

**EMPLOYMENT APPEALS BOARD DECISION**  
**2018-EAB-0874**

*Reversed & Remanded*

**PROCEDURAL HISTORY:** On August 6, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 71816). Claimant filed a timely request for hearing. On August 28, 2018, ALJ Seideman conducted a hearing, and on August 29, 2018, issued Order No. 18-UI-115716, affirming the Department's decision. On September 7, 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 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.

**CONCLUSIONS AND REASONS:** Order No. 18-UI-115716 is reversed and this matter remanded for further proceedings consistent with this order.

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. 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 her employer for an additional period of time. Leaving work without good cause includes resigning to avoid what would otherwise be a discharge or potential discharge for misconduct. OAR 471-030-0038(5)(b)(F).

Claimant was an office specialist who worked for the Oregon Department of Corrections (ODOC) at Mill Creek Correctional Facility (MCCF) from October 3, 2005 to July 20, 2018, when she quit work pursuant to a resignation notice dated June 20, 2018. Claimant's job involved work on administrative tasks, often in connection with inmate activities at MCCF. On June 1, 2016, the employer disciplined claimant for violating ODOC policies and her supervisor's directives by permitting and paying certain inmates to work seven days per week without express approval from a manager. She was later disciplined for other violations of ODOC policies, and on June 29, 2017, entered into a Last Chance Agreement in lieu of the employer continuing an employment dismissal process at that time. Exhibit 1. On March 21, 2018, the employer learned that claimant allegedly had added two inmates to weekend work attendance rosters resulting in them being paid for work in positions that did not even exist on weekends. Claimant's alleged conduct again violated ODOC policies and staff directives prohibiting such conduct as well as the express admonition to her against such conduct contained in her prior discipline on June 1, 2016. During a subsequent investigation on May 8, 2018, claimant reportedly asserted that she had received authorization for her actions from a named supervisor, who denied that he had spoken to her about such matters. Later, claimant reportedly admitted that she had engaged in the 2018 conduct on her own and without authorization from the named supervisor. Exhibit 1.

On June 1, 2018, the employer initiated another dismissal process against claimant based on her March 2018 conduct in adding inmates to a work roster and May 2018 conduct in being untruthful when claiming her supervisor had authorized her March conduct. On June 19, 2018, claimant attended a pre-dismissal meeting at which both her union representative and union attorney recommended she resign, effective July 20, 2018, because she would likely be fired if she did not. In return for her resignation, claimant and her husband were to remain eligible for health benefits through August 20, 2018. Claimant agreed and submitted her resignation notice on June 20, 2018. Exhibit 4.

At hearing, claimant stated that she quit work to avoid being discharged and remain eligible for medical benefits for her and her husband through August 2018. Audio Record ~ 5:00 to 7:30. She asserted that she had been targeted and harassed by several staff members and that when she complained, nobody took her complaints seriously, and for that additional reason she also felt she had to resign. Audio Record ~ 7:30 to 8:15. However, in Order No. 18-UI-115716, the ALJ concluded that under OAR 471-030-0038(4) claimant voluntarily left work without good cause, because she had reasonable alternatives to quitting when she did. The ALJ reasoned, "Claimant's situation was not so grave that she didn't have any reasonable alternative but to quit. She could have tried to challenge the allegations. She could have sought other work." Order No. 18-UI-115716 at 2. Because the ALJ failed to inquire at all regarding the applicability of OAR 471-030-0038(5)(b)(F), we reverse and remand for further development of the record.

At hearing, the employer's evidence regarding claimant's alleged misconduct for which she was undergoing the pre-dismissal process consisted primarily of the findings and conclusions set out in a pre-dismissal letter dated June 1, 2018 and an investigative report authored by its special investigations unit. Exhibits 1 and 2. However, the ALJ failed to ask claimant whether she agreed or disagreed with those findings and conclusions and, despite claimant's assertion that she quit, in part, because she had been targeted and harassed by several staff members and that when she complained, nobody took her complaints seriously, the ALJ failed to inquire regarding the basis for that assertion.

On remand, the ALJ should ask claimant to respond in detail to the parts of Exhibits 1 and 2 that relate to the employer's allegations of misconduct, including whether she added the inmates in question to the 2018 work rosters referred to, and if so, why she did and whether she knew her actions violated applicable employer policies and directives. The ALJ should also inquire regarding whether, on or around May 8, 2018, as the documents state, claimant knowingly misrepresented to the investigator that she had received authorization from a supervisor or manager to add the inmates to the rosters in question, and if so, why she did so. The ALJ also should make a sufficient inquiry to determine if, despite the employer's policies and directives to the contrary, claimant sincerely believed that the actions she undertook 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).

The ALJ should also inquire regarding the basis for claimant's assertion that she quit in part because she had been targeted and harassed by several staff members and that when she complained, nobody took her complaints seriously.

The ALJ should also inquire 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? In addition to her benefits concerns, 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?

Finally, the ALJ should allow the employer an opportunity to respond to claimant's statements and contentions made during the remand hearing with respect to any of these issues.

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). For the reasons stated, the ALJ failed to develop the record necessary for a determination of whether claimant voluntarily left work for good cause. Accordingly, Order No. 18-UI-115716 is reversed, and this matter remanded for further development of the record.

**DECISION:** Order No. 18-UI-115716 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: October 11, 2018**

**NOTE:** The failure of any party to appear at the hearing on remand will not reinstate Order No. 18-UI-115716 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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