

**EMPLOYMENT APPEALS BOARD DECISION**  
**2017-EAB-1073**

*Reversed & Remanded*

**PROCEDURAL HISTORY:** On April 10, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, not for misconduct within 15 days of claimant’s planned voluntary leaving without good cause (decision # 91815). Claimant filed a timely request for hearing. On August 10, 2017, ALJ Seideman conducted a hearing, and on August 17, 2017 issued Hearing Decision 17-UI-90595, concluding claimant voluntarily left work without good cause. On September 5, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

**CONCLUSIONS AND REASONS:** Hearing Decision 17-UI-90595 is reversed and this matter remanded for further proceedings.

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) (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), such a claimant must show that no reasonable and prudent person with the characteristics and qualities of an individual with such impairment would have continued to work for her employer for an additional period of time.

In Hearing Decision 17-UI-90595, the ALJ concluded claimant was disqualified from benefits because she did not show good cause for leaving work when she did. The ALJ broadly reasoned that “[c]laimant’s situation wasn’t so grave she didn’t have any reasonable alternative but to quit,” and pointed out that claimant “could have tried harder” and “could have sought other work before quitting.” Hearing Decision 17-UI-90595 at 3. However, the record that the ALJ developed is insufficient to support the conclusions he reached, or to allow EAB to determine whether claimant left work with or without good cause.

At the outset, while claimant testified she was “disabled in one eye” and was a “slow learner,” the ALJ failed to inquire at all about these conditions. Transcript at 7. The ALJ should conduct a sufficient inquiry to determine whether either condition constitutes a permanent or long-term impairment. The ALJ should ask claimant the nature of her eye disability, the name for it and whether the “disability” has been diagnosed by a medical professional and, if so, when and by whom. The ALJ should ask sufficient questions to determine whether claimant’s reference to being a “slow learner” meant that she has a learning disability and, if so, to ask the same preliminary questions about it as about the eye disability. With respect to either condition, the ALJ should ask claimant how either affected her work performance, if it either made it more difficult, or impossible, for her to meet the employer’s performance standards and, if so, how. To the extent that either condition appears to be impairing, the ALJ should further inquire if the employer was aware of the impairing condition(s), how it became aware, and how, if at all, it made accommodations or allowances for those aspects of claimant’s workplace performance that the condition(s) impacted.

While claimant testified she left work, in part, because she was harassed in the workplace, and cited repeated warnings she received relatively near in time to leaving work as examples of this alleged harassment, the ALJ did not adequately develop the facts on this issue. Specifically, the ALJ should have asked the employer how many warnings were issued to claimant and when, and if the employer agrees, as claimant contended, that the warnings were issued because her sales figures, or those of her store, were not at expected levels. Transcript at 15. The ALJ should further inquire about the basis for each warning, the deficiencies in claimant’s performance that the warning pointed out, and, if one or more of the warnings included specific goals for claimant to try to attain, to describe those goals and whether or not claimant met those goals. To the extent claimant failed to meet any specific goals included in any warnings, the ALJ should inquire about how claimant’s efforts fell short, whether or not the warnings provided for disciplinary sanctions if claimant’s performance did not improve, and, if so, what they were. If applicable, the ALJ should inquire into any explanations that claimant provided for the deficiencies addressed in the warnings or any issues claimant had with any aspects of the warnings, any requests claimant made to the employer to help her address the deficiencies noted in the warnings, whether the employer acted to comply with claimant’s requests, if so, how, and, if not, why not. With respect to the 30 day warning claimant received on February 24, 2017, the ALJ should determine how the employer wanted claimant to improve her performance, how claimant’s improvement would be measured, whether the warning threatened claimant with discharge if her performance did not improve, and, if so, when claimant would be discharged if her performance did not improve. The ALJ should also inquire of claimant if she thought she could improve her performance in the manner and time period the warning required and, if not, why not. The ALJ should, in addition, ask claimant why she quit rather than try to perform consistent with the requirements of the February 24, 2017 warning, and develop the evidence as to the reasons claimant thought it was necessary to quit rather than be fired, including all adverse consequences claimant thought would accompany her firing.

