DEPARTMENT OF HUMAN RESOURCES

STATE OF MARYLAND
HARRY HUGHES
Governor

RUTH MASSINGA
Secretary

EMPLOYMENT SECURITY ADMINISTRATION
1100 North Eutaw Street
Baltimore, Maryland 21201
Telephone: 383-5032

—DECISION—

DECISION NO: 1067-BH-83

DATE: September 15, 1983

CLAIMANT: Bertha Savage

APPEAL NO.: 03064

S.S.NO.:

EMPLOYER: Church Hospital

LO.NO: 45

APPELLANT: CLAIMANT

ISSUE Whether the claimant's unemployment was due to leaving work voluntarily, without good cause, within the meaning of §6(a) of the Law.

NOTICE OF RIGHT OF APPEAL TO COURT

YOU MAY FILE AN APPEAL FROM THIS DECISION IN ACCORDANCE WITH THE LAWS OF MARYLAND. THE APPEAL MAY BE TAKEN IN PERSON OR THROUGH AN ATTORNEY IN THE CIRCUIT COURT OF BALTIMORE CITY, OR THE CIRCUIT COURT OF THE COUNTY IN MARYLAND IN WHICH YOU RESIDE.

THE PERIOD FOR FILING AN APPEAL EXPIRES AT MIDNIGHT October 15, 1983

— APPEARANCE —

FOR THE CLAIMANT:

Bertha Savage - Claimant
Richard North - Attorney at Law

FOR THE EMPLOYER:

Christopher Miles - Reed Roberts Assoc.
Christine Roberts - Employee Relations Coordinator

EVIDENCE CONSIDERED

The Board of Appeals has considered all of the evidence presented, including the testimony offered at the hearings. The Board has also considered all of the documentary evidence introduced in this case, as well as the Employment Security Administration's documents in the appeal file.

The claimant requested and was granted a voluntary leave of

FINDINGS OF FACT

The claimant was employed by Church Hospital as a Clinical Unit Clerk. Her first day of work was February 2, 1968 and her last day of work was October 10, 1982, a period of approximately fifteen years.

In addition to working for the employer, for several years, the claimant was a student at Coppin State College in Baltimore, Maryland. To complete her degree requirements, the claimant was required to student teach at or near the end of her course of study. Student teaching is a full-time endeavor which lasts roughly three months. As a result, the claimant requested and was granted a leave of absence from her employment, without pay.

The employer grants leaves of absence as a benefit of employment to eligible employees for certain purposes. Leaves of absence are granted for educational purposes.

The leave of absence in this case was granted in writing, signed by the claimant and the department head. It provided that the request for a leave of absence was granted; that the claimant's position could not be guaranteed upon her return but that every effort would be made to place the claimant in the first available vacancy; that the leave of absence began on October 10, 1982; that it was to last for 13 weeks; that the claimant was expected to return on December 13, 1982; that if the claimant could not return on the date specified, she was to inform the department head and to request an extension to the leave of absence; that while on the approved leave of absence, the employer would continue to pay the premium for group health, dental , and life insurance, but only for the specified period of the leave of absence or approved extension; that if the claimant failed to return to work at the end of the leave of absence, the employer could assume that the claimant voluntarily resigned and could terminate her employment. The claimant embarked on the leave of absence on October 10, 1982.

The claimant completed her student teaching, and on December 2, 1982, she called the employer and confirmed that she intended to return to work as scheduled on December 13, 1982. She was informed at that time, to her chagrin, that no work was available for her. She was told that her name was placed on a "return-to-work list" where it would remain for a period of one year, and if no work was found for her during that time, she would be terminated. The claimant applied for unemployment insurance benefits shortly thereafter.

