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State of Oregon
Employment Appeals Board
875 Union St. N.E.
Salem, OR 97311

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EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0585

Reversed & Remanded

PROCEDURAL HISTORY: On March 29, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant quit work without good cause (decision # 84440). Claimant filed a timely request for hearing. On April 25, 2016, ALJ Seideman conducted a hearing, and on April 27, 2016 issued Hearing Decision 16-UI-58210, concluding the employer discharged claimant, but not for misconduct. On May 17, 2016, the employer filed an application for review with the Employment Appeals Board (EAB).

We received the employer's written argument, and, under ORS 657.275(2) and OAR 471-041-0090 (October 29, 2006), we considered it to the extent it was based on information received into evidence at the hearing when reaching this decision. We did not consider the employer's new information. Should either of the parties to this matter wish to submit documents into the hearing record and have those documents considered by the ALJ during the hearing on remand, the parties should submit copies of those documents to the Office of Administrative Hearings (OAH), and to each other, in accordance with instructions contained in the Notice of Hearing OAH will send to them when scheduling the hearing.[1]

CONCLUSIONS AND REASONS: Hearing Decision 16-UI-58210 must be set aside as unsupported by a complete record, and this matter remanded.

ORS 657.176(2) provides, in pertinent part, that individuals are subject to disqualification from unemployment insurance benefits if they are discharged for misconduct or voluntarily quit a job without

[1] Instructions for submitting documents intended for use as exhibits during the hearing typically appear in the Notice of Hearing on the pages titled "BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS" and "NOTICE OF RIGHTS." If the parties have any questions about those instructions they should immediately contact OAH for additional information. The parties *should not* assume that any document they want to have considered has already been submitted, or assume that the other party already has a copy.

good cause. In decision # 84440, the Department concluded that claimant quit work with the employer "because she was dissatisfied with a demotion to a driving position" after the employer had eliminated the dispatcher position claimant had held. In Hearing Decision 16-UI-58210, the ALJ concluded that the employer discharged claimant. The ALJ's findings were consistent with those of the Department, including that the employer eliminated claimant's dispatcher position and "offered her a position as a driver."[2] For reasons the ALJ did not explain, however, the ALJ disagreed with the Department's conclusion that claimant quit, and instead decided that the employer had discharged her.[3]

The Department defines a voluntary quit as when "the employee could have continued to work for the same employer for an additional period of time," and a discharge as when "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." OAR 471-030-0038(2) (August 3, 2011). For purposes of those rules, the term "work" is defined not in terms of the particular job an individual holds, but rather as "the continuing relationship between an employer and an employee." OAR 471-030-0038(1)(a). Therefore, the mere fact that the employer eliminated the dispatcher position claimant held did not necessarily cause a "work" separation between claimant and the employer, so long as the employer had other continuing "work" available.

On remand, the ALJ must develop the record sufficiently to allow a determination of whether claimant quit work or was discharged. The ALJ should ask whether the employer became unwilling to continue employing claimant, and, if so, what date and time that occurred, whether the employer prepared a final check for claimant before he spoke with her about eliminating her dispatcher job and offering her the driving job, whether that check was a regular paycheck prepared for a regularly scheduled payday, and why the employer paid claimant through the end of the month if he thought she had already quit her job. The employer's witness stated that he drove to claimant's house during the relevant time period. The ALJ should follow up on that line of inquiry by asking what the employer's witness did when he drove to claimant's house, including whether he contacted claimant, spoke with anyone or left messages for claimant indicating that he had stopped by. The ALJ should also ask claimant whether and on what specific date and time she became unwilling to continue working for the employer. The ALJ should ask claimant what date she discovered her work phone had been turned off, and, once she found out it had been turned off, whether she called the employer to ask why her phone was turned off. The ALJ should ask claimant who she spoke with when she called in sick on the 21st, and what she said during that call. The ALJ should ask claimant how many days after the 21st was she sick, whether she called in sick on any of those days, and whether she ever tried to initiate contact or communication with the employer after the 21st. The ALJ should ask claimant if she knew the employer had called her or driven to her home, or driven past her home, during the week following the 21st, whether she received any messages that the employer had attempted to contact her, or whether she attempted to respond to him.

The record must also be developed with additional information regarding whether the work separation was disqualifying. If the work separation was a discharge, it would only disqualify claimant from benefits if the discharge was for misconduct. ORS 657.176(2)(a). Misconduct means, 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

[2] Hearing Decision 16-UI-58210 at 2.

[3] *Id.* at 3.

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. If the work separation was a voluntary leaving, however, it would only disqualify claimant from benefits if she voluntarily left work without good cause. ORS 657.176(2)(c). "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 the employer for an additional period of time. The employer has the burden to prove that misconduct occurred in a discharge case. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). Claimant has the burden to prove good cause in a voluntary leaving case. *Young v. Employment Department*, 170 Or App 752, 13 P3d 1027 (2000).

