

- DECISION -

Claimant:
MARC H ANTELMAN

Decision No.: 720-BR-13

Date: April 5, 2013

Appeal No.: 1233307

S.S. No.:

Employer:
ALBAN TRACTOR CO INC

L.O. No.: 65

Appellant: Employer

Issue: Whether the claimant was discharged for misconduct or gross misconduct connected with the work within the meaning of Maryland Code, Labor and Employment Article, Title 8, Section 8-1002 or 1003.

- 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 6, 2013

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 full time inside engineer from January 2009 until August 17, 2012, earning \$65,000 until his discharge for repeated tardiness.

The claimant's work hours were Monday through Fridays from 8:30 a.m. until 5:00 p.m. In February, 2012, the claimant's supervisor gave the claimant a verbal warning that the

claimant needed to improve his tardiness. In a meeting on February 15, 2012, with another supervisor, the claimant was advised that he did not have flexible hours and was expected to be at his desk at 8:30 a.m. In June 2012, the employer reviewed the claimant's records and determined that the claimant had continued his tardiness.

On July 12, 2012, the claimant's supervisors met with the claimant and gave the claimant a written reprimand for his tardiness. During this meeting, the claimant asserted for the first time that he had a medical condition that caused him to be late.

After a first note from the claimant's physician which did not provide sufficient information, the claimant submitted an additional note from his physician which stated that the claimant suffered from a medical condition that could cause drowsiness and that the claimant could sometimes have difficulty awakening which could cause him to be later than his scheduled 8:30 a.m. start time. In a physician's note dated July 24, 2012, the claimant's physician stated that the claimant had a Generalized Anxiety Disorder and, again, asserted that the claimant's sleep was affected by medication. The physician stated that the claimant "can do well with a start time of 9:00 a.m."

On July 31, 2012, the claimant was sent an email changing his start time to 9:00 a.m., absent exigent circumstances, and making it clear that the claimant was expected to be at his desk and ready to begin work. The claimant testified that he understood that this meant that he was to be at his desk at 9:00 a.m. On August 8, 2012 the claimant arrived late to work because of traffic. On August 15, 2012 at 9:02 a.m., the claimant sent an email to his supervisor that he was on his way but that he had to "pull off the road to take a supplier phone call." However, the claimant's phone records show that the claimant made two outbound calls. There were no inbound calls on the claimant's telephone log. The claimant later changed his story that he pulled over to call a supplier. The claimant was discharged for his continued tardiness after receiving verbal and written warnings.

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."

For unemployment insurance law purposes, it is not relevant whether the claimant was owed more warnings prior to discharge under the technicalities of the employer's discharge procedures. *Oakley v. Progress Unlimited, Inc.*, 394-BR-92

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*.

The Board finds the employer's testimony to be more credible than the claimant's. The claimant changed his story on the reason for his lateness on August 15, 2012.

In the instant case, after the claimant received several warnings, both parties agreed that the claimant was to be at his desk at 9:00 a.m. starting work, absent exigent circumstances

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 met its burden of demonstrating that the claimant's actions rose to the level of gross misconduct within the meaning of *Maryland Annotated, Labor & Employment Article, § 8-1002*. The decision of the hearing examiner 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 August 12, 2012 and until the claimant becomes re-employed, earns at least twenty five times their weekly benefit amount and thereafter becomes unemployed through no fault of their own.

The Hearing Examiner's decision is reversed.



Eileen M. Rehrmann, Associate Member



Donna Watts-Lamont, Chairperson

KJK

Copies mailed to:

MARC H. ANTELMAN

ALBAN TRACTOR CO INC

ANDRES CROSETTO ESQ.

ALBAN TRACTOR CO INC

ALBERT B. RANDALL JR. ESQ.

Susan Bass, Office of the Assistant Secretary

UNEMPLOYMENT INSURANCE APPEALS DECISION

MARC H ANTELMAN

SSN #

Claimant

Vs.

ALBAN TRACTOR CO 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: 1233307

Appellant: Claimant

Local Office : 65 / SALISBURY
CLAIM CENTER

December 10, 2012

For the Claimant: PRESENT, ANDRES CROSETTO, ESQ.

