DECISION

Claimant:
LYNETTE M ELLSWORTH

Employer:
DONALD B RICE TIRE CO INC

Decision No.: 5083-SE-12

Date: October 24, 2012

Appeal No.: 1201175

S.S. No.:

L.O. No.: 64

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).

- 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 23, 2012

- APPEARANCES -

FOR THE CLAIMANT:
Present
Cynthia Fennimore, Esq.

FOR THE EMPLOYER:
Sabine Nave Vice President
Mark MessengerManager

EVALUATION OF EVIDENCE

The Board of Appeals finds the testimony and documentation submitted by the parties in the Special Examiner Hearing both sufficient and credible to support that this separation from employment was due to a discharge for misconduct connected with the work. This finding is based upon the preponderance of credible evidence.

It is clear from the credible testimony of all of the witnesses that the employer herein was accommodating the needs of the claimant who was a single parent of two children – one of which having special health concerns. The employer presents detailed documentation (Employer Exhibits #5 and 6) indicating flexibility for nearly a two year period with the claimant's tardiness. Although the exact amount of tardiness attributable to the claimant's children's health and education will never be known, the employer allowed the claimant to make up any lost time by working through lunch, working overtime and working on Saturdays. The employer seemed to be accommodating and the claimant seemed to communicate with the employer. The employer exhibits, despite the tardiness noted shows that from May 5, 2010 to May 31, 2011, the claimant worked 2,232.25 hours out of a regular total of 2,174.50 yielding 57.75 hours of overtime. From June 1, 2011 to the claimant's discharge on December 8, 2011, the claimant worked 1,120.17 hours out of a regular total of 1,083.17 yielding 37.00 hours of overtime. "Being on time" was noted as "needing improvement" in the claimant's Performance Appraisal dated June 16, 2011 (Employer Exhibit #4). The testimony and documentation regarding assertions of "tardiness" corroborate the claimant's testimony that her "work got done" and that she "never realized there was a problem until the end".

The employer also presents its policy regarding "Absences and Lateness" as Employer Exhibit #1. On page two of that document, the employer publishes that "employment with Rice Tire is a voluntary, employment-at-will relationship, for no defined period of time" and reserving the right to terminate an employment relationship "for any reason at any time". On December 8, 2011, the employer chose to terminate the employment of the claimant for what it perceived as a violation of its attendance policy – being absent on December 7, 2011 without prior notice and permission. Apparently, at this point, the employer decided not to continue its practice of accommodation and discharged the claimant. The circumstances of this case lacks 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).*The Board finds that the claimant committed a technical violation of the employer's policy but, because of her efforts to contact the employer, did not exhibit a gross indifference to the employer's interests in this case.

FINDINGS OF FACT

The claimant was employed as a full-time Office Assistant by Donald B. Rice Tire Co., Inc. She worked for this employer from May 5, 2010 to December 7, 2011. She was discharged by this employer on December 8, 2011 for failing to report to work on December 7, 2011 and failing to call in 15 minutes prior to that scheduled shift in order to give the employer notice thereof. At the time of claimant's separation from employment, the claimant was paid at the rate of $9.00 per hour (Employer Exhibit #2).

The claimant called the employer's premises sometime prior to the start of her shift on December 7, 2011, but no one answered the telephone. Then the claimant proceeded to call her immediate supervisor's cell phone which also was not answered. The claimant then called a co-worker, Andy Stump, in order to notify the employer of her impending absence.

Previously, on December 5, 2011, the employer noted (Employer Exhibit 3) that the claimant did not call 15 minutes prior to her shift to warn the employer that she would be arriving late. On December 8, 2011, the employer discharged the claimant for not appearing for work on December 7, 2011. The claimant thought that she had complied with the call-in requirement and had been excused for that day. The employer did not agree and discharged the claimant on December 8, 2011 when she reported for work.

Upon hire, the claimant disclosed to the employer that she was a single mother of two children and that one of those children had special health needs involving respiratory problems – possibly cystic fibrosis. The employer was accommodating regarding the claimant's work hours in relation to the special medical and educational needs of her children. Generally, if the claimant missed work time, she was able to make up time by not taking lunch, working overtime and working extra hours on Saturdays. The claimant and employer communicated regarding the claimant's work hours.

CONCLUSIONS OF LAW

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).

