-DECISION-

Claimant:
RANDY L GREENE

Employer:
YRC INC

Decision No.: 3366-BR-13

Date: August 19, 2013

Appeal No.: 1239283

S.S. No.:

L.O. No.: 63

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: September 18, 2013

REVIEW OF THE RECORD

After a review of the record, the Board adopts the hearing examiner's 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, 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).*

In the claimant's appeal, his attorney contends the claimant's absence was covered by FMLA and the hearing examiner's disregard of that argument was error. Claimant's counsel also contends the claimant was seriously ill and in no condition to drive long distance as he was scheduled that day. Counsel also contends there was, "error in concluding that this was 'simple misconduct'. The employer produced no documentation that any specific rule was violated." Counsel lastly contends the hearing examiner, "wrongly denied the Claimant's request for an in-person hearing." Claimant's counsel requests, "a new, in-person, hearing before a Hearing Officer versed in FMLA law."

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 record is complete. Both parties appeared and testified. Both parties were represented by counsel. Both parties were given the opportunity to cross-examine opposing witnesses and to offer and object to documentary evidence. Both parties were offered closing statements. The necessary elements of due process were observed throughout the hearing. The Board finds no reason to order a new hearing or take additional evidence in this matter. The request for a new, in-person hearing is denied.

The Board has thoroughly reviewed the record from the hearing. The Board finds the claimant was discharged because he left the employer's facility without advising a member of management or a supervisor. The employer's policies require such notification. However, the Board does not find the claimant's failure to notify any particular person he was leaving to be disqualifying misconduct. The Board notes that not every policy violation is misconduct.

In this case, the claimant became ill while he was at work. He was having chest and stomach pains. He knew he could not drive. He advised a co-worker he was leaving and why. The claimant should not be expected to search for a supervisor to provide this information, when he was ill. The claimant relied upon his co-worker to advise the employer. The claimant saw his doctor the next day and obtained a note from that doctor that he needed to be off work for several days. The claimant immediately faxed that note to the employer and confirmed its receipt.

An absence due to illness is not misconduct. A lack of proper notification, consistent with the employer's policy, due to illness is not misconduct. The employer's discharge of the claimant, for leaving work without permission, was not for a disqualifying reason.

The Board agrees with claimant's counsel that the hearing examiner erred in categorizing this as simple misconduct. The hearing examiner focused on the claimant's decision to wait a few hours and see his personal physician rather than go immediately to an emergency room. The Board does not find this determinative. The claimant saw his doctor the same day and obtained a note excusing him from work because of a medical condition. The claimant may have violated the employer's policy or expectation that he obtain permission from a supervisor prior to leaving, but he did so for reasons which excuse that lapse and which do not rise to the level of any misconduct.

The Board understands claimant's counsel frustration with being precluded, at two hearings, from offering evidence and argument on the applicability of FMLA to the claimant's circumstances. However, because the Board finds the evidence sufficient to render a decision, the Board does not find this preclusion to be reversible error. Under these circumstances, whether the employer should have placed the claimant on FMLA leave, or offered to place the claimant on FMLA leave, is not controlling. Whether the employer improperly discharged the claimant when he should have been eligible for FMLA leave is not controlling. The more direct inquiry is whether the claimant's leaving the workplace, due to illness, and not specifically advising a supervisor, was misconduct. The Board concludes it was not and further analysis of the applicability of FMLA is unnecessary.

The Board further notes that a claimant may be on FMLA leave, or be eligible for FMLA leave, and still be discharged for disqualifying reasons. The proper question is whether the claimant committed some act or omission which constitutes disqualifying misconduct under the Maryland Unemployment Laws. Here, the claimant did not and he is qualified for benefits if he is otherwise eligible.

The Board lastly 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 YRC INC.

The Hearing Examiner's decision is reversed.

