

- DECISION -

Claimant:
PAULA B BROOKS LEFTWICH

Decision No.: 3023-BR-12

Date: June 08, 2012

Appeal No.: 1200378

S.S. No.:

Employer:
ADAMS & ASSOCIATES INC

L.O. No.: 64

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: July 09, 2012

REVIEW OF THE RECORD

After a review of the record, the Board adopts the following findings of fact and reverses the administrative law judge's decision.

The claimant was employed as a full time academic instructor from October 23, 2006 through November 4, 2011. The claimant is unemployed as the result of a discharge.

The claimant was informed that she had to complete a course of study and pass the Praxis I and Praxis II examinations and obtain a teaching certification as a condition of continued employment. From 2006 through 2009, the employer did not take any adverse action against the claimant for not obtaining the certification. However, beginning with the 2009 school year, a new supervisor informed the claimant that she had to complete the course of study and obtain her teaching certification. The claimant's supervisor and the claimant developed a step-by-step plan to achieve this goal.

Beginning in November 2009, the claimant began her studies and took examinations. The claimant either passed the classes or earned an "A" in her classes. The claimant turned in a term paper and final assignment in May 2011 before being out on medical leave from May 6, 2011 through September 13, 2011. Until May 2011, the claimant was making satisfactory progress towards obtaining her teaching certification in accordance with the plan she and her supervisor established in the Fall of 2009. During this period, the claimant continued to obtain a waiver from having her teaching certification. The claimant additionally received bonuses and awards for her job performance.

Notwithstanding, for reasons unclear, the claimant was not afforded a teaching certification waiver for the 2011-2012 school year. Consequently, the employer discharged the claimant.¹

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 administrative law judge on the basis of evidence submitted to the administrative law judge, or evidence that the Board may direct to be taken, or may remand any case to an administrative law judge 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)*.

¹ In *Queen v. Maryland Lumber Company, 910-BR-84*, the Board of Appeals held, "Where a claimant truck driver, through voluntary or negligent actions, renders himself legally unable to perform the very functions for which he was hired, leaving the employer no choice but to discharge the claimant, the "mandatory" discharge shall be considered a "constructive voluntary quit" under § 8-1001. The concept of "constructive voluntary quit", however, was overturned by the Court of Special Appeals in *Dept. of Econ. & Empl. Dev. v. Taylor, 108 Md. App. 250 (1996)*. Therefore, the concept of "constructive voluntary quit" is no longer applicable and the case at bar must be decided as a discharge under existing Maryland law.

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 claimant was required to have a teaching certification as a condition of continued employment. To obtain the teaching certification, the claimant was required to engage in a course of study and pass the "Praxis I" and "Praxis II" examinations.

Where a claimant is required to have certification from a government agency to keep her job, the claimant has a duty to her employer to conduct herself in such a way as to maintain his certification. *Davis v. National Security Agency*, 853-BR-92. Where the credible evidence establishes that a claimant schoolteacher is separated from her job for failing to obtain and/or maintain her certification by the State of Maryland as a classroom teacher, the burden of proof shifts to the claimant to establish that the claimant made good faith efforts to comply with the requirements of the certification. *Abraham v. Prince George's County Public Schools*, 487-BH-85. A claimant who fails to obtain licensure or certification due to circumstances beyond his control or due to no fault of their own is not discharged for misconduct. *Id.*

If the claimant establishes that she made good faith efforts to comply with the requirements of certification, the separation is without misconduct within the meaning of § 8-1003. *Davis v. National Security Agency*, 853-BR-92; *Prince George's County Public Schools*, 487-BH-85. If the evidence fails to establish that the claimant made good faith efforts to comply with the requirements of certification, the claimant's conduct constitutes misconduct or gross misconduct connected with the work within the meaning of § 8-1003 or § 8-1002 depending upon the facts and circumstances of the claimant's conduct. *Id.*

In the appeal to the Board, the claimant's counsel argues that from 2006 to September 2009, the claimant, as a matter of course, was automatically granted a teaching certification waiver. Counsel additionally asserts that the employer's conduct constituted condonation during this period. The remainder of claimant's argument is that "from 2009 forward, [the claimant] diligently followed the employer's detailed outlines to achieve the requisite educational goals necessary for getting her teaching certification...[and that the claimant] in fact complied with the certification goals and achievements...[T]he only reason that [the claimant] was terminated in November 2011, was because the last waiver submitted on her behalf to the Department of Labor was denied." The Board concurs.

