

- DECISION -

Claimant:
JEFFREY L TRITE

Decision No.: 2085-BR-11

Date: May 11, 2011

Appeal No.: 1027280

S.S. No.:

Employer:
WASHINGTON CO BOARD COMMISSION

L.O. No.: 63

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: June 10, 2011

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 claimant's insubordination, unauthorized overtime and refusal to leave the premises when asked, all constitute gross misconduct. The Board concurs.

The claimant may, in fact, have reduced his personal use of the company cell phone, but the directive he was given was to discontinue personal use of the cell phone. The employer was willing to allow the claimant to make occasional personal calls on the cell phone, but the claimant adamantly refused. Instead he stated that he would use the cell phone as he wished. His continued use of the employer's cell phone for personal reasons was in deliberate disregard for the employer's stated requirements. The claimant continued to periodically work unauthorized overtime and even on the occasions when he could not avoid it, he did not advise a supervisor of his overtime or why it had occurred. This was a deliberate action in disregard for the employer's expressed expectations. The claimant's refusal to leave the premises when asked was an additional act in deliberate disregard for the employer's reasonable expectations. Further, the claimant stated refusal to limit his cell phone usage, his refusal to abide by the overtime policy and his refusal to leave the work premises were all acts of willful insubordination.

The evidence, taken as a whole, clearly established that the claimant was discharged for several actions taken in deliberate and willful disregard for the employer. Thus, his termination was for gross misconduct under the law.

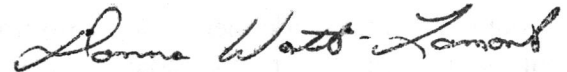
The Board notes that the hearing examiner did not offer or admit the *Agency Fact Finding Report* into evidence. The Board did not consider this document when rendering its decision.

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.

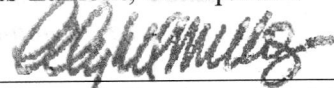
DECISION

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 May 30, 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.



Donna Watts-Lamont, Chairperson



Clayton A. Mitchell, Sr., Associate Member

RD/mw

Copies mailed to:

JEFFREY L. TRITE
WASHINGTON CO BOARD COMMISSION
JAMES A. STULLER
ANITA VOYCE
WASHINGTON CO BOARD COMMISSION
Susan Bass, Office of the Assistant Secretary

UNEMPLOYMENT INSURANCE APPEALS DECISION

JEFFREY L TRITE

SSN #

Claimant

vs.

WASHINGTON CO BOARD COMMISSION

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: 1027280

Appellant: Employer

Local Office : 63 / CUMBERLAND
CLAIM CENTER

September 17, 2010

For the Claimant: PRESENT

For the Employer: PRESENT , JAMES A. STULLER, ANITA VOYCE, GEORGE SONNIK, III, MARK BRADSHAW

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 worked for the employer from March 1, 1998 through June 3, 2010, his last day at work. At the time of separation, the claimant was working on a full-time basis as a utilities inspector and was paid \$20.87 an hour. The claimant was discharged for insubordination.

On May 3, 2010, the claimant's supervisor met with him to discuss personal calls the claimant was making on his employer's cell phone. It is the employer's policy that the cell phones it issues to employees should only be used for business purposes. During the most recent 30 day billing period the claimant had made over 100 calls on his cell phone and at least 90 percent of them were personal. The claimant was warned

that he had to stop using the phone for personal calls or at least keep them to a bare minimum. The claimant had been verbally warned by his supervisor before on April 27, 2010, on this same issue.

The claimant did not accept his supervisor's warning and told the supervisor that he would continue using the cell phone as he had before for personal calls as he believed it did not cost the County any more when he did. The claimant was upset and at first refused to leave his supervisor's office when the meeting was over. A memorandum was issued directing the claimant in writing to discontinue using the County cell phone for personal business under threat of more severe penalties including termination. The claimant had a meeting with the employer's director of human resources on May 6, 2010. The director confirmed what the claimant's supervisors had told him.

