-DECISION-

Claimant:
SINDY A KIMMIS

Employer:
STEIN ERIKSEN LODGE

Decision No.: 1469-BR-14

Date: May 28, 2014

Appeal No.: 1400765

S.S. No.:

L.O. No.: 63

Appellant: Claimant

Issue: Whether the claimant failed, without good cause, to apply for or to accept available, suitable work within the meaning of Maryland Code, Labor and Employment Article, Title 8, Section 1005.

- 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: June 27, 2014

REVIEW OF THE RECORD

After a review of the record, the Board adopts the hearing examiner's findings of fact, but concludes that these 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. *Md. Code Ann., Lab. & Empl. Art., § 8-510(d).* The Board fully inquires into the facts of each particular case. *COMAR 09.32.06.03(E)(1).*

Section 8-1005 of the Labor and Employment Article provides that an individual who otherwise is eligible to receive benefits is disqualified from receiving benefits if the Secretary finds that the individual, without good cause, failed to;

i. apply for work that is available and suitable when directed to do so by the Secretary;
ii. accept suitable work when offered; or
iii. return to the individual's usual self-employment when directed to do so by the Secretary.

In her appeal, the claimant offers multiple contentions of error as to the conclusions of law and the evaluation of evidence in the hearing examiner's decision. The claimant requests an opportunity for oral argument and requests leave to submit additional documentation into the record. Because the Board generally agrees with the claimant's contentions, and because the Board is reversing the hearing examiner's decision, the claimant's motions for oral argument and leave to supplement the record are denied.

On appeal, the Board reviews the evidence of record from the Lower Appeals hearing. The Board will not order the taking of additional evidence or a new hearing unless there has been clear error, a defect in the record, or a failure of due process. The record is complete. Both parties appeared and testified. Both parties were given the opportunity to cross-examine opposing witnesses and to offer and object to documentary evidence. Both parties were offered closing statements. The necessary elements of due process were observed throughout the hearing. The Board finds no reason to order a new hearing or take additional evidence in this matter. Sufficient evidence exists in the record from which the Board may make a decision.

The Board has thoroughly reviewed the record from the hearing but disagrees with the hearing examiner's decision. The claimant contended that the employer was changing its factual statements based upon the state (Kansas or Maryland). That contention is in error. There were actually different issues. In Maryland, the only issue before the hearing examiner, and before the Board, was whether the claimant refused, without good cause, to accept an offer of suitable work. The other issue concerned her actual separation from employment and the question of whether that separation was disqualifying previously was

adjudicated by the State of Kansas. The facts were different in each proceeding because the issue was different and each issue arose at a different time.

Contrary to one of the claimant's contentions, the employer did make a bona fide and specific offer of work. The claimant knew what the terms and conditions of employment were; she knew what the wages were; she knew what the duties were; she knew when the work was likely to start. The offer was genuine, specific, and suitable. However, the Board concludes that the claimant had good cause to decline reemployment with this employer.

The claimant had, during the time she was off work, moved back to her parents' home in Kansas, approximately 1,300 miles from her former employment. The claimant was not financially able to remain in a ski resort town, unemployed during the slow season, when most businesses were quite slow if not completely closed. The claimant was under no obligation to remain in Utah pending a return to work sixty or more days into the future. She was free to move to Kansas, or anywhere else she chose. She had no obligation to remain in proximity to the employer's location. The hearing examiner's finding that this distance was not good cause is tantamount to requiring a claimant to move to wherever any employer may offer otherwise suitable employment. The law makes no such requirement. It does not matter why the claimant moved. She moved and the offer of work, while otherwise suitable, was 1,300 miles from her residence. It would be illogical, if not absurd, to expect the claimant to pack up and move that distance to resume employment in late November or early December, on a part-time basis, for $11 per hour, for four or five months, until the next seasonal lay-off in March or April.

Under the circumstances presented here, the claimant had good cause for refusing this offer of work. She remains entitled to benefits if she is other eligible and qualified.

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 upon a preponderance of the credible evidence that the employer did not meet its burden of demonstrating that the claimant failed to accept available, suitable work within the meaning of *Md. Code Ann., Lab. & Empl. Art. §8-1005*. The decision shall be reversed for the reasons herein stated.

