

**- DECISION -**

Claimant:  
GRACIE S MCGRIFF

Decision No.: 1031-BR-12

Date: April 11, 2012

Appeal No.: 1143868

S.S. No.:

Employer:  
WASHINGTON METRO ARA TRAN AUTH

L.O. No.: 63

Appellant: Employer

Issue: Whether the claimant was discharged for misconduct or gross misconduct connected with the work within the meaning of Maryland Code, Labor and Employment Article, Title 8, Section 8-1002 or 1003.

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**- 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: May 11, 2012

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**REVIEW OF THE RECORD**

After a review of the record, the Board adopts the following findings of fact and conclusions of law and reverses the hearing examiner's decision.

Upon hire, the claimant was given the employer's policy on drug and alcohol. Subsequently, the claimant failed a drug test that was required as a prerequisite to her voluntary transfer into a station manager's position at WMATA (Washington Metropolitan Area Transit Authority).

The claimant was allowed to remain employed with WMATA as long as she participated in WMATA's Employer Assistance Program and remained drug free. The claimant's counselor counseled the claimant on the Agency's drug testing policies and procedures.

Subsequently, the claimant was randomly tested on September 8, 2011 and tested positive for marijuana. The test also indicated an increased use of marijuana. The claimant was advised that she could have the specimen independently tested at an approved laboratory. The claimant only wanted to take the test sample to a laboratory that was not on the list of federally approved labs. The claimant was suspended on September 10, 2011.

On September 20, 2011, the claimant went before WMATA'S Joint Labor & Relations Board for review. The claimant was given the opportunity to explain her positive drug tests. After hearing the claimant's testimony and reviewing the claimant's drug test, the committee voted unanimously that the claimant be terminated. The claimant was discharged on September 26, 2011.

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)*.

In a discharge case, the employer has the burden of demonstrating that the claimant's actions rise to the level of misconduct, gross misconduct or aggravated misconduct based upon a preponderance of the credible evidence in the record. *Hartman v. Polystyrene Products Co., Inc., 164-BH-83*; *Ward v. Maryland Permalite, Inc., 30-BR-85*; *Weimer v. Dept. of Transportation, 869-BH-87*; *Scruggs v. Division of Correction, 347-BH-89*; *Ivey v. Catterton Printing Co., 441-BH-89*.

As the Court of Appeals explained in *Department of Labor, Licensing and Regulation v. Hider, 349 Md. 71, 82, 706 A.2d 1073 (1998)*, "in enacting the unemployment compensation program, the legislature created a graduated, three-tiered system of disqualifications from benefits based on employee misconduct. The severity of the disqualification increases in proportion to the seriousness of the misconduct."

*Dept. of Labor, Licensing & Regulation v. Boardley, 164 Md. 404, 408 fn.1 (2005)*.

Section 8-1002 of the Labor and Employment Article defines gross misconduct as conduct of an employee that is a deliberate and willful disregard of standards of behavior that an employing unit rightfully expects and that shows gross indifference to the interests of the employing unit or repeated violations of employment rules that prove a regular and wanton disregard of the employee's obligations.

The term "misconduct" as used in the statute means a transgression of some established rule or policy of the employer, the commission of a forbidden act, a dereliction from duty, or a course of wrongful conduct committed by an employee within the scope of his employment relationship, during hours of employment or on the employer's premises, within the meaning of Section 8-1003 of the Labor and Employment Article. (*See, Rogers v. Radio Shack*, 271 Md. 126, 314 A.2d 113).

Simple misconduct within the meaning of § 8-1003 does not require intentional misbehavior. *DLLR v. Hider*, 349 Md. 71 (1998); also see *Johns Hopkins University v. Board of Labor, Licensing and Regulation*, 134 Md. App. 653, 662-63 (2000)(psychiatric condition which prevented claimant from conforming his/her conduct to accepted norms did not except that conduct from the category of misconduct under § 8-1003). Misconduct must be connected with the work; the mere fact that misconduct adversely affects the employer's interests is not enough. *Fino v. Maryland Emp. Sec. Bd.*, 218 Md. 504 (1959). Although not sufficient in itself, a breach of duty to an employer is an essential element to make an act connected with the work. *Empl. Sec. Bd. v. LeCates*, 218 Md. 202 (1958). Misconduct, however, need not occur during the hours of employment or the employer's premises. *Id.*

Without sufficient evidence of a willful and wanton disregard of an employee's obligations or gross indifference to the employer's interests, there can be no finding of gross misconduct. *Lehman v. Baker Protective Services, Inc.*, 221-BR-89. Where a showing of gross misconduct is based on a single action, the employer must show the employee demonstrated gross indifference to the employer's interests. *DLLR v. Muddiman*, 120 Md. App. 725, 737 (1998).

