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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
2018-EAB-0174

Reversed & Remanded

PROCEDURAL HISTORY: On November 13, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 80432). Claimant filed a timely request for hearing. On January 26, 2018, ALJ Meerdink conducted a hearing, and on January 29, 2018 issued Hearing Decision 18-UI-101951, concluding that the evidence as to whether claimant quit or was discharged, and whether the work separation was disqualifying, was in equipoise, and that claimant therefore was not disqualified from benefits because of her work separation. On February 20, 2018, the Department filed an application for review with the Employment Appeals Board (EAB). EAB considered the Department's written argument when reaching this decision.

CONCLUSIONS AND REASONS: The hearing decision in this matter should be set aside, and this matter remanded for development of the record.

If the employee could have continued to work for the same employer for an additional period of time, the work separation is a voluntary leaving; if the employee is willing to continue to work for the same employer for an additional period of time but is not allowed to do so by the employer, the separation is a discharge.[1] ORS 657.176(2)(a) requires a disqualification from unemployment insurance benefits if the employer discharged claimant for misconduct connected with work, which is defined, in pertinent part, as a willful or wantonly negligent violation of the standards of behavior which an employer has the right to expect of an employee.[2] Likewise, ORS 657.176(2)(c) requires a disqualification from benefits if claimant quit work without good cause, which is defined, in pertinent part, as a reason of such gravity

[1] OAR 471-030-0038(2) (August 3, 2011).

[2] OAR 471-030-0038(3)(a).

that a reasonable and prudent person of normal sensitivity, exercising ordinary common sense, would have no reasonable alternative but to leave work.[3]

The ALJ found as fact that claimant's employment ended on September 30th after a "verbal argument" between claimant and the owner the previous day.[4] The ALJ concluded that claimant's work separation was not disqualifying, reasoning that because the parties "flatly contradicted" each other's assertions and neither party's evidence was "more persuasive" than the others, "the evidence stands in equipoise" and was therefore insufficient to establish that claimant's work separation should be disqualifying.[5] The Department requested review of the ALJ's decision, arguing that although "[t]he parties disagreed regarding the ultimate separation type . . . much of the rest of their stories were consistent," and it was the ALJ's failure to "ask direct questions" and "illicit [*sic*] information" about the September 30th call that resulted in there being insufficient evidence.[6] We agree with the Department.

The employer's witness testified at the hearing that the way claimant left the workplace on September 29th left everyone questioning what was going on. The ALJ should ask the employer who "everyone" was. The ALJ should also ask what was surprising or questionable about the way claimant left, given both parties testified that claimant left work on September 29th because the owner asked her to do so.

Claimant asked the employer about the basis of her hearsay testimony regarding the events of September 29th. The ALJ stated that the employer's testimony was second-hand and did not allow the employer to answer the question. On remand, the ALJ should inquire with the employer's witness about the basis of her hearsay testimony, whether the events at issue were documented, and when, or whether she learned about the events from speaking with the owner or others, and when that occurred.

Both parties mentioned Julika during the hearing, but neither party described who she was. The ALJ should ask the parties who Julika is and to describe her role, her relationship to claimant, and whether she had any supervisory or administrative authority over claimant or the employer's business.

The employer's witness initially said that her September 30th call with claimant was very brief, and all that happened was that she asked if claimant wanted to discuss what had happened and claimant did not; where claimant and the employer go from here and claimant responded that she never wanted to return; and then she and claimant discussed claimant's personal items and her paycheck. Later during the hearing, however, the employer's witness also said that during the phone call she had asked claimant how claimant thought things were working out. The ALJ should ask the employer's witness at what point in the phone call she asked claimant how she thought things were working out, what she meant to convey or what she expected to hear when she asked claimant that question, and why the employer's witness did not mention that she had asked that question when she initially described the phone call. The ALJ should ask claimant whether or not she agrees that the employer's witness asked her that

[3] *See* OAR 471-030-0038(4); *McDowell v. Employment Department*, 348 Or 605, 612, 236 P3d 722 (2010); *Young v. Employment Department*, 170 Or App 752, 13 P3d 1027 (2000).

[4] Hearing Decision 18-UI-101951 at 1.

[5] *Id.* at 2.

[6] *See* Department's written argument.

question during the hearing, and whether or how the call differed from the employer's witness's description of it.

The employer's witness testified that claimant said during the September 30th phone call that claimant did not want to discuss what happened on September 29th. The ALJ must ask claimant whether she agrees she said that, in what context, and why she said it. The employer's witness testified that she asked claimant during the September 30th phone call where do we go from here, and that in response claimant stated that she never wanted to come into the office again. The ALJ must ask claimant if she made that response. If not, the ALJ should ask claimant whether she told the employer's witness at any point during the September 30th call that she never wanted to return to the office again, and, if so, ask in what context she said she would not return to the office.