DECISION

It is held that the claimant did not fail without good cause, to accept available, suitable work within the meaning of Maryland Code Annotated, Labor and Employment Article, Title 8, Section 1005. No disqualification is imposed under this section of law. Benefits are allowed for the week beginning December 1, 2013.

The Hearing Examiner's decision is reversed.

Donna Watts-Lamont, Chairperson

Eileen M. Rehrmann, Associate Member

VD
Copies mailed to:
SINDY A. KIMMIS
STEIN ERIKSEN LODGE
SUSAN BASS DLLR
Susan Bass, Office of the Assistant Secretary

UNEMPLOYMENT INSURANCE APPEALS DECISION

SINDY A KIMMIS

SSN #

Claimant

vs.

STEIN ERIKSEN LODGE

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: 1400765
Appellant: Employer
Local Office : 63 / CUMBERLAND CLAIM CENTER

February 11, 2014

For the Claimant: PRESENT

For the Employer: PRESENT , ERIC SHOWALTER, CELESTE ARMSTRONG

For the Agency:

ISSUE(S)

Whether the claimant failed to apply for or accept available, suitable work within the meaning of MD Annotated Code, Labor and Employment Article, Title 8, Section 1005.

FINDINGS OF FACT

The claimant, Sindy Kimmis, was employed with the Stein Eriksen Lodge from February 25, 2013 to September 1, 2013. At the time of separation, she claimant was working part time as a hotel concierge, earning $11.00 per hour.

The claimant established an unemployment claim effective December 30, 2012 with a weekly benefit amount of $319.00. The claimant reopened her claim effective May 16, 2013. She filed an additional claim effective September 24, 2013. She filed for benefits the weeks ending November 2, 9, 16, 23 and 30, 2013.

The employer is a ski resort and is closed during slow periods during April and May and from October through November each year. Originally, the claimant was hired as a seasonal front desk agent. That

position ended March 31, 2013 because of the seasonal closing. The claimant returned to her parents' home in Kansas during the time the employer was closed in April and May 2013. Celeste Armstrong, the guest services manager, then offered the claimant a part-time, year round position as a concierge. The claimant accepted the position on April 29, 2013 and started working in this position on June 7, 2013. She worked 20 to 32 hours per week

In August 2013, Ms. Armstrong told the staff as a group and one-on-one that they would be coming back to their jobs on December 1, 2013, after the fall seasonal closing.

On August 15, 2013, Ms. Armstrong received an e-mail from the claimant asking if Labor Day could be her last weekend because she was paying rent month to month and knew her hours would go down in September. In the claimant's August 15, 2013 e-mail to Ms. Armstrong, she states, "I will be going back to Kansas to reside with my family until it is time to return in December." Ms. Armstrong responded that she absolutely could work with that. If the claimant had not requested to stop working after Labor Day, the claimant would have had 16 to 24 hours of work per week through September 2013. After September 1, 2013, the claimant went back to her parents' home in Kansas. The employer stayed open through mid-October 2013. The employer was holding the claimant's job until the December reopening.

On November 4, 2013, Ms. Armstrong sent the claimant an e-mail stating that the employer was reopening the week of Thanksgiving and asking if anything had changed on the claimant's end. On November 11, 2013, Ms. Armstrong again sent the claimant an e-mail to confirm whether or not the claimant would be returning. She asked the claimant to let her know by November 13, 2013 and stated that if she did not hear from the claimant by then, she would assume the claimant was not returning. On November 12, 2013, the claimant sent an e-mail to Ms. Armstrong stating that she had permanently relocated to Kansas and it would be too costly for her to move again to Utah.

CONCLUSIONS OF LAW

Md. Code Ann., Labor & Emp. Article Section 8-1005 provides that a claimant may be disqualified from benefits where the claimant, without good cause, has failed to:

(1) apply for available, suitable work when directed to do so;
(2) accept suitable work when offered; or
(3) return to usual self-employment when directed to do so.

Section 8-1005 states that the following factors shall be considered in determining whether work is suitable for an individual:

(1) the degree of risk involved to the health, morals and safety of the individual;
(2) the experience and previous earnings of the individual;
(3) the previous training and physical fitness of the individual;
(4) the length of unemployment and the prospects for securing local work in the individual's usual occupation; and
(5) the distance of the available work from the individual's residence.

