

- DECISION -

Claimant:
LISA M MELOCHE

Decision No.: 4279-BR-13

Date: October 18, 2013

Appeal No.: 1319415

S.S. No.:

Employer:
SAFEWAY INC

L.O. No.: 65

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: November 17, 2013

REVIEW OF THE RECORD

After a review of the record, and after deleting the first two paragraphs, the Board adopts the hearing examiner's modified findings of fact. The Board makes the following additional findings of fact:

The claimant worked for this employer for two days: March 4, 2013, and March 7, 2013. She was in training to be a part-time food clerk, at an hourly wage of \$7.60. The claimant was discharged when she did not return to work after March 7, 2013.

The Board concludes that these facts warrant different conclusions of law and a reversal of the hearing examiner's decision.

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. The Board finds the evidence supports the claimant's contention that she was discharged and did not quit. The claimant had no intention of leaving this employment. The claimant made repeated telephone calls to the employer's location to speak to someone about her schedule. The claimant did not learn when she was next scheduled and, consequently, did not report for work. The employer initiated the separation upon its conclusion that the claimant had abandoned her employment. Because the employer initiated the separation, it was a discharge.

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*.

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."

In her appeal, the claimant reiterates much of her testimony from the hearing. The claimant denies she quit this employment or intended to quit this employment. The claimant does not explain why she did not ask the person to whom she spoke at the store to check her schedule. Likewise, the claimant does not explain why she simply did not go to the store and check the schedule herself. The claimant does not cite to the evidence of record and makes no other contentions of error.

On appeal, the Board reviews the evidence of record from the Lower Appeals hearing. The Board will not order the taking of additional evidence or a new hearing unless there has been clear error, a defect in the

record, or a failure of due process. The record is complete. Both parties appeared and testified. Both parties were given the opportunity to cross-examine opposing witnesses and to offer and object to documentary evidence. Both parties were offered closing statements. The necessary elements of due process were observed throughout the hearing. The Board finds no reason to order a new hearing or take additional evidence in this matter.

The Board has thoroughly reviewed the record from the hearing. The Board finds the claimant did not quit, but was discharged from this employment. The remaining question is whether that discharge was for some disqualifying reason.

The claimant did not fully understand the procedure she was to use to obtain her future work schedule. The claimant did attempt to call the store manager and her supervisor for this information on several occasions. The claimant attempted to leave message for these people as well. For reasons beyond the claimant's control, her messages were not delivered. Because the claimant made several attempts to ascertain her work schedule, the Board cannot find that she was discharged for gross misconduct.

However, the claimant did not take the next logical or reasonable steps. The claimant did not ask the person at the employer's facility to check the schedule for her. And, the claimant did not go to the store and check it herself. The claimant had been told where the schedule was posted and when it was posted. The claimant certainly could have gone to the store and checked. Because the claimant did not, she was in breach of her duty to the employer. For this reason, the Board finds that her discharge was for simple misconduct.

The claimant has also made contentions that she did not file her claim for benefits from this employer. The claimant asserts her benefit claim was against a prior employer (HD). The claimant did not have a complete understanding of how the unemployment insurance system works with respect to claims, employers, and benefits. The claimant did have a prior claim wherein her benefits were based upon wage credits from HD. Her qualification for benefits, at that time, was determined by the nature of her separation from HD. When the claimant had subsequent employment with this employer, and became separated, her qualification for benefits was determined by the nature of this separation. Each separation from employment affects a claimant's qualification for unemployment benefits. Further, a claimant does not have the option of selecting against which prior employer her claim is filed. Claims are paid based upon wage credits earned from all employment during the claimant's base period.

Additionally, benefits generally are not paid by the employer, but are paid by the State from a Trust Fund into which employers make contributions based upon their respective payroll and tax rating. Employers do not determine who is allowed to receive benefits; the State Agency (here DLLR) makes that decision based upon the reasons for the claimant's separation from employment.

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 misconduct within the meaning of §8-1003. The claimant is disqualified from the receipt of benefits for the week beginning March 10, 2013, and for the next nine weeks thereafter. The decision shall be reversed for the reasons stated herein.

DECISION

It is held that the claimant was discharged for misconduct connected with the work, within the meaning of Section 8-1003 of the Labor and Employment Article Maryland Code Annotated, Title 8, Section 1003. The claimant is disqualified from receiving benefits from the week beginning March 10, 2013, and the nine weeks immediately following.

The Hearing Examiner's decision is reversed.



Donna Watts-Lamont, Chairperson



Clayton A. Mitchell, Sr., Associate Member

KP/MW

Copies mailed to:

LISA M. MELOCHE

SAFEWAY INC

GAYLE TUREK (08/20/13)

SAFEWAY INC

Susan Bass, Office of the Assistant Secretary

UNEMPLOYMENT INSURANCE APPEALS DECISION

LISA M MELOCHE

SSN #

vs.

SAFEWAY INC

Claimant

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: 1319415

Appellant: Employer

Local Office : 65 / SALISBURY

CLAIM CENTER

July 19, 2013

For the Claimant: PRESENT

For the Employer: PRESENT, GAYLE TUREK, TAMMY IANNANTUONO

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).

FINDINGS OF FACT

The claimant, Lisa Meloche, was employed with Safeway, Inc. from January 2013 to March 10, 2013. At the time of separation, she was working part time as a food clerk, earning \$7.60 per hour. The claimant voluntarily quit the job.

The claimant was hired in January 2013, but did not start work until March 4, 2013. She worked six hours that day. She worked nine hours on March 7, 2013. She was in training both days.

On the first day of training, Tammy Iannantuono, the assistant manager, told the claimant that the schedule is posted outside the break room every Friday at 1:00 pm. The claimant could call or come in to the store to

find out her schedule for the following Sunday through Saturday. She could ask the assistant manager, the store manager or the front end manager about the schedule.

The claimant was scheduled to work Wednesday, March 20, 2013 and Friday, March 22, 2013, but failed to report to work either day and failed to notify the employer of her absence. Ms. Iannantuono did not hear from the claimant until the claimant called on April 11, 2013. At that time, Ms. Iannantuono informed the claimant that she had abandoned her job.

The claimant started calling the employer on Monday, March 11, 2013 at the store number, 410-882-8822, and called each day through March 14, 2013 and again on March 16, 18, 19 and 21, 2013. Each time, she asked for Ms. Iannantuono or Jerry, the store manager, but was told they were not there or not available. The claimant spoke to unidentified female employees and left messages with them for Ms. Iannantuono or Jerry to call back the claimant about her schedule, but no one called. The claimant never asked the female employees to check her schedule and never came to the store herself to check the schedule. Neither Ms. Iannantuono nor Jerry received any of these messages. Ms. Iannantuono never told the claimant that she would call the claimant to inform her of her schedule.

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, the claimant failed to meet this burden.

The claimant voluntarily quit her job when she failed to report for two consecutive scheduled work days and failed to notify the employer of her absence. The employer previously told the claimant that it was her responsibility to check the posted schedule each Friday after 1:00 pm to find out her schedule for the following week. The claimant failed to come in to the store and check the schedule and failed to ask anyone she called to do so.

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 March 10, 2013 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 reversed.



R M Tabackman, 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

This is a final decision of the Lower Appeals Division. Any party who disagrees with this decision 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 August 05, 2013. 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: July 18, 2013

DW/Specialist ID: USB22

Seq No: 001

Copies mailed on July 19, 2013 to:

LISA M. MELOCHE

SAFEWAY INC

LOCAL OFFICE #65

GAYLE TUREK

SAFEWAY INC