

**EMPLOYMENT APPEALS BOARD DECISION**  
**2016-EAB-1190**

*Reversed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On June 28, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 83302). Claimant filed a timely request for hearing. On July 22, 2016, ALJ S. Lee conducted a hearing, and on July 28, 2016 issued Hearing Decision 16-UI-64648, affirming the Department's decision. On August 18, 2016, claimant filed an application for review with the Employment Appeals Board (EAB). On September 12, 2016, EAB issued Appeals Board Decision 2016-EAB-0961, reversing the hearing decision and remanding the case for additional information. On September 27, 2016, ALJ S. Lee conducted a hearing, and on October 5, 2016 issued Hearing decision 16-UI-68629, again concluding that claimant voluntarily left work without good cause. On October 25, 2016, claimant filed an application for review of Hearing Decision 16-UI-68629 with EAB.

**FINDINGS OF FACT:** (1) Baker & Gingell, PC employed claimant as a staff accountant from December 1, 2014 until April 29, 2016.

(2) In the early 2000s, claimant's physician diagnosed claimant with an allergy to spearmint. In approximately 2010, claimant was exposed to toxic mold, diagnosed with asthma, and prescribed an inhaler. Claimant took daily allergy medication and claimant was advised to avoid exposure to her allergen and use an inhaler and an antihistamine if she experienced an allergic reaction.

(3) Claimant continued to experience symptoms of an allergic reaction around spearmint after her diagnosis. She experienced widespread hives over her back and around her neck.<sup>1</sup> She also experienced nausea, shortness of breath and wheezing. Claimant took an antihistamine to alleviate some of her symptoms, but felt unwell and exhausted while taking it.

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<sup>1</sup> Hives are swollen red welts that cause mild to severe itching and last minutes to years depending on the severity. See <http://acaai.org/allergies/types/skin-allergies/hives-urticaria>.

(4) Prior to October 2015, claimant and another staff accountant were friendly in the workplace. During the period of time claimant and the other accountant were friendly, claimant disclosed to the other accountant that she had an allergy to spearmint. In October 2015, the other accountant abruptly stopped speaking with or being friendly toward claimant for reasons unknown to claimant.

(5) In mid-March 2016, a third accountant chewed spearmint gum in the workplace. Claimant began to experience an allergic reaction and felt sick. She asked an administrative support staff person to ask the coworker to discard the gum, and the coworker complied. Claimant went home early from work because of her allergic reaction.

(6) The following week, the accountant with whom claimant used to be friendly brought and chewed spearmint gum in the office for the first time. Claimant experienced an allergic reaction that included hives, shortness of breath and wheezing. Claimant felt too sick to remain at work and had to leave, and reported the problem to one of the employer's co-owners. She did not point to her visible hives or go into detail about her physical symptoms because she considered them apparent and did not believe the employer needed to have all the details of her symptoms in order to address the problem. One of the employer's co-owners told the other accountant not to bring spearmint gum into the workplace again.

(7) During the first week of April 2016, the employer held a staff meeting during which staff members were instructed that gum was not allowed on the property. The other accountant continued to chew spearmint gum before work and carry spearmint gum with her at the workplace. Claimant continued to experience symptoms of allergic reactions at work when she encountered the coworker. She had to use glasses instead of contacts because her eyes felt itchy and were burning, she had to use her inhaler at work, and she had to consume daily doses of an antihistamine. Between the antihistamine, which caused her to feel drowsy, and the 100-hour per week work weeks necessitated by the end of tax season, claimant felt exhausted at work. She consumed too much caffeine to compensate for her tiredness, which exacerbated her nausea. When claimant arrived home from work she typically had to go straight to bed, which affected her ability to be a parent to her child.

(8) By April 8, 2016, claimant felt "miserable" while at work. July 22, 2016 hearing, Audio recording at ~ 31:25. On April 8, 2016, the co-owner told claimant she could work from home or leave early if work allowed when she was feeling unwell. The employer could not assign claimant to work from home permanently or on a regular basis because the demands of the work sometimes necessitated claimant be present in the workplace. Claimant and the other accountant already worked at opposite ends of the employer's office and claimant was doing everything she could to avoid the other accountant, including altering her work hours so she could work before the other accountant arrived to work. The employer could not entirely separate claimant from the other accountant and lacked the ability to otherwise ensure that claimant and the other accountant did not encounter each other at work.

(9) On April 8, 2016, claimant notified the employer that she planned to quit work in three weeks. She felt "so sick" that she could not continue working. July 22, 2016 hearing, Audio recording at ~ 12:55. She believed that although the employer had tried to address the accountant's decision to repeatedly bring spearmint into the workplace, the employer's co-owners were "not her [the accountant's] parents" and could not "control" her behavior. July 22, 2016 hearing, Audio recording at ~ 35:20.

(10) Claimant's symptoms improved except if she was in proximity to the other accountant, at which time her symptoms worsened. On approximately April 14, 2016, claimant complained again that she smelled spearmint gum at work. The other co-owner spoke with the accountant and reminded her that she was not allowed to have gum in the workplace. The accountant reported that she had it in her car and has chewed it while in her car, but did not have it with her. However, claimant had seen spearmint gum in the accountant's pocket that day and concluded that the accountant had lied to the co-owner. After that incident, claimant stopped reporting the accountant to the employer's co-owners and did not pursue any further resolution of her problem because she believed the employer could not stop the accountant from using spearmint before work or carrying it with her at work.

(11) Claimant last worked for the employer on April 28, 2016. By the effective date of her resignation, April 29, 2016, claimant had repeatedly been exposed to the spearmint allergen at work, and the employer's efforts to eliminate the allergen from the workplace were not effective. Effective April 29, 2016, claimant quit work to avoid continued exposure to the spearmint allergen in the workplace.

