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State of Oregon
Employment Appeals Board
875 Union St. N.E.
Salem, OR 97311

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EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-1458

Reversed & Remanded

PROCEDURAL HISTORY: On October 26, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 161616). Claimant filed a timely request for hearing. On November 21, 2017, ALJ Frank conducted a hearing at which the employer failed to appear, and on November 29, 2017 issued Hearing Decision 17-UI-97814, affirming the Department's decision. On December 18, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted written argument to EAB. Claimant's argument contained information that was not part of the hearing record, and failed to show that factors or circumstances beyond claimant's reasonable control prevented claimant from offering the information during the hearing. Under ORS 657.275(2) and OAR 471-041-0090 (October 29, 2006), we considered only information received into evidence at the hearing when reaching this decision. However, because the case shall be remanded to the Office of Administrative Hearings (OAH) for further information, claimant may send the new information to OAH and the other parties in accordance with instructions OAH will provide in the notice of hearing it sends, and offer the new information during the hearing on remand. At that time, the ALJ will decide if that information is relevant to the issues on remand and should be admitted into evidence, and the employer will have the opportunity to respond to the information.

CONCLUSIONS AND REASONS: Hearing Decision 17-UI-97814 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 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). The standard is objective. *McDowell v. Employment Department*, 348 Or 605, 612, 236 P3d 722 (2010). Claimant had anxiety, a permanent or long-term "physical or mental impairment" as defined at 29 CFR §1630.2(h). A claimant with that impairment who quits work must show that no reasonable and prudent person with the characteristics and qualities of an individual with such impairment would have continued to work for her employer for an additional period of time.

In Hearing Decision 17-UI-97814, the ALJ concluded claimant was disqualified from benefits because she voluntarily left work without good cause. Hearing Decision 17-UI-97814 at 3. The ALJ limited the analysis to whether claimant showed good cause to quit under OAR 471-030-0038(5)(e), when an individual quits due to a reduction in hours. *Id.* However, the record that the ALJ developed is insufficient to support the conclusion that the scope of the analysis should be limited to whether claimant had good cause to quit pursuant to OAR 471-030-0038(5)(e) or to determine whether claimant left work with or without good cause.

Claimant testified that she would not have quit if the employer had not reduced her shifts to two days per week. Audio Record at 13:45-14:15. The ALJ should also ask claimant if she would have quit when the employer reduced her hours if she did not have other issues with the employer. If other issues affected her decision, which other issues affected her decision to quit and why. Claimant also provided circumstantial evidence that the reduction of her hours was in retaliation for her having filed a worker's compensation claim. However, claimant also testified that there would be a seasonal reduction in hours, but she did not know when the seasonal reduction in hours would begin. Audio Record at 13:07-13:30. The ALJ should ask claimant what the employer told her, if anything, about when the seasonal reduction in hours would occur and what to expect when it did occur. Did the employer state if it would make incremental changes to the schedule when the golf season waned, or otherwise state how it would implement the changes? Did the employer state it would give employees a warning before the seasonal reduction? The ALJ should ask claimant if she spoke to other employees about past seasonal changes to their schedules. What had they experienced? The ALJ should ask claimant if she had noticed business slowing during September and early October.

Claimant alleged that she had four shifts per week from the end of June 2017 until the beginning of October, and that everyone else "still had their five days" in October when claimant's schedule was reduced to two days per week. Audio Record at 11:24-12:48. However, the ALJ should ask claimant why, then, the record shows claimant's and other employees' shifts appear to have varied from no shifts to five shifts per week during July 2017. *See* Exhibit 1 at 2-4. The ALJ should ask claimant if there were any emails or other communications from the employer explaining the changes to employees' schedules during July. The ALJ should ask claimant if the employer promised a certain number of hours per week at hire. The ALJ should ask claimant how often throughout her employment she was scheduled to work three days per week, two days per week, or less. Claimant also submitted an email from the employer in which the October schedule change was attributed to "aeration on ghost." Exhibit 1 at 18. The ALJ should ask claimant what "aeration on ghost" was and if it had happened before; and, if it had happened before, the ALJ should ask about the previous resulting change in hours, and if such changes were typical.

With regard to the schedule change in October, the record shows other "Champions" workers' schedules were changed as well. *See* Exhibit 1 at 17, 19. The ALJ should ask if claimant knew why other

employees lost hours that week, except for Tonia Martins, who gained 2.25 hours. *Id.* Did Martins have seniority over claimant? Did the other employees have more or less seniority or experience than claimant?

Claimant also alleged that she "begged" for work in the employer's other restaurants and areas and other employees were given hours in those areas, even overtime. Audio Record at 19:14-19:37. The ALJ should ask claimant what she asked the employer, to whom she directed her request, and the employer's response. The ALJ should ask claimant who the other employees who had been given more hours were, what positions they held, and if they were permanent or seasonal staff.

The record shows claimant received a "final warning" on July 25, 2017. Exhibit 1 at 5. The ALJ should ask claimant if she received first and second warnings before the final warning, and if so, when they occurred and, briefly, what the alleged infractions were. The ALJ should ask claimant if she believes her reduced schedule could be attributable to the warnings she received, and why or why not. The ALJ should ask claimant why she believes the warnings were due to retaliation rather than errors on her part.

Claimant alleged that her immediate supervisor "[singled] her out by repeatedly yelling at [her]," and that the employer harassed her because she filed a worker's compensation claim. Exhibit 1 at 14-15. The ALJ should ask claimant when and how she first observed the mistreatment, and what incidents occurred once the mistreatment began. The ALJ should ask claimant who did the mistreatment, how often, and if claimant complained to a supervisor or other employer representative about the mistreatment. If claimant complained, did the employer respond?

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-97814 is reversed, and this matter remanded for further development of the record.

DECISION: Hearing Decision 17-UI-97814 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.

DATE of Service: <u>January 23, 2018</u>

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Hearing Decision 17-UI-97814 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.

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