-DECISION-

Claimant:
DAMON A MCTAVISH

Employer:
THE HOWARD COUNTY LUBE

Decision No.: 2533-BR-11

Date: May 06, 2011

Appeal No.: 1039659

S.S. No.:

L.O. No.: 64

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 05, 2011

REVIEW ON THE RECORD

After a review on the record, the Board adopts the following findings of facts and conclusions of law. The hearing examiner's decision is reversed.[1]

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[1] The Board notes that the hearing examiner became argumentative and adversarial with the employer's witnesses during the hearing. The hearing examiner rushed through both the claimant's testimony and argued with the employer's witnesses during employer's direct examination. She failed to clarify with the claimant and employer the status of the claimant's employment at the time of separation. The hearing examiner confused both the claimant and the employer's witnesses with her demeanor. Rather than trying to elicit facts from both, she was rude and argumentative, thus, confusing the entire process. However, the Board, after a careful review of the hearing, has elicited enough factual testimony to make a determination of the issue of the claimant's separation.

The claimant began full-time employment with the employer on or about July 20, 2009. In August, 2010 the claimant began full-time employment with another employer but retained a part-time position with the employer of record, working on weekends.

On Saturday, September 25, 2010, the claimant worked his shift (*See Employer's Exhibit 1*). The claimant was scheduled to work on September 26, 2010 but failed to show up for his shift.

The employer had a policy that one no call/no show was grounds for termination. The claimant was aware of this policy by a written acknowledgement of same.[2]

The employer terminated the claimant via correspondence on September 30, 2010. (*See Employer's Exhibit 2*)

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)*.

A threshold issue in this case is whether the claimant voluntarily quit or whether the claimant was discharged. For the following reasons, the Board affirms the hearing examiner's decision that the claimant was discharged.

The burden of proof in this case is allocated according to whether the claimant voluntarily quit or whether the employer discharged the claimant. 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.*

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[2] Although the employer's witness requested the policy and the claimant's signed acknowledgement of the policy be admitted into the record, the hearing examiner did not do so.

When a claimant voluntarily leaves work, he has the burden of proving that he left for good cause or valid circumstances based upon a preponderance of the credible evidence in the record. *Hargrove v. City of Baltimore, 2033-BH-83*; *Chisholm v. Johns Hopkins Hospital, 66-BR-89.* Purely personal reasons, no matter how compelling, cannot constitute good cause as a matter of law. *Bd. Of Educ. Of Montgomery County v. Paynter, 303 Md. 22 (1985).* An objective standard is used to determine if the average employee would have left work in that situation; in addition, a determination is made as to whether a particular employee left in good faith, and an element of good faith is whether the claimant has exhausted all reasonable alternatives before leaving work. *Board of Educ. v. Paynter, 303 Md. 22 (1985); also see Bohrer v. Sheetz, Inc., Law No. 13361, (Cir. Ct. for Washington Co., Apr. 24, 1984).* The "necessitous or compelling" requirement relating to a cause for leaving work voluntarily does not apply to "good cause". *Board of Educ. v. Paynter, 303 Md. 22 (1985).* A resignation in lieu of discharge is a discharge under *§§ 8-1002, 8-1002.1*, and *8-1003*. *Miller v. William T. Burnette and Company, Inc., 442-BR-82.*

The intent to discharge or the intent to voluntarily quit can be manifested by words or actions. "Due to leaving work voluntarily" has a plain, definite and sensible meaning, free of ambiguity. It expresses a clear legislative intent that to disqualify a claimant from benefits, the evidence must establish that the claimant, by his or her own choice, intentionally and of his or her own free will, terminated the employment. *Allen v. Core Target Youth Program, 275 Md. 69 (1975).* A claimant's intent or state of mind is a factual issue for the Board of Appeals to resolve. *Dept. of Econ. & Empl. Dev. v. Taylor, 108 Md. 250(1996), aff'd sub. nom., 344 Md. 687 (1997).* An intent to quit one's job can be manifested by actions as well as words. *Lawson v. Security Fence Supply Company, 1101-BH-82.* A resignation submitted in response to charges which *might* lead to discharge is a voluntary quit. *Hickman v. Crown Central Petroleum Corp., 973-BR-88*; *Brewington v. Dept. of Social Services, 1500-BH-82*; *Roffe v. South Carolina Wateroe River Correction Institute, 576-BR-88* (where a claimant quit because he feared a discharge was imminent, but he had not been informed that he was discharged is without good cause or valid circumstances); *also see Cofield v. Apex Grounds Management, Inc., 309-BR-91.* When a claimant receives a medical leave of absence but is still believes she is unable to return upon the expiration of that leave and expresses that she will not return to work for an undefinable period, the claimant is held to have voluntarily quit. *See Sortino v. Western Auto Supply, 896-BR-83.*

The intent to discharge can be manifested by actions as well as words. The issue is whether the reasonable person in the position of the claimant believed in good faith that he was discharged. *See Dei Svaldi v. Martin Taubenfeld, D.D.S., P.A., 1074-BR-88* (the claimant was discharged after a telephone conversation during which she stated her anger at the employer and the employer stated to her, "If that's the way you feel, then you might as well not come in anymore." The claimant's reply of "Fine" does not make it a quit). *Compare, Lawson v. Security Fence Supply Company, 1101-BH-82.* A quit in lieu of discharge is a discharge for unemployment insurance purposes. *Tressler v. Anchor Motor Freight, 105-BR-83.*

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."

