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

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0512

Reversed & Remanded

PROCEDURAL HISTORY: On March 16, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 145251). Claimant filed a timely request for hearing. On April 24, 2018, ALJ Seideman conducted a hearing, and on April 27, 2018 issued Order No. 18-UI-108319, concluding claimant voluntarily left work without good cause. On May 15, 2018, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted written argument to EAB but failed to certify that she provided a copy of her argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). Therefore, we considered the entire record, but did not consider claimant's argument when reaching this decision.

CONCLUSIONS AND REASONS: Order No. 18-UI-108319 is set aside, and the matter remanded for further 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. OAR 471-030-0038(2) (January 11, 2018). 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 that an employer has the right to expect of an employee. OAR 471-030-0038(3)(a). 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.

Claimant asserted that she was discharged prior to her shift on February 6, and the employer alleged claimant voluntarily left work when she failed to report to work on January 30, February 2, and February 6 and 7, 2018. It is undisputed that claimant was a "no call, no show" for her scheduled shift

on January 30, 2018, and that she notified the employer that she was unable to work on February 2, 2018 due to illness. Absences due to illness are not misconduct. OAR 471-030-0038(3)(b). However, claimant alleged that although she was initially scheduled to work on February 6, 2018 and possibly one other day during that week, she assumed she had been discharged and did not report to work on February 6 or thereafter because she received a check from the employer for her accrued vacation time before her scheduled shift on February 6. Claimant assumed it was a final check after a work separation from the employer. Claimant also testified that she "messaged" her coworker on February 6, and that her coworker told her she was not on the schedule for that day, confirming claimant's understanding that she had been discharged.

The employer alleged that the work separation did not occur until February 7, and that it was prompted by claimant's failure to report to work. The employer's human resources representative provided hearsay testimony that claimant's manager left claimant a voicemail message on February 6 and claimant did not return the message. The pharmacy manager, the person who allegedly tried to contact claimant at the end of her employment, also testified at the hearing. Claimant's manager testified, "We tried several times to communicate with [claimant] . . . [and had] poor response back." Audio Record at 17:36 to 17:50. The ALJ did not ask claimant's manager sufficient follow-up questions to determine from the record the nature of the work separation, when it occurred, and whether claimant should be disqualified from benefits based on her work separation. Claimant testified that she received her work schedule two weeks in advance. The ALJ must ask claimant's manager if claimant was scheduled to work on February 6 and 7, what time she was scheduled to work and if her schedule changed for those dates during her last two weeks of employment. The ALJ should ask the employer's witness how claimant would have known if her schedule changed. Claimant testified that she could check her schedule online, but the ALJ did not ask claimant if she checked her schedule online on February 6, and if so, what the online resource showed. The ALJ should ask the pharmacy manager when and how she and others tried to contact claimant during her final weeks of work (including on February 6 and 7), and claimant's response, if any. The ALJ should ask the pharmacy manager when and what she reported back to human resources and the store director regarding claimant during her final two weeks of employment.

The ALJ should ask the employer what is normal procedures are when it completes a work separation of an employee, and ask questions to see if the employer followed those procedures with claimant. For example, the employer should ask its witnesses if it sends an employee a work separation letter or other mailings at the time of separation. If yes, it should ask if those documents were sent to claimant, and when.

If either party has documentary evidence to support its allegations, it must provide the documents to the ALJ and the other parties before the date of the hearing on remand.

The intent of this decision is not to constrain the ALJ to asking only questions related to the specified subject matter. Therefore, in addition to asking the questions suggested, 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.

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, Order Nos. 18-UI-108319 is reversed, and this matter is remanded for development of the record.

DECISION: Order No. 18-UI-108319 is set aside, and this matter remanded for further proceedings consistent with this order.

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Order Nos. 18-UI-108319 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.

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

DATE of Service: June 18, 2018

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