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

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VQ 005.00

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0092

Reversed & Remanded

PROCEDURAL HISTORY: On December 21, 2017, the Oregon Employment Department (the Department) served notices of two administrative decisions, the first concluding that claimant voluntarily left work without good cause (decision # 152110) and the second concluding that claimant was not available for work during the weeks of November 26, 2017 through December 16, 2017 (decision # 161655). Claimant filed timely requests for hearing. On January 18, 2018, ALJ Seideman conducted two hearings, one at 8:15 a.m. on decision # 161655 and the other at 9:30 a.m. on decision # 152110. On January 25, 2018, the ALJ issued two hearing decisions, the first affirming decision # 152110 (Hearing Decision 18-UI-101664) and the second modifying decision # 161655 (Hearing Decision 18-UI-101665). On January 29, 2018, claimant filed an application for review of Hearing Decision 18-UI-101664 with the Employment Appeals Board (EAB). On February 14, 2018, Hearing Decision 18-UI-101665 became final without an application for review having been filed.

Claimant submitted a written argument to EAB in which she sought to have EAB consider certain documents included with the argument, asserting that she had tried to offer them into evidence at the January 25, 2018 hearings. EAB addresses these documents below.

CONCLUSIONS AND REASONS: Hearing Decision 18-UI-101664 is reversed and this matter remanded for further proceedings.

The issue in this matter is whether claimant had good cause to leave work when she did. 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, claimant contended that she resigned from work on November 28, 2017 because her daughter was in crisis, the employer strongly discouraged her from taking a leave of absence to deal with that crisis, and claimant's supervisor told her that the medical doctor with whom claimant closely worked would seek to have her discharged if she took a leave of absence and she needed to resign or she would be discharged. Transcript at 5, 9, 10, 11, 12, 13, 31, 32. In Hearing Decision 18-UI-101664, the ALJ disregarded claimant's testimony about what she was told, reasoning that it was less credible than that of claimant's supervisor, who testified that she did not tell claimant that she needed to quit in order to avoid being discharged, and that she told claimant that any decision to resign was "totally up to [her]." Hearing Decision 18-UI-101644 at 3; Transcript at 25. Based on this credibility determination, the ALJ concluded claimant did not show that she had good cause to leave work since she did not show that she was threatened with discharge if she did not resign.

At the hearings on decisions #161655 and # 152110, however, claimant offered copies of documents that appeared to be her letter of resignation and text message communications between her and her supervisor, the nurse manager, from around the time she left work and appeared to include certain statements that the nurse manager made to claimant. At the hearing on decision #161655, it appeared that the employer might not have received copies of the proffered documents in advance of the hearing, and that the ALJ and the Department might not have received all of the documents that claimant intended to offer. Audio of 8:15 a.m. hearing on decision # 161655 at ~4:06, ~4:46, ~8:09. Because the nurse manager confirmed that she had engaged in an exchange of texts with claimant around the time that claimant quit and all parties otherwise agreed, the ALJ determined that he would read the proffered documents into the record during the hearing, but later decided he would have claimant testify as to the contents of those documents. Audio of 8:15 a.m. hearing at ~4:06, ~4:29, ~16:21; Audio of 9: 30 a.m. hearing on decision # 152110 at ~3:22. However, the ALJ never read the contents of the documents into the record and never asked claimant to do so, with the result that their contents were never introduced into evidence at either the hearing on decision # 161655 or decision # 152110.

In claimant's written argument to EAB, she asserted she was including copies of the documents that she tried to offer during the hearings, contended she was not aware that those documents were not admitted into evidence, and asked EAB to consider the documents, which she suggested were identical to those she had offered during the hearings. OAR 471-041-0090(2) (October 29, 2006) authorizes EAB to consider new information if it is relevant and material to EAB's determination and factors or circumstances beyond a party's reasonable control prevented the party from offering the information into evidence at the hearing. The documents the ALJ received from claimant before the hearing and that claimant included with her written argument are relevant and material to the issue of whether what the nurse manager stated to claimant reasonably induced her to resign.

In addition, it was beyond claimant's reasonable control that the ALJ did not read into the record the contents of the documents that she offered or that the ALJ did not ask her to read them into evidence, which amounted to a failure 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, as required under ORS 657.270(3). *See accord Dennis v. Employment Division*, 302 Or 160, 728 P2d 12 (1986). Claimant's request for EAB to consider her information therefore is granted, and due process requires that the employer be given a reasonable opportunity to respond. Hearing Decision 18-UI-101664 therefore is reversed, and this matter remanded for further development of the record, as set out below.

As a preliminary matter, we note that the documents that the ALJ received before the hearings and those claimant included with her written argument, which claimant purported to be the same exchange of text messages and the same letter of resignation, are different in content and give rise to questions. Along with this decision, we are providing to the parties copies of the documents from claimant that the ALJ had at the time of the hearing (marked as "Documents from Hearing") as well the documents that claimant included with her written argument (marked as "Documents from Argument"). The ALJ should question the parties sufficiently to determine which set or which individual documents are authentic, *i.e.*, which of the chain of texts represents the texts actually exchanged by claimant and the nurse manager, what is the proper sequence or order in which the texts were transmitted, and which letter of resignation is the one the employer actually received. The ALJ should further inquire into the reason that the documents claimant provided to the ALJ for the hearings differ from those claimant submitted for EAB's consideration.

