

**EMPLOYMENT APPEALS BOARD DECISION**  
**2016-EAB-0425**

*Reversed & Remanded*

**PROCEDURAL HISTORY:** On December 3, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 125356). Claimant filed a timely request for hearing. On March 28, 2016, ALJ Vincent conducted a hearing, and on April 6, 2016 issued Hearing Decision 16-UI-56661, affirming the Department's decision. On April 11, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

**CONCLUSIONS AND REASONS:** Hearing Decision 16-UI-56661 must be reversed, and this matter remanded for additional information.

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). An individual who quits work to accept an offer of other work has quit work with good cause only if the offer is definite and the new work is scheduled to begin in the shortest time reasonable under the circumstances. OAR 471-030-0038(5)(a). 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.<sup>1</sup>

ORS 657.176(8) provides that when an individual has notified an employer that the individual will leave work on a specific date, and it is determined that the voluntary leaving would be for reasons that do not

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<sup>1</sup> We applied the standard of a reasonable and prudent person without impairment when reaching this decision. Although claimant testified that he had some physical difficulties, he did not establish by a preponderance of the evidence that they constituted permanent or long-term "physical or mental impairments" as defined at 29 CFR §1630.2(h).

constitute good cause, that the employer discharged the individual, but not for misconduct connected with work, prior to the date of the planned voluntary leaving, and that the actual discharge occurred no more than 15 days prior to the planned voluntary leaving, then the separation from work shall be adjudicated as if the discharge had not occurred and the planned voluntary leaving had occurred, except that the individual shall be eligible for benefits for the period including the week in which the actual discharge occurred through the week prior to the week of the planned voluntary leaving date. OAR 471-030-0038(3)(a) defines misconduct, 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(1)(c) defines wanton negligence, in relevant part, as indifference to the consequences of an act or series of actions, or a failure to act or a 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 or her conduct would probably result in a violation of the standards of behavior which an employer has the right to expect of an employee. Isolated instances of poor judgment, good faith errors, unavoidable accidents, absences due to illness or other physical or mental disabilities, or mere inefficiency resulting from lack of job skills or experience are not misconduct. OAR 471-030-0038(3)(b).

In Hearing Decision 16-UI-5666, the ALJ concluded that claimant quit work without good cause effective October 9, 2015 to accept an offer of other work that began on October 26, 2015. *See* Hearing Decision 16-UI-56661 at 1-2. The ALJ reasoned that claimant's new job was not scheduled to begin in the shortest length of time reasonable under the circumstances because claimant left 17 days between jobs and "did not give any explanation why he could not have continued working with [the employer] until a date closer in time to his new start date with Salon Centric." *Id.* at 2. The hearing record fails to support the ALJ's conclusions.

Claimant testified at the hearing that he gave "a two-week notice on October 6<sup>th</sup>, but they just let me go on October 9<sup>th</sup>." Transcript at 11. The ALJ replied, "Why – you agreed that your last day would be October 9<sup>th</sup>" and continued based on the assumption that claimant had agreed to accelerate his resignation effective date. *Id.* Claimant did not testify that he agreed to quit effective that day, however, and, while claimant's "Letter of Resignation" indicates that claimant's last day would be October 9<sup>th</sup>, the ALJ did not ask claimant or the employer any questions about whether claimant prepared the letter of resignation, whether the employer gave claimant a form to complete, whether claimant or the employer picked the dates listed on the letter, why claimant or the employer picked October 9<sup>th</sup> as his last day, and whether claimant agreed to that date. The ALJ should ask claimant to explain any discrepancy between the date on the form and his testimony that he gave two weeks' notice on October 6<sup>th</sup>, which would make his planned last day of work October 20<sup>th</sup> instead of October 9<sup>th</sup>. The ALJ must ask claimant and the employer when claimant gave notice, when claimant planned to quit work, whether the employer accelerated claimant's quit date, whether claimant agreed to the accelerated quit date or merely acquiesced, and what date claimant's quit was, ultimately, effective.

In the event the record shows that claimant planned to quit work effective October 20, 2015 and the employer accelerated claimant's leaving date, the ALJ must ask additional questions about the circumstances of the work separation. If claimant planned to quit work on October 20, 2015, that would have left 6 days between his employment with the employer and the date he was scheduled to begin work with Salon Centric on October 26, 2015. In order to determine whether that 6-day period was the shortest time reasonable under the circumstances, the ALJ must ask claimant why he planned to wait 6

days between jobs, what he planned to do with that time period, why he thought it was necessary to do those activities before beginning work with Salon Centric, and why he could not have continued working for the employer for a few more days before beginning work with Salon Centric.

If claimant's planned voluntary leaving date was October 20<sup>th</sup>, the ALJ must also inquire about the circumstances under which the employer accelerated the work separation to October 9<sup>th</sup>. If the employer would not allow claimant to continue working after October 9<sup>th</sup>, the ALJ must analyze this case under ORS 657.176(8), which requires the ALJ ask the employer why it would not allow claimant to continue working between October 9<sup>th</sup> and October 20<sup>th</sup>. The ALJ must also inquire sufficiently to determine whether or not the reason the employer provides for ending claimant's employment on October 9<sup>th</sup> instead of allowing him to work throughout his notice period constituted misconduct for purposes of unemployment insurance benefits.

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 is disqualified from receiving benefits based on his work separation from the employer, Hearing Decision 16-UI-56661 is reversed, and this matter is remanded for development of the record.

**DECISION:** Hearing Decision 16-UI-56661 is set aside, and this matter remanded for further proceedings consistent with this order.<sup>2</sup>

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

**DATE of Service:** May 4, 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.

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<sup>2</sup> **NOTE:** The failure of any party to appear at the hearing on remand will not reinstate Hearing Decision 16-UI-56661 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.