

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0359

Reversed & Remanded

PROCEDURAL HISTORY: On February 18, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision # 95104). The employer filed a timely request for hearing. On March 20, 2015, ALJ Wyatt conducted a hearing, and on March 25, 2015, issued Hearing Decision 15-UI-35736, concluding claimant voluntarily left work with good cause. On April 1, 2015, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer failed to certify that he provided a copy of his 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 the employer 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 15-UI-35736 should be set aside, and this matter remanded for further development of the record.

This matter comes before EAB to determine whether claimant should be disqualified from receiving unemployment insurance benefits because of his separation from work. In the Department's initial determination, its authorized representative concluded the employer discharged claimant because he did not call or report for work on January 6, 2015 due to illness, which was not misconduct. Decision # 95104. However, after a hearing, the ALJ concluded claimant quit on January 6, 2015 because the employer did not pay him for all the hours he worked on December 15, 16, 18 and 19, 2014 and that his voluntary leaving was with good cause. Hearing Decision 15-UI-35736 at 2-3.

Under OAR 471-030-0038(2), 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; 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) (August 3, 2011). Here, because

there was no dispute that claimant could have worked for the employer after January 6 but chose not to do so, the work separation was a voluntary leaving.

A claimant who leaves work voluntarily is disqualified from the receipt of benefits unless he (or she) proves, by a preponderance of the evidence, that he had good cause for leaving work 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 leave work. OAR 471-030-0038(4). The standard is 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 in his circumstances would have continued to work for the employer for an additional period of time.

Claimant testified at hearing that he chose not to continue to work for the employer after January 6, 2015 because he had worked 25 hours for the employer between December 15 and 19 and was paid for only 4.5 hours of work during that period on January 2, 2015. Audio Record ~ 14:00 to 19:00. The employer testified that claimant worked only 4.5 hours during the period in question and that after he paid claimant for that amount of hours on January 2, claimant never objected and worked an additional 8 hours for him that day before ignoring his requests thereafter that claimant report for work. Audio Record ~ 20:00 to 22:00; 26:00 to 28:00.

Oregon law generally requires that workers receive at least the minimum wage for all hours worked when due. An individual who quits work because he is paid less than minimum wage, or not paid for hours worked, on an ongoing basis, and who leaves work in whole or in part because he is being subjected to working conditions that violate Oregon wage and hour laws, may establish good cause for quitting work under ORS 657.176(2)(c).¹ However, the ALJ did not ask, and the record does not show, what records either party had that would tend to prove the hours claimant worked during the period in question, the employer’s regular pay periods and pay dates, when claimant first realized he had not been paid for all the hours he worked during that period, whether and when he addressed his missing pay with the employer, what response, if any, he received, why he chose to work an additional eight hours on January 2 and none thereafter if he thought he had been shorted his pay, and whether non-payment of wages owed was an isolated instance or a regular occurrence. Before we can determine whether claimant had good cause for leaving work when he did for the reason given, the record must be developed with evidence regarding those issues.

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 had good cause for quitting work, Hearing Decision 15-UI-35736 is reversed, and this matter is remanded for development of the record.

¹*Accord Marian Estates v. Employment Department*, 158 Or App 630, 976 P2d 71 (1999) (an individual who quit work because of a dispute over past wages, but is being lawfully paid at the time of the quit, has not shown good cause for quitting work); *J. Clancy Bedspreads and Draperies v. Wheeler*, 152 Or App 646, 954 P2d 1265 (1998) (an individual subjected to ongoing unlawful wage practices has shown good cause for quitting work).

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Hearing Decision 15-UI-35736 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.

DECISION: Hearing Decision 15-UI-35736 is set aside, and this matter remanded for further proceedings consistent with this order.

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

DATE of Service:

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 Court of Appeals website at courts.oregon.gov. Once on the website, use the ‘search’ function to search for ‘petition for judicial review employment appeals board’. A link to the forms and information will be among the search results.

Please help us improve our service by completing an online customer service survey. To complete the survey, please go to <https://www.surveymonkey.com/s/5WQXNJH>. If you are unable to complete the survey online and wish to have a paper copy of the survey, please contact our office.