

- DECISION -

Claimant:
VICTORIA S CONNOR

Decision No.: 2032-BR-12

Date: June 08, 2012

Appeal No.: 1128936

Employer:
J & G WITH A E, INC

S.S. No.:

L.O. No.: 64

Appellant: Claimant

Issue: Whether the claimant left work voluntarily, without good cause within the meaning of Maryland Code, Labor and Employment Article, Title 8, Section 1001.

- NOTICE OF RIGHT OF APPEAL TO COURT -

You may file an appeal from this decision in the Circuit Court for Baltimore City or one of the Circuit Courts in a county in Maryland. The court rules about how to file the appeal can be found in many public libraries, in the Maryland Rules of Procedure, Title 7, Chapter 200.

The period for filing an appeal expires: July 09, 2012

REVIEW OF THE RECORD

After a review of the record, the Board adopts the hearing examiner's findings of fact but concludes that those facts warrant different conclusions of law and a reversal of the hearing examiner's decision.

The General Assembly declared that, in its considered judgment, the public good and the general welfare of the citizens of the State required the enactment of the Unemployment Insurance Law, under the police powers of the State, for the compulsory setting aside of unemployment reserves to be used for the benefit of individuals unemployed through no fault of their own. *Md. Code Ann., Lab. & Empl. Art., §8-102(c)*. Unemployment compensation laws are to be read liberally in favor of eligibility, and disqualification provisions are to be strictly construed. *Sinai Hosp. of Baltimore v. Dept. of Empl. & Training, 309 Md. 28 (1987)*.

The Board reviews the record *de novo* and may affirm, modify, or reverse the findings of fact or conclusions of law of the hearing examiner on the basis of evidence submitted to the hearing examiner, or evidence that the Board may direct to be taken, or may remand any case to a hearing examiner for purposes it may direct. *Md. Code Ann., Lab. & Empl. Art., §8-510(d); COMAR 09.32.06.04*. The Board fully inquires into the facts of each particular case. *COMAR 09.32.06.03(E)(1)*.

“Due to leaving work voluntarily” has a plain, definite and sensible meaning, free of ambiguity. It expresses a clear legislative intent that to disqualify a claimant from benefits, the evidence must establish that the claimant, by his or her own choice, intentionally and of his or her own free will, terminated the employment. *Allen v. Core Target Youth Program, 275 Md. 69 (1975)*. A claimant’s intent or state of mind is a factual issue for the Board of Appeals to resolve. *Dept. of Econ. & Empl. Dev. v. Taylor, 108 Md. App. 250, 274 (1996), aff’d sub. nom., 344 Md. 687 (1997)*. An intent to quit one’s job can be manifested by actions as well as words. *Lawson v. Security Fence Supply Company, 1101-BH-82*. In a case where medical problems are at issue, mere compliance with the requirement of supplying a written statement or other documentary evidence of a health problem does not mandate an automatic award of benefits. *Shifflet v. Dept. of Emp. & Training, 75 Md. App. 282 (1988)*.

There are two categories of non-disqualifying reasons for quitting employment. When a claimant voluntarily leaves work, he has the burden of proving that he left for good cause or valid circumstances based upon a preponderance of the credible evidence in the record. *Hargrove v. City of Baltimore, 2033-BH-83; Chisholm v. Johns Hopkins Hospital, 66-BR-89*.

Quitting for “good cause” is the first non-disqualifying reason. *Md. Code Ann., Lab. & Empl. Art., §8-1001(b)*. Purely personal reasons, no matter how compelling, cannot constitute good cause as a matter of law. *Bd. Of Educ. Of Montgomery County v. Paynter, 303 Md. 22, 28 (1985)*. An objective standard is used to determine if the average employee would have left work in that situation; in addition, a determination is made as to whether a particular employee left in good faith, and an element of good faith is whether the claimant has exhausted all reasonable alternatives before leaving work. *Board of Educ. v. Paynter, 303 Md. 22, 29-30 (1985)*(requiring a “higher standard of proof” than for good cause because reason is not job related); *also see Bohrer v. Sheetz, Inc., Law No. 13361, (Cir. Ct. for Washington Co., Apr. 24, 1984)*. “Good cause” must be job-related and it must be a cause “which would reasonably impel the average, able-bodied, qualified worker to give up his or her employment.” *Paynter, 303 Md. at 1193*. Using this definition, the Court of Appeals held that the Board correctly applied the “objective test”: “The applicable standards are the standards of reasonableness applied to the average man or woman, and not to the supersensitive.” *Paynter, 303 Md. at 1193*.

