

- DECISION -

Claimant:	Decision No.:	2679-BR-11
DENA L PAYTON	Date:	May 09, 2011
	Appeal No.:	1048360
	S.S. No.:	
Employer:	L.O. No.:	60
BOARD OF EDUCATION OF BALTO CO	Appellant:	Claimant

Issue: Whether the claimant left work voluntarily, without good cause within the meaning of Maryland Code, Labor and Employment Article, Title 8, Section 1001.

- 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 08, 2011

REVIEW ON THE RECORD

After a review on the record, the Board adopts the following findings of fact. The Board vacates the hearing examiner's conclusions of law but bases its decision on different grounds. Notwithstanding, the claimant remains disqualified from the receipt of benefits.

The claimant was employed as a part-time cafeteria aid from October 23, 2008 through June 18, 2010. The claimant is unemployed as the result of a discharge. *See Claimant's Exhibit 1.*

The claimant had a long pattern of attendance violations with the employer. The claimant was absent on ten separate days, was late on five occasions and left early without authorization on six occasions.

Because of the claimant's failure to report to work on a consistent basis, the claimant was discharged effective June 18, 2010.

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 reverses the hearing examiner's finding on this issue.

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*.

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.

The Board finds insufficient evidence that the claimant manifested the requisite intent to quit her job. The claimant reasonably believed that when Principal Harris discharged her from her position at the school that she was indeed *discharged*. The Board is persuaded that the claimant was informed, "If we need you, we'll call you" on an as-needed basis. The Board finds that the claimant did not have the continuing obligation to apply for work with this employer. The Board finds the preponderance of the credible evidence supports a conclusion that the claimant was discharged on June 18, 2010.

Finding that the claimant was discharged, the Board now examines whether it was for a disqualifying reason.

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 finds sufficient evidence that the claimant was in repeated violation of the employer's attendance policy. Her chronic pattern of not reporting to work on a consistent basis was with gross disregard of her employer's interests. The claimant knew or should have known that such conduct would lead to her discharge.

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 hearing examiner's voluntary quit decision shall be reversed and vacated and the claimant shall be disqualified from benefits for the reasons stated herein.

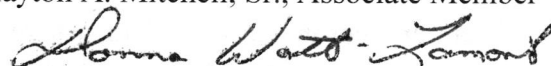
DECISION

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 June 13, 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.



Clayton A. Mitchell, Sr., Associate Member



Donna Watts-Lamont, Chairperson

RD

Copies mailed to:

DENA L. PAYTON

BOARD OF EDUCATION OF BALTO CO

CAROL STROUD

BOARD OF EDUCATION OF BALTO CO

Susan Bass, Office of the Assistant Secretary

UNEMPLOYMENT INSURANCE APPEALS DECISION

DENA L PAYTON

SSN #

Claimant

vs.

BOARD OF EDUCATION OF BALTO CO

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: 1048360

Appellant: Claimant

Local Office : 60 / TOWSON CALL
CENTER

January 31, 2011

For the Claimant: PRESENT

For the Employer: PRESENT , CAROL STROUD, MARY ROHEY

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 was employed from October 23, 2008 to June 18, 2010. At the time of separation, she was working part time as an assistant school cafeteria aid, earning \$8.57 per hour. The claimant worked from 11:00 am to 1:30 pm, Monday through Friday during the school year. The claimant voluntarily quit the job.

From August 31, 2009, the claimant also worked for the employer as a substitute school bus attendant. She was required to report to the employer's Wabash Avenue lot at 6:00 am daily to receive her assignment. She was paid for an eight hour day, even though she was only assigned to work a morning run and/or an afternoon run.

The employer's records show that the claimant stopped working as a bus attendant after December 14, 2009, although work was available. She stopped reporting because she thought the employer would call her if they needed her.

The claimant worked as a cafeteria aid at Fort Garrison Elementary School. The claimant last worked as a cafeteria aid on June 18, 2010, the last day of school. In July, 2010, the claimant called the principal, Karen Harris, to ask about returning to her job at the start of the 2010-2011 school year. Ms. Harris told the claimant that her position at the school was terminated because of the claimant's failure to report to work on a consistent basis. The claimant had been absent 10 separate days, late 5 to 10 days and had left early 6 to 8 days. The claimant's 10 year old daughter attended the school and the claimant's absences and leaving early occurred when her daughter was sick. The incidents of lateness occurred because the claimant's ride to work was late. The claimant received no warnings for attendance issues.

The claimant was not discharged from employment when Ms. Harris terminated her from Fort Garrison School. The claimant could have requested a job at another school, but failed to do so. She assumed she could only work at Fort Garrison.

CONCLUSIONS OF LAW

Md. Code Ann., Labor & Emp. Article, Section 8-1001 provides that an individual is disqualified from receiving benefits when unemployment is due to leaving work voluntarily. The Court of Appeals interpreted Section 8-1001 in Allen v. CORE Target City Youth Program, 275 Md. 69, 338 A.2d 237 (1975): "As we see it, the phrase 'leaving work voluntarily' has a plain, definite and sensible meaning...; 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, of his or her own free will, terminated the employment." 275 Md. at 79.

Md. Code Ann., Labor & Emp. Article, Section 8-1001 provides that an individual shall be disqualified for benefits where unemployment is due to leaving work voluntarily without good cause arising from or connected with the conditions of employment or actions of the employer, or without valid circumstances. A circumstance is valid only if it is (i) a substantial cause that is directly attributable to, arising from, or connected with conditions of employment or actions of the employing unit; or (ii) of such necessitous or compelling nature that the individual has no reasonable alternative other than leaving the employment.

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 claimant had the burden to show, by a preponderance of the evidence, that she voluntarily quit her position for reasons that constitute either good cause or valid circumstances pursuant to the Maryland Unemployment Insurance Law. Hargrove v. City of Baltimore, 2033-BH-83. In this case, the claimant failed to meet this burden.

The claimant worked for the Board of Education. She stopped reporting to her position as a substitute school bus aid when work was available. Additionally, when her school principal told her she could not return to her position as a cafeteria aid at that school because of her excessive absenteeism and tardiness, the claimant failed to seek another position in another school.

DECISION

IT IS HELD THAT the claimant's unemployment was due to leaving work voluntarily without good cause or valid circumstances within the meaning of Md. Code Ann., Labor & Emp. Article, Section 8-1001. Benefits are denied for the week beginning June 13, 2010 and until the claimant becomes reemployed and earns at least 15 times the claimant's weekly benefit amount in covered wages and thereafter becomes unemployed through no fault of the claimant.

The determination of the Claims Specialist is affirmed.



R M Tabackman, 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 to Petition for Review

Any party may request a review 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 February 15, 2011. 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 : January 21,2011
TH/Specialist ID: UTW2P
Seq No: 002
Copies mailed on January 31, 2011 to:
DENA L. PAYTON
BOARD OF EDUCATION OF BALTO CO
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BOARD OF EDUCATION OF BALTO CO