

**EMPLOYMENT APPEALS BOARD DECISION**  
**2016-EAB-0121**

*Reversed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On October 16, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 101302). Claimant filed a timely request for hearing. On January 13, 2016, ALJ Ballinger conducted a hearing, and on January 15, 2016 issued Hearing Decision 16-UI-51160, affirming the Department's decision. On February 13, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

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

During the hearing, the ALJ admitted into evidence as Exhibit 3 certain documents that claimant offered, but failed to mark those documents as a hearing exhibit. Transcript at 33; Hearing Decision 16-UI-51160 at 1. Because those documents were described at hearing and readily identifiable, EAB has corrected the ALJ's administrative oversight and has marked them as Exhibit 3.

**FINDINGS OF FACT:** (1) Maurice's, Inc. employed claimant from July 7, 2011 until April 14, 2015, last as a store manager.

(2) Sometime in approximately August 2014, claimant told her supervisor she was pregnant and planned to breastfeed her baby after the baby was born. On January 19, 2015, claimant began an employer-approved maternity leave. On January 21, 2015, claimant gave birth to a daughter. Claimant breast-fed her daughter. Claimant's anticipated date to return to work was March 4, 2015.

(3) On February 19, 2015, claimant sent an email to her supervisor, the district manager, about returning to work on March 4, 2015 with a reduced schedule. In response to the district manager's inquiry about claimant's preferred work hours, claimant replied that she wanted to work approximately twenty to thirty hours per week "to give me a chance to ease into working as a breastfeeding mother." Exhibit 3 at 12. On February 25, 2015, claimant sent another email to the district manager, inquiring about her anticipated work schedule. Exhibit 3 at 6. The supervisor replied on February 26, 2015, letting claimant

know her expected schedule, and asking claimant to call the acting store manager for more detailed information about the schedule. Exhibit 3 at 6. On March 6, 2015, claimant contacted the acting store manager to finalize the arrangements for her return to work, and was told she was scheduled to work on March 9, 2015. Claimant then asked the store manager what workplace location had been selected for her to pump or express breast milk during the work day. The acting store manager told claimant that she and claimant's supervisor would "figure out the best place" and that the location selected might be the backroom area in the store. Transcript at 10. The backroom to the store was one non-partitioned large room in which there was a break area for employees, an area for the manager to perform administrative duties, and another area in which freight was delivered, received and processed. Claimant expressed her concern that the backroom was not a sufficiently private area to pump breast milk and that staffing for the store might be insufficient to allow claimant to take the breaks she needed to express breast milk. The acting manager assured claimant that she and claimant's supervisor would "work on it." Transcript at 10.

(4) On March 9, 2015, when claimant reported for work, she saw nothing had been done to find a private location for her to pump breast milk. On that day, claimant sent an email to the district manager stating that she did not know where she should pump breast milk since the store had changed locations when she was on leave and she no longer had a separate office and the backroom was filled with freight, merchandise and supplies. Exhibit 3 at 15. In response, the benefits manager sent claimant an email inquiring if there were any partitioned and enclosed areas in the backroom where claimant could close herself behind a door for privacy and which had an electrical outlet for her breast pump. Exhibit 3 at 15. Claimant replied the only closed area off the backroom was a restroom. Claimant also stated that she thought the backroom would be a difficult place to pump breast milk because employees were regularly in and out of it and this activity would disrupt her. Exhibit 3 at 15. Claimant asked and received permission from the district manager to go home on March 9, 2015 because there was no private location in the workplace where she could express breast milk.

(5) On March 10, 2015, claimant reported for work. The employee scheduled to work with claimant in the store that day notified claimant that she needed to leave the store and claimant would be working alone for the remainder of her shift. Later that morning, claimant received an email from the benefits manager asking if there were any customer fitting rooms that offered privacy for pumping breast milk and had a power outlet for her breast pump. Exhibit 3 at 15. Claimant replied there was an outlet located in the entry way to the fitting rooms outside of the actual fitting rooms. Later on March 10, 2015, claimant sent another email to the benefits manager stating that she thought the fitting rooms were not a suitable place to express breast milk because the breast pump was noisy and the fitting room area was noisy and would be disruptive because customers were in and out of the fitting rooms trying on clothes. Exhibit 3 at 16. Claimant then asked the benefits manager if it made more sense for her to extend her maternity leave to allow the employer to "figure out a good solution" for her to express breast milk. Exhibit 2 at 19.