The second category or non-disqualifying reason is quitting for “valid circumstances”. *Md. Code Ann., Lab. & Empl. Art., §8-1001(c)(1)*. There are two types of valid circumstances: a valid circumstance may be (1) a substantial cause that is job-related or (2) a factor that is non-job related but is “necessitous or compelling”. *Paynter 202 Md. at 30*. The “necessitous or compelling” requirement relating to a cause for leaving work voluntarily does not apply to “good cause”. *Board of Educ. v. Paynter, 303 Md. 22, 30 (1985)*. In a case where medical problems are at issue, mere compliance with the requirement of supplying a written statement or other documentary evidence of a health problem does not mandate an automatic award of benefits. *Shifflet v. Dept. of Emp. & Training, 75 Md. App. 282 (1988)*.

Section 8-1001 of the Labor and Employment Article provides that individuals shall be disqualified from the receipt of benefits where their unemployment is due to leaving work voluntarily, without good cause arising from or connected with the conditions of employment or actions of the employer or without, valid circumstances. A circumstance for voluntarily leaving work is valid if it is a substantial cause that is directly attributable to, arising from, or connected with the conditions of employment or actions of the employing unit or of such necessitous or compelling nature that the individual had no reasonable alternative other than leaving the employment.

In her appeal, the claimant requests "a new hearing". She reiterates her testimony from the hearing and contends the employer failed to take appropriate action after she complained of the harassment. She also contends she was compelled to quit this employment because of the circumstances. On appeal, the Board reviews the evidence of record from the Lower Appeals hearing. The Board will not order a new hearing or the taking of additional evidence unless there has been clear error, a defect in the record or a failure of due process. Here, the record is complete and both parties were afforded their full due process rights. The Board finds no reason to order a new hearing or to take additional evidence. The Board finds sufficient evidence on the record upon which a decision may be made.

The Board has conducted a thorough review of the record and finds the decision should be reversed. Although the claimant was confused about some of the specific dates, she was clear on what happened and what did not happen. The employer's witness testified, not from her own first-hand information, but based upon what was told to her by the owner. The hearing examiner improperly gave this hearsay testimony undue weight.

The evidence established that the claimant was subjected to unwanted sexual harassment by a co-worker. The claimant complained to the employer. The employer held a meeting the following day, telling employee's that they all needed to stop this behavior. The offending employee continued to engage in unwanted behavior of an inappropriate sexual nature. The offending employee told the claimant that the meeting had been a "joke". The employer maintained this allegation of sexual harassment was the result of sexual banter which had occurred among the claimant, the offending employee and another worker. The employer's witness only testified about this, stating she had affidavits, but not offering any corroborating evidence. The persons at the employer with actual knowledge of any of these events were not present and did not testify. The Board cannot find that the employer has refuted the claimant's credible testimony that she quit because of sexual harassment in the workplace. The Board also does not find that the claimant was obligated to remain and see if things would change in the future, when nothing changed after the meeting. A worker is not required to engage in an act of apparent futility in order to establish good cause. Here, the claimant quit for reasons which were compelling and which were directly related to her employment. She has shown good cause.

The Board notes that the hearing examiner did not offer or admit the *Agency Fact Finding Report* into evidence. The Board did not consider this document when rendering its decision.

The Board finds based on a preponderance of the credible evidence that the claimant met her burden of demonstrating that she quit this employment for good cause within the meaning of §8-1001 for quitting this employment. The decision shall be reversed for the reasons stated herein.

