

# DLLR

STATE OF MARYLAND

DEPARTMENT OF LABOR, LICENSING AND REGULATION

MARRIS N. GLENDENING, Governor  
KATHLEEN KENNEDY TOWNSEND, Lt. Governor  
JOHN P. O'CONNOR, Secretary

Board of Appeals  
Hazel A. Warnick, Chairperson

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Claimant:

ROBERT E. LYSTON

Decision No.: 01379-BH-99

Date: June 2, 1999

Appeal No.: 9821343

Employer:

PRE MIX INDUSTRIES INC

S.S. No.:

L.O. No.: 09

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: July 2, 1999

## - APPEARANCES -

FOR THE CLAIMANT:

ROBERT E. LYSTON

PAULETTE LETSON, WITNESS

FOR THE EMPLOYER:

LORI HASKELL



## **EVALUATION OF THE EVIDENCE**

The Board of Appeals has considered all of the evidence presented, including the testimony offered at the hearings. The Board has also considered all of the documentary evidence introduced in this case, as well as the Department of Labor, Licensing and Regulation's documents in the appeal file.

The Board found the testimony of the claimant to be very credible. The employer had no evidence to dispute the claimant's testimony that the only controlled dangerous substance that he had ingested, was cough medication that he had been given by a co-worker, the narcotic contents of which, the claimant was unaware of at the time he took it.

## **FINDINGS OF FACT**

The Board of Appeals adopts the findings of fact of the Hearing Examiner. The Board further finds that the employer has a strict zero tolerance drug policy; therefore, the claimant was fired as a result of the positive drug test. The circumstances surrounding the test result were not considered by the employer.

The claimant was aware of the drug policy and in fact had been responsible for enforcing it. He also was aware of the fact that he could have had the sample retested by a different laboratory, but chose no to do so. When he had the accident with the company car (although not on company business), he voluntarily submitted to a drug test.

When the claimant was given the test results, the physician with whom he spoke, told him that the positive results for codeine and morphine could have been caused by the cough medicine that he had taken.

## **CONCLUSIONS OF LAW**

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).

The employer has the burden of proof in the case of a discharge. The Board concludes that the employer has not met that burden in this case.

While it is technically true that the employer's positive drug test result was a violation of the employer's policy, the Board does not find that this one isolated incident, due to an unintentional mistake by the claimant, rises to the level of misconduct, let alone gross misconduct.

The Board is not unmindful of the seriousness of drug use and testing at the workplace and the necessity of zero tolerance for such use. However, this case concerns an otherwise responsible employee who had no intention of using a drug and did not realize he was doing so. He made one mistake and lost his job as a result. However, he is not disqualified from receiving unemployment insurance.

### DECISION

IT IS HELD THAT the claimant was discharged, but not for gross misconduct or misconduct, connected with the work, within the meaning of §8-1002 or 8-1003 of the Labor and Employment Article. No disqualification is imposed based upon his separation from employment with Pre Mix Industries Incorporated.

The decision of the Hearing Examiner is affirmed.



Hazel A. Warnick, Chairperson



Clayton A. Mitchell, Sr., Associate Member

### **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 410-767-2424 or 1-800-827-4839. 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.**

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Date of hearing:

Copies mailed to:

ROBERT E. LYSTON

PRE MIX INDUSTRIES INC

LORI HASKELL, DIR., HUMAN RES.

Local Office - #09

# UNEMPLOYMENT INSURANCE APPEALS DECISION

ROBERT E. LYSTON

Before the:

**Maryland Department of Labor,  
Licensing and Regulation**

**Appeals Division**

1100 North Eutaw Street

Room 511

Baltimore, MD 21201

(410) 767-2421

SSN

**Claimant**

vs.

PRE MIX INDUSTRIES INC

Appeal Number: 9821343

Appellant: Claimant

Local Office: 40 / Eastpoint

**Employer/Agency**

January 11, 1999

**For the Claimant:** PRESENT, PAULETTE LETSON

**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 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 was employed from March 9, 1998 to November 5, 1998. At the time of his separation from employment, the claimant worked as the general manager, full-time, at a salary of \$74,000 a year. The claimant was discharged from employment due to the following: the claimant tested positive for opiates on a drug test administered on October 31, 1998. The claimant was not taking or using any illegal drugs at that time. The only reason the positive drug results was that earlier that day, the claimant had taken a prescription cough medicine containing codeine, Thenergan with codeine. It was the codeine that caused the positive drug test result for opiates.

## CONCLUSIONS OF LAW

Md. Code Ann., Labor & Emp. Article, Section 8-1002 (Supp. 1996) provides that an individual shall 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 of behavior that an employer has a right to expect and that shows 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 (Supp. 1996) 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.

Md. Code Ann., Labor & Emp. Article, Section 8-1003 (Supp. 1996) 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, 314 A.2d 113 (1974).


## EVALUATION OF EVIDENCE

The employer, who was not present at the hearing, has not met its burden of establishing, by a preponderance of the credible evidence, that the claimant was discharged from his employment due to misconduct or gross misconduct.

## DECISION

IT IS HELD THAT the claimant was discharged, but not for gross misconduct or misconduct connected with the work within the meaning of Md. Code Ann., Labor & Emp. Article, Sections 8-1002 or 8-1003 (Supp. 1996). No disqualification is imposed based upon the claimant's separation from employment with Premix Industries, Inc. The claimant may contact the local employment office concerning the other eligibility requirements of the law.

The determination of the Claim Specialist is reversed.

  
K. Scheinberg, Esq.  
Hearing Examiner

### Notice of Right of Further Appeal

Any party may request a further appeal either in person or by mail which may be filed in any local office of the Department of Labor, Licensing and Regulation, or with the Board of Appeals, Room 515, 1100 North Eutaw Street, Baltimore, MD 21201. Your appeal must be filed by January 26, 1999.

Note: Appeals filed by mail are considered timely on the date of the U.S. Postal Service postmark.

Date of hearing: December 30, 1998

THJ/Specialist ID: EUTW2

Seq. No.: 002

Copies mailed on January 11, 1999 to:

ROBERT E. LYSTON  
PRE MIX INDUSTRIES INC  
LOCAL OFFICE #09