DECISION

It is held that the claimant was discharged for misconduct, connected with the work, within the meaning of Maryland Code Annotated, Labor and Employment Article, Title 8, Section 1003. The claimant is disqualified from receiving benefits from the week beginning December 4, 2011 and the four (4) weeks immediately following.

The decision of the Hearing Examiner is modified.

Donna Watts-Lamont, Chairperson

Clayton A. Mitchell, Sr., Associate Member

YJ

Date of hearing: July 09, 2012
Copies mailed to:
LYNETTE M. ELLSWORTH
DONALD B RICE TIRE CO INC
CYNTHIA FENIMORE ESQ.
Susan Bass, Office of the Assistant Secretary

UNEMPLOYMENT INSURANCE APPEALS DECISION

LYNETTE M ELLSWORTH

SSN #

Claimant

vs.

DONALD B RICE TIRE CO 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: 1201175
Appellant: Claimant
Local Office : 64 / BALTOMETRO CALL CENTER

February 07, 2012

For the Claimant: PRESENT, PENNY WALKER

For the Employer: PRESENT

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, Lynette M. Ellsworth, filed a claim for benefits establishing a benefit year beginning December 4, 2011. She qualified for a weekly benefit amount of $232.00.

The claimant worked for this employer, Donald B. Rice Tire Co., Inc., from May 5, 2010 to December 7, 2011. At the time she was terminated, she was working as an office assistant.

The employer terminated the claimant because of attendance/excessive tardiness. The employer has an employee manual which includes the attendance/tardiness policy. The claimant received a copy of this

manual. The policy of the employer is that an employee should be present at the start of their shift. There is no grace period in which an individual can arrive after the start of their shift but still be considered to not have arrived late to work. Excessive tardiness could lead to discharge. If an employee is going to absent, they are to contact their supervisor prior to beginning of shift.

The claimant was scheduled to work an 8:00 a.m. to 5:00 p.m. shift. She was late on June 2, 2011 (8.27 a.m.), June 4, 2011 (9:09 a.m.), June 6, 2011 (8:01 a.m.), June 7, 2011 (8:08 a.m.), June 10, 2011 (8:23 a.m.), June 11, 2011 (8:35 a.m.), June 15, 2011 (8:11 a.m.), June 16, 2011 (8:03 a.m.), June 20, 2011 (8:02 a.m.), June 21, 2011 (8:02 a.m.) Her son, Rylen, had an appointment at his doctor's main office on June 6, 2011 for a routine well care check at 2:50 p.m. which was attended. Rylen also has a scheduled doctor's appointment at his doctor's main office on June 7, 2011 at 1:30 p.m. which was cancelled with an excuse given. Claimant's Exhibit #2, Appointment History for Rylen Ellsworth, page 11 as designated at top of sheet) Rylen was not hospitalized on June 6-7, 2011. No documentation was placed into evidence showing that Rylen was hospitalized.

In July, 2011, the claimant was late on July 8, 2011 (8:23 a.m.), July 29, 2011 (8:03 a.m.) and July 30, 2011 (9:18 a.m.). In August, 2011, she was tardy on August 8, 2011 (10:47 a.m.), August 15, 2011 (8:03 a.m.), August 19, 2011 (8:02 a.m.), August 24, 2011 8:02 a.m.), August 25, 2011 (8:01 a.m.), August 26, 2011 (8:04 a.m.), August 29, 2011 (8:02 a.m.) and August 31, 2011 (8:05 a.m.) Rylen attended a doctor's appointment at his doctor's main office on August 29, 2011 at 9:40 a.m. Claimant's Exhibit #2, Appointment History for Rylen Ellsworth, page 11 as designated at top of sheet)

In September, 2011, the claimant was tardy a number of times. She was late on September 7, 2011 (8:08 a.m.), September 16, 2011 (9:32 a.m.), September 20, 2011 (8:06 a.m.), September 22, 2011 (8:03 a.m.), September 23, 2011 (9:53 a.m.), September 26, 2011 (8:14 a.m.), September 27, 2011 (8:03 a.m.), September 29, 2011 (8:04 a.m.) and September 30, 2011 (8:30 a.m.).