Section 8-1005 provides for a claimant's disqualification for a violation of its provisions. Such disqualification begins with the latest week in which the claimant was to have applied for work, was notified that suitable work was available, or was directed to return to self-employment, and continues for at least 5 but no more than 10 weeks or until the claimant becomes re-employed and has earned wages in covered employment that equal at least 10 times the claimant's weekly benefit amount. The duration of the penalty shall be governed by the factors cited above.

Where the employer wrote a letter to each striking employee requesting that the employee return to work, the Board held that the employer made a bona fide job offer despite the fact that the letter did not mention any specific duties, salaries or working conditions. The Board reasoned that the striking employees in that case were well aware of the salaries and duties of the jobs offered and the fact that the work started immediately. The Board held that the work was suitable and disqualified the claimants who refused the offer from receiving benefits. The Circuit Court and Court of Special Appeals affirmed the Board. Adams v. Cambridge Wire Cloth Company, 68 Md. App. 666, 515 A.2d 492 (1986), cert. denied, Adams v. Cambridge Wire Cloth Company, 308 Md. 382, 519 A.2d 1283 (1987).

The claimant reasonably believed that the employer offered her work on Saturdays and Sundays for six hours each day, but only through the holiday season. The job offer was suitable and the claimant's refusal was without good cause, since the claimant's prior work for this employer was also part-time (18 hours per week). However, since the job was for one-third fewer hours per week and its duration beyond the holiday season was uncertain, a minimum disqualification is appropriate. Berg v. Lee's Boutique, 141-BR-89.

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.

In this case, it is determined that the employer did communicate a bona fide job opening to the claimant with the following specifications: On November 4 and 11, 2013, the claimant's supervisor, Celeste Armstrong, notified the claimant by e-mail that the claimant could resume her part-time, year-round position as a hotel concierge after the seasonal break. It would be the same position she held prior to the seasonal break with the same duties, hours, pay and location. Although Ms. Armstrong did not specify in her e-mails the duties, salary, hours, date or location of the job, the claimant was well-aware that Ms. Armstrong was offering the same part-time, year-round job the claimant had before the seasonal break. In April 2013, when Ms. Armstrong hired the claimant for the concierge job, she told the claimant it was a part-time, year-round position and in August 2013, Ms. Armstrong personally told the claimant she would be returning on December 1, 2013. Additionally, the claimant's August 15, 2013 e-mail shows that she was aware she was to return to the job in December after the break. This offer is considered suitable work because it is the same job title, duties, hours, pay and location that the claimant previously had before the seasonal break.

It is further determined that the claimant's reason for failing to apply for or accept this work is not supported by good cause. The claimant worked in Utah. She chose to relocate to her parents' home in Kansas during the seasonal break, thereby creating the distance from the job.

Previously, during the seasonal break in the spring of 2013, the claimant relocated to her parents' home, but came back after the break to work at the Utah location where she had worked before the break. However, in November 2013, the claimant chose not to do so.

Consequently, I find that the claimant did fail to apply for or accept available, suitable work within the meaning of Md. Code Ann., Labor & Emp. Article Section 8-1005. A penalty under that section shall be imposed.

DECISION

IT IS HELD THAT the claimant failed without good cause to apply for and/or accept available, suitable work within the meaning of Md. Code Ann., Labor & Emp. Article, Section 8-1005. The claimant is disqualified from receiving benefits for the week beginning December 1, 2013 and until the claimant becomes reemployed and earns wages in covered employment that equal at least 10 times the claimant's weekly benefit amount.

The determination of the Claims Specialist is reversed.

This case is referred to the call center for a determination of whether the claimant's separation from her employment was for a disqualifying reason within the meaning of Md. Code Ann., Labor & Emp. Article, Title 8, Section 1001.

R. Tabackman

R M Tabackman, 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

This is a final decision of the Lower Appeals Division. Any party who disagrees with this decision 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 February 26, 2014. 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 31, 2014
CH/Specialist ID: WCU42
Seq No: 008
Copies mailed on February 11, 2014 to:

SINDY A. KIMMIS
STEIN ERIKSEN LODGE
LOCAL OFFICE #63
SUSAN BASS DLLR