DECISION

It is held that the claimant voluntarily quit, but for good cause connected with the work, within the meaning of Maryland Code Annotated, Labor and Employment Article, Title 8 Section 1001. No disqualification is imposed based upon the claimant's separation from employment with J & G WITH A E, INC.

The Hearing Examiner's decision is reversed.



Donna Watts-Lamont, Chairperson



Clayton A. Mitchell, Sr., Associate Member

VD

Copies mailed to:

VICTORIA S. CONNOR

J & G WITH A E INC

Susan Bass, Office of the Assistant Secretary

UNEMPLOYMENT INSURANCE REMAND APPEALS DECISION

VICTORIA S CONNOR

SSN #

Claimant

vs:

J & G WITH A E, INC

Employer/Agency

Before the:

**Maryland Department of Labor,
Licensing and Regulation**

Division of Appeals

1100 North Eutaw Street

Room 511

Baltimore, MD 21201

(410) 767-2421

Appeal Number: 1128936

Appellant: Claimant

Local Office : 64 / BALTOMETRO
CALL CENTER

January 13, 2012

For the Claimant: PRESENT, LUIS G. FIGUEROA, ESQ.

For the Employer: PRESENT, NANCY JUDE

For the Agency:

ISSUE(S)

Whether the claimant's separation from this employment was for a disqualifying reason within the meaning of the MD. Code Annotated, Labor and Employment Article, Title 8, Sections 1001 (Voluntary Quit for good cause), 1002 - 1002.1 (Gross/Aggravated Misconduct connected with the work), or 1003 (Misconduct connected with the work).

PREAMBLE

The Claim Specialist made a "Benefit Determination" on August 2, 2011, to which the claimant timely appealed to the Division of Lower Appeals. On September 8, 2011, Hearing Examiner KG Boettger, Esq., entered a *Decision* reversing the aforementioned "Benefit Determination," to which the claimant timely appealed to the Board of Appeals. By *Remand Order* entered on December 9, 2011, the Board of Appeals remanded the matter for a *de novo* hearing on the merits of the case because the claimant did not receive notice for the hearing.

FINDINGS OF FACT

The claimant, Victoria S. Connor, began working for this employer, J & G With A E, Inc, on December 10, 2010. At the time of separation, the claimant was working as a receptionist, earning \$9.00 per hour. The claimant last worked for the employer on February 21, 2011, before quitting under the following circumstances:

On February 17, 2011, Chris Furchert, sales representative, sent a picture message of his penis to the claimant. The claimant reported this to Michelle, the sister-in-law of Mario Triscandaro, the owner, on February 17, 2011 at night. On February 18, 2011, Mr. Triscandaro conducted an investigation into the incident and discovered that the claimant, Mr. Furchert, and the another employee had all been having sexual conversations. Mr. Triscandaro advised all of the parties to stop such behavior. The claimant requested a transfer to another store, but the employer did not have a transfer available for the claimant. Mr. Furchert also showed the claimant pictures of topless women and asked the claimant for her opinion about them. The claimant asked Mr. Furchert to stop showing her such pictures. The claimant did not report this issue to the employer. On February 21, 2011, the claimant quit the employment.

CONCLUSIONS OF LAW

Md. Code Ann., Labor & Emp. Article, Section 8-1001 provides that an individual is disqualified from receiving benefits when unemployment is due to leaving work voluntarily. The Court of Appeals interpreted Section 8-1001 in Allen v. CORE Target City Youth Program, 275 Md. 69, 338 A.2d 237 (1975): "As we see it, the phrase 'leaving work voluntarily' has a plain, definite and sensible meaning...; it expresses a clear legislative intent that to disqualify a claimant from benefits, the evidence must establish that the claimant, by his or her own choice, intentionally, of his or her own free will, terminated the employment." 275 Md. at 79.

