

**EMPLOYMENT APPEALS BOARD DECISION**  
**2016-EAB-0278**

*Reversed and Remanded*

**PROCEDURAL HISTORY:** On January 27, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant voluntarily left work without good cause (decision # 112350). Claimant filed a timely request for hearing. On February 23, 2016, ALJ Murdock conducted a hearing, and on March 1, 2016, issued Hearing Decision 16-UI-54048, affirming the administrative decision. On March 14, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

**EVIDENTIARY MATTER:** The ALJ marked information provided by the employer as Exhibit 1, but did not admit it as an exhibit because claimant had not yet received a copy of the exhibit<sup>1</sup> and because she found the information contained in the exhibit to be “unduly repetitious” of testimony presented at the hearing. Hearing Decision 16-UI-54048 at 1. The ALJ erred in refusing to continue the hearing so that claimant could receive a copy of Exhibit 1. The information contained in Exhibit 1, which includes the police report on the incident that resulted in claimant being cited for second degree theft and the employer’s letter stating why it was considering claimant’s discharge, is relevant to the issues in this case. Because we are reversing and remanding this case for further development of the record, OAH must provide claimant with a copy of Exhibit 1 prior to the hearing on remand.

**FINDINGS OF FACT:** (1) Multnomah County School District #1 employed claimant as a campus security officer from December 16, 2013 until December 9, 2015.

(2) Claimant’s work as a security officer and his position with the employer required that he maintain a license issued by the Oregon Department of Public Safety Standards and Training (DPSST).

(3) Some time prior to December 9, 2015, claimant was stopped by a store employee at a Walmart store for allegedly taking merchandise from the store without paying for it.

---

<sup>1</sup> In the February 19, 2016 cover letter acknowledging submission of the exhibit to the Office of Administrative Hearings (OAH), the employer’s representative stated that a copy had been mailed to claimant.

(4) As a result of the incident in the Walmart store, claimant was cited for theft in the second degree. Claimant obtained legal representation and the charges against him were eventually dismissed.

(5) The employer learned of the charges against claimant and conducted an investigation into the situation. Claimant determined that he would lose his DPSST license as a result of the incident at Walmart. He concluded that if the employer discharged him, he would lose his DPSST license for ten years, but if he resigned his position, he could reapply for his DPSST license in four years. Claimant resigned his position with the employer because he believed his resignation would reduce the length of time he would be without a DPSST license. Had claimant not resigned, the employer would have discharged him because a DPSST license was a requirement of his position.

**CONCLUSION AND REASONS:** Hearing Decision 16-UI-54048 must be reversed and remanded for development of the 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. Leaving work for good cause does not include an individual’s willful or wantonly negligent failure to maintain a license “necessary to the performance of the occupation involved so long as such failure is reasonably attributable to the individual,” or resignation to avoid a discharge for misconduct. OAR 471-030-0038(5)(b)(E) and (F). Misconduct is defined, in relevant part, as a willful or wantonly negligent violation of the standards of behavior which an employer has the right to expect of an employee, or an act or series of actions that amount to a willful or wantonly negligent disregard of an employer’s interest. OAR 471-030-0038(3)(a). Wanton negligence is defined, in relevant part, as indifference to the consequences of an act or series of actions, or a failure to act or series of failures to act, where the individual acting or failing to act is conscious of his or her conduct and knew or should have known that his conduct would probably result in a violation of the standards of behavior which an employer has the right to expect of an employee. OAR 471-030-00388(1)(c).

Claimant asserted he quit his job with the employer because he understood that he would lose the Oregon DPSST license he was required to hold to work as a security guard due to an alleged shoplifting incident at Walmart. Had claimant not resigned, the employer planned to discharge him. It is therefore necessary to determine whether claimant’s loss of his license resulted from willful or wantonly negligent behavior, and also to determine whether he resigned to avoid a discharge for misconduct. In order to make such a determination, additional information is needed about the incident at Walmart and claimant’s decision to resign.

At the hearing, claimant asserted that a Walmart employee accused him of placing merchandise in his shopping cart that he did not ring up in the store’s automated self-checkout system. Claimant testified that he told the Walmart employee that he had stolen the merchandise because he wanted to avoid a “hassle,” and that what he did was “a stupid choice.” Audio Recording at 17:53, 31:05. The ALJ failed

to obtain sufficient details about claimant's conduct during the incident to determine whether it was willful or wantonly negligent. On remand, the ALJ must ask how claimant rang up the items that he wanted to purchase, whether he was automatically notified that he had not rung up all the items he wanted to purchase, what he did that may have caused the Walmart employee to believe he did not ring up all the items he wanted to purchase, and explain what choice he made on the day of the incident that was "stupid." In addition, the ALJ must ask what claimant told the Walmart employee when he was detained for the alleged theft, and whether he specifically admitted that he had committed theft.

In regard to claimant's decision to resign rather than be discharged, the ALJ must ask how and where claimant obtained the information that led him to choose to resign rather than be discharged. The ALJ must inquire upon what basis claimant believed that DPSST would revoke his license – whether he thought it would have been revoked for his arrest, or whether he thought it would have been revoked for statements he made to the Walmart employees. It appears that claimant did not promptly notify the employer or DPSST that he had been arrested. The ALJ should ask if claimant understood his failure to do so affected his ability to retain his DPSST license. The ALJ should also ask claimant why he did not promptly notify the employer or DPSST of his arrest.

In regard to the reasons why the employer intended to discharge claimant, it appears that claimant did not notify the employer that the criminal charges against him had been dismissed until he had submitted his resignation. Audio Recording at 23:50. The employer's witness testified that the employer planned to discharge claimant because his DPSST license was going to be revoked for a lack of "good moral fitness." Audio Recording at 21:58. The ALJ must therefore ask whether the employer would have discharged claimant had it know that the charges had been dismissed. The ALJ should also ask the employer's witness to explain why and upon what basis the employer concluded that claimant would lose his DPSST license due to a lack of "moral fitness."

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, Hearing Decision 16-UI-54048 is reversed, and this matter is remanded for development of the record.

**NOTE:** The failure of any party to appear at the hearing on remand will not reinstate Hearing Decision 16-UI-54048 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.

**DECISION:** Hearing Decision 16-UI-54048 is set aside, and this matter remanded for further proceeding consistent with this order.

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

**DATE of Service:** April 12, 2016

**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](http://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.

**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.