In determining whether an employee has committed gross misconduct, "[t]he important element to be considered is the nature of the misconduct and how seriously it affects the claimant's employment or the employer's rights." *Dept. of Econ. & Empl. Dev. v. Jones*, 79 Md. App. 531, 536 (1989). "It is also proper to note that what is 'deliberate and willful misconduct' will vary with each particular case. Here we 'are not looking simply for substandard conduct...but for a willful or wanton state of mind accompanying the engaging in substandard conduct.'" *Employment Sec. Bd. v. LeCates*, 218 Md. 202, 207 (1958)(internal citation omitted); also see *Hernandez v. DLLR*, 122 Md. App. 19, 25 (1998).

Aggravated misconduct is an amplification of gross misconduct where the claimant engages in "behavior committed with actual malice and deliberate disregard for the property, safety or life of others that...affects the employer, fellow employees, subcontractors, invitees of the employer, members of the public, or the ultimate consumer of the employer's products or services...and consists of either a physical assault or property loss so serious that the penalties of misconduct or gross misconduct are not sufficient."

The failure to follow workplace rules or procedures can constitute gross misconduct. *See, e.g. Kidwell v. Mid-Atlantic Hambro, Inc.*, 119-BH-86; *Ullman v. Anne Arundel County Public Schools*, 498-BR-93.

In the instant case, the claimant was enrolled in her employer's Employee Assistance Program (EAP) which required that the claimant remain drug free. The claimant tested positive for marijuana on an EAP random drug test. The claimant was notified of the test results; knew the employer's drug policy; was given an opportunity for an independent test at an approved laboratory which she declined and was recommended for discharge by the Joint Labor Management Committee. The Board finds that based upon the credible evidence that the claimant violated her employer's policy on drug use.

The hearing examiner erred in concluding that the employer failed to meet the requirements of § 17-214.1(C)(1)(iv) of the *Health-General Article of the Annotated Code of Maryland*. The Board of Appeals had held in the precedent case of *Thompson v. Washington Metro Area Transit Authority, 1461-BH-91* that "the Washington Metropolitan Area Transit Authority Compact is an agreement between Virginia, Maryland and the District of Columbia. Under its terms, this employer is free to:

Create and abolish offices, employment, and positions (other than those specifically provided therein) as it deems necessary for the purposes of this authority, and fix and provide for the qualification, appointment, removal, term, tenure, compensation, pension and retirement rights of officers and employees without regard to the laws of any of the signatures.

Therefore, the employer was not required to follow the provisions of the *Maryland Health General Article*, and failure to do so does not invalidate its evidence of the claimant's failure to pass the drug test.

The Board finds that even though WMATA is not required to meet the requirements of § 17-214.1(C)(1)(iv) of the *Health-General Article of the Annotated Code of Maryland*, WMATA's actions met these standards.

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 employer met its burden of demonstrating that the claimant's actions rose to the level of gross misconduct within the meaning of *Maryland Annotated, Labor & Employment Article, § 8-1002*. The decision of the hearing examiner shall be reversed for the reasons stated herein.

## DECISION

It is held that the claimant was discharged for gross misconduct connected with the work, within the meaning of Maryland Code Annotated, Labor and Employment Article, Title 8, Section 1002. The claimant is disqualified from receiving benefits from the week beginning September 25, 2011 and until the claimant becomes re-employed, earns at least twenty five times their weekly benefit amount and thereafter becomes unemployed through no fault of their own.

The Hearing Examiner's decision is reversed.



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Eileen M. Rehrmann, Associate Member



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Donna Watts-Lamont, Chairperson

KJK

Copies mailed to:

GRACIE S. MCGRIF

WASHINGTON METRO ARA TRAN AUTH

JOSH MONTAGUE ESQ.

Susan Bass, Office of the Assistant Secretary

**UNEMPLOYMENT INSURANCE APPEALS DECISION**

GRACIE S MCGRIFF

SSN #

**Claimant**

vs.

WASHINGTON METRO ARA TRAN AUTH

**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: 1143868

Appellant: Claimant

Local Office : 63 / CUMBERLAND  
CLAIM CENTER

January 11, 2012

**For the Claimant:** PRESENT

**For the Employer:** PRESENT, JOSH MONTAGUE, ESQ., KIMBERLY GILLERSPICE

**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 1002 - 1002.1. (Gross/Aggravated Misconduct connected with the work), 1003 (Misconduct connected with the work) or 1001 (Voluntary Quit for good cause).

**FINDINGS OF FACT**

The claimant, Gracie Mcgriff, worked for the above-captioned employer, Washington Metropolitan Area Transit Authority, from July 08, 2008, through April 17, 2010. The claimant earned \$17.51 per hour, while working full-time as a Bus Operator.

The claimant was terminated on September 26, 2011, for testing positive for marijuana. On July 22, 2011, the claimant was referred to the employer's medical department to take a physical for a station manager position that had become available. The claimant was required to take a drug and alcohol test as part of the physical. On July 25, 2011, the employer was advised by their medical department that the claimant had tested positive for marijuana. The claimant was advised of the test result. The claimant disputed the test result.

