DECISION

Claimant:
OLGA ROSHUPKIN

Employer:
A&A MEDICAL SUPPLY COMPANY

Decision No.: 3086-SE-13

Date: July 10, 2013

Appeal No.: 1306070

S.S. No.:

L.O. No.: 60

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.
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: August 09, 2013

- APPEARANCES -

FOR THE CLAIMANT:
Olga Roshupkin
Anna Trachtman

FOR THE EMPLOYER:

PROCEDUREAL HISTORY

On November 13, 2012, the employer, filed a timely appeal of the October 31, 2012 Benefit Determination allowing unemployment compensation benefits for the claimant, Dena Horne.

A Lower Appeals Division hearing was conducted on December 5, 2012. On December 26 , 2012, the Lower Appeals Division issued a decision reversing the Agency's initial determination and disqualifying the claimant from receiving unemployment benefits pursuant to *Maryland Code Annotated, Labor & Employment Article, §8-1002(a)(1)(i).*

On January 9, 2013, the claimant filed a timely appeal to the Board of Appeals. The Board scheduled a hearing before a Special Examiner to hear additional evidence and testimony regarding the issue established in the matter. The Special Examiner hearing was held on June 12, 2013.

REVIEW OF THE RECORD

The Board of Appeals has considered all of the evidence presented, including the testimony offered at the hearing. The Board has also considered all of the documentary evidence introduced in this case, as well as the Department of Labor, Licensing and Regulation's documents in the appeal file.

After a review of the record and in consideration of new testimony and evidence established at the Special Examiner's hearing, the Board adopts the following findings of facts and conclusions of law. The hearing examiner's decision is reversed.

FINDING OF FACTS

The claimant, Olga Roshupkin, began working for the employer, A&A Medical Supply Company, on August 15, 2008. The claimant worked as full-time lead customer service representative. The claimant's last day of work for the employer was January 11, 2013, before being discharged by the employer.

The employer's business had been sold to a new entity in August, 2012 and most of the prior management team had been replaced.

The claimant called off work due to illness on Monday, January 14, 2013. The clamant called her new supervisor, Jeannie to inform her that she was not well and experiencing flu like symptoms. The claimant called her supervisor again on January 15, 2013 explaining that she was still sick and would not be in work. Again, on January 16, 2013, the claimant contacted her supervisor to inform her of her continued illness. During this time, the claimant's job duties and tasks were being delegated to other employees. At no time were the claimant's continuing duties being neglected.

On the evening of January 16, 2013, the claimant went to the emergency room because of her continued illness. The claimant was extremely dehydrated due to her high fever. *(See Claimant's Special Examiner Exhibit #1)* On January 17, 2013, the claimant again contacted her supervisor to advise her that she would not be in work because of her continued illness. The claimant did not contact her supervisor on January 18, 2013 because she slept for most of the day.

On Saturday, January 19, 2013 the claimant saw a text sent the previous day, from her supervisor which stated "Please call me. Do not show up to work." The claimant went to work on the following Monday to collect her belongings. At that time, she received a termination letter from the employer dated January 19, 2013. The letter stated that "your employment with the company has been terminated". *(See Claimant's Special Examiner Exhibit #2)*

The employer did not have an established written policy regarding absences. The employer's policy was administered on a case by case basis depending on the circumstances surrounding employees' absences. The claimant was never previously reprimanded or written up for attendance issues.

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).*

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

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 that the weight of the credible evidence supports a finding that the employer discharged the claimant by text message and by letters. The claimant did not manifest the requisite intent to voluntarily quit her job. Finding that the claimant was discharged, the Board shall now address 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)*. 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)*.

In *Rivas v. Miller and Long Company, Inc., 431-SE-91,* the claimant notified the employer that he was ill and would be unable to report to work. The employer advised the claimant to return to the job site as soon as he was physically able to do so. The claimant was unable to work for 13 days. Upon recuperating, he returned to the job site ready to resume his job, however, the claimant learned he had been discharged while he was absent due to illness. The claimant's discharge for failing to report to work while he was ill was not for misconduct..

Just as an employee has a basic duty of loyalty toward an employer, an employer has a basic duty to treat an employee in good faith. *Woerner v. White Marsh Mall, Inc., 2159-BR-92.*

In the instant case, the claimant was ill for the dates in question. On each occasion she contacted her employer and continually updated the employer on her condition. The claimant worked for the employer for a period of five years. She was a good employee and had no occasions of disciplinary actions. The employer had a duty to treat the claimant in good faith. The employer failed to do so. The Board finds that the claimant was discharged but for no misconduct connected with the work.

The Board notes that the hearing examiner nor the special examiner offered or admitted 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 has not met its burden of demonstrating that the claimant's actions rose to the level of gross misconduct within the meaning of *§ 8-1002.* The employer has also not met its burden of showing that the claimant's discharge was for misconduct within the meaning of *§ 8-1003.* The 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 A&A MEDICAL SUPPLY COMPANY.

The Hearing Examiner's decision is reversed.

Clayton A. Mitchell, Sr., Associate Member

Donna Watts-Lamont, Chairperson

VD/mr
Date of hearing: June 20, 2013
Copies mailed to:
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Susan Bass, Office of the Assistant Secretary