At no time throughout this entire scenerio was the claimant's resignation tendered, discussed, or even considered. Nevertheless, the Appeals Referee concluded that the claimant was unemployed because she voluntarily quit her job, and that the quit occurred on December 13, 1982, the date her leave of absence was scheduled to expire. He went on to disqualify the claimant for unemployment insurance benefits beginning October 10, 1982, the date the leave of absence began, and until she became reemployed, earned ten times her weekly benefit amount, and thereafter became unemployed through no fault of her own. We reverse.

CONCLUSIONS OF LAW

Section 6(a) of the unemployment insurance law provides a disqualification for benefits where a claimant's unemployment is due to leaving work voluntarily, without a good cause attributable to the employer.

Anytime an employee takes a leave of absence, returns home at the end of the work day, or goes to the bathroom, he physically "leaves work." However, if the employee loses his job for no other reason than taking a leave of absence, returning home after completion of the day, or going to the bathroom, it would be patently absurd to conclude that his unemployment was due to "leaving work" within the meaning of unemployment insurance law. In Muller v. Board of Education, 144-BH-83, we held that the term "leaving work" refers only to an actual severance of the employment relation and does 'not include a temporary interruption in the performance of services. In reaching our decision in Muller, we reviewed Employment Security Administration v. Browning-Ferris, Inc. , 292 Md. 515, 432 A.2d 1356 (1982), which held that striking employees had not "left work" within the meaning of the §6(a) disqualification because the strikers intended only a temporary interruption in the performance of services, and not an actual severance of the employment relation.

The term "leaving work" therefore, as used in §6(a) presupposes an actual severance of the employment relation and not a mere physical leaving with an intent to return.

The issue presented in this case is as follows: Did the claimant actually sever the employment relation by accepting the leave of absence with the provision that her job was not guaranteed?

The Appeals Referee concluded that "The employer did nothing to deprive the claimant of her job with possible exception of putting someone in it to perform the duties because the job had to be done." He reasoned that because the claimant had the intent to accept a leave of absence which did not guarantee her job, that was all the intent that was needed under the statute and under case law. He cites no authority for that proposition. The thrust of the Appeals Referee's Decision is that the claimant constructively left work by accepting a leave of absence which did not guarantee her job.

As we have seen, the required intent is not an intent to accept a leave of absence, which does not guarantee the job, but rather, it is an intent to actually sever the employment relation which must be shown.

Moreover, in Allen v. Core Target City Youth Program, 275 Md. 69, 338 A.2d 237 (1975) the Court pointed out that the doctrine of "constructive voluntary leaving" has never been accepted by the Court. The Court went on to state:

> 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. If an employee is discharged for any reason, other than perhaps for the commission of an act which the employee knowingly intended to result in his discharge, it cannot be said that his or her unemployment was due to 'leaving work voluntarily' . . . The phrase 'leaving work voluntarily' cannot by construction be extended so as to make it applicable to any case which is not shown to be clearly within the contemplation of the Legislature.

A word must be said about a leave of absence. In ordinary usage, a leave of absence is an agreement between the employer and the employee for the suspension of the performance of duties for a period of time. Frequently, remuneration is also suspended for a similar period by agreement of the parties. It implies that the employee will return to work at the expiration thereof, and that the employer will reinstate him. In Muller, supra, which, incidentally, was strenuously urged by the claimant, and cited by the Referee in his Decision, we held that although the leave of absence there did not promise, in so many words, that the claimant would be reemployed at the expiration thereof, such a promise was fairly to be implied for a written leave of absence for a specific period of time, ipso facto, was a promise to reemploy. Since a leave of absence, by its essential nature promises reinstatement, it is not necessary for the promisor to also "guarantee" his promise. (The contract of a guarantor is very different from the contract of the original obligor.)

