

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0407

Reversed & Remanded

PROCEDURAL HISTORY: On November 25, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision # 101757). The employer filed a timely request for hearing. On March 15, 2016, ALJ Seideman conducted a hearing, and on March 18, 2016 issued Hearing Decision 16-UI-55347, concluding claimant voluntarily left work without good cause. On April 7, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

The employer submitted written argument to EAB. The argument contained information that was not part of the hearing record, and failed to show that factors or circumstances beyond the employer's reasonable control prevented the employer from offering the information during the hearing. Under ORS 657.275(2) and OAR 471-041-0090 (October 29, 2006), we considered only information received into evidence at the hearing when reaching this decision and the employer's argument to the extent it was based on the hearing record. Given that this matter is being remanded for additional proceedings, however, the employer may present the new information during the next hearing if it chooses to do so.

CONCLUSIONS AND REASONS: Hearing Decision 16-UI-55347 is reversed, and this matter remanded to the Office of Administrative Hearings (OAH) for further proceedings.

The first issue before the ALJ was whether claimant voluntarily quit work or was discharged by the employer. If the employee could have continued to work for the same employer for an additional period of time, the work separation is a voluntary leaving. OAR 471-030-0038(2)(a) (August 3, 2011). If the employee is willing to continue to work for the same employer for an additional period of time but is not allowed to do so by the employer, the separation is a discharge. OAR 471-030-0038(2)(b).

On September 21, 2015, claimant's sister sent an email to claimant's supervisor on claimant's behalf. The supervisor read the email to be claimant's voluntary resignation. Claimant testified that she did not

intend the email to be a resignation. Audio Record at 30:28 to 31:00. Claimant was hospitalized and “confused” at the time due to her medical condition and medication. Audio Record at 33:54 to 34:02. The supervisor responded the same day to the email stating that claimant no longer needed to report to work. Claimant testified that she understood that email to be a discharge. Audio Record at 34:18 to 34:34. Claimant sent the supervisor an email on September 23, after she was discharged from the hospital and “coherent enough to do so” stating that she had been in the hospital. Audio Record at 33:18 to 33:43. She did not receive a response to that email from the employer.

In Hearing Decision 16-UI-55347, the ALJ concluded that the work separation was a voluntary quit, reasoning that “it was very reasonable for the employer to treat [claimant’s September 21 email] as a voluntary quit,” and that claimant’s contention at hearing that she was not aware the employer would consider the email to be a resignation because it was written by her sister was “not convincing.”¹

On remand, the ALJ should further explore the nature of the work separation by inquiring into the facts that show whether claimant could have continued to work for the employer for an additional period of time, and whether claimant was willing to continue working. The record indicates claimant communicated with her supervisor between September 17 and 21, 2015, at times other than those instances addressed at hearing. *See* Exhibit 5. The ALJ should inquire as to what communication occurred and what was said during that time between claimant and the employer.

The ALJ should inquire as to claimant’s mental capacity at the time her sister sent the September 21 email to claimant’s supervisor. The ALJ should inquire regarding the extent to which claimant was directing what her sister wrote in the email by asking, for example, what claimant asked or told her sister to write, if anything, and why, or whether claimant’s sister acted on her own. The ALJ should inquire as to whether claimant had the opportunity to review and edit the email her sister wrote before her sister sent it. Claimant testified that she did not intend to quit with the email. The ALJ should inquire as to claimant’s intent in sending the email, including why she referred to training cards, her time card and training sheet, and choosing between her job and her health. The ALJ should inquire as to claimant’s intent when she told her supervisor, “I wish you the best.” *See* Exhibit 5.

Claimant’s supervisor responded to the first September 21 email from claimant by stating that claimant need not report back to work. Exhibit 5. Later that day, claimant sent an email to her supervisor stating that she preferred to have her check mailed to her. Exhibit 5. The ALJ should inquire as to when claimant read the first September 21 email from the supervisor, who sent claimant’s second email asking that her final check be mailed to her, and claimant’s involvement in writing that email. The ALJ should inquire as to any other the reasons why claimant believed the employer had discharged her on September 21.

Claimant testified at hearing that she thought the work separation was a based on a “misunderstanding.” Audio Record at 24:52 to 25:10. The ALJ should inquire as to when claimant first believed the work separation was based on a misunderstanding, and what, if anything she did to correct that misunderstanding. The ALJ should ask claimant when the effects of her medical condition and medication ended, how long it affected her mental capacity, and it what manner.

¹ Hearing Decision 16-UI-55347 at 3.

The ALJ should ask the employer to explain its text message regarding keeping claimant as a “sub,” if and when claimant’s temporary position was scheduled to end, whether the employer had other work available for claimant after that time, what the possibility of continuing work was, and in what capacity. If the employer intended for claimant to continue working as a “sub,” the ALJ should ask the employer what that meant in terms of the ongoing employment relationship and continuing “work” for claimant. Claimant asked the employer, by text message, if she was able to keep her current shift, and testified that the employer did not respond to her question. Audio Record at 23:26 to 23:31. Claimant’s supervisor testified that she responded to claimant’s text message in a voice conversation with claimant at the end of August. Audio Record at 37:39 to 38:11. The ALJ should ask claimant if she recalls that conversation and what was said during that conversation.

Claimant testified that she sent her supervisor an email on September 23 saying that she had been in the hospital, and that the employer did not respond. Audio Record at 24:02 to 24:09; *see also* Exhibit 7. The ALJ should inquire as to everything claimant said in the email she sent to the employer on September 23, and as to whether there was any other communication in any form between claimant and the employer after September 21, including if claimant returned to the workplace to retrieve her personal items, and what was said in those communications. The ALJ should inquire if and when the employer learned that claimant was hospitalized from September 21 through 23, and whether it discussed claimant’s health with her after her last day of work on September 17. The ALJ should inquire if the employer provided claimant the Employee Separation of Service Form, and if so, the nature of claimant’s response. *See* Exhibit 2.

Claimant has insulin-dependent diabetes, a permanent or long-term “physical or mental impairment” as defined at 29 CFR §1630.2(h). If, on remand, the ALJ determines claimant voluntarily quit work, the ALJ should assess whether claimant had good cause to quit using the standard which applies to an individual with insulin-dependent diabetes.

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 nature of the work separation and if it was a discharge, whether that discharge was for misconduct or if it was a voluntary leaving, whether claimant showed good cause, Hearing Decision 16-UI-55347 is reversed, and this matter remanded for further development of the record.

DECISION: Hearing Decision 16-UI-55347 is set aside, and this matter remanded for further proceedings consistent with this order.²

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

DATE of Service: May 16, 2016

² **NOTE:** The failure of any party to appear at the hearing on remand will not reinstate Hearing Decision 16-UI-55347 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 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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