

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0514

Reversed & Remanded

PROCEDURAL HISTORY: On November 22, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant, but not for misconduct (decision # 80508). On December 12, 2016, decision # 80508 became final, without a request for hearing having been filed. On March 10, 2017, the employer filed an untimely request for hearing. On April 14, 2017, ALJ Holmes-Swanson conducted a hearing, and on April 18, 2017, issued Hearing Decision 17-UI-81264, allowing the employer's late request for hearing and affirming decision # 80508. On May 3, 2017, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer failed to certify that it provided a copy of its argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). We therefore did not consider the argument when reaching this decision.

Based on a *de novo* review of the entire record in this case, and pursuant to ORS 657.275(2), the ALJ's findings and analysis with respect to the conclusion allowing the employer's late request for a hearing are **adopted**.

FINDINGS OF FACT: (1) The Terimore Motel employed claimant as an office manager until September 12, 2016. Claimant's duties included taking charge of the motel reception area, checking guests in and out, answering the telephone and scheduling housekeepers.

(2) Claimant and her domestic partner lived in an apartment on the motel premises. On a number of occasions in July and August 2016, claimant and her domestic partner talked with the employer's owner and the owner's son about claimant's job and the living conditions for her and her partner.

(3) On September 12, 2016, claimant separated from her employment with the employer.

CONCLUSION AND REASONS: Hearing Decision 17-UI-81264 is set aside and this matter remanded for further development of the record.

At issue here is the nature of claimant's work separation. If the employer 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). "Work" means "the continuing relationship between an employer and an employee." OAR 471-030-0038(1)(a). The date an individual is separated from work is the date the employer-employee relationship is severed. *Id.*

The ALJ concluded that claimant was discharged, because "the balance of the evidence" demonstrated that the employer was unwilling to allow claimant to continue working "because it had hired a replacement based upon its mistaken belief that the claimant intended to end her employment when the employer was able to find a replacement." Hearing Decision 17-UI-81264. We disagree.

Contrary to the ALJ's assertion, we do not find that "the balance of the evidence" demonstrates the employer's unwillingness to allow claimant to continue working. Claimant testified that during July and August 2016, she never told the employer's owner or his son that she was going to quit her job. Transcript at 28. Claimant asserted that she talked with the employer's owner about the conditions of the apartment where she and her partner were living, and apologized to him for oversleeping one day, but never discussed her continued work for the employer. Transcript at 27, 32. The son of the employer's owner, however, testified that he and his father talked with claimant and her partner "several times" during July and August, that claimant and her partner told him and his father that claimant was going to quit, and that they eventually agreed that claimant would continue working until they could obtain her replacement. Transcript at 20, 21. Because we find no reason to doubt the credibility of either claimant or the son of the employer's owner, the evidence regarding the nature of claimant's work separation is equally balanced. By failing to question the employer's owner, who was sworn in as a witness, about his conversations with claimant and her partner, the ALJ did not pursue the opportunity to obtain evidence that could corroborate either the owner or claimant's version of the work separation.

On remand, the ALJ must ask that employer's owner if he spoke to claimant or her partner in July and August, when those conversations occurred and what was discussed. The ALJ must then determine, based on this evidence, whether claimant's work separation was a voluntary leaving or a discharge. If the ALJ determines that claimant quit her job, he must ask claimant why she left, inquiring specifically about her work hours, about which claimant was "disgruntled," her living conditions, which claimant found unsatisfactory, and any other reasons why quit her job. Transcript at 30. If the ALJ determines that claimant's work separation was a discharge, based on the evidence presented at the hearing, the ALJ should ask the employer's owner why he was unwilling to allow claimant to continue working.

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 to determine the nature of claimant's work separation, Hearing Decision 17-UI-81264 is reversed, and this matter remanded for development of the record.

DECISION: Hearing Decision 17-UI-81264 is set aside, and this matter remanded for further proceedings consistent with this order.

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

DATE of Service: May 22, 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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