

**EMPLOYMENT APPEALS BOARD DECISION**  
**2018-EAB-0180**

*Reversed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On December 28, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 131639). Claimant filed a timely request for hearing. On January 29, 2018, ALJ S. Lee conducted a hearing, and on February 1, 2018, issued Hearing Decision 18-UI-102285, affirming the Department's decision. On February 20, 2018, claimant filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) United Community Action Network employed claimant as a registered nurse from February 2016 to October 24, 2017. Claimant's job consisted of performing home visits to assess the needs of and treat ill and at-risk children.

(2) Claimant had received treatment for cancer prior to January 2017. Beginning in January 2017, claimant began experiencing incidents of unpredictable nausea, stomach cramps, vomiting and diarrhea. The vomiting incidents lasted from 10 minutes to 3 hours. The incidents increased in frequency into June 2017, when they became so frequent that claimant became concerned that they had become a health issue for her patients. She also began taking her own car to her assignments to avoid any possibility of an incident occurring in an employer vehicle. Claimant consulted with her oncologist, who concluded that she was experiencing an acid reflux condition and prescribed medication for that condition.

(3) In June 2017, claimant requested a step-down from her position as a full-time lead nurse to work only part-time. The employer agreed and scheduled claimant to begin working part-time, 10-14 hours per week, on September 15, 2017. Later, in a COBRA election notice, the employer notified claimant by mail that her health insurance would end on September 30, 2017 because of her "reduction in hours of employment" after September 15, 2017. Exhibit 1.

(4) Although she took the medication her oncologist had prescribed, by August 2017, claimant experienced increasing incidents of vomiting several times per week and sometimes vomiting and diarrhea simultaneously, which, on several occasions, caused her to leave work unexpectedly after informing the employer that she was ill. Eventually, beginning in the last week of August 2017, claimant remained home from work after informing the employer she was suffering from a serious medical condition. She utilized her remaining paid time off (PTO) for approximately a week and one half, after which she remained at home on unpaid leave.

(5) On September 11, 2017, claimant returned to her oncologist and explained that the prescribed medication had not been effective in alleviating her condition. He authorized a CT scan of her abdomen to be performed on September 22, 2017, to rule out the possibility of a recurrence of her cancer.

(6) On September 14, 2017, the employer sent claimant a letter confirming that it was aware that she was away from work due to a medical condition and notifying her that she might be eligible for protected leave under the Family Medical Leave Act (FMLA) and Oregon Family Leave Act (OFLA) if her condition was “serious”, as certified by her medical provider. Exhibit 1. Claimant received the necessary forms and asked her oncologist complete them but he refused, explaining that it took too much time to do so and that he questioned whether an acid reflux condition qualified as a serious medical condition.

(7) On September 22, 2017, claimant received the CT scan, which indicated that she was suffering from a possible appendicitis and claimant was directed to an emergency room, after which she was hospitalized for surgery. However, the consulting surgeon concluded that her condition might be treatable with antibiotics rather than surgery, and gave claimant the option to choose either course of treatment. Claimant chose a course of antibiotics and was released from the hospital. Afterward, claimant remained at home, but saw no improvement in her condition, despite taking the medication.

(8) On October 24, 2017, after unsuccessfully attempting at least two courses of medication, losing weight, and consistently being tired and sick with vomiting and diarrhea, all of which affected her ability to safely perform her nursing duties, with no end to her symptoms in sight, and after being notified that her employer paid medical benefits had ended and that her physician would not complete necessary FMLA paperwork, claimant quit work.

**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 she (or he) proves, by a preponderance of the evidence, that she had good cause for leaving work when she did. ORS657.176(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). By October 2017, claimant had suffered from an unspecified and debilitating abdominal condition for over nine months, 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 18-UI-102285, after concluding that claimant suffered from a serious medical condition and that because her unpredictable medical symptoms made it difficult for her to consistently and safely perform her home visits her situation was “grave,” the ALJ nonetheless further concluded that claimant left work without good cause. The ALJ reasoned,

...claimant failed to explore if there were reasonable alternatives to her leaving her position...First, claimant could have taken FMLA leave...While I found claimant credible that her oncology doctor would not complete the FMLA paperwork...she did not ask him again when the CT scan showed [a possible] perforated appendix...Further...[after the failed antibiotics]... she did not return to any doctor to see what further possible treatments were available...[and] did not go to her employer to see if there was alternative work or accommodations that could be made...

Hearing Decision 18-UI-102285 at 4. We agree with the ALJ that claimant’s situation was grave, but disagree that claimant had reasonable alternatives to quitting.

By the time claimant quit on October 24, 2017, claimant had already been off work for more than seven weeks without any improvement in her condition and was on unpaid leave. And, although she did not return to her oncologist after September 11, 2017 to again request that he fill out FMLA paperwork, as of October 1, 2017, claimant no longer had medical coverage or any income and her course of antibiotics had not yet been completed, so she did not know whether that would be successful or not. Moreover, even if she had been granted such leave, it would have been indefinite, likely protracted, and would have remained unpaid. *See Sothras v. Employment Division*, 48 Or App 69, 616 P2d 524 (1980) (unpaid leave generally is not a reasonable alternative to leaving work if it would not, in a reasonably short period of time, resolve the issues that gave rise to the grave situation.).

Although claimant did not specifically request an accommodation from the employer for her medical condition, she was persuasive that the only at home work that was possible was charting, but that since she was no longer performing any nursing duties, charting would not be necessary. Although claimant’s supervisor suggested that some short-term work at home might have been possible, the record as a whole demonstrates that such an alternative was likely a futile one, given claimant’s circumstances, and fact that the employer had not offered any such work to her after knowing that she had been home for weeks, unpaid, due to a medical condition. Given the vagueness and lack of specificity in the record, there is insufficient evidence to establish that an accommodation in her work duties was an actual, concrete and reasonable alternative for claimant. *See Gonzales v. Employment Department*, 200 Or App 547, 115 P3d 976 (2005) (evidence insufficient to show claimant’s theoretical transfer to other work was a reasonable alternative when no evidence that employer actually checked and confirmed that such work was available and that claimant was qualified and capable of performing that job).

On this record, claimant demonstrated that her circumstances were grave and that, when she left work, no reasonable and prudent traveling nurse with the characteristics and qualities of an individual with her impairment would have continued to work for her employer for an additional period of time.

Accordingly, claimant had good cause for leaving work when she did and is not disqualified from receiving unemployment insurance benefits on the basis of her work separation.

**DECISION:** Hearing Decision 18-UI-102285 is set aside, as outlined above.<sup>1</sup>

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

**DATE of Service:** March 28, 2018

**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.