The Board finds that the weight of the credible evidence supports a finding that as of September 2009, the claimant pursued her teaching certification in good faith and with due diligence. The Board gives no

weight to the claimant's actions prior to September 2009 due to the mitigating circumstances relating to the employer's condonation and automatic waivers granted to the claimant. The 2011 teaching certification waiver denial was beyond the claimant's control. The claimant worked and pursued her teaching certification to the best of her ability. The fact that the employer could lose its contract with the Department of Labor is neither mitigating nor relevant as to whether the claimant was discharged for misconduct in this case.

The weight of the credible evidence does not support a finding that the claimant proximately violated a workplace rule, engaged in a course of wrongful conduct or was willfully or deliberately acting with gross disregard to her employer's interests.

The Board notes that the administrative law judge 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 did not meet its burden of demonstrating that the claimant's actions rose to the level of misconduct within the meaning of § 8-1003. The administrative law judge's decision shall be reversed for the reasons stated herein.

DECISION

It is held that the claimant was discharged, but not for gross misconduct or misconduct connected with the work, within the meaning of Maryland Code Annotated, Labor and Employment Article, Title 8, Section 1002 or 1003. No disqualification is imposed based upon the claimant's separation from employment with ADAMS & ASSOCIATES, INC.

The Hearing Examiner's decision is reversed.



Clayton A. Mitchell, Sr., Associate Member



Donna Watts-Lamont, Chairperson

RD

Copies mailed to:

PAULA B. BROOKS LEFTWICH
ADAMS & ASSOCIATES INC
VICTORIA R. ROBINSON ESQ.
Susan Bass, Office of the Assistant Secretary

UNEMPLOYMENT INSURANCE APPEALS DECISION

PAULA B BROOKS LEFTWICH

SSN #

Claimant

vs.

ADAMS & ASSOCIATES 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: 1200378

Appellant: Claimant

Local Office : 64 / BALTOMETRO

CALL CENTER

February 08, 2012

For the Claimant: PRESENT

For the Employer: PRESENT , ROBIN DONALDSON

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, Paula Brooks-Leftwich, filed a claim for benefits establishing a benefit year beginning November 6, 2011. She qualified for a weekly benefit amount of \$430.00.

The Claimant began working for Adams and Associates, Inc. (Employer) on or about October 23, 2006. At the time of separation, the Claimant was working as an Academic Instructor earning \$43,000.00 per year. The Claimant last worked for the Employer on or about November 4, 2011, before being terminated for failing to obtain a Maryland Teaching Certificate as required by her job description and the Department of Labor.

The Employer is an educational company with which the U.S. Department of Labor contracts for teaching services. The Claimant began working for the Employer in October 2006. At that time, the Claimant was informed that a valid teaching certificate was required for her position, but that the requirement may be waived by the U.S. Department of Labor temporarily if the Claimant (or any similarly situated employee) has an approved plan to acquire the certification. (Empl. 1) The Claimant did not hold a valid teaching certificate at any time relevant to this matter.

In November 2007, the Claimant was instructed to contact Sylvan Learning Center to prepare for the "Praxis" test portion of the certification process. The target date to complete this directive was November 2007. The Claimant did not complete this task. (Empl. 5) In May 2008, the Claimant was instructed to acquire study materials and join a study group in preparation for taking the Praxis test. The target date for completion of this task was August 2008. (Empl. 6) Sometime in 2009, the Employer constructed a detailed outline of each course the Claimant was required to complete and pass in order to achieve her teaching certificate. (Empl. 7) There were twelve courses in total. The target date for the Claimant to have finished the twelve courses and successfully achieved her teaching certificate in the 2009 outline was August 2011. The Claimant completed three of the twelve courses by late 2010. In late 2010, the Employer constructed another detailed outline listing each remaining course the Claimant was required to complete and pass in order to achieve her teaching certificate. (Empl. 8) The target date for the Claimant to have finished the remaining nine courses and successfully achieved her teaching certificate in the 2010 outline was Spring 2013. The Claimant completed two of the remaining nine courses by approximately August 2011. In approximately September 2011, the Employer constructed another detailed outline listing each remaining course the Claimant was required to complete and pass in order to achieve her teaching certificate. (Empl. 9) The target date for the Claimant to have finished the remaining seven courses and successfully achieved her teaching certificate in the 2011 outline was Spring 2014. The Claimant completed none of the remaining seven courses. In each year since the Claimant's employment with the Employer began, the U.S. Department of Labor granted her a waiver of the teaching certificate requirement. On November 1, 2011, the U.S. Department of Labor, having granted the Claimant a waiver in each of the previous five years of the Claimant's employment, declined to grant the Claimant a sixth waiver. On November 4, 2011, the Employer terminated the Claimant's employment.

