

**- DECISION -**

Claimant:  
THERESA A JACOBS

Decision No.: 1535-BR-11

Date: March 23, 2011

Appeal No.: 1034403

S.S. No.:

Employer:  
FAIRWAY SERVICES LTD

L.O. No.: 65

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: April 22, 2011

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**REVIEW ON THE RECORD**

After a review on the record, and after deleting "or about" from the first and third sentences of the first paragraph, the Board adopts the hearing examiner's modified findings of fact. However, the Board concludes that these facts warrant different conclusions 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(H)(1)*. The Board fully inquires into the facts of each particular case. *COMAR 09.32.06.02(E)*.

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). 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).

The hearing examiner found that the claimant was discharged for attendance problems, caused by illness. The hearing examiner concluded that this was a non-disqualifying reason. However, the evidence does not support this conclusion.

The claimant was not discharged for her absences or her inability to work due to illness. The claimant was discharged for her willful refusal to contact the employer when requested. Even if, as she claimed, the claimant did not receive the first e-mail until late in the evening, she should have contacted the employer the following morning. The employer was making repeated attempts to speak with the claimant and try to keep her employed. The employer was very satisfied with the claimant's performance and had not wanted to terminate her employment. However, when the claimant continued to ignore requests for contact, the employer decided there was nothing else that could be done.

The Board is of the opinion that the claimant's refusal to contact the employer when requested was an act of insubordination. This was deliberate and clearly contrary to the employer's expected standards of behavior and its expectations. Her discharge for this repeated failure to contact the employer, therefore, was for gross misconduct under the law.

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 has 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**

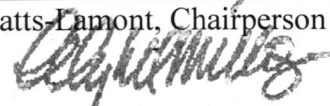
It is held that the claimant was discharged for gross misconduct connected with the work, within the meaning of Maryland Code Annotated, Labor and Employment Article, Title 8, Section 1002. The claimant is disqualified from receiving benefits from the week beginning July 4, 2010 and until the claimant becomes re-employed, earns at least twenty 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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Donna Watts-Lamont, Chairperson



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Clayton A. Mitchell, Sr., Associate Member

RD/mw

Copies mailed to:

THERESA A. JACOBS

FAIRWAY SERVICES LTD

Susan Bass, Office of the Assistant Secretary

## **UNEMPLOYMENT INSURANCE APPEALS DECISION**

THERESA A JACOBS

SSN #

**Claimant**

vs.

FAIRWAY SERVICES LTD

**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: 1034403  
Appellant: Employer  
Local Office : 65 / SALISBURY  
CLAIM CENTER

December 3, 2010

**For the Claimant:** PRESENT, RICHARD JACOBS

**For the Employer:** PRESENT, COREY RIMEL

**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 8-1001 (voluntary quit for good cause), 8-1002 - 1002.1 (gross/aggravated misconduct connected with the work) or 8-1003 (misconduct connected with the work).

### **FINDINGS OF FACT**

The claimant began working for this employer on or about November 2, 2009. At the time of separation, the claimant was working part time as a bookkeeper/administrative assistant earning \$12.00 per hour. The claimant last worked for the employer on or about July 8, 2010, before being terminated under the following circumstances:

On Monday, July 12, 2010 the claimant contacted her supervisor and informed him that she was ill and would be unable to report for work. The claimant had been absent from work due to illness eleven Mondays in twenty-six weeks of work. The employer had allowed the claimant to make up missed time

and she performed her job in a satisfactory manner. The employer determined, on July 12, 2010, that it could no longer continue to employ the claimant if she could not work her regularly scheduled days of Monday, Wednesday and Thursday. The employer sent the claimant an e-mail on July 12, 2010 informing her that "unless you are willing to seek a second opinion and assure us that you will work as agreed we can no longer hold this position." The claimant was asked to respond to this e-mail immediately. The claimant did not receive the e-mail until late in the evening and did not respond. The claimant's supervisor contacted her twice the following day to determine her response to the e-mail. The claimant was unable to provide a satisfactory response and was terminated.

The claimant has been treated since April 19, 2010 for neck and right shoulder nerve damage and pain as well as migraine headaches and low back and sciatic pain. She always kept her employer informed of her medical condition and treatment and provided all documentation required by the employer.

### 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).

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. However, 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.

Absenteeism due to illness is not misconduct. DuBois v. Redden & Rizk, P.A., 71-BH-90.

### EVALUATION OF EVIDENCE

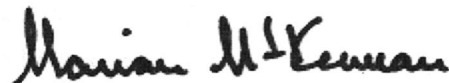
The Hearing Examiner considered all of the testimony and evidence of record in reaching this decision. Where the evidence was in conflict, the Hearing Examiner decided the Facts on the credible evidence as determined by the Hearing Examiner.

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. While the employer presented evidence showing that the claimant missed a great deal of time from work, the claimant was credible that she missed that time due to legitimate medical issues, namely her neck and shoulder nerve damage, migraine headaches and low back and sciatic pain. The employer was aware of her medical problems. Absenteeism due to illness is not misconduct. See DuBois, supra. Accordingly, I hold the employer has failed to meet its burden and while the claimant was discharged, it was for a non-disqualifying reason and benefits will be allowed.

**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 with the above-identified employer. 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 Specialist is affirmed.



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M McKennan, 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 December 20, 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: November 22, 2010  
DAH/Specialist ID: USB5A  
Seq No: 002  
Copies mailed on December 3, 2010 to:  
THERESA A. JACOBS  
FAIRWAY SERVICES LTD  
LOCAL OFFICE #65