

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-1426

Reversed & Remanded

PROCEDURAL HISTORY: On October 27, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant quit work without good cause (decision # 95354). On October 31, 2016, claimant filed a timely request for hearing on decision # 95354. On November 4, 2016, the Department served notice of an administrative decision concluding claimant was overpaid \$6,233 she was liable to repay, and imposing a \$1,246.60 monetary penalty and 52 penalty weeks (decision # 195152). On November 7, 2016, claimant filed a timely request for hearing on decision # 195152. On November 28, 2016, ALJ Shoemake conducted two hearings, and on December 15, 2016 issued Hearing Decision 16-UI-72982, affirming decision # 95354, and Hearing Decision 16-UI-73007, affirming decision # 195152. On December 20, 2016, claimant filed applications for review of both hearing decisions with the Employment Appeals Board (EAB).

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Hearing Decisions 16-UI-72982 and 16-UI-73007. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2016-EAB-1425 and 2016-EAB-1426).

EAB considered claimant's argument when reaching this decision to the extent it was relevant and based on the hearing record.

CONCLUSIONS AND REASONS: Hearing Decisions 16-UI-72982 and 16-UI-73007 should be reversed and these matters remanded.

As a preliminary matter, we note that the interpreter services provided to claimant in this matter were inadequate. The interpreter told the ALJ she was confused numerous times during the hearing regarding claimant's work separation. *See* Transcript, Hearing Decision 16-UI-73007 at 15, 16. She said she did not understand claimant at one point. *See* Transcript, Hearing Decision 16-UI-72982 at 6. The

interpreter stated at the hearing that claimant testified, "I quit – quit the job . . ." and when claimant corrected the interpretation, stating in English, "I didn't tell I quit. I leave," the interpreter said she did not see the difference. *See* Transcript, Hearing Decision 16-UI-72982 at 5. Given those issues, we recommend that OAH either secure a different interpreter for any proceedings on remand if at all possible, or, if it is not possible to do so, take whatever other reasonable steps might be available to the ALJ to ensure the interpreter can understand the parties, follow the testimony without confusion, and provide accurate interpretation of their testimony.

The ALJ found as fact that claimant had another job and worked there during the day shift during her employment with the employer in this case, but concluded that she did not have good cause to quit work with the employer, in part because claimant "did not show that there was a specific schedule conflict" between that job and her job with the employer. Hearing Decision 16-UI-72982 at 1, 2. We agree with the ALJ that claimant quit work.¹ However, claimant testified that she quit work "because I was put into situations – a situation when I couldn't have two jobs." *See* Transcript, Hearing Decision 16-UI-72982 at 5. She testified that she worked part time at her other job in Portland during a five-month period of time when the employer failed to offer her any work, and, when the employer offered her the assignment in Woodburn, "it ended up with my having conflict between two jobs that I had. And I was faced with the choice. I either had to quit one of the jobs. I – I was supposed to choose between the two jobs I had," both of which required her to work during the daytime hours. *Id.* at 7-8. Given that testimony, that she had two jobs, one in Woodburn and one in Portland, both during daytime hours, and she could not work both at the same time, the ALJ needed to develop the record as to why claimant chose to keep her part-time job in Portland rather than the full-time assignment in Woodburn. Specifically, the ALJ should ask claimant questions about her part-time job in Portland, including who she worked for, where her work location was, what her position was, how long she had held that job, how many hours she worked each week, whether the job was on a permanent, temporary or on-call basis, whether that employer provided her with steady work, and whether the work was ongoing during the second week of May 2016 or expected to continue thereafter.

