

**EMPLOYMENT APPEALS BOARD DECISION**  
**2015-EAB-0111**

*Affirmed*  
*Disqualification*

**PROCEDURAL HISTORY:** On December 24, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 95033). Claimant filed a timely request for hearing. On January 26, 2015, ALJ Seideman conducted a hearing, and on January 27, 2015 issued Hearing Decision 15-UI-32935, affirming the Department's decision. On February 6, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered claimant's written argument when reaching this decision.

**FINDINGS OF FACT:** (1) Spirit Mountain Garming, Inc. employed claimant as a revenue auditor from April 10, 2012 until November 18, 2014.

(2) In 2013, claimant requested and the employer approved a six week leave under the Family Medical Leave Act (FMLA) when claimant had cancer surgery. During that FMLA leave, claimant requested and the employer approved "hardship benefits." The hardship benefits allowed claimant to receive an income substitute for her pay during the FMLA leave, which was otherwise unpaid after an employee exhausted the employee's accrued personal time off (PTO) benefits.

(3) In October 2014, claimant contracted bronchial pneumonia. Claimant requested and the employer approved a FMLA leave due to this illness from October 14, 2014 through October 22, 2014. After claimant took this leave, she had approximately ten weeks of FMLA leave remaining available to her. The employer expected claimant to return to work on October 26, 2014 unless she extended her leave under FMLA.

(4) Claimant did not return to work on October 26, 2014. Claimant did not request an extension of her time away from work under FMLA. Claimant called the controller, who was the supervisor of the department in which she worked, and left a message stating that she was still ill and unable to work on October 26, 2014.

(5) Between October 26, 2014 and November 18, 2014, claimant did not report for work. During this period, claimant was aware that a FMLA leave was available to her, but did not request additional time away from work as FMLA leave. Audio at ~18:58, ~22:29. For each the days that she was absent from work, claimant left a message on the controller's phone the night before stating that she was not going to be at work. Before approximately November 10, 2014, claimant stated that illness prevented her from reporting for work. After November 10, 2014, claimant's messages stated only that she was not going to report for work. Audio at ~25:31. Although the controller did not report for work until 7:30 a.m., and claimant's usual shift began at 7:30 a.m., claimant's messages reporting her absences were left on the controller's phone between 10:00 p.m. and 2:00 a.m., when the controller was not in and claimant could not speak with the controller directly.

(6) Beginning shortly after October 26, 2014 and continuing through November 17, 2014, the casino audit supervisor and other casino employees called claimant each day after she had left a message on the controller's phone reporting that she was not going to report for work. The audit supervisor and the other employees were not able to reach claimant directly and left messages asking claimant to call in and speak personally either to the audit supervisor or the controller to discuss her situation. Audio at ~17:00, ~17:22, ~21:10. At least once, a representative from the employer's human resources department attempted to reach claimant directly and, when the representative could not, the representative left a message asking claimant to call the casino and speak personally with her. Audio at ~17:48. The employer also sent emails to claimant addressed to her personal email account requesting that she call in and speak personally to an employer representative. Audio at ~17:55. Although claimant received all of these messages, claimant did not return them and did not personally contact any employer representative. Audio at ~17:20, ~17:55, ~21:10, ~21:30. The employer wanted to speak with claimant to learn if she was continuing not to report for work due to illness or some other reason, and if it was a result of illness to see if clamant wanted a leave under FMLA and to apply for hardship benefits while on that leave. Audio at ~17:00.

(7) On November 18, 2014, claimant had not personally contacted the employer as the employer had requested. On that date, the employer sent claimant a letter stating that she was considered separated from work effective that day.

**CONCLUSIONS AND REASONS:** Claimant voluntarily left work without good cause.

The first issue this case presents is the nature of claimant's work separation. If claimant could have continued to work for the employer for an additional period of time, the work separation was a voluntary leaving. OAR 471-030-0038(2)(a) (August 3, 2011). If claimant was willing to continue to work for the same employer for an additional period of time but was not allowed to do so by the employer, the separation was a discharge. OAR 471-030-0038(2)(b).

Claimant contended that she did not quit work and that the employer discharged her for "absenteeism" under its attendance policy. Audio at ~7:07, ~7:22. It appears that by her unexcused absences claimant

failed to comply with the employer's attendance policy and could have been discharged for that reason. Audio at ~18:42. However, it does not appear that the employer was unwilling to allow claimant to continue to work for it, and was trying as best it could to reach claimant directly to learn the reasons why she was not reporting to work and to accommodate her absences. Claimant's behavior in phoning the employer each day and leaving a message that she was not reporting for work might make her intentions about continuing the work relationship seem ambiguous. However, claimant called the employer very late and night, apparently to avoid a personal conversation with the controller, and changed the messages she left after November 10, 2014 so that she no longer mentioned illness as a reason for absences. In addition, claimant failed to contact the employer after employer representatives had left her approximately 15 messages over approximately 16 work days expressly asking claimant to call and speak personally to an employer representative. These facts strongly imply that claimant did not want to continue working for the employer. Based on this record, we conclude that sometime before the employer sent claimant the November 18 letter stating that a work separation had occurred, the employer determined that, by her behavior, claimant had objectively indicated her unwillingness to continue working for the employer by adamantly refusing to communicate with the employer. By November 18, 2014, a reasonable period for claimant's lack of personal contact with the employer, despite its repeated efforts to make that contact, had been exceeded. Claimant's work separation was a voluntary leaving on November 18, 2014.

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) (August 3, 2011). 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.

Claimant conceded at hearing that she knew FMLA leave was available to protect her job with the employer, but indicated that she did not seek to pursue such a leave because it would have been unpaid. Audio at ~12:46, ~13:40, ~14:02, ~14:34, ~23:32. Assuming that claimant was so ill that she could not work from October 26, 2014 through November 17, 2014, a reasonable and prudent employee, who was aware of FMLA and its protections, and who wanted to maintain her job, would have sought a FMLA leave even if it was unpaid, rather than remaining incommunicado with the employer and objectively demonstrating an intention to leave work. Although some of claimant's testimony at hearing might suggest that after October 26, 2014, she was too ill to request a FMLA leave, she was able to call the employer daily to leave a message that she was going to be absent and she was able to leave her home to see doctors during this time. These actions of claimant show that she was not too incapacitated to call the employer to request FMLA leave had she wanted to do so. Audio ~21:10, ~22:43, ~28:41. Claimant thus failed to demonstrate that she faced a grave situation that left her no alternative but to quit her job.

Claimant did not meet her burden to show that, more likely than not, she had good cause to leave work when she did. Claimant is disqualified from receiving unemployment insurance benefits.

**DECISION:** Hearing Decision 15-UI-32395 is affirmed.

Susan Rossiter and J. S. Cromwell;  
Tony Corcoran, not participating.

**DATE of Service:** March 23, 2015

**NOTE:** You may appeal this decision by filing a Petition for Judicial Review with the Oregon Court of Appeals within 30 days of the date of service listed above. *See* ORS 657.282. For forms and information, you may write to the Oregon Court of Appeals, Records Section, 1163 State Street, Salem, Oregon 97310 or visit the Court of Appeals website at [courts.oregon.gov](http://courts.oregon.gov). Once on the website, use the ‘search’ function to search for ‘petition for judicial review employment appeals board’. A link to the forms and information will be among the search results.

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