

- DECISION -

Claimant:
JEFFREY L COLES

Decision No.: 2316-BR-12

Date: July 6, 2012

Appeal No.: 1201965

S.S. No.:

Employer:
SAFEWAY INC

L.O. No.: 64

Appellant: Claimant

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: August 06, 2012

REVIEW OF THE RECORD

After a review of the record, and after deleting "or about" from the first sentence of the second paragraph, the Board adopts the hearing examiner's modified findings of fact. However 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*. 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, 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).*

In his appeal, the claimant contends his absences were because of his prior work-related injury. He questions some of the dates used, but does not provide any specifics. The claimant does not cite to the evidence of record and makes no other contentions of error. On appeal, the Board reviews the evidence of record from the Lower Appeals hearing. The Board will not order the taking of additional evidence or a new hearing unless there has been clear error, a defect in the record, or a failure of due process. The Board has thoroughly reviewed the record from the hearing and concurs with the hearing examiner's findings of fact, but disagrees with the hearing examiner's decision.

The hearing examiner appropriately found that it was not reasonable for the employer to have expected the claimant to continue to go to a doctor for his pain when he had no insurance, no personal funds to pay for medical care, and no hope of further treatment, or improvement. However, the hearing examiner inappropriately found the claimant's absences, under these circumstances, to constitute simple misconduct.

Clearly the claimant's attendance was in violation of the employer's policy. The employer certainly had the right to discharge the claimant for this reason, and in fact was lenient with the claimant. However, those facts do not necessarily establish that the claimant's ultimate discharge was for misconduct. Misconduct is defined by the acts or omissions of the claimant; it is not defined by the employer's policies. Here, the majority of the claimant's absences were related to an injury for which he could not receive any helpful treatment. The only remedy available to the claimant when his back hurt was to take off work. The employer needed the claimant's regular attendance and when that was not possible, the employer discharged the claimant. Again, the employer took an action well within its rights and likely reasonable under these circumstances. The claimant's absences were not, however, of a nature sufficient to support a finding of gross misconduct, or simple misconduct, under Maryland law.

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.

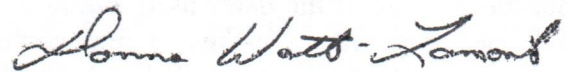
The Board finds based on a preponderance of the credible evidence that the employer has not met its burden of demonstrating that the claimant's actions rose to the level of gross misconduct within the meaning of § 8-1002. The employer has also not met its burden of showing that the claimant's discharge 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 SAFEWAY INC.

The Hearing Examiner's decision is reversed.



Donna Watts-Lamont, Chairperson



Clayton A. Mitchell, Sr., Associate Member

VD

Copies mailed to:

JEFFREY L. COLES

SAFEWAY INC

PIXIE ALLEN

SAFEWAY INC

Susan Bass, Office of the Assistant Secretary

UNEMPLOYMENT INSURANCE APPEALS DECISION

JEFFREY L COLES

SSN #

Claimant

vs.

SAFEWAY 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: 1201965
Appellant: Employer
Local Office : 64 / BALTOMETRO
CALL CENTER

February 09, 2012

For the Claimant: PRESENT

For the Employer: PRESENT , PIXIE ALLEN, TAMEKA WATKINS

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, Jeffrey L. Coles, filed a claim for benefits establishing a benefit year beginning December 4, 2011. He qualified for a weekly benefit amount of \$430.00.

The claimant began working for this employer, Safeway, Inc., on or about April 26, 2006. At the time of separation, the claimant was working as a full-time night stocker for which the claimant was paid \$15.85 an hour. The claimant last worked for the employer on December 4, 2011, before being terminated for excessive absenteeism.

The employer's attendance policy allows 7 attendance "occurrences" in a rolling 12-month period before discharge becomes an option. It counts absences as one occurrence, and counts absences for illness unless

medical documentation is provided. The claimant had many more than 7 occurrences, most of which were medically related, but for which he did not or could not provide medical documentation.

The employer followed its policy of progressive discipline (being even more generous than its policy provides for) in giving the claimant a verbal warning after 13 (rather than 3) occurrences (Employer Exhibit No. 1), a written warning after 14 (rather than 4) occurrences (Employer Exhibit No. 2), a written warning and three-day suspension after 18 (rather than 5) occurrences (Employer Exhibit No. 3), and a final written warning and five-day suspension after 21 (rather than 6) occurrences (Employer Exhibit No. 4). After this, the claimant left early, without permission, on December 4, 2011 and was discharged by the employer.

The claimant had two prior periods of missed work due to medical conditions from injuries sustained on the job, specifically injuring his back. He was cleared to return to work and the above occurrences were all after that return to work. However, the claimant missed most of the time from work (that led to his discharge) because of recurring back pain that made him need to miss work. He did not see a doctor when he experienced this pain for several reasons. He had been told by his doctors that there was not any further treatment they could provide for the pain. He had no medical insurance and could not afford to see a doctor and pay for continual visits, in order to procure notes for the employer to document his pain.

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 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).

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.

In Kinsey v. Nordstrom, Inc., 1103-BR-90, the claimant's absences all appeared to be due to illness. However, at least some of her occurrences of lateness were not due to legitimate medical reasons or other unavoidable reasons. The Board of Appeals determined that an employee who misses a large number of work days, even if excused, has a heightened duty not to miss any work for unexcused reasons. The Board determined that the claimant was discharged for misconduct.

EVALUATION OF THE 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 been met as to misconduct, but not as to gross misconduct.

The claimant missed an excessive amount of time from work. Most were for medical reasons stemming from a prior injury at work. While he clearly violated the employer's policy in not providing medical documentation for each day he was absent due to medical conditions, it is not reasonable to expect an employee to continually spend the money necessary to visit a doctor solely to procure a note documenting his pain when the doctor cannot really do anything to treat the employee.

However, the claimant failed to establish that all of the absences were for legitimate medical reasons and left early without permission just after returning from a five-day suspension and final written warning that his job was in great jeopardy for attendance-related reasons. In line with the precedents cited above, notably Kinsey v. Nordstrom, Inc., the claimant's overall attendance history and actions rise to the level of misconduct.

I hold that the claimant committed a transgression of some established rule or policy of the employer, a forbidden act, a dereliction of duty, or engaged in a course of wrongful conduct within the scope of the claimant's employment relationship, during hours of employment, or on the employer's premises. An unemployment disqualification shall be imposed based on Md. Code, Ann., Labor & Emp. Article, Section 8-1003 pursuant to this separation from this employment.

DECISION

IT IS HELD THAT the claimant was discharged for misconduct connected with the work within the meaning of Md. Code Ann., Labor & Emp. Article, Section 8-1003. Benefits are denied for the week beginning December 4, 2011 and for the 9 weeks immediately following. The claimant will then be 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.



D A Fisher, 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 February 24, 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 : February 02,2012

CH/Specialist ID: RBA1H

Seq No: 001

Copies mailed on February 09, 2012 to:

JEFFREY L. COLES

SAFEWAY INC

LOCAL OFFICE #64

PIXIE ALLEN

SAFEWAY INC