

**EMPLOYMENT APPEALS BOARD DECISION**  
**2018-EAB-0790**

*Reversed & Remanded*

**PROCEDURAL HISTORY:** On June 14, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 81046). Claimant filed a timely request for hearing. On July 30, 2018, ALJ Scott conducted a hearing, and on July 31, 2018 issued Order No. 18-UI-114085, affirming the Department's decision. On August 10, 2018, claimant filed an application for review with the Employment Appeals Board (EAB).

**CONCLUSIONS AND REASONS:** Order No. 18-UI-114085 is reversed and this matter is 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) (January 11, 2018). A claimant has left work without good cause if she resigns to avoid what would otherwise be a discharge or potential discharge for misconduct. OAR 471-030-0038(5)(b)(F). 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 her employer for an additional period of time.

In Order No. 18-UI-114085, the ALJ concluded that claimant voluntarily left work as a correctional counselor at a state facility without good cause. The ALJ reasoned that because claimant quit work to avoid being discharged for misconduct her leaving could not be for good cause. Order No. 18-UI-114085 at 4; OAR 471-030-0038(5)(b)(F). The basis for the ALJ's conclusion that claimant had

engaged in misconduct were the ALJ's findings that claimant had significant prohibited contacts with an "inmate/offender," HG, during October and November 2017, claimant allowed "inmates/offenders" to use the phone in her office on approximately 120 occasions, and claimant used her authorized access to the employer's electronic system, CIS/AS400, to review information about HG after he was released from the correctional facility. Order No. 18-UI-114085 at 6. We disagree because under the circumstances the record is not sufficiently developed to support these conclusions.

At hearing, the employer's evidence of claimant's alleged misconduct principally relied on testimony from the employer's witness about the findings set out in a pre-dismissal letter dated March 20, 2018 and an investigative report authored by its special investigations unit as well as the employer's written code of ethics and rules and policies. The ALJ did not have these documents at the time of the hearing and the ALJ held the record open to allow the employer to submit them after the hearing. The employer submitted 106 pages, which were marked and received into evidence at that time as Exhibit 1. However, because the ALJ did not have Exhibit 1 when she was questioning claimant, claimant did not have an opportunity to respond to many of the employer's allegations against her.

On remand, the ALJ should allow claimant to respond in detail to the parts in Exhibit 1 that relate to the incidents on which the ALJ's conclusion that claimant engaged in misconduct was based, including claimant's contacts with HG in October and November 2017 and the nature of those contacts and of claimant's relationship with HG; claimant allowing inmates/offenders to use her office phone and how many times she did so and why; and, claimant using authorized access to CIS/AS400 to review information about HG after his release and why she did so. If needed, the ALJ should make an affirmative inquiry of claimant sufficient to determine if she has a relevant, plausible rebuttal to the factual allegations underlying the employer's claims of misconduct and to the employer's contentions that claimant knew that the actions she was taking and that allegedly constituted misconduct were in fact prohibited by the employer. The ALJ also should make a sufficient inquiry to determine if, despite the employer's prohibitions, claimant sincerely believed that the actions undertaken did not violate to employer's standards, and should be excused from constituting misconduct as a good faith error under OAR 471-030-0038(3)(b). Finally, the ALJ should allow the employer an opportunity to respond to claimant's statements and contentions during the remand hearing with respect to Exhibit 1 or otherwise.

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 claimant could not respond to Exhibit 1, the ALJ failed to develop the record necessary for a determination of whether claimant voluntarily left work for good cause, Order No. 18-UI-114085 is reversed, and this matter remanded for further development of the record.

**DECISION:** Order No. 18-UI-114085 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: September 13, 2018**

**NOTE:** The failure of any party to appear at the hearing on remand will not reinstate Order No. 18-UI-114085 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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