-DECISION-

Claimant:
SAMIR RAJBHANDARI

Employer:
BOXCO INC

Decision No.: 1308-BH-11

Date: March 04, 2011

Appeal No.: 0938534

S.S. No.:

L.O. No.: 61

Appellant: CLAIMANT - REMAND FROM COURT

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: April 04, 2011

- APPEARANCES -

FOR THE CLAIMANT:

SAMIR RAJBHANDARI
A'LANE TEMPCHIN, Esq.

FOR THE EMPLOYER:

BRENDAN STOCKMASTER
Director of Operations

EVALUATION OF THE EVIDENCE

This case was remanded to the Board of Appeals pursuant to the Order of the Circuit Court for Montgomery County.

The Board held a hearing on March 1, 2011 for legal argument only. The employer and the claimant appeared and presented argument. The Board considered all the evidence in the record and the parties' legal arguments when rendering this 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(H)(1).* The Board fully inquires into the facts of each particular case. *COMAR 09.32.06.02(E).*

A threshold issue in this case is whether the claimant voluntarily quit or whether the claimant was discharged. The burden of proof in this case is allocated according to whether the claimant voluntarily quit or whether the employer discharged the claimant. 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.*

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.* 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 (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 (1985); also see Bohrer v. Sheetz, Inc., Law No. 13361, (Cir. Ct. for Washington Co., Apr. 24, 1984).* 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 (1985).* A resignation in lieu of discharge is a discharge under *§§ 8-1002, 8-1002.1,* and *8-1003. Miller v. William T. Burnette and Company, Inc., 442-BR-82.*

The intent to discharge or the intent to voluntarily quit can be manifested by words or actions. "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. 250(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.* A resignation submitted in response to charges which *might* lead to discharge is a voluntary quit. *Hickman v. Crown Central Petroleum Corp., 973-BR-88*; *Brewington v. Dept. of Social Services, 1500-BH-82*; *Roffe v. South Carolina Wateroe River Correction Institute, 576-BR-88* (where a claimant quit because he feared a discharge was imminent, but he had not been informed that he was discharged is without good cause or valid circumstances); *also see Cofield v. Apex Grounds Management, Inc., 309-BR-91.* When a claimant receives a medical leave of absence but is still believes she is unable to return upon the expiration of that leave and expresses that she will not return to work for an undefinable period, the claimant is held to have voluntarily quit. *See Sortino v. Western Auto Supply, 896-BR-83.*

The intent to discharge can be manifested by actions as well as words. The issue is whether the reasonable person in the position of the claimant believed in good faith that he was discharged. *See Dei Svaldi v. Martin Taubenfeld, D.D.S., P.A., 1074-BR-88* (the claimant was discharged after a telephone conversation during which she stated her anger at the employer and the employer stated to her, "If that's the way you feel, then you might as well not come in anymore." The claimant's reply of "Fine" does not make it a quit). *Compare, Lawson v. Security Fence Supply Company, 1101-BH-82.* A quit in lieu of discharge is a discharge for unemployment insurance purposes. *Tressler v. Anchor Motor Freight, 105-BR-83.*

The Board is persuaded that the claimant did not manifest the requisite intent to quit his job. In fact, his actions support a finding that he made attempts to preserve his employment during and after his innocent incarceration. The Board is persuaded that the employer discharged the claimant as evidenced by a September 20, 2009 email from Chris Kalisz.

The Board is persuaded that the facts of this case fit squarely within the holding of *Lansinger v. Baltimore County Fire Dept., 1305-BR-82.* No intent to quit can be inferred by a claimant's innocent incarceration. *Id.* A claimant who is incarcerated, but who is later released without having been convicted of a crime, has not voluntarily quit his job, provided that he has appropriately notified his employer of his absence. *Id.* In the instant case, the claimant informed the employer of his incarceration. The claimant's incarceration was beyond his control. The claimant's incarceration was for criminal allegations that were *nolle prossed.* The claimant was discharged but not for misconduct.

FINDINGS OF FACT

The claimant was employed as a full-time cable box collector and technician from February 19, 2007 through July 29, 2009. The claimant is unemployed as the result of a discharge.

