

- DECISION -

Claimant:
OTIS E HARPER

Decision No.: 3408-BR-12

Date: July 30, 2012

Appeal No.: 1215067

S.S. No.:

Employer:
ROWEN CONCRETE INC

L.O. No.: 61

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: August 29, 2012

REVIEW OF THE RECORD

After a review of the record, the Board adopts the following findings of fact and conclusions of law and reverses the hearing examiner's decision.

The claimant worked as a full time commercial mixer truck from April 23, 2010 until June 13, 2011. The claimant sustained an injury to his left arm on April 19, 2011. The claimant was out on disability until September 6, 2011.

The claimant provided his employer a medical disability certificate that stated that the claimant could resume full work duties on September 6, 2011. (The claimant also received a disability certificate that he could return to work on August 9, 2011 but he did not provide the certificate to his employer)

The claimant asserted that he told his supervisor that his doctor told him he could return to work but only on light duty. The claimant's manager told the claimant only to contact him when he could return to work without restrictions since the company did not have any light duty work.

After the employer received the disability certificate, which clearly certifies that the claimant can return to work without restrictions, the employer told the claimant that he had a start date and time for September 12, 2011. The claimant did not call in or report to work. The same activity took place on September 13, 2011, as well as September 14, 2011. The claimant was sent a letter dated September 21, 2011 that the claimant was terminated for refusal to report to work September 7, 2011 and failure to work to work or call in on September 12, 2011, September 13, 2011, and September 14, 2011.

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); also see *Johns Hopkins University v. Board of Labor, Licensing and Regulation*, 134 Md. App. 653, 662-63 (2000)(psychiatric condition which prevented claimant from conforming his/her conduct to accepted norms did not except that conduct from the category of misconduct under § 8-1003). 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).

Aggravated misconduct is an amplification of gross misconduct where the claimant engages in "behavior committed with actual malice and deliberate disregard for the property, safety or life of others that...affects the employer, fellow employees, subcontractors, invitees of the employer, members of the public, or the ultimate consumer of the employer's products or services...and consists of either a physical assault or property loss so serious that the penalties of misconduct or gross misconduct are not sufficient."

The failure to follow workplace rules or procedures can constitute gross misconduct. *See, e.g. Kidwell v. Mid-Atlantic Hambro, Inc., 119-BH-86; Ullman v. Anne Arundel County Public Schools, 498-BR-93.* Attendance violations may constitute gross misconduct. An employer has the right to insist that its employees report to work on time, adhere to a specified schedule and leave only when that schedule has been completed. An employee's decision to follow a come-and-go-as-I-please philosophy could clearly disrupt the orderly operation of the workplace. *Dept. of Econ. Dev. v. Propper, 108 Md. App. 595 (1996).*

Persistent and chronic absenteeism, where the absences are without notice or excuse and continue in the face of warning constitutes gross misconduct. *Watkins v. Empl. Security Admin., 266 Md. 223 (1972).* The failure to report or call into work without notice may constitute gross misconduct. *Hardin v. Broadway Services, Inc. 146-BR-89.* Employees who miss a lot of time from work, even for excused reasons, have a heightened duty not to miss additional time for unexcused reasons and to conform with the employer's notice requirements. *Daley v. Vaccaro's Inc., 1432-BR-93.*

A specific warning regarding termination is not required and a reasonable person should realize that such conduct leads to discharge. *Freyman v. Laurel Toyota, 608-BR-87.* 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. 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 and Rizk, P.A., 71-BH-90*(The claimant was absent from work and on maternity leave. Due to unexpected medical complications, the claimant was not able to return to work as early as anticipated. The claimant kept her employer informed of her medical condition. The employer could not hold the claimant's job until she could be able to return to work).

However, absenteeism not totally attributable to illness can be misconduct or gross misconduct. *Schools v. AMI-Sub of Prince George's County, 932-BR-90*(The claimant had an excessive number of incidents of tardiness. During his last month of employment, his lateness was due entirely to a documented medical condition. The earlier incidents were due to transportation problems. The discharge was for misconduct); *Johnson v. United States Postal Service, 66-BR-91*(The claimant missed 11 of the last 34 days of work. The claimant had been injured and her assignments were adjusted within her capabilities. The amount of absenteeism was not justified by her injury. She had been counseled about the importance of avoiding absenteeism. The discharge was for gross misconduct). Even though a claimant's last absence was with good reason, a finding of gross misconduct is supported where the claimant was discharged for a long record of absenteeism without valid excuse or notice, which persisted after warnings. *Hamel v. Coldwater Seafood Corporation, 1227-BR-93.*

The claimant asserted that he was only cleared for light duty and that the claimant's manager told him not to contact him until he could return to regular duty. The claimant, however, gave his employer a disability certificate from his treating physician which clearly stated that he could assume full work duties without restriction on September 6, 2011.

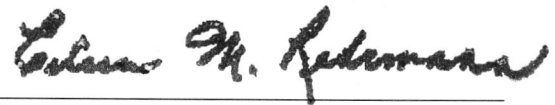
The Board notes that the hearing examiner did not offer or admit the *Agency Fact Finding Report* into evidence. The Board did not consider this document when rendering its decision.

