

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

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-1101

Reversed & Remanded

PROCEDURAL HISTORY: On August 5, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 82143). Claimant filed a timely request for hearing. On September 6, 2016, ALJ Vincent conducted a hearing at which the employer did not appear, and on September 9, 2016 issued Hearing Decision 16-UI-67240, affirming the Department's decision. On September 23, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted written argument to EAB, but failed to certify that she provided a copy of her argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). Therefore, we considered the entire record, but did not consider claimant's argument when reaching this decision.

CONCLUSIONS AND REASONS: Hearing Decision 16-UI-67240 is reversed, and this matter remanded to the Office of Administrative Hearings (OAH) for further proceedings.

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 P3d 722 (2010). A claimant who quits work must show that no reasonable and prudent person would have continued to work for her employer for an additional period of time.

In Hearing Decision 16-UI-67240, the ALJ concluded that claimant quit work due to "dissatisfaction with her working conditions," and that "[n]one of the reasons cited by claimant" was sufficiently grave that no reasonable and prudent person would not have continued to work for the employer while she sought other work.¹ Claimant testified that she left work due to the employer's "unfair" practices,

¹ Hearing Decision 16-UI-67240 at 2.

including reducing her hours and keeping the credit card “to go” tips that she earned. Audio Record at 4:16 to 4:55. However, the ALJ did not adequately develop the record for a determination of why, specifically, claimant left work on January 12, 2016 or why claimant felt things at work were so grave that she felt quitting that day was her only or best option. The ALJ did not ask claimant if she attempted to resolve her dissatisfaction with her working conditions before she left work, such as by complaining to a supervisor or owner. The Department’s decision states that claimant felt the employer treated her differently after claimant had been sick. Administrative Decision # 82143. The ALJ did not ask claimant if she was sick, for how long, and if the employer’s reaction to her illness was a factor in her decision to quit.

During the hearing, the ALJ focused on whether claimant’s cost of working was less than her earnings and if claimant could have looked for other work, and did not develop the record regarding the employer’s potentially unlawful practice of retaining some of claimant’s tips for the employer. Federal regulations² prohibit employers from retaining an employee’s tips unless in furtherance of a valid tip pool. The ALJ did not ask claimant when the employer permitted claimant to retain tips, how much claimant earned per month in tips, and under what circumstances the employer retained the tips. The ALJ did not ask claimant why she believed she had earned those tips and they properly belonged to her and not to the employer. The ALJ did not ask if the “to go” tips were voluntary payments or gratuities from the “to go” customers to thank claimant or if they were compulsory service charges in an amount dictated by the employer for orders prepared “to go.” The ALJ did not ask claimant if the employer retained the credit card “to go” tips pursuant to an agreement between claimant and the employer, and if so, the terms of that agreement. The ALJ did not ask if the “to go” tips, or any of the tips, were retained by the employer for a tip pool. If the employer utilized a tip pool, the ALJ must determine which employees were included in the tip pool and if it included employees who do not customarily receive tips, such as dishwashers and cooks.

EAB has consistently held that, if a claimant experienced unlawful wage and hour or employment practices on an ongoing basis that caused her to leave work, it may constitute good cause for quitting work.³ Thus, depending on the evidence elicited by the ALJ, the ALJ should develop the record about whether the employer’s practices, including its practice of withholding tips, were ongoing or likely to recur at the time claimant left work. Absent such inquiries, EAB cannot determine whether claimant left work with good cause.

² See Updating Regulations Issued Under the Fair Labor Standards Act, 76 Fed. Reg. 18,832 (Apr. 5, 2011); Fair Labor Standards Act (29 U.S.C. §§ 201 - 219).

³ *Appeals Board Decision* 2015-EAB-1244, November 13, 2015 (good cause to leave work when employer took unlawful deductions from claimant’s pay and did not provide the rest and meal breaks required by law); *Appeal Board Decision* 2015-EAB-0758, August 10, 2015 (good cause to leave work when employer did not provide lawfully require breaks); *Appeals Board Decision* 2014-EAB-0614, May 12, 2014 (good cause to leave work when employer failed to pay claimant in compliance with state law); *Appeals Board Decision* 12-AB-2132, August 30, 2012 (good cause to leave work when employer did not pay claimant overtime pay or other pay in compliance with state law); *Appeals Board Decision* 12-AB-0380, February 8, 2012 (good cause to leave work when employer did not pay claimant state required minimum wage and unlawfully deducted cash shortages from claimant’s pay).

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-67240 is reversed, and this matter is remanded for development of the record.

DECISION: Hearing Decision 16-UI-67240 is set aside, and this matter remanded for further proceedings consistent with this order.⁴

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

DATE of Service: October 18, 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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⁴ **NOTE:** The failure of any party to appear at the hearing on remand will not reinstate Hearing Decision 16-UI-67240 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.