(6) On March 11, 2015, the benefits manager sent an email to claimant stating that she was in consultation with the human resources department "to figure out a space that would work for you," and stating that she would allow claimant to extend her maternity leave. Exhibit 3 at 16. The benefits manager also asked claimant whether the employer could create a suitable place to express breast milk by obtaining a privacy screen and placing it the otherwise open backroom. Exhibit 3 at 19. Claimant responded that the screen in the backroom was preferable to a fitting room for expressing breast milk,

but she thought it was best to extend her leave to allow the employer time to formulate “a better plan for a designated area to [allow her to] pump [breast milk]” during the work day. Exhibit 3 at 17. Claimant then sent an email to the district manager stating that she was taking a leave to allow the employer “to get a better plan [for expressing breast milk] in place for my return after [the] LOA.” Exhibit 3 at 18. The employer agreed that claimant’s leave would be extended until April 14, 2015.

(7) On April 4, 2015, claimant sent an email to the district manager reminding the manager that she was scheduled to return to work on April 15, 2015. Exhibit 3 at 9. The district manager responded addressing several matters and stating, “We will have screens for your office area to put up for privacy as a nursing station upon your return.” Exhibit 3 at 10. On April 9, 2015, claimant responded and asked the district manager about the type of screens she was intended to use and if there was any other option than using a screen to create a private pumping area within the backroom. Exhibit 3 at 10. The district manager responded the options available to screening off an area in the backroom were using the bathroom in the store or one of the fitting rooms. Exhibit 3 at 11. In response, claimant expressed concern about the privacy of a screened or curtained off area that was located in the backroom. Exhibit 3 at 11.

(8) On April 10, 2015, the benefits manager sent claimant an email asking claimant to call her to discuss any concerns she had about the employer’s accommodations for expressing breast milk after she returned to work. Exhibit 3 at 19. Claimant replied she had concerns about the adequacy of staff to cover for her when she needed to take a break from the sales floor to express milk. Claimant also noted that the screens to create an area of her to express breast milk in the backroom had not been delivered and “my only concern with returning is not having a good place to pump [breast milk].” Exhibit 3 at 19. The benefit manager replied that the screens were not expected to arrive until April 20, 2015, stated that claimant could extend her leave until the screens arrived, and stated that if claimant had concerns about sufficient breaks to pump breast milk, she should consult with the district manager. Exhibit 3 at 20. Claimant responded that she wanted the employer to have already set up a private place for her to express milk before she returned to work. Sometime shortly after this exchange, claimant visited the store to discuss the options for a place to express milk and the acting store manager told her that a bathroom or a fitting room was available for that purpose. Claimant told the acting store manager that those places were not appropriate or private enough.

(9) On April 13, 2015, claimant sent an email to a representative from the employer’s human resources department stating that she was “not comfortable” with the options proposed by the acting store manager until the screens arrived, and none of the proposed locations was sufficiently removed from interruptions or noise. Exhibit 3 at 21. Claimant asked the representative for any ideas she had about appropriate alternatives to the restroom, a fitting room or screened off area in the backroom for a lactation station. Exhibit 3 at 21. In her response to claimant, the human resources representative copied the benefits manager, stated that blankets or curtains could be placed over rolling clothes racks to ensure claimant’s privacy in the backroom before the screens arrived and asked the benefits manager if she had any other suggestions for claimant. Exhibit 3 at 21. On April 13, 2015, the benefits manager responded to the human resources representative and claimant and proposed that until the screens arrived, claimant could use a fitting room to express breast milk or could do so behind a blanket or curtain positioned over a rolling clothes rack in the backroom. The benefits manager also stated that claimant could delay her return to work until the screens arrived to enclose an area of the backroom for claimant’s use.

(10) On April 13, 2015, claimant sent an email to the human resources representative which she copied to the benefits manager stating that, although she had intended to return to work on April 15, 2015, she was resigning immediately because “my situation leaves me no choice.” Exhibit 3 at 23. Claimant voluntarily left work on April 13, 2015 because the restroom, a fitting room or a screened area in the large non-partitioned backroom were not sufficiently private and suitable locations for her to express breast milk during the work day.

**CONCLUSIONS AND REASONS:** Claimant voluntarily left work with good cause.

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.

In Hearing Decision 16-UI-51160, the ALJ concluded claimant did not show that she left work for good cause. While the ALJ determined that claimant’s request for a “private quiet place” where she could express breast milk was reasonable, and claimant faced a situation of “some gravity . . . when she discovered that the employer had taken no action on her request,” he concluded that claimant did not exhaust her reasonable options before quitting, reasoning that she did not give the employer time to “implement one of more of its suggestions before deeming them unacceptable,” she did not propose any alternatives to the employer’s suggestions and “the employer was clearly open to such suggestions.” Hearing Decision 16-UI-51160 at 3. We agree with the ALJ that claimant’s situation was grave, but disagree that she had reasonable alternatives to quitting work.

