-DECISION-

Claimant:
JULIUS C BRIANDT

Decision No.: 169-BR-11

Date: February 09, 2011

Appeal No.: 1013946

S.S. No.:

Employer:
FLIPPO CONSTRUCTION CO INC

L.O. No.: 64

Appellant: Claimant

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: March 11, 2011

REVIEW ON THE RECORD

After a review on the record, the Board makes the following findings of fact:

The claimant worked for this employer for approximately four years as a heavy equipment operator. He was considered a good employee, but had occasional write-ups for various rule infractions. In late February 2010, the claimant was suspended for three days, per the employer's policies, for an incident unrelated to his separation from employment.

On Thursday March 4, 2010, the claimant's supervisor suspended him for the claimant's failure to properly check his equipment prior to starting a job. The supervisor did not give the claimant a letter of suspension or any other written documentation. The employer expected the claimant to return to work on Monday, March 8, 2010, but did not tell the claimant that his suspension was two days instead of the customary three days, as per the

> employer's policies. The claimant went home and, because he had not been told the length of his suspension, waited for the employer to contact him to return to work.
>
> The claimant filed a claim for unemployment insurance benefits on March 4, 2010, because he did not know how long he would be suspended from work.
>
> When the claimant did not report for work or call the employer on either March 8 or March 9, 2010, and the employer received paperwork on the claimant's unemployment claim, the employer concluded that the claimant had quit and processed his separation paperwork. The claimant never planned to quit, but was waiting to be called back to work.

The Board concludes that these facts warrant different conclusions of law and a reversal of the hearing examiner's decision.

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).* 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).*

The evidence established that the claimant did not quit this employment. He never intended to do so and never stated anything, to anyone, that would have led a reasonable person to conclude that such was the claimant's intention. The claimant was sent home by his supervisor, ostensibly on a suspension. However, the claimant was not given the usual paperwork, nor was he given a return-to-work date. The claimant, understandably, was concerned that, since he did not know the length of his suspension, he would not have sufficient income to pay his bills. He filed for unemployment insurance benefits in case he would need them to cover this indefinite period.

The employer witness who appeared and testified had no first-hand knowledge of the circumstances surrounding the claimant's separation beyond the processing of his separation paperwork on March 9, 2010. The claimant's supervisor did not appear and testify. The witness presented only hearsay testimony,

which was vague as to specifics, and totally dependent upon statements made by an absent declarant. Such testimony cannot be given substantial weight absent corroborative evidence.

The claimant's testimony was consistent and credible. The claimant did not know how long his suspension would last because the employer did not provide him with the paperwork normally given to an employee upon a suspension. The claimant's supervisor, for unknown reasons, expected the claimant to return after only a two-day suspension, but did not explain this to the claimant. Nor did the supervisor leave any sort of explanation in his paperwork used by the employer witness for the hearing.

The claimant went home, as instructed, and waited for the employer to contact him to return to work. The claimant's actions were reasonable under the circumstances. Those actions do not evince any intent to abandon his employment. The claimant was doing as instructed, and what was logical based upon his prior experience with a suspension. The claimant cannot be found to have failed to report for work on a day he did not know he was supposed to report for work. The employer chose to discharge him for this two-day absence, but has not shown that the claimant acted with any disregard, carelessness or negligence with respect to his employer.

The employer's evidence is insufficient to support the hearing examiner's conclusions and insufficient to support a finding that the claimant was discharged for any disqualifying reason.

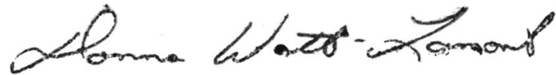
The Board notes that the hearing examiner did not offer or admit the *Agency Fact Finding Report* into evidence. The Board did not consider this document when rendering its decision.

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 employer has also not met its burden of showing that the claimant's discharge was for 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 FLIPPO CONSTRUCTION CO. INC.

The Hearing Examiner's decision is reversed.



Donna Watts-Lamont, Chairperson

Clayton A. Mitchell, Sr., Associate Member

KJK/jm
Copies mailed to:
JULIUS C. BRIANDT
FLIPPO CONSTRUCTION CO INC
Susan Bass, Office of the Assistant Secretary