

**- DECISION -**

Claimant:  
COLIN M BISASKY

Decision No.: 2286-BR-13

Date: June 21, 2013

Appeal No.: 1307524

S.S. No.:

Employer:  
UNIDINE CORPORATION

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.

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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: July 22, 2013

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**REVIEW OF THE RECORD**

After a review of the record, the Board adopts the following findings of fact and conclusions of law and reverses the hearing examiner's decision:

The claimant worked as a part-time server in a retirement community, earning \$9.56 hourly from January 22, 2012 through December 5, 2012. The claimant was discharged for his attendance violations.

The employer's attendance policy provides that an employee may be discharged after accumulating three attendance offenses in one year. The claimant was given a final written warning on March 13, 2012 for his failure to work at his assigned time.

The claimant was absent on November 29, 2012 and violated the employer's policy by not calling at least one hour before scheduled.

On November 30, 2012, the claimant was due at work at 4:45 p.m. but did not call out until 4:30 p.m.

On December 4, 2012, the claimant was due at 4:45 p.m. but did not arrive until 5:00 p.m. after being called by his supervisor.

On December 5, 2012, the claimant arrived at work at 12:10 p.m. when he was scheduled to begin work at 11:45. The claimant was consequently discharged.

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); 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.

The Board has consistently held that an employer's policy is not definitive of misconduct or gross misconduct. A policy is instructive and can establish an employer's work-rule as well as a worker's awareness of a work-rule. The violation of a policy can support an employer's decision to discharge a worker. A policy violation cannot, however, of itself establish misconduct or gross misconduct. There must be competent and credible evidence that the act or omission which led to the policy violation was misconduct or gross misconduct.

In the instant case, the credible evidence established that the claimant continued a pattern of attendance violations after receiving verbal and written warnings. The attendance violations of November 29, 2012 and November 30, 2012 occurred before the claimant's mother was hospitalized. The claimant could not provide any reasons for those violations.

The claimant asserted that there were mitigating circumstances for his attendance problems on December 4, 2012. The claimant's aunt proffered that the claimant's mother provided the claimant with transportation to work and direction in his life and his mother was hospitalized on the fourth of December. In addition, the claimant had a dental procedure on December 3, 2012. The claimant claimed that his fellow workers knew that he was in severe pain and the pain medication that he was taking had made him drowsy. However, the claimant did not provide any medical documentation to his employer and the claimant testified that he was on the pain medication for several weeks. Additionally the claimant violated his employer's attendance policies even when his mother was home.

The Board finds that the claimant's behavior showed a deliberate disregard of the standards that an employer has the right to expect. The claimant was on final warning and was aware that any additional incidents could result in termination. The claimant's position was time sensitive. The claimant was a food server for residents of a retirement community wherein meals were provided at specific times. His

attendance violations placed an undue burden on the employer in meeting the food service needs of the residents.

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 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 of the hearing examiner 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 November 25, 2012 and until the claimant becomes re-employed, earns at least twenty five times their weekly benefit amount and thereafter becomes unemployed through no fault of their own.

The Hearing Examiner's decision is reversed.



Eileen M. Rehrmann, Associate Member



Donna Watts-Lamont, Chairperson

VD

Copies mailed to:

COLIN M. BISASKY

UNIDINE CORPORATION

Susan Bass, Office of the Assistant Secretary

**UNEMPLOYMENT INSURANCE APPEALS DECISION**

COLIN M BISASKY

SSN #

**Claimant**

vs.

UNIDINE CORPORATION

**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: 1307524

Appellant: Claimant

Local Office : 63 / CUMBERLAND  
CLAIM CENTER

April 23, 2013

**For the Claimant:** PRESENT, MARIE JENKINS

**For the Employer:** PRESENT, REGINALD STEPHENS

**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**

The claimant, Colin Bisasky, opened a claim for unemployment insurance benefits and established a benefit year beginning January 27, 2013 and qualified for a weekly benefit amount of \$176.

The claimant worked for the employer, Unidine Corporation, from January 22, 2012 through December 5, 2012. His last actual day at work was December 4, 2012. At the time of the separation from employment, the claimant was working on a part time basis, 20 to 30 hours a week, as a server at the Fairhaven Retirement Community and was paid a wage of \$9.56 an hour. The claimant was discharged due to attendance issues.

The employer has a strict attendance policy that provided that an employee may be discharged after three attendance offenses in one year. The offenses include tardiness and being absent as well as not calling in within a prescribed period to notify a supervisor you will be absent or late.

The claimant was absent on November 29, 2012. He was due to come in at 11:45 a.m. but did not call the employer until 11:30 a.m. The policy states that he should have provided at least one hours' notice. On the following day the claimant was due to be at work at 4:35 p.m. but did not call out until 4:30 p.m. The claimant was late coming to work on December 4, 2012. He was due at 4:45 p.m. but did not arrive until 5 p.m. after being called by his supervisor. He was late again the next day when he was due to report to work at 11:45 a.m. but did not arrive until 12:10 p.m. During this period the claimant was experiencing dental problems which ultimately led to him having a dental procedure performed just after he was discharged. The pain medication he was receiving for this problem made him drowsy. At the same time his mother was experiencing medical problems which included her being hospitalized to have her appendix removed from December 4 through December 10, 2012. The claimant is very dependent on this mother to provide him transportation to work and direction in his life. The claimant had also been late in calling out to report an absence on February 8, 2012 and for coming in to work 40 minutes late after he was called by his supervisor on March 13, 2012. The claimant had misread his schedule for that day. The claimant received written warnings for these first two occasions and he was terminated after the series of events in late November and early December 2012.

### 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 not been met.

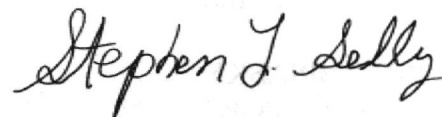
The claimant's conduct in this case was clearly not willful or deliberate on his part and does not meet the standard of gross misconduct under the law. The claimant's occasions of attendance violations were rather sparse until he underwent personal problems with his own health and that of his mother at the end of the year. If his pattern had continued for more than one week there may have been grounds for a finding of at least misconduct. However, as the claimant did provide credible evidence of mitigating circumstances in this case related to his attendance during this brief period, it is held that he was discharged but not for reason of misconduct in this case.

I hold that the claimant did not commit a transgression of some established rule or policy of the employer, a forbidden act, a dereliction of duty, or engage 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. No 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, 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 reversed.



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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 May 08, 2013. 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 : April 02,2013  
TH/Specialist ID: WCU42  
Seq No: 001  
Copies mailed on April 23, 2013 to:

COLIN M. BISASKY  
UNIDINE CORPORATION  
LOCAL OFFICE #63