

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0751

Reversed & Remanded

PROCEDURAL HISTORY: On May 8, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant quit work without good cause (decision # 132826). Claimant filed a timely request for hearing. On June 15, 2017, ALJ Meerdink conducted a hearing and issued Hearing Decision 17-UI-85801, affirming the Department’s decision. On June 20, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

CONCLUSIONS AND REASONS: This matter is set aside and remanded for additional evidence.

The ALJ found as fact that claimant “tendered her resignation to the employer” after she and her manager agreed that “claimant was not a good fit for the employer,” and concluded on that basis that claimant voluntarily left work.¹ We disagree. More evidence is required to determine whether claimant quit or was discharged from her job.

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).

In this case, the evidence shows that it was the employer, not claimant, that suggested the “need” to “part ways,” and claimant “agreed.”² The ALJ must ask the parties if claimant planned to leave work that day prior to the meeting, whether the employer would have allowed claimant to continue working after the meeting had claimant not “agreed” to “part ways,” and whether claimant thought she had a choice about whether to “agree” or disagree about parting ways and the basis of her belief about that matter. The ALJ should also ask any other follow-up questions necessary to determine whether continuing work was available to claimant at the time she “agreed” to part ways, and whether claimant

¹ Hearing Decision 17-UI-85801 at 2.

² Audio recording at ~ 13:40.

left work because she was in “agreement” that she needed to leave rather than because she merely acquiesced to the employer’s desire to “part ways.”

The ALJ also found that claimant’s voluntary leaving was without good cause because, although she “felt she lacked the skills for her work as a claims adjuster,” “none of the evidence in the hearing record suggests she faced a grave situation.”³ We disagree that the evidence supports that conclusion. If the record as developed on remand shows that claimant did, in fact, voluntarily leave her job, the ALJ must develop the record as to whether or not claimant had good cause for doing so.

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). 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 did not merely “feel” she lacked the skills for her work as a claims adjuster, she and the employer agreed that she did, in fact, lack skills. The ALJ found as fact that she had no experience with insurance adjusting, felt uncertain about the tasks she was assigned, and that her manager repeatedly spoke with or warned her about the inadequacy of her job performance.⁴ The ALJ’s findings were all supported in this hearing record. Therefore, the evidence conclusively establishes that claimant was not proficient at her job and lacked the skills required to perform it.

The record in this matter was well-developed as to the problems claimant experienced performing her duties and her unfamiliarity with many aspects of her work, and we do not require further evidence about those matters. However, the record fails to show why, or why not, claimant’s lack of skills and experience performing insurance adjuster work amounted to a grave situation such that any similarly situated reasonable and prudent person would have no reasonable alternative but to quit work. It appears that claimant lacked the ability to perform her job to the employer’s specifications and the employer repeatedly warned her and suggested that they part ways. The ALJ should ask the employer whether the employer thought claimant had the ability to improve her job performance and meet the employer’s expectations with further time and coaching, or whether the employer thought claimant would be unable to do so. The ALJ should also ask claimant why being unable to perform her job duties created a situation that was so grave that she felt it was necessary to quit her job rather than continuing to try to improve, and ask the employer whether and for how long it would have been willing to allow claimant to try to improve her performance, and under what conditions. The ALJ should ask whether or not the employer was able to provide claimant with any other resources or duty modifications that might have helped her improve her performance, whether or not the employer discussed those with claimant, and to what extent claimant was aware of any such resources or options. The ALJ should also ask any

³ Hearing Decision 17-UI-85801 at 2.

⁴ Hearing Decision 17-UI-85801 at 1.

other follow-up questions necessary to determine whether or not claimant's situation was "grave" and whether reasonable alternatives existed.

If, on the other hand, the evidence on remand shows that the employer did not have continuing work available to claimant at the time the employer suggested they needed to "part ways," then the work separation was a discharge and the ALJ must inquire with the parties as to whether that discharge was or was not for misconduct. ORS 657.176(2)(a) requires a disqualification from unemployment insurance benefits if the employer discharged claimant for misconduct connected with work. OAR 471-030-0038(3)(a) 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.

Should the record on remand suggest the possibility that the employer discharged claimant, the ALJ must ask the employer to explain what was the proximate cause of the discharge, the event without which the employer would not have suggested the need to "part ways" with claimant during the final meeting. The ALJ should then inquire with the employer as to any prior incidents that might have contributed to the employer's decision to "part ways" with claimant. The record in this matter suggests that claimant had many problems satisfactorily completing her work due at least in part to her lack of skills or experience performing facets of her insurance adjuster duties, but the employer identified other problems with her work that appear unrelated to her skills as an insurance adjuster. For example, the employer expected claimant to complete certain tasks within a designated time period and to call on her mentor and manager if she needed help, yet it appears that claimant repeatedly failed to complete tasks on time or call for help. With respect to that expectation, the ALJ should establish the time period the employer set for claimant for tasks, whether and how claimant was aware of the time period, instances in which claimant met or failed to meet deadlines, how did she keep track of deadlines, why claimant let things go beyond deadlines, how claimant kept track of her deadlines, what she did to try to meet them, whether she called her manager or mentor for help with any of the tasks as the deadlines approached, and why or why not, and, finally, what did she do to improve after being warned about missing her deadlines. The ALJ should conduct similar inquiries into the other deficiencies in claimant's work performance, such as failing to make or return calls, promising but failing to send checks on certain occasions, and any other deficiency identified by the evidence.

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 quit, with or without good cause, or was discharged, for or not for misconduct, Hearing Decision 17-UI-85801 is reversed, and this matter is remanded for development of the record.

DECISION: Hearing Decision 17-UI-85801 is set aside, and this matter remanded for further proceedings consistent with this order.⁵

⁵ **NOTE:** The failure of any party to appear at the hearing on remand will not reinstate Hearing Decision 17-UI-85801 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.

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

DATE of Service: July 14, 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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