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State of Oregon
Employment Appeals Board
875 Union St. N.E.
Salem, OR 97311

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EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-1010

Reversed & Remanded

PROCEDURAL HISTORY: On April 28, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 142529). Claimant filed a timely request for hearing. On August 9, 2017, ALJ Amesbury conducted a hearing, and on August 11, 2017 issued Hearing Decision 17-UI-90210, affirming the Department's decision. On August 21, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted a written argument in which he sought to present voluminous documents that were not offered during the hearing. While claimant contended those documents were relevant and material to EAB's determination, he did not explain why he was unable to present them at the hearing or otherwise show that factors or circumstances beyond his reasonable control preclude him from doing so as required by OAR 471-041-0090(2) (October 29, 2006). For that reason, EAB likely would not consider these evidentiary submissions because they were not submitted in the first instance on review. However, because of EAB's disposition of this matter, claimant may offer these documents as exhibits at the hearing on remand, and the ALJ may, as appropriate, admit them into evidence if the ALJ determines that they are relevant and material to the issues on which EAB has remanded this matter.

CONCLUSIONS AND REASONS: Hearing Decision 17-UI-90210 is reversed and this matter remanded for further development of the record

A claimant who leaves work voluntarily 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). If a claimant has a permanent or long-term "physical or mental impairment" as defined at 29 CFR §1630.2(h), good cause for leaving work is such that a reasonable and prudent person with the characteristics and qualities of a claimant with such impairment would not have continued to work for his employer for an additional period of time.

In Hearing Decision 17-UI-90210, the ALJ concluded that claimant did not show good cause for leaving work when he did. The ALJ reasoned first that claimant was very long-term employee who, after working for approximately 38 years in an atmosphere of "relaxed accountability," quit work because he disliked complying with new policies the employer had implemented requiring him to submit written plans for his anticipated upcoming work activities, and otherwise monitoring his workplace activities and restricting his workplace autonomy. Hearing Decision 17-UI-90210 at 3. As such, the ALJ determined that the employer's changes in policy and imposition of restrictions did not constitute a grave reason for claimant to quit work when he did. *Id.* The ALJ also reasoned that, although claimant showed that he had diabetes and a degenerative condition in his lower back that significantly restricted his workplace activities, because the employer had "historically allowed claimant broad leeway to adjust his duties to fit his limitations," claimant "did not describe any significant change to that practice," and, "at most," the employer's new policies required only that claimant "document his [physical] restrictions or absences that occurred because of his physical conditions," claimant had reasonable alternatives to leaving work based on his physical limitations. Hearing Decision 17-UI-90210 at 3-4. However, there is insufficient evidence in the record to support the grounds on which the ALJ reached these conclusions, and insufficient evidence to allow EAB to determine whether or not claimant voluntarily left work with or without good cause.

Aspects of claimant's testimony at hearing raised potential issues of ageism and discriminatory application of the employer's disciplinary policy to him. At the hearing on remand, the ALJ should ask claimant his age and the bases for his statement that the employer told him he "wasn't worth the amount of money they [were] putting into [him] *** and the Hermiston people deserve better" and his further statement that the employer told him he was "old" and "you're up there [in age] and you're costing us too much money," including who stated these things to claimant or made statements from which he inferred this them, the actual statements made as close to verbatim as possible, and what was meant by the references to money and costs. Transcript at 14, 15-16. The ALJ should also inquire of claimant about all the facts, statements or incidents on which he based his suspicion that the employer was trying to induce him to leave work due to his age and to appropriately follow up on the facts or incidents that claimant cites. With respect to the many warnings that were issued to claimant beginning in January 2017, the ALJ should inquire of claimant what he meant when he stated, that the "disciplinary actions [were] for things that I may not [have] been in control of, and *** it was just instantaneously like if you keep doing this we're going to discipline you or terminate you." Transcript at 5-6. With respect to those warnings, the ALJ should elicit sufficient information from claimant and the employer's witness(es) to determine whether those warnings were well-founded disciplinary measures about matters that claimant could control or were issued as part of an effort to induce claimant to resign from work. The ALJ should also elicit information from claimant and the employer's witness(es) setting forth the general context in which claimant was issued the many warnings he received beginning in January 2017, including the number of warnings that were issued after December 2016, the bases for the warnings, the substance of the warnings, whether, in addition to being given the written warnings, claimant received verbal counselings and, if so, from whom, the substance of those counselings and whether claimant was given assistance or training to help him comply with the terms of the warnings and, if not, why not.

