

-DECISION-

Claimant:
MITCHELL A DEAN SR

Decision No.: 1639-BH-07

Date: August 07, 2007

Appeal No.: 0704683

Employer:
WACO PRODUCTS INC

S.S. No.:

L.O. No.: 60

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: September 06, 2007

- APPEARANCES -

FOR THE CLAIMANT:
Present
Bradford Warbasse-Attorney

FOR THE EMPLOYER:
William Taylor-President

PREMINLIMINARY STATEMENT

This matter was scheduled before the Board of Appeals for legal argument only, on July 10, 2007 at 10:00 a.m. The claimant, Mitchell A. Dean, appeared and was represented by counsel, Bradford W. Warbasse. William Taylor, President of WACO Products, Inc., appeared as representative for the employer.

EVALUATION OF THE EVIDENCE

The Board of Appeals has considered all of the evidence presented, including the testimony offered at the hearing. The Board has also considered all of the documentary evidence introduced in this case, as well as the Department of Labor, Licensing and Regulation's documents in the appeal file.

FINDINGS OF FACT

The Board of Appeals adopts the findings of fact of the Hearing Examiner. The Board of Appeals makes the additional finding of fact that the claimant quit his employment with Waco Products, Inc. to accept new employment for personal, but not economic reasons.

CONCLUSIONS OF LAW

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 serious, 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 a case of a voluntary quit the burden is on the claimant to prove, by a preponderance of credible evidence, that he quit his employment for reasons that rose to the level of good cause or valid circumstances with the meaning of Section 8-1001 of the Md. Code Ann., Labor and Employment Article. The claimant has met his burden in this case and established that he had valid circumstances for quitting his employment.

Voluntarily quitting one's job to accept better employment cannot constitute good cause within the meaning of Section 8-1001 as a matter of law. *Total Audio - Visual v. DLLR*, 360 Md. 387, 395, 758 A.2d 124, 128 (2000)("[a] plain reading of Section 8-1001 makes clear that leaving employment for a better paying job does not constitute 'good cause'.") It may, however, constitute "valid circumstances" if it can be shown that the reasons for quitting meet the "necessitous or compelling" test of Section 8-1001(c)(ii) (Section 8-1001(c)(i) is inapplicable as a matter of law in cases such as the one at bar. The Court of Appeals found, "[n]ot being directly related to, attributable to or connected with the employee's

employment or the actions of that employing unit, offers of higher pay as an inducement to leave existing employment must fall, if at all into [Section 8-1001(c)(ii)."]

This is a "stricter test" than good cause test. *Plein v. DLLR*, 369 Md. 421 (2002). Under this stricter test the Court of Appeals requires that more needs to be shown than that the precipitating event or cause "would reasonably [have] impel[led] the average able-bodied qualified worker to give up his or her employment." *Total Audio - Visual, supra, quoting Board of Educ. of Montgomery County v. Payner*, 303, Md. 22, 29, 491 A.2d 1186, 1189-90 (1985).

The Board's current interpretation of *Total Audio - Visual* read in conjunction with the *Plein* decision finds that voluntarily quitting one's job for purely economic reasons is neither "necessitous" nor "compelling" under Section 8-1001. To the extent that this interpretation is inconsistent, *Gagne v. Potomac Talking Book Services, Inc.*, 374-BH-03 in the Board overruled its prior precedent decision in *Gaskins v. UPS*, 1686-BR-00.

