-DECISION-

Claimant:
MICHAEL J SANDOE

Employer:
PARK PLACE OPERATING INC

Decision No.: 431-BR-12

Date: April 11, 2012

Appeal No.: 1138185

S.S. No.:

L.O. No.: 65

Appellant: Employer

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: May 11, 2012

REVIEW OF THE RECORD

After a review of the record, the Board adopts the hearing examiner's findings of fact but reaches a different conclusion of law. Notwithstanding the Board's decision on different legal grounds, the claimant is not disqualified from benefits. The Board finds that the claimant was discharged for the single incident of not reporting to work due to illness.

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 reverses the hearing examiner's decision on this issue. The Board finds that the claimant was discharged.

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.*

Before a penalty can be applied under Sections 8-1002, 8-1002.1 or 8-1003, it must be shown that the employer discharged or suspended the claimant. In some cases, it is clear that the employer discharged the claimant, either verbally or in writing. However, in other cases, the actions and words of the claimant and employer are unclear and must be interpreted to determine whether a discharge occurred.

For example, an employee's resignation in lieu of discharge is treated as a discharge where the employee has no choice but to resign or be discharged. However, where an employee resigns in order to avoid facing charges that might result in a discharge, the resignation is treated as a voluntary quit under Section 8-1001. A claimant's failure to file a grievance or appeal a discharge does not convert the discharge into a voluntary quit. A claimant's acceleration of the date of departure after being discharged does not change the discharge into a voluntary quit. Similarly, an employer's acceleration of the date of a claimant's resignation, (unless due to intervening acts of misconduct by the claimant), does not change the claimant's resignation into a discharge.

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.*

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 *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 her 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.

A claimant who resigns in lieu of discharge does not show the requisite intent to quit under *Allen v. CORE Target City Youth Program, 275 Md. 69, 338 A.2d 237 (1975)*. In this case, the claimant was discharged for gross misconduct. *Tressler v. Anchor Motor Freight, 105-BR-83.*

The employer did not sufficiently demonstrate that the claimant's actions were more than a mere isolated incident. *See Proctor v. Atlas Pontiac, 144-BR-87* (An instantaneous lapse in the performance of job duties does not constitute misconduct); *also see Gilbert v. Polo Grill, 192-BH-91* (One slight lapse in the claimant's performance is insufficient to support a finding of misconduct). In the light most favorable to the employer, the claimant failed to use good judgment by not notifying the employer of his physical condition and requesting a replacement. Failing to use good judgment, or an isolated case of ordinary negligence, in the absence of a showing of culpable negligence or deliberate action in disregard of the employer's interests in insufficient to prove misconduct. *Hider v. DLLR, 115 Md. App. 258, 281 (1997)*; *Greenwood v. Royal Crown Bottling Company, 793-BR-88.*

In the instant case, the claimant was employed for well over two years with the employer. He had no previous disciplinary actions leveled against him during his course of employment.

The claimant called two and a half hours prior to his scheduled 4:00 p.m. shift. He reported to the employee on duty that he would not be reporting because he was sick. Although this was against the employer's policy, this procedure was condoned by the claimant's supervisor on previous occasions. The claimant had never been absent from work in the time he was employed by the employer.

At 3:13 p.m., the claimant received a text message from his supervisor which stated that if the claimant did not arrive for his scheduled shift she would have no choice but to fire him.

The claimant did not show up for his shift because of his illness. The claimant believed that he was discharged because he did not show up. The employer did not contact the claimant, nor did the claimant contact the employer following the incident leading up to the claimant's discharge.

The case at bar is nearly identical to that in *Dei Svaldi v. Martin Taubenfeld, D.D.S., P.A., 1074-BR-88.* The claimant was told by his supervisor that he would be fired if he did not show up for his shift. The claimant assumed that he was fired because he did not appear. The Board finds that the claimant did not have the requisite intent to demonstrate that he voluntarily quit his employment. The claimant was discharged.

The Board finds that this single isolated incident of not showing up to work his scheduled shift does not rise to the level of misconduct.

The Board recognizes that the decision in the instant case does not change the outcome for the appellant/employer but merely changes the conclusions of law 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 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 decision shall be modified 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 PARK PLACE OPERATING, INC.

The Hearing Examiner's decision is modified.

Donna Watts-Lamont, Chairperson

Clayton A. Mitchell, Sr., Associate Member

RD/mr
Copies mailed to:
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PARK PLACE OPERATING INC
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Susan Bass, Office of the Assistant Secretary

UNEMPLOYMENT INSURANCE APPEALS DECISION

MICHAEL J SANDOE

SSN #

Claimant

vs.