Donna Watts-Lamont, Chairperson

Clayton A. Mitchell, Sr., Associate Member

KP/MW
Copies mailed to:
RANDY L. GREENE
YRC INC
Susan Bass, Office of the Assistant Secretary

UNEMPLOYMENT INSURANCE APPEALS DECISION

RANDY L GREENE

SSN #

Claimant

vs.

YRC 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: 1239283
Appellant: Claimant
Local Office : 63 / CUMBERLAND CLAIM CENTER

May 08, 2013

For the Claimant: PRESENT, JOHN B. STOLARZ, ESQ.

For the Employer: PRESENT, GARY CHAPMAN, CRYSTAL BARNES ESQ.

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).

PREAMBLE

This matter has been remanded by the Board of Appeals for a De Novo Hearing on the merits.

FINDINGS OF FACT

The Claimant (Randy Greene) filed a claim for benefits establishing a benefit year beginning October 28, 2012. He qualified for a weekly benefit amount of $430.00.

The Claimant began working for this Employer (YRC, Inc.) on May 28, 2002. At the time of separation, the Claimant was working as a Road Driver. The Claimant last worked for the Employer on October 26,

2012, before being terminated for leaving work without permission.

The Employer has a policy which provides that all employees must notify a supervisor or manager prior to leaving work. On October 26, 2012, the Claimant became ill at work shortly after starting of his shift at 12:00 a.m. The Claimant was experiencing chest pains and in his hands and stomach about 1:00 a.m. The Claimant was scheduled drive from Baltimore, Maryland to Charlotte, North Carolina that night. The Claimant did not feel well enough to complete the trip to North Carolina. After being at work a short while, the Claimant advised another employee in the truck yard that he was ill and he was leaving. The Claimant further requested said employee to notify the Terminal Manager (Gary Chapman) that he was leaving and that he needed to see his doctor. There were two (2) other operation managers on duty that night in addition to Mr. Chapman, but the Claimant did not speak to anyone other than a co-worker. The Claimant left his truck in the middle of the yard and unattended with the door open. The Claimant called Mr. Chapman about forty-five (45) minutes after leaving work and informed him that he was going to the doctor and that he would bring him a doctor's note. The Claimant did not go to the emergency room night, but waited until the next day until his personal physician could see him. On October 26, 2012, the Claimant's physician scheduled him for 1:00 p.m. and provided the Claimant with a disability form excusing him from work from October 26, 2012 through November 4, 2012. The Claimant faxed the note to the Employer's offices and called the Employer's secretary (Shirley) who confirmed that she received of the same. On October 27, 2012, Mr. Chapman called the Claimant and informed him that he was being terminated for violating the Employer's policy by leaving work without permission.

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).

EVALUATION OF 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.

The Claimant engaged in simple misconduct. The Claimant owed the Employer a duty to notify the Employer prior to leaving the premises instead of having his co-worker to do so. There were two (2) other managers on duty that the Claimant could have notified prior to leaving. The Claimant failed to do so. I find it would have even been reasonable for the Claimant to have telephoned Mr. Chapman from the truck

yard prior to leaving the Employer's premises to advise him that he was not well prior to leaving. However, the Claimant did not have a medical emergency whereas he did not go straight to a hospital emergency room, but instead waited until later that day when his personal physician was available to see him. Therefore, even if the Claimant did not feel well enough to walk back to Mr. Chapman's office to tell him of his illness, the Claimant could have advised Mr. Chapman via the telephone prior to leaving the premises. If the Claimant left work and immediately went to a hospital or physician's office I would find no misconduct. However, based upon the totality of the circumstances, I find that the Claimant committed a wrongful or forbidden act within the scope of his employment by leaving work without permission and thereby violating the Employer's policy.

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 October 21, 2012 and for the nine (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.

L Williamson

L Williamson, 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

This is a final decision. 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 May 23, 2013. 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: April 29, 2013
BLP/Specialist ID: WCU1J
Seq No: 001
Copies mailed on May 08, 2013 to:

RANDY L. GREENE
YRC INC
LOCAL OFFICE #63
JOHN B. STOLARZ ESQ.