

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0797

Reversed & Remanded

PROCEDURAL HISTORY: On May 27, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 161407). Claimant filed a timely request for hearing. On June 22, 2015, ALJ R. Frank conducted a hearing, and on June 29, 2015 issued Hearing Decision 15-UI-40835, affirming the Department's decision. On July 2, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted new information to EAB, specifically, a copy of a civil rights complaint he filed with the Oregon Bureau of Labor and Industries on June 22, 2015 based on the employer's refusal to return claimant to full duty after claimant's physician released him to full duty after an on-the-job injury, and a copy of his medical release to full duty without restrictions. The civil rights complaint is new information that is relevant and material to the matter before us, and, given that it was filed the same day as the hearing in this matter, it likely was not available to claimant to use in the hearing. The medical release corroborates claimant's testimony that he was released to unrestricted duty at a time when the employer refused to reinstate him to full duty. Both are admitted into the record as EAB Exhibits 1 and 2, respectively, to complete the record. OAR 471-041-0090 (October 29, 2006). 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. Unless such objection is received and sustained, the EAB Exhibit 1 and EAB Exhibit 2 will remain in the record.

CONCLUSIONS AND REASONS: Hearing Decision 15-UI-40835 should be reversed, and this matter remanded for development of a complete record.

A claimant who leaves work voluntarily is disqualified from the receipt of benefits unless he 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) (August 3, 2011). 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 his employer for an additional period of time.

In Hearing Decision 15-UI-40835, the ALJ concluded that claimant quit work due to a reduction in hours, and, applying OAR 471-030-0038(5)(e), concluded that claimant quit work without good cause. However, the record shows that the employer had not merely reduced claimant's hours, the employer had refused to reinstate claimant to regular duties despite claimant having a medical release to unrestricted duty after recovering from an on-the-job injury. Audio recording at ~8:30; EAB Exhibit 1. It appears more likely than not that claimant quit work because he believed the employer had unlawfully reduced his hours after return to work from an on-the-job injury, and, therefore, claimant quit work because he believed his working conditions were unlawful. *Id.*

Prior to December 1, 2014, claimant worked approximately 40 hours per week for the employer. On approximately December 1, 2014, claimant was injured while on duty. EAB Exhibit 1. He filed a workers' compensation claim, and was restricted from working until he recovered. On April 28, 2015, claimant was released by his physician to regular, full time, unrestricted duty. EAB Exhibit 2. The employer refused to reinstate claimant to regular duty despite claimant's release. The employer considered claimant a safety and insurance risk because he had experienced three compensable on-the-job injuries in a three-year period, and, because of those risks, the employer decided he would only return claimant to part-time work consisting of approximately 20 hours per week. Audio recording at ~20:00. Claimant asked for reinstatement to the regular duties and hours he had held before his on-the-job injury and said the part time schedule was unacceptable, but the employer refused to reinstate claimant to his former position, causing claimant to quit.

The Courts and EAB have consistently held that employees are not required to suffer oppressive and unlawful working conditions for the sake of remaining employed or in order to maintain their qualification for unemployment insurance benefits, particularly where the oppressive or unlawful conditions are likely to persist despite some remediation effort on the employee's part.¹ ORS 659A.043 provides, for employers with 21 or more workers, that "A worker who has sustained a compensable injury shall be reinstated by the worker's employer to the worker's former position of employment upon demand for such reinstatement, if the position exists and is available and the worker is not disabled from performing the duties of such position. *** A certificate by the attending physician or a nurse practitioner authorized to provide compensable medical services under ORS 656.245 that the physician or nurse practitioner approves the worker's return to the worker's regular employment or other suitable employment shall be prima facie evidence that the worker is able to perform such duties."

There is no evidence in this case that the employer did not have a position for claimant, or evidence of a medical determination that claimant was disabled or otherwise incapable of performing his job. Therefore, if the employer had 21 or more workers at the time of his injury and the time of his reinstatement, then, based on the employer's testimony, there is sufficient evidence from which to conclude that it is more likely than not that the employer was subjecting claimant to an unlawful

¹ See *J. Clancy Bedspreads and Draperies v. Wheeler*, 152 Or App 646, 954 P2d 1265 (1998); *McPherson v. Employment Division*, 285 Or 541, 591 P2d 1381 (1979) (persistent unlawful conditions may constitute good cause for quitting work); *contra Marian Estates v. Employment Department*, 158 Or App 630, 976 P2d 71 (1999) (good cause for quitting work does not exist where the unlawful condition is in the past and unlikely to reoccur).

working condition by reducing his hours and refusing to reinstate claimant to full duty on the basis of his on-the-job injuries despite claimant's requests to be reinstated. However, the ALJ did not ask, and the record does not show, how many employees the employer had at the time of claimant's injury and at the time of his release to return to unrestricted duty. Therefore, this record cannot show whether or not claimant had good cause to quit work because his working conditions were unlawful, and this case must be remanded for the ALJ to ask the employer whether it employed 21 or more workers at both the time of claimant's injury (approximately December 1, 2014) and at the time of his release to return to work (April 28, 2015), as well as any other inquiry the ALJ deems appropriate or necessary.

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 had good cause to quit work due to a persistent, unresolved unlawful working condition, Hearing Decision 15-UI-40835 is reversed, and this matter is remanded for development of the record.

DECISION: Hearing Decision 15-UI-40835 is set aside, and this matter remanded for further proceedings consistent with this order.²

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

DATE of Service: August 20, 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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² **NOTE:** The failure of any party to appear at the hearing on remand will not reinstate Hearing Decision 15-UI-40835 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.