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State of Oregon
Employment Appeals Board
875 Union St. N.E.
Salem, OR 97311

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VQ 005.00

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0049

Reversed & Remanded

PROCEDURAL HISTORY: On October 21, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 140616). Claimant filed a timely request for hearing. On December 17, 2015, ALJ R. Frank conducted a hearing, and on December 24, 2015 issued Hearing Decision 15-UI-49969, affirming the Department's decision. On January 13, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted written argument to EAB, but failed to certify that he provided a copy of his argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). Therefore, we considered the entire record, but did not consider claimant's argument when reaching this decision.

CONCLUSION AND REASONS: Hearing Decision 15-UI-49969 is reversed and this matter is remanded for further development of the record.

This matter comes before EAB to determine whether, based on the facts developed at the hearing, claimant should be disqualified from receipt of unemployment benefits because he quit his job. 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.

Under ORS 657.270, the ALJ is required to give all parties a reasonable opportunity for a fair hearing. Where, as here, a party is unrepresented, that obligation necessarily requires that the ALJ 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). The record in this case must be remanded because the ALJ did not develop a record that demonstrated a full and fair inquiry into the relevant facts.

In Hearing Decision 15-UI-49969, the ALJ found that claimant voluntarily left work on September 29, 2015 because he objected to his working conditions, which included his manager occasionally touching him and making remarks such as claimant looked "cute," and a final incident involving foul language directed at him by two different employees.[1] The ALJ determined that claimant did not demonstrate good cause for quitting because his situation was not grave and, even if gravity had existed, he failed to pursue the reasonable alternative of contacting the employer's human resources department about his working conditions.[2] Although claimant left work after a final incident that occurred on September 29, 2015, he testified that he left work because of "persistent harassment from the top down for five years, a lot of it sexual, [and] a lot of it from [his on-site manager]." Audio Record at 10:06 to 10:23. Good cause for leaving work may exist if a claimant faces ongoing oppression or abuse in the workplace. *See e.g. McPherson v. Employment Div.*, 285 Or 541, 557, 591 P2d 1381 (1979) (claimants are not required to endure slurs or personal abuse for fear that abandoning an oppressive situation will disqualify the worker from unemployment benefits). Generally speaking, the types of oppressive working conditions that are considered grave enough to amount to good cause for quitting work are those in which the claimant is, for example, subjected to ongoing unwanted sexual advances and touching despite complaints, ongoing sexual harassment, ongoing verbal abuse, sexist and ageist remarks, fits of temper, hostility and slurs based on gender or other protected classes, or assault. *See, accord Appeals Board Decision* 13-AB-0502, April 2, 2013; *Appeals Board Decision* 12-AB-3213, January 8, 2013; *Appeals Board Decision* 12-AB-3173, December 14, 2012; *Appeals Board Decision* 11-AB-3647, February 9, 2012; *Appeals Board Decision* 11-AB-3308, December 22, 2011; *Appeals Board Decision* 11-AB-2864, December 12, 2011; *Appeals Board Decision* 11-AB-3063, October 28, 2011; *Appeals Board Decision* 11-AB-2272, September 6, 2011.

Because the record does not contain sufficient information about the details of the harassment claimant testified that he experienced, we cannot determine whether claimant faced a situation so oppressive that it left him no reasonable alternative but to quit when he did. On remand, the ALJ must ask claimant when the incidents began, when they occurred and with what frequency, the type of harm that occurred, who mistreated him, how often he had to work with the individuals who mistreated him, and what he did to try to stop the mistreatment before he complained to his on-site manager on September 29, 2015. Additionally, the ALJ must ask claimant how the conduct affected him. The ALJ denied claimant's request to call a witness, one of claimant's former managers with the employer, who was prepared to testify about "the situation claimant went through" while employed. Audio Record at 14:26 to 15:10. The ALJ did not allow the testimony, reasoning that claimant, and not another witness, was "best qualified" to provide details about the circumstances that prompted claimant to quit. *Id*. That ruling was error. OAR 471-040-0025(5) (August 1, 2004) states that all evidence "commonly relied upon by reasonably prudent persons in conduct of serious affairs" is admissible at hearing unless it is irrelevant, immaterial, or unduly repetitious. Details of the mistreatment claimant experienced at work is relevant and material, and the record fails to show that the manager's testimony would have been repetitious, especially where the ALJ did not ask claimant questions to elicit the details of the mistreatment.

[1] Hearing Decision 15-UI-49969 at 1, 2.

[2] *Id.* at 2.

The ALJ reasoned that claimant should have complained to the employer's human resources department. The record does not show claimant failed to complain to the employer. Claimant testified only that he did not report the conduct of his on-site manager "in particular." Audio Record at 13:47 to 14:13. The ALJ did not ask if claimant complained about others who mistreated him, or the employer's response. Claimant also testified that "upper management knew what was going on" regarding the harassment. *Id.* The ALJ did not ask the claimant why he believed the employer knew about the mistreatment, or what, if anything, upper management did in response to claimant's complaints. The ALJ must ask claimant about the chain of command, and what claimant knew regarding complaint procedures with the employer. Without this information, we cannot determine if it would have been futile for claimant to complain to the employer.

For the above reasons, we conclude that the ALJ failed to conduct a full and fair inquiry into the circumstances of claimant's work separation. We therefore remand this matter to OAH for further development of the record.

DECISION: Hearing Decision 15-UI-49969 is set aside, and this matter remanded for further proceedings consistent with this order.[3]

Susan Rossiter and J. S. Cromwell.

DATE of Service: <u>February 2, 2016</u>

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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[3] **NOTE:** The failure of any party to appear at the hearing on remand will not reinstate Hearing Decision 15-UI-49969 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.