

- DECISION -

Claimant:
CAROL L TUMMINELLO

Decision No.: 6200-BR-11

Date: November 10, 2011

Appeal No.: 1126270

S.S. No.:

Employer:
E & C ENTERPRISES INC

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: December 12, 2011

REVIEW ON THE RECORD

After a review on the record, the Board makes the following findings of facts and conclusions of law. The decision of the hearing examiner is reversed.

The claimant was employed by Eastern Petroleum for over seventeen years as a data specialist supervisor. On December 9, 2010, Eastern Petroleum was taken over by E&C Enterprises.

One week after the buy-out, the employees of Eastern Petroleum were told that the office in Annapolis, Maryland would be closed and that all employees would be transferred to Woodbridge, Virginia.

A move to this location would force the claimant to commute to upwards of four hours a day or relocate her family which was not an option because she lived with her elderly mother.

The claimant, after being notified of the relocation, inquired into a tele-commuting option, and was told that she would be unable to do so. If she wanted to continue to work for the employer, she would need to work from the Woodbridge, Virginia office.

A week after the take over, the claimant felt she had no other option but to voluntarily quit her employment because she was unable to relocate or commute to the new location.

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 09.32.06.02(E)*.

“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.

The Board has established long-standing precedent that a voluntary quit is for good cause because of a detrimental change in the employment of the claimant. For example, in *Mayhugh v. Fischer Educational Systems, Inc., 1000-BR-85*, after a change in ownership, the claimant was not paid commissions, his health insurance was canceled, and the new employer implied that the claimant was not wanted. The claimant made repeated efforts to recover the commissions due him. Taken together, these factors constitute good cause for the claimant's resignation.

As counsel to the claimant in the instant case appropriately argues for his client, in *Auth v. General Glass Corporation, 898-BR-85* the claimant had good cause to quit where the employer transferred the claimant to a distant location, requiring a commute of approximately six hours round trip each day.

Finally, in *Pennington v. Lott Constructors, Inc.*, 870-BR-89, the claimant quit because the employer wanted him to transfer from the Maryland-Virginia area to Jacksonville, Florida. In addition, the employer would not cover all the claimant's reasonable expenses that he would incur as a result of this move. The claimant voluntarily quit with good cause.

Before the Board addresses the claimant's separation issue, it would first like to address the hearing examiner's hearing protocol and subsequent decision. A basic tenant of administrative law is that "administrative agencies must observe basic rules of fairness as to the parties before them." *Quoting Traveres v. Baltimore Police Dept.*, 115 Md. App. 395, 416 (1997).

Counsel for the claimant addresses these issues in his appeal letter to the Board. The Board concurs with the allegations that the "hearing examiner did not...adhere to the established hearing protocol." Counsel further points out, correctly, that "the hearing examiner (who is to remain neutral at all times) is charged with the duty to conduct a *de novo* hearing." In this case, Hearing Examiner Brown entirely ignored the basic principles of appropriate conduct.

Further, the hearing examiner's entire findings of facts are taken from the Agency Fact Finding Report which was not offered or entered into evidence during the hearing. In an attempt to elicit the facts iterated in the report, the hearing examiner inappropriately read portions of it during the hearing. The claimant appeared at the Lower Appeals' hearing. There was no apparent reason or justification for the hearing examiner to read from the Fact Finding Report other than to circumvent the claimant's right to a *de novo* hearing and justify an affirmance of the claim's specialist's erroneous benefit determination.

Finally, the hearing examiner's decision contains inaccurate findings of fact, incomplete conclusions of law and clearly erroneous evaluation of the evidence. The Board cannot find any justification to affirm the decision. A hearing examiner is charged with the task of conducting an impartial, *de novo* hearing, and then making a logical, **informed** decision, using the guidance from the appropriate Board precedent and other legal authority. In the instant case, the hearing examiner failed in her duty to do so and completely ignored the relevant law in an attempt to justify an erroneous benefit determination. A hearing examiner is an impartial adjudicator at an appeals' hearing. A hearing examiner **is not** an advocate for the Agency.

