

**- DECISION -**

Claimant:  
RORY G WHITE

Decision No.: 190-BR-11

Date: January 12, 2011

Appeal No.: 1038224

S.S. No.:

Employer:  
J W TREUTH & SONS INC

L.O. No.: 60

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: February 11, 2011

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**REVIEW ON THE RECORD**

After a review on the record, the Board adopts the hearing examiner's 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).*

In its appeal, the employer contends that the hearing examiner misapplied the law to the agreed-upon facts. The Board agrees. The uncontroverted evidence of record established that the claimant willfully and deliberately failed and refused to perform the job duties to which he was assigned. The claimant had performed this type of work in the past and it was well within his regular scope of work. The claimant was simply upset because he did not get to accompany a delivery as was the usual pattern. However, the employer had a good business reason for requesting the claimant to perform other duties on the day in question and the claimant had no good reason for his refusal to do so. The evidence also established that the only reason for the claimant's discharge was this refusal to perform his job duties.

The claimant's refusal was intentional. His failure to perform the requested duties had an adverse impact on the employer. The claimant knew or should have known that his conduct was contrary to the employer's interests. The claimant's action was in deliberate disregard for the employer and, as such, was gross misconduct.

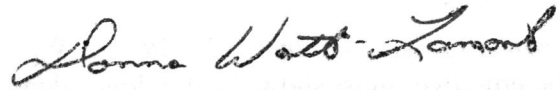
The Board notes that the hearing examiner did not offer or admit the *Agency Fact Finding Report* into evidence. The Board did not consider this document when rendering its decision.

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

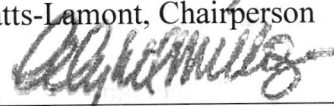
It is held that the claimant was discharged for gross misconduct connected with the work, within the meaning of Maryland Code Annotated, Labor and Employment Article, Title 8, Section 1002. The claimant is disqualified from receiving benefits from the week beginning August 22, 2010 and until the claimant 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:

RORY G. WHITE

J W TREUTH & SONS INC

J W TREUTH & SONS INC

Susan Bass, Office of the Assistant Secretary

Claimant objected.

Mr. Shepherd left and returned about 20 minutes later. The Claimant had not sanitized the trailer as instructed and was not on the loading dock. Instead, the Claimant went upstairs to "push meat." Mr. Shepherd found the Claimant and asked why he had not performed his assigned duties and the Claimant responded that he was "working" and continued to refuse to answer the question. Mr. Shepherd advised the Claimant that if he was not going to perform his assigned job duties then he was fired. After confirming that he was fired, the Claimant became irate. He screamed at Mr. Shepherd and used profane language. One of the Employer's owners came out and instructed the Claimant to leave the premises and he did.

### CONCLUSIONS OF LAW

Maryland Code Annotated, Labor and Employment Article § 8-1002(a)(1)(i) (Supp. 2010) 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).

Maryland Code Annotated, Labor and Employment Article § 8-1003 (Supp. 2010) 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, 314 A.2d 113 (1974).

### EVALUATION OF EVIDENCE

In deciding this case, I considered all available evidence, including the testimony of the Claimant and the Employer's witness, Curtis Shepherd. Where evidence was in conflict, I decided the facts on the basis of the evidence I deemed most credible.

The evidence established that the Claimant was discharged. The Employer has the burden to prove by a preponderance of the evidence that it discharged the Claimant for some degree of misconduct connected with the work within the meaning of the Maryland Unemployment Insurance Law before the Claimant can be denied benefits. Ivey v. Catterton Printing Company, 441-BH-89. In this case, the Employer demonstrated that the Claimant was discharged for simple misconduct.

The Employer's witness testified that the Claimant became upset when he was not allowed to go on the delivery of the trailer, but was assigned to stay behind and work. He explained that there is no formal rotation and that employees must perform their assigned job duties. The Claimant acknowledged that he became upset, when he was assigned to work on the loading dock, because it was his "turn" to accompany

**UNEMPLOYMENT INSURANCE APPEALS DECISION**

RORY G WHITE

SSN #

**Claimant**

vs.

J W TREUTH & SONS 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: 1038224

Appellant: Claimant

Local Office : 60 / TOWSON CALL  
CENTER

November 16, 2010

**For the Claimant:** PRESENT

**For the Employer:** PRESENT, CURTIS SHEPHERD

**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**

JW Treuth and Sons, Inc., a meat slaughter house (Employer), employed Rory White (Claimant) as a full-time Dock Laborer at \$12.50 per hour from November 30, 2009 through August 25, 2010.

On August 24, 2010, the Claimant assisted in loading a trailer, which was scheduled for delivery the next day. Typically, the employee who loads a trailer is allowed to accompany the driver on the delivery of that trailer on the following day. On August 25, 2010, another employee failed to report for work and Curtis Shepherd, the Dock Foreman, assigned a new employee to the delivery of the trailer. He then assigned the Claimant, an experienced employee, to wash out the back of a trailer to prepare it for loading. The

the driver with the delivery of the meat he had loaded the prior day. He also conceded that he screamed and used profane language, but not until after he had been dismissed.

The Claimant noted that he was a hard-working employee, who the Employer has hired on several occasions.

After a careful examination of the evidence of record, I find the Employer demonstrated that there was no established rotation of work duties and that the Claimant was dismissed after he failed to perform his assigned tasks. In addition, the parties agreed that the Claimant did not swear in a loud tone until after he was dismissed.

I find that the Claimant's conduct does not demonstrate a deliberate and willful disregard of standards that the Employer had a right to expect, and/or that showed a gross indifference to the Employer's interests. The Claimant made clear that he left the loading dock and did not clean the trailer because he was upset, but noted that he went upstairs and continued to work. There also was no dispute that the Claimant did not become irate and use profane language until after he had been dismissed.

I, however, do find that the Employer requires its employees to act in an appropriate manner and to perform their assigned tasks. The evidence shows that the Claimant failed to act in such a fashion, walked away and did not follow his supervisor's instructions. I find that the Claimant's conduct constituted misconduct as it rose to the level of "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 the employment relationship." Rogers v. Radio Shack, 271 Md. 126, 132, 314 A.2d 113 (1974).

I find that the Claimant's actions constituted misconduct as contemplated under Maryland Code Annotated, Labor and Employment Article § 8-1003.

### DECISION

IT IS HELD THAT the circumstances surrounding the Claimant's discharge constituted misconduct connected with the work within the meaning of Maryland Code Annotated, Labor and Employment § 8-1003. Benefits are denied for the week beginning August 22, 2010 and for the four weeks immediately following.

The determination of the Claim Specialist is reversed.

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Jana Burch  
Administrative Law Judge



### **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 December 1, 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: October 26, 2010  
DAH/Specialist ID: WHG3C  
Seq No: 001  
Copies mailed on November 16, 2010 to:  
RORY G. WHITE  
J W TREUTH & SONS INC  
LOCAL OFFICE #60