

**EMPLOYMENT APPEALS BOARD DECISION**  
**2017-EAB-1412**

*Reversed & Remanded*

**PROCEDURAL HISTORY:** On October 27, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, not for misconduct, within 15 days of her planned voluntarily leaving without good cause (decision # 85156). Claimant filed a timely request for hearing. On December 4, 2017, ALJ Clink conducted a hearing, and on December 5, 2017 issued Hearing Decision 17-UI-98189, affirming the Department's decision. On December 11, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

**CONCLUSIONS AND REASONS:** Hearing Decision 17-UI-98189 is reversed, and this matter remanded for further proceedings consistent with this order.

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). 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.<sup>1</sup> Both standards are objective. *McDowell v. Employment Department*, 348 Or 605, 612, 236 P2d 722 (2010). A claimant who quits work must show

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<sup>1</sup> 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

(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.

that no reasonable and prudent person would have continued to work for the 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. *Id.* 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-98189, the ALJ concluded that the employer discharged claimant, not for misconduct on October 10, 2017, less than 15 days prior to claimant's planned quit date of October 19, 2017. Hearing Decision 17-UI-98189 at 1-2. Based on this record, we agree. The ALJ also concluded that claimant's planned quit was without good cause because she was "dissatisfied with the working conditions", reasoning, "claimant was uncomfortable in the workplace and she was suffering from depression...Claimant did not file a formal complaint with the employer or request a leave of absence and she did not request a transfer prior to leaving work. The claimant has not shown a reason of such gravity that she had no reasonable alternative but to leave work." Hearing Decision 17-UI-98189 at 3. However, the record that the ALJ developed is insufficient to support the conclusions she 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 was suffering from depression for which she received treatment, the ALJ failed to inquire sufficiently about her condition to determine if it constituted a permanent or long-term physical impairment as defined under 29 CFR §1630.2(h). Audio Record at 14:00 to 17:30. On remand, the ALJ should ask claimant how long she had been suffering from her depression prior to her planned voluntary leaving, and when she began receiving treatment for her condition. And while the ALJ's questioning demonstrated that claimant had unexplored alternatives to quitting work that were available to her when she submitted her notice of resignation, without knowing the nature and severity of her problems at work or how they affected claimant, we are not able to determine whether or not they were *reasonable* alternatives to quitting work when she did. Specifically, the ALJ should inquire about the specific conduct of claimant's coworkers toward her, whether she considered it abusive, whether it triggered symptoms of her depression, and if so, how severe were those symptoms and how did they affect claimant's work performance? When claimant spoke with her supervisor, what did claimant request, if anything, to alleviate her coworker's behaviors toward her and what was her supervisor's response prior to leaving for vacation? Also, had claimant received any medical advice regarding her 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-98189 is reversed, and this matter remanded for further development of the record.

**DECISION:** Hearing Decision 17-UI-98189 is set aside, and this matter remanded for further proceedings consistent with this order.<sup>2</sup>

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

**DATE of Service: January 17, 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](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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<sup>2</sup> The failure of any party to appear at the hearing on remand will not reinstate Hearing Decision Hearing Decision 17-UI-98189 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.