The Board does, however, have enough evidence in the record to complete its own review and analysis of the claimant's case. In so doing, the Board reverses the hearing examiner's decision and bases its decision on the following analysis.

The claimant was employed by her employer for nearly seventeen years when it was obtained by another company. A week following that acquisition the claimant was told that her current place of business was closing and that all employees would be working in Woodbridge, Virginia—a location that was nearly a four hour daily commute for the claimant.

Because the claimant could not relocate her family, which included an elderly parent and a teenager, she inquired about tele-commuting. When that request was denied, the claimant had no other alternative but to quit her employment.

Based on the Board's precedent in *Auth, supra*, appropriately argued by claimant's counsel, the claimant's voluntary quit was for good cause and benefits shall be permitted.


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 E & E ENTERPRISES, INC.

The Hearing Examiner's decision is reversed.



Donna Watts-Lamont, Chairperson



Clayton A. Mitchell, Sr., Associate Member

RD/mr

Copies mailed to:

CAROL L. TUMMINELLO
E & C ENTERPRISES INC
OXON HILL MOBIL

Susan Bass, Office of the Assistant Secretary

UNEMPLOYMENT INSURANCE APPEALS DECISION

CAROL L TUMMINELLO

SSN #

Claimant

vs.

E & C ENTERPRISES 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: 1126270

Appellant: Claimant

Local Office : 63 / CUMBERLAND

CLAIM CENTER

August 22, 2011

For the Claimant: PRESENT

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

Claimant Carol Tumminello worked for this employer from December 9, 2010 through December 16, 2010. At separation, the claimant worked as a full-time accounting and billing staffer, earning \$20.98 hourly. The claimant voluntarily quit her position for a variety of reasons related to the employer's business practices and policies affecting workers.

The timeline described by the claimant showed that despite her brief tenure, much of what she saw about the company caused her concern. When the claimant was hired, the company was being bought out. The issues that concerned the claimant included company reading of customer banking information, which made her "uncomfortable" and her dissatisfaction at the prospect of having the Annapolis location permanently closed, although management had asked everyone to decide what they wanted to do once the takeover was

completed. The claimant also recalled a promised Christmas holiday with pay that was withdrawn from all staff. As a result of what she saw, the claimant decided that the employer's behavior was not ethical.

Although she had an e-mail address for HR she did not contact anyone about her concerns because she did not feel that it would do any good. During her earlier interview with the Claims Specialist, and later during the course of the hearing, the claimant admitted that she made a personal decision to quit due to all of the above.

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 claimant had the burden to show, by a preponderance of the evidence, that he 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, that burden was not met.

Despite the variation of issues that bothered the claimant during her hearing she willingly objected to only one thing, the commute to Virginia. The claimant's refusal to address any issue other than that raised the question of whether she had written the clause reading "I simply made the personal decision to quit due to all of these things." She admitted writing the passage, and to support her position, the claimant's counsel cited a 1985 decision, Auth vs. General Glass, 898 BR 85. In Auth, the claimant quit his position due to conditions of his employment, which the decision does not identify. That claimant was transferred to a new work location that required six hours round-trip each day but apparently only he was required to make the trip. This case is different in several crucial ways. First, the Annapolis office where this claimant worked was closing and everyone had to leave. Second, this claimant testified during her hearing that she had quit her job for several reasons as discussed above, not just the estimated 1½ - 2 commute from Annapolis to Woodbridge, VA. In fact, the claimant admitted that she did not want to move her family to Virginia, which is a purely personal reason. Given that testimony, the only reason to cite Auth, is to conceal the personal motives expressly addressed by this claimant to the Claims Specialist and on the record during her hearing.

The claimant failed to demonstrate that the basis for her voluntary quit rose to the level needed to demonstrate either good cause or valid circumstances under 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 under the Md. Code Ann., Labor & Emp. Article, Section 8-1001. Benefits are denied for the week beginning December 12, 2010, 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.

L Brown

L. Brown, 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

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 September 06, 2011. 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: August 12, 2011

BLP/Specialist ID: WCU22

Seq No: 002

Copies mailed on August 22, 2011 to:

CAROL L. TUMMINELLO
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LOCAL OFFICE #63