On July 29, 2009, the claimant was incarcerated for allegedly stalking and assaulting his girlfriend and another male individual. The claimant attempted to contact his employer several times while incarcerated by collect call. The claimant had no one else to contact the employer. On August 3, 2009, the claimant made a collect call to his employer and a dispatcher answered the call. The dispatcher did not accept the calling charges.

On August 5, 2009 the claimant contacted the office manager through his bail bonding company. The employer was advised that the claimant was incarcerated and wanted to keep his job but could not discuss the particulars of his case on advice of counsel. The claimant also requested the employer's assistance with his bail. The office manager instructed the claimant to call the next day. On August 6, 2009, the claimant called the employer but could not speak with anyone. The employer did not assist the claimant with his bail.

The claimant was released from jail on August 14, 2009. The claimant spoke by telephone with his supervisor on August 19, 2009, and requested to return to work. The claimant's supervisor abruptly ended the phone call and did not further contact the claimant.

Because the claimant did not receive any further contact from the employer, on September 11, 2009, the claimant went to the employer's office to request a return to work. The claimant's supervisor informed the claimant he had no authority to bring the claimant back to work.

On September 19, 2009, the claimant again sent an electronic mail message to his employer expressing his desire to return to work. The claimant was informed that there was no work for him and the claimant could not be re-hired due to his legal issues. On September 20, 2009, the claimant was instructed to "pursue other venues". The claimant was formally discharged.

The criminal charges against the claimant were dropped *nolle prosequi*. The claimant was not convicted of any crime and did not plead guilty to any charge.

CONCLUSIONS OF LAW

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

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*.

Attendance violations may constitute gross misconduct. An employer has the right to insist that its employees report to work on time, adhere to a specified schedule and leave only when that schedule has been completed. An employee's decision to follow a come-and-go-as-I-please philosophy could clearly disrupt the orderly operation of the workplace. *Dept. of Econ. Dev. v. Propper, 108 Md. App. 595 (1996)*.

Persistent and chronic absenteeism, where the absences are without notice or excuse and continue in the face of warning constitutes gross misconduct. *Watkins v. Empl. Security Admin., 266 Md. 223 (1972).* The failure to report or call into work without notice may constitute gross misconduct. *Hardin v. Broadway Services, Inc. 146-BR-89.* Employees who miss a lot of time from work, even for excused reasons, have a heightened duty not to miss additional time for unexcused reasons and to conform with the employer's notice requirements. *Daley v. Vaccaro's Inc., 1432-BR-93.*

A specific warning regarding termination is not required and a reasonable person should realize that such conduct leads to discharge. *Freyman v. Laurel Toyota, 608-BR-87.* A violation of an employer's attendance policy is not misconduct per se where that policy does not distinguish between absences which occurred because of legitimate medical reasons and absences for which there was no reasonable excuse. Where an employee has been absent for a day of scheduled work, the burden of proof shifts to the employee to explain the reason for the absence. *Leonard v. St. Agnes Hospital, 62-BR-86.*

A claimant who was innocently incarcerated, who notified his employer of his incarceration and who was released when criminal charges were dropped constitutes a good excuse for his absences which were totally beyond his control and a finding of misconduct is not supported. *Lansinger v. Baltimore County Fire Dept., 1305-BR-82.*

In the instant case, the employer did not sufficiently demonstrate that the claimant's actions constituted a violation of workplace rules, a course of wrongful conduct or a breach of duty to his employer. The claimant's innocent incarceration was beyond his control. The claimant made reasonable attempts to inform his employer of his incarceration and his availability for work. Because the charges against the claimant were dropped, there is insufficient evidence that the claimant engaged in misconduct within the meaning of *§ 8-1003.*

The Board finds based on a preponderance of the credible evidence that the employer did not meet its burden of demonstrating that the claimant's actions rose to the level of misconduct within the meaning of *§ 8-1003.* The hearing examiner's decision shall be reversed for the reasons stated herein.

DECISION

It is held that the claimant was discharged, but not for gross misconduct or misconduct connected with the work, within the meaning of Maryland Code Annotated, Labor and Employment Article, Title 8, Section 1002 or 1003. No disqualification is imposed based upon the claimant's separation from employment with BOXCO, INC.

The Hearing Examiner's decision is reversed.