We readily acknowledge that the precise question presented in this case appears to be a question of first impression in Maryland's Unemployment Insurance Law. However, it is not without persuasive authority. In Western Electric Co. v. Director of Division of Employment Security 340 Mass. 190, 163 N.E.2d. 154 (1960) 85 claimants took leaves of absence for maternity purposes in accordance with a collective bargaining agreement. They were not reinstated following their leaves, because no work was available. The leave applications contained the statement that there was "no guaranty of reinstatement;" that the employees would notify the employer if they decided not to apply for reinstatement at the expiration of the leave, and that accepting substantially full-time employment elsewhere would

automatically terminate the leave and result in a break in service. The collective bargaining agreement provided for maintenance of seniority. The Court held that reading these provisions together, they showed an intent not to sever completely the employer-employee status. Further, if an employer regarded the relationship of employment to have been terminated upon the granting of the leave it is hardly likely that it would have been granted subject to the above conditions. The Court went on to hold that the claimants became unemployed when they were not reinstated at the expiration of their leaves because no work was available. Benefits were allowed. In accord, see 51 A.L.R. 3d Unemployment Compensation, 287.

In the case under consideration, the leave of absence provided that the claimant's position could not be guaranteed. The very same document also stated that a leave of absence had been granted; that the leave would last for a specific period of time; that during the leave of absence, the employer would continue to pay the premium for group health, dental, and life insurance, and that if the claimant failed to return at the expiration of the leave, then the employer could terminate her employment. We hold therefore, that the claimant did not sever the employment relation when she accepted the leave of absence, notwithstanding the provision that her job was not guaranteed. It was a leave of absence and not a resignation that was intended by the parties. Finally, the claimant's unemployment is not due to leaving work voluntarily, within the meaning of §6(a), but rather, she is unemployed because no work was available upon the termination of the leave of absence. This is a non-disqualifying reason for unemployment and benefits will be allowed. We note that the leave of absence was originally scheduled to expire on December 13, 1982. However, the claimant was notified on December 2, 1982, that there was no work available when the leave of absence expired. The claimant was terminated on December 2, 1982, which put an end to the leave of absence.

Therefore,

DECISION

The claimant is unemployed but her unemployment was not due to leaving work voluntarily within the meaning of §6(a) of the Law. No disqualification is imposed based upon her separation from employment with Church Hospital.

The claimant was discharged but not for gross misconduct or misconduct, connected with the work, within the meaning of §(b) or 6(c) of the Maryland Unemployment Insurance Law.

Benefits are allowed from the week beginning December 5, 1982.

The decision of the Appeals Referee is reversed.

Maurice E. Dill
Associate Member

Hazel A. Warnick
Associate Member

D:W

CONCURRING OPINION

I agree that the weight of the caselaw dictates the result reached in this case. The courts of other states have used various rationales to reach the conclusion that persons who take leaves of absence cannot be penalized for voluntarily quitting their jobs. See, Western Electric Co., cited above; South Central Bell Telephone Company v. Mississippi Employment Security Commission 357 So. 2d 312 (1978); South Central Bell Telephone Company v. Admistrator, 247 So. 2d 615 (1971); Neilson v. Department of Employment Security, 312 A. 2d 708 (1973); Gray v. Brasch and Miller Construction Co., 624 P. 2d 396 (1981).

In the Gray case an Idaho regulation provided that a person on a leave of absence was employed and not eligible for benefits. Similarly, the South Central Bell v. Mississippi case held that a person on a leave of absence is "not unemployed." This rationale is not applicable in Maryland, where the definition of "unemployment" in §20(1) clearly covers persons on an unpaid leave of absence. See, the Board's decision in the Catherine Cree case, 801-BH-81. In the Catherine Cree case and the Fourtinakis case, 870-BH-81, the Board of Appeals rejected the concept that a "severance of the employment relationship" was necessary in order for a person to be unemployed within the meaning of §20(1).

The Board holds today that a "severance of the employment relationship" is necessary before a person can be disqualified for voluntarily quitting a job within the meaning of §6(a). While I have no quarrel with the application of this principle in this particular case, (since it does not contradict our holdings on 520(1)), I think that the principle is too broadly stated in the majority's opinion.