There must be a showing of something more connected with the conditions of the prior employment which motivated the claimant to quit his or her job to better employment to constitute a valid circumstance within the meaning of Section 8-1001. The Court of Appeals has stated, "Accepting more money and changing jobs is as much of a gamble and thus, as much of a personal matter as going in to business for oneself. In [the Court of Appeals'] view, it is unmistakably clear that Section 8-1001(a) was not designed to provide benefits when the precipitating cause for the voluntary leaving of employment was for higher pay or a better job. Instead, it was designed to prevent hardship to persons who lose their job through no fault of their own." *Plein v. DLLR*, 369 Md. 421 (2002), *quoting Total Audio - Visual*; (In *Plein, supra*, the claimant was employed by Atlas Tile & Terrazo as a tile setter's helper at a job paying \$9.00 per hour. He accepted employment with Home Depot, U.S.A. as a sales associate in the floor and wall department. The Home Depot job paid \$12.00 per hour with the prospect of receiving, after a waiting period, a health insurance plan and stock purchase options and, after one year, two weeks vacation and sick leave. The claimant left his employment with Atlas and began working at Home Depot on August 14, 2000. On September 27, 2000, the claimant was laid off through no fault of his own. The Courts of Appeals found that the claimant was not entitled to unemployment benefits under the "necessitous or compelling" test of Section 8-1001 under its interpretation and under the authority of *Total Audio - Visual*, 360 Md. 387, 400-01, 758, A.2d 124, 131-32 (2000)). The Court explained in *Plein*, "In *Total Audio-Visual*, this Court, albeit, and perhaps significantly so, a sharply divided one, determined, and held that the General Assembly did not intend that a person who voluntarily terminates his or her otherwise satisfactory employment for other employment with better pay be eligible to receive unemployment benefits when laid off through no fault of his or her own by the subsequent employer.

The claimant's primary reason for quitting this employment was to accept other employment that gave him the flexibility to ensure his child's safety. The circumstances surrounding his son's assault and the subsequent criminal trial made it necessary for the claimant to remain with his son until his son's school day officially began at 7:45 a.m. There was no one else available to perform this task or to accept this responsibility.

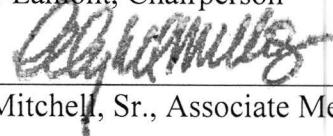
DECISION

It is held that the claimant left work voluntarily, without good cause but for valid circumstances, within the meaning of Maryland Code Annotated, Labor and Employment Article, Title 8, Section 1001. He is disqualified from receiving benefits from the week beginning January 14, 2007 and the four weeks immediately following.

The decision of the Hearing Examiner is reversed.



Donna Watts-Lamont, Chairperson



Clayton A. Mitchell, Sr., Associate Member

Francis E. Sliwka, Jr., Associate Member

Date of hearing: July 10, 2007

Copies mailed to:

MITCHELL A. DEAN SR
WACO PRODUCTS INC
BRADFORD W. WARBASSE ESQ
William Stuart Taylor
WACO PRODUCTS INC
Susan Bass, Office of the Assistant Secretary

UNEMPLOYMENT INSURANCE APPEALS DECISION

MITCHELL A DEAN SR

SSN #

Claimant

vs.

WACO PRODUCTS 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: 0704683

Appellant: Claimant

Local Office : 60 / TOWSON CALL
CENTER

April 06, 2007

For the Claimant: PRESENT, BRADFORD W. WARBASSE, ESQ

For the Employer: PRESENT, WILLIAM TAYLOR

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).

FINDINGS OF FACT

The claimant worked for the above-captioned employer from December of 2002 to January 19, 2007. At the time the claimant resigned, he was employed as a mechanic earning \$15.65 per hour.

After the claimant's son was accepted to a new school, the employer allowed the claimant to arrive to work late. The claimant's start time was supposed to be 7:00 a.m., but the school did not open until 7:45 a.m. Thereafter, the claimant's son was assaulted by another student at a different school. However, this other school shared some of the facilities used by the school the claimant's son attended. The claimant's son became a witness for the State of Maryland in a prosecution against this other child in the juvenile court. The claimant did receive threats from other students from this different school. The claimant's son's school

was also made aware of this problem. As a result, the claimant would wait until the doors of the school opened so that he could observe his child go into the school free from harm.

