

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-1018

Reversed
No Disqualification

PROCEDURAL HISTORY: On July 7, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 100114). Claimant filed a timely request for hearing. On August 11, 2016, ALJ Triana conducted a hearing, and on August 12, 2016 issued Hearing Decision 16-UI-65550, affirming the Department's decision. On August 30, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) TOPS Malibu, Inc. employed claimant as a customer service representative from November 17, 2014 until May 6, 2016.

(2) In approximately August 2015, claimant's 16 year-old daughter became withdrawn and reclusive. Claimant was increasingly concerned about her daughter's emotional state. Around that time, claimant's daughter was diagnosed with depression, anxiety, psychosis and an eating disorder. The daughter began treatment with a psychiatrist. The psychiatrist informed claimant that her daughter had suicidal tendencies as a result of depression and that, at that time, those tendencies had developed into active suicidal thoughts. The psychiatrist advised claimant to be alert to her daughter's emotional state, and explained to her how to make inquiries of her daughter that would elicit accurate information about her emotional state. After August 2015, the daughter continued to receive psychiatric treatment and, after time, she was no longer actively suicidal.

(3) After August 2015, claimant brought up some of her concerns about her daughter in non-work conversations with the employer's office manager. Beginning sometime around early April 2016, claimant observed that her daughter was again isolating herself and again becoming withdrawn and reclusive. From what claimant's daughter told claimant, it appeared that the daughter was extremely depressed and entering another phase of active suicidal ideation. Claimant arranged for her daughter to speak with her treating psychiatrist.

(4) By approximately mid-April 2016, claimant decided she needed to stay at home during the days to ensure that her daughter did not act on her suicidal thoughts. Claimant did not have any family or close

friends in the area who would be able to provide the necessary oversight her daughter needed during the days. Claimant worked the day shift for the employer. She looked for a new job that would allow her to work nights and be at home during the days. Claimant did not think to ask the employer if she could take a leave of absence since the employer had a small staff, it did not have the staffing to readily accommodate an employee on leave, and claimant knew the employer had sought to terminate the only other employee claimant was aware had taken a leave.

(5) On April 22, 2016, claimant informed the operations manager that she was resigning because she needed to stay home days to oversee the well-being of her daughter and she had found a job elsewhere that allowed her to work nights. The operations manager accepted the resignation and did not attempt to offer claimant a different schedule, a leave of absence, or any other accommodation that would allow claimant to care for her daughter without leaving work.

(6) Effective May 6, 2016, claimant voluntarily left work. As of August 2016, claimant's daughter continued to experience symptoms of mental illness and her psychiatrist continued to recommend that claimant consistently be home and available to her daughter.

CONCLUSIONS AND REASONS: We disagree with the ALJ and conclude that 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-65550, the ALJ concluded claimant did not show good cause for leaving work when she did. Although the ALJ found that the emotional state of claimant’s daughter constituted a “grave” reason for claimant to leave work, the ALJ concluded that asking the employer to allow her take a leave from employment to care for her daughter was an alternative to quitting work, and the employer “provided persuasive testimony that it would have accommodated that request either by hiring a temporary replacement for claimant or simply placing claimant on a leave of absence”, making that alternative reasonable. Hearing Decision 16-UI-65550 at 2. We agree with the ALJ that claimant's situation was grave, but disagree that she had a reasonable alternative to leaving work because of it.

It was plain from the record that claimant’s daughter had serious mental health conditions and claimant needed to provide care for her daughter during the days when she would otherwise have been working for the employer. Notably, claimant quit work on May 6, 2016 and three months later, at the time of the hearing, her daughter still needed her at home and the daughter’s psychiatrist was suggesting that she continue remaining “consistently at home” with the daughter during days. Audio at ~13:59. Claimant's personal situation was grave.

The record fails to show that a leave of absence was a reasonable alternative for claimant to quitting, or that another reasonable alternative existed. At the time of the hearing, the situation that caused claimant to quit work was ongoing, and there was no evidence in the record about how long a leave claimant required or when claimant's daughter would likely be sufficiently improved to allow claimant to work again during the day. It appears the employer was not legally required to accommodate claimant's leave of absence.¹ Although the employer's witness testified that the employer would have done what it could to accommodate claimant regardless, it is not clear what the employer could realistically have done to cover for claimant during the indefinite absence she required. Audio at ~27:20. As well, despite its good intentions, the employer did not rebut claimant's testimony that the employer had sought to discharge the only other employee claimant knew had taken a leave of absence while the employee was on that leave. Audio at ~11:50. Although the employer made efforts to improve staffing and cover claimant's duties, we find it unlikely that a business with a small staff and only two customer service representatives would have been able to accommodate the protracted leave of indefinite duration that claimant needed. Audio at ~12:07. Even assuming for the sake of argument that the employer had been able to support claimant's leave, it appears that any leave available to her would mainly have been unpaid. The Court of Appeals has previously held, and we agree, that a protracted unpaid leave of absence is generally not a reasonable alternative to leaving work. *See Sothras v. Employment Division*, 48 Or App 69, 616 P2d 524 (1980) (under different circumstances, an unpaid leave of four months was not a reasonable alternative to quitting work).

In sum, the record was ambiguous about whether or not leave was, as a practical matter, available to claimant, much less the duration of leave she required, and any leave of absence that claimant took would ultimately have been unpaid. Under the circumstances, the theoretical possibility of a protracted unpaid leave was not a reasonable alternative to quitting work, and the record failed to show that other alternatives were available to claimant that would have allowed her to deal with her grave personal situation short of quitting work. No reasonable and prudent person would have continued working under the circumstances. We therefore conclude that claimant showed good cause for leaving work when she did, and is not disqualified from receiving unemployment insurance benefits.

DECISION: Hearing Decision 16-UI-65550 is reversed as set out above.²

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

DATE of Service: October 12, 2016

¹ The employer had fewer than 25 employees. An employer with less than 25 employees is not required under the Oregon Family Medical Leave Act (OFLA) to make an unpaid leave of equal to or less than 12 weeks available to eligible employees and an employer with less than 50 employees is not required to make an up to 12 week leave available under the federal Family Medical Leave Act (FMLA). ORS 659A.153(1); 29 USC §2611(2)(B)(ii).

² This decision reverses a hearing decision that denied benefits. We note, however, that the circumstances claimant described at the hearing raised a potential issue regarding her availability for work that might independently affect whether or not benefits are payable based on this decision. Please note that payment of benefits owed, if any, 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. 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.

Please help us improve our service by completing an online customer service survey. To complete the survey, please go to <https://www.surveymonkey.com/s/5WQXNJH>. If you are unable to complete the survey online and wish to have a paper copy of the survey, please contact our office.