Application of this principle, together with the holding in Allen that there must be an intent to terminate the employment, could lead to absurd results. If one must have an intent to "sever the employment relationship" before he can be said to voluntarily quit, persons who actually quit their jobs within the ordinary meaning of the work will not be penalized under §6(a). For example, a person who, without approval, leaves his job to travel around the world for an indefinite time, hoping that he will keep his seniority, that the employer will continue his health benefits and that his employer will rehire him, could be found not to have intended to "sever the employment relationship." In order to guard against such possible abuses of common sense, I believe the principle should not be so broadly stated.

There is, in my opinion, something nonsensical in saying that a leave of absence form which specifically states:

> Your position cannot be guaranteed to you when you return. Every effort will be made to place you in the first available vacancy of the appropriate level of work and pay for which you are qualified.

is nevertheless a promise to rehire the employee on the expiration of the leave of absence. If the application of contract law were relevant to this case, it would be ludicrous to suggest that a "leave of absence" form conspicuously containing this language is an enforceable promise. This is unemployment insurante law, however, and the caselaw seems to be that the very use of the term "leave of absence" implies such a promise, no matter what the agreement actually says . Western Electric, supra; Southern Central Bell v. Adminsitrator, supra. Since the caselaw holds that there was a promise of reemployment made, the claimant did not voluntarily quit her job when she went on her leave of absence. (Of course, the Board's decision in Muller would preclude, on other grounds, the granting of benefits during the leave of absence.)

Thomas W. Keech
Chairman

K
kmb
DATE OF HEARING: June 7, 1983

COPIES MAILED TO:

CLAIMANT

EMPLOYER

Richard North, Esquire

UNEMPLOYMENT INSURANCE - PIMLICO

Mr. Christopher Miles
Reed, Roberts Associates, Inc.

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Remand

– DECISION –

DATE: 4/19/83

CLAIMANT: Bertha Savage

APPEAL NO.: 03064

S.S.NO.:

EMPLOYER: Church Hospital

L.O.NO.: 45(1)

APPELLANT: Claimant

ISSUE: Whether the unemployment of the claimant is due to leaving work voluntarily, without good cause, within the meaning of Section 6(a) of the Law.

NOTICE OF RIGHT TO PETITION FOR REVIEW

ANY INTERESTED PARTY TO THIS DECISION MAY REQUEST A REVIEW AND SUCH PETITION FOR REVIEW MAY BE FILED IN ANY EMPLOYMENT SECURITY OFFICE, OR WITH THE APPEALS DIVISION, **ROOM 515,** 1100 NORTH EUTAW STREET, BALTIMORE, MARYLAND 21201, EITHER IN PERSON OR BY MAIL.

THE PERIOD FOR FILING A PETITION FOR REVIEW EXPIRES AT MIDNIGHT ON May 4, 1983

–APPEARANCES–

FOR THE CLAIMANT:

Claimant-Present
Susan Kirwan, Legal Student
John Capowsky, Esquire
Univ. of Md. Legal Serv. Clinic

FOR THE EMPLOYER:

Chris Miles,
Reed, Roberts
Associates,
Inc.
C. Roberts,
Employment Coordinator

FINDINGS OF FACT

The claimant was employed by church hospital for approximately fifteen years from 1968 until September 12, 1982. She was earning $5.47 per hour, as a Clinical Unit Clerk, when she last worked for the hospital.

The claimant requested and was granted a voluntary leave of

absence to attend Coppin State College and to student teach. The claimant wanted this time in order to complete her teaching requirements for her own personal benefit. This additional schooling was in no way connected with her work as a Clinical Unit Clerk at the hospital. The claimant filed an application which clearly stated that if the leave of absence was granted that the claimant understood that the hospital could not guarantee her job would be held for her. The document further stated that when she was able to return to work every effort would be made to place her in the first available vacant position within the appropriate work level.

