

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0212

Reversed & Remanded

PROCEDURAL HISTORY: On January 5, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 120107). Claimant filed a timely request for hearing. On February 14, 2018, ALJ Seideman conducted an interpreted hearing, and on February 22, 2018 issued Hearing Decision 18-UI-103730, affirming the Department's decision. On February 28, 2018, claimant filed an application for review with the Employment Appeals Board (EAB).

CONCLUSIONS AND REASONS: This matter is set aside as unsupported by a complete record, and this matter is remanded for a new hearing and new hearing decision.

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. OAR 471-030-0038(2)(a) (August 3, 2011). 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. OAR 471-030-0038(2)(b).

In this case, claimant suggested that he was never told by the employer that he was hired and that after he worked a training shift he wanted to continue working for the employer but the employer did not call him to work. The employer suggested that continuing work was available for claimant but he did not contact the employer. The ALJ did not do an adequate inquiry with either party that would allow us to determine whether the employer discharged claimant or if claimant quit. Nor was the record sufficiently developed to allow a determination of whether, if claimant quit, he did so with or without good cause, or, if he was discharged, whether the discharge was or was not for misconduct.¹

¹ Claimant must prove by a preponderance of the evidence, that he had good cause for leaving work when he 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). 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 his employer for an additional period of time.

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 matters at issue, Hearing Decision 18-UI-103730 is reversed, and this matter is remanded. A new hearing and hearing decision are required.²

DECISION: Hearing Decision 18-UI-103730 is set aside, and this matter is remanded for further proceedings consistent with this order.

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

DATE of Service: March 27, 2018

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Hearing Decision 18-UI-103730 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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If the record on remand shows that the employer discharged claimant, the employer must prove by a preponderance of the evidence that the discharge was for misconduct. ORS 657.176(2)(a) requires a disqualification from unemployment insurance benefits if the employer discharged claimant for misconduct connected with work. 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.

² The hearing consisted primarily of interrupted testimony by both parties, along with the ALJ rebuking claimant for speaking too close to the phone receiver, speaking too fast, not listening, and, apparently accidentally, interrupting the interpreter. *See e.g.* Transcript at 5, 6, 20. The ALJ also interrupted claimant for the benefit of the interpreter, but did not let claimant continue answering the question after the interruption, instead moving on to ask different questions. *See e.g.* Transcript at 6. It does not appear that the ALJ conducted a thorough inquiry with either party, nor does it appear that he conducted a full and fair inquiry into the matters before him. The circumstances suggest that perhaps a new ALJ should be assigned for the remand hearing.