**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). Claimant had an allergy, which may be considered 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 her employer for an additional period of time.

In Hearing Decision 16-UI-68629, the ALJ concluded that claimant's spearmint allergy and asthma were long-term conditions that affected her ability to breathe and conduct her affairs as normal.<sup>2</sup> Although the ALJ found claimant sincere and credible in her account of her experience with "her coworker's annoying behavior and persistence in bringing in spearmint gum," the ALJ was not persuaded that claimant's situation was grave. The ALJ reasoned, "While claimant had a serious health concern, she did not seek medical assistance or make the seriousness of [her] condition known to the employer. Claimant could have continued working for the employer, while asking the employer to take more action against her co-worker or while working with the employer to flex her schedule or telecommute to improve her working situation, even if it meant dealing with her co-worker's possible non-compliance . . . I am persuaded that a reasonable and prudent person, even one with asthma and allergies, would have done so, if the alternative was voluntarily leaving work and reducing her income to zero."<sup>3</sup> The ALJ

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<sup>2</sup> Hearing Decision 16-UI-68629 at 3.

<sup>3</sup> Hearing Decision 16-UI-68629 at 3-4.

further reasoned, “If the employer could not stop the co-worker after being notified that [she] was still violating their policies, then claimant would be justified in leaving her position.”<sup>4</sup>

At the time claimant left work, however, she had, on at least one occasion, personally told the accountant that she was allergic to spearmint. She personally told an administrator and asked a third accountant not to chew spearmint gum because of her allergy. She personally told the co-owners she was allergic to spearmint and was so sick from her reaction that she had to leave work and had visible hives. Claimant had also left work on at least two occasions when her allergic reaction to spearmint was too severe to allow her to complete her work day, and received permission from the employer to work from home when able in order to avoid exposure to the allergen. Given those circumstances, it is difficult to understand what effect providing the employer with additional personal medical details might have had on the situation or the employer’s reaction to it. It is also established in this record that claimant reported the accountant’s use of spearmint to the employer three times; a co-owner instructed the accountant in a one-on-one meeting not to use spearmint, during a staff meeting the co-owners again told the accountant (among others) that gum was not permitted at work, and, on a third occasion, a co-owner again personally instructed the accountant not to use gum or spearmint in the workplace. Claimant was also aware that the accountant had lied to the co-owner on that final occasion, and despite the repeated instructions, the accountant continued to use spearmint. Although the employer made repeated efforts to ensure that the accountant and other employees all stopped bringing spearmint gum to the workplace, the employer’s efforts were not successful at controlling the accountant’s behavior, and the employer’s business needs would not permit claimant to work from home full time.

The record developed at the hearings in this matter suggests there was little more the employer felt it could have done to address claimant’s concern. For example, when asked what else the employer was willing to do to address claimant’s problem, the employer’s witness replied, “We’d already instructed on April 14<sup>th</sup> . . . that [] it could not be on premises.”<sup>5</sup> When asked what else the employer could have done had the employer known specific details about claimant’s allergies and symptoms, the employer’s witness replied, “Well I would have tried to figure out what we could do” and “[i]f there was anything we could have done to alleviate it we could of.” The witness also testified, with respect to claimant’s allegation that the accountant lied to the employer about having spearmint in the office on April 14<sup>th</sup>, “I’m skeptical that that happened” and expressed doubts about the severity of claimant’s condition.<sup>6</sup> The employer’s witness also testified, “I don’t know what else we could have done based on the information that’d been conveyed to us,” but did not explain what the employer could have or would have done differently if, for example, the employer knew claimant had asthma in addition to feeling too sick to work due to allergy symptoms, especially given his skepticism concerning claimant’s health and the accountant’s continued behavior.<sup>7</sup> Given the number of incidents claimant experienced and reported, and the ineffectiveness of the employer’s apparently sincere, repeated, but ultimately ineffectual efforts to address claimant’s complaint, it appears that on the date claimant quit work, the

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<sup>4</sup> Hearing Decision 16-UI-68629 at 4.

<sup>5</sup> July 22, 2016 hearing, Audio recording at ~ 26:15.

<sup>6</sup> September 27, 2016 hearing, Audio recording at ~ 24:40-26:00.

<sup>7</sup> September 27, 2016 hearing, audio recording at ~28:00.

employer had sufficient information to establish that claimant was exposed to an allergen in the workplace that caused her to feel too sick to work, and that despite its repeated efforts to do so, “the employer could not stop the co-worker.” We conclude, therefore, that claimant was, as of the date she quit work, “justified in leaving her position” and did not need to continue suffering allergic reactions that made her get hives, feel itchy and nauseated, have difficulty breathing, wheeze, and take medication that made her feel so exhausted after work that she was unable to care for her child, even though quitting that work had the effect of “reducing her income to zero.”

No reasonable and prudent person with asthma and allergies to spearmint, when repeatedly exposed to the allergen by a coworker, whose repeated efforts to either avoid the coworker, avoid the workplace, treat her condition with medication, and recruit assistance from the employer’s co-owners to make the coworker stop, would continue working for the employer under these circumstances. Claimant demonstrated good cause for quitting work, and she should not be disqualified from receiving unemployment insurance benefits because of this work separation.

**DECISION:** Hearing Decision 16-UI-68629 is set aside, as outlined above.<sup>8</sup>

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

**DATE of Service:** November 18, 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>8</sup> **NOTE:** This decision reverses a hearing decision that denied benefits. Please note that payment of any benefits, if owed, may take from several days to two weeks for the Department to complete.