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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-0351

Reversed & Remanded

PROCEDURAL HISTORY: On March 2, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 134901). Claimant filed a timely request for hearing. On March 30, 2018, ALJ Hall conducted a hearing at which the employer failed to appear, and issued Order No. 18-UI-106377, concluding the employer discharged claimant, but not for misconduct. On April 10, 2018, the employer filed an application for review with the Employment Appeals Board (EAB).

CONCLUSIONS AND REASONS: Order No. 18-UI-106377 should be reversed and this matter remanded for additional evidence.

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).

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.

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). 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.

ORS 657.176(8) provides that, for purposes of applying ORS 657.176(2),

> [W]hen an individual has notified an employer that the individual will leave work on a specific date and it is determined that:
> (a) The voluntary leaving would be for reasons that do not constitute good cause;
> (b) The employer discharged the individual, but not for misconduct connected with work, prior to the date of the planned voluntary leaving; and
> (c) The actual discharge occurred no more than 15 days prior to the planned voluntary leaving,
>
> then the separation from work shall be adjudicated as if the discharge had not occurred and the planned voluntary leaving had occurred. However, the individual shall be eligible for benefits for the period including the week in which the actual discharge occurred through the week prior to the week of the planned voluntary leaving date.

The ALJ found as fact that, "[o]n January 9, 2018, the employer discharged the claimant as part of a voluntary layoff program" and that in March 2018, "the employer had a reduction in force and eliminated the claimant's level of employment." Order No. 18-UI-106377 at 2. The record does not establish that is accurate, however, as claimant testified that, at the time she resigned, she "did not know for positive" if her employment was going to be eliminated. Audio recording at ~ 13:55. The record shows that the ALJ did not ask what date claimant submitted her resignation, whether claimant's resignation to the employer specified what date she wanted to be her last day of work, or how her last date of work was established. Without that information we cannot determine which work separation law applies to claimant's separation.

Claimant testified at the hearing that resigning was "entirely" her decision but then said that it was not entirely her decision. The ALJ found as fact that claimant was willing to work and "asked to work until at least mid-February 2018 due to a large project she was working on" and the employer "declined," suggesting that resigning was not claimant's decision. *Id.* at 1, 3. The ALJ's findings that the employer discharged claimant and that she was "willing to work" are contradicted by the evidence that the "layoff program" that ended claimant's employment with the employer was voluntary, that claimant submitted a resignation in order to be part of the voluntary severance program, and that the reduction in force that seemed to be driving claimant's decision to voluntarily leave her employment was not going to happen until two months after claimant resigned. In other words, it appears that claimant was the party in control of whether or not her employment ended; however, the evidence about whose decision it was to end claimant's employment is unclear, and more inquiry is required. Likewise, the record fails to show why claimant submitted a resignation prior to January 9th when the reduction in force she was resigning to avoid was not going to occur until March, and additional inquiry about that is required, as well.

The ALJ also reasoned that the discharge was not for misconduct because the record did not establish that "claimant violated a reasonable employer policy." *Id.* Although claimant testified at the hearing that she was not aware of "any disciplinary action pending against" her at the time she resigned, and that she had "no prior disciplinary action" from the employer, claimant also testified at the hearing that the employer "encouraged" her to take a voluntary separation. Audio recording at ~ 19:00; ~15:40-15:50. The ALJ should have asked at the hearing if claimant knew why the employer was encouraging her to

voluntarily separate from her employment or had any reason to end her employment involuntarily at the time the employer encouraged her to resign, and ask any other relevant follow-up questions based on the parties' answers to that question.

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 the employer discharged claimant for misconduct or not, or whether claimant voluntarily left work with or without good cause, Order No. 18-UI-106377 is reversed, and this matter is remanded for development of the record.

We note that both parties submitted written arguments to EAB containing new information that was not part of the hearing record on review. EAB may consider new information that is not part of the record if, in pertinent part, the party offering the information shows that circumstances beyond the party's reasonable control prevented it from offering the information at the hearing. OAR 471-040-0090 (October 29, 2006). Neither party made the necessary showing, however, so EAB did not review the new information. Because this case is being remanded to the Office of Administrative Hearings for additional proceedings, however, should the parties elect to appear at the remand hearing they may submit their new information as exhibits or through testimony. Should the parties wish to submit the documents into evidence, they should follow the instructions that will be provided on the Notice of Hearing scheduling the remand hearing or call the Office of Administrative Hearings for instuctions.

DECISION: Order No. 18-UI-106377 is set aside, and this matter remanded for further proceedings consistent with this order.

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

DATE of Service: <u>May 10, 2018</u>

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Order No. 18-UI-106377 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.

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