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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-0747

Reversed & Remanded

PROCEDURAL HISTORY: On June 13, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 153018). Claimant filed a timely request for hearing. On July 16, 2018, ALJ Seideman conducted a hearing, at which the employer failed to appear, and issued Order No. 18-UI-113184 affirming the Department's decision. On July 27, 2018, claimant filed an application for review with the Employment Appeals Board (EAB).

With her application for review, claimant submitted written argument. Claimant's argument contained information 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 and claimant's argument, to the extent it was based thereon, when reaching this decision. However, because this case is being remanded to the Office of Administrative Hearings (OAH) for further proceedings, each party may send new information to OAH and the other party and offer the new information into the record at the hearing on remand, in accordance with instructions OAH will send the parties in the notice scheduling the remand hearing. At that time, the ALJ will decide if the new information is relevant and material to the issues on remand and, if so, will admit it into the record with each party having the opportunity to respond to the new information. Any party wishing to submit information for consideration by the ALJ at the remand hearing should submit the information in accordance with the instructions that will be included in the notice of hearing, and should contact OAH for further information. Any information submitted that does not comply with OAH's rules and instructions might not be considered.

CONCLUSIONS AND REASONS: Order No. 18-UI-113184 is reversed and this matter remanded for further proceedings consistent with this order.

The ALJ found as fact that claimant "quit to avoid a discharge" when, after 13 years of employment, she "was accused of verbally accusing a client and calling him a liar" and that during a "pre-dismissal process…the employer stated that claimant was going to be fired" after which it gave her the option to

"quit," which option claimant chose after her union representative told her "there was no way that claimant could prevail." Order No. 18-UI-113184 at 1-2. The ALJ then concluded that claimant quit work without good cause, reasoning that "if she would have been discharged by her employer it would have been for misconduct" which claimant wanted "to avoid." *Id*. We disagree that the record supports the ALJ's conclusions that claimant quit work, or that her work separation was disqualifying, and conclude that additional evidence is necessary to reach any determination in this case.

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) (January 11, 2018). 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).

If the work separation was a voluntary leaving, ORS 657.176(2)(c) provides that a claimant who leaves work voluntarily is disqualified from the receipt of benefits unless she (or he) proves, by a preponderance of the evidence, that she had good cause for leaving work when she did. *See also 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). An individual who leaves work to avoid a discharge for misconduct or potential discharge for misconduct has left work without good cause. OAR 471-030-0038(5)(b)(F). The "good cause" 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.

If the work separation was a discharge, however, 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. OAR 471-030-0038(1)(c) defines wanton negligence, in relevant part, as indifference to the consequences of an act or series of actions, or a failure to act or a series of failures to act, where the individual acting or failing to act is conscious of his or her conduct and knew or should have known that his or her conduct would probably result in a violation of the standards of behavior which an employer has the right to expect of an employee.

It appears on this record that the idea to resign did not originate with claimant, and, in fact, claimant "was willing to continue to work" until May 17, 2018 when she quit based on advice from her union representative following a pre-dismissal hearing. Audio Record ~ 10:45 to 15:00. While it is apparent that claimant was willing to continue to work for the employer until the May 17 meeting, it is not clear whether or not claimant could have continued to work for the employer for any additional time period had she not chosen to resign from work that day. The ALJ must therefore conduct additional inquiry into the final meeting between claimant and her union representative, the pre-dismissal hearing and any findings made as a result of that hearing, the availability of continuing work and whether any quit or discharge was disqualifying for purposes of unemployment insurance benefits.

For example, the ALJ should ask what was the purpose of the final meeting between claimant and her representative. Was the meeting to talk about the results of the pre-dismissal hearing? What was the result of the hearing? What did the employer learn about claimant's conduct? Did the employer intend to discharge claimant because of her conduct? Was a termination agreement presented to claimant? Did claimant discuss the terms of an agreement prior to the meeting? Did claimant and her union representative have input as to the terms of the agreement?

Claimant's union representative encouraged claimant to resign. Did the union representative tell claimant why he or she thought she should resign? What reasons did the union representative give for encouraging claimant to resign, particularly after the union representative testified that "the termination was based on the…hearing and the findings and that the other person that was involved with her was cleared totally" although the other person had "the exact same fact pattern." Audio Record ~ 19:40 to 20:15. What were the hearing findings? Did the employer incentivize claimant's resignation by offering claimant money or benefits in exchange for her resignation? If so, what were the incentives and how did they factor in claimant's decision to quit? If not, why did claimant quit if she wanted to continue to work for the employer? Did claimant believe her discharge was imminent if she did not resign? What did the employer say or do that caused her to believe a termination was imminent? If the employer was not going to fire her immediately, what did she think the employer was prepared to do? When did claimant think the employer would fire her if she did not resign: immediately; the next time she made an error; or another time?

The union representative testified that an alternative available to claimant was to hire a private attorney to fight a termination but that would have cost several thousands of dollars. Audio Record ~ 20:05 to 20:20. Did he believe the employer's decision could be overturned? Would that have occurred before or after termination? What discussions did claimant have with the union or the employer about alternatives to quitting? What, if anything, did claimant or her union representative say during the meeting that suggested claimant did not want to agree to resign? What, if anything, did the employer say in response?

If claimant thought the employer would discharge her if she refused to quit work, what did claimant think the difference was between quitting and being discharged for refusing to quit since the termination of her employment would be the result either way? Why was not being fired so important to claimant that she preferred to quit work instead? Did she have concerns about her reputation in the community? Was she concerned about the effect of a discharge on her career prospects? Was the possible stigma of a discharge in claimant's situation the same as it would be for any employee who was discharged from a job, or did claimant think the stigmatizing effect of a discharge would be worse for her than it would for most people? If so, why did claimant think that was the case?

If claimant was going to be discharged, it appears that the employer would likely have based that decision on the results of the pre-dismissal hearing. It appears that if claimant quit work, it was likely to avoid being discharged or potentially being discharged. Either way, the work separation would be disqualifying if the discharge or potential discharge was for misconduct. The record lacks sufficient evidence to determine if such a discharge would have been for misconduct. With respect to the employer's accusations, the ALJ should ask claimant what she knew about the employer's policies regarding communication with clients or in general, what she said exactly, why she said it, and whether she thought saying such things would violate the employer's policies or expectations? The ALJ should also ask any other questions he or she deems necessary to reach a determination about whether or not

claimant's discharge or potential discharge would have been for misconduct, and ask any other follow-up questions necessary to reach a decision in this matter.

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 should be disqualified from receipt of benefits due to a discharge for misconduct or voluntary leaving without good cause, Order No. 18-UI-113184 is reversed, and this matter is remanded for development of the record.

DECISION: Order No. 18-UI-113184 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: August 29, 2018

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Order No. 18-UI-113184 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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