Md. Code Ann., Labor & Emp. Article, Section 8-1001 provides that an individual shall be disqualified for benefits where unemployment is due to leaving work voluntarily without good cause arising from or connected with the conditions of employment or actions of the employer, or without valid circumstances. A circumstance is valid only if it is (i) a substantial cause that is directly attributable to, arising from, or connected with conditions of employment or actions of the employing unit; or (ii) of such necessitous or compelling nature that the individual has no reasonable alternative other than leaving the employment.

EVALUATION OF EVIDENCE

The Hearing Examiner considered all of the testimony and evidence of record in reaching this decision. Where the evidence was in conflict, the Hearing Examiner decided the Facts on the credible evidence as determined by the Hearing Examiner.

The claimant had the burden to show, by a preponderance of the evidence, that she voluntarily quit his position for reasons that constitute either good cause or valid circumstances pursuant to the Maryland Unemployment Insurance Law. Hargrove v. City of Baltimore, 2033-BH-83. In this case, this burden has not been met.

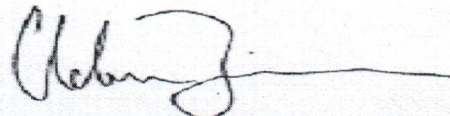
The claimant credibly testified that Mr. Furchert sent her a picture of his penis. After the claimant reported such behavior to the owner's sister-in-law, the employer conducted an investigation. The employer began to make a reasonable attempt to address the issue, and the claimant elected to quit prior to the employer having a legitimate attempt to remedy the issue. Further, the employer credibly testified the claimant's request for a transfer was not available because the employer did not have work available for the claimant at another location. The claimant failed to give the employer the opportunity to remedy the issue prior to quitting the employment.

It is thus determined that the claimant has concurrently failed to demonstrate that the reason for quitting rises to the level necessary to demonstrate good cause or valid circumstances within the meaning of the sections of law cited above.

DECISION

IT IS HELD THAT the claimant's unemployment was due to leaving work voluntarily without good cause or valid circumstances within the meaning of Md. Code Ann., Labor & Emp. Article, Section 8-1001. Benefits are denied for the week beginning February 20, 2011 and until the claimant becomes reemployed and earns at least 15 times the claimant's weekly benefit amount in covered wages and thereafter becomes unemployed through no fault of the claimant.

The determination of the Claims Specialist is reversed.



A C Zimmerman, Esq.
Hearing Examiner

Notice of Right to Request Waiver of Overpayment

The Department of Labor, Licensing and Regulation may seek recovery of any overpayment received by the Claimant. Pursuant to Section 8-809 of the Labor and Employment Article of the Annotated Code of Maryland, and Code of Maryland Regulations 09.32.07.01 through 09.32.07.09, the Claimant has a right to request a waiver of recovery of this overpayment. This request may be made by contacting Overpayment Recoveries Unit at 410-767-2404. If this request is made, the Claimant is entitled to a hearing on this issue.

A request for waiver of recovery of overpayment does not act as an appeal of this decision.

Esto es un documento legal importante que decide si usted recibirá los beneficios del seguro del desempleo. Si usted disiente de lo que fue decidido, usted tiene un tiempo limitado a apelar esta decisión. Si usted no entiende cómo apelar, usted puede contactar (301) 313-8000 para una explicación.

Notice of Right of Further Appeal

Any party may request a further appeal either in person, by facsimile or by mail with the Board of Appeals. Under COMAR 09.32.06.01A(1) appeals may not be filed by e-mail. Your appeal must be filed by January 30, 2012. You may file your request for further appeal in person at or by mail to the following address:

Board of Appeals
1100 North Eutaw Street
Room 515
Baltimore, Maryland 21201
Fax 410-767-2787
Phone 410-767-2781

NOTE: Appeals filed by mail are considered timely on the date of the U.S. Postal Service postmark.

Date of hearing: January 03, 2012
DAH/Specialist ID: RWD1D
Seq No: 001
Copies mailed on January 13, 2012 to:
VICTORIA S. CONNOR
J & G WITH A E INC
LOCAL OFFICE #64