

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0596

Reversed & Remanded

PROCEDURAL HISTORY: On May 4, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 95359). Claimant filed a timely request for hearing. On June 1, 2018, ALJ Frank conducted a hearing at which the employer failed to appear, and on June 8, 2018 issued Order No. 18-UI-110972, affirming the Department's decision. On June 11, 2018, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant's argument contained new information, including information regarding the impact of her work environment on her health, that was not part of the hearing record, and failed to show that factors or circumstances beyond claimant's reasonable control prevented claimant from offering the information during the hearing. Under ORS 657.275(2) and OAR 471-041-0090 (October 29, 2006), we considered only information received into evidence at the hearing when 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 by way of her written argument 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-110972 is reversed and this matter remanded for further proceedings.

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) (August 3, 2011). The standard is objective. *McDowell v. Employment Department*, 348 Or 605, 612, 236 P3d 722 (2010). For a claimant with a permanent or long-term "physical or mental impairment" as defined at 29 CFR §1630.2(h), good cause is such that a reasonable

and prudent person with the characteristics and qualities of an individual with such impairment would not have continued to work for her employer for an additional period of time, but would have left work.

The record shows that claimant, a nursing supervisor, reported racist comments made to two Latino employees she supervised to her supervisor, the medical director, and human resources. Claimant's immediate supervisor made a statement to claimant minimizing the racist statements, and the employees withdrew their complaints after speaking with the same supervisor. Based on the supervisor's response to the complaints, claimant decided she would need also to report her supervisor's responses to the employer as discriminatory. Claimant did not know if or how human resources had responded to the complaints. In Order No. 18-UI-110972, the ALJ concluded that claimant did not show good cause for leaving work when she did, reasoning that she did not face a grave situation at work and should have pursued the alternative of transferring to a different department or location.¹ That claimant had a reasonable alternative of transfer is not supported by the record. The ALJ reasoned that claimant did not face a grave situation at work because other employees, and not claimant, were the recipients of the racist statements and claimant did not know the status of human resources' response, if any, to the complaints.² However, the evidence at hearing as developed by the ALJ was insufficient to allow EAB to determine if claimant had good cause to leave work when she did.

The ALJ should ask claimant how the work environment affected her, including if and how it affected her health and if she sought medical attention for any symptoms. The ALJ should ask questions to determine what circumstances in the working environment caused claimant to experience health effects if she experienced health effects. The ALJ should also ask claimant what symptoms she experienced, the frequency of her symptoms, and what caused her symptoms to occur. In doing so, the ALJ should also determine if claimant had a permanent or long-term "physical or mental impairment" as defined at 29 CFR §1630.2(h) such that a modified standard for voluntary quit should be applied to this case. The ALJ should ask claimant about what advice she received from medical professionals to improve her symptoms, and what claimant did to address her symptoms.

The ALJ should ask claimant what occurred between the time claimant spoke with her direct supervisor about the racist comments and the time claimant quit that affected her decision to quit? What impact did having to report her supervisor's statements have on claimant? Did claimant report her supervisor's "salt" statement to the employer? If yes, what was the employer's response, if any? Claimant testified that she had "run into similar circumstances" before and had reported racist micro-aggressions before. Audio Record at 17:37 to 17:50, 19:15 to 19:31. The ALJ should inquire into the details of those incidents, including how the employer responded to the incidents or similar reports in the past.

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

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

¹ Order No. 18-UI-110972 at 2.

² *Id.*

the ALJ did not develop the record necessary for a determination of whether claimant had good cause to voluntarily leave work, Order No. 18-UI-110972 is reversed, and this matter is remanded for development of the record.

DECISION: Order No. 18-UI-110972 is set aside, and this matter remanded for further proceedings consistent with this order.

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

DATE of Service: July 13, 2018

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Order No. 18-UI-110972 or return this matter to EAB. Only a timely application for review of the subsequent hearing order will cause this matter to return to EAB.

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