

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-1097

Reversed & Remanded

PROCEDURAL HISTORY: On July 29, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 150046). Claimant filed a timely request for hearing. On August 24, 2016, ALJ S. Lee conducted a hearing, and on August 31, 2016 issued Hearing Decision 16-UI-66670, affirming the Department's decision. On September 19, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

CONCLUSIONS AND REASONS: Hearing Decision 16-UI-66670 is reversed and this matter is remanded for further proceedings.

In Hearing Decision 16-UI-66670, the ALJ concluded claimant voluntarily left work without good cause on July 11, 2016. The ALJ reasoned that, although claimant demonstrated she had difficulties working with her supervisor, she did not show those difficulties were grave or that she likely would have been discharged not for misconduct at a meeting scheduled for July 12, 2016. The ALJ further reasoned that a reasonable and prudent person would have attended that meeting to determine what actually going to happen with her employment, and to possibly address issues with her supervisor and with her work performance. The ALJ also found that the effects of claimant's work environment on her mental health, as claimant described them at the hearing, did not constitute good cause for leaving work, specifically noting that claimant did not seek the assistance from a physician or a counselor. We conclude that the evidence was not sufficiently developed to support those conclusions.

At the outset, it was apparent that claimant decided to leave work the day before the meeting scheduled for July 12, 2016 because she believed she was going to be discharged at that meeting. Transcript at 14. Leaving work to avoid a discharge not for misconduct may be good cause to leave work under appropriate circumstances. *McDowell v. Employment Department*, 348 Or 605, 612, 236 P3d 722 (2010). On remand, the ALJ should develop the evidence as to whether that discharge would or would not have been for misconduct, including if any employer representative told claimant she might be discharged if she did not make the improvements set out in the February 23, 2016 performance improvement plan, if the employer reviewed claimant's performance under the performance

improvement plan on or around March 23, 2016, the date scheduled to review the plan, or at any other time, by whom her performance was evaluated, and the results of any evaluations. Exhibit 1 at 1. The ALJ should also inquire about any deficiencies in claimant's performance that the employer might have identified after the performance improvement plan was in place and what, if anything, claimant thought she had done that caused the employer to want to discharge her on July 12, 2016. To the extent possible, the ALJ should attempt to elicit specific information about any reasons the employer might have had to discharge claimant on July 12, 2016.

Although claimant testified she was "sick from all the pressure" exerted on her by her supervisor at the time she decided to quit work, the ALJ did not pursue her statement beyond determining she had not seen a physician or counselor for treatment. Transcript at 11, 13. However, mental health conditions and impacts for which a claimant did not seek professional help may still constitute grave circumstances. On remand, the ALJ should ask claimant to describe the symptoms she attributed to the pressure, how they affected her personally and affected her work performance, when they began, if they worsened over time and whether she wanted to see a health care professional for treatment of them even if she was unable to do so. The ALJ should ask claimant how, if at all, she differentiated between the effects of workplace pressure and pressure from her personal life, such as the death of her children's father and her need to provide emotional support for her children. The ALJ should also explore in more depth the alleged behavior of claimant's supervisor that caused claimant to feel pressure. The ALJ should inquire if there were any incidents from which claimant perceived pressure other than surrounding the performance improvement plan, the meeting on May 3, 2016 and the planned meeting on July 12, 2016. If so, the ALJ should explore what specifically the supervisor did, what she said and when it occurred.

Claimant testified she did not seek assistance from the employer's human resources department to address her problems with her supervisor because she knew of other employees who had sought such assistance and that department did not take the complaints seriously but treated them like "gossip." Transcript at 16. On remand, the ALJ should ask claimant to describe in detail what occurred, including what she knew about the nature of those employees' complaints and whether they involved claimant's supervisor, whether the human resources department took any action on those complaints and, if so, what, whether those employees experienced any adverse consequences from their complaints and the specific actions on which claimant drew her conclusions about the human resources department. The ALJ also should inquire into how claimant acquired her knowledge about the alleged attitude of the human resources department.

Finally, during the hearing claimant had two witnesses prepared to testify on her behalf but the ALJ did not call them as witnesses. Audio Record at ~3:00 *et seq.* In her written argument to EAB, claimant asked that receiving testimony from those witnesses be "reconsidered." Claimant should have those witnesses available for the remand hearing, and the ALJ should ask claimant to give an offer of proof, including who those witnesses are, their positions with the employer if any, and a description of the topics on which they would give testimony and the information they would provide, including whether they would address how claimant was treated by her supervisor, her supervisor's general behavior, claimant's work performance or any other matters that are relevant to the hearing on remand.

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 good cause for leaving work when she did, Hearing Decision 16-UI-66670 is reversed, and this matter remanded for further development of the record.

DECISION: Hearing Decision 16-UI-66670 is set aside, and this matter remanded for further proceedings consistent with this order. *Decisión de la Audiencia 16-UI-66670 se pone a un lado, y esta materia se remite para otros procedimientos constantes con esta orden.*

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

DATE of Service: October 31, 2016

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Hearing Decision 16-UI-66670 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: La falta de cualquier partido de aparecer en la audiencia en la remisión no reinstalará el 16-UI-66670 de la decisión de la audiencia ni volverá esta materia a EAB. Solamente un uso oportuno para la revisión de la decisión subsecuente de la audiencia hará esta materia volver a 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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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.