

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-1200

Reversed & Remanded

PROCEDURAL HISTORY: On August 27, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant quit work for the employer without good cause (decision # 173447). Claimant filed a timely request for hearing. On September 28, 2015, ALJ Vincent conducted a hearing, and on October 1, 2015 issued Hearing Decision 15-UI-45226, affirming the Department's decision. On October 6, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

CONCLUSIONS AND REASONS: Hearing Decision 15-UI-45226 is reversed, and this matter remanded to the Office of Administrative Hearings (OAH) for additional proceedings.

A claimant who quits work is disqualified from the receipt of benefits unless she proves, by a preponderance of the evidence, that she had good cause for quitting when she 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 quit work. OAR 471-030-0038(4) (August 3, 2011). For an individual with a permanent or long-term "physical or mental impairment" (as defined at 29 CFR §1630.2(h)) good cause for quitting work is such that a reasonable and prudent person with the characteristics and qualities of such individual, would quit. Both standards are 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 would have continued to work for her employer for an additional period of time.

In Hearing Decision 15-UI-45226, the ALJ found as fact that claimant "sometimes had difficulty" working for the employer because she "felt" the employer's owners and their family members "interfered with her work at inappropriate times and in inappropriate ways," and that claimant "frequently felt disrespected."¹ The ALJ further found that on or about July 21, 2015, one of the owners

¹ Hearing Decision 15-UI-45226 at 1.

yelled at claimant in front of a customer, and that claimant again “felt disrespected.”² The ALJ further found that on “approximately the same date,” claimant discovered that the employer had been allowing another server to use claimant’s identification number when reporting the server’s tips, which claimant believed caused her to pay taxes on the other server’s tips, and that claimant reported the matter to one of the owners, who worked with claimant to identify whether any tips had been reported on her identification number that should not have been.³ Based on those findings, the ALJ determined that claimant notified the employer on July 23, 2015 that she was quitting work, effective August 5, 2015, due to her “belief that her work environment was too stressful.”⁴ The ALJ then concluded that claimant quit work without good cause because she instead could have continued working and “spoken to her employers about finding ways to reduce or eliminate her continued stress,” and the fact that she gave the employer two weeks’ notice that she was quitting demonstrated that she could have continued working while she sought other employment.⁵

At hearing, however, claimant did not testify that she quit work merely because her “work environment” was “too stressful”; instead, she asserted that the employer’s owners and their relatives “interfered with her work,” or that she felt “disrespected.” She testified about a July 21, 2015 incident during which the owner allegedly yelled at her and during which the owner’s mother and sister-in-law also allegedly verbally abused her. She asserted that this incident was part of a pattern of verbally abusive behavior by the owners and their relatives occurring over a period of several years, which grew significantly worse during claimant’s last year of employment. Audio Record at 7:00-9:45. However, the ALJ failed to conduct an inquiry into the alleged prior incidents and pattern of verbally abusive behavior, or claimant’s attempts, if any, to resolve the situation.

With respect to claimant’s assertion that she “discovered” the employer had been allowing another server to use claimant’s identification number when reporting the server’s tips, the ALJ did not ask claimant whether she received that information before or after she notified the employer she was quitting work. The record therefore fails to support the ALJ’s finding that claimant received the information before she notified the employer she was quitting, and that claimant therefore quit work, in part, for that reason. Assuming the ALJ’s finding is correct, the record shows that claimant did not report the matter to the employer’s co-owner until after she notified the employer she was quitting work. Audio Record at 13:00. However the record also fails to support the ALJ’s finding that the co-owner worked with claimant before she quit in identifying whether any tips had been reported on her identification number that should not have been. Audio Record at 10:15.

At hearing, the employer’s co-owner testified that the information claimant received was false, that the employer had not been allowing the other server to use claimant’s identification number when reporting the server’s tips, that it determined after claimant quit that no tips had been reported on her identification number that should not have been, and that it mailed that information to claimant shortly after she quit. Audio Record at 19:15-20:30. As it stands, the record on those issues is equally balanced, and the

² *Id.*

³ *Id.* at 2.

⁴ *Id.* at 3.

⁵ *Id.*

record therefore fails to support the ALJ's finding that the employer had been allowing the other server to use claimant's identification number when reporting the server's tips. However, claimant offered to have the server testify on that issue, and the ALJ excluded the server's testimony. Audio Record at 15:30. Nor did the ALJ conduct an inquiry into whether the employer's alleged practice of allowing the server to use claimant's identification number resulted in claimant paying taxes on tips she was not paid.

Finally, we disagree with the ALJ's assertion that the fact that claimant gave the employer's two weeks' notice that she was quitting demonstrated that she had the reasonable alternative of continuing to work for the employer until she found other employment. At hearing, claimant testified that she gave two weeks' notice only because she felt ethically obligated to do so, and believed that quitting without notice would result in a negative reference from the employer that would interfere with her ability to find other employment. Audio Record at 5:25-5:50, 7:35-8:45. The Oregon Court of Appeals has repeatedly held that it is immaterial to the good cause analysis whether an individual could have continued to work while seeking other employment. *See e.g., Warkentin v. Employment Dept.*, 245 Or App 128, 134-35, 261 P3d 72 (2011) (The conclusion that an individual could have continued to work while seeking other employment "is as true in this case as it is in any other case, and is beside the point. The findings do not determine the issue before the board – whether a reasonable person would have quit work."). The fact an individual gives notice is similarly immaterial to the issue of whether a reasonable and prudent person would have quit work.

In sum, absent further inquiry, we cannot determine whether to the extent claimant quit work due to the alleged verbal abuse by the employer's owners and their relatives, and the employer's alleged practice of allowing another server to use claimant's identification number when reporting the server's tips, she quit work for reasons of such gravity that no reasonable and prudent person would have continued working for the employer. We therefore cannot determine whether claimant quit work with 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 whether claimant quit work with good cause, Hearing Decision 15-UI-45226 is reversed, and this matter is remanded for development of the record.

DECISION: Hearing Decision 15-UI-45226 is set aside, and this matter remanded for further proceedings consistent with this order.

Susan Rossiter and J. S. Cromwell.

DATE of Service: October 26, 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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