

**- DECISION -**

Claimant:  
MICHAEL UPCHURCH

Employer:  
LINDSTROM CORPORATION

Decision No.: 2230-BR-06  
Date: October 16, 2006  
Appeal No.: 0612163  
S.S. No.:  
L.O. No.: 61  
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).

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**- 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: November 15, 2006

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**PRELIMINARY STATEMENT**

This matter was scheduled for a hearing on August 21, 2006, before Hearing Examiner Randazzo. All parties were given proper notice of the time and place of the hearing. The claimant was the only party that appeared and gave live testimony under oath.

### EVALUATION OF THE EVIDENCE

The Board of Appeals has considered all of the evidence presented, including the testimony offered at the hearing. 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.

When contacted by an Agency Claims Specialist, the claimant and the employer gave very different statements as to the reason for the claimant's separation from employment. These statements, though hearsay, were properly entered into evidence as Agency Exhibit 1. While hearsay evidence is admissible in administrative hearings it is not given the same weight as live testimony given under oath.

The claimant's live testimony, given under oath, is unrefuted. The Board of Appeals finds the claimant's testimony to be credible. The employer's statement, contained in Agency Exhibit 1, was not taken under oath and was not subject to cross examination by the claimant at the hearing.

### REVIEW ON THE RECORD

The claimant was employed from May 14, 2005 until May 19, 2006. The claimant became separated from employment as a result of a discharge.

The claimant was discharged by the owner of the business, David Fellows. The claimant was told by Mr. Fellows that he was no longer needed.

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).

In a case of a discharge the burden is on the employer to prove, by a preponderance of credible evidence, that the claimant was discharged for reasons that rose to the level of gross misconduct or misconduct within the meaning of section 8-1002 or section 8-1003 of the law. The employer has not met its burden in this case. The employer failed to appear at the hearing to present any evidence as to why the claimant was discharged. The employer's statement to the Claim Specialist was not sufficient to refute the claimant's sworn testimony given at the hearing.

The claimant was terminated because the employer discovered that he was working jobs on the side in the company vehicle without permission. The claimant denies that he engaged in this type of activity but the employer previously provided information to the Agency which was contained in the Fact Finding Report. (See Agency Exhibit No. 2) In that interview, the employer's witness, David Fellows, the owner of the company, indicated that the claimant would leave at 8 am and was expected back around 2 pm for a roundtrip delivery but would often return around 5 pm and unable to explain his whereabouts. The employer then conducted an investigation which determined that the claimant was doing business on the side in the company truck. The employer learned this because they spoke to some of their customers with whom the claimant was engaged in this side business.

### CONCLUSIONS OF LAW

COMAR 09.32.06.02M states that if a party appealing fails to appear at a hearing after having been given the required notice of the hearing, the Hearing Examiner may dismiss the appeal. Failure to be present at the location designated for the hearing within 10 minutes of the time scheduled is a failure to appear within the meaning of this section.

COMAR 09.32.06.02N(2) provides that a request for the reopening of a dismissed case may be granted for the following reasons:

- (a) The party received the hearing notice on or after the date of the hearing as a result of:
  - (i) an untimely or incorrect mailing of the hearing notice by the Appeals Division, or
  - (ii) a delay in the delivery of the hearing notice by the United States Postal Service, or
- (b) An emergency or other unforeseen and unavoidable circumstance prevented a party from both attending the hearing and requesting a postponement of the hearing, or
- (c) A party requested a postponement for the reasons listed above, but it was improperly denied.

COMAR 09.32.06.02N(3) provides that misreading of a properly prepared hearing notice as to the date, time and place of the hearing is not good cause for reopening a dismissed case.

Md. Code Ann., Labor & Emp. Article, Section 8-1002 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 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).


### EVALUATION OF EVIDENCE

The claimant testified credibly that the reason for missing the prior appeal hearing was due to traffic. There was no one present from the employer to dispute this testimony and the claimant has met his burden to show that there is sufficient good cause to allow consideration of the underlying issue.

**DECISION**

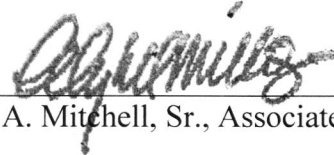
It is held that the claimant was discharged, but not for gross misconduct or misconduct, connected with the work, within the meaning of Maryland Code Annotated, Labor and Employment Article, Title 8, Section 1002 or 1003. No disqualification is imposed based upon his separation from employment with LINDSTROM CORPORATION.

The decision of the Hearing Examiner is reversed.



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Donna Watts-Lamont, Chairperson



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Clayton A. Mitchell, Sr., Associate Member

Copies mailed to:  
MICHAEL UPCHURCH  
LINDSTROM CORPORATION  
Michael Taylor, Agency Representative

**UNEMPLOYMENT INSURANCE APPEALS DECISION**

MICHAEL UPCHURCH

SSN #

**Claimant**

vs.

LINDSTROM CORPORATION

**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: 0612163

Appellant: Claimant

Local Office : 61 / COLLEGE PARK  
CLAIM CENTER

September 5, 2006

**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 1002 - 1002.1 (Gross/Aggravated Misconduct connected with the work), 1003 (Misconduct connected with the work) or 1001 (Voluntary Quit for good cause). Whether the appeal should be reopened pursuant to COMAR 09.32.06.02 N.

**FINDINGS OF FACT**

A hearing in this matter was set for July 17, 2006 at 9:30 am in Wheaton. The appellant failed to appear within ten minutes of the scheduled hearing time. This failure was due to a problem with traffic on that day. The claimant left at 8 am and was stuck in traffic because of two accidents on the D.C. Beltway which caused him to get to the Wheaton location 15 minutes late. The claimant would have otherwise been on time had it not been for the unforeseen traffic.

The claimant worked for the above captioned employer from May 14, 2005 to May 19, 2006. At the time the claimant was terminated, he was employed as a truck driver earning \$9.50 per hour in a full time capacity.

A claimant, who is terminated, is eligible for benefits unless it is established, by a preponderance of the credible evidence that his termination was due to misconduct. In the case at bar, this burden has not been met. Although there was no representative from the employer present, the owner of the employer's company provided information at the Fact Finding Interview. This information was contained in the file and was reviewed by this Hearing Examiner. The credible information of the employer indicates that the claimant was terminated because he was using the company truck for a business on the side without permission. Although the claimant disputed this account, he did not credibly testify regarding the real reason for his separation. The claimant seemed to indicate that he did not have any known reason for his termination although he believed that the owner wanted to use somebody else to drive a truck. However, on this issue, the claimant's testimony was less than credible. Therefore, the prior information provided by the employer will be considered in evaluating the claimant's testimony and the prior determination will remain enforced.

### DECISION

IT IS HELD THAT the appealing party established compliance with the requirements of COMAR 09.32.06.02N in the above-captioned case. The case is reopened, allowing consideration of the substantive issues in the case.

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 May 14, 2006 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.



P G Randazzo, 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 410-949-0022 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.**

**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 September 20, 2006. 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

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

Date of hearing : August 21,2006  
TW/Specialist ID: RWD1D  
Seq No: 001  
Copies mailed on September 5, 2006 to:  
MICHAEL UPCHURCH  
LINDSTROM CORPORATION  
LOCAL OFFICE #61