

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-1408

Reversed and Remanded

PROCEDURAL HISTORY: On October 23, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 140336). Claimant filed a timely request for hearing. On November 27, 2017, ALJ Griffin conducted a hearing at which the employer failed to appear, and on November 29, 2017 issued Hearing Decision 17-UI-97762, affirming the Department's decision. On December 8, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted written argument to EAB, but 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). Claimant certified that she sent a copy to EAB, but did not certify that she sent a copy to the employer. Therefore, we considered the entire record, but did not consider claimant's argument when reaching this decision.

CONCLUSIONS AND REASONS: Hearing Decision 17-UI-97762 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 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" typically is defined 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). For an individual with a permanent or long-term "physical or mental impairment" (as defined at 29 CFR §1630.2(h)), good cause for voluntarily leaving work is such that a reasonable and prudent person with the characteristics and qualities of such individual, would have no reasonable alternative but to leave work.¹ Both standards are objective. *McDowell v.*

¹ 29 C.F.R. §1630.2(h) defines "physical or mental impairment" as the following:

(1) Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine; or

Employment Department, 348 Or 605, 612, 236 P2d 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.

For the purposes of applying ORS 657.176(2)(c), when an individual has notified an employer that the individual will leave work on a specific date and it is determined that the voluntary leaving would be for reasons that do not constitute good cause, and the employer discharged the individual, not for misconduct, no more than 15 days prior to the date of the planned voluntary leaving, then the separation from work shall be adjudicated as if the discharge had not occurred and the planned voluntary leaving had occurred. ORS 657.176(8). However, the individual shall be eligible for benefits for the period including the week in which the actual discharge occurred through the week prior to the week of the planned voluntary leaving date. 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.

In Hearing Decision 17-UI-97762, the ALJ concluded that the employer discharged claimant not for misconduct on May 10, 2017, less than 15 days prior to the date of claimant's planned quit date of May 24, 2017. Hearing Decision 17-UI-97762 at 3. Based on this record, we agree. The ALJ also found that claimant gave notice that she would leave work on May 24, 2017 because she was required to work in an environment "she found personally distasteful." *Id.* at 4. The ALJ reasoned that being required to work near a restroom in a "dimly lit, ergonomically incorrect workspace" was not a situation of such gravity that claimant had no reasonable alternative but to quit. *Id.* However, the record that the ALJ developed is insufficient to support the conclusions he reached regarding claimant's planned quit, or to allow EAB to determine whether claimant's voluntary leaving would have been for good cause or not.

As a preliminary matter, while claimant testified that she had bilateral carpal tunnel surgery six years ago, her hands "had not completely healed," and "her eyesight isn't that good," the ALJ failed to inquire sufficiently about these conditions to determine if either condition constituted a permanent or long-term physical impairment as defined under 29 CFR §1630.2(h). Audio Record at 5:39-5:47, 9:23-9:30. The ALJ should ask claimant about the nature of her carpal tunnel condition and her eyesight impairment. Was claimant's carpal tunnel syndrome still active? With respect to either condition, the ALJ should ask claimant how the impairments affected claimant.

We also note that claimant's work situation may have been more than just "distasteful" to claimant. The ALJ did not conduct a sufficient inquiry into whether claimant experienced health concerns due to her work environment. The ALJ should ask claimant what specific concerns she had about the ergonomics and lighting of her work station. The ALJ should ask claimant if she experienced symptoms due to the poor ergonomics and lighting of her work station. What did claimant do, if anything, to alleviate these symptoms? Had claimant received medical advice regarding her work station? Did claimant ask the employer to make changes to her work station to make it ergonomically correct or to improve the lighting?

(2) Any mental or psychological disorder, such as an intellectual disability (formerly termed "mental retardation"), organic brain syndrome, emotional or mental illness, and specific learning disabilities.

To the extent claimant was dissatisfied with her working environment due to its proximity to a bathroom, claimant testified that she missed work for two days because she “just couldn’t stomach sitting there by the bathroom.” Audio Record at 9:43-10:00. The ALJ should ask claimant questions to determine if claimant became physically ill or merely found it distasteful to work near the bathroom. The ALJ should ask claimant to elaborate regarding her symptoms caused by sitting by the bathroom. The ALJ should ask claimant if she had physical symptoms that caused her to miss work those two days. The ALJ should ask if the employer made any changes or offered to make any changes to improve claimant’s working conditions?

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’s planned quit would have been for good cause or not, Hearing Decision 17-UI-97762 is reversed, and this matter remanded for further development of the record.

DECISION: Hearing Decision 17-UI-97762 is set aside, and this matter remanded for further proceedings consistent with this order.

J. S. Cromwell and D. P. Hettle;
S. Alba, not participating.

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Hearing Decision 17-UI-97762 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.

DATE of Service: January 12, 2018

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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