With respect to the misconduct inquiry, the ALJ must allow the employer the opportunity to provide evidence about claimant's work performance, including the employer's policies or expectations, whether and how claimant knew about them, and whether and how claimant violated any of them, and, if so, whether the violation was excusable as an isolated instance of poor judgment or a good faith error. The ALJ must also allow claimant the opportunity to respond to any information the employer provides.

With respect to the good cause inquiry, the ALJ must inquire further about the circumstances that caused claimant to refuse the employer's offer of continuing work as a driver. With respect to whether and how frequently claimant drove for the employer, the ALJ should ask both parties how many driving assignments claimant had during her employment for the employer and for Central Oregon Cabulance, how frequently the driving assignments occurred, how much of her workday or work week she spent driving, whether she was qualified to drive, and whether she had ever submitted any safety or health complaints or voiced concerns to the employer based upon her performance of driving assignments. It appears based on the employer's argument that the employer has one document listing claimant's job title as "driver." The ALJ should ask the employer about that document, what it means, and whether it gave the document to claimant, had her sign it, or otherwise made it available to her, and the ALJ should allow claimant to respond to the employer's evidence about that. The ALJ should also follow up with claimant to identify the reasons she considered herself physically incapable of driving, her concern that working as a driver was not physically suitable for her because of her size and fear of injury, ask her to specify what injuries she feared would occur if she worked as a driver, whether she had ever been injured while performing driving duties, whether she had any medical issues she thought prevented her from working as a driver, and whether she had any medical restrictions from a healthcare provider that were relevant to her capability of working as a driver. The ALJ should also ask claimant to reconcile her history working as a driver for the employer and/or Central Oregon Cabulance with her claim that she was physically incapable of doing that work.

With respect to claimant's claim that working for the employer as a driver would pay less than minimum wage, the ALJ must solicit more details about the wage before we can determine whether or not claimant's allegation is supportable. For example, according to the evidence in the record, one witness, P, who alleged he earned less than minimum wage, earned $13,548 for approximately seven months of

work; assuming he worked 40 hours of work per week, that equals approximately $11 per hour, which exceeds the state minimum wage. The other witness, Z, said he earned only $3 to $4 per hour, but earned $10,925 in approximately a seven month period, which, again assuming 40 hours of work per week, equals roughly $9 per hour, which may or may not be less than minimum wage depending whether the $10,925 was for 40 hours of work per week over a seven month period, or was for fewer hours or a shorter period. Additional evidence as to the number of hours and what period of time was covered is necessary to resolve the discrepancies before evidence of P's and Z's earnings could support claimant's contention that drivers working for the employer earned less than minimum wage.[4]

During the hearing in this matter, the employer attempted to question claimant's witnesses about their histories with the employer in order to solicit information about the existence of any bias against the employer or motive to retaliate against the employer. The ALJ interjected, "… this is [*sic*] not have anything to do with his termination. He's just a witness regarding her termination," and "I think you're trying to show some – some unhappy feelings, but we don't need to get into that." Transcript at 23. We agree with the ALJ that the object of the hearing in this matter was not to develop a record about claimant's witness's work separation, and we agree that the ALJ has an obligation to exclude irrelevant evidence from the hearing. However, evidence about a witness's history with either party, including the witness's "unhappy feelings," is not irrelevant. It is, rather, relevant, at least to the extent necessary to develop a record about the witness's bias against or motivation to lie (or lack thereof). Therefore, on remand the ALJ must allow the parties to develop a record about the potential bias of the other party's witnesses, or any other matter that goes to a witness's credibility and the veracity of their testimony.

Finally, it is also notable that claimant's testimony during the previous hearing, and that of her witnesses, was evasive and/or vague on many issues, particularly about the frequency with which claimant worked as a driver for the employer or its predecessor and claimant's witness's earnings (prorated hourly). Specifically, claimant gave vague responses to questions by the ALJ and on cross-examination about whether and how frequently she drove for the employer and its predecessor, and her witnesses were vague about their wages and frequency of claimant's driving. The ALJ should follow up on any vague or evasive testimony by any party or witness, and ask them to provide additional details or explain why they are unable to provide specific and detailed testimony about matters they alleged they experienced firsthand. The ALJ should also inform any witness who chooses to provide vague, evasive or non-detailed testimony that doing so may affect the perception of their credibility and the weight their testimony is given.

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 a disqualifying work separation, Hearing Decision 16-UI-58210 is reversed, and this matter is remanded for development of the record.

[4] Oregon's minimum wage was $9.25 per hour. *See* http://www.oregon.gov/boli/TA/Pages/T_FAQ_Minimum-Wage.aspx

DECISION: Hearing Decision 16-UI-58210 is set aside, and this matter remanded for further proceedings consistent with this order.[5]

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

DATE of Service: <u>June 17, 2016</u>

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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[5] **NOTE:** The failure of any party to appear at the hearing on remand will not reinstate Hearing Decision 16-UI-58210 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.