

**- DECISION -**

Claimant:  
JONATHAN A WOOTEN

Decision No.: 1226-BR-14

Date: April 30, 2014

Appeal No.: 1335269

S.S. No.:

Employer:  
REVOLUTION FOODS INC

L.O. No.: 64

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.

---

**- 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 30, 2014

---

**REVIEW OF THE RECORD**

After a review of the record, the Board adopts the hearing examiner's findings of fact. The Board makes the following additional finding of fact.

The claimant lived 10 minutes from the work site.

The Board concludes that these facts warrant a different conclusion of law and a reversal of the hearing examiner's decision.

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."

This case rests upon the credibility of the witnesses. The Board defers to the Hearing Examiner's credibility determinations. The Board rarely reverses credibility determinations and finds no reason to do so in this case. There is substantial evidence to support the Hearing Examiner's decision; therefore, it shall be affirmed.

The claimant was well aware that his employment was a risk. The claimant received a final warning on October 16, 2013 regarding his lateness issues. The claimant was late the next day for no valid reason. In nine days the claimant was late three times.

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 § 8-1002. The decision 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 October 20, 2013 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.



---

Donna Watts-Lamont, Chairperson



---

Eileen M. Rehrmann, Associate Member

VD

Copies mailed to:

JONATHAN A. WOOTEN

REVOLUTION FOODS INC

Susan Bass, Office of the Assistant Secretary

**UNEMPLOYMENT INSURANCE APPEALS DECISION**

JONATHAN A WOOTEN

SSN #

**Claimant**

vs.

REVOLUTION FOODS 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: 1335269

Appellant: Claimant

Local Office : 64 / BALTOMETRO  
CALL CENTER

January 08, 2014

**For the Claimant:** PRESENT

**For the Employer:** PRESENT, KATHY MURRAY, LAUREN TANNER

**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).

**PREAMBLE**

It should be noted that there is a substantial contradiction as to the evidence and testimony as between the claimant and the employer's representatives. The Findings of Fact are based upon the competent evidence as determined by the Hearing Examiner.

**FINDINGS OF FACT**

The claimant, Mr. Wooten, began his employment with Revolution Foods in August, 2009. The employer engages in providing healthy school lunches for its clients. The claimant's position was as a linebacker moving raw food product from the warehouse to the production area where the food was prepared for the employer's clients. The claimant earned \$11.75 per hour.

The claimant last performed regular work services for the employer on October 17, 2013. The claimant was discharged on his next work day, October 23. The sole reason for the claimant's discharge was as a result of attendance issues. The following should be noted regarding the claimant's attendance:

1. On June 18, 2012, the claimant received a verbal warning which was reduced to writing and acknowledged by him. The claimant was late to work by approximately one and a half hours on that day.
2. On June 26, 2012, the claimant received a verbal warning which was reduced to writing and acknowledged by him. The claimant called the employer after his start time, and was late to work by approximately one half hour.
3. On September 11, 2012, the claimant received a written warning which was acknowledged by him. This warning was as a result of an incident on September 6, when the claimant clocked out for a 30 minute lunch break at 11:46 AM. He did not clock back in and return to work until 12:39 PM.
4. On September 11, 2012, the claimant also received a final written warning which was acknowledged by him. The warning was as a result of an incident on September 9. On that day the claimant took a 40 minute break rather than the 30 minutes which is permitted by company policy. In addition, the claimant raised an issue that he required assistance with his job duties. The employer provided assistance to the claimant. However, the employer believed that the claimant clocked out at 2:30 PM, when he was scheduled until 4:00 PM.
5. On February 11, 2013, the claimant received a verbal warning which was reduced to writing and acknowledged by him. This warning was a result of an incident on February 4. On that day the claimant was scheduled to start work at 5:00 AM. The claimant notified the employer at 4:41 AM that he was sick and would not be at work. The employer required the claimant to provide two hours' notice before the start of his work shift when unable to work.
6. On October 23, 2013, the claimant received a "coaching discussion" form which the employer used as documentation to discharge him from his position. The claimant did not sign or acknowledge this documentation. It was noted that the claimant had three occasions of tardiness during his last nine days of employment. On October 9, the claimant was scheduled to start work at 5:00 AM, and arrived at work at 5:14 AM. On October 16, the claimant was scheduled to start work at 6:00 AM, and arrived at work at 6:10 AM. On October 17, the claimant was scheduled to start work at 6:00 AM, and arrived at work at 6:12 AM.