For the Employer:

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 1002 - 1002.1 (Gross/Aggravated Misconduct connected with the work), 1003 (Misconduct connected with the work) or 1001 (Voluntary Quit for good cause).

FINDINGS OF FACT

The Claimant, Mark Antelman, began working for the Employer, Alban Tractor Company, Inc., on or about January, 2009. At the time of separation, the Claimant was working as an inside engineer, earning wages in the amount of \$65,000.00 per year. The Claimant last worked for the Employer on August 17, 2012, before being discharged for chronic lateness.

The Claimant was scheduled to work Mondays through Fridays from 8:30 a.m. until 5:30 p.m. In February, 2012, the Claimant's Supervisor, Vijay Vohra, verbally and by e-mail advised the Claimant that he was arriving to work after his scheduled start time and that he needed to improve in this area. The Claimant responded that he was often delayed by circumstances beyond his control such as traffic and sometimes business calls from customers. He believed that any time missed he made up for at the end of the day.

Later, on February 15, 2012, Jennifer Keyser, Esq., Asst. General Counsel, also advised the Claimant that he did not have flexible hours and that he was expected to be at his desk at 8:30 a.m. The Employer determined his start time by the time indicated when he swiped his badge to get access to the building and/or whether he was present for roll call.

By June, 2012, the Employer, decided to review the access reports for the period extending from April 5, 2012 through June 11, 2012. The Employer noted instances where the claimant was not swiped in by 8:30 a.m. In addition, he was considered late on June 12, 2012, June 13, 2012, June 18, 2012, July 9, 2012, July 11, 2012 and July 12, 2012.

On July 12, 2012, Jennifer Keyser, Esq. and Vijay Vorah met with the Claimant and issued a written warning for violations of the company rules on tardiness. During this meeting the Claimant notified the Employer that he had a medical condition that was causing him to arrive late. It was agreed that he would submit medical documentation to the appropriate party within the company. The Claimant submitted a letter from his doctor indicating that his medication caused drowsiness making awakening difficult. He was asked for a more definitive statement. A second note was forwarded dated July 16, 2012, in which the doctor included that the Claimant was impaired by chronic anxiety which caused problems with him arriving to work on time. A third note dated July 24, 2012, requested that the claimant's start time be changed to 9:00 a.m. On July 31, 2012, Marianne Bishoff, HR Manger, sent an e-mail to the Claimant granting the request. His start time was adjusted to 9:00 a.m.

On August 8, 2012, the Claimant arrived late due to traffic. On August 15, 2012 at 9:02 a.m., the Claimant sent a message to the Employer to indicate he was on his way. He was delayed by a call with a customer and had pulled over to the side of the road to talk. The claimant's Supervisor notified the Employer of this incident.

On August 17, 2012, the Claimant was discharged from his employment.

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 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 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. However, 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 & Rizk, P.A., 71-BH-90.

EVALUATION OF EVIDENCE

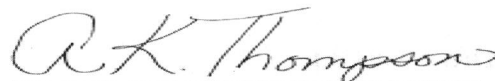
The Hearing Examiner considered all of the testimony and evidence of record in reaching this decision. Where the evidence was in conflict, the Hearing Examiner decided the Facts on the credible evidence as determined by the Hearing Examiner.

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. While the Employer presented evidence showing that the claimant was repeatedly late to work, the Claimant provided evidence that he missed that time due to legitimate medical issues, namely his chronic anxiety and medication issues. Absenteeism due to illness is not misconduct. See DuBois, supra. After the schedule change, the Claimant was late once due to circumstances beyond his control and once because he engaged in company business. These occasions do not show an intent to continue to arrive late. Accordingly, I hold the Employer failed to meet its burden and while the Claimant was discharged, it was for a non-disqualifying reason and benefits will be allowed.

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@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.



A K Thompson, 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 26, 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: November 14, 2012
AEH/Specialist ID: USB7S
Seq No: 001
Copies mailed on December 10, 2012 to:

MARC H. ANTELMAN
ALBAN TRACTOR CO INC
LOCAL OFFICE #65
ANDRES CROSETTO ESQ.