The claimant was advised by the employer that she had to enroll in the employee assistance program to maintain her employment with the employer. On August 15, 2011, the claimant enrolled in the employee assistance program. The claimant was required as part of the employee assistance program to submit to random drug tests. The claimant was advised by the employer that further violations of the employer's substance abuse policy would lead to termination.

On September 08, 2011, the claimant was required to take a random drug test. The claimant tested positive for marijuana. The claimant was advised by the employer that she had tested positive for marijuana and that her usage levels showed an increase in usage indicating that she had currently used marijuana. The claimant denied using marijuana and disputed the test result. The claimant was suspended by the employer thereafter and terminated on September 26, 2011, for testing positive for marijuana.

The claimant was not provided with a copy of the laboratory test result indicating the positive test result after testing positive for marijuana; the claimant was not provided with a copy of the employer's written policy on the use or abuse of controlled dangerous substances after testing positive for marijuana; the claimant was not provided with a statement or copy of the provisions set forth in subsection (d) of Section 17-214.1 permitting an employee to request independent testing of the same sample for verification of the test result after testing positive for marijuana.

### CONCLUSIONS OF LAW

Md. Code Ann., Labor & Emp. Article, Section 8-1003 provides for a disqualification from benefits where the claimant is discharged or suspended as a disciplinary measure for misconduct connected with the work. The term "misconduct" is undefined in the statute but has been defined as "...a transgression of some established rule or policy of the employer, the commission of a forbidden act, a dereliction of duty, or a course of wrongful conduct committed by an employee, within the scope of his employment relationship, during hours of employment, or on the employer's premises." Rogers v. Radio Shack, 271 Md. 126, 132 (1974).

Section 17-214.1(c)(1)(iv) of the Health-General Article of the Annotated Code of Maryland provides that an employer, after having required an employee to be tested for the use or abuse of any controlled dangerous substance, and who receives notice that the employee has tested positive, after confirmation of that test result, shall provide the employee with:

- (i) a copy of the laboratory test indicating the test results;
- (ii) a copy of the employer's written policy on the use or abuse of controlled dangerous substances or alcohol by employees,...;
- (iii) If applicable, written notice of the employer's intent to take disciplinary action, terminate employment, or change the conditions of continued employment; and
- (iv) a statement or copy of the provisions set forth in subsection (d) of this section permitting an employee to request independent testing of the same sample for verification of the test result.

The employer failed to meet the requirements of Section 17-214.1(c)(1)(iv) of the Health-General Article of the Annotated Code of Maryland. This section provides that an employer, after having required an employee to be tested for the use or abuse of any controlled dangerous substance, and who receives notice that the employee has tested positive, after confirmation of that test result, shall provide the employee with



a statement or copy of subsection (d) of this section permitting an employee to request independent testing of the same sample for verification of the test result. Therefore, based on the employer's failure to meet this requirement, thereby denying the claimant an opportunity to be retested, the Board concluded that the claimant was discharged for no misconduct. The Board cannot consider as evidence test results which were not acquired in conformity with the law. Webe v. Anderson Oldsmobile Company, 88-BR-91.

### 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 employer had the burden to show, by a preponderance of the credible evidence, that the claimant was discharged for some degree of misconduct connected with the work within the meaning of the Maryland Unemployment Insurance Law. Ivey v. Catterton Printing Company, 441-BH-89. In the case at bar, that burden has not been met.

The claimant disputes the accuracy of the test results and denies using illegal drugs. The evidence shows that the employer failed to provide the claimant with a copy of the test results, failed to provide the claimant with a copy of their policy on the use and abuse of controlled dangerous substances after she tested positive for marijuana, and failed to offer a right of re-test in accordance with Health General Article, Section 17-214.1(c)(1)(iv); pursuant to the Webe case, *supra*, the test results were not acquired in conformity with the law and cannot be considered as evidence. Accordingly, I hold the employer has failed to meet its burden and a disqualification is therefore not warranted.

### DECISION

IT IS HELD THAT the claimant was discharged, but not for misconduct connected with the work within the meaning of Md. Code Ann., Labor & Emp. Article, Section 8-1003. No disqualification is imposed based upon the claimant's separation from employment. The claimant is eligible for benefits so long as all other eligibility requirements are met. The claimant may contact Claimant Information Service concerning the other eligibility requirements of the law at [ui@dllr.state.md.us](mailto:ui@dllr.state.md.us) or call 410-949-0022 from the Baltimore region, or 1-800-827-4839 from outside the Baltimore area. Deaf claimants with TTY may contact Client Information Service at 410-767-2727, or outside the Baltimore area at 1-800-827-4400.

The determination of the Claims Examiner is reversed.



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S L Young, 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**

Any party 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 January 26, 2012. 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: December 29, 2011  
BLP/Specialist ID: WCU6H  
Seq No: 006  
Copies mailed on January 11, 2012 to:

GRACIE S. MCGRUFF  
WASHINGTON METRO ARA TRAN AUTH  
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JOSH MONTAGUE ESQ.