

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0055

Reversed & Remanded

PROCEDURAL HISTORY: On October 13, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 143843). Claimant filed a timely request for hearing. On December 22, 2017, ALJ Janzen conducted a hearing, and on December 26, 2017 issued Hearing Decision 17-UI-99670, affirming the Department's decision. On January 13, 2018, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted a written argument that contained information that was not part of the hearing record. Claimant failed to show that factors or circumstances beyond her reasonable control prevented her from offering that information during the hearing as required by OAR 471-041-0090 (October 29, 2006). For that reason, EAB considered only information received into evidence at the hearing when reaching this decision, and claimant's argument only to the extent it relied on such evidence. However, claimant may offer the information that she sought to present by way of her argument at the hearing on remand, at which time the ALJ will determine whether it is relevant and material and whether it should be admitted.

CONCLUSIONS AND REASONS: Hearing Decision 17-UI-99670 is reversed and this matter is 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). 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.

At hearing, it was not disputed that the employer's home for development disabled residents was seriously understaffed at the time claimant left work and had been chronically understaffed for some time preceding claimant's departure. In Hearing Decision 17-UI-99670, although the ALJ appeared to accept that claimant left work because she believed that the employer's understaffing created an environment that was unsafe both for residents and staff, he concluded that claimant did not show that the employer's understaffing was good cause for her to leave work because the employer was attempting to recruit new staff at that time, and "[c]laimant could have waited for new staff to be hired to see if they would alleviate the problem or waited to see if the employer would take some other action to alleviate claimant's concerns." Hearing Decision 17-UI-99670 at 2. We disagree because, on this record, there is no evidence suggesting claimant was aware that the employer was taking concrete steps that were reasonably likely to alleviate the understaffing that had already persisted for some months when she decided to leave work despite the employer's good faith efforts to recruit new staff. The evidence therefore was insufficient to establish that additional waiting was a reasonable alternative. However, while we disagree with the ALJ's stated reasoning, the record as it currently exists is not sufficiently developed for us to determine whether the consequences of the understaffing cited by claimant constituted grave circumstances that were good cause for her to leave work.

At the outset, the ALJ should follow up claimant's testimony that the house to which she was assigned was a "high needs facility", including that those residents were "high need," had "high medical stuff" and were "very demanding." Audio at ~11:53, ~20:16. The ALJ should ask what claimant meant and obtain examples of the tasks that needed to be performed to meet the particular needs of those clients. The ALJ should ask what would generally be adequate staffing to meet the needs of the five residents in that house during shifts, both in terms of the number of caregivers and the level of training in which those caregivers needed to be proficient. The ALJ should ask the employer's witnesses as well as claimant, if she knows, to describe the requirements for the number of staff working at the house and the level of training for that staff as set out by contract or agreement between the employer and the State of Oregon or Deschutes County, and how often the employer estimates it failed to meet those requirements beginning in March 2017 (approximately six months before claimant quit) and continuing until claimant left work. *See* Audio at ~38:14. The ALJ should further inquire if the State of Oregon or Deschutes County ever notified the employer it was not meeting those requirements and, if so, the substance of any such communications, the nature of the employer's noncompliance and if any governmental entity took action and, if so, what action. The ALJ should also ask both claimant and the employer to estimate the number or percentage of shifts claimant worked beginning in approximately March 2017 during which the number of caregivers or their training was such that the safety of the residents or the staff was jeopardized, to describe the nature of the inadequacy and, for each instance cited, how specifically the residents' well-being or that of the staff was harmed or jeopardized.

While claimant alluded to shifts she worked on July 12, 2017 and September 13, 2017 as being inadequately staffed, the ALJ did not ask claimant to describe how, if at all, the well-being or health of residents was jeopardized on those days as well as on other days during the last six months of her employment (i.e., beginning in approximately March 2017), when the house was inadequately staffed or the staff were inadequately trained. In this respect, the ALJ should ask the dates or approximate dates on or months during which these inadequacies occurred and for concrete examples of what the inadequacy was, how the residents' or staff's health or well-being was harmed or in danger of being harmed due to these inadequacies, and what efforts claimant made to avert or rectify the situations of inadequacy, including any steps she took to obtain adequate, trained staff coverage to be on duty, who

she called (e.g., human resources, her manager or others), the results of claimant's efforts to obtain additional staff, and if other staff, administrative or managerial employees were called in or not called in and, if not why not, and, if claimant she took no steps, why she did not. The ALJ also should specifically ask claimant to identify the duties that the other staff, administrative or managerial employees called in to provide coverage due to inadequate staffing were expected to perform and which duties they were not qualified to perform, or could not or would not perform. The ALJ should ask claimant if at any time after July 12, 2017, when the manager of human resources told claimant that she should call human resources or other managers if she was unable to locate adequate staffing for shift, she did call human resources or managers for this purpose, approximately when she did so and how many times, the result of that call or, if claimant did not make such call, why she did not. As appropriate, the ALJ should follow up on the information claimant provides to adequately develop the record about the prevalence of inadequate numbers of staff on duty or inadequately trained staff on shifts beginning in approximately March 2017, the specific harms and dangers to the residents' health and well-being as a consequence, the steps claimant took to avoid those harms and dangers and the result, if any, of those steps.

With respect to the claimant working 13.75 hours without having a break on July 13, 2017, the ALJ should inquire if it was claimant's decision to work those hours or if she had no choice. If claimant thought she had no choice, the ALJ should explore the basis for claimant's belief. In addition, the ALJ should ask claimant if she usually had breaks during her shifts, if so, why she was unable to take any breaks on July 13, 2017, if she asked the employer to have a break on July 13, 2017 and, if so, who she asked, and the result of that request.

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 without good cause, Hearing Decision 17-UI-99670 is reversed, and this matter remanded for further development of the record.

DECISION: Hearing Decision 17-UI-99670 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: February 16, 2018

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Hearing Decision 17-UI-99670 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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