PARK PLACE OPERATING INC

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: 1138185
Appellant: Claimant
Local Office : 65 / SALISBURY CLAIM CENTER

November 18, 2011

For the Claimant: PRESENT , KEVIN ORTIZ

For the Employer: PRESENT , WILLIAM DOUGLAS

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, Michael J. Sandoe, began working for this employer, Park Place Operating, Inc., on or about June 28, 2009. At the time of separation, the claimant was working as a shift supervisor. The claimant last worked for the employer on or about September 9, 2011, before quitting under the following circumstances:

On September 9, 2011 the claimant asked the hotel owner, Caryl Cardenes, for the following day off to attend a charity event in support of slain Delaware State Trooper, Chad Spicer. Ms. Cardenes denied his request. The claimant was scheduled to report for work on September 10, 2011 at 4:00 p.m. The claimant attended the charity event on the morning of September 10, 2011, meeting other participants in Georgetown, Delaware between 8:30 – 9:30 a.m. They then rode to Smyrna, Delaware where lunch was

offered by various vendors. During lunch the claimant became ill and was vomiting. The claimant knew that another employee, Vickie Curtis, was working as a reservationist and at approximately 1:00 p.m. he called her on her cell phone and told her he was sick and would not be able to work. He did not ask to speak to a manager although there was a manager on duty because the usual practice is to contact the hotel, the information is logged in a book and, if necessary, the person receiving the call, contacts a manager to arrange coverage.

The claimant received a text message from the hotel owner at 3:13 p.m. in which she said: "If you don't come in tonight, I will have no choice but to fire you." The claimant was angered by this message because he has never missed a day from work, never had any disciplinary action during his employment, and always volunteered to perform work that was beyond what was required of him. He did not attempt to contact the owner in response to her e-mail, did not report for work that day and did not report for his next scheduled shift.

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.

A voluntary quit done in response to an employer's reprimand or in anticipation of being discharged is a voluntary quit without good cause or valid circumstances. In this case, the claimant was reprimanded but failed to meet his burden of showing that the reprimand was unreasonable or that the employer was acting in bad faith. Sutch v. Peter Alden, et al., 644-BR-90.

The employer's disciplinary action was taken in bad faith. Just as an employee has a basic duty of loyalty toward her employer, an employer has a basic duty to treat an employee in good faith. Where this duty is violated in regard to disciplinary procedures, good cause is established. Woerner v. White Marsh Mall, Inc., 2159-BR-92.

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 asserts that he did not quit but was, in fact, discharged. This assertion is not supported by the facts. The claimant testified that his employer sent him a text message that he would be fired *if* he did not report for work. The claimant had called out sick after his request for leave for that day had been denied. It was not unreasonable for the owner to suspect that the claimant was not sick. A reasonable person would have contacted the owner after having received that text message to attempt to demonstrate that he was, in fact, sick. Instead, the claimant testified that he felt it was unjust, given his prior history and he assumed she had made up her mind. The employer's message was not a final statement, it gave the claimant alternatives that he did not pursue. Therefore, the claimant's decision to discontinue all communication with employer after receiving her text message demonstrates his intention to leave the employment and is a voluntary quit.

The claimant had the burden to show, by a preponderance of the evidence, that he voluntarily quit his 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 been met.

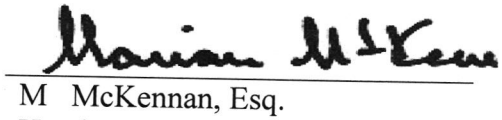
The claimant voluntarily quit in anticipation of being discharged for calling out sick for the first time during his employment. The claimant credibly testified that this was the first, and only time, he had called out sick and he and a witness credibly testified that he was sick and had been vomiting when he called out sick. The claimant also credibly testified that he was an exemplary employee who had never been the subject of any prior disciplinary action. The claimant has presented sufficient evidence to demonstrate that the disciplinary action, threatened by the employer if he did not report for work, was unreasonable and taken in bad faith. Just as an employee has a basic duty of loyalty toward her employer, an employer has a basic duty to treat an employee in good faith. Where this duty is violated in regard to disciplinary procedures, good cause is established. Woerner v. White Marsh Mall, Inc., 2159-BR-92.

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

DECISION

IT IS HELD THAT the claimant left the employment voluntarily but with good cause within the meaning of Md. Code Ann., Labor & Emp. Article, Section 8-1001. No disqualification is imposed based upon this separation from employment with this employer. The claimant is eligible for benefits so long as all other eligibility requirements are met. The claimant may contact the Claimant Information Service regarding 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.



M McKennan, 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 December 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 : November 08,2011
TH/Specialist ID: USB26
Seq No: 001
Copies mailed on November 18, 2011 to:
MICHAEL J. SANDOE
PARK PLACE OPERATING INC
LOCAL OFFICE #65
PARK PLACE HOTEL