This same document, that is, the application form for leave of absence without pay, also contained information which shows that the employer did not consider the claimant to have voluntarily resigned at the time that the leave of absence was requested. The document states that if the claimant fails to return at the end of the leave of absence that "the hospital can assume that I have voluntarily resigned and can terminate my employment". The application form contained two approval statements. The one which was executed in the claimant's case showed that her leave of absence was granted but that her position cannot be guaranteed to her when she returns. Another portion of approval which shows the leave of absence granted with a guaranteed position until an appropriate date was not used. Attached to the application form for leave of absence was a summary of the leave of absence policy of the employer. The summary of the leave of absence policy stated that the granting of a leave of absence does not guarantee that upon an employees return to work the employee will be assigned to the same job. It further states that every effort will be made to place the employee in an available vacancy in the department job category for which they qualify.

When the claimant took the leave of absence she was aware that she might not have a job when the leave of absence expired. When the claimant's leave of absence did expire, the employer had no job for her because someone had been moved from within the organization to perform the duties that the claimant had previously performed. Someone was needed to perform these duties on a regular basis.

CONCLUSIONS OF LAW

There is absolutely no question but that the claimant in this case would be working at Church Hospital at her job as a Clinical Unit Clerk had she not taken the leave of absence for purely personal reasons in order to complete her education in the teaching field. The employer did nothing to deprive the claimant of her job with possible exception of putting some one in it to perform the duties because the job had to be done. The claimant is unemployed through voluntary actions of her own

part. The claimant is an intelligent person who was aware of the risk she was taking at the time that she applied for and accepted a leave of absence which did not guarantee her a job at the completion of the leave of absence. The employer made it very clear to the claimant that her acceptance of the leave of absence could result in the loss of her job for a period of time. The claimant accepted all of this and voluntarily entered into it. Under these circumstances, it must be found that the claimant is unemployed through a voluntary act. The unemployment begins as of the date of the expiration of her leave of absence.

The representatives of the claimant urge that the decision of Allen vs. Core Target City, 275 Maryland 69, would require that the claimant in this case be granted benefits. Quite the contrary is true, the Court in that case indicated that a person may voluntarily leave employment by performing certain acts which will lead to separation from employment. The claimant did exactly that.

The representatives of the claimant also urge that the decision of the Board of Appeals in Muller vs. Board of Education 144BH requires that this claimant be granted unemployment insurance benefits. It is urged that the Board stated that the term to leave work voluntarily requires an employee to have an intent to leave work. The claimant in this case, did have the necessary intention to leave work. She had an intention to accept a leave of absence which could under the happening of circumstances result in her loss of employment. This is all the intention that is needed under the Statute and under case Law. One must be charged with the intending the forseeable consequences of one's acts. The forseeable consequence of the claimant's actions in accepting the leave of absence was possible loss of her job.

It must be considered whether or not there are valid and serious circumstances in this case and whether those circumstances are compelling and necessitous. I do not find that there are. There was no compulsion to require the claimant to take the leave of absence to complete her education or schooling, which was not connected with her job. There was nothing necessitous about it and nothing compelling about it and there are, therefore, no valid and serious circumstances present which would justify the imposition of less than the full disqualification under Section 6(a) of the Law.

DECISION

The claimant voluntarily left her employment without good cause, connected with her work, within the meaning of Section 6(a) of the Maryland Unemployment Insurance Law. She is disqualified

from receiving benefits for the week beginning October 10, 1982 (the end of her leave of absence) until she becomes re-employed and earns at least ten times her weekly benefit amount ($1,530) and thereafter becomes unemployed through no fault of her own.

The determination of the Claims Examiner is affirmed.

Martin A. Ferris
Appeals Referee

Date of Hearing: 3/31/83
rc
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Copies mailed to:

Claimant
Employer
Unemployment Insurance - Baltimore

Reed, Roberts Associates, Inc.

The Legal Aid Bureau, Inc.