

**EMPLOYMENT APPEALS BOARD DECISION**  
**2016-EAB-0137**

*Affirmed*  
*Disqualification*

**PROCEDURAL HISTORY:** On October 7, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant, but not for misconduct (decision # 92613). The employer filed a timely request for hearing. On December 31, 2015, ALJ Demarest conducted a hearing, and issued Hearing Decision 15-UI-50373, concluding that claimant voluntarily left work without good cause. On January 20, 2016, Hearing Decision 15-UI-50373 became final without an application for review having been filed. On February 8, 2016, claimant filed an untimely application for review with the Employment Appeals Board (EAB).

**Untimely Application for Review Allowed**

To be timely, an application for review must be filed within 20 days of the date the Office of Administrative Hearings mailed the hearing decision sought to be reviewed. ORS 657.875; OAR 471-041-0070(1) (March 20, 2012). The 20-day filing period may be extended a reasonable time upon a showing of good cause; good cause exists if the applicant shows that factors or circumstances beyond the applicant's reasonable control prevented a timely filing. OAR 471-041-0070(2)(a).

With her application for review, claimant submitted documents showing that on January 4, 2016, she submitted her application for review to EAB by fax; the cover sheet included with these documents indicated that the fax was successfully transmitted to EAB, but for unknown reasons EAB did not receive the application for review. Circumstances beyond claimant's reasonable control – the apparent malfunction of a fax machine or interruption of the fax transmission that resulted in EAB's non-receipt of claimant's fax – prevented claimant from timely filing her application for review. Claimant has therefore demonstrated good cause for extending the period for filing her application for review and her late application for review is allowed.

**FINDINGS OF FACT:** (1) Spirit Mountain Gaming employed claimant from October 7, 2003 until July 6, 2015, last as a floor supervisor.

(2) The employer's policy provided that an employee would be discharged if the employee accrued 14 absences within a 12 month period. Claimant knew and understood the employer's policy, because prior to July 6, 2015, she accumulated her 13<sup>th</sup> absence within a 12-month period. After that absence, the employer warned claimant in writing that she would be discharged if she accumulated a 14<sup>th</sup> absence within a 12-month period. Claimant signed an acknowledgement that she had read and understood this written warning.

(3) On July 5, 2016, claimant was scheduled to work but did not report for her scheduled shift because her daughter was ill. Because this was her 14<sup>th</sup> absence within a 12-month period, claimant concluded that the employer discharged her. Because she assumed she would be discharged, claimant did not report for shifts she was scheduled to work on July 6, 9 and 10, 2015.

(4) From July 6 through July 10, 2015, the employer's gaming director made numerous telephone calls to claimant, calling both her land line and cell phone. Claimant did not answer these calls, and the gaming director left messages, asking that claimant contact him to discuss her employment status. The employer was willing to allow claimant to continue working while it attempted to resolve her attendance violation. Depending on claimant's circumstances, the employer might have been willing to waive claimant's 14<sup>th</sup> absence, or grant her approved leave for the shifts she missed.

(6) By letter dated July 10, 2015, the employer discharged claimant for failing to report for her scheduled shift on July 6, 2015.

(5) Claimant did not check messages on her land line or cell phone until July 11 or 12, 2015. Because it was the weekend, she knew the gaming director was not working and did not call him.

(6) On July 13, 2015, claimant received the employer's letter discharging her.

**CONCLUSION AND REASONS:** We agree with the ALJ and conclude that claimant voluntarily left work without good cause.

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) (August 3, 2011). 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). The employer was willing to permit claimant to continue working while it attempted to resolve her violation of its attendance policy. Claimant's work separation was therefore a voluntary leaving.

To qualify for unemployment benefits, claimant must prove that he quit work for good cause. ORS 657.176(2)(c). "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.

Claimant voluntarily left work because she mistakenly assumed the employer would discharge her. Rather than leaving work for that reason, claimant had the option either to check telephone messages and respond to the gaming director's calls, or contact the employer on her own initiative to ask about the status of her employment. Claimant failed to demonstrate that her daughter's illness, which she testified

lasted only a few days, created a situation so grave that claimant was unable either to check her telephone messages or make telephone calls. A reasonable and prudent person of normal sensitivity, exercising ordinary common sense, would not leave work due to an unconfirmed belief the person had been discharged without pursuing the reasonable alternative of asking whether her belief was true.

Claimant voluntarily left work without good cause. She is disqualified from the receipt of unemployment benefits on the basis of this work separation.

**DECISION:** Hearing Decision 15-UI-50373 is affirmed.

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

**DATE of Service:** February 29, 2016

**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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