

- DECISION -

Claimant:
MICHAEL A SHARP

Decision No.: 3702-BR-11

Date: July 08, 2011

Appeal No.: 1048726

S.S. No.:

Employer:
KHRG BALTIMORE LLC

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.

- 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 08, 2011

REVIEW ON THE RECORD

After a review on the record, and after deleting "or about" from the first sentence of the first paragraph, the Board adopts the hearing examiner's modified findings of fact. The Board concludes that these facts warrant different 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).

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 affirms the hearing examiner's decision 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).

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.

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*.

In his appeal, the claimant contends that he did not quit this employment. The Board agrees that he did not intend to quit. The claimant was discharged by the employer. The reason for the claimant's discharge, however, was disqualifying.

The evidence shows that the claimant was incarcerated for an indefinite period. The claimant did notify the employer, but could not provide an anticipated date on which he could return to work. The employer could not hold his position for an indefinite period of time. The claimant's inability to report for work for this period was because of some act which caused him to be arrested and jailed. The claimant's situation is similar to that in *Farmer v. Perdue Farms, Inc., 1563-BR-91*, wherein a claimant who failed to report for work due to incarceration for a crime for which he was guilty was discharged for gross misconduct.

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 has met its burden of demonstrating that the claimant's actions rose to the level of gross misconduct within the meaning of § 8-1002. The decision shall be reversed for the reasons stated herein.

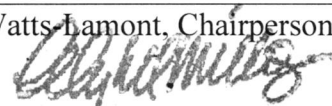
DECISION

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 September 19, 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.



Donna Watts Lamont, Chairperson



Clayton A. Mitchell, Sr., Associate Member

RD/mw

Copies mailed to:

MICHAEL A. SHARP

KHRG BALTIMORE LLC

Susan Bass, Office of the Assistant Secretary

UNEMPLOYMENT INSURANCE REMAND APPEALS DECISION

MICHAEL A SHARP

SSN #

Claimant

vs.

KHRG BALTIMORE LLC

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: 1048726

Appellant: Claimant

Local Office : 63 / CUMBERLAND

CLAIM CENTER

March 13, 2012

For the Claimant: PRESENT

For the Employer: PRESENT, JILL STRAUSS

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).

PREAMBLE

A decision in this matter was originally issued by another Hearing Examiner on February 4, 2011. A corrected decision was issued on February 7, 2011. That decision was subsequently appealed to the Board of Appeals. The Board reversed the decision of the Hearing Examiner in a decision dated July 8, 2011. That decision was subsequently appealed to the Circuit Court for Baltimore City. The Circuit Court remanded the case to the Board of Appeals for a *de novo* hearing in an Order of Court dated November 10, 2011. The Board of Appeals remanded the case to the Lower Appeals Division for a *de novo* hearing in an order dated February 8, 2012.

FINDINGS OF FACT

The claimant, Michael A. Sharp, filed a claim for benefits establishing a benefit year beginning May 11, 2010. He qualified for a weekly benefit amount of \$268.00.

The claimant began working for this employer, KHRG Baltimore LLC, on or about July 16, 2009. At the time of separation, the claimant worked as a full-time cook for which the claimant was paid \$12.18 an hour. The claimant last worked for the employer on September 30, 2010, before being terminated on October 4, 2010 under the following circumstances:

The claimant came to work on September 30, 2010, but before his shift started, he was escorted off the premises by police. He was arrested and charged with a theft-related offense not connected with his work. He was incarcerated for about five to six weeks, until going to trial. He was acquitted of the charge and his record was expunged (*See*, Claimant Exhibits No. 1 and 2).

Once incarcerated, the claimant was allowed to make one telephone call. He called his elderly father to apprise him of his situation. During that conversation, the claimant asked his father to ask his (the claimant's) sister to contact the employer and let the employer know that he was going to be unable to work for an extended period of time. Thereafter, the claimant did not have an opportunity to make another telephone call for about a week and a half and was limited to "collect" calls. The employer did not have any record of receiving any notification from any of the claimant's family members. When the claimant did not appear to work his scheduled shifts on October 1, 2011, October 4, 2011 and October 5, 2011, the employer terminated his employment for three consecutive "no-call, no-show" absences.

CONCLUSIONS OF LAW

Md. Code Ann., Labor & Emp. Article, Section 8-1003 provides for a disqualification from benefits where the claimant is discharged or suspended as a disciplinary measure for misconduct connected with the work. The term "misconduct" is undefined in the statute but has been defined as "...a transgression of some established rule or policy of the employer, the commission of a forbidden act, a dereliction of 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." Rogers v. Radio Shack, 271 Md. 126, 132 (1974).

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).

Md. Code, Ann., Labor & Emp. Article, Section 8-1002 provides that an individual shall be disqualified from receiving benefits when he or she was discharged or suspended from employment because of behavior that demonstrates gross misconduct. The statute defines gross misconduct as repeated violations of employment rules that prove a regular and wanton disregard of the employee's obligations.

A claimant who is incarcerated, but who is later released without having been convicted of a crime, has not voluntarily quit his job, provided that he has appropriately notified his employer of his absence. Lansinger v. Baltimore County Fire Department, 1305-BR-82.

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 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 Company, 441-BH-89. In the case at bar, that burden has not been met.

The case of Lansinger v. Baltimore County Fire Department, *supra*, is on-point with the facts of this case. The claimant was incarcerated and unable to work and later acquitted of the charge against him. While the employer may not have ultimately received notification of the claimant's inability to come to work because of the incarceration, the claimant made all reasonable attempts under the circumstances to get the employer notified prior to the employer's decision to terminate the claimant's employment. Furthermore, as the claimant was taken into police custody on the work premises, the employer was on notice that the claimant was likely still in police custody at the time he failed to appear for the next three shifts for which he was scheduled.

Therefore, upon the assessment of the demeanor and credibility of all witnesses who participated in the hearing and the totality of the evidence presented at said hearing, it is determined that the employer has failed to demonstrate that the reason for the claimant's separation from employment rises to the level necessary to demonstrate that the claimant committed any misconduct in connection with the work within the meaning of the sections of law cited above.

Consequently, no unemployment disqualification shall be imposed based upon his separation from this employment.

DECISION

IT IS HELD THAT the claimant was discharged, but not for misconduct connected with the work within the meaning of Md. Code Ann., Labor & Emp. Article, Section 8-1003. No disqualification is imposed based upon the claimant's separation from employment with the above-identified employer. The claimant is eligible for benefits so long as all other eligibility requirements are met. The claimant may contact Claimant Information Service concerning the other eligibility requirements of the law at ui@dlr.state.md.us or call 410-949-0022 from the Baltimore region, or 1-800-827-4839 from outside the Baltimore area. Deaf claimants with TTY may contact Client Information Service at 410-767-2727, or outside the Baltimore area at 1-800-827-4400.

The determination of the Claims Specialist is affirmed.



D A Fisher, 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 March 28, 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.