

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0861

Reversed & Remanded

PROCEDURAL HISTORY: On March 29, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 151750). Claimant filed a timely request for hearing. On July 7, 2017, ALJ Amesbury conducted a hearing and issued Hearing Decision 17-UI-86479, concluding claimant voluntarily left work without good cause. On July 20, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered claimant's written argument when reaching this decision.

CONCLUSIONS AND REASONS: Hearing Decision 17-UI-86479 must be reversed as unsupported by a complete record, and this matter remanded to the Office of Administrative Hearings (OAH) for further proceedings.

The ALJ found as fact that claimant "resigned" and "agreed to resign" when, after 17 years of employment, she was placed on paid administrative leave for a couple of weeks while the employer investigated her email use and disloyalty to the administrators, during which the "employer's representatives . . . asked claimant to sign documents stating that she was resigning in lieu of termination" and both the employer's representatives and claimant's union representative "encouraged claimant to sign the resignation." Hearing Decision 17-UI-86479 at 1-2. The ALJ then concluded that claimant "quit work because the employer's administrators did not like her" and "apparently agreed to sign the documents stating that she was resigning in lieu of termination rather than continue working in a situation that she considered unpleasant," which was not a situation of such gravity that she had no alternative but to quit. *Id.* at 2-3. We disagree that the record supports the ALJ's conclusions that claimant quit work, or that her work separation was disqualifying, and conclude that additional evidence is necessary to reach any determination in this case.

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).

If the work separation was a voluntary leaving, ORS 657.176(2)(c) provides that 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. *See also 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). An individual who leaves work to avoid a discharge for misconduct or potential discharge for misconduct has left work without good cause. OAR 471-030-0038(5)(b)(F). The “good cause” 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.

If the work separation was a discharge, however, 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. OAR 471-030-0038(1)(c) defines wanton negligence, in relevant part, as indifference to the consequences of an act or series of actions, or a failure to act or a series of failures to act, where the individual acting or failing to act is conscious of his or her conduct and knew or should have known that his or her conduct would probably result in a violation of the standards of behavior which an employer has the right to expect of an employee.

It appears on this record that the idea to resign did not originate with claimant, and, in fact, that claimant did not have any intent to resign from her job until the employer asked and encouraged her to resign during a March 7th meeting that the employer had set. While it is therefore apparent that claimant was willing to continue to work for the employer until the March 7th meeting, it is not clear whether or not claimant could have continued to work for the employer for an additional period of time had she not agreed to the employer's request that she resign from work. The ALJ must therefore conduct additional inquiry into the final meeting and the availability of continuing work, as well as whether any quit or discharge was disqualifying for purposes of unemployment insurance benefits.

What was the purpose of the final meeting? Did claimant agree to resign before the final meeting, and the purpose of the meeting was just to sign the agreement? Was the meeting to talk about the results of the employer's investigation? What was the result of the employer's investigation? What did the employer learn about claimant's conduct? Did the employer intend to discharge claimant because of her conduct? How was the termination agreement presented to claimant? Did claimant discuss the possible agreement prior to the meeting and with whom did she discuss it? Was the agreement presented to her during the meeting? Did claimant and her union representative have input as to the terms of the agreement?

Claimant's union representative encouraged claimant to resign. Did the union representative tell claimant why he or she thought she should resign? What reasons did the union representative give her

for encouraging her to resign? Did the employer incentivize the resignation by offering claimant money or benefits in exchange for her resignation? If so, what were the incentives and how did they factor in claimant's decision to quit?

Claimant referred to her resignation as being "in lieu of termination" but also said that the employer did not expressly say she was going to be discharged. Why, then, did claimant call the resignation "in lieu of termination"? Did she believe her discharge was imminent if she refused to resign? What did the employer say or do that caused her to believe a termination was imminent? If the employer was not going to fire her immediately, what did she think the employer was prepared to do? Did the employer tell claimant or her union representative what the results of the investigation were and what the consequences to claimant might be? When did claimant think the employer would fire her if she did not agree to resign? Immediately, the next time she made an error, or another time?

Claimant said during the hearing that she asked the union representative at some point if there were any alternatives to her quitting her job. When did that happen? How did the union representative respond? What kinds of discussions did claimant have with the union or the employer about alternatives to quitting? Claimant said she asked the employer during the final meeting if she could stay at work and suggested that the employer did not really respond to her. What, if anything, did claimant or her union representative say during the meeting that suggested claimant did not want to agree to resign? What, if anything, did the employer say in response? If the employer did not directly respond, what did claimant or the union representative say to elicit a response? If neither tried to elicit a response, why not?

What did claimant think would happen if she said no to the employer's request that she resign? If claimant did not want to leave her job, why did she not refuse to agree and see what happened? If she thought the employer would discharge her if she refused to quit work, what did claimant think the difference was between quitting and being discharged for refusing to quit since the termination of her employment would be the result either way? Why was not being fired so important to claimant that she preferred to quit work instead? Did she have concerns about her reputation in the community? Was she concerned about the effect of a discharge on her career prospects? Was the possible stigma of a discharge in claimant's situation the same as it would be for any employee who was discharged from a job, or did claimant think the stigmatizing effect of a discharge would be worse for her than it would for most people? If so, why did claimant think that was the case?

If claimant was discharged, it appears that the employer likely based that decision on the results of its investigation into claimant's emails and actions that were perceived as disloyal to the employer or as fomenting disapproval of the employer in the community. It appears on this record that if claimant quit work, it was likely to avoid being discharged or potentially being discharged. Either way, the work separation would be disqualifying if the discharge or potential discharge was for misconduct. The record lacks sufficient evidence to determine if such a discharge would have been for misconduct. With respect to claimant's emails, the ALJ should ask claimant what she knew about the employer's policies regarding emails or communications in general, what she emailed or said to coworkers, what she emailed or said to the community, when she emailed or said it, why she emailed or said it, and whether she thought emailing or saying such things would violate the employer's policies or expectations? With respect to "venting" to the office manager, the ALJ should ask claimant what she said, when she said it, why she said it, and whether or not she thought her conduct would violate an employer policy or expectation? With regard to sending emails, did she use her work account? Did she send emails while

on duty or off duty? If she was on duty, why did she think it was appropriate to send those emails while on duty and being paid by the employer to perform work? The ALJ should also ask any other follow-up questions she or he deems necessary to reach a determination about these matters.

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 should be disqualified from receipt of benefits due to a discharge for misconduct or voluntary leaving without good cause, Hearing Decision 17-UI-87479 is reversed, and this matter is remanded for development of the record.

DECISION: Hearing Decision 17-UI-87479 is set aside, and this matter remanded for further proceedings consistent with this order.¹

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

DATE of Service: August 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.

Please help us improve our service by completing an online customer service survey. To complete the survey, please go to <https://www.surveymonkey.com/s/5WQXNJH>. If you are unable to complete the survey online and wish to have a paper copy of the survey, please contact our office.

¹ **NOTE:** The failure of any party to appear at the hearing on remand will not reinstate Hearing Decision 17-UI-87479 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.