-DECISION-

Claimant:
DELEATRICE E FLETCHER

Employer:
SHOPPERS FOOD WAREHOUSE CORP

Decision No.: 3839-BH-11

Date: July 06, 2011

Appeal No.: 1009928

S.S. No.:

L.O. No.: 61

Appellant: Employer

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: August 05, 2011

- APPEARANCES -

FOR THE CLAIMANT:

DELEATRICE E. FLETCHER

FOR THE EMPLOYER:

GEORGE JENKINS, Store Director
DAPHNE EVANS, Co-Manager
DONNA KLAUZA, Employer Rep.

EVALUATION OF THE EVIDENCE

On June 14, 2011, the Board held a *de novo* hearing in this matter due to prior procedural errors and a defective audio record. The Board considered only the evidence presented at the June 14, 2011 hearing.

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 the instant case, the claimant asserts that her absences were due to a medical condition. Notwithstanding, the claimant had an affirmative obligation to keep her employer apprised of the reasons for her absences and to follow the employer's attendance and call-out policies. The claimant did not provide the employer any documents to support her assertion that she was absent due to a medical condition prior to her discharge. The Board is not persuaded that the claimant presented sufficient mitigating evidence for her violations in this regard. There is insufficient evidence that the claimant was unable to contact her employer or provide medical documentation for her absences prior to her discharge. The Board is persuaded that the weight of the evidence supports a finding that the claimant's actions, in the face or warning, were repeated and were with intentional and wanton disregard for her employer's interests.

FINDINGS OF FACT

The claimant was employed as a part-time deli clerk from April 8, 2002 through September 15, 2009. The claimant is unemployed as the result of a discharge.

The claimant had a history of attendance problems. She was scheduled to work twenty to thirty hours per week but rarely worked a full schedule due to lateness and absences. The employer required that an employee report to work on time and as scheduled. From June 9, 2009 through August 8, 2009, the claimant was absent fifteen times. From June 7, 2009 through September 15, 2009, the claimant was late to work ten times. The claimant repeatedly violated the employer's policy of calling into work at least one hour prior to a shift to report any anticipated incidents of lateness. The claimant was warned that continued unapproved absences or attendance violations would result in her discharge.

After August 8, 2009, the claimant was on approved leave from work for medical reasons. The employer did not use this period of time against the claimant. However, the claimant was scheduled to return on September 15, 2009. The claimant worked on this date, which was the last day she performed services for this employer.

The claimant was scheduled to work on September 17, 2009. The claimant called the employer to state that she would be late; however, the claimant failed to appear for work. Because the employer believed this absence may have been due to medical reasons, the employer did not count this absence against the claimant, notwithstanding its technical violation of the employer's attendance policy.

The employer posts its work schedules on the Friday before the next work week. The claimant was scheduled to work on September 19 – 21, 2009, September 23 and 24, 2009, and September 26, 2009.

The claimant did not call in or report to work on these days. As a result, the employer discharged the claimant.

CONCLUSIONS OF LAW

The findings of fact and evaluation of evidence are incorporated herein by reference.

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 failure to follow workplace rules or procedures can constitute gross misconduct. *See, e.g. Kidwell v. Mid-Atlantic Hambro, Inc., 119-BH-86*; *Ullman v. Anne Arundel County Public Schools, 498-BR-93.* Attendance violations may constitute gross misconduct. An employer has the right to insist that its employees report to work on time, adhere to a specified schedule and leave only when that schedule has been completed. An employee's decision to follow a come-and-go-as-I-please philosophy could clearly disrupt the orderly operation of the workplace. *Dept. of Econ. Dev. v. Propper, 108 Md. App. 595 (1996).*

Persistent and chronic absenteeism, where the absences are without notice or excuse and continue in the face of warning constitutes gross misconduct. *Watkins v. Empl. Security Admin., 266 Md. 223 (1972).* The failure to report or call into work without notice may constitute gross misconduct. *Hardin v. Broadway Services, Inc. 146-BR-89.* Employees who miss a lot of time from work, even for excused reasons, have a heightened duty not to miss additional time for unexcused reasons and to conform with the employer's notice requirements. *Daley v. Vaccaro's Inc., 1432-BR-93.*
A specific warning regarding termination is not required and a reasonable person should realize that such conduct leads to discharge. *Freyman v. Laurel Toyota, 608-BR-87.* A violation of an employer's attendance policy is not misconduct per se where that policy does not distinguish between absences which occurred because of legitimate medical reasons and absences for which there was no reasonable excuse. Where an employee has been absent for a day of scheduled work, the burden of proof shifts to the employee to explain the reason for the absence. *Leonard v. St. Agnes Hospital, 62-BR-86.*

Absenteeism due to illness is not misconduct. *DuBois v. Redden and Rizk, P.A., 71-BH-90*(The claimant was absent from work and on maternity leave. Due to unexpected medical complications, the claimant was not able to return to work as early as anticipated. The claimant kept her employer informed of her

medical condition. The employer could not hold the claimant's job until she could be able to return to work).

