

- DECISION -

Claimant:
KEVIN B REICH

Decision No.: 4852-BR-12

Date: November 02, 2012

Appeal No.: 1226482

S.S. No.:

Employer:
HARFORD CO PUB SCHOOLS

L.O. No.: 64

Appellant: Claimant

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: December 03, 2012

REVIEW OF THE RECORD

After a review of the record, the Board adopts the following findings of fact and conclusions of law and reverses the hearing examiner's decision.

The claimant was employed as a "Tech Ed" teacher from August 23, 2010 until June 13, 2012, earning \$25.20 per hour.

The claimant was in the second year of teaching *Foundations of Technology* and was in his second year of a plan of assistance in the areas of planning and implementation.

In the second year, the claimant failed to achieve the progress in the required improvements identified in the first conference. Thereupon, the claimant was notified by the Board of Education at the claimant's end of the year performance evaluation that the claimant's contract would not be renewed for the 2012-2013 school year and that he was terminated because he did not meet the employer's standards of work.

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)*.

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 employer's representative asserts the claimant's representative argued in the letter of appeal to the Board, that the hearing examiner applied the wrong statutory analysis in that the hearing officer should have applied Maryland Annotated, Labor & Employment Article, § 8-909 rather than the application of § 1-1002. The Board finds that the hearing examiner's statutory application was correct. The claimant was terminated and cause was given; therefore the provisions of *Maryland Annotated, Labor & Employment Article*, § 1-1002, 8-1002.1, 8-1003 apply. In the instant case we are dealing with a termination for not meeting standards of work, not the reasonable assurance of § 8-909.

The weight of the credible evidence shows that the claimant was unable to meet the standards of work due to a lack of competency. In a similar case, the claimant was unable to perform her job to the satisfaction of the employer. The claimant tried to do her job to the best of her ability but was not capable of doing the job. There was no evidence that the claimant was discharged for any misconduct on her part. *Cumor v.*

Computers Communications Group, 90-BH-87. In the instant, case the claimant was discharged for not meeting the employer's standards of work. There was no evidence that the claimant was terminated for misconduct.

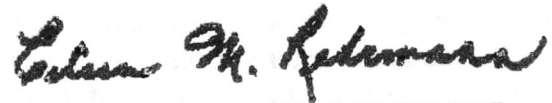
The Board notes that the hearing examiner did not offer or admit the *Agency Fact Finding Report* into evidence. The Board did not consider this document when rendering its decision.

The Board finds based on a preponderance of the credible evidence that the employer did not meet its burden of demonstrating that the claimant's actions rose to the level of gross misconduct or misconduct within the meaning of *Maryland Annotated, Labor & Employment Article, § 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 HARFORD CO. PUBLIC SCHOOLS.

The Hearing Examiner's decision is reversed.



Eileen M. Rehrmann, Associate Member



Donna Watts-Lamont, Chairperson

RD

Copies mailed to:

KEVIN B. REICH

HARFORD CO PUB SCHOOLS

DONNA D. HENRY

Susan Bass, Office of the Assistant Secretary

UNEMPLOYMENT INSURANCE APPEALS DECISION

KEVIN B REICH

SSN #

Claimant

vs.

HARFORD CO PUB SCHOOLS

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: 1226482

Appellant: Employer

Local Office : 64 / BALTOMETRO
CALL CENTER

August 27, 2012

For the Claimant: PRESENT

For the Employer: PRESENT, DONNA D. HENRY, DEBBIE CANNON

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

Claimant Kevin Reich filed a claim for benefits establishing a benefit year beginning July 1, 2012 with a weekly benefit amount of \$430.

The claimant first worked for Harford County Public Schools on August 23, 2010 as a teacher earning \$25.20 per hour. He remained in that position until June 13, 2012, when he was terminated for failure to exhaust all available remedies related to retaining his job.

The claimant worked for this employer for just over two years. During that time, he and two colleagues were assessed in accordance with County Schools' regulations, then evaluated by repeated observers.

However, the claimant's March 2012 Probationary Teacher Evaluation showed that in the classroom, his performance was not satisfactory and his planning and implementation needed more development. Initially, he was put on a Plan of Assistance, which is used to improve classroom performance, but nothing changed. When it was clear that the claimant did not meet the standards of work, he was put on a second Plan of Assistance, but his contract was not renewed. On April 11, the claimant was asked to attend a meeting with Jeffrey Fradel, Sr., Manager of Staff and Labor Relations to discuss other prospects with the School Board, but he did not appear, and was terminated soon thereafter.

Once the claimant was terminated, he could have appealed to the Board of Education, but he failed or refused to act and Mr. Fradel never heard any more from him on the matter. The claimant based his separation on the idea that a new teacher configuration was needed and he was the only non-tenured instructor, which made him more vulnerable to separation. However, the claimant had not advanced; he was still a teacher, while two similarly situated colleagues became principals.

CONCLUSIONS OF LAW

Md. Code Ann., Labor & Emp. Article, Section 8-1002 provides that an individual will 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 show 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 will 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.

EVALUATION OF EVIDENCE

The employer had the burden to show, by a preponderance of the evidence, that the claimant was discharged for some degree of misconduct connected with the work under the Maryland Unemployment Insurance Law. Ivey v. Catterton Printing Company, 441-BH-89. In this case, that burden was met as to gross misconduct.

The claimant was expressly told what was needed to improve his performance as a teacher, but he never rose to the occasion. Rather than become proactive and seek other avenues for continuing in another capacity, he rejected any and all possibilities, which is inconsistent with the letter and spirit of Unemployment Law. Under the circumstances, a total disqualification is appropriate.

The claimant's actions showed deliberate and willful disregard of the standards the employer had a right to expect, and total indifference to the employer's interests, all of which constituted gross misconduct in connection with the work. An unemployment disqualification will be imposed based on Md. Code, Ann., Labor & Emp. Article, Section 8-1002 pursuant to this separation from employment.

DECISION

IT IS HELD THAT the claimant was discharged for gross misconduct connected with the work within the meaning of Md. Code Ann., Labor & Emp. Article, Section 8-1002(a)(1)(i). The claimant is disqualified from receiving benefits from the week beginning June 10, 2012, and until the claimant becomes reemployed and earns wages in covered employment that equal at least 25 times the claimant's weekly benefit amount.

The determination of the Claims Specialist is reversed.

L BROWN

L Brown, 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 September 11, 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.

Date of hearing: August 23, 2012
BLP/Specialist ID: RWD1D
Seq No: 001
Copies mailed on August 27, 2012 to:

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DONNA D. HENRY