

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0346

Reversed & Remanded

PROCEDURAL HISTORY: On January 23, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant, but not for misconduct (decision # 84210). The employer filed a timely request for hearing. On March 13, 2017, ALJ Seideman conducted a hearing, and on March 14, 2017, issued Hearing Decision 17-UI-78822, concluding that the employer discharged claimant for misconduct. On March 21, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered claimant's written argument to the extent it was based on information received into evidence at the hearing. *See* ORS 657.275(2) and OAR 471-041-0090 (October 29, 2006).

FINDINGS OF FACT: (1) From March 25, 2015 until December 15, 2016, Autozoners employed claimant as a part-time sales and customer service representative.

(2) On April 13, 2016 and November 4, 2016, the employer warned or disciplined claimant for violating its attendance policy.

(3) On December 9, 2016, claimant attempted to use the employer's system to request paid time off on December 12, 2016. Claimant wanted this day off so he could travel to Salem, and celebrate his brother's release from prison; his brother was being released after having been incarcerated for 23 years. Audio recording at 26:22. Claimant was unable to process his request, however.

(4) Claimant discussed the problem with his December 12 leave request with his supervisor, the manager of the store where claimant worked. The supervisor told claimant the employer's system would not process his request, because he had no vacation leave available, and that he could not use sick leave to take time off to celebrate his brother's release. The manager told claimant that he could take December 12 off if he could find an employee at another one of the employer's stores to cover claimant's shift. At some point in their discussion, the manager told claimant that if he was not going to show up to work on December 12, he should not show up at all. Audio recording at 29:49. Because claimant believed that the manager, and not he, should be responsible for trying to obtain someone to work claimant's December 12 shift, he made no attempt to find someone to replace him.

(5) Some time prior to the time his December 12 shift was scheduled to begin, claimant called his supervisor and said he would be late to work. Claimant did not report for work on December 12, however. Claimant also did not report for an assigned shift on December 15 because he believed the employer had discharged him for his failure to report for work on December 12.

CONCLUSION AND REASONS: This matter is reversed and remanded for further development of the record.

Work Separation: If the employee could have continued to work for the same employer for an additional period of time, the work separation is a voluntary leaving. OAR 471-030-0038(2)(a) (August 3, 2011). If 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, the separation is a discharge. OAR 471-030-0038(2)(b).

Here, the record is insufficient to determine the nature of claimant's work separation. The employer's classification of claimant's work separation as job abandonment, which is defined in its policy as a failure "to call in or report to work for 2 consecutive days" and which results in automatic termination of employment, indicates that the employer may have been unwilling to have claimant continue working after December 15. Exhibit 2. Claimant, however, testified that he did not report for work on December 15 because he had been discharged, based on his supervisor's remark that if claimant did not show up on December 12, he should not show up at all. On remand, the ALJ must ask the employer whether it would have been willing to allow claimant to continue working if he had reported for work on December 15.

Disqualification: In addition to developing the record to determine the nature of the work separation, the ALJ must further develop the record to determine whether claimant is disqualified from the receipt of unemployment benefits.

A claimant who is discharged is disqualified from benefits if the discharge was for misconduct. ORS 657.176(2). OAR 471-030-0038(3)(a) (August 3, 2011) defines misconduct, 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 disregard of an employer's interest. Isolated instances of poor judgment, good faith errors, unavoidable accidents, absences due to illness or other physical or mental disabilities, or mere inefficiency resulting from lack of job skills or experience are not misconduct. OAR 471-030-0038(3)(b).

A claimant who voluntarily left work is disqualified from the receipt of benefits unless he proves, by a preponderance of the evidence, that he had good cause for leaving work when he 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 his employer for an additional period of time.

Assuming the record shows claimant was discharged, the record is insufficient to demonstrate whether claimant's actions on December 12 constituted willful and wanton negligent violations of the employer's policy, and whether his conduct on that date was an isolated instance of poor judgment. The record is incomplete in regard to the employer's attendance policy which claimant may have violated on more than one occasion. Exhibit 2 contains only one page of the employer's attendance policy, which defines the terms used in the policy; additional pages, which may specify what the policy provides and what discipline the employer imposes on employees, based on the number and nature of violations they accrue. On remand, the ALJ must ask the employer what the policy specified in regard to absences from and tardiness to scheduled shifts, whether the policy used some type of "point system" or any other system that imposed progressively more severe disciplinary sanctions on an employee for increased policy violations, and, if the employer used such a system, how many "points" had claimant earned or sanctions imposed prior to December 12, 2016. The ALJ must ask whether claimant's notification that he would be tardy on December 12 complied with the requirements of the employer's attendance policy, and, if it did not, what sanctions the policy provided for claimant's inadequate notification of and his absence on December 12. The ALJ must also ask what were claimant's prior attendance violations on April 13, 2016 and November 4, 2016, what caused claimant to violate the employer's attendance expectations on those dates, what, if any, discipline the employer imposed on claimant for these violations, and whether it warned claimant about the consequences of any future attendance violations.

Assuming the record shows claimant quit, the record in this matter is inadequate to determine whether claimant's belief that the employer had discharged him because he did not report to work on December 12 was reasonable and may have constituted good cause for quitting. On remand, the ALJ must ask the employer whether the store manager with whom claimant spoke on December 9 and who warned him about the consequences of not reporting for work on December 12 had authority to discharge claimant, and must also ask claimant if he understood the store manager had authority to discharge him. The ALJ must ask claimant when he made his phone call on December 12, to whom he spoke, if anyone, what he told the person to whom he spoke or what message did he leave, and, if he spoke to someone, what he was told. The ALJ must ask the employer about the contents of any records or any other evidence it may have of claimant's conversation with the store manager on December 9 and of claimant's December 12 telephone call.

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 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 the receipt of unemployment benefits, Hearing Decision 17-UI-78822 is reversed, and this matter remanded for further development of the record.

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Hearing Decision 17-UI-78822 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 17-UI-78822 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: April 7, 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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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.

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