In addition, the ALJ should specifically ask the employer's witness(es) why the employer decided to implement the various changes in policy or the new practices that restricted claimant's workplace autonomy, including, but not limited to, the requirement that all of claimant's overtime needed to be

approved in advance, that claimant needed to have approval in advance for all absences, and the requirement that claimant needed to submit weekly work plans. With respect to the work plans, the ALJ should ask the employer's witness(es) how the employer expected claimant to generate those plans if he did not have a workplace computer, how precisely the plans claimant submitted were deficient, how, if at all, the employer addressed claimant's objections that he was unable to prepare adequate plans for upcoming weeks since there was no way he could anticipate many of the funerals, factors relating to the funerals or other events that were going to occur in the cemetery and which would impact his work activities during an upcoming week, and why it issued the warning about inadequate work plans to claimant, especially if the inadequacies were due to his practical inability to predict his work activities in the upcoming week . The ALJ should give claimant an opportunity to explain, from his perspective, what caused the deficiencies in the work plans he submitted and if those factors were beyond his control. The ALJ should further ask claimant to describe the warning claimant received in January 2017 for "not performing," and how exactly claimant was allegedly not performing. Transcript at 13. The ALJ should follow up claimant's description with both claimant and the employer's witness(es) sufficiently to allow a determination of whether claimant was legitimately failing to perform his work duties or whether the warning was a pretext to enable the employer to discipline claimant. The ALJ also should inquire of the employer about the warning that claimant received in January 2017 for not reporting to work when claimant contended he had asked the chairman of the board for that time off in December and the chairman never responded, including whether the employer agrees that claimant asked the chairman for the time off and, if so, why the employer decided to issue a warning to claimant despite his efforts to obtain permission for the time off. Transcript at 19. The ALJ should also make inquiry of claimant and the employer about the substance of any communications between them concerning any of the warnings after they were issued and the efforts, if any, that claimant made to comply with the matters about which he was warned or, more generally, to comply with the employer's newly changed policies. The ALJ should follow up claimant's comments with an inquiry of him and the employer as to the reasons he continued to receive warnings despite his efforts to comply with the employer's expectations.

The ALJ should also ask the employer's witness(es) if any members of the employer's board of directors or any employer representatives had discussed among themselves claimant's reactions to, or alleged failure to comply with, the various new policies and restrictions that the employer imposed on claimant, the substance of those discussions, whether any plans or steps were proposed or taken to control claimant's activities or to encourage claimant's compliance with those changed policies and restrictions, whether there were any discussions of plans or steps to be taken if claimant did not comply with the changed policies and restrictions, whether claimant's alleged hindering, obstructing or resisting the implementation of the employer's changed policies and practices was discussed, whether the impacts of claimant's alleged non-compliance on the work environment was discussed, whether anything was proposed or stated that suggested that claimant's compliance with the changed policies or workplace practices had become a workplace imperative, whether the desirability that claimant would leave work was discussed or alluded to, and the employer's desired outcome(s) in issuing warnings to claimant. To the extent that any of these inquires yields an affirmative response or information, the ALJ should develop the evidence as to the substance of what was stated, by whom it was stated and what steps, if any, the employer took in response to those discussions. In addition, the ALJ should follow up the information that is elicited on any of the above matters, as appropriate, to determine whether claimant was subject to ageism or discriminatory application of disciplinary sanctions.

Aspects of claimant's testimony also suggested that the employer did not compensate him for overtime he was required to work. With respect to claimant's need to receive work-related emails from the employer and to respond to those emails from his home using his home computer, because there was no computer at the cemetery, the ALJ should ask the employer's witness(es) if the employer agrees that claimant was required to use his home computer to communicate with the employer or to send documents to it. The ALJ should further ask claimant to estimate how much time per week or other relevant period that he thought he spent in unpaid overtime dealing with these emails at his home computer or in emailing documents he needed to prepare and submit to the employer electronically. Transcript at 8, 9, 23. The ALJ should ask claimant if he sought overtime pay for the time he spent after work to respond to receive and respond to the employer's emails, or to submit other documents electronically to the employer from his home computer, and if he did not, why he did not. The ALJ should further ask claimant if he brought up with the employer that he was working overtime to respond to the employer's emails or to submit documents using his home computer, what the employer's response was and, if claimant did not bring up this topic with the employer, why he did not. The ALJ should inquire of the employer's witness(es) if the employer was aware that claimant was responding to its emails and making submissions to it from his home computer and if it was aware, from the time shown on claimant's electronic communications to the employer or otherwise, that claimant was sending the communications after his work hours and, if applicable, was not seeking overtime pay for this after hours work. Assuming the employer was aware or should have been aware that claimant was performing these tasks after work hours and was not seeking overtime compensation, the ALJ should inquire of the employer if it continued to require claimant to communicate with it electronically when it knew there was no computer in his work area and, if so, why it did so, and why it did not proceed to pay claimant overtime pay for his work efforts.

