

**EMPLOYMENT APPEALS BOARD DECISION**  
**2017-EAB-1411**

*Reversed & Remanded*

**PROCEDURAL HISTORY:** On October 3, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 133944). Claimant filed a timely request for hearing. On November 17, 2017, ALJ Wyatt conducted a hearing, and on November 22, 2017 issued Hearing Decision 17-UI-97536, affirming the Department's decision. On December 11, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted written argument to EAB that contained new information and a request to reopen the hearing which we construe as a request to provide additional new information. We do not address the merits of claimant's request to provide new information here because this case is being remanded to the Office of Administrative hearings for further proceedings. Claimant may provide the new information he wants to be included in the record at the hearing on remand.

**CONCLUSIONS AND REASONS:** Hearing Decision 17-UI-97536 is reversed and this matter remanded for further proceedings.

A claimant who leaves work voluntarily is disqualified from the receipt of benefits unless he 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) (August 3, 2011). The standard is objective. *McDowell v. Employment Department*, 348 Or 605, 612, 236 P3d 722 (2010).

In Hearing Decision 17-UI-97536, the ALJ concluded claimant was disqualified from benefits because he voluntarily left work without good cause. The ALJ found that claimant's coworkers' discriminatory conduct created a "potentially grave" situation for claimant at work, but reasoned that claimant had the reasonable alternative of participating in human resources' investigation of the coworkers' conduct instead of quitting. Hearing Decision 17-UI-97536 at 2. The ALJ also broadly reasoned that claimant

did not face a grave situation at work or had reasonable alternatives to quitting because of his manager's email to an in-house recruiter, stating that claimant was "unreliable." *Id.* 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.

Claimant left work in part because he read an email from his manager to the employer's in-house recruiter in conjunction with claimant's application for transfer within the company, stating that claimant was "unreliable." Audio Record at 12:33-13:26. The ALJ should ask claimant what the email stated specifically, what impact claimant thought the email would have on his ability to transfer, and why claimant thought that. Claimant testified that he received an email response from the recruiter stating that, based on the manager's comments, the employer would no longer interview claimant. Audio Record at 21:23-22:08. However, the record is unclear as to whether claimant received that email, or other similar communication leading him to believe that the transfer would not occur, before he gave notice to quit. Thus, the ALJ should ask claimant if he received a response from the recruiter regarding the manager's statements before he gave notice that he would quit. Claimant testified that the manager's criticism was unjustified. Audio Record at 14:15-14:35. The ALJ should ask claimant why he believed the manager would have criticized his reliability without justification.

Claimant testified that the "main issue" that prompted him to seek a transfer within the company, and ultimately, to quit, was harassment based on the daily racist, homophobic and misogynistic behavior of two coworkers claimant worked with. Audio Record at 25:26-26:02. The ALJ did not adequately develop the facts on this issue. The ALJ should ask claimant if he is a member of a protected class based on race/color, sex/gender, sexual orientation or other protected class. The ALJ should ask claimant how often he worked with the two offending employees, and the general context of his daily contact with them. The ALJ should ask claimant if the coworkers were his superiors at work. The ALJ should ask claimant when claimant began working for the employer, when he first experienced harassment at work, how often it occurred, and when the last incident occurred. The ALJ should ask claimant to describe the incidents, including but not limited to incidents of harassment directed at claimant personally. The ALJ should ask claimant what happened, when it happened, who did it and its impact on claimant. The ALJ should ask claimant to describe the harm, if any, he experienced from the harassment, and how it affected him. If claimant experienced physical effects, the ALJ should ask claimant if he had a medical condition affected by the harassment.

The ALJ should ask if the employer did anything to prevent or correct the harassment. Did the employer have a policy regarding harassment? Did claimant receive training regarding harassment in the workplace? Did the employer communicate to claimant that it had a complaint or grievance process regarding harassment, and how to use it? Did claimant ever complain about the harassment to the employer? If claimant did not complain using the employer's processes, why not? If claimant complained, what action did the employer take? The ALJ should ask claimant if the employer ever disciplined the offending coworkers, and if so, what occurred after they were disciplined. The ALJ should ask claimant if he ever told the harassers directly that their conduct was unwelcome. If not, why not?

Claimant testified that he did not participate in an investigation by human resources when another employee complained about harassment because he had seen "multiple incidences" of retaliation. Audio Record at 28:23-29:05. The ALJ should ask claimant what retaliation he witnessed, and why he

believed it was retaliation based on complaints about harassment. Claimant testified that the harassment got worse after the investigation. Audio Record at 29:06-29:15. The ALJ should ask claimant to elaborate regarding how the harassment worsened after the investigation. The ALJ should ask claimant if there were ever threats made or implied against claimant. The ALJ should ask claimant what changes he witnessed after the investigation and if any of his own working conditions changed. The ALJ should ask claimant if there were any other reasons claimant did not complain to the employer about the harassment.

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-97536 is reversed, and this matter remanded for further development of the record.

**DECISION:** Hearing Decision 17-UI-97536 is set aside, and this matter remanded for further proceedings consistent with this order.

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

**DATE of Service: January 9, 2018**

**NOTE:** The failure of any party to appear at the hearing on remand will not reinstate Hearing Decision 17-UI-97536 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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