

- DECISION -

Claimant:
ARITHUS D ANDERSON

Decision No.: 3001-BR-14

Date: November 19, 2014

Appeal No.: 1412873

Employer:
AUGMENTATION INC

S.S. No.:

L.O. No.: 63

Appellant: Claimant

Issue: 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).

- 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: December 19, 2014

REVIEW OF THE RECORD

The claimant has filed a timely appeal to the Board from an Unemployment Insurance Lower Appeals Division Decision issued on June 20, 2014. That Decision held the claimant was discharged for gross misconduct within the meaning of *Md. Code Ann., Lab. & Empl. Art., §8-1002*. Benefits were denied for the week beginning April 20, 2014, and until the claimant becomes reemployed, earns twenty-five times his weekly benefit amount, and then becomes unemployed under non-disqualifying conditions.

On appeal, the Board reviews the evidence of record from the Lower Appeals hearing. The Board reviews the record *de novo* and may affirm, modify, or reverse the hearing examiner's 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. *Md. Code Ann., Lab. & Empl. Art., §8-510(d)*. The Board fully inquires into the facts of each particular case. *COMAR 09.32.06.03(E)(1)*. Only if there has been clear error, a defect in the record, or a failure of due process will the Board remand the matter for a new hearing or the taking of additional evidence. Under some limited circumstances, the Board may conduct its own hearing, take additional evidence or allow legal argument.

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)*.

In this case, the Board has thoroughly reviewed the record from the Lower Appeals hearing. The record is complete. Both parties appeared and testified. Both parties were given the opportunity to cross-examine opposing witnesses and to offer and object to documentary evidence. Both parties were offered the opportunity to present closing statements. The necessary elements of due process were observed throughout the hearing. The Board finds no reason to order a new hearing, to take additional evidence, to conduct its own hearing, or allow additional argument. Sufficient evidence exists in the record from which the Board may make its decision.

The Board finds the first two paragraphs of the hearing examiner's Findings of Fact are supported by substantial evidence in the record. The Board adopts only those two paragraphs. The Board makes the following additional findings of fact:

After two more absences in April 2014, the client informed the employer that the claimant should be removed from the assignment. Neither the employer nor the client had a record of the claimant calling in to report these last absences.

The employer did not discharge the claimant from its employ, although the employer would have been unlikely to place the claimant in another assignment because of his apparent attendance problems.

The Board concludes that these facts warrant different conclusions of law and a reversal of the hearing examiner's decision.

Md. Code Ann., Lab. and Empl. Art., Title 8, Section 1002 provides:

- (a) Gross misconduct...
 - (1) Means conduct of an employee that is:

- i. 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
- ii. repeated violations of employment rules that prove a regular and wanton disregard of the employee's obligations...

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).

Md. Code Ann., Lab. and Empl. Art., Title 8, Section 1003 provides:

- (a) Grounds for disqualification – an individual who otherwise is eligible to receive benefits is disqualified from receiving benefits if the Secretary finds that unemployment results from discharge or suspension as a disciplinary measure for behavior that the Secretary finds is misconduct in connection with employment but that is not:
 - (1) Aggravated misconduct...or
 - (2) Gross misconduct...

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 the employment relationship, during hours of employment or on the employer's premises, within the meaning of *Md. Code Ann., Lab. and Empl. Art., Title 8, Section 1003*. (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 his appeal, the claimant reiterates his testimony from the hearing and offers additional documentary evidence of his attempts to contact the client concerning his last absences. He contends he was released from the client company because, "work was slow". The claimant otherwise does not cite to the evidence of record and makes no other contentions of error.

The hearing examiner did not delve into the actual employment relationship between the claimant and the employer. The hearing examiner did not fully consider the employer's testimony that the claimant had not been discharged from it, but removed from an assignment. The witness did testify it was quite unlikely that the claimant would be placed in another assignment, but she did not state he had been discharged from employment and did not provide reasons for his non-placement beyond her own conclusion that his attendance problems at his last assignment would be problematic at any future assignment.

When the claimant was removed from the assignment, he remained in the employment relationship, but not working. The employer did not place him in another assignment, and, at that point, the claimant was not working due to a lack of work with the employer.

There are three parties (the claimant, the employer, and the client) involved in such matters. Only two (the claimant and the employer) are relevant for unemployment insurance qualification purposes. The employment relationship is between the claimant and the employer. The client company is a third-party, for whom the employer provides personnel. The employer's client may ask a claimant to be removed from an assignment. This, however, is not a discharge from employment. A claimant may decide to cease working for the employer's client, and request another assignment. This is not necessarily a voluntary quit. It is only the cessation of one assignment and the claimant remains employed unless the employer, or the claimant, severs the actual employment relationship between them.

