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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-0883

Reversed & Remanded

PROCEDURAL HISTORY: On July 26, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 151805). Claimant filed a timely request for hearing. On August 21, 2018, ALJ Frank conducted a hearing at which the employer failed to appear, and on August 24, 2018 issued Order No. 18-UI-115568, concluding claimant voluntarily left work without good cause. On September 10, 2018, claimant filed an application for review with the Employment Appeals Board (EAB).

With her application for review, claimant submitted written argument to EAB, but failed to certify that she provided a copy of her argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). The argument also 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 as required by OAR 471-041-0090 (October 29, 2006). For these reasons, we considered only information received into evidence at the hearing when reaching this decision. *See* ORS 657.275(2).

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. Each party will also be able to testify concerning new and relevant matters at the hearing on remand.

CONCLUSIONS AND REASONS: Order No. 18-UI-115568 is reversed and this matter remanded for further proceedings.

Claimant was employed as a cook in a rural bar and grill from March 27, 2018 through June 25, 2018. The employer's kitchen manager was hard on the wait staff to the extent it often made them cry which made it more difficult for claimant because when they were upset, she often had to assist them waiting on tables in addition to performing her own work. The manager also assigned claimant to work on the busiest nights of the week, which upset claimant. Claimant also was "creeped out" by a night time cook she worked with and believed he was on drugs and she "couldn't be around that." Audio Record ~ 16:00 to 17:00. On or about June 18, 2018, claimant suffered a work injury when she dropped a kitchen knife on her foot, which "cut [her] toe to the bone." Audio Record ~ 11:00 to 12:00. Her injury made it impossible for her to work and she called in injured and unable to work on Saturday, June 23 and Sunday, June 24 and arranged for a replacement to work her shifts. On Monday, June 25, claimant was scheduled to work beginning at 2:00 p.m. However, earlier that day claimant decided she would not return to work for the employer at all for the above reasons and did not notify the employer or arrange for a replacement for her shift. At 5:42 p.m. that day, the employer's kitchen manager sent her a text message that stated, "You're done." Claimant did not respond to the text message.

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) (January 11, 2018). Although the Department concluded that claimant had been discharged, the ALJ concluded that claimant quit based on her testimony that she had decided on June 25, 2018 that she was no longer willing to continue to work for the employer and for that reason, did not call in to the employer or arrange for a replacement. Order No. 18-UI-115568 at 2. We agree.

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). 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 the employer for an additional period of time.

In Order No. 18-UI-115568, the ALJ concluded that claimant did not show good cause for leaving work when she did, reasoning that her stated reasons for quitting - being scheduled to work on busy nights of the week, a coworker on drugs who made her feel uncomfortable and the employer's tendency to make wait staff cry and make her job more difficult, were not sufficiently grave to constitute good cause. However, the evidence at hearing as developed by the ALJ was insufficient to allow EAB to determine if claimant had good cause to leave work when she did.

First, after the ALJ concluded that the evidence at hearing showed that claimant quit rather than was discharged, the ALJ failed to notify claimant that she then had the burden to establish good cause for quitting. Moreover, the ALJ did not sufficiently inquire of claimant regarding her stated reasons for quitting.

At the hearing on remand, the ALJ should inquire of claimant if she is aware of whether her work injury was permanent in any way, whether the employer was sufficiently aware of the seriousness of her injury, whether it would have prevented her from working on June 25, 2018 and whether it played any role in her decision not to return to work for the employer. In doing so, the ALJ should also determine if claimant had a permanent or long-term "physical or mental impairment" as defined at 29 CFR §1630.2(h) such that a modified standard for voluntary quit should be applied to this case. The ALJ should ask claimant about what advice she may have received from medical professionals regarding her ability to work. The ALJ should also inquire regarding the coworker claimant believed was on drugs. Why did she believe he was on drugs, and what else, if anything made it uncomfortable for her to work with him? Did she bring any of her concerns regarding her work environment to the employer and if so, what was the employer's response? If not, why did she not bring her concerns to the employer and give the employer the opportunity to address them?

On remand, the ALJ should ask the aforementioned questions, as well as any follow-up questions the ALJ deems relevant to whether or not claimant had good cause for quitting work.

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 did not develop the record necessary for a determination of whether claimant had good cause to voluntarily leave work, Order No. 18-UI-115568 is reversed, and this matter is remanded for development of the record.

DECISION: Order No. 18-UI-115568 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: <u>October 12, 2018</u>

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Order No. 18-UI-115568 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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