

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0329

Reversed & Remanded

PROCEDURAL HISTORY: On March 1, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 145038). Claimant filed a timely request for hearing. On March 23, 2018, ALJ Snyder conducted a hearing, and on March 30, 2018 issued Order No. 18-UI-106299, affirming the Department's decision. On April 3, 2018, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted to EAB a letter from her doctors dated April 16, 2018. EAB may consider new information that is not part of the record if the information is relevant and material to EAB's determination and the party offering the information demonstrates that circumstances beyond the party's reasonable control prevented it from offering the information at the hearing. OAR 471-040-0090 (October 29, 2006). Claimant did not explain the relevance of the letter to her case. Thus, EAB did not consider the new information in reaching this decision. However, because the case shall be remanded to the Office of Administrative Hearings for further information, claimant may offer the new information that she sought to present to EAB at 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 would have the opportunity to respond to the information.

CONCLUSIONS AND REASONS: Order No. 18-UI-106299 is reversed and remanded to OAH for further proceedings regarding the nature of the work separation and whether claimant shall be disqualified from the receipt of benefits under ORS 657.176.

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. OAR 471-030-0038(2) (August 3, 2011). 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. OAR 471-030-0038(3)(a). 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 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), *McDowell v. Employment Department*, 348 Or 605, 612, 236 P3d 722 (2010); *Young v. Employment Department*, 170 Or App 752, 13 P3d 1027 (2000).

In Order No. 18-UI-106299, the ALJ concluded that claimant quit work because she was demoted and could not perform housekeeping work with her lower back pain. Order No. 18-UI-106299 at 2. On February 7, 2018, the employer's manager told claimant she would no longer be working as the executive housekeeper, but rather, would perform another role for the employer. The employer asserted that it did not specifically state a position for claimant to begin once she left the executive housekeeping position. Claimant asserted that she was discharged, but also that she was demoted from executive housekeeper to housekeeper, indicating that the employer was willing to allow claimant to continue working albeit in a position claimant could not perform due to a back condition. Audio Record at 4:16. We conclude there is insufficient evidence in the record to determine the nature of the work separation. The ALJ must ask the parties to recount the final conversation they had on February 7. Who ended the conversation? How did the conversation end? Was there any further communication after the meeting on February 7? The ALJ must also ask the employer what, if any, position it intended to offer claimant. The ALJ should ask claimant why she asserted she was discharged if she also thought the employer was demoting her to a housekeeping position. Claimant testified that she told the manager on her last day of work that she did not want to stop working for the employer. Audio Record at 8:03. When did that statement occur in the context of their conversation? What was the manager's response?

In Order No. 18-UI-106299, the ALJ concluded that claimant quit work without good cause because she had the reasonable alternative of asking for a reasonable accommodation such as "work restrictions or light duty shifts" to minimize the impact of her work on her back. Order No. 18-UI-106299 at 2. The ALJ did not sufficiently develop the record for EAB to determine if claimant made a request for reasonable accommodation and if claimant had good cause to quit work, if indeed she did quit. Claimant testified that she had sciatic nerve damage and was unable to bend over without pain, could not stand back up when she bent over, and would be unable to clean bathtubs and toilets due to her medical condition. Audio Record at 7:02, 14:45. The ALJ should ask claimant questions regarding her medical condition including whether the condition was related to her pregnancy or expected to last after she gave birth, what work activities were limited due to her condition, how those activities were limited, and whether she was able to do the activities with a modification such as, for example, with different equipment, less frequently, or for shorter periods of time. Did claimant have limitations regarding walking, standing and lifting in addition to bending due to her sciatica?

Claimant testified that she told her manager at their final meeting that she was not physically able to do housekeeping because she could not bend over. Audio Record at 4:22. Claimant also testified that her manager was "aware" that she had sciatic nerve damage, and that she told her manager about her condition, and he "knew" she was not able to bend at the waist. Audio Record at 7:05, 14:01, 14:45. Despite claimant's assertions, the record is unclear if claimant requested a reasonable accommodation related to her medical condition. The ALJ should ask claimant if she told the employer she was unable to perform a duty or duties of the housekeeping job, or any other job with the employer, *due to her sciatica*. The ALJ should ask claimant if she ever described to the employer the problems posed by the work offered by the employer? If yes, the ALJ should ask claimant the details of those conversations

such as when they occurred and exactly what was said, including the employer's response. The ALJ should ask the employer to respond as to what it recalled regarding those conversations. Claimant testified that she told her manager that she could do housekeeping after her pregnancy, but not during her pregnancy, and she had done housekeeping for the employer in the past. Audio Record at 5:16, 7:19. However, the record is insufficient to determine if claimant requested a reasonable accommodation from the employer for her sciatica. The ALJ should ask the parties to recount the statements they made to each other on claimant's last day of work, and during any subsequent conversations, in as much detail as they can recall.

The employer's manager asserted that he "had a discussion" with claimant on her last day of work about her moving into "a different role." Audio Record at 10:28. He testified further that claimant did not want to train the new executive housekeeper for more than one day. Audio Record at 10:46. The ALJ should ask the witnesses if claimant was unwilling to train her coworker, and if unwilling, why? Was it because of her medical condition? The employer's witness testified that he asked claimant after she refused to train her coworker, "So, where does that leave us?" and claimant responded, "As a housekeeper, and I can't do that, so you're just going to have to let me go." Audio Record at 11:11. The ALJ should ask claimant why she apparently believed the only position available was a housekeeping position. The ALJ should ask both parties if another position was available at the time claimant's employment ended, if they discussed other positions, and if not, why not. If one existed, the ALJ should ask claimant if she could perform the functions of that position. The employer's witness stated that, if claimant had said anything about being a laundry attendant or modified work, the employer "might have done that," but that claimant left immediately and did not give the manager a chance to continue the conversation. Audio Record at 11:45. The ALJ should ask the employer if it attempted in any way to clarify claimant's needs due to her sciatica. If not, why not? The ALJ should ask the employer if it was possible to accommodate claimant's condition by altering how she performed housekeeping work, purchasing or modifying equipment, or modifying her schedule. Did the parties discuss the possibility of a leave of absence? Why or why not?

On remand, the ALJ should ask the aforementioned questions, as well as any follow-up questions she deems relevant to whether or not claimant had good cause for quitting work, or in the alternative, whether the employer discharged claimant for misconduct.

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 the work separation and whether claimant shall be disqualified from the receipt of benefits under ORS 657.176, Order No. 106299 is reversed, and this matter is remanded for development of the record.

DECISION: Order No. 18-UI-106299 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: May 2, 2018

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