The claimant's child was 14 years old at the time. This situation was causing the claimant to arrive to work even later than previously accommodated by the employer. The doors to the school did not open until 7:45 a.m. and while previously the claimant was dropping his son off earlier, he was now, again, waiting until the actual school doors opened.

The claimant was concerned about arriving to work even later and approached his supervisor on numerous occasions regarding his concern. In response, the supervisor indicated that the claimant needed to get his personal issues resolved. However, the supervisor never told the claimant that he needed to begin arriving at work at 7:00 a.m. or gave the claimant a period of time to resolve the personal issues involving his son for which he was concerned and causing him to arrive even later to work. In addition, the employer has a progressive disciplinary procedure whereby an employee will get a verbal warning and a written warning prior to any possible termination. In this case, the claimant received no warnings either verbally or in writing to indicate that his job was in jeopardy. Nonetheless, the claimant quit to accept other employment with more flexible hours.

CONCLUSIONS OF LAW

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

A claimant who resigns is ineligible for benefits unless it is established, by a preponderance of the evidence, that this resignation was for good cause or valid circumstances. In the case at bar, this burden has not been met.

First, the employer witness was very credible. Alternatively, the claimant's testimony was not credible in many respects. Much of the claimant's testimony was the result of being led by his representative. Even after the claimant's counsel was warned, he continued to lead his client or attempt to do so. This portion of the claimant's testimony was largely unconvincing. In addition, the claimant never testified that he was told that he had to begin arriving to work at 7:00 a.m. The claimant did testify that his understanding was that he had to begin arriving to work at 7:00 a.m. at some point. However, there is no indication by the claimant as to when this change was to occur. In addition, the claimant's testimony indicated that it was not his employer that was coming to him and complaining but the claimant going to the employer with regard to his concerns. The claimant also testified that he was receiving complaints from coworkers. However, there is no indication that there were any threats from coworkers and this testimony was largely not credible as the claimant provided no names of individuals who complained to him as well as no dates or what was even specifically said to him on any particular occasion from a coworker. Further, as to conditions of

employment, the evidence indicates that the employer was being extremely generous with the claimant and allowing him to arrive late despite the initial agreement made at the time of hire. Thus, as to the conditions of employment, the claimant did not establish good cause for resigning. The evidence was insufficient to indicate that the employer actually changed the conditions of employment made at the time of hire or after but only that the employer was placing the claimant on notice that his additional lateness was going to need to be resolved by the claimant with regard to his personal issues regarding his son. The totality of the evidence therefore does not establish good cause or valid circumstances for this resignation based upon the conditions of employment.

To the extent that the claimant's reasons for resigning were purely personal, good cause can never be found. Board of Education of Montgomery County v. Paynter, 303 Md. 22 191A.2d. Further, when one resigns for purely personal reasons, valid circumstances may only be found when there are necessitous and compelling reasons for resigning and no reasonable alternative but to resign. In this case, the claimant clearly did not establish that no reasonable alternative was available as the totality of the evidence indicates that the employer was still giving the claimant time to resolve the issues involving the assault on the claimant's child. Further, the claimant's job was not seriously in jeopardy as the employer had not given the claimant any warnings, either verbally or in writing. The totality of the evidence indicates that the employer was still willing to work with the claimant. In addition, there is no indication that the claimant attempted to work with the school to allow the claimant's son to come into the building prior to 7:45 a.m. if he was worried about the safety of his child. Thus, the decision shall be reached that the claimant resigned for reasons which do not amount to good cause or valid circumstances.

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 January 14, 2007 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 affirmed.



C R Morrison, 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.

Notice of Right to Petition for Review

Any party may request a review 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 April 23, 2007. 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

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

Date of hearing: March 28, 2007
DAH/Specialist ID: USB39
Seq No: 001
Copies mailed on April 06, 2007 to:
MITCHELL A. DEAN SR
WACO PRODUCTS INC
LOCAL OFFICE #60
BRADFORD W. WARBASSE ESQ
William Stuart Taylor
WACO PRODUCTS INC
FILE