

- DECISION -

Claimant:
JENNIFER D FLORES

Decision No.: 4889-BR-10

Date: January 14, 2011

Appeal No.: 1028774

S.S. No.:

Employer:
WASHINGTON CO BOARD EDUCATION

L.O. No.: 63

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: February 14, 2011

REVIEW ON THE RECORD

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

The claimant was employed as a part-time custodian from March 21, 2001 through June 17, 2010. The claimant is unemployed as the result of a discharge.

In violation of workplace rules and reasonable standards of workplace conduct, the claimant falsified her time records, removed items from the school (including bags of toilet paper rolls), brought her children to work, and not completing her job duties.

As a result of the above, the claimant was discharged on June 17, 2010.

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); 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.

The failure to perform regular duties within the scope of employment may constitute gross misconduct. See, e.g., *Alexander v. Helping Hand*, 950-BH-89.

Misappropriation of the employer's property may be gross misconduct. See, e.g., *Decker v. Maryland Cup Corp.*, 247-BR-87; *Angel v. Service Merchandise Co., Inc.*, 57-BH-90; *Hanlin v. Jake's Service Station*, 1213-BR-90; also see *Boardman v. Creative Hairdressers*, 241-BH-87; *McNair v. Housing Authority of Baltimore*, 1111-BH-89.

Lying or making a false representation to an employer can constitute gross misconduct. See, e.g., *Shivery v. Slagle's Construction Company, Inc.*, 438-SE-88; *Wilson v. Dept. of Agriculture*, 680-BR-90; *Robinson v. Realty Investment Company, Inc.*, 853-BR-90; *Conaway v. Oxford Realty Services Corporation*, 51-BR-91; *Herche v. Rock-Tenn Company*, 329-BR-94. Falsification of or making false statements in work records may constitute gross misconduct. *Younger v. Washington Suburban Sanitary Comm'n*, 259-BH-91.

Misreporting time at work is a falsification of work records. *Thomas v. Deaton Hospital and Medical Center*, 1121-BR-93. Falsifying time cards or time reports constitutes gross misconduct. See *Wilton v. Dept. of Health*, 685-BR-89; *Gieryic v. Tri-State Motor Transit Co.*, 140-BR-90; *Blackwell v. Maryland Training School*, 581-BH-91.

The Board finds the employer more credible than the claimant. The Board finds that the employer presented sufficient credible evidence to support the findings of fact. The Board finds that the employer did not need to have a written policy for every combination and permutation of possible wrongful conduct. Not permitting visitors at work does not need to be a written policy. Not permitting an employee's children to accompany the employee to work does not need to be a written policy. These acts are prohibited as a matter of common sense and constitute a course of wrongful conduct.

The Board does not find credible the claimant's assertion that she "honestly" did not believe that taking bags of toilet paper rolls was wrong. The claimant did not have the employer's permission to take these items. The coworker did not have the apparent or actual authority to grant permission for the claimant to take items from the workplace. The claimant's assertion that she could report to and leave work at a time of her choosing is not credible. The claimant's explanations in this regard are not reasonable.

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 § 8-1002. The hearing examiner's decision 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 13, 2010 and until the claimant becomes re-employed, earns at least twenty times their weekly benefit amount and thereafter becomes unemployed through no fault of their own.

The Hearing Examiner's decision is reversed.



Clayton A. Mitchell, Sr., Associate Member



Donna Watts-Lamont, Chairperson

RD

Copies mailed to:

JENNIFER D. FLORES
WASHINGTON CO BOARD EDUCATION
JAMES A. STULLER
WASHINGTON CO BOARD EDUCATION
Susan Bass, Office of the Assistant Secretary

UNEMPLOYMENT INSURANCE APPEALS DECISION

JENNIFER D FLORES

SSN #

Claimant

vs.

WASHINGTON CO BOARD EDUCATION

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: 1028774

Appellant: Claimant

Local Office : 63 / CUMBERLAND
CLAIM CENTER

August 27, 2010

For the Claimant: PRESENT

For the Employer: PRESENT, JAMESA. STULLER, HEIDI BLACK

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 began working for this employer on March 21, 2001. At the time of separation, the claimant was working as a part-time custodian. The claimant last worked for the employer on June 17, 2010, before being terminated for alleged falsification of time records; alleged misappropriation of employer property; alleged poor work performance; and having unauthorized persons at the job site, during work hours.

The claimant was under internal investigation by the employer for alleged poor work performance. The employer used a surveillance camera to watch the claimant during her scheduled shift from 8:00 p.m. to 10:00 p.m. The claimant was observed leaving work early, with toilet tissue that belonged to the employer, and having unauthorized visitors. Specifically, the claimant was observed leaving work early on April 15,

2010 at 8:24 p.m., arrived 1.5 hours late on April 16, 2010; leaving with toilet paper on May 6, 2010, and on June 2, 2010; left work early on May 14, 2010 at 7:38 p.m. and returned 48 minutes later; children at work on June 3, 2010, and having a male visitor at work on June 17, 2010. (Employer Exhibit #1) The claimant arrived late to work from April 12, 2010 through May 19, 2010. (Employer Exhibit #3)

The claimant was not aware of a policy which prohibited visitors at work. The employer did not produce a copy of this policy violation. The claimant left work early for personal reasons, without prior approval from the employer. On some occasions, the claimant worked late to make up her missed time and left early, when she was told by her supervisor that she should not be left alone in the building. The claimant was given toilet tissue by another employee and honestly believed that she did nothing wrong by accepting the tissue. The claimant did not receive a prior warning that she would be terminated for late arrivals and leaving work early, and performed her job to the best of her ability.

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).

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.

In Freyman v. Laurel Toyota, Inc., 608-BR-87, the Board of Appeals held "The claimant's lateness continued despite warnings. A specific warning regarding termination is not required and a reasonable person should realize that such conduct leads to discharge. This was gross misconduct."

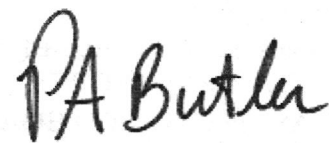
Similarly, in the case at bar, the claimant was late for work and offered no justifiable reason for the late arrivals to work. The claimant made an effort to make up her time by working later than her scheduled shift to offset her late arrival time. This is not the action of someone deliberately falsifying time records. The employer failed to produce its policy which prohibited visitors on the job site. The claimant presented credible testimony that she was unaware of any policy and that she performed her job to the best of her ability.

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 June 13, 2010 and for the four (4) 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.



P A Butler, 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 September 13, 2010. 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: August 23, 2010
DAH/Specialist ID: WCU1Q
Seq No: 001
Copies mailed on August 27, 2010 to:
JENNIFER D. FLORES
WASHINGTON CO BOARD EDUCATION
LOCAL OFFICE #63
JAMES A. STULLER