During the hearing, claimant testified that the employer's witness conveyed three pieces of information to her during the September 30th call, but claimant did not describe the call in detail and the ALJ did not ask claimant to describe what happened. On remand, the ALJ should ask claimant to describe the call, what she and the employer's witness said, and how each responded to the other.

During the hearing, the employer's witness said she asked claimant during the September 30th call how claimant wanted to be paid; claimant testified that the employer's witness asked claimant if she would accept her pay by direct deposit. The ALJ should examine the parties about claimant's paycheck, and who first raised the issue of claimant's pay. The ALJ should ask the employer's witness why, if she thought claimant had quit work, she was asking how claimant wanted to receive her paycheck rather than simply paying her on the payday in accordance with state law. The ALJ should ask claimant why, if she thought she had been discharged, she did not ask that her paycheck be provided prior to the regularly scheduled payday in accordance with state law.

The employer's witness alleged that claimant had removed all but two personal items from the workplace at some point prior to September 30th, suggesting claimant had been planning to quit her job. The ALJ did not ask the employer's witness to substantiate that allegation by describing what types of things she thought claimant usually kept at work, what was missing on September 30th, or whether or when she noticed claimant removing items from the workplace prior to September 30th.

The employer's witness also suggested that claimant's request, prior to September 29th, for her pay stub information suggested that she was planning to quit. The ALJ should ask the parties when, or for how long, claimant had been requesting pay stubs from the employer, and for what pay periods. The ALJ should ask the parties when, other than September 29th or September 30th, claimant had asked the employer for her pay stub(s). The ALJ should also ask why the employer had not provided claimant with her pay stubs as required by state law.

The ALJ stated during the hearing that he was going to defer ruling on the admissibility of the email from claimant's mother; the record fails to show, however, whether the ALJ admitted or excluded the email from evidence. We consider the email relevant and material, and conclude that the ALJ erred in failing to admit it into evidence. On remand, the ALJ should admit the email into evidence and question claimant about its content and why the email was sent when it was.

Although claimant claimed that she did not quit work and was, at all relevant times, willing to continue working for the employer, the record does not support claimant's assertion. The parties did not appear to dispute that, during the September 30th call, that claimant said she did not want to discuss what happened on September 29th, and said that she did not want to come into the office again. If that was the case, the ALJ should ask claimant to explain how, why, or under what circumstances she believed she was willing to continue working without resolving the September 29th dispute or returning to the workplace. Additionally, claimant clearly had problems with the owner's behavior, the text message from Julika suggested there were other problems with the working environment, claimant was concerned about not receiving pay stubs, her September 30th text message and testimony suggested that she did not trust the employer about basic matters like her hours, pay and pay stubs, and it seems she possibly felt underpaid. The ALJ should ask claimant, given her dissatisfaction with those employment conditions, whether she was actually willing to continue working for the employer, what her plans were with respect to her job when she left work on September 29th, when her next scheduled shift was, and under what circumstances she would have reported to work for it. The ALJ should ask claimant about her statement that she never wanted to return to the office, when she said that, what she meant to convey by saying it, and whether she thought continuing work was still available to her at the time she said it.

Likewise, the employer claimed continuing work was available for claimant at all relevant times but that claimant quit work; however, the record does not support that assertion, either. The evidence clearly suggests that claimant had work performance problems that were of concern to the owner. For example, the owner had confronted claimant on September 29th about her work performance, suggested that claimant needed to improve some processes to avoid making future errors, Julika's text message suggested that there were other work performance problems, and the witness made reference to problems with the quality of claimant's work, her leaving on September 29th, and her resistance to developing improved processes for doing her work. Given those circumstances, the ALJ should have asked the employer under what circumstances, if any, the employer was going to let claimant continue working. The ALJ should ask what the purpose was of the employer's witness's September 30th call to claimant, whether the employer planned to have claimant report to work for her next scheduled shift, whether that plan changed because of claimant's refusal to discuss things or anything else that happened during the call. The ALJ should ask what would have happened had claimant showed up for her next scheduled shift, whether claimant would have been allowed to continue working, and, if not, why.

The intent of this decision is not to constrain the ALJ to asking only questions related to the items listed herein. Therefore, in addition to asking questions based upon these items, the ALJ should ask any follow-up questions he deems necessary or relevant to the nature of claimant's work separation and whether or not it should be disqualifying. The ALJ should also allow the parties to provide any additional relevant and material information about the work separation, and to cross-examine each other as necessary. Should it become clear to the ALJ during the remand hearing that claimant either quit work or was discharged, the ALJ should conduct a full and fair inquiry into whether the discharge or voluntary leaving were disqualifying events.

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 the nature of claimant's work

separation and whether or not it was disqualifying, Hearing Decision 18-UI-101951 is reversed, and this matter is remanded for development of the record.

DECISION: Hearing Decision 18-UI-101951 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: March 19, 2018

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Hearing Decision 18-UI-101951 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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