The ALJ should also ask claimant about her job with the employer, for example, why she had not been assigned to work in a five month period, what the terms of the Woodburn assignment were (*e.g.* whether it was a permanent, temporary or on-call assignment), and how long the assignment was expected to last. The ALJ should ask claimant why she concluded it was better to keep her part-time job in Portland over the employer's Woodburn assignment, for example, which employer paid more, gave her more hours, or offered her steadier work. The ALJ should also ask claimant whether she discussed her concerns about the Woodburn assignment or the conflict between her two jobs with the employer at any point prior to leaving her job, and, if not, why she left her job with the employer without first approaching the employer about them. Without that information, and any other follow-up inquiry the

¹ 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.

ALJ deems appropriate, the record fails to show whether or not claimant quit her job with the employer with or without good cause.

The ALJ also found as fact that claimant was disqualified from receiving unemployment insurance benefits in the amount of \$6,233 because she quit her job with the employer without good cause, and concluded she was responsible for repaying that money to the Department. Hearing Decision 16-UI-73007 at 2, 4-5. The ALJ based her conclusion that claimant willfully misrepresented her work separation to the Department to obtain benefits in part on the fact that claimant had "vast experience" with 12 prior unemployment claims, and inferring from that fact that claimant must have known what she was doing when making a misrepresentation in this matter. Hearing Decision 16-UI-73007 at 4.

The existence and amount of the overpayment is based entirely on whether claimant is disqualified for benefits because of the above-referenced work separation; whether claimant is liable for a monetary penalty or penalty weeks, however, depends on whether the Department proved claimant made a willful misrepresentation to obtain benefits.² Although claimant had 12 prior unemployment insurance claims, the fact that she has had two prior instances of misrepresentations suggests that her prior claiming experiences should not be used to establish her expertise as a claimant. The record cannot support a conclusion about whether or not she is a particularly knowledgeable or savvy claimant without the ALJ first asking claimant and the Department's witness about her claim history, for example, whether claimant has reported prior work separations to the Department, and, if so, reported them correctly or was notified that she had not and instructed how to report them in the future, and whether claimant has had any other problems claiming during her 12 prior claims.

We also note that during the overpayment hearing, the ALJ asked claimant, "Did you contact the Employment Department to ask how you should report your job separation?" Transcript, Hearing Decision 16-UI-73007 at 15. Claimant answered, "Yes. And not once; more than once", and when the ALJ asked claimant what she was told, the hearing record became unintelligible. *Id.* The interpreter became confused, parties began speaking over each other, claimant became confused then began testifying in English, apparently because she felt unable to make herself understood using the interpreter, after which the ALJ told claimant to "stop" testifying, likely to allow the interpreter to interpret her statements. As a result, the ALJ did not follow up with claimant or the Department about claimant's contacts with the Department to ask how to report her job separation, including when those occurred, what she was told, and what she understood based on those contacts. On remand, the ALJ should develop the record with respect to that issue.

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.

² ORS 657.310(1) provides that an individual who received benefits to which the individual was not entitled is liable to either repay the benefits or have the amount of the benefits deducted from any future benefits otherwise payable to the individual under ORS chapter 657. That provision applies if the benefits were received because the individual made or caused to be made a false statement or misrepresentation of a material fact, or failed to disclose a material fact, regardless of the individual's knowledge or intent. *Id.* In addition, an individual who has been disqualified for benefits under ORS 657.215 for making a willful misrepresentation is liable for a penalty in an amount of at least 15, but not greater than 30, percent of the amount of the overpayment. ORS 657.310(2).

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, was overpaid benefits or made material misrepresentations to obtain benefits, Hearing Decisions 16-UI-72982 and 16-UI-73007 are reversed, and these matters remanded for development of the record.

DECISION: Hearing Decisions 16-UI-72982 and 16-UI-73007 are set aside, and these matters remanded for further proceedings consistent with this order.³

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

DATE of Service: January 6, 2017

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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³ **NOTE:** The failure of any party to appear at the hearing(s) on remand will not reinstate Hearing Decisions 16-UI-72982 and 16-UI-73007 or return these matters to EAB. Only timely applications for review of the subsequent hearing decisions will cause these matters to return to EAB.