In October, 2011, she was late on October 5, 2011 (8:02 a.m.), October 10, 2011 (8:02 a.m. and late returning from lunch), October 11, 2011 (8:10 a.m.), October 13, 2011 (8:02 a.m.), October 14, 2011 (8:15 a.m.), October 17, 2011 (8:29 a.m.), October 18, 2011 (8:05 a.m.), October 19, 2011 (8:02 a.m.), October 21, 2011 (8: 54 a.m.), October 28, 2011 (10:26 a.m.) and October 31, 2011 (8:08 a.m.) Rylen had a doctor's appointment in his doctor's main office at 11:50 a.m. on October 13, 2011 but he did not show up for his appointment. Claimant's Exhibit #2, Appointment History for Rylen Ellsworth, page 11 as designated at top of sheet) In October, 2011, the claimant spoke with her supervisor, Mark Messinger, about a potential period of leave of two (2) weeks under the Family Medical Leave Act. She had learned that Rylen needed a scoping procedure and might need a week or two off from school. She did not take a period of leave.

In November, 2011, the claimant was late on November 1, 2011 (8:04 a.m.), November 4, 2011 (8:13 a.m.), November 7, 2011 (8:05 a.m.), November 8, 2011 (8:02 a.m.), November 10, 2011 (10:25 a.m.), November 15, 2011 (8:01 a.m.), November 18, 2011 (8:02 a.m.), November 22, 2011 (8:07 a.m.), November 23, 2011 (12:20 p.m.), November 26, 2011 (8:09 a.m.), November 29, 2011 (8:03 a.m.) and November 30, 2011 (8:03 a.m.). Rylen had no scheduled doctor's appointment on November 18, 2011. Claimant's Exhibit #2, Appointment History for Rylen Ellsworth, page 11 as designated at top of sheet)

In December, 2011, the claimant was tardy on December 1, 2011 (10:03 a.m.), December 2, 2011 (8:07 a.m.) and December 5, 2011 (8:50 a.m.) Rylen attended a doctor's appointment in his doctor's main office

on December 5, 2011 at 2:30 p.m. for routine well care. No documentation was admitted showing that he attended another doctor's appointment the next day, December 6, 2011 for a shot. Rylen became ill the evening of December 5, 2011 and through the early morning of December 6, 2011. The claimant called in to talk to her supervisor the morning of December 6, 2011. It is the policy of the employer that an employee, who is going to be late or can not work their shift, must contact their supervisor. Her supervisor was not available at that moment. She spoke to a coworker but never spoke to her supervisor. The claimant did not work her scheduled shift on December 6, 2011.

The explanations the claimant offered to her employer for her lateness, other than the above mentioned medical dates, was that Rylan attended a specialist twice a month and had blood work once a month. No evidence was presented as to specialist or blood work appointment times or dates. She also indicated to her employer that she was sometimes late because she took her son to school and talked to teachers or signed for medication.

The claimant received a number of warnings due to attendance/tardiness. She received a warning, as a part of her performance evaluation, on June 16, 2011. Her behavior did not improve following this warning. Then, on July 28, 2011, she received a verbal warning that was memorialized in writing. The claimant's behavior did not improve following this warning. She received a written warning on October 10, 2011 that she signed acknowledging receipt. Once again, she did not modify her behavior. The claimant received her last warning on December 5, 2011. The very next day, December 6, 2011, she did not follow policy by contacting her supervisor and did not work her scheduled shift. She worked on December 7, 2011 and was terminated on December 8, 2011.

CONCLUSIONS OF LAW

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's lateness continued despite warnings and the claimant was absent twice without notice. A specific warning regarding termination is not required and a reasonable person should realize that such conduct leads to discharge. This was gross misconduct. Freyman v. Laurel Toyota, Inc., 608-BR-87.

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.

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 not been met.

The employer was present at the hearing and testified with credibility. She was consistent in her testimony and did not contradict herself.

The claimant was also present at the hearing but did not credibly testify. She testified that on June 6 -7, 2011 she was late starting her 8:00 a.m. shift because her son was hospitalized. However, her own exhibit, Claimant's Exhibit #2, Appointment History for Rylen Ellsworth, page 11 as designated at top of sheet), contradicts her testimony. Rylen had a doctor's appointment at 2:50 p.m. at his doctor's main office on June 6, 2011. Rylen attended this appointment. If Rylen was hospitalized on June 6, 2011 before 8:00 a.m. and remained hospitalized through June 7, 2011, Rylen would not have been able to attend his doctor's appointment at the doctor's office at 2:50 p.m. If Rylen was hospitalized after 2:50 p.m. on June 6, 2011, which would have allowed Rylen attend his doctor's appointment, his hospitalization would have not interfered with the claimant's ability to make it to work on time.

