

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0589

Reversed & Remanded

PROCEDURAL HISTORY: On April 13, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant, but not for misconduct.(decision # 130925). The employer filed a timely request for hearing. On May 12, 2015, ALJ Seideman conducted a hearing, and on May 15, 2015, issued Hearing Decision 15-UI-38568, concluding that claimant voluntarily left work without good cause. On May 21, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

CONCLUSION AND REASONS: Hearing Decision 15-UI-38568 is reversed, and this matter remanded to the Office of Administrative Hearings (OAH) for additional 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).

In Hearing Decision 15-UI-38568, the ALJ concluded that claimant voluntarily left work, rejecting claimant's contention that the employer discharged him. The ALJ then held that the reason claimant quit – because he believed the employer wanted him to perform work on a project that claimant felt he was not qualified to perform – did not constitute good cause. According to the ALJ, “it was pointed out to him that he had done that [work] several times and the claimant then appeared to not be concerned about it. Employer felt there was no problem.” Hearing Decision 15-UI-38568 at 5. The ALJ based these conclusions on testimony regarding two telephone calls between claimant and one of the employer's managers. The ALJ failed to adequately develop the record regarding these telephone calls, however.

The first telephone conversation occurred sometime before March 2, 2015. The manager testified that during this conversation, he talked with claimant about work on a Highway 99E project and that claimant agreed to perform this work. Audio at 14:40. The manager also testified that the work required by the project – setting up lane closures – was work that claimant had performed in the past for

the employer. Audio at 16:48. The ALJ never questioned the manager about the date, time, and length of this phone call. After the manager left the hearing, claimant testified and denied that he accepted the Highway 99E assignment during his telephone conversation with the manager; he also testified that he told the manager that the project required a certified Traffic Control Supervisor (TCS), a certification claimant did not possess. Audio 26:01. The ALJ did not recall the manager to obtain any evidence that might rebut claimant's testimony.

The second telephone call upon which the ALJ based his conclusions occurred on March 2, 2015. The ALJ found that the employer's manager called claimant on that date and that during this call "[c]laimant was apparently upset because of another job he was working on and then told [the manager] that he was quitting immediately." Hearing Decision 15-UI-38568 at 4. The ALJ never asked the manager what specifically he told claimant about the other job that apparently upset claimant. Nor did the ALJ inquire about the details of this other job – when work on this job was performed, where this work was performed, what work claimant performed on this job, and whether claimant's performance on the job failed to meet the employer's expectations. The ALJ asked claimant no questions about this other job and never asked claimant if he discussed this matter with the manager during the March 2, 2015 phone call.

The employer called a witness who testified that claimant "walked around bragging that he quit" his job with the employer. Audio at 21:49. The ALJ failed to ask this witness what was his relationship to claimant, when claimant made the statement about quitting, who was present when claimant made this statement or statements, and exactly what claimant said. The employer's witness also testified that he had worked with claimant setting up lane closures in the past. Audio at 22:35. The ALJ did not inquire when, where, and how often claimant and the witness had worked together setting up lane closures.

Claimant testified that after his March 2, 2015 conversation with the manager, the employer's owner sent him a text message informing him that he was fired, and then sent him another text message telling him that his final paycheck would be mailed to him. Audio at 31:34, 31:58. Although the employer's owner indicated during her cross examination of claimant that she disagreed with claimant's testimony about these text messages (Audio at 32:12), the ALJ never asked the owner about the content of these text messages.

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(4); *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 as to whether claimant quit work with good cause, Hearing Decision 15-UI-35910 is reversed, and this matter is remanded for further development of the record.

DECISION: Hearing Decision 15-UI-38568 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 8, 2015

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.

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