CONCLUSIONS OF LAW

Md. Code Ann., Labor & Empl. 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 (1958); Painter v. Department of Emp. & Training, et al., 68 Md. App. 356 (1986); Department of Economic and Employment Dev. v. Hager, 96 Md. App. 362 (1993).

EVALUATION OF THE EVIDENCE

I considered all of the testimony and evidence of record in reaching this decision. Where the evidence was in conflict, I decided the facts on the credible evidence as I determined.

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 Co., 441-BH-89. In the case at bar, that burden has been met.

The Employer's representative, Robin Donaldson, testified in accord with the above Findings of Fact. Additionally, she said that because the Employer holds a contract with the U.S. Department of Labor to provide teaching services, the Employer must abide by the standards set by the U.S. Department of Labor. When the Employer's waiver request regarding the Claimant's teaching certificate was denied, the Employer had no choice but to terminate the Claimant's employment. Had the Employer not terminated the Claimant, it would have violated the terms of its contract with the U.S. Department of Labor.

The Claimant testified that she knew she had to achieve a teaching certificate, but no one told her how to plan or within what timeframe she was required to obtain her teaching certificate. She also asserted that the Employer had had a number of Human Resources Managers, none of whom (with the exception of Ms. Donaldson) had ever "sat down with [her] to develop an educational plan."

While the Claimant truly may believe that she is a victim of circumstance, the Employer's exhibits belie the Claimant's perception. On October 26, 2006, the Claimant signed her "Applied Academic Instructor" job description which clearly states that the teaching certificate requirement may be *temporarily* waived by the Department of Labor. On December 9, 2009, the Claimant signed her "Applied Reading Instructor" job description which clearly states that the teaching certificate requirement may be *temporarily* waived by the Department of Labor. The Claimant participated in, and was given a copy of, an "Academic Instructor Professional Development Plan" for the years 2007, 2008, 2009, 2010 and 2011. The 2009, 2010 and 2011 plans were quite detailed as to the Employer's expectations of the Claimant and how the Claimant was to successfully achieve her goal. Simply put, the Claimant did little or nothing between 2006 and 2009 to achieve her teaching certificate. In 2009, a detailed development plan was in place with a target date of Spring 2011 for the Claimant to achieve her teaching certificate. Between November 2009 and May 2011, the Claimant achieved the first five of twelve courses needed to earn her teaching certificate. At this point, the Claimant was a full year past the target date set for finishing those first five classes. Moreover, despite the Claimant's assertions to the contrary, her 2007 and 2008 development plans included the successful completion of the first three tasks of the Claimant's 2009 development plan. (See Empl. 5, 6 and 7)

I hold that the Claimant's actions showed a deliberate and willful disregard of the standards the Employer had a right to expect, showed a gross indifference to the Employer's interests and therefore constituted gross misconduct in connection with the work. An unemployment disqualification shall be imposed based on Md. Code, Ann., Labor & Empl. Article, Section 8-1002 pursuant to this separation from this 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 & Empl. Article, Section 8-1002(a)(1)(i). The Claimant is disqualified from receiving benefits from the week beginning October 30, 2011 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 Specialist is affirmed.

Teresa Garland

Teresa Garland
Administrative Law Judge

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 February 23, 2012. 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 19,2012

CH/Specialist ID: WCU5N

Seq No: 001

Copies mailed on February 08, 2012 to:

PAULA B. BROOKS LEFTWICH

ADAMS & ASSOCIATES INC

LOCAL OFFICE #64