

**EMPLOYMENT APPEALS BOARD DECISION**  
**2016-EAB-0435**

*Reversed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On February 18, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 100011). Claimant filed a timely request for hearing. On March 16, 2016, ALJ Wipperman conducted a hearing, and on March 25, 2016 issued Hearing Decision 16-UI-55831 affirming the Department's decision. On April 13, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant failed to certify that he provided a copy of his 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 him from offering the information during the hearing as required by OAR 471-041-0090 (October 29, 2006). We considered only information received into evidence at the hearing when reaching this decision. *See* ORS 657.275(2).

**FINDINGS OF FACT:** (1) Klamath Tribal Health & Family Services employed claimant as a maintenance worker and custodian from July 15, 2013 to December 22, 2015.

(2) On August 26, 2014, claimant suffered a near fatal heart attack while at work. Thereafter, he was required by his physicians to take medications and be blood-tested every three months. He qualified for (Family Medical Leave Act) FMLA leave and was off work full-time from August 26 through October 6, 2014. He took intermittent FMLA leave from October 7 through January 14, 2015, when he was released to full-time work without restrictions.

(3) From January 15 through May 2015, claimant worked full-time but continued to experience symptoms, such as dizziness and leg cramping, intermittently while at work which caused him difficulty. In June 2015, he requested and was granted two days off per week, for five weeks, without

pay, for “personal” reasons, even though his request was based on his continued symptoms, because he had exhausted paid leave and believed he had exhausted protected medical leave. Audio Record ~ 35:30 to 35:55. At the end of the five weeks, he continued to take “personal” days off, intermittently, into November 2015. Claimant’s physician continually encouraged him to take an unspecified amount of time off from the job to protect his health because of his continuing symptoms at work.

(4) Claimant’s supervisor considered claimant’s intermittent absences from work a problem because he believed a full-time maintenance worker/custodian was needed. In early November 2015, claimant met with the employer’s human resource manager concerning whether he was “able” to continue in the job full-time and how to turn in a resignation notice, which he had decided to do. Audio Record ~ 35:55 to 36:30. At that time, claimant understood that he had exhausted paid leave, but the manager did not advise claimant that he had become re-eligible for unpaid FMLA leave because 12 months had passed since his heart attack and the beginning of his last FMLA leave period.

(5) On November 25, 2015, before claimant turned in his resignation notice, the employer discharged claimant from his employment. Claimant disagreed with the reasons for the discharge and filed a grievance with the employer. After a review, the employer’s grievance committee reversed the discharge decision and reinstated claimant’s employment, effective December 22, 2015. However, on that day, claimant resigned from his employment for health reasons based on his physician’s encouragement, because he could not afford to take an indefinite unpaid leave.

**CONCLUSIONS AND REASONS:** We disagree with the ALJ. Claimant voluntarily left work with good cause.

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) (August 3, 2011). The standard is objective. *McDowell v. Employment Department*, 348 Or 605, 612, 236 P2d 722 (2010). Claimant had a debilitating heart condition for well over a year, which was a permanent or long term “physical or mental impairment” as defined at 29 CFR §1630.2(h). A claimant with that impairment who quits work must show that no reasonable and prudent person with the characteristics and qualities of an individual with such impairment would have continued to work for his employer for an additional period of time.

Claimant quit work to protect his health because he was encouraged by his physician to take time off work due to his debilitating heart condition and because he had exhausted paid leave available to him. In Hearing Decision 16-UI-55831, after finding that at the time claimant quit, he “had additional unpaid leave under FMLA available to him”, the ALJ concluded claimant quit work without good cause. The ALJ reasoned that although claimant’s heart condition may have constituted such a grave condition that a would cause a reasonable individual to stop working for the employer, claimant had the reasonable alternative of taking an indefinite protected but unpaid leave in order to “continue the employment relationship” for an unspecified period of time. Hearing Decision 16-UI-55831 at 3. We disagree.

Claimant asserted that he was unaware that he had any FMLA leave left available to him and the employer's witness did not assert or show that she made him aware that he might again qualify for FMLA leave when she spoke to him about his ability to continue working full time and intended resignation in early November. Under the circumstances, claimant could have reasonably concluded he had no protected leave, even if unpaid, available to him. Audio Record ~ 21:30 to 23:45. See *Early v Employment Department*, 247 Or App 328 (2015) (when the employer is aware that an employee intends to quit his job, the employer's failure to offer claimant reasonable alternatives to quitting under the circumstances presented "implicitly suggests that there were none.") Moreover, it has long been held that a leave without pay, for an unknown and possibly protracted period, is not a reasonable alternative to quitting work. See *Taylor v. Employment Division*, 66 Or App 313 (1984); *Sothras v. Employment Division*, 48 Or App 69 (1980).

On this record, the preponderance of the evidence shows that no reasonable and prudent person with the characteristics and qualities of an individual with claimant's heart condition, who had been continually encouraged by his physician to take time off from the job for an indefinite period due to the symptoms he experienced at work, would have continued to work for his employer for an additional period of time. Accordingly, we conclude that claimant quit work when he did with good cause and is not disqualified from receiving unemployment insurance benefits on the basis of his work separation.

**DECISION:** Hearing Decision 16-UI-55831 is set aside, as outlined above.<sup>1</sup>

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

**DATE of Service:** May 19, 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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<sup>1</sup> 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.