

- DECISION -

Claimant:
WILLIE R HINTON JR

Decision No.: 1747-BR-13

Date: April 29, 2013

Appeal No.: 1233583

S.S. No.:

Employer:
BRICK BODIES FITNESS SERVICES
INC

L.O. No.: 63

Appellant: Claimant

Issue: 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).

- 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 29, 2013

REVIEW OF THE RECORD

After a review of the record, and after deleting the last three sentences of the third 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*. 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). 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).

In his appeal, the claimant expresses his disagreement with the hearing examiner's findings of fact and with the decision. The claimant reiterates his testimony from the hearing. The claimant contends:

The hearing examiner uses very strong language saying that I acted misgrossley [sic] and had willful disregard, gross indifference in connection with the work place. I think these nebulous terms and language being used to describe my behavior are a gross misrepresentation of my character...

On appeal, the Board reviews the evidence of record from the Lower Appeals hearing. The Board will not order the taking of additional evidence or a new hearing unless there has been clear error, a defect in the record, or a failure of due process. The record is complete. Both parties appeared and testified. Both parties were given the opportunity to cross-examine opposing witnesses and to offer and object to documentary evidence. Both parties were offered closing statements. The necessary elements of due process were observed throughout the hearing. The Board finds no reason to order a new hearing or take additional evidence in this matter.

The Board has thoroughly reviewed the record from the hearing and concludes that the evidence does not support a finding of gross misconduct. The language used by the hearing examiner was neither "very strong", nor "nebulous" as the claimant contends, however. The hearing examiner used the language from the statutory provision she found applicable. The Board merely disagrees with the level of misconduct.

The evidence showed that the claimant was absent for reasons beyond his control. The length of his absence was similarly beyond his control. The claimant, however, was negligent in keeping his employer informed of the delay in his anticipated return to work. That negligence was a breach of the claimant's duty to the employer and constituted simple misconduct. Clearly, the claimant was subpoenaed to appear in a court proceeding in another state. The claimant had little advance notice of this and did advise the employer when he received the subpoena. The claimant should have known to remain in more consistent contact with the employer even though he could do nothing about the length of his absence. The Board finds that this lack of proper and timely communication, between April 23, 2012, and May 3, 2012, was simple misconduct for which the claimant should have been assessed a benefit penalty.

The Board notes that the claimant was discharged on May 3, 2012. Nothing which occurred after that date was relevant to that discharge. Whether the claimant provided documentation in support of his absence so that he could be reinstated was immaterial to the reason for his discharge. Similarly, the claimant's ultimate date of return following the trial was immaterial. The Board has removed the hearing examiner's references to this from the findings of fact and likewise deletes the related analysis from the Evaluation of Evidence section of the decision.

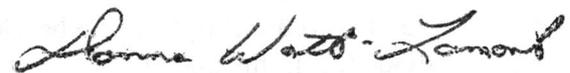
The Board also notes that the hearing examiner did not offer or admit the *Agency Fact Finding Report* into evidence. The Board did not consider this document when rendering its decision.

The Board finds based on a preponderance of the credible evidence that the employer has not met its burden of demonstrating that the claimant's actions rose to the level of gross misconduct within the meaning of §8-1002. The employer has met its burden of demonstrating that the claimant's actions rose to the level of simple misconduct within the meaning of §8-1003. The claimant is disqualified from benefits for the week beginning April 15, 2012, and for the next fourteen weeks thereafter. The decision shall be reversed for the reasons stated herein.

DECISION

It is held that the claimant was discharged for misconduct connected with the work, within the meaning of Section 8-1003 of the Labor and Employment Article Maryland Code Annotated, Title 8, Section 1003. The claimant is disqualified from receiving benefits from the week beginning April 15, 2012, and the fourteen weeks immediately following.

The Hearing Examiner's decision is reversed.



Donna Watts-Lamont, Chairperson



Clayton A. Mitchell, Sr., Associate Member

KJK/mw

Copies mailed to:

WILLIE R. HINTON JR

BRICK BODIES FITNESS SERVICES

BRICK BODIES FITNESS SERVICES

Susan Bass, Office of the Assistant Secretary

UNEMPLOYMENT INSURANCE APPEALS DECISION

WILLIE R HINTON JR

SSN #

Claimant

vs.

BRICK BODIES FITNESS SERVICES
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: 1233583

Appellant: Employer

Local Office : 63 / CUMBERLAND
CLAIM CENTER

November 15, 2012

For the Claimant: PRESENT

For the Employer: PRESENT, MORTEZ SELLERS

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 (Willie Hinton, Jr.) filed a claim for benefits establishing a benefit year beginning August 19, 2012. He qualified for a weekly benefit amount of \$192.00.

The Claimant began working for this Employer (Brick Bodies Fitness Services, Inc.) on April 19, 2010. At the time of separation, the Claimant was working in Customer Service. The Claimant last worked for the Employer on April 19, 2012, before being terminated for being absent from work for an extended period of time.

The Claimant did not report to work on Friday, April 19, 2012 as scheduled. On Monday, April 23, 2012, the Claimant contacted the Employer and advised it that he had received a subpoena to appear as a witness for a trial in Chicago, Illinois and would return when the trial ended. On May 3, 2012, the Claimant was advised that he would be terminated as a result of having been absent from work. On May 7, 2012, the Employer advised the Claimant that he would be permitted to return to work after the trial if he produced the subpoena to evidence that his lengthy absence was caused by him having been ordered to appear in court for said trial. The Claimant did not return to Maryland until June 1, 2012. The Claimant failed to return to work or produce said documentation to the Employer to retain his employment.

CONCLUSIONS OF LAW

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).

EVALUATION OF THE 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 been met.

The Claimant engaged in gross misconduct. The Claimant was allegedly subpoenaed to appear as a witness for a trial in Chicago, Illinois. The Claimant made the Employer aware after missing his second day of being scheduled for work. The Claimant was absent for over one (1) month without contacting the Employer in the interim. After being placed on notice of the Claimant's alleged whereabouts, the Employer later advised the Claimant that he would be permitted to return to work if he produced the legal documentation which mandated that he appear in court. The Claimant failed to do so. The Claimant further failed to produce said documentation even after being given an opportunity by the Hearing Examiner to produce evidence of the reason for his absence. Consequently, the Claimant's conduct demonstrated a gross indifference to the Employer's interests and showed a willful disregard of the standards that the Employer had right to expect.

I hold that the Claimant's actions showed a deliberate and willful disregard of the standards the Employer had a right to expect, showed a gross indifference to the Employer's interests and therefore constituted gross misconduct in connection with the work. An unemployment disqualification shall be imposed based on Md. Code, Ann., Labor & Emp. Article, Section 8-1002 pursuant to this separation from this employment.

DECISION

IT IS HELD, that the Claimant was discharged for gross misconduct connected with the work within the meaning of Md. Code Ann., Labor & Emp. Article, Section 8-1002(a)(1)(i). The Claimant is disqualified from receiving benefits from the week beginning April 15, 2012 and until the Claimant becomes reemployed and earns wages in covered employment that equal at least 25 times the Claimant's weekly benefit amount.

The determination of the Claims Specialist is reversed.

L. Williamson

L. Williamson, 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 November 30, 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: November 05, 2012
DAH/Specialist ID: WCU3P
Seq No: 001
Copies mailed on November 15, 2012 to:
WILLIE R. HINTON JR
BRICK BODIES FITNESS SERVICES
LOCAL OFFICE #63