

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0547

Reversed & Remanded

PROCEDURAL HISTORY: On March 30, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 71518). Claimant filed a timely request for hearing. On April 22, 2015, ALJ Clink conducted a hearing at which the employer did not appear, and on April 28, 2015 issued Hearing Decision 15-UI-37573, reversing the Department's decision and concluding the employer discharged claimant but not for misconduct. On May 6, 2015, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer submitted a request to reopen the hearing since it did not appear and did not present evidence on its own behalf. The employer's request is construed as one to have EAB consider new information under OAR 471-041-0090 (October 29, 2006), which allows EAB to consider information not offered at the hearing if the requesting party shows that it was prevented by circumstances beyond its reasonable control from presenting that information at the hearing. The employer stated that it did not appear at the hearing because it "made the mistake of waiting for a call from the hearing [which] had been to our best recollection the process from our previous hearings [about how to participate in a phone hearing]," and conceded that, upon reviewing the notice of hearing, it realized that its recollection was incorrect and that the correct method was to call in to the hearing at the phone number shown on the notice. Because the erroneous understanding that caused the employer to miss the hearing was the type of human error within a party's reasonable control to avoid by reading the hearing notice, the employer's request to have EAB consider its new evidence must be denied. In light of EAB's disposition on review, EAB notes that the employer may appear on its own behalf at the hearing on remand and present evidence relevant to the issues on which EAB requires further development of the record.

CONCLUSIONS AND REASONS: Hearing Decision 15-UI-37537 is reversed, and this matter is remanded for further development of the record.

In Hearing Decision 15-UI-35737, the ALJ found as fact that claimant's supervisor yelled at him to "get out of here [the workplace]" on February 12, 2015, and after yelling this at claimant, the supervisor did

not speak to claimant later when the supervisor saw claimant in the office area. Hearing Decision 15-UI-37537 at 1; Audio at ~14:33, ~15:35, ~16:55. Based on these events and claimant's suppositions, the ALJ concluded that the work separation was a discharge. Hearing Decision 15-UI-37537 at 1, 2. However, claimant's testimony at hearing was confused about why he decided to leave the workplace on February 12, 2015 and not return thereafter. Claimant contended that the supervisor discharged him when told him to get out of the workplace. When claimant was asked to explain the thought process involved in his decision to leave the workplace, however, he testified extensively about his dissatisfactions with the supervisor's "disrespectful" behavior that day and on other occasions, and did not assert that he left because he had been "fired." Audio at ~9:37, ~14:44, ~15:00, ~16:55, ~17:08, ~20:14. The ALJ should have, but did not, clarify the principal reason that claimant left work that day and whether it was due to a belief that he was discharged or due to his dissatisfactions with the supervisor's behavior.

To the extent that claimant left the workplace on February 12, 2015 because he thought he had been discharged, EAB has consistently held that statements like "get out of here" are ambiguous expressions of a supervisor's intent to discharge and an employee who mistakenly construes such a statement as a discharge may have voluntarily left work without good cause.¹ If possible, on remand, the ALJ should ask the employer or the particular supervisor, why the supervisor made the statement that he did to claimant, whether the supervisor intended to discharge claimant, and why the supervisor did not speak to claimant when he later saw claimant in the office. The ALJ should also inquire about any circumstances other than the supervisor's statement that caused claimant to leave the workplace that day, and the bases, if any, for claimant's assumption that he did not need to ask for further clarification from the supervisor before concluding that the supervisor had discharged him. The ALJ should further inquire why claimant went to the office after the supervisor told him "get out of here," what was the substance of claimant's interaction with the secretary in the office and why he did not follow the advice of the secretary to "talk to him [the supervisor]" before deciding that he had been discharged. Audio at ~16:00. Finally, the ALJ should ask why claimant made the statement "I'm out of here" before leaving the workplace on

¹ See *Chad J. Westlake* (Employment Appeals Board, 2015-EAB-0232, April 16, 2015) (claimant who mistakenly assumed co-owner intended to discharge him when he stated "I'll effing do it myself" and told claimant to "hit the road," was not discharged but voluntarily left work without good cause since co-owner's statements were ambiguous and claimant did not ask co-owner to clarify his intention); *Sonya G. Wasserman* (Employment Appeals Board, 2014-EAB-1670, December 16, 2014) (claimant who mistakenly assumed that owner intended to discharge her when owner asked claimant to turn in her keys and stated "it is what it is" did not have good cause to leave work because owner's statements were ambiguous and claimant did not ask for clarification); *Gary L. Reisen* (Employment Appeals Board, 11-AB-2392, October 10, 2011) (claimant who assumed, without confirming, that he was fired when, after an argument, manager told him to "get out" did not have good cause to leave work because manager's statement, under the circumstances, was ambiguous); *Joshua A. Smith* (Employment Appeals Board, 11-AB-0702, March 15, 2011) (claimant who assumed, without seeking clarification, that he was fired when told the "leave the kitchen" did not have good cause to leave work because statement was ambiguous); *Samantha M. Knauss* (Employment Appeals Board, 10-AB-3931, January 14, 2011) (claimant who assumed, without seeking clarification, that she was discharged when, after calling in sick, he manager told her "no just don't come in" did not have good cause to leave work because statement was ambiguous); *Cliff D. Hoover* (Employment Appeals Board, 10-AB-1790, July 22, 2010) (claimant who assumed, without confirming, that she was discharged when owner said "it's not working out" and "we should probably go our separate ways" quit work without good cause because owner's statements were ambiguous); *Chantel M. Dominguez* (Employment Appeals Board, 09-AB-2465, August 18, 2009) (claimant who assumed, without clarifying, that she was discharged based on employer's statement to her to "do what you gotta do" left work without good cause because employer's intentions were ambiguous).

February 12, 2015 and why that statement should not be construed as expressing an intention to quit work because claimant was displeased that the supervisor had shouted at him. Audio at ~14:43.

To the extent claimant left the workplace on February 12, 2015 because, in whole or in part, he was upset that his supervisor had shouted at him, and not only because he believed he had been discharged, the ALJ has not developed the evidence sufficiently to determine the gravity of claimant's situation and to decide if claimant explored reasonable alternatives other than leaving when he did. Appropriate areas of inquiry would include a specific description of the circumstances surrounding the supervisor's interaction with claimant on February 12, 2015, what exactly claimant found objectionable about it, what claimant meant when he stated that the supervisor was "disrespectful" to him at that time and on previous occasions, the actions or statements that claimant considered "disrespectful," what harms claimant believed he sustained from the February 12 interaction or prior interactions, and relevant and specific examples, if any, of the past behaviors of the supervisor that claimant considered objectionable. Audio at ~14:44, ~15:04, ~17:14, ~20:14. The ALJ should also ask whether claimant addressed his concerns about the supervisor's behavior in the workplace to anyone and, if so, to whom claimant raised these concerns, what claimant told these individuals, and when he raised these concerns. Without further development of the record, EAB cannot determine whether claimant was discharged or whether he voluntarily left work and, if he voluntarily left work, EAB cannot determine whether he left work for good cause.

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 the nature of the work separation and, if its circumstances disqualify claimant from benefits, Hearing Decision 15-UI-37573 is reversed, and this matter remanded for further development of the record.

DECISION: Hearing Decision 15-UI-37573 is set aside, and this matter remanded for further proceedings consistent with this order.

Susan Rossiter and J. S. Cromwell;
D. P. Hettle, *pro tempore*, not participating.

DATE of Service: June 26, 2015

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Hearing Decision 15-UI-37573 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 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.