

-DECISION-

Claimant:
LORI A SMITH

Decision No.: 605-BH-14
Date: August 15, 2014

Appeal No.: 1325898

Employer:
O'BEERY MCLIQUORS LLC

S.S. No.: 213-72-4125

L.O. No.: 63

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 14, 2014

- APPEARANCES -

FOR THE CLAIMANT:
Lori A. Smith

FOR THE EMPLOYER:
Failed to Appear

EVALUATION OF THE EVIDENCE

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)*.

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.

This is a case of first impression on the issue of whether the claimant had good cause to voluntarily quit a job that paid less than the statutory minimum wage to seek and accept a job that paid at least the minimum wage. While common sense dictates that a claimant would have good cause, the Board notes that there existed confusion in light of the holdings in *Plein v. DLLR*, 369 Md. 421 (2002) and *Total Audio - Visual v. DLLR*, 360 Md. 387 (2000).

The Board issues this decision to clarify the applications of these cases to situations where a claimant voluntarily quits a job that does not pay in accordance with the wage and hour laws for a job that pays in full accord with the wage and hour laws. To the extent any prior Board holdings conflict with this decision, they are hereby overruled and this case shall be applied as controlling precedent.

In the instant case, the Board is persuaded that the claimant voluntarily quit her employment with O'Berry McLiquors, LLC because the employer was not paying the claimant a minimum wage and because the claimant had the opportunity to accept a job that paid at least the minimum wage. In the September 27, 2013 decision, the hearing examiner disqualified the claimant from benefits, finding that she voluntarily quit without good cause or valid circumstances "to accept another" job "for purely economic reasons" applying *Plein v. DLLR*, 369 Md. 421 (2002), *Total Audio - Visual v. DLLR*, 360 Md. 387 (2000) and *Gagne v. Potomac Talking Book Services, Inc.*, 374-BH-03.

The Board finds that the hearing examiner misapplied *Plein*, *Total Audio - Visual* and *Gagne* to the facts in this case. As the Court of Appeals 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. [bold emphasis added]

The Board is persuaded that the claimant's job with O'Beery McLiquors, LLC was not satisfactory employment; in fact, the employment was not legal employment because the claimant was not paid at least the statutory minimum wage for services rendered.

COMAR 09.12.41.19D(3) provides, "A tipped employees wages must equal at least the **minimum wage** when direct wages and tips are combined." [emphasis in original]. In 2013, Maryland's minimum wage was \$7.25 per hour.

The weight of the evidence in this case supports a finding that the claimant never received more than \$4.75 per hour even when combining her direct hourly wage (\$3.00 per hour) with her tips. During her tenure of employment in February 2013, the claimant received a total of \$217.00 in gross wages, including tips. The Board finds the claimant's job in no way, shape or form fits within the meaning of "satisfactory employment" as contemplated by *Total Audio-Visual* and *Plein*. Consequently, those decisions do not apply to the facts in the case at bar.

The Board is persuaded, based upon a preponderance of the credible evidence, that the employer's refusal to pay the claimant the statutory minimum wage is directly attributable to and connected with the conditions of employment. Applying the objective standard, the Board has no trepidation finding that good cause for the claimant's voluntarily quit is supported by the weight of the evidence in the claimant's record.

The Board notes that the employer, duly notified of the date, time and place of the hearings before the hearing examiner and the Board, failed to appear.¹ The Board finds the claimant's testimony and evidence credible and un-rebutted.

FINDINGS OF FACT

The Board adopts the hearing examiner's findings of fact. The Board also finds the following facts:

The employer initially paid the claimant a direct wage of \$2.00 per hour plus tips. After the claimant complained, the employer increased the claimant's guaranteed hourly wage to \$3.00 per hour plus tips. The employer informed the claimant it was her responsibility to entice potential patrons to come to the establishment in order to enhance business and increase her potential for tips. Shifting the burden to the claimant to procure business was an unreasonable requirement and not an original basis of the bargain for claimant's accepting employment with this employer.

At no time during her employment did the claimant make more than \$4.75 per hour including tips. At no time during her employment did the claimant make the minimum wage of \$7.25 per hour when combining her hourly wage with her earned tips.

