

EMPLOYMENT APPEALS BOARD DECISION

2015-EAB-1637

Reversed & Remanded

PROCEDURAL HISTORY: On December 2, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant but not for misconduct (decision # 145420). Claimant filed a timely request for hearing. On December 29, 2014, ALJ Wiperman conducted a hearing, and on December 31, 2014 issued Hearing Decision 14-UI-31121, reversing the Department's decision and concluding that claimant voluntarily left work without good cause. On January 5, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered claimant's written argument when reaching this decision.

CONCLUSIONS AND REASONS: Hearing Decision 14-UI-31121 is reversed and this matter is remanded for further proceedings.

In Hearing Decision 14-UI-31121, the ALJ first concluded that the work separation was a voluntary leaving, based solely on the testimony of the employer's witness that the claimant could have continued to work at the employer's Lincoln City, Oregon office after she moved from Toledo, Oregon to Lebanon, Oregon. Hearing Decision 14-UI-31121 at 2; Audio at ~11:30. The ALJ further concluded that claimant did not have good cause for leaving work because did so under a mistaken belief that she had been discharged. Hearing Decision 14-UI-31121 at 3. Alternatively, the ALJ concluded that the distance of claimant's commute to work in Lincoln City, after she moved to Lebanon, was not a grave reason for her to leave work because she herself created that gravity by deciding to move to Lebanon in the first place. Hearing Decision 14-UI-31121 at 3.

In its current state, the record is insufficient to determine whether claimant was discharged or she voluntarily left work. Although the employer's witness testified that claimant was not discharged and that claimant left work "because she was moving to Lebanon and there were currently no available positions in Lebanon," the witness never stated why or how the employer reasonably concluded that

claimant intended to leave work if the employer did not arrange to transfer claimant to a work location more convenient to Lebanon than Lincoln City and on what day the employer anticipated this leaving would occur. Audio at ~11:38. Claimant never testified about whether she considered her work separation to have been a voluntary leaving or a discharge or whether, despite her move to Lebanon, she intended to continue working in Lincoln City if the employer did not arrange for a position in Corvallis or Eugene or some location more convenient than Lincoln City. *See* Audio at ~20:31. The ALJ should have, but did not, develop the record concerning why the employer believed that claimant voluntarily left work, what documents or communications from claimant supported this belief, and how it came about that the employer believed that claimant was going to leave work on or about October 22, 2014 (until the risk manager asked her to stay until October 31, 2014 to train her replacement). Audio at ~22:54. In light of claimant's testimony that the branch manager "evicted" her from the Lincoln City office on her last day of work, October 31, 2014, the ALJ should also have asked claimant whether she was willing to continue working at the Lincoln City office after that day despite the length of her commute to work from Lebanon, what were the sequence of events that lead to the "eviction," and why the loan manager decided he needed to escort claimant from the premises. Audio at ~24:37. Claimant also testified that the branch manager "would not let me stay on as his processor" during a conversation that she had with him on or about September 16, 2014. The ALJ did not ask whether claimant understood that the employer was at that time unwilling to allow her to continue working at the Lincoln City office or whether claimant understood only that the employer was unwilling to allow her to work as a loan officer from another one of the employer's offices. Audio at ~22:54. In this respect, the ALJ's approach to the issue of the work separation, that it was sufficient for the employer merely to assert that continuing work was available for claimant to establish that the work separation was a voluntary leaving, was in error. Hearing Decision 14-UI-31121 at 2. Rather, the important issue was the reasonableness of both parties' beliefs in light of their communications and behaviors toward each other during the time leading up to claimant's final day.

If, after further inquiry, the ALJ determines that claimant's work separation was a voluntary leaving, the ALJ should explore the gravity of the reasons that claimant left work. Although the ALJ concluded in Hearing Decision 14-UI-31121 that it was sufficient to establish that claimant did not have good cause if the gravity she experienced was of her own making, the relevant regulation is not so simply applied. Under OAR 471-030-0038(5)(f), "[w]here the gravity of the situation experienced by the individual results from his or her own deliberate actions, to determine whether good cause exists, the actions of the individual in creating the grave situation must be examined in accordance with the provisions of [OAR 471-030-0038(4)]."¹ OAR 471-030-0038(5)(f). Here, if claimant left work because of the length of her commute to Lincoln City after she moved to Lebanon, it must be determined why claimant decided to move to Lebanon, a location farther from Lincoln City than her previous residence in Toledo. Although claimant testified that moving to Lebanon was her "long-term plan," the ALJ should have, but did not, inquire about the reasons for this plan, what ends it was intended to fulfill and why claimant needed to pursue that plan when she did. Audio at ~21:38. In particular, claimant's statements at hearing about her need to lessen her commute time, make little sense when she moved to Lebanon, which is farther from Lincoln City than her previous residence in Toledo and her "fall-back" plan of working in Eugene after she moved to Lebanon would not appreciably, if at all, lessen the length or distance of her previous

¹ Under OAR 471-030-0038(4), "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.

commute to work. Audio at ~20:49. In view of this testimony, claimant's underlying reasons for quitting work must be further explored. In addition, we note that claimant testified that she decided to move to Lebanon before the employer gave her a concrete answer about whether it would allow her to work remotely or work from an office more convenient to her new home in Lebanon than in Lincoln City. The ALJ did not ask claimant why she obtained a residence in Lebanon and placed into motion plans to move there before she had a obtained a solid answer from the employer about whether a transfer or working remotely was possible, however. If claimant's work separation was a voluntary leaving, it cannot be determined, without this additional information, whether claimant had good cause to leave work or whether her decision to move to Lebanon from Toledo was the decision of a reasonable and prudent person under the circumstances. If claimant's work separation was a discharge, the ALJ must inquire into its basis to enable us to determine whether it was for misconduct.

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 claimant's work separation and whether, if it was a voluntarily leaving, claimant had good cause to do so and whether, if it was a discharge, claimant was discharged for misconduct Hearing Decision 14-UI-31121 is reversed, and this matter remanded for further development of the record.

DECISION: Hearing Decision 14-UI-31121 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: March 5, 2015

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Hearing Decision 14-UI-31121 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 website at court.oregon.gov. Once on the website, click on the blue tab for "Materials and Resources." On the next screen, click on the tab that reads "Appellate Case Info." On the next screen, select "Appellate Court Forms" from the left panel. On the next page, select the forms and instructions for the type of Petition for Judicial Review that you want to file.

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.