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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-0696

Reversed & Remanded

PROCEDURAL HISTORY: On May 23, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 90529). Claimant filed a timely request for hearing. On June 19, 2018, ALJ Murdock conducted a hearing, and on June 22, 2018 issued Order No. 18-UI-111924, affirming the Department's decision. On July 9, 2018, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted a written argument that contained documents and information not admitted into the hearing record. Ordinarily, EAB would not consider on review any evidence not admitted into record absent a showing as required by OAR 471-041-0090(2) (October 29, 2006) that factors or circumstances beyond claimant's reasonable control prevented her from offering that evidence during the hearing. However, given that EAB has remanded this matter for further evidentiary development, claimant may offer this new information and these documents at the hearing on remand. At that time, the ALJ will determine whether the new information and documents are relevant to the issues on which this matter has been remanded and should be admitted into evidence. Claimant and the employer, should the employer also offer new documents on remand, are advised that they must comply with the instructions on the Notice of Hearing for the remand proceeding before the ALJ will consider admitting those documents into evidence, including that the documents must be provided to the ALJ and the other party in advance of the time scheduled for that hearing.

CONCLUSIONS AND REASONS: Order No. 18-UI-111924 is reversed and this matter remanded for further development of the record.

In Order No. 18-UI-111924, the ALJ concluded that claimant did not show good cause for leaving work. The ALJ reasoned, in part, that claimant failed to show that the schedule she was working created a situation of gravity that amounted to good cause for leaving work. Order No. 18-UI-111924 at 3. However, the ALJ did not sufficiently develop the evidence in the record to allow EAB to determine whether claimant's work schedule constituted good cause to leave work.

At hearing, claimant contended that, although a contract between her and the employer allowed her one day per week off from her duties as a live-in caregiver, and she and the employer's owner had agreed that she would have Fridays off, the employer routinely gave her only 12 hours off on Fridays rather than a full 24 hours. Audio at ~14:24 *et seq.* As well, claimant contended that the employer often did not have a replacement for her available on Fridays, which necessitated that she remain at work on what would otherwise have been her days off and cancel any appointments she had made in anticipation of having those days off. Audio at ~17:24, ~18:12. It appears to us that the schedule that claimant alleged she was working, if proved, might well constitute good cause for her to leave work. At hearing the ALJ should fully explore the harms that claimant experienced from not regularly having at least one 24 hour day off per week, including eliciting concrete examples of those harms.

At hearing, claimant offered for admission into evidence certain time records purporting to show that, at best, she was receiving only 12 hours off on Saturdays when the employer allowed her any time off. Audio at ~15:52, ~37:04. Although claimant stated that she mailed copies of this proposed exhibit to the employer and the ALJ on the same day, the employer's owner stated the employer did not receive it and, consequently, the ALJ did not admit claimant's exhibit into evidence. Audio at ~6:27. However, claimant and the employer testified at length during the hearing as to how many hours claimant regularly had off, and claimant's exhibit appears relevant and material to at least this disputed issue. EAB has marked claimant's proposed exhibit as EAB Exhibit 1 and admits that exhibit into the hearing record. A copy of EAB Exhibit 1 is included with this mailed decision. Any party who objects to the admission of EAB Exhibit 1 must submit any such objection to this office in writing, setting forth the basis of the objection, within ten days of the date on which this decision is mailed. Unless such an objection is received and sustained, EAB Exhibit 1 will remain a part of the record.

In connection with time records in EAB Exhibit 1, the ALJ should ask claimant the reason that she compiled these records and whether she created them contemporaneously with the days they purport to record the hours that she worked. If not contemporaneously created, the ALJ should inquire approximately when claimant made the entries in these time records, the source(s) from which she determined the hours shown in those entries for particular days, and all steps she took to ensure that the time she entered for particular days was accurate. Since in her role as resident manager, the employer was not subject to minimum wage or overtime prohibitions with respect to claimant, the ALJ should ask claimant the reason that the time records specify the hours she worked in any week over 40. The ALJ should further inquire of claimant why, rather than offering time records from all of the months that she worked, from September 23, 2016 through May 11, 2018, she offered only time records for the months of September and October 2016, March and April 2017, and September 2017 through February 2018. If claimant submits similar time records for the months during her employment that are missing from EAB Exhibit 1, the ALJ should admit them into evidence and ask claimant the same questions about them as for the months included in EAB Exhibit 1. It is not EAB's intent to constrain the ALJ's inquiry into these records by its specific questions, however, and the ALJ should make additional inquiries of claimant about them or the issues to which they give rise, as she deems appropriate.

In connection with the May 31, 2018 letter on the letterhead of Neilsen & Associates, the ALJ should ask claimant if she knows what its author meant by stating "[d]ays off were not given, which is against the contract" and the basis for this statement. The ALJ also should ask how, if at all, the author has first-hand information as to the "contract" terms and as to the days claimant did and did not did not receive off. As well, the ALJ should inquire into the circumstances under which the letter was prepared and how

claimant came into possession of it. At hearing, both parties testified as to the employment contract between them and some of its terms. To the extent either party offers the contract for admission into evidence at the remand hearing, the ALJ should admit it, subject to the objections of the other party.

With respect to the employer, the ALJ should ask its witness(es) to specify the doubts the employer may have, if any, as to the authenticity or accuracy of any of the documents in EAB Exhibit 1 and the bases for those doubts. The ALJ should allow the employer's witness(es) an opportunity to respond to claimant's testimony with respect to EAB Exhibit 1 and any additional documents that claimant might offer during the hearing on remand. As the ALJ deems appropriate, he should admit into evidence any relevant documents that the employer might offer during the hearing on remand and question the employer's witnesses and claimant about them as needed.

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 claimant had good cause for leaving work when she did, Order No. 18-UI-111924 is reversed, and this matter remanded for further development of the record.

DECISION: Order No. 18-UI-111924 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: <u>August 10, 2018</u>

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Order No. 18-UI-111929 or return this matter to EAB. Only a timely application for review of the subsequent Order will cause this matter to return to EAB.

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