

**EMPLOYMENT APPEALS BOARD DECISION**  
**2016-EAB-0141**

*Reversed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On November 24, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant quit working for the employer without good cause (decision # 112037). Claimant filed a timely request for hearing. On January 7, 2016, ALJ Vincent conducted a hearing at which the employer failed to appear, and on January 13, 2016 issued Hearing Decision 16-UI-51008, affirming the Department's decision. On February 2, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) Nicks Italian Café Inc. employed claimant as a line cook from May 25, 2014 to August 30, 2015.

(2) The employer was owned by Eric Ferguson and Carmen Periano, who were husband and wife. Ms. Periano was the original owner's daughter. Mr. Ferguson also was the employer's head chef and manager. Claimant worked more closely with the head chef and manager than with other employees.

(3) On August 29, 2015, Ms. Periano arrived at the café, served Mr. Ferguson with divorce papers, "kicked him out of the business," and immediately tried to "take over the kitchen and run the whole business herself." Audio Record at 10:00-10:15. However, when Ms. Periano was asked to help expedite food orders, she clearly was under the influence of alcohol, ate food off of customers' plates, threw away food orders, and otherwise interfered with the cooks' and servers' work. It took claimant and a server approximately 20 minutes to persuade Ms. Periano to leave the food line. The cooks fell so far behind in their work that most customers left, and the few who remained were not charged for their food due to the delay. Claimant found the situation "insanely stressful." Audio Record at 11:30.

(4) On August 30, 2015, Ms. Periano was responsible for overseeing the preparation of food for approximately 700 people. However, she left work for the day without notifying employees after the food was only half-prepared. The employees on duty responded by stating that they were "walking out right now" and that they were "done with this business." Audio Record at 12:00. Claimant stated that he was leaving work, too, asserting he could not take the stress. As claimant left work, he sent Mr.

Ferguson a text message stating that Ms. Periano was not at work, all the employees had left, and the kitchen was closed. Mr. Ferguson replied with a text message thanking claimant.

(5) Later that day, Mr. Ferguson convinced the other employees to return to work later that day. That evening, a co-worker sent claimant a text message stating that claimant could return to work if he wanted to. Claimant did not return to work because he had no reason to believe that Mr. Ferguson would return as the head chef and manager, or that Ms. Periano's behavior would improve.

(6) Mr. Ferguson remained willing to allow claimant to return to work for the employer. However, Ms. Periano did not want claimant to return.

**CONCLUSIONS AND REASONS:** We disagree with the ALJ and conclude that claimant quit work with 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). "Work" means "the continuing relationship between an employer and an employee." OAR 471-030-0038(1)(a). The date an individual is separated from work is the date the employer-employee relationship is severed. *Id.*

A claimant who leaves work voluntarily is disqualified from the receipt of benefits unless he proves, by a preponderance of the evidence, that he had good cause for leaving work when he 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 his employer for an additional period of time.

In Hearing Decision 16-UI-51008, the ALJ concluded that claimant quit work without good cause, asserting that the other employees' return to work after walking out demonstrated that doing so was a reasonable alternative to quitting.<sup>1</sup> As claimant left work, however, he sent Mr. Ferguson a text message stating that Ms. Periano was not at work, all the employees had left, and the kitchen was closed. Mr. Ferguson replied with a text message thanking claimant, but made no attempt to convince him to return to work at that time. Nor did claimant know, or have reason to know, that Mr. Ferguson would convince the other employees to return to work. Although a coworker later notified claimant that he could return if he wanted to, the record fails to show that claimant knew all the other employees had agreed to return, and there was no indication that Mr. Ferguson would return as the head chef and manager, or that Ms. Periano's behavior would improve. Finally, claimant's situation was different than the other employees because he would be required to work more closely with Ms. Periano, who did not want claimant to return to work for the employer. No reasonable and prudent person in claimant's situation would have continued working for the employer.

Claimant quit work with good cause. He is not disqualified from receiving benefits based on his work separation from the employer.

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<sup>1</sup> Hearing Decision 16-UI-51008 at 2.

**DECISION:** Hearing Decision 16-UI-51008 is set aside, as outlined above.

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

**DATE of Service:** February 23, 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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