The Board finds based on a preponderance of the credible evidence that the employer met its burden of demonstrating that the claimant's actions rose to the level of gross misconduct within the meaning of *Maryland Annotated, Labor & Employment Article, § 8-1002*. The decision of the hearing examiner shall be reversed for the reasons stated herein.

DECISION

It is held that the claimant was discharged for gross misconduct connected with the work, within the meaning of Maryland Code Annotated, Labor and Employment Article, Title 8, Section 1002. The claimant is disqualified from receiving benefits from the week beginning June 12, 2011 and until the claimant becomes re-employed, earns at least twenty five times their weekly benefit amount and thereafter becomes unemployed through no fault of their own.

The Hearing Examiner's decision is reversed.



Eileen M. Rehrmann, Associate Member



Clayton A. Mitchell, Sr., Associate Member

RD

Copies mailed to:

OTIS E. HARPER

ROWEN CONCRETE INC

Susan Bass, Office of the Assistant Secretary

UNEMPLOYMENT INSURANCE APPEALS DECISION

OTIS E HARPER

SSN #

Claimant

vs.

ROWEN CONCRETE 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: 1215067

Appellant: Claimant

Local Office : 61 / COLLEGE PARK
CLAIM CENTER

May 14, 2012

For the Claimant: PRESENT

For the Employer: PRESENT, MARTHA FERNANDEZ

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).

FINDINGS OF FACT

The claimant, Otis E. Harper, filed a claim for benefits establishing a benefit year beginning March 25, 2012. He qualified for a weekly benefit amount of \$401.00.

The claimant began working for this employer, Rowen Concrete, Inc., on or about April 23, 2010. At the time of separation, the claimant was working full time as a commercial mixer truck driver. The claimant last worked for the employer on or about June 13, 2011 before leaving work as a result of a work related injury to his left arm sustained on April 19, 2011.

Between July 7, 2011 and August 11, 2011 the claimant's physicians at St. Paul and Biddle Medical Associates, had advised the claimant that he could not work as a truck driver and had provided Disability Certificates to that effect. (Claimant's Exhibit 2, pages 1-3) In early September, 2011 the claimant presented a disability certificate to the employer that indicated that he could resume full work duties on September 6, 2011. (Employer's Exhibit 1) The claimant had been given a similar certificate on August 6, 2011 which also said he could resume full work duties on August 9, 2011 but he had apparently not presented this to the employer. (Claimant's Exhibit 2, page 4)

The claimant had a conversation with his supervisor on September 7, 2011 during which he informed his supervisor that his doctor had told him that he could only do light duty work and his supervisor had informed him that there was no light duty work available. The claimant asked his supervisor if he should continue to call in and was told he should not call until he was fully released.

When actively working the claimant was required to call in each day to find out if he had a "start time" for work that day. After the claimant received the disability certificate indicating that the claimant could return to full duty he was given a start time on September 12, 2011 but did not call in to receive notice of that start time. He did not call or report for work. He was given a start time for September 13, 2011 and again he did not call or report for work. He was given a start time for September 14, 2011 and again he did not call or report for work. Pursuant to the employer's collective bargaining agreement with Teamsters Local 311 the claimant was discharged for being absent for two consecutive days. A letter was sent to the claimant dated September 21, 2011 notifying him of his discharge. (Employer's Exhibit 2)

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.

The claimant was discharged because he allegedly took an unauthorized vacation. However, at the time the claimant took off from work, he honestly believed that he was on an authorized vacation leave. He had accumulated vacation leave and his belief that his vacation was authorized was reasonable. The misunderstanding between the claimant and the employer was due to a miscommunication. The claimant's actions did not amount to misconduct or gross misconduct. Sims v. Red Roof Inns, Inc., 655-BH-91.

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 not been met.

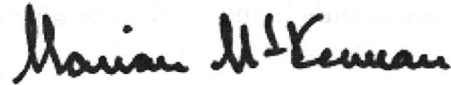
The claimant was discharged as the result of a misunderstanding. The claimant credibly testified that he had a conversation with his supervisor at the time he submitted his disability certificate on September 7, 2011, and told him that his doctor had advised him that he could only do light duty work and that his supervisor told him that there was no light duty available and that he should not call in again until he was fully cleared to return to full duty. Despite this conversation, the claimant's disability certificate indicated that the claimant could return to full duty and he was scheduled to work. However, the evidence does not establish that the claimant knew that he was scheduled to work. The claimant credibly testified that he did not call in for a start time because he did not believe he had been cleared for work and had been told by his supervisor not to call until he had been fully cleared. Nevertheless, as a result of his failure to report for work or call in when scheduled, he was discharged. This miscommunication was not misconduct or gross misconduct. See Sims, supra.

I hold that the claimant did not commit a transgression of some established rule or policy of the employer, a forbidden act, a dereliction of duty, or engage 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. No 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, but not for misconduct connected with the work within the meaning of Md. Code Ann., Labor & Emp. Article, Section 8-1003. No disqualification is imposed based upon the claimant's separation from employment with the above-identified employer. The claimant is 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.



M McKennan, 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 May 29, 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: May 09, 2012

DW/Specialist ID: WCP2M

Seq No: 001

Copies mailed on May 14, 2012 to:

OTIS E. HARPER

ROWEN CONCRETE INC

LOCAL OFFICE #61