ORS 653.077(2) and ORS 653.077(5) require a covered employer who has received reasonable notice from an employee that the employee intends to express breast milk in the workplace to make “reasonable efforts to provide a location, that is not a public restroom or a toilet stall, which allows the employee to express milk in private.” ORS 653.075(3) states that the needs of an employee who is breast-feeding include a “clean, convenient, private location to express milk in the workplace.” A “private location” to express breast milk is a place other than a public restroom or toilet stall, where the employee expressing breast milk is “concealed from view and without intrusion by other employees or the public” and the location must have a door that closes and, if it has windows, they must be capable of being covered. OAR 839-020-0051(3)(a) (January 1, 2008). A “public restroom” is a restroom that is available for use by other employees or the general public. OAR 839-020-0051(3)(b). An employer who has received notice from an employee that she intends to express breast milk in the workplace is allowed a reasonable time in which to make necessary preparations for the required private location. OAR 839-020-0051(7). At hearing, the employer did not contend it was not subject to the requirements of ORS 653.077 or OAR 839-020-0051, and absent evidence to the contrary, we infer that it was.

Claimant first gave the employer notice that she intended to express milk in the workplace as early as August 2014, repeated that intention on February 19, 2015 and, if there was any lack of clarity about her

intentions, the employer received formal notice on March 6, 2015 when claimant spoke to the acting store manager. When claimant returned to work on March 9, 2015, the employer had not taken steps to create a private location for claimant and claimant delayed her return to work until April 15, 2015 for the specific purpose of enabling the employer to set up such a private area. While the ALJ stated claimant did not give the employer time to set up any of the locations for a lactation station that it suggested would be suitable for claimant, as of April 13, 2015, only two days before claimant's second return to work and more than four weeks after claimant's first attempt to return to work, it had still not done so. Under the circumstances, it appears that the employer was allowed a reasonable amount of time to create a lactation area for claimant, and did not make a reasonable effort to do so, thereby violating the requirements set forth in OAR 839-020-0051(7).

By April 13, 2015, the employer had apparently settled upon creating a lactation station in its open backroom by enclosing a portion of it with screens. Until the screens arrived, however, the employer planned to create a makeshift screen using rolling racks covered with blankets or curtains, or have claimant temporarily use a restroom or fitting room instead. The employer did not rebut claimant's testimony that the backroom was regularly used by other employees and outside delivery people, and even if it was screened off, it was subject to intrusion by these people, which does not comply with the requirements set forth in OAR 839-020-0051(3)(a). The employer also did not dispute that the fitting room it proposed as a temporary lactation station was in the line of fitting rooms used by customers in the regular course of business, and likely also was not a location that was private or not subject to intrusion. In addition, the rolling clothes rack, with a blanket or curtain to attempt to obscure claimant from view in the open backroom while she expressed breast milk, was likely was not private and was subject to the same types of intrusions by others as the screened off area it proposed in for the same backroom. Finally, use of a restroom as a lactation station is prohibited by ORS 653.077(5)(b) and OAR 839-020-0051(3)(a). It appears that none of the employer's proposals, if implemented, would likely meet satisfy the employer's obligation to provide claimant with a reasonably private and sanitary area to express breast milk. Claimant was facing having to return to work without a reasonably private and sanitary location in the workplace in which to express breast milk, which amounted to a grave situation.

We disagree with the ALJ about whether the alternatives listed in Hearing Decision 16-UI-51160 were reasonable, however. It was not reasonable to expect claimant to continue working for the employer awaiting creation of a lactation area that was not expected to be compliant with the applicable laws and rules. Nor was it reasonable, given the circumstances, to expect claimant to propose alternative solutions to the employer. The employer had more than a month, and possibly several months, to create a lactation area for claimant's use that was reasonably private and sanitary, and repeatedly proposed the same three possibilities despite claimant repeatedly expressing concerns. The record fails to show that there were any other possible locations for a lactation area that claimant could have proposed, much less that the employer would have considered or acted on claimant's suggestion within a reasonable time.

Claimant's need to express breast milk at the workplace, and the employer's failure to provide her with a reasonably private and sanitary place in which to do it, amounted to a grave situation. Claimant had no reasonable basis for believing that taking additional maternity leave or exploring any other alternative to quitting work would result in the creation of a reasonably private and sanitary lactation station. No similarly situated reasonable and prudent person would have continued working for the employer when faced with a grave situation and futile alternatives to quitting. Claimant had good cause for leaving work when she did, and is not disqualified from receiving unemployment insurance benefits.

**DECISION:** Hearing Decision 16-UI-51160 is set aside, as outlined above.

Susan Rossiter and J. S. Cromwell;  
D. P. Hettle, not participating.

**DATE of Service:** March 2, 2016

**NOTE:** This decision reverses a hearing decision that denied benefits. Please note that payment of any benefits owed may take from several days to two weeks for the Department to complete.

**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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