The claimant testified that she was late on August 29, 2011 because Rylen had a doctor's appointment. She arrived at work at 8:02 a.m. on August 29, 2011. Rylan's doctor's appointment was not until 9:40 a.m. Claimant's Exhibit #2, Appointment History for Rylen Ellsworth, page 11 as designated at top of sheet). The claimant testified that she was late to work on October 13, 2011 because Rylen had a doctor's appointment. She arrived at work at 8:02 a.m. Rylen's doctor's appointment was at 11:50 a.m. on October 13, 2011. The claimant testified that she was tardy to work on November 18, 2011 because Rylen had a doctor's appointment. The only documentary evidence admitted by the claimant does not support that contention. He had no scheduled doctor's appointment on November 18, 2011. Claimant's Exhibit #2, Appointment History for Rylen Ellsworth, page 11 as designated at top of sheet) It is also interesting to note that the first page of Claimant's Exhibit #2, identified as page 10 at the top of the page, was submitted by the claimant as the doctor appointments of her son, Rylan. However, this first page of the exhibit, as marked at the top of the page, is clearly not the appointment schedule of Rylan.

The claimant further insisted in her testimony that she did not attend work on December 7, 2011 and that her last day of work was December 6, 2011. She testified that she took Rylen to the doctor on December 6, 2011 and that he received a shot and became ill on the evening of December 6, 2011 and through the early morning hours of December 7, 2011. Her own exhibit clearly shows no doctor's appointment on December 6, 2011. However, it does indicate that Rylen attended a doctor's appointment in his doctor's main office on December 5, 2011 at 2:30 p.m. for routine well care. The employer testified that the claimant worked a full shift on December 7, 2011.

Given the many examples above of the claimant's lack of credibility, the claimant's testimony that her supervisor told her that she could be up to twelve (12) minutes late and still be considered on time is not credible. The employer testified that there is no grace period and the employee manual, which was received by the claimant, does not indicate any grace period. The claimant goes on to claim that, because of this "grace period," she refuses to acknowledge any tardiness before 8:13 a.m. and that she agrees that she was late *only eighteen* (18) times. In fact, the claimant was late twenty (20) times when her arrival time was 8:13 or later. She was late a total of fifty-four (54) times from June 2, 2011 through December 7, 2011.

The claimant testified that she would not have been late, or had as many instances of tardiness, in October, 2011 if her supervisor had allowed her to take a leave of absence for two (2) weeks after Rylen's scoping procedure. It is unlikely that a supervisor, given a request for leave under the Family Medical Leave Act, did not entertain this request. Even if this had occurred, the claimant was late a total of ten (10) times in October. If these were subtracted from her total of fifty-four (54) instances of tardiness, she would still have been late forty-four (44) times.

Taking her son to school, talking to his teachers and signing for his medication at school were also excuses given by the claimant to her employer as to why she did not make it to work by 8:00 a.m. The claimant could not testify as to the dates that these excuses would apply. In addition, she received warnings about her lateness and should have made alternative arrangements such as taking her son to school earlier and making appointments with teachers. She could also not testify to the specific dates or times that her son may have visited specialists or gotten his blood drawn. No documentation was admitted as to these events.

Even if one were to consider just the twenty (20), sixteen if four (4) were subtracted for October, instances of lateness at 8:13 a.m. or later, this would be more than enough for a finding of gross misconduct. However, the reality of the situation is that the claimant was late a total of fifty-four (54) times. She received four (4) warnings but continued to show a regular and wanton disregard of her obligations to her employer. Therefore, I hold that the claimant's showed a regular and wanton disregard of her obligations to the employer and therefore constituted gross misconduct in connection with the work. An unemployment disqualification shall be imposed based on Md. Code, Ann., Labor & Emp. Article, Section 8-1002 pursuant to this separation from this employment.

DECISION

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)(ii). The claimant is disqualified from receiving benefits from the week beginning December 4, 2011 and until the claimant becomes reemployed and earns wages in covered employment that equal at least 25 times the claimant's weekly benefit amount.

The determination of the Claims Specialist is affirmed.

N. Grimes
N Grimes, 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 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 February 22, 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: January 27, 2012
DAH/Specialist ID: RBA3H
Seq No: 002
Copies mailed on February 07, 2012 to:
LYNETTE M. ELLSWORTH
DONALD B RICE TIRE CO INC
LOCAL OFFICE #64
PENNY WALKER