Based upon the evidence from the hearing record, the Board concludes that the claimant's unemployment was due to a lack of work and not for any disqualifying reason.

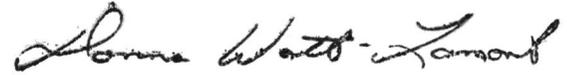
The Board notes that the hearing examiner did not offer or admit the *Agency Fact Finding Report* into evidence. The Board did not consider this document when rendering its decision.

The Board finds, based upon a preponderance of the credible evidence, that the employer did not meet its burden of proof and show that the claimant was discharged for gross misconduct within the meaning of *Md. Code Ann., Lab. and Empl. Art., §8-1002*, or for misconduct within the meaning of *Md. Code Ann., Lab. and Empl. Art., §8-1003*. The decision shall be reversed, for the reasons stated herein.

DECISION

The Board holds that the claimant was discharged, but not for gross misconduct or misconduct connected with the work, within the meaning of *Md. Code Ann., Lab. and Empl. Art., Title 8, Section 1002 or 1003*. No disqualification is imposed based upon the claimant's separation from employment with this employer.

The Hearing Examiner's decision is Reversed.



Donna Watts-Lamont, Chairperson



Clayton A. Mitchell, Sr., Associate Member

VD

Copies mailed to:

ARITHUS D. ANDERSON

AUGMENTATION INC

Susan Bass, Office of the Assistant Secretary

UNEMPLOYMENT INSURANCE APPEALS DECISION

ARITHUS D ANDERSON

SSN #

Claimant

vs.

AUGMENTATION 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: 1412873
Appellant: Employer
Local Office : 63 / CUMBERLAND
CLAIM CENTER

June 20, 2014

For the Claimant: PRESENT

For the Employer: PRESENT, NANCYA. HAMILTON

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, Arithus Anderson, worked for the above captioned employer, Augmentation, Inc., from October 28, 2013 until April 23, 2014 as a full time mechanical assembler earning \$11.00 per hour. The claimant was terminated for poor attendance at the request of the client.

The employer is a temporary help firm and the claimant was on temporary-to-permanent assignment at Stulz Air Technology Systems. The claimant was a no call/no show on March 14 and 17, 2013 and the client was moving towards dismissing the claimant. He pleaded to keep his job and argued that he had requested time off on those days from a supervisor. The client decided to allow the claimant to continue.

The claimant was a no call/no show on April 22 and 24, 2014. He did not call off work with either his supervisor at Stulz or a representative from this employer. Stulz informed the employer that they were removing the claimant as an employee at that time. (See Emp. Ex. #1-2)

CONCLUSIONS OF LAW

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).

EVALUATION OF EVIDENCE

The evidence presented shows that the employer discharged the claimant. In a discharge case the employer has the burden of proving, by a preponderance of the credible evidence presented at the hearing that the discharge was for some form of misconduct, as that term is defined above. Ivey v. Catterton Printing Company, 441-BH-89. In the case at bar, that burden has been met.

The claimant argued that he called off from work properly on April 22 and 24 but presented no evidence to support that contention. The employer had no record of a call to either the client or themselves. This attendance issue combined with his prior no call/no show incidents were the moving factors in the decision to terminate. Although the claimant argued that he had been approved time off in March, the employer credibly argued that the client did not agree with that position and let the claimant keep his job because he begged for it. Then one month later he was absent again without calling off and the client decided to move on.

This type of behavior demonstrates overall indifference to the employer's interests and was a deliberate and willful disregard of the standards of behavior that the employer had a right to expect.

I hold that the claimant's actions showed a regular and wanton disregard of his obligations to the employer and therefore constituted gross misconduct in connection with the work. An unemployment disqualification shall be imposed based on Md. Code, Ann., Labor & Employment Article, Section 8-1002 pursuant to this separation from employment.

DECISION

IT IS HELD THAT the claimant was discharged for gross misconduct connected with the work within the meaning of Md. Code Ann., Labor & Emp. Article, Section 8-1002(a)(1)(i). The claimant is disqualified from receiving benefits from the week beginning April 20, 2014 and until the claimant becomes reemployed and earns wages in covered employment that equal at least 25 times the claimant's weekly benefit amount.

The determination of the Claims Examiner is reversed.



P G Randazzo, 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

This is a final decision of the Lower Appeals Division. Any party who disagrees with this decision 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 July 07, 2014. 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: June 12, 2014

DW/Specialist ID: WCU81

Seq No: 001

Copies mailed on June 20, 2014 to:

ARITHUS D. ANDERSON
AUGMENTATION INC
LOCAL OFFICE #63