However, absenteeism not totally attributable to illness can be misconduct or gross misconduct. *Schools v. AMI-Sub of Prince George's County, 932-BR-90*(The claimant had an excessive number of incidents of tardiness. During his last month of employment, his lateness was due entirely to a documented medical condition. The earlier incidents were due to transportation problems. The discharge was for misconduct); *Johnson v. United States Postal Service, 66-BR-91*(The claimant missed 11 of the last 34 days of work. The claimant had been injured and her assignments were adjusted within her capabilities. The amount of absenteeism was not justified by her injury. She had been counseled about the importance of avoiding absenteeism. The discharge was for gross misconduct).

Even though a claimant's last absence was with good reason, a finding of gross misconduct is supported where the claimant was discharged for a long record of absenteeism without valid excuse or notice, which persisted after warnings. *Hamel v. Coldwater Seafood Corporation, 1227-BR-93.*

In the instant case, the claimant was warned that any further violations of the employer's attendance policy would result in her discharge. The claimant did not report to work after September 15, 2009. The claimant did not provide the employer with any documents supporting that she was absent due to a legitimate medical reason. The claimant was on a heightened duty not to miss additional time from work and to follow the employer's policies. There is insufficient mitigating evidence that mitigates the claimant's action (or inaction) in this case. The Board finds sufficient evidence to support a finding of gross misconduct.

The Board finds based on a preponderance of the credible evidence that the employer met its burden of demonstrating that the claimant's actions rose to the level of gross misconduct within the meaning of *§ 8-1002.* The Agency's initial benefit determination and the hearing examiner's 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 13, 2009 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.

Clayton A. Mitchell, Sr., Associate Member

Eileen M. Rehrmann, Associate Member

RD
Date of hearing: June 14, 2011
Copies mailed to:
DELEATRICE E. FLETCHER
SHOPPERS FOOD WAREHOUSE CORP
DONNA KLAUZA
TALX UC EXPRESS
Susan Bass, Office of the Assistant Secretary

UNEMPLOYMENT INSURANCE APPEALS DECISION

DELEATRICE E FLETCHER

SSN #

Claimant

vs.

SHOPPERS FOOD WAREHOUSE CORP

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: 1009928
Appellant: Claimant
Local Office : 61 / COLLEGE PARK CLAIM CENTER

December 21, 2010

For the Claimant: PRESENT

For the Employer: PRESENT, GEORGE JENKINS

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

The Board of Appeals remands this case to the Lower Appeals Division for a de novo hearing.

FINDINGS OF FACT

The claimant was employed by Shoppers Food Warehouse, Corp. on April 8, 2002. At the time of her separation from employment on September 15, 2009, she earned $15.40 per hour as a deli clerk.

The claimant was discharged due to poor attendance. The claimant was late five to ten times during her last two month's employment. Her tardiness was due to transportation.

The claimant received written warning about her attendance in December, 2008 and June, 2009. The claimant was diagnosed with hyperthyroidism and her absences were due to illness. The claimant notified the employer when absent. On September 16, 2010, the claimant notified the employer that her doctor was taking her off work on September 17th, 18th and 19th. The employer suspended and subsequently terminated the claimant alleging job abandonment.

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.

In Watkins v. Employment Sec. Admin., 266 Md. 223 (1972), the Court of Appeals held that absence or tardiness, even where the majority of the incidents were caused by illness, may constitute gross misconduct where such behavior has occurred without notice or excuse and has continued in the face of warnings.

EVALUATION OF EVIDENCE

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 been met as to simple misconduct. The claimant's absences were due to medical problems and the employer was properly notified. The claimant's absences, therefore, were not misconduct. However, the claimant was excessively tardy during her last two months of employment. The claimant's tardiness was misconduct under Maryland law.

DECISION

IT IS HELD THAT the claimant was discharged for misconduct connected with the work within the meaning of Md. Code Ann., Labor & Emp. Article, Section 8-1003. Benefits are denied for the week beginning September 13, 2009, and for the four weeks immediately following. The claimant will then be 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@dllr.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 reversed.

S Moreland, 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

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 January 05, 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: December 13, 2010
BLP/Specialist ID: WCP4S
Seq No: 001
Copies mailed on December 21, 2010 to:

DELEATRICE E. FLETCHER
SHOPPERS FOOD WAREHOUSE CORP
LOCAL OFFICE #61