To assist the ALJ, we will outline some discrepancies that has EAB noted. In the Documents from Hearing (DH), there is a one paragraph, 11-line letter of resignation, dated November 28, 2018, with the salutation "Dear Lori, Megan and Dr. Davies." DH at 15. In the Documents from Argument (DA), there is a one page, 33-line letter of resignation bearing the same date and salutation. DA at 4. The principal differences between the letters are that the resignation letter claimant included with the written argument refers to "your strong recommendation that I resign," the employer's "explanation that resigning would make me eligible for rehire," the "forced resignation," that "it is clear to me if I don't resign I will be terminated," and "please accept this letter of resignation, which was my only alternative." DA at 4. None of quoted language appears in the resignation letter included in the Documents from Hearing, and in which claimant states only that she is "ask[ing] you [employer] to accept my immediate resignation so that I may tend my daughter and focus on healing our family." DH at 15.

With respect to the chain of text messages included in each set of documents, the chain included in the Documents from Hearing begins at 3:13 p.m. and the other party to it is identified as "Lori." DH at 2 *et seq.* The chain included with the Documents included with claimant's written argument begins at 5:45 p.m. and the other party is identified as "Lori ********."[1] DA at 6 *et seq.* The chain in the Documents from Hearing begins with claimant stating that her daughter is at the hospital and that she may need to adjust her work schedule and take some time off from work to transport her daughter to an outpatient treatment program, and discusses a possible FMLA leave, with "Lori" not responding for the first time until the third page. DH at 2-4. The chain in the Documents from Argument begins with claimant stating that there is an emergency with claimant's daughter and that she will follow up after she knows more, with "Lori ********" first responding on the first page. DA at 6. When compared side-by-side, there are further differences between the two chains of texts in content, length, and the sequences in which claimant and "Lori" or "Lori ********" exchange the texts.

As to content, in the chain of texts included in the Documents from Hearing, claimant appears to express some concerns about a physician's communications with her, that the physician may be trying to change Lori's mind about claimant, that the physician may have been giving Lori false feedback about claimant,

[1] The surname listed in the text message chain beginning at 5:45 p.m. has been redacted to protect the privacy and confidentiality of the individual involved, and substituted with asterisks to differentiate it from the text message chain that does not include the individual's surname.

and that the physician had gone to management, apparently to complain about claimant. HD at 5-9. In the Documents from Argument, the content of the chain of texts addresses claimant's concerns about how the physician had treated her after she applied for and used a FMLA leave earlier in the year, and that claimant thinks she "probably won't need to" use FMLA leave time due to her daughter. DA at 7-8. At that point, without any predicate or inquiry by claimant, "Lori ********" interjects that she does not know what the physician is "up to but she went above m[y] head and is meeting with a manager]," at which point claimant denied having had performance issues and wrote that the physician had acted "aggressive" toward her since she was previously on FMLA. DA at 9.

In the Documents from Argument, there is a great deal more discussion of the physician's poor attitude toward claimant than in the Documents from Hearing. In the Documents from Hearing, "Lori" writes, in apparent response to claimant's concerns about her "rights," "OK I am urging that you resign versus terminating your employment. If you choose to do this, I will [n]eed that letter of resignation and I will indicate that you are eligible for rehire." HD at 18. In the Documents from Argument, the texts are much clearer as to the alleged attitude of the physician toward claimant and "Lori ********'s" recommendation that claimant resign. For example, claimant states that, "when you talked to me this morning, you [Lori] said [the physician] wants me out";[2] "you said I should resign so I don't get fired";[3] and "are you still saying I should resign?"[4] Lori ******** replies, "I think it's best that you resign. If you do that I will send a note to HR that you are eligible for rehire"; and "I think resigning is your best option. If you can get that letter to me by the end of the day I will send it to HR."[5] Claimant replies, "I wanted to let you know I emailed you my resignation letter. It's not at all what I wanted to do and I'm very sad. I think [the physician] got away with something that violated my rights. I'm very sad."[6]

At the remand hearing, the ALJ should inquire of claimant which set of documents, if either, contains her actual, contemporaneous communications with the nurse manager, "Lori" or "Lori ********," and her actual resignation letter, and how she came to present different sets of documents to the ALJ and to EAB that purported to represent the same communications. If claimant contends that both sets represent actual contemporaneous communications with the nurse manager, the ALJ should explore how that occurred. With respect to the documents claimant contends include the actual chain of text messages exchanged with the nurse manager, the ALJ should inquire of the employer if that set contains the accurate text messages exchanged between the nurse manager and claimant and, if not, how the exchange the nurse manager participated in differs from the one that claimant contends is accurate, including any changed or omitted language. To the extent possible, the ALJ should determine if the employer has records of the texts that were exchanged and the actual resignation letter it received from claimant and, if so, enter copies of them into evidence if the employer has provided copies of them to the other parties and the ALJ in advance of the hearing on remand.[7] In either case, the ALJ should ask the employer exactly what, to the best of the nurse manager's recollection, she stated to claimant in reference to resigning. The ALJ should also invite the employer to point out the aspects of the

[2] DA at 11.
[3] DA at 12.
[4] DA at 12.
[5] DA at 12-13.
[6] DA at 14.
[7] Instructions for ensuring that documents will be considered at the remand hearing will appear on the first page of the notice of the remand hearing, which is the notice that informs the parties of the scheduling of the remand hearing. If either party wants documents other than those contained in the Documents from Hearing and Documents from Argument, the party must comply with instructions that are set out in the notice of hearing.

documents in either set, if any, that cause it to question their authenticity. As appropriate, the ALJ should explore what claimant and the nurse manager meant by the language used in the texts and how the other party interpreted that language, and seek explanations for the apparent disconnects in the text chains, both what EAB has pointed out above as well as what the ALJ or the parties may have discerned. The ALJ should also allow the employer and claimant, as appropriate, an opportunity to respond to the other's testimony about the documents.

DECISION: Hearing Decision 18-UI-101664 is set aside, and this matter remanded for further proceedings consistent with this order.

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

DATE of Service: March 8, 2018

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Hearing Decision 18-UI-101664 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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