

- DECISION -

Claimant:
MARY B WARREN

Decision No.: 991-BR-11

Date: March 21, 2011

Appeal No.: 0935787

S.S. No.:

Employer:
HOLIDAY INN EXPRESS & SUITE

L.O. No.: 63

Appellant: CLAIMANT - REMAND FROM
COURT

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: April 20, 2011

REVIEW ON THE RECORD

Pursuant to the Order of the Circuit Court for Montgomery County, this case was remanded to the Board for a review on the record of the hearing examiner's decision. After a review on the record, the Board adopts the following findings of fact and reverses the hearing examiner's decision.

The claimant was employed as a full-time night auditor from April 3, 2009 through August 18, 2009. The claimant is unemployed as the result of a discharge.

After the claimant's last day of work, the claimant was incarcerated for allegedly driving without a license. The claimant contacted the employer to inform it of her predicament. The employer stated that it could not hold the claimant's job. The claimant was incarcerated for three days. The employer discharged the claimant.

The charges against the claimant were dropped on September 22, 2009. *See Claimant's Exhibit B-1.*

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(H)(1)*. The Board fully inquires into the facts of each particular case. *COMAR 09.32.06.02(E)*.

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."

Where the employer is not present and the claimant credibly denies each of the employer's allegations made to the claims specialist a finding of misconduct is not supported. *Lipman v. Graphics Factory, Inc.*, 697-BR-90. A claimant does not have to prove why the employer fired him. *Ivey v. Catterton Printing Company*, 441-BH-89.

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 a lawful incarceration may be gross misconduct. See, e.g., *Farmer v. Perdue Farms, Inc.*, 1563-BR-91.

However, absenteeism due to incarceration where the employer had notice and where claimant was found not guilty or where the charges were dropped constitutes a good excuse for absences which were totally beyond the claimant's control does not support a finding of misconduct. *Lansinger v. Baltimore County Fire Dept.*, 1305-BR-82.

In the appeal to the Board, the claimant presented court documents which demonstrate that the charges against her were dropped *nolle prosequi*. The documents are from the District Court's Traffic Citation Information system and are public documents. The Board takes judicial and official notice of the documents.

The employer, duly notified of the date, time and place of the hearing, failed to appear at the hearing. The employer has not filed an appearance in the appeal before the Board. Per the Board's February 15, 2011 correspondence, a copy of the documents was sent to the employer at its address of record. The employer offered no argument or objection. There being no objection, the Board entered the Claimant's court documents as *Claimant's Exhibit B-1*.


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 misconduct within the meaning of § 8-1003. The decision shall be reversed for the reasons stated herein.

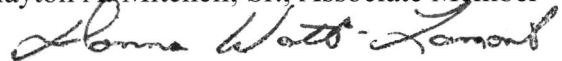
DECISION

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 HOLIDAY INN EXPRESS & SUITE.

The Hearing Examiner's decision is reversed.



Clayton A. Mitchell, Sr., Associate Member



Donna Watts-Lamont, Chairperson

RD

Copies mailed to:

MARY B. WARREN

HOLIDAY INN EXPRESS & SUITE

HOLIDAY INN EXPRESS & SUITES .

Susan Bass, Office of the Assistant Secretary

UNEMPLOYMENT INSURANCE APPEALS DECISION

MARY B WARREN

SSN #

Claimant

vs.

HOLIDAY INN EXPRESS & SUITE

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: 0935787

Appellant: Claimant

Local Office : 63 / CUMBERLAND

CLAIM CENTER

December 03, 2009

For the Claimant: PRESENT

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 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 was employed as a night auditor from April 3, 2009 thru August 18, 2009. On or about August 18 the claimant was sentenced to two weeks in jail for driving on a suspended license. The claimant asked her supervisor if she could be temporarily taken off the schedule. The claimant was informed that her job could not be held. The claimant ultimately served three days but her job was not available for her upon her release.

CONCLUSIONS OF LAW

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.

EVALUATION OF EVIDENCE

A claimant who has been discharged may be eligible to receive unemployment insurance benefits unless it has been established, by a preponderance of the credible evidence that the discharge was for a reason which constitutes some level of misconduct in connection with the work. In this case, the employer was not present at the hearing to offer evidence with regards to the circumstances of the claimant's separation. The claimant candidly acknowledged that she was discharged for absenteeism upon informing the employer that she was going to be temporarily incarcerated. Pursuant to Unemployment Insurance Law, a termination based upon absenteeism due to incarceration is generally held to be for gross misconduct unless charges were dropped or the claimant was found to be not guilty. In this case, no such contention was made by the claimant. Therefore, and notwithstanding the claimant's candid testimony, the Benefit Determination is not amenable for modification.

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)(ii). The claimant is disqualified from receiving benefits from the week beginning August 16, 2009 and until the claimant becomes reemployed and earns wages in covered employment that equal at least 20 times the claimant's weekly benefit amount.

The determination of the Claims Specialist is affirmed.



E B Steinberg, 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 to Petition for Review

Any party may request a review 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 18, 2009. 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 20, 2009
MG/Specialist ID: WCU3R
Seq No: 005
Copies mailed on December 03, 2009 to:
MARY B. WARREN
HOLIDAY INN EXPRESS & SUITE
LOCAL OFFICE #63