removed her personal belongings from the workplace late in the evening on July 21, 2014 and placed the clinic property in her possession at that time on that owner's desk. If claimant does not disagree, the ALJ should ask claimant to explain why she did this before she received the emails on July 22, 2014 and why she did not report for work on July 21, 2014. If appropriate, the ALJ should also follow up with inquiries of claimant about what specific statements in the owner's July 21, 2014 email convinced her that she was discharged, particularly since the email did not use words traditionally associated with a discharge, of both claimant and the employer's witness about whether claimant could be discharged without the agreement of both of the employer's owners and whether claimant sought clarification from one or both of the owners or some other member of the employer's staff about the intentions underlying the July 21, 2014 email. The ALJ should also ask claimant what she intended when she stated in her July 21, 2014 email to the owner, "If you think we can meet and try to work

something out, please contact me. If not, I am very sorry that we cannot work together to make things better." Exhibit 9-Exhibit 10. Specifically, the ALJ should inquire whether, despite having made this statement, claimant was willing to continue working for the employer if the owner did not immediately schedule a meeting with her or whether claimant was agreeing to resign if that meeting was not scheduled. The ALJ should also inquire if there were any communications between claimant and either of the owners on July 21 and July 22, 2014 other than the emails that claimant submitted as exhibits and the substance of those communications. In connection with any purported discharge of claimant, the ALJ should inquire whether the owner intended to discharge claimant on July 21, 2014 by not meeting with claimant, why he did not agree to meet with her, and whether at that time he and the other owner were willing to continue the employment relationship. The ALJ should further inquire about why one of the owners notified the veterinary information that claimant was no longer a member of the employer's veterinary practice group and when that owner did so. If possible, it would be appropriate for the ALJ to obtain testimony from the other of the employer's owners to learn what information she has about claimant's work separation, what the other owner or claimant told her on July 21 or July 22, 2014 about claimant's work status, why she sent claimant the email on July 21, 2014 that suggested she did not believe that claimant had at that time left work, why she sent claimant the email on July 22, 2014 that suggested that at that time she was aware that claimant no longer worked for the employer and what information she received, and from whom, that had led her to believe that claimant was no longer employed. Exhibit 11; Exhibit 13. If the evidence that the ALJ develops shows that the employer intended to discharge claimant, the ALJ should inquire into the grounds for that discharge and whether it constituted misconduct.

To the extent that claimant was not discharged and did not leave work due to her belief that she had been discharged, the ALJ should better develop the evidence about the reasons that claimant left work. Although claimant contended at hearing that one of the owners was "verbally abusive," "toxic" and "hostile" to her, the ALJ should have had claimant provide detailed testimony that supported these conclusions, including the actual words that the owner used and when he used them, his tone and what it was about his communications that might cause a reasonable and prudent professional to conclude that the behavior, as described, was so grave that she had no recourse other than to leave work. Audio at ~7:44, ~8:15, 10:31, ~11:11, ~15:00, ~15:47. Given claimant's testimony that she was "afraid to go back" to work on July 21, 2014, the ALJ should have, but did not, inquire into the detail of exactly what claimant feared, why she had this fear, and whether that owner had ever before engaged in the level or type of behavior that claimant feared. Audio at ~12:00. The ALJ should also have inquired about the nature of claimant's working relationship with the other owner and whether claimant ever raised concerns with that owner about the other owner's behavior and, if not, why she did not. Absent making the inquiries detailed above, EAB cannot determine the nature of claimant's work separation and, if it was a discharge, whether it was for misconduct or, if it was a voluntary leaving, whether claimant had good cause for doing 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). The ALJ failed to develop the record necessary for a determination of the nature of the work separation and, if it was a discharge, whether it was for misconduct, and if it was a voluntary leaving, whether that leaving

was for good cause. For this reason, Hearing Decision 14-UI-26604 is reversed, and this matter remanded for further development of the record.

DECISION: Hearing Decision 14-UI-26604 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: January 2, 2015

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Hearing Decision 14-UI-26604 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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