A violation of an employer's absenteeism policy is not misconduct per se where that policy does not distinguish between absences which occurred due to 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.*

The claimant failed to report to work or notify the employer of his absence for three consecutive scheduled work days. There was no indication that the claimant was so seriously ill that he could not call the employer during this time. This was gross misconduct. *Rhodes v. Mullan Enterprises, Inc., 615-BR-89.*

The employer's policy, of which the claimant should have been aware, provided that an employee who neither reported to work nor called for three consecutive days would be terminated. The claimant failed to report to work or call in for four consecutive days. The record shows no excuse other than his written statement that he had a hangover. This was gross misconduct. *Hardin v. Broadway Services, Inc., 146-BR-89.*

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's review of this case is somewhat atypical due to the nature of the hearing examiner's behavior during the Lower Appeal Division hearing. However, there was enough testimony and documentary evidence admitted that the Board is able to render a clear, concise, fair decision.[3]

The claimant originally worked for the employer as a full-time employee; his relationship with the employer of record then transformed into a part-time position at his request. The employer agreed and only scheduled the claimant for work on the weekends.

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3 It is important to note that the hearing examiner's decision never fully explained the employment status of the claimant. The hearing examiner also failed to educate the parties as to how the process of the unemployment claim is determined. For example, the employer argues that the claimant's claim was submitted on September 12, 2010, when the claimant was still employed by the employer of record. The hearing examiner was obviously not attentive when the claimant explained his status with the employer of record as going from full-time to part-time after he obtained another full-time position. It was obvious that the claimant was separated from his new full-time position on or about September 12, 2010. However, the hearing examiner neither explained nor acknowledged the employer's confusion over the overlapping of these dates. The hearing examiner was more interested in arguing and chastising the employer's witnesses as to their inability to remember dates of the claimant's separation, than in getting to the factual determinations. The Board believes that it is imperative that the parties in a Lower Appeals' hearing receive all the necessary guidance and direction so as to alleviate the mischaracterization of the separation as is apparent in the instant case.

On September 26, 2010 the claimant failed to show up for his scheduled Sunday shift. He did not call his manager. In fact, the claimant did not call on the following Monday, Tuesday, Wednesday or Thursday.[4] Finally, the employer sent the claimant a termination letter. The employer's policy was that a no call/no show would result in discharge. The claimant was aware of this policy.

In most cases, the Board has held that one isolated incident does not constitute gross misconduct. However, given the facts in the present case, the claimant had a heightened duty to at least notify his employer of the reason he could not be available for his scheduled shift. If it was an extreme emergency situation, he could have at least contacted his employer on Monday to explain the circumstances. The claimant failed to do anything.

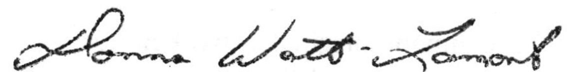
The claimant's employer accommodated the claimant's new full-time position and honored claimant's request that he work only on weekends. The claimant had a duty at that time to follow the employer's policies to the letter.

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 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 September 19, 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/mr

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4 Although the claimant alleges that his failure to show up to work was due to having to attend to his mother who was ill, the Board finds this explanation circumspect. The claimant said that he called his assistant manager on "September 23rd" which was 3 days prior. However, the time records show that the claimant worked on September 25th. *(See Employer's Exhibit 1)*

Copies mailed to:
DAMON A. MCTAVISH
THE HOWARD COUNTY LUBE
THE LUBE CENTER
Susan Bass, Office of the Assistant Secretary

UNEMPLOYMENT INSURANCE APPEALS DECISION

DAMON A MCTAVISH

SSN #

Claimant

vs.

THE HOWARD COUNTY LUBE MANAGEMENT COMPANY 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: 1039659
Appellant: Claimant
Local Office : 64 / BALTOMETRO CALL CENTER

November 22, 2010

For the Claimant: PRESENT

For the Employer: PRESENT, KIMBERLY SABATANO, ROY WHITEHEAD

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 1001 (Voluntary Quit for good cause), 1002 - 1002.1 (Gross/Aggravated Misconduct connected with the work), or 1003 (Misconduct connected with the work).

FINDINGS OF FACT

The Claimant began working for this Employer on or about July 21, 2009. At the time of separation, the Claimant was working as a lube technician. The Claimant last worked for the Employer on or about September 25, 2010 before being terminated for an alleged no call/no show.

On or about September 25, 2010, the Claimant went out of town. The following day he called the Employer to indicate he would not be in to work that day. The Claimant was scheduled to begin work at 9:00 a.m. When he returned to work by the Manager, Roy Whitehead, that he was fired for a no call/ no show.

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.

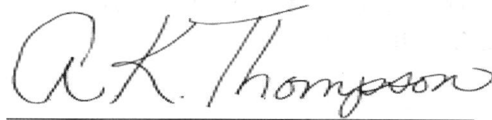
The Employer had the burden to show, by a preponderance of the credible evidence, that the Claimant was discharged for some degree of misconduct connected with the work within the meaning of the Maryland Unemployment Insurance Law. Ivey v. Catterton Printing Company, 441-BH-89. In the case at bar, that burden has not been met.
The credible evidence presented indicated the Claimant was discharged for an alleged no call/no show. In fact, the Claimant did call. The Employer relied on the word of an assistant manager who was not present at the hearing. Claimant's testimony given under oath is more credible.

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 FURTHER 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 Howard County Lube Management Company, Inc. 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 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.



A K Thompson,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 December 07, 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 15, 2010
BLP/Specialist ID: WHG4A
Seq No: 003
Copies mailed on November 22, 2010 to:

DAMON A. MCTAVISH
THE HOWARD COUNTY LUBE
LOCAL OFFICE #64