As well, claimant testified that he often needed to work overtime because he was required to open the cemetery before or after its scheduled hours to accommodate the opening and closing of graves and for other matters. Transcript at 18. The ALJ should ask claimant to estimate how much overtime he worked due to these occurrences per month or other relevant period of time and ask claimant if he sought pay for these overtime hours and if he did not, why he did not. The ALJ should inquire of the employer's witness(es) sufficiently to determine whether the employer was aware that claimant was putting in this overtime, if claimant was compensated for this overtime and, if not, why not, and if claimant's requests for overtime pay for this reason were refused, why they were refused. The ALJ should also follow up claimant's testimony that "when I [] did do overtime I usually got written up for it" and when "I went back through the payroll slips [] I noticed several times that I never got paid for overtime." Transcript at 18. The ALJ should inquire of claimant the reasons that he was working the overtime to which he referred, how much overtime he estimates he worked and during what approximate period of time, how much overtime he sought compensation for, if he did not seek compensation for all of the overtime, why he did not, the approximate date(s) on which he was written-up for seeking overtime pay, by whom he was written up, why exactly he was written up for requesting the overtime, if he received pay for the overtime that was the basis for any write-up, how much overtime pay he received, or if he was not paid for the overtime he worked, why he was not and how much total overtime compensation the employer failed to pay him as shown by his payroll records or otherwise. As appropriate, the ALJ should elicit testimony from the employer's witness(s) relevant to the matters raised by claimant's testimony about overtime and allow the employer an opportunity to respond to claimant's contentions.

Aspects of claimant's testimony about his physical condition and his work restrictions also require further development of the record. At the outset, the ALJ should ask both claimant and the employer's witness(es) to describe the physical demands of claimant's position as sexton and the customary tasks he was expected to perform. The ALJ should further ask claimant to describe specifically any physical restrictions to his work activities that were in place around the time he quit work, who determined those restrictions, and which, if any, of his usual work duties that he was effectively restricted from performing or was unable to perform due to physical limitations. The ALJ should in addition develop the evidence about what work activities claimant was performing around the time he quit work that exceeded either the work restrictions that were in place or the limitations imposed by his physical condition. If claimant was performing work activities that exceeded his physical restrictions or abilities, the ALJ should ask claimant about the frequency with which this happened, the reasons that this happened, if he informed any employer representatives that he was exceeding his restrictions or limitations, if not, why he did not, and if so, to describe the employer's response. The ALJ should specifically ask claimant if it was correct, as the employer's witness testified at hearing, that he employer "presumed" that "he [claimant] would adjust [his work activities] as needed." Transcript at 26. If claimant was unable to adjust his work activities to accommodate his physical restrictions and physical limitations by himself, the ALJ should develop the evidence about the factors that hindered claimant from doing so, if claimant ever told the employer that he was unable to comply with his restrictions or limitations, that he was required to work beyond his reasonable capacities, and if he did not, why not. The ALJ should inquire of the employer's witness as to the substance of the doctor's notes that she stated claimant gave to the employer, what restrictions they listed, the approximate dates of the notes, the substance of any discussions between employer representatives and claimant about how he should or could permissibly modify his job duties to accommodate his physical limitations and what, if anything, the employer did to accommodate claimant's limitations. Transcript at 25-26. The ALJ also should further inquire of claimant and the employer's witness if any employer representative ever asked claimant if he was able to accommodate his work activities to his physical restrictions or limitations and, if so, the substance of those communications and any steps the employer took to facilitate an accommodation and, if no such communications occurred, why they did not. Finally, the ALJ should follow up claimant's testimony that a physician suggested to him that he "probably shouldn't be working in a job like this anymore," including the relation of that physician to claimant, approximately when and the context in which this advice was given, and if claimant ever informed the employer of this medical advice. Transcript at 10.

As a final matter, the ALJ should develop the evidence about any efforts by claimant to address the many issues surrounding his employment with the employer around the time that he quit, including his concerns about ageism, discriminatory application of the employer's disciplinary policy, the many disciplinary warnings he received after January 2017, the issue of unpaid overtime and his physical restrictions or limitations. The ALJ should specifically inquire of claimant if, at any point, he thought it was futile or useless to bring these issues to the employer's attention and, if so, why he thought so.

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 voluntarily left

work with or without good cause, Hearing Decision 17-UI-90210 is reversed, and this matter remanded for further development of the record

DECISION: Hearing Decision 17-UI-90210 is set aside, and this matter remanded for further proceedings consistent with this order.

J. S. Cromwell and D. P. Hettle.

DATE of Service: September 20, 2017

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Hearing Decision 17-UI-90210 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.

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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