In addition to the warnings claimant cited as examples of harassment, claimant mentioned at hearing that people talked about her behind her back, which made the situation difficult for her since she was in a management position. Transcript at 13-14. The ALJ should ask claimant who these people were, what they were saying about her, when they said it and how claimant discovered what was being said about her, and to describe the ways were those comments were personally or professionally detrimental to claimant. The ALJ should have inquired, in addition, if claimant thought she was harassed by any other

people in the workplace and to describe with specificity any other instances of harassment. With respect to all incidents of alleged harassment, including that of people talking behind claimant's back, the ALJ should ask claimant why she thought she was singled out and harassed, who, if anyone, she complained to, what she stated to those to whom she complained, what steps, if any, were taken to address her concerns or to curb the allegedly harassing behavior, and, if the harassment was ongoing at the time claimant quit, whether it diminished or discontinued, and, if so, how.

As well, the ALJ should inquire of claimant how precisely she thought being demoted or transferred would rectify the performance deficiencies pointed out in the warnings she received. The ALJ should ask claimant to identify all employer representatives with whom she brought up a demotion or transfer, when she did so, and what the responses of the representatives were. The ALJ should in addition ask claimant to identify all employer representatives from whom she requested additional training, how many times she sought additional training, what she hoped to accomplish through additional training, and what the response of the employer representatives was to claimant's request(s) for additional training. Claimant further suggested that the employer's response to her requests for assistance of "just look it up" or "do it yourself" was inadequate, but did not state why that response was an inadequate one. Transcript at 7, 14. The ALJ should explore the reasons claimant thought the employer's responses were insufficient, the identity of the employer representative(s) who made the cited statements to claimant and the context in which they were made, if claimant raised the inadequacy of those responses with any employer representatives and, if so, to whom, and the response of those representatives.

With respect to claimant's contacts with the employer's human resources department, the ALJ should ask claimant approximately how many times she contacted that department, the substance of each contact and the specific nature of each complaint claimant raised. The ALJ should further explore the impacts of the workplace on claimant, including how precisely the warnings, talking behind her back, allegations of incompetence, etc., affected her emotional, mental and physical health and her work and home life and how, if at all, she attempted to control any adverse effects she experienced. The ALJ should follow up with claimant's answers, as appropriate, to obtain a fuller picture of how claimant experienced the workplace environment and its impacts on her. The ALJ should also explore the thought process underlying why, after claimant received the third warning, she apparently considered the situation sufficiently dire that she decided to quit work. The ALJ should allow the employer an opportunity to respond to claimant's additional testimony on remand, including claimant's testimony that she sought help from her manager and the human resources department, asked for training, a demotion or a transfer, and thought people were talking about her behind her back. Transcript at 9, 12. In particular, the ALJ should inquire of the employer if it agrees with some or all of claimant's testimony on these issues and, if so, what parts it does, what parts it does not, and any alternate explanation(s) it has.

Finally, claimant and the employer gave markedly different testimony on whether claimant's final day of work was February 24, 2017 (claimant's testimony) or March 8, 2017 (the employer's testimony). The ALJ should ask the employer's witness if she has any first-hand information about claimant's last day of work or if she is solely relying on second-hand information from, and records created by, the human resources department. The employer should ask claimant and the employer if either is able to submit any documents or business records showing or tending to show that last day claimant clocked into work, and to admit any such offered document into evidence if they appear to be authentic.

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-90595 is reversed, and this matter remanded for further development of the record.

**DECISION:** Hearing Decision 17-UI-90595 is set aside, and this matter remanded for further proceedings consistent with this order.

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

**DATE of Service: October 5, 2017**

**NOTE:** The failure of any party to appear at the hearing on remand will not reinstate Hearing Decision 17-UI-90595 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](http://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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