

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0542

Reversed & Remanded

PROCEDURAL HISTORY: On March 14, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant voluntarily left work without good cause (decision # 115820). Claimant filed a timely request for hearing. On April 28, 2016, ALJ Seideman conducted a hearing in which the employer failed to appear, and on April 29, 2016, issued Hearing Decision 16-UI-58583, concluding that claimant voluntarily left work with good cause. On May 5, 2016, the employer filed an application for review with the Employment Appeals Board (EAB).

By letter dated May 13, 2016, the employer representative asked that a new hearing be scheduled. The employer's request is treated as a request to have EAB consider new information under OAR 471-041-0090 (October 29, 2006), which provides that EAB may consider new information if the party offering the information demonstrates that circumstances beyond a party's reasonable control prevented the party from presenting the information at the hearing. In support of its request, the employer's representative states that "due to technical issues to their new system," the employer's witness was "unable to access their copy of the hearing notice to call in for the hearing at the necessary time." The employer's witness fails to describe what "technical issues" prevented the employer from participating in the hearing. In addition, the employer's representative does not explain why the employer's witness was unable to contact the Office of Administrative Hearings (OAH) prior to or at the time the hearing was scheduled to begin to advise an OAH representative of the problems the witness was experiencing and obtain assistance calling into the hearing. Without this information, we have no reason to conclude that the employer's inability to participate in the hearing resulted from circumstances beyond its reasonable control. The employer's request to present new information is therefore denied. We note, however, that because we are reversing Hearing Decision 16-UI-58583 and remanding the matter to the ALJ for further development of the record, the employer will have an opportunity to present evidence at the hearing on remand.

CONCLUSION AND REASONS: Hearing Decision 16-UI-58583 is reversed, and this matter remanded to OAH for another on claimant voluntarily left work with good cause.

A claimant who leaves work voluntarily is disqualified from the receipt of benefits unless she proves, by a preponderance of the evidence, that she had good cause for leaving work when she 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 P2d 722 (2010). A claimant who has a permanent or long-term “physical or mental impairment” as defined at 29 CFR §1630.2(h) who quits work must show that no reasonable and prudent person with the characteristics and qualities of an individual with such impairment would have continued to work for her employer for an additional period of time.

In Hearing Decision 16-UI-58583, the ALJ found that “claimant felt that at least two of her coworkers did not like her and were not kind to her. Claimant had taken some times off of work for medical purposes but when she went back to see about returning, she felt she got the same reception.” Hearing Decision 16-UI-58583 at 2. The ALJ found that claimant “had consulted with her doctor who recommended that she quit, as did her husband,” and concluded that “[c]laimant’s situation was so grave that she had no reasonable alternative but to quit. This perhaps saved her life.” *Id.* The ALJ failed to sufficiently develop the record to establish that claimant had good cause for voluntarily leaving work, however.

Claimant testified that she quit her job because she was subjected to harassment by and negativity from her coworkers that created a hostile work environment for her. The ALJ failed obtain any specific evidence regarding the behavior of claimant’s coworkers, however. On remand, the ALJ must ask what claimant’s coworkers did or said that claimant found to be negative or harassing, who were the coworkers who engaged in this conduct, when this conduct began, and how often it occurred. The ALJ must ask claimant to provide particular examples of conduct by her coworkers that claimant found negative, harassing or offensive, and must also ask claimant to provide dates on which this conduct occurred. The ALJ must inquire whether and how the behavior of claimant’s coworkers affected claimant’s emotional, physical and mental state. The ALJ must ask claimant to explain in detail why she chose to voluntarily leave work on January 15, 2016, and must inquire if any specific incident or circumstance triggered her decision to quit her job on that date.

Claimant testified that she took leave from work --in 2011 or 2012, and again in 2015 or 2016. On remand, the ALJ must ask claimant or the employer the specific dates on which claimant took leave, and the reasons for the leave. If, as claimant indicated, most of this leave was taken for medical reasons and because claimant’s doctor advised her to do so, the ALJ must ask what specific medical condition or illness resulted in the need for leave, when claimant was diagnosed with this medical condition or became ill, what treatment was prescribed for her condition or disease, and whether claimant’s health improved while she was on leave from her job. The ALJ should ask any other questions necessary to determine whether claimant has a permanent or long-term mental or physical impairment as that term is defined in 29 CFR §1630.2(h). Claimant apparently returned to work after she was on leave in 2011 or 2012; the ALJ must ask whether her return to work adversely affected or exacerbated any medical condition with which she had been diagnosed, and ask claimant to describe any such adverse effects.

Claimant testified that after she had taken four to six weeks of leave due to the death of an immediate family member, she concluded in January 2016 that she could not return to the stressful environment at

work, and “even my doctor advised against it.” Audio recording at 11:32. Claimant also testified that she saw her doctor at the end of December 2015 or beginning of January 2016. Audio recording at 14:23. The ALJ must ask claimant what her doctor told about her medical condition and her work environment during this visit.

Claimant testified that she had been working under the direction of a new manager for approximately one year before she quit her job, and that the new manager was attempting to address problems in the workplace. Audio recording at 10:27. The ALJ must ask claimant when and if she discussed problems claimant was experiencing in the workplace with the manager, what actions, if any, the manager took to address these problems, and whether any of these actions were successful. Finally, the ALJ must inquire about any other options that might have been available to claimant to resolve her workplace problems, such as complaining to another one of the employer’s managers.

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 to determine whether claimant had good cause to voluntarily leave work, this matter is remanded to the ALJ for development of a record sufficient to make such a determination.

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-58583 is set aside, and this matter remanded for further proceedings consistent with this order.

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

DATE of Service: June 6, 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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