The claimant's supervisors did not have the authority to discharge the claimant. That authority lies with the County Commissioners. Shortly after the incident regarding cell phone usage, there was a formal request by the claimant's superiors to have him discharged.

While that request was under review, the claimant was suspended for five days for working unauthorized overtime on May 17, 2010. The claimant had been warned several times in the past that any overtime he worked would have to be approved first by a supervisor. In May 2008, the claimant was directed in writing that no overtime was to be worked without prior approval. In July 2008, the claimant worked three consecutive days of overtime without prior approval and, as a result, was suspended two days without pay. On September 23, 2009, a written directive was issued to the claimant and a co-worker stating their normal work hours and restating that any overtime worked must be approved in advance.

On May 17, 2010, the claimant was given the assignment of witnessing the inspection by video camera, of a sewer line for leaks by a private party. This required him to work through his usual lunch break of ½ an hour. In such cases, the claimant would usually be expected to leave work a ½ hour earlier in order to avoid overtime. The inspection was halted around 3 p.m. due to problems with the camera. The claimant returned to the office to finish his day at the normal time. He recorded in his work log that he had worked the extra ½ hour by skipping lunch. On May 19, 2010 when the claimant returned to work after taking a day off, he was advised that the employer was upset about his log entry because this would mean the claimant would be owed the overtime. The claimant was suspended five days without pay and given a final warning.

The County Administrator decided to ask the Commissioners to terminate the claimant. The Commissioners agreed to the request at their weekly meeting held on June 1, 2010. In the meantime, the claimant had reduced his using the employer's cell phone for personal business. During the billing period of May 9, 2010 through June 8, 2010, he made only five personal calls.

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).

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 8-1002 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.

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 been met.

The claimant argued that working the ½ hour overtime was unavoidable because he had to return to the office to complete his work rather than go home ½ hour early. The claimant also argued that he had never been formally warned that his job was in immediate jeopardy. He also noted that he had reduced his personal use of his cell phone as instructed.

The employer argued that the claimant had clearly been unreasonably argumentative and contrary when he was warned about the cell phone usage as he told his superiors that he would continue to use the phone for personal business and then, refused to leave the office at the end of the meeting. It was also argued that whether or not the ½ hour was unavoidable, the claimant should have let his supervisor know about it so it could be authorized.

The Hearing Examiner concludes that the claimant was clearly insubordinate at the meeting in early May when his use of the cell phone was discussed with him. The claimant could have easily curbed his own behavior and accepted the instruction given to him by the employer without causing trouble. He did in fact do so, contrary to what he told the employer, by reducing his personal calls to a minimum during the following billing cycle.

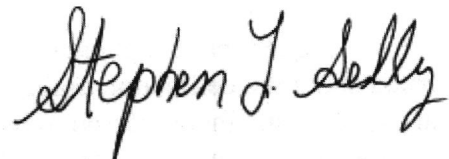
Overall, the incidents regarding unauthorized overtime are widely separated in time and the claimant actually obeyed the directive he was given regarding his personal use of the company cell phone. As a result, it is determined he was discharged for simple rather than gross misconduct in this case.

I hold that the claimant committed a transgression of some established rule or policy of the employer, a forbidden act, a dereliction of duty, or engaged in a course of wrongful conduct within the scope of the claimant's employment relationship, during hours of employment, or on the employer's premises. An unemployment disqualification shall be imposed based on Md. Code, Ann., Labor & Emp. Article, Section 8-1003 pursuant to this separation from this employment.

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 May 30, 2010 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 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 Selby, 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 October 04, 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: September 07, 2010

CH/Specialist ID: WCU3T

Seq No: 001

Copies mailed on September 17, 2010 to:

JEFFREY L. TRITE

WASHINGTON CO BOARD COMMISSION

LOCAL OFFICE #63

JAMES A. STULLER

ANITA VOYCE

WASHINGTON CO BOARD COMMISSION