

-DECISION-

Claimant:
DIANA M NICEY

Decision No.: 3106-BH-12

Date: June 15, 2012

Appeal No.: 1106753

Employer:
SAFEWAY INC

S.S. No.:

L.O. No.: 63

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: July 16, 2012

- APPEARANCES -

FOR THE CLAIMANT:

DIANA M. NICEY
DANIEL Q. MAHONE, Esq.

FOR THE EMPLOYER:

PRELIMINARY STATEMENT

This matter was scheduled for a hearing before the Board of Appeals (Board) pursuant to an Order of the Circuit Court for Washington County ordering the Board to reconsider the denial of unemployment benefits to the claimant and to consider additional evidence from the claimant. This matter was scheduled for a hearing as ordered. The claimant, the employer and the Agency were properly noticed as to the time and place of the Board hearing. Only the claimant appeared and offered evidence.

EVALUATION OF THE EVIDENCE

The Board 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. The Board finds the testimony of the claimant to be more credible than that of the employer's witnesses.

FINDINGS OF FACT

The claimant was employed from August 20, 2008 until November 20, 2010, as a meat wrapper. The claimant became separated from this employment as a result of a discharge.

On November 4, 2010, the claimant was placed on light duty as a result of a job-related injury. The claimant was being treated by the Opal Medical Group, P.A. During the week of November 20, 2010 the claimant did not report to work due to pain she was experiencing. She called work to report her absence, though she did not speak with her manager.

The claimant was seen by her doctor and excused from work from December 3, 2010 to December 13, 2010. The claimant faxed a copy of her medical excuse to Mr. Mark Woodfield on December 7, 2010. *Claimant's Exhibit B1*. The transmission verification report reflects that the document was faxed "OK".

The claimant sent a second facsimile to Mr. Woodfield on December 7, 2010 in which she wrote that she "called to confirm Doctors 12-13-10", that she was waiting on call from "Ribewood" and that she needed time off "until we know what due."

The claimant was waiting for approval from the employer to see a specialist. That approval was never forthcoming.

The employer discharged the claimant as of December 14, 2010.

CONCLUSIONS OF LAW

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 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).

The claimant was absent from work due to a work related injury. The claimant kept her employer advised of her need to be off work. The employer made the decision to discharge the claimant while she was out on sick leave and awaiting approval from the employer to see a specialist.

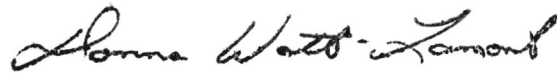
The Board notes that the *Agency Fact Finding Report* was not entered into evidence in this case. The Board did not consider this document when rendering its decision.

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 or misconduct within the meaning of § 8-1002 or §8-1003. The decision shall be reversed for the reasons stated herein.

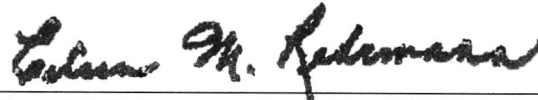
DECISION

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 SAFEWAY, INC.

The Board’s prior decision in this matter and the decision of the Hearing Examiner are reversed.



Donna Watts-Lamont, Chairperson



Eileen M. Rehrmann, Associate Member

RD

Date of hearing: May 29, 2012

Copies mailed to:

DIANA M. NICEY

SAFEWAY INC

DANIEL Q. MAHONE ESQ.

ROBERT SAUER

SAFEWAY INC

Susan Bass, Office of the Assistant Secretary

UNEMPLOYMENT INSURANCE APPEALS DECISION

DIANA M NICEY

v

SSN # v

Claimant

vs.

SAFEWAY INC

v

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: 1106753

Appellant: Claimant

Local Office : 63 / CUMBERLAND
CLAIM CENTER

March 28, 2011

For the Claimant: PRESENT , DANIELQ. MAHONE, ESQ.

For the Employer: PRESENT , ROBERT SAUER, MARK WOODFIELD

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, Diana Nicely, began working for this employer, Safeway Inc., on or about August 20, 2008. At the time of separation, the claimant was working as a meat wrapper. The claimant last worked for the employer on or about November 20, 2010, before quitting.

Due to an injury in the workplace, the claimant had been put on light duty by her doctor on November 4, 2010. The claimant continued to work her scheduled shifts. On or about November 20, 2010, the claimant felt that she could not work anymore due to the pain that she was experiencing. Although the claimant was still scheduled regularly, she did not report to the workplace for her shifts. During the week of November 20, 2010 through November 26, 2010, the claimant called the workplace to report her absence, but failed to

report her absence to her manager as instructed. On November 29, 2010, the claimant missed the entire next week of work, through December 6, 2010, without notifying her employer of her absence.

The claimant's manager called her on December 6, 2010, to notify her that she was still on the schedule. However, the claimant did not report for any of her shifts during the week of December 6, 2010 through December 14, 2010 and failed to notify her employer of her absence. Although the claimant did notify her manager during the December 6, 2010 conversation that she was making efforts to find a doctor to help her, the claimant made no request that she be put on leave, that she be assigned extremely light duty, or that she be given any other accommodations. Furthermore, the claimant failed to present the employer with any documentary evidence that her condition had worsened and required her to be out of the workplace.

The claimant quit her job without pursuing all reasonable alternatives.

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, this burden has not been met.

Although the claimant offered credible testimony that she had been experiencing medical problems related to an accident in the workplace, the claimant was unable to show any evidence that she had been restricted from working by a doctor. The claimant acknowledged that she was released by her doctor for light duty work in early November. The employer offered credible testimony that it accommodated her request. The claimant acknowledged that on or about November 20, 2010, she felt that she could not work any longer

due to her pain and decided to not return to the workplace. However, at no time did the claimant present medical documentation to the employer that she was unable to work. Further, the claimant did not make efforts to seek leave from the employer or ask for further accommodations to be made. The claimant simply did not return for her scheduled shifts. For the majority of the shifts that she missed, she failed to notify the employer that she would be missing those shifts. Therefore, it is found that the claimant quit her position with the employer and did not pursue all reasonable alternatives to maintain her employment with the employer.

It is thus determined that the claimant has concurrently failed to demonstrate that the reason for quitting rises to the level necessary to demonstrate good cause or valid circumstances within the meaning of the sections of law cited above.

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 November 14, 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.

H. Abromson

H. Abromson, 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 April 12, 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 : March 17,2011
CH/Specialist ID: WCU60
Seq No: 001
Copies mailed on March 28, 2011 to:
DIANA M. NICEY
SAFEWAY INC
LOCAL OFFICE #63
DANIEL Q. MAHONE ESQ.
SAFEWAY INC