

**EMPLOYMENT APPEALS BOARD DECISION**  
**2017-EAB-1300**

*Reversed & Remanded*

**PROCEDURAL HISTORY:** On August 2, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 74824). Claimant filed a timely request for hearing. On October 25, 2017, ALJ Frank conducted a hearing, and on November 2, 2107 issued Hearing Decision 17-UI-96028, affirming the Department’s decision. On November 8, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered claimant’s written argument to the extent it was based on the record. *See* ORS 657.275(2) and OAR 471-041-0090 (October 29, 2006).

**CONCLUSIONS AND REASONS:** Hearing Decision 17-UI-96028 must be reversed, and this matter remanded for additional proceedings consistent with this order.

The employer, a finance organization, employed claimant as a production assistant who was directly supervised by AJ, a loan officer. Sometime between June 2 and June 9, 2017, claimant met with AJ in her office, during which meeting AJ allegedly came over her desk and spoke to claimant in a threatening manner, following which claimant spoke to the branch manager and requested a transfer. On June 16, 2017, AJ again met with claimant in her office, this time for the purpose of giving claimant a written warning for performance deficiencies. On the phone was BP who was the employer’s branch manager. When claimant reviewed the warning, he observed that it was for tardiness and some inappropriately worded emails in addition to an allegation that claimant had gone over AJ’s desk in their previous meeting and had spoken to her in a threatening manner while waving his arms, which claimant considered a complete fabrication. Claimant became upset and left work. For the remainder of that day and over the next several work days claimant requested and received authorized sick time or vacation time and spoke to the employer’s human resources manager MH several times about a possible transfer to another supervisor and his unwillingness to work under AJ for fear of future fabrications about his behavior toward her. MH investigated the transfer options and when she told claimant that a transfer was not possible, claimant suggested “maybe [the employer] should let him go.” Audio Record ~ 26:00

to 27:00. Shortly thereafter, claimant received two weeks “severance” and signed a release agreement, effectively ending his employment. Audio Record ~ 26:45 to 27:00.

At hearing, claimant asserted that the employer discharged him and the employer asserted claimant quit. In Hearing Decision 17-UI-96028, after finding that shortly after the June 16 meeting, “claimant walked off the job in tears and did not attempt to report to work again”, the ALJ concluded claimant quit without good cause, reasoning,

While claimant disagreed with part, but not all, of the warning issued on June 16, 2017, the employer’s issuance of this warning was not a grave circumstance. Nor was claimant’s disdain of the prospect of continuing to work under the supervision of a particular individual.

Hearing Decision Hearing Decision 17-UI-96028 at 2, 3. We disagree and conclude the record fails to support the ALJ’s conclusion that claimant quit work.

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). “Work” means the continuing relationship between an employer and an employee. OAR 471-030-0038(1)(a). For a continuing employment relationship to exist, there must be some future opportunity for the employee to perform services for the employer; no continuing relationship exists if the employer does not have an expectation that a service will be performed. *See e.g.* Employment Appeals Board, 02-AB-2040, October 15, 2002, *citing* Employment Appeals Board, 97-AB-873, June 5, 1997.

Although the ALJ found that claimant quit work on June 16, there was no dispute at hearing that claimant requested and received authorized sick and vacation time on and after June 16 and that during the following week, claimant and MH discussed both his possible transfer and claimant’s suggestion that “maybe [the employer] should let him go.” Although MH described the payment the employer gave to claimant as a “severance”, which implies that the employer instigated the separation, the ALJ did not inquire of claimant or MH, and the record does not show, what the exact nature of the final communications between claimant and MH, or the “severance” or separation agreement, consisted of. Accordingly, on this record, we are unable to determine the nature of the work separation, let alone whether the work separation was disqualifying.

On remand, the ALJ should ask claimant to respond to MH’s testimony that claimant did not want to work for the employer anymore and inquire of both claimant and MH regarding the dates of each call between them during the period following June 16, who initiated them, what was said and by whom, what was the plan for the next contact at the end of each call, culminating in questions regarding the final resolution of the dispute, i.e. the nature of the work separation. With regard to the meeting between claimant and AJ which was the essence of the dispute between them, the ALJ should enquire regarding what prompted either AJ’s or claimant’s alleged conduct regarding which both were apparently upset. The ALJ should also inquire of both claimant and BP what was discussed between them after that meeting leading up to the warning at issue given to claimant on June 16, 2017.

Assuming claimant was “let go”, 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. The ALJ should inquire regarding what was the employer’s reason for discharging claimant and what, if any, reasonable employer expectations claimant violated that prompted the separation.

Assuming claimant quit, a claimant who leaves work voluntarily is disqualified from the receipt of benefits unless he (or she) 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). The standard is objective. *McDowell v. Employment Department*, 348 Or 605, 612, 236 P3d 722. A claimant who quits work must show that no reasonable and prudent person would have continued to work for the employer for an additional period of time. The ALJ should inquire of claimant why he considered the alleged fabrication so serious that he concluded that he had no reasonable alternative but to quit when he did.

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 did not develop the record necessary for a determination of the nature of claimant’s work separation or whether the employer discharged claimant for misconduct or claimant had good cause to voluntarily leaving work, Hearing Decision 17-UI-96028 is reversed, and this matter is remanded for development of the record.

**NOTE:** The failure of any party to appear at the hearing on remand will not reinstate Hearing Decision 17-UI-96028 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.

**DECISION:** Hearing Decision 17-UI-96028 is set aside, and this matter remanded for further proceedings consistent with this order.

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

**DATE of Service: December 11, 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](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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