EO: 200
BYE: 201921

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

623
VQ 005.00
DS 005.00

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0858

Reversed & Remanded

PROCEDURAL HISTORY: On June 18, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant but not for misconduct (decision # 151920). The employer filed a timely request for hearing. On August 10, 2018, ALJ Frank conducted a hearing, and on August 17, 2018 issued Order No. 18-UI-115176, affirming the Department's decision. On August 31, 2018, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer submitted a written argument in which it offered information it did not present during the hearing in support of its position that claimant's work separation was a voluntary leaving and not a discharge. EAB does not consider new information for the first time on review where, as here, the employer did not show that factors or circumstances beyond its reasonable control prevented it from offering the new information at the hearing as required by OAR 471-041-0090 (October 29, 2006). However, since this matter is being remanded to the Office of Administrative Hearings (OAH) for further proceedings, the employer may offer its information at the remand hearing and, at that time, the ALJ will determine whether it should be admitted into evidence.

CONCLUSIONS AND REASONS: Order No. 18-UI-115176 is reversed and this matter is remanded for further proceedings.

In Order No. 18-UI-115176, the ALJ determined that after claimant notified the employer that he planned to leave work on June 1, 2018, the employer intervened and discharged him by removing his name from the work schedule after May 30, 2018.

A claimant who leaves work voluntarily is disqualified from the receipt of benefits unless he proves, 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) (January 11, 2018). 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.

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.

ORS 657.176(8) provides that if an individual is discharged, not for misconduct, within 15 days of a planned voluntary leaving without good cause, the work separation is adjudicated as a voluntary leaving except claimant shall be eligible for benefits for the period including the week in which the actual discharge occurred through the week prior to the week of the planned voluntary leaving date. ORS 657.176(8)(a)-(c).

In Order No. 18-UI-115176, the ALJ found that a May 25, 2018 letter in which claimant told the employer that he was stepping down from his position as a full-time supervisor effective June 1, 2018 and would work only a fixed part-time schedule was a notice of resignation since it expressed claimant's unwillingness to "accept the terms of continuing employment." Order No. 18-UI-115176 at 2. The ALJ concluded that claimant's planned voluntary leaving on June 1, 2018 would have been for good cause because claimant showed that family circumstances required him to care for his children, but that the employer "effectively discharged claimant" before the effective date of his planned voluntary leaving by removing claimant's name from the work schedule before that date. Order No. 18-UI-115176 at 3. The ALJ concluded that the preemptive discharge was not for misconduct since it was due to claimant having resigned when he had "a reasonable right" to quit his job. Order No. 18-UI-115176 at 3, 4.

However, there are insufficient facts in the record to support the ALJ's conclusion that claimant's May 25, 2018 letter was a resignation, determine why claimant did not work after May 30, 2018, or determine whether the cessation of work occurred because the employer was unwilling to allow him to continue working or because claimant chose not to work after that date. Assuming claimant voluntarily left work, the preponderance of the evidence in the record does not support the ALJ's conclusion that claimant's child care circumstances were good cause for him to leave work. Finally, while the ALJ's desire to keep the hearing focused is understandable, on occasion he abruptly cut off the parties during the hearing when it appeared that what they were trying to say may have been relevant to the issues on which this matter is being remanded. *E.g.* Audio at ~20:40, ~32:43, ~33:30. For these reasons, this matter must be remanded for further inquiry.

With respect to the work separation, claimant repeatedly testified that he did not intend to quit his job. The ALJ should ask claimant what he intended his letter to do, and what he planned to do if the employer refused to accommodate his request only to work the part-time hours listed in the letter. The ALJ should ask claimant's manager how he interpreted claimant's demand only to work the hours set out in the May 25 letter, if he thought claimant's demand was tantamount to a resignation or was misconduct, and why. If the manager communicated his interpretation to claimant, when, and what was the substance of what he told claimant, and what was claimant's response?