The claimant's subsequent job with Barreville Outdoor Club paid more than the statutory minimum wage.

CONCLUSIONS OF LAW

The findings of fact and evaluation of the evidence are incorporated herein by reference.

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

¹ The *Agency Fact Finding Report* is not in evidence. The Board did not consider this document when rendering its decision; however, the Board notes that the employer did not respond to the Agency with separation information at the outset of this case.

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).

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.

Except as otherwise provided², each employer must pay each employee who is subject to both the applicable federal and Maryland statutes at least the minimum wage for that employee under the federal act³, and each other employee who is subject to the Maryland statute at least the highest minimum wage under the federal act, or a training wage under regulations⁴ that the Commissioner of Labor and Industry adopts.⁵

² See, e.g., *Md. Code Ann., Lab. & Empl. art., Section 3-414*.

³ *Md. Code Ann., Lab. & Empl. art., Section 3-413(b)(1)*.

⁴ See COMAR 09.12.41. et.seq.

⁵ *Md. Code Ann., Lab. & Empl. art., Section 3-413(b)(2)*.

The Board finds based on a preponderance of the credible evidence that the claimant met her burden of demonstrating that she quit for good cause within the meaning of § 8-1001. The hearing examiner's 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 O'BEERY MCLIQUORS LLC.

The Hearing Examiner's decision is reversed.



Clayton A. Mitchell, Sr., Associate Member



Eileen M. Rehrmann, Associate Member

VD

Date of hearing: February 25, 2014

Copies mailed to:

LORI A. SMITH

O'BEERY MCLIQUORS LLC

CAROLYN LATHROP STAFF ATTY.

PENNY WALKER SCHLAMOWITZ

Susan Bass, Office of the Assistant Secretary

UNEMPLOYMENT INSURANCE APPEALS DECISION

LORI A SMITH

SSN #

Claimant

vs.

O'BEERY MCLIQUORS LLC

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: 1325898

Appellant: Claimant

Local Office : 63 / CUMBERLAND
CLAIM CENTER

September 27, 2013

For the Claimant: PRESENT , PENNY WALKER, LEGAL AIDE

For the Employer:

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, Lori Smith, began working for this employer, O'Berry McLiquors LLC, on February 3, 2013. At the time of separation, the claimant was working as a bartender. The claimant last worked for the employer on February 28, 2013, before quitting under the following circumstances:

The claimant earned \$3.00 an hour plus tips working for this employer. The claimant then found a job at Barreville Outdoor Club making \$8.25 per hour working as a bartender. The claimant quit.

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.

In Total Audio-Visual Systems, Inc. v. DLLR, 360 Md. 387 (2000), the Court held that an individual who has left his or her employment to accept other employment has not left his or her job for good cause as defined in Section 8-1001(b)(1) of the Labor & Employment Article of the Annotated Code of Maryland. This is because quitting ones job for purely economic reasons is neither necessitous nor compelling. See also Plein v. Dep't of Labor Licensing & Regulation, 369 Md. 421, 800 A.2d 757 (2002); Gagne v. Potomac Talking Book Services, Inc., 374-BH-03.

However, a finding of valid circumstances is appropriate if the claimant can show that accepting the alternative employment was "of such a necessitous and compelling nature that the individual had no reasonable alternative other than leaving the employment." Gaskins v. UPS, 1686-BR-00.

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 her 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 the case at bar, that burden has not been met. Under Maryland law, voluntarily quitting one job to accept another cannot constitute a quit for good cause as a matter of law. See Total Audio-Visual, *supra*. Furthermore, pursuant to the Board of Appeals decision in Gagne, *supra*, a voluntary quit for purely economic reasons, as in the instant case, is a quit for neither good cause nor valid circumstances. Therefore, benefits must be denied at this time.

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 24, 2013 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.

D W Purdie Esq.

D W Purdie, 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 to Petition for Review

This is a final decision of the Lower Appeals Division. Any party who disagrees with this decision 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 October 15, 2013. 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 : September 20,2013
TH/Specialist ID: WCP5C
Seq No: 004
Copies mailed on September 27, 2013 to:

LORI A. SMITH
O'BEERY MCLIQUORS LLC
LOCAL OFFICE #63