

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-1378

Reversed & Remanded

PROCEDURAL HISTORY: On September 7, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 101527). Claimant filed a timely request for hearing. On October 3, 2017, the Office of Administrative Hearings (OAH) mailed notice of a hearing for October 16, 2017 to the parties, but sent the employer's notice of hearing to an incorrect address. On October 16, 2017, ALJ Scott conducted a hearing at which the employer failed to appear, and on October 17, 2017 issued Hearing Decision 17-UI-94708, concluding the employer discharged claimant not for misconduct. OAH sent the employer's copy of Hearing Decision 17-UI-94708 to an incorrect address, and on October 25, 2017, the United States Postal Service returned it to OAH as undeliverable. On October 27, 2017, OAH mailed a new notice of hearing for November 13, 2017. On November 6, 2017, the United States Postal Service returned the employer's October 3, 2017 notice of hearing to OAH as undeliverable.

On November 13, 2017, ALJ Scott conducted a hearing at which claimant and the employer appeared, and on November 20, 2017 issued Hearing Decision 17-UI-97247, concluding the employer discharged claimant, but not for misconduct, within 15 days of claimant's planned voluntarily leaving without good cause, and was disqualified from benefits effective June 25, 2017. Hearing Decision 17-UI-97247 superseded Hearing Decision 17-UI-94708. On November 25, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

Both parties submitted written argument to EAB that contained new information not offered at hearing. Neither party showed that factors or circumstances beyond their reasonable control prevented the party from offering the information during the hearing as required by OAR 471-041-0090 (October 29, 2006). We considered only information received into evidence at the hearing when reaching this decision. See ORS 657.275(2). Claimant also failed to certify that she provided a copy of her argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). The parties may present the new information at the hearing on remand if the information is served upon the other parties as required by OAH rules and if ALJ finds it is relevant and material.

CONCLUSIONS AND REASONS: Hearing Decision 17-UI-97247 is reversed and this matter remanded for further proceedings.

The ALJ found that claimant gave the employer notice that her last day of work would be June 23, 2017, but that the employer discharged claimant on June 9, 2017, 14 days before her planned voluntary leaving. Hearing Decision 17-UI-97247 at 3. While the record shows claimant originally told the employer she would leave work on June 23, it is not clear from the record if the employer discharged claimant 14 days earlier on June 9, or if claimant and the employer mutually agreed claimant's employment would end that day rather than on June 9. Whether claimant was discharged on June 9 or agreed to quit that day is relevant to decide if ORS 657.176(8) applies to this case and whether claimant is disqualified from waiting week credit or benefits for the period of June 4 through June 17. In deciding the nature of a work separation, 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). On remand, the ALJ should ask the parties questions to determine if it was claimant or the employer that decided claimant's employment would end on June 9 rather than June 23. For example, the ALJ should ask the employer if the employer would have allowed claimant to continue working until June 23, and if it was claimant who requested that her final day of work be June 9 rather than June 23.

With regard to claimant's voluntary leaving of work, whether it was on June 9 or June 23, the ALJ reasoned that claimant left work due to a reduction in pay, and that OAR 471-030-0038(5)(d) did not apply to claimant's quit because claimant's reduction in pay was due to a demotion or reassignment. Hearing Decision 17-UI-97247 at 4. The ALJ thus assessed claimant's quit under the general voluntarily quit provision of 471-030-0038(4), and concluded that claimant did not show that a reasonable and prudent person would have left work under claimant's circumstances. Hearing Decision 17-UI-97247 at 5. However, both parties testified, and we conclude, that claimant left work at least in part to accept an offer of other work. Transcript at 11:06-11:55, 26:45-26:51.

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). An individual who leaves work to accept an offer of other work has left with good cause, providing the offer was definite, paid the same or more than either the individual's pay from the work left or the weekly benefit amount, and is to begin in the shortest length of time reasonable under the circumstances. OAR 471-030-0038(5)(a). 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.

Additional information is necessary to determine if claimant had good cause to quit work to accept an offer of other work. To show good cause to quit, the offer must have been definite. Thus, the ALJ must ask claimant questions to determine if the offer of other work was definite when claimant gave the

employer notice that she would quit. The ALJ must ask if the offer of work was contingent on claimant passing any pre-employment tests, such as a drug test or criminal background check. If yes, had claimant already passed the test or background check as of June 9? Was there anything conditional about the job offer? Were there other candidates for the same position? Had claimant already received the job offer by June 9? Who made the offer to claimant? What was their position with the prospective employer? Was the offered work a temporary or seasonal position? Was it an on-call position? Was the new work reasonably expected to continue? What were the terms of the offer regarding hours per week, pay rate, and start date? Were the regular hours variable? If so, what were the hours when claimant started work in the new job? If there was overtime, was overtime variable or contingent? Was overtime guaranteed? If yes, on what basis did claimant conclude overtime was guaranteed? There was testimony regarding claimant's hours, including overtime, for the employer throughout different seasons and in different positions. However, what were claimant's hours with the employer when she quit work on June 9? What were her hours and pay rate going to be as of June 23? If there was time between the start date of the new job and claimant's job she quit, why did claimant give notice when she did? If applicable, why did she not give notice to end her job immediately before she was to start the new job? What was claimant's weekly unemployment benefit amount?

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 quit with or without good cause, Hearing Decision 17-UI- 97247 is reversed, and this matter is remanded for development of the record.

DECISION: Hearing Decision 17-UI-97247 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 27, 2017

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Hearing Decision 17-UI-97247 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.

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.