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

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VQ 005.00

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-1120

Reversed & Remanded

PROCEDURAL HISTORY: On August 9, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily quit work without good cause (decision # 80754). Claimant filed a timely request for hearing. On September 8, 2016, ALJ Frank conducted a hearing, and on September 16, 2016 issued Hearing Decision 16-UI-67608, affirming the Department's decision. On October 1, 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). In her written argument, claimant asked EAB to reopen the hearing. Claimant's request is construed as a request for EAB to consider new, relevant and material information under OAR 471-041-0090 (October 29, 2006), which allows EAB consider such information when the party offering the information establishes that factors or circumstances beyond the party's reasonable control prevented the party from offering the information into evidence at the hearing. Because claimant's request contained no detail regarding the new information she sought to present, she thus failed to show such information would be relevant and material or that factors or circumstances beyond claimant's reasonable control prevented her from offering the information into evidence at the hearing. For these reasons, EAB did not consider claimant's written argument and is not reopening the hearing based on claimant's request. However, because EAB is remanding this case to OAH to develop the record, the parties may present new information at the hearing on remand.

CONCLUSIONS AND REASONS: Hearing Decision 16-UI-67608 should be reversed, and this matter remanded to the Office of Administrative Hearings (OAH) for further development of the record.

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.

Claimant quit work because she was not able to lift more than thirty pounds during the remainder of her pregnancy, until November 2016, and because she wanted to reduce her income to become eligible for state subsidized health care. The ALJ concluded that claimant quit work without good cause because "a maternity leave of absence would have been a reasonable alternative to quitting, and a viable solution to both of [claimant's reasons for quitting]." Hearing Decision 16-UI-67608 at 2.

With regard to claimant's physical restrictions while pregnant, the ALJ did not conduct a full and fair inquiry into the facts necessary for consideration of whether claimant could have continued working through workplace accommodations or medical leave, or if requesting accommodations or medical leave would have been futile. Before an alternative to quitting is considered available to a claimant, there must at least be some evidence showing that it is more than a hypothetical option. *See Gonzales v. Employment Department,*200 Or App 547, 115 P3d 976 (2005) (an alternative is not considered reasonably available absent some evidence that the employer actually considered it or other circumstances show that it was more than merely an unverified hypothetical option). The employer's witness stated that claimant could have had maternity leave to attend appointments. Transcript at 8. However, the record does not show if the employer was subject to family medical leave laws or if the employer would have permitted claimant to use maternity leave other than for medical appointments. The ALJ must ask the employer if claimant could have taken full time or part time leave, if and how claimant was aware of leave options and that she could take leave in lieu of quitting, how long claimant could have remained on leave, and the details of the employer's leave policy, if it had one. When the ALJ asked the employer's witness if the employer would have provided claimant modified work to meet her lifting restrictions, the employer's witness responded, "It would have been considered, but otherwise I wouldn't know the outcome of that." Transcript at 9. Thus, the record does not show if it would have been a reasonable alternative, or futile, for claimant to request a workplace accommodation for work duties she was able to perform. The ALJ must ask the parties if and how claimant knew she could request accommodations, if the employer had positions or job duties that were suitable for claimant, and how the employer addressed requests for accommodations.

Claimant quit work, in part, because her income made her family's household income too high for claimant to qualify for state subsidized health insurance. The ALJ failed to ask claimant if she knew the employer offered health insurance, if she had health insurance available to her through her husband's employment, if the employer's health insurance was an affordable option for claimant, and why claimant apparently preferred state subsidized health insurance. The ALJ also failed to ask claimant if she had health care options available to her if she could not afford the employer's insurance.

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 a work separation from the employer, Hearing Decision 16-UI-67608 is reversed, and this matter is remanded for development of the record.

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Hearing Decision 16-UI-67608 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-67608 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: October 25, 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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