Claimant's documents list meetings with his manager on May 25, 2018 and May 29, 2018 and June 1, 2018 in which the May 25 letter or claimant's demand only to work part-time hours was discussed. Exhibit 2 at 2-3. The employer's documents refer to meetings discussing the same topics on May 27 May 28 and May 29, 2018. Exhibit 1 at 3, 8. The ALJ should attempt to determine the dates of the actual meetings and what was stated in each about claimant's May 25 letter and intent to work only part-time, and the effect of any such statements on the employment relationship. Was claimant or the manager willing to continue the employment relationship as of the conclusion of each meeting? Did claimant say or do anything in the meeting about whether he was quitting work or not, as distinct from whether he was willing to continue working full-time? Did the manager say or do anything indicating that he was willing or unwilling to allow claimant to continue working for the employer?

The ALJ should confirm with both claimant and the manager whether claimant told the manager on May 25 that he was not quitting work, and specifically inquire of both if claimant made any similar statements after May 25. *See* Audio at ~33:00; Exhibit 2 at 2. If so, when, what did claimant say, what, if anything, was it in response to, and what was the manager's reaction, if any? The ALJ should follow up on claimant's testimony that the manager asked him on May 29 "if I was going to work my last day," including whether the manager agrees that took place, the context in which the question was asked, the discussion that preceded and followed the question, and whether or how that date was selected. Audio at ~20:05, ~20:40, Exhibit 2 at 2.

The ALJ should ask both claimant and the manager what claimant's work schedule was as of May 25, 2018 for the period of May 26 to June 1, 2018 and which of those days claimant actually worked. The parties should consider submitting documentary evidence for the remand hearing about claimant's work schedule if such evidence exists. The ALJ should determine whether claimant worked all his scheduled work days during that period and, if claimant missed any days, why. The ALJ should determine whether the employer removed claimant's name from the schedule, why claimant believed the employer had removed him from the schedule, when and how claimant was told he had been removed from the schedule, and whether claimant asked the employer about it.

If the record developed on remand suggests the employer discharged claimant, the ALJ should further develop the record about misconduct. The ALJ concluded that the employer discharged claimant for resigning; the preponderance of the record to date suggests, however, that the employer discharged claimant for being unwilling to work beyond the limited hours he set forth in his May 25th letter. The ALJ should therefore inquire further as to the reason the employer discharged claimant, and whether the discharge was for misconduct, including whether or not claimant knew or should have known that if he did not agree to the employer's terms with respect to working reduced hours he would be discharged.

Turning to claimant's desire to work a reduced schedule for child care reasons, the ALJ should make further inquiry of claimant to determine if his child care needs might have constituted good cause for him to leave work or to refuse to work other than the hours set out in the May 25 letter, as well as to determine if claimant needed to restrict his work hours to the extent set out in that letter. The ALJ should ask claimant to specify his girlfriend's typical weekly work schedule and compare her schedule to claimant's availability, and why claimant thought working hours in addition to those listed in the letter "would not have worked out." Audio at ~19:50. The ALJ should inquire further into the comprehensiveness of claimant's efforts to locate affordable child care, including the basis for

claimant's belief that he did not qualify for publicly-subsidized child care and for the accuracy of the information he obtained from the "food stamp" about the cost of child care. Audio at ~17:16.

In addition, the ALJ should ask claimant to detail all efforts he made to locate affordable child care and the results of those efforts and, if he made no efforts, why not. The ALJ should also ask what negative consequences he thought would occur if he had to use private child care on an infrequent basis in the event he was asked to work hours in addition to those set out in the May 25 letter and whether it was feasible for someone else to provide child care infrequently, and when claimant's move from his parents' house necessitated he have alternative child care arrangements in place?

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 receiving benefits based on his work separation from the employer, Order No. 18-UI-115176 is reversed, and this matter remanded for further development of the record.

The parties and ALJ are advised that the intent of this decision is not to constrain the ALJ to asking only the outlined questions. In addition to the questions or areas of inquiry stated herein, the ALJ should ask any follow-up questions he deems necessary or relevant to a determination in this case. The ALJ should also allow the parties to provide any additional relevant and material information about the work separation, and to cross-examine each other as necessary.

DECISION: Order No. 18-UI-115176 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.

DATE of Service: <u>October 5, 2018</u>

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Order No. 18-UI-115176 or return this matter to EAB. Only a timely application for review of the subsequent Order will cause this matter to return to EAB.

<u>Please help us improve our service by completing an online customer service survey</u>. To complete the survey, please go to https://www.surveymonkey.com/s/5WQXNJH. If you are unable to complete the survey online and wish to have a paper copy of the survey, please contact our office.