Clayton A. Mitchell, Sr., Associate Member

Donna Watts-Lamont, Chairperson

RD
Date of hearing: March 01, 2011
Copies mailed to:
SAMIR RAJBHANDARI
BOXCO INC
ALANE TEMPCHIN ESQ.
BOXCO INC
Susan Bass, Office of the Assistant Secretary

UNEMPLOYMENT INSURANCE APPEALS DECISION

SAMIR RAJBHANDARI

SSN #

Claimant

vs.

BOXCO 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: 0938534
Appellant: Claimant
Local Office : 61 / COLLEGE PARK CLAIM CENTER

February 26, 2010

For the Claimant: PRESENT

For the Employer: PRESENT, BRENDAN STOCKMASTER, CHRIS KALISZ

For the Agency: PRESENT, KSHEETIZ THAPALIYA, INTERPRETER

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).

PREAMBLE

The Agency provided the claimant with a Nepali interpreter for the hearing. The claimant elected to proceed in English with the Nepali interpreter standing by in case the claimant needed translation. During the hearing, the claimant did not request the services of the Nepali interpreter.

FINDINGS OF FACT

The claimant was employed from February 19, 2007 to July 29, 2009. At the time of separation, he was working full time as a Cable Box Collector/Technician, earning a commission.

The claimant's immediate supervisor was Rafael Mason. The employer requires employees to notify the supervisor if they are going to be absent. If the employee can not reach the supervisor the employee can call Brandon Stockmaster, Director of Operations or Kris Kalisz, the owner. Employees are advised this at the time of hire.

The claimant failed to report to work on July 30, 2009. He failed to contact the employer to report his absence on that day or any other day until approximately August 3, 2009.

The claimant was arrested approximately 10p.m. July 29, 2009. He was incarcerated at the Loudun County Detention Center in Virginia. He was charged with assault and stalking of his girlfriend and another male individual.

On August 3, 2009, he contacted the employer at 830p.m., calling collect. Lenora Buckley, a dispatcher, answered the phone. The claimant was able to identify himself and then a recording came on advising that it was a collect call from the Loudon County Detention Center. The employer did not accept the charges.

On August 6, 2009, Kris Kalisz, the owner, received an e-mail from Geraldine Papillero, the office manager, stating that the claimant had called her the previous night advising he had been locked up since July 3, 2009. She stated that the claimant was asking the employer to help bail him out. The claimant stated he had no relatives or friends. The employer did not respond to the claimant because the employer had no direct contact from the claimant. When the claimant spoke to Ms. Pappillero. He did not know how long he would be in jail.

The claimant was released from jail on bail on August 14, 2009. However, he did not immediately contact the employer. The employer did not hear anymore from the claimant until September 19, 2009 when he sent an e-mail to Kris Kalisz. The claimant stated that he wanted his job back. The claimant never advised the employer of what charges were filed against him or the resolution of those charges.

The employer's client requires that the employees have criminal background checks annually. The employer's are supposed to report outstanding charges. Criminal charges or convictions could prevent the employer from allowing an employee to work for them.

The claimant provided documentation that he received a deferred finding for six months on the charge of stalking. He had to be placed on supervised probation until all ordered sanctions were completed at which time the probation would convert to unsupervised until the court date of March 29, 2010. He was prohibited from having contact with the male individual or his family for a period of 179 days. Although the claimant stated that the assault charge would not be prosecuted, he did not provide documentation of this.

At the time the claimant stopped reporting to work continued employment was available.

CONCLUSIONS OF LAW

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

In the case of a voluntary quit, the claimant has the burden of proving, by a preponderance of the credible evidence that the quit was for a good cause or valid circumstances. Hargrove v City of Baltimore, 2033-BH-83. In this case, the claimant failed to meet that burden. The credible evidence supports the finding that the claimant stopped reporting to work after he was incarcerated. The employer did not hear from the claimant for several days and when the employer finally did learn of the claimant's whereabouts, the claimant had no idea how long he would be incarcerated. Once the claimant was released, he failed to immediately contact the employer and did not do so for over a month. Continuing employment was available at the time he stopped reporting.

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 July 26, 2009 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.

R. Tabackman

R M Tabackman, 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 March 15, 2010. 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 : January 27, 2010
MG/Specialist ID: RWD2Q
Seq No: 002
Copies mailed on February 26, 2010 to:
SAMIR RAJBHANDARI
BOXCO INC
LOCAL OFFICE #61