The claimant did not have a regular set work schedule. The number of days that he would work would vary from week to week. In addition the claimant's start time would also vary during different work shifts. The claimant attributes some of his attendance violations to personal illness, matters regarding his child, transportation issues, and the changing work schedule.

## CONCLUSIONS OF LAW

Md. Code, Ann., Labor & Emp. Article, Section 8-1002 provides that an individual shall be disqualified from receiving benefits when he or she was discharged or suspended from employment because of behavior that demonstrates gross misconduct. The statute defines gross misconduct as repeated violations of employment rules that prove a regular and wanton disregard of the employee's obligations.

Md. Code Ann., Labor & Emp. Article, Section 8-1002 provides that an individual shall be disqualified from receiving benefits where he or she is discharged or suspended from employment because of behavior which demonstrates gross misconduct. The statute defines gross misconduct as conduct that is a deliberate and willful disregard of standards that an employer has a right to expect and that shows a gross indifference to the employer's interests. Employment Sec. Bd. v. LeCates, 218 Md. 202, 145 A.2d 840 (1958); Painter v. Department of Emp. & Training, et al., 68 Md. App. 356, 511 A.2d 585 (1986); Department of Economic and Employment Dev. v. Hager, 96 Md. App. 362, 625 A.2d 342 (1993).

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).

The Board of Appeals held in Daley v. Vaccaro's, Inc., 1432-BR-93, "Employees who miss a lot of time, even for excused reasons, have a heightened duty not to miss additional time...and to conform to the employer's notice requirements." The Board of Appeals further held in Kinsey v. Nordstrom, Inc., 1103-BR-90, "An employee who misses a large number of work days, even if excused, has a heightened duty not to miss any work for unexcused reasons. The claimant was discharged for misconduct."

The claimant had an excessive number of incidents of tardiness. However, during his last month of employment, his lateness was entirely due to his documented medical condition. The earlier incidents of tardiness were due to transportation problems. The claimant was discharged for misconduct. Schools v. AMI-Sub of Prince George's County, 932-BR-90.

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.

## 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 facts were decided on the credible evidence as determined by the Hearing Examiner.

The claimant was discharged from his employment on October 23, 2013. The claimant been employed for in excess of four years. The sole reason for the claimant's discharge was as a result of attendance issues.


The claimant had verbal and written counselings regarding his attendance in 2012. In 2013, he had one warning in February, before having three occasions of tardiness in October. There were some mitigating personal circumstances which led to the attendance violations. The competent evidence does indicate that the claimant's termination from employment was for wrongdoing by him.

In viewing the totality of the evidence (including the nature and extent of any attendance violations), it will not be held that the claimant's actions leading to his discharge rise to the level of gross misconduct as defined above. Therefore, no penalty will be imposed pursuant to Section 1002 of the Maryland Unemployment Insurance Law. However, the claimant's actions do constitute a transgression of established rules and policies of the employer and a course of wrongful conduct committed by an employee within the scope of the employment relationship. Misconduct will apply pursuant to Section 1003 of the Maryland Unemployment Insurance.

### DECISION

IT IS HELD THAT the claimant was discharged for misconduct connected with the work within the meaning of Md. Code Ann., Labor & Emp. Article, Section 8-1003. Benefits are denied for the week beginning October 20, 2013 and for the nine weeks immediately following. The claimant will then be 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 Specialist is reversed.



---

S B Karp, 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**

This is a final decision of the Lower Appeals Division. Any party who disagrees with this decision 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 23, 2014. 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 20, 2013  
BLP/Specialist ID: WHG32  
Seq No: 002  
Copies mailed on January 08, 2014 to:

JONATHAN A. WOOTEN  
REVOLUTION FOODS INC  
LOCAL OFFICE #64