

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-1217

Reversed & Remanded

PROCEDURAL HISTORY: On August 3, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 160507). Claimant filed a timely request for hearing. On September 21, 2017, ALJ R. Frank conducted a hearing at which the employer did not appear, and on September 29, 2017 issued Hearing Decision 17-UI-93497, affirming the Department's decision. On October 19, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

In her written argument, claimant argued that the ALJ erred with respect to her request for a default judgment based upon the employer's failure to appear at the hearing. The ALJ orally denied her request for a default judgment during the hearing when he told her that the hearing did not "work that way" because she had the burden of proof in this case. Audio Recording at ~ 5:45. He did not err in failing to re-deny the request in the hearing decision. Nor did the ALJ err in denying the request for a default judgment. ORS chapter 657 and OAR chapter 471 do not allow parties to win by default in unemployment insurance cases; the Oregon Rules of Civil Procedure to which claimant cited in support of her request do not apply to unemployment insurance cases. In this case, which is a voluntary leaving, claimant has the burden of proving good cause for leaving by a preponderance of the evidence, regardless whether or not the employer appeared at the last hearing, or appears at the hearing on remand. Claimant's request for a default judgment was properly denied.

Claimant's remaining arguments cited to allegations that the ALJ erred with respect to the findings of fact and conclusions of law. Because the outcome of this decision is to remand for additional proceedings, however, it is not necessary for EAB to address the allegations at this time.

CONCLUSIONS AND REASONS: Hearing Decision 17-UI-93497 should be reversed and this matter remanded.

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). 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.

The ALJ concluded that claimant left work without good cause, reasoning that even though claimant was understandably offended by her supervisor's "insistent and verbally aggressive" approach to speaking with her, and quit after he followed her into the mail room and "questioned [her] aggressively" with an "elevated [] voice" while "posturing physically in an intimidating manner," she had reasonable alternatives to quitting when she did. Hearing Decision 17-UI-93497 at 2. The ALJ specified that claimant could have, and did not, contact human resources or pursue "the possibility of a job transfer or other accommodation," and that it was "more likely than not that in this workplace, like others, there were avenues available for claimant to air her grievances and resolve her issues." *Id.* at 2-3. The ALJ concluded on those bases that claimant did not show good cause for quitting her job. We disagree that the record was sufficiently developed to support a conclusion in this case.

Claimant testified and presented statements from others suggesting that claimant's supervisor was not merely aggressive with her on one occasion, but that he might have engaged in a pattern of abusive behavior that created a hostile work environment. On remand, the ALJ should ask whether claimant complained about any prior incidents she experienced or that she knew about, whether or how she complained about the supervisor to the supervisor or others, whether she was aware of others complaining about the supervisor, and ascertain what the employer's response was to any of the complaints. If claimant did not complain to anyone, and did not know of any other complaints, the ALJ should ask claimant why she did not complain, and what she thought might happen if she had complained.

In addition to the supervisor's behavior, claimant also stated that she quit work in part because of "Short staff/mounting pressures, unfair work load distribution." Exhibit 1. On remand, the ALJ should ask claimant about those issues, whether they factored into her decision to quit work, and, if so, how so, and whether she would have quit work because of those issues even if the supervisor had not behaved as he did in the mail room incident. The ALJ should ask whether or how claimant tried to resolve those issues short of quitting work, and, if she did not do anything to resolve them, why she did not and what she thought might happen if she had tried to resolve them.

The ALJ found that contacting human resources and pursuing other "avenues" to air and resolve grievances would be reasonable alternatives for claimant to quitting work; however, claimant averred that going to human resources was not feasible for her. On remand, the ALJ should ask claimant why she thought human resources would not help her, and what experiences she had or had heard about in the past that informed her belief about human resources' unhelpfulness to her. The ALJ should ask claimant about the conversation she had with human resources three days after she quit work, what she said about her supervisor's behavior and other reasons she quit during that meeting, and how the employer responded to whatever she said.

On remand, the ALJ should ask the aforementioned questions, as well as any follow-up questions he deems relevant to whether or not claimant had good cause for quitting work. If the employer appears at

the hearing on remand, the ALJ should provide the employer with the opportunities to cross-examine claimant and respond to her allegations.

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 or not claimant quit work with good cause, Hearing Decision 17-UI-93497 is reversed, and this matter is remanded for development of the record.

DECISION: Hearing Decision 17-UI-93497 is set aside, and this matter remanded for further proceedings consistent with this order.

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

DATE of Service: November 17, 2017

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Hearing Decision 17-UI-93497 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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