

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0412

Reversed & Remanded

PROCEDURAL HISTORY: On February 25, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant, but not for misconduct (decision # 155713). The employer filed a timely request for hearing. On March 30, 2016, ALJ Wipperman conducted a hearing, and on April 1, 2016, issued Hearing Decision 16-UI-56319, concluding that claimant voluntarily left work without good cause. On April 8, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant 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 did not consider the argument when reaching this decision.

EVIDENTIARY MATTER: At the hearing, the ALJ marked claimant's evidence, which appears to be a schedule of work assignments at the employer's restaurant for the week of January 18, 2016, as Exhibit 1. The employer objected to the admission of Exhibit 1 on the grounds that it was illegible and irrelevant. The ALJ told the parties he would rule on the admission of Exhibit 1 in his hearing decision. Audio Recording at 17:31. In Hearing Decision 16-UI-56319, the ALJ overruled the employer's objections and admitted Exhibit 1 into the record. Hearing Decision 16-UI-56319 at 1. The ALJ erred in failing to admit Exhibit 1 at the hearing.

At the hearing, the employer asserted that claimant quit his job when he failed to report for his scheduled shift on January 17, 2016. Claimant, however, contended that the employer discharged him after an angry altercation on January 16. As proof that he had been discharged, claimant offered Exhibit 1 to show that on January 16, the employer removed him from the work schedule. Exhibit 1 is clearly relevant to determining the nature of claimant's work separation, and due process required that the ALJ allow the employer to respond to the exhibit at the hearing. Because we are remanding this case for further development of the record, the employer will have an opportunity to respond to Exhibit 1.

CONCLUSION AND REASONS: Hearing Decision 16-UI-56319 is set aside, and this matter remanded for further development of the record.

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). In Hearing Decision 16-UI-56319, the ALJ found that the employer sent claimant home early on January 16, 2017, after an angry argument with the manager and the chef, but that claimant and the employer expected claimant to report to work a scheduled shift on January 17. The ALJ also found that “claimant heard from a coworker that employer had taken him off the schedule going forward. That coworker was not an individual who had authority to make changes to employer’s schedule.” Hearing Decision 16-UI-56319 at 4. The ALJ concluded that claimant erroneously decided, based on the information from his coworker, that he had been discharged, and therefore did not report for work on January 17. *Id.* Because the ALJ found that continuing work with the employer was available that claimant refused to perform, the ALJ concluded that claimant voluntarily left work. The record was not sufficiently developed to support the ALJ’s conclusion that claimant voluntarily left work, however.

Additional evidence concerning what happened on January 16, as well as evidence regarding the employer’s work schedule for the week of January 18, is needed to determine the nature of claimant’s work separation. In regard to the events of January 16, the employer’s manager initially stated that claimant “walked off the job” on that date. Transcript at 4. When questioned about what occurred at a January 16 meeting in which the manager, claimant and the employer’s chef participated, the manager testified that the chef asked claimant to leave the workplace, because claimant was angry, using foul language, and “demonstrating a physically aggressive posture.” Transcript at 8. Claimant testified that he became upset during the January 16 meeting, and was sent home by the employer, even though he did not behave aggressively or use foul language. Transcript at 16. Given the disputed testimony regarding what occurred on January 16, the testimony of the chef was necessary to corroborate (or not) the manager’s account of that meeting; the ALJ erred by not allowing the chef to testify. On remand, the ALJ must ask the chef for his account of the January 16 meeting.

In regard to claimant’s work schedule for January 17 and the week of January 18, the employer’s manager initially stated that he believed that claimant was scheduled to work on January 17, and that to his “knowledge” claimant was scheduled to work on that date. Transcript at 5. When the ALJ asked additional questions about claimant’s schedule, however, the manager testified with a greater degree of certainty regarding claimant’s schedule, asserting that the work schedule would have been communicated to claimant “about a week and a half” before January 17, and that he anticipated that claimant would report to work on that date. Transcript at 9. On remand, the ALJ must ask the manager on what basis he determined that claimant was scheduled to work on January 17. Exhibit 1 appears to be a schedule for the week of January 18 that was prepared on January 16 and which includes no assignments for claimant. At the hearing, however, the employer’s manager testified that the employer made no change in the work schedule after claimant left the workplace on January 16. Transcript at 9-10. On remand, the ALJ must ask claimant specifically how and when he obtained a copy of the schedule. The ALJ must also ask the employer’s witnesses whether the employer recognizes the schedule as one prepared by the employer. If an employer witness acknowledges that the schedule in Exhibit 1 was prepared by the employer, the ALJ must ask who prepared it and when (if known) and when the schedule was communicated to employees.

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). The ALJ failed to develop the record necessary for a determination of whether claimant voluntarily left work or the employer discharged claimant. Depending on the conclusion the ALJ reaches regarding the nature of claimant's work separation, the ALJ must then determine whether claimant had good cause for quitting his job under ORS 657.1176(2)(c) or whether the employer discharged claimant for misconduct under ORS 657.176(2). Any inquiry the ALJ makes regarding reasons for claimant's discharge must include questions about any occasions prior to January 16, 2016 on which the employer alleges that claimant engaged in misconduct.

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Hearing Decision 16-UI-54426 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-56319 is set aside, and this matter remanded for further proceedings consistent with this order. *Decisión de la Audiencia 16-UI-56319 se pone a un lado, y esta materia se remite para otros procedimientos constantes con esta orden.*

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

DATE of Service: May 5, 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. 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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NOTA: *Usted puede apelar esta decisión presentando una solicitud de revisión judicial ante la Corte de Apelaciones de Oregon (Oregon Court of Appeals) dentro de los 30 días siguientes a la fecha de notificación indicada arriba. Ver ORS 657.282. Para obtener formularios e información, puede escribir a la Corte de Apelaciones de Oregon, Sección de Registros (Oregon Court of Appeals/Records Section), 1163 State Street, Salem, Oregon 97310 o visite el sitio web en courts.oregon.gov. En este sitio web, hay información disponible en español.*

Por favor, ayúdenos mejorar nuestros servicios por llenar el formulario de encuesta sobre nuestro servicio de atención al cliente. Para llenar este formulario, puede visitar <https://www.surveymonkey.com/s/5WQXNJH>. Si no puede llenar el formulario sobre el internet, puede comunicarse con nuestra oficina para una copia impresa de la encuesta.