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

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EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0768

Request to Reopen Allowed
Reversed and Remanded

PROCEDURAL HISTORY: On May 11, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision # 83321). The employer filed a timely request for hearing. On May 24, 2018, the Office of Administrative Hearings (OAH) served, by mail, notice of a hearing scheduled for June 7, 2018, at which time the employer failed to appear. On June 7, 2018, ALJ Scott issued Order No. 18-UI-110879, dismissing the employer's request for hearing based on its failure to appear.

On June 21, 2018, the employer filed a timely request to reopen the June 7, 2018 hearing. On July 2, 2018, OAH mailed to the parties notice of a hearing scheduled for July 16, 2018 to address the employer's reopen request, and if granted, conduct a hearing on the merits of decision # 83321. On July 16, 2018, ALJ Wymer conducted a hearing on both the employer's reopen request and the merits of decision # 83321, and on July 18, 2018 issued Order No. 18-UI-113332, denying the employer's request to reopen after concluding it failed to establish good cause to reopen the hearing.

On August 4, 2018, the employer filed an application for review of Order No. 18-UI-113332 with the Employment Appeals Board (EAB). With its application for review, the employer submitted a written argument. However, the employer failed to certify that it provided a copy of its argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). For this reason, EAB did not consider the employer's argument or any information not received into evidence at the hearing when reaching this decision.

CONCLUSION AND REASONS: The employer's request to reopen is allowed. However, this matter is set aside as unsupported by a complete record concerning the merits of decision # 83321 and remanded for a new hearing and new order on that issue.

In Order No. 18-UI-113332, the ALJ dismissed the employer's request to reopen the hearing regarding the merits of # 83321 on the basis that the employer failed to establish good cause for its failure to attend the hearing on June 7, 2018. The ALJ decided to do so, however, only after he conducted a hearing on the merits of decision # 83321. Thus, in actual fact, the ALJ allowed the employer's request for a

reopening. Accordingly, the conclusion the ALJ reached in Order No. 18-UI-113332 is inconsistent with the record. EAB has repeatedly held that it is plain error to dismiss a request for hearing or a request to reopen a hearing after a hearing on the merits has been conducted. In such cases, EAB has concluded that the requirements of due process can only be met if EAB considers the merits of the administrative decision at issue. *See, e.g.*, Appeals Board Decision 2010-AB-3722 (December 3, 2010) and Appeals Board Decision 2014-EAB-1665 (October 31, 2014). Consistent with our reasoning in these cases, the employer's request to reopen the hearing is allowed, and it is necessary for us to determine whether record establishes, as the Department concluded, that claimant is not disqualified from receiving benefits on the basis of her work separation.

Claimant was a night audit and front desk staff person at the employer's hotel. Based on the record before us, claimant was employed from February 19, 2018 to about April 15, 2018. During her employment, claimant received at least three paychecks for less than the amount she should have been paid, which claimant objected to until the employer correctly paid her. According to claimant, the third incorrect paycheck was short a substantial amount based on the employer's failure to pay her overtime hours and some regular time hours. After claimant objected to that check, the manager issued another check that only paid her for the regular time hours she had been shorted. At that point, claimant believed the manager had been unprofessional about the matter and contacted the employer's owner directly, after which she received another check that corrected her wages for that pay period. At one point, the employer's bank reportedly did not have sufficient funds in the employer's account and the manager paid claimant out of his own pocket. The manager eventually took claimant off of the employer's work schedule for "unprofessional" conduct. Audio Record ~ 27:00 to 33:00. On April 15, 2018 the manager notified claimant by phone that she was removed from the schedule reportedly without explaining why. When she met with him on April 16, she received what would be her final check and the manager reportedly told her she had the option to quit on her own terms for a good reference or be fired for misconduct.

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).

At hearing, the employer's manager suggested that continuing work was available to claimant if she had met with him, but claimant never came in for a discussion or review. Audio Record ~ 47:45 to 48:45. Claimant asserted that the manager never told her that if she came in for a discussion, he would put her back on the schedule. Audio Record ~ 49:00 to 50:30. The ALJ did not do an adequate inquiry with either party that would allow us to determine the nature of the work separation. For example, the ALJ never questioned the manager for details about his conversations with claimant by phone on Sunday, April 15, in person on Monday April 16 when she picked up her final check and he reportedly asked her to sign certain documents, or whenever he allegedly told her that she would be placed back on the schedule if and after she came in to talk with him. Nor did the ALJ question claimant in detail about her conversation with the owner during which the manager suggested that she was rude and belligerent.

The record was not sufficiently developed to allow a determination of whether, if claimant quit, why she quit and whether she did so with or without good cause, or, if she was discharged, whether the discharge

was or was not for misconduct.[1] If, upon further inquiry, the ALJ determines that claimant quit, the ALJ should fully develop her reasons for doing so. Was it because she repeatedly received inaccurate paychecks, the manager's reportedly unprofessional conduct toward her, or her removal from the schedule and what she concluded from that. What alternatives to quitting did claimant explore before doing so?

If, upon further inquiry, the ALJ determines the employer discharged claimant, the ALJ should fully develop its reasons for doing so. What employer expectations did she violate, were they reasonable and when and how were they communicated? When did she violate those expectations and how and how many times did she do so? If an employer expectation was violated only once, was it too serious to allow claimant to remain employed and why did the employer reach that conclusion?

In connection with all calls in which either party contends that the other manifested unprofessionalism or the like, the ALJ should develop the evidence, as appropriate, about the specific statements that were made or what exactly the party did in the calls and what in their word choice, tone or otherwise constituted unprofessionalism. As appropriate, the ALJ should allow each party an opportunity to respond to the other's evidence about the calls and to explain their actions.

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 matters at issue, Order No. 18-UI-113332 is reversed, and this matter is remanded for further proceedings consistent with this order. A new hearing and order are required.

DECISION: Order No. 18-UI-113332 is set aside, and this matter remanded for further proceedings consistent with this order.

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

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[1] Claimant must prove by a preponderance of the evidence that he had good cause for leaving work when he 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 his employer for an additional period of time.

If the record on remand shows that the employer discharged claimant, the employer must prove by a preponderance of the evidence that the discharge was for misconduct. 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. Isolated instances of poor judgment and good faith errors are not misconduct. OAR 471-030-0038(3)(b).

DATE of Service: September 7, 2018

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Order No. 18-UI-113332 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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