

**- DECISION -**

Claimant:  
JACOB A ATTIKO

Decision No.: 617-BR-12

Date: March 12, 2012

Appeal No.: 1130426

S.S. No.:

Employer:  
RITE AID OF MARYLAND INC

L.O. No.: 61

Appellant: Claimant

Issue: Whether the claimant left work voluntarily, without good cause within the meaning of Maryland Code, Labor and Employment Article, Title 8, Section 1001.

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**- 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: April 11, 2012

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**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 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 09.32.06.02(E)*.

A threshold issue in this case is whether the claimant voluntarily quit or whether the claimant was discharged. The hearing examiner found, as a fact, that the employer terminated the claimant's employment. There was no evidence of any intent to quit or any action which would have manifested such an intent. The employer initiated the separation. This was a discharge and should have been analyzed under *Md. Code Ann., Lab. & Empl. Art., §§ 8-1002 and 8-1003*.

The burden of proof in this case is allocated according to whether the claimant voluntarily quit or whether the employer discharged the claimant. 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.

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).

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.

In his appeal, the claimant reiterates the reason for his absence as having been in the hospital. The evidence shows that the employer was aware the claimant was hospitalized for, at least, part of this time.

The claimant's sister made initial contact with the employer about the claimant's hospitalization, but did not maintain that contact. Neither did the claimant advise the employer of any continued absence or his anticipated date of return. The claimant was clearly and repeatedly negligent with respect to his employer's expectations and its interests. The claimant failed to report for work or contact the employer for several of his scheduled days of work. Upon his release, the claimant did not provide any medical documentation to the employer which would show that he was not able to maintain contact with the

employer. The employer discharged him for this continued lack of notice of his absences. His discharge, for these repeatedly careless acts in disregard for the employer's expectations, was for gross misconduct under the 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 met its burden of demonstrating that the claimant's actions rose to the level of gross misconduct within the meaning of § 8-1002. The 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 April 24, 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.



Donna Watts-Lamont, Chairperson



Clayton A. Mitchell, Sr., Associate Member

KJK/mw

Copies mailed to:

JACOB A. ATTIKO

RITE AID OF MARYLAND INC

JEFF SCHER

RITE AID OF MARYLAND INC

Susan Bass, Office of the Assistant Secretary

**UNEMPLOYMENT INSURANCE APPEALS DECISION**

JACOB A ATTIKO

SSN #

**Claimant**

vs.

RITE AID OF MARYLAND 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: 1130426

Appellant: Employer

Local Office : 61 / COLLEGE PARK

CLAIM CENTER

September 20, 2011

**For the Claimant: PRESENT**

**For the Employer: PRESENT, JEFF SCHER, BROOKE DAUGHERTY, BETTY PRICE**

**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, Jacob Attiko, was employed with Rite Aid of Maryland, Inc. from February 8, 2007 to April 25, 2011. At the time of separation, he was working full time as a sales associate, earning \$10.13 per hour. The claimant voluntarily quit the job.

The employer's policy states two consecutive days of no call/no show results in automatic termination. This policy is stated in a handbook the claimant received at the time of hire.

The claimant was hospitalized on the evening of April 25, 2011. On the claimant's next scheduled work day, his sister called his supervisor, Betty Price, and told her he was in the hospital and would not report to work that day. Ms. Price asked his sister if she knew when the claimant would be discharged. The

claimant's sister told Ms. Price she had no idea when the claimant would get out, and she would call back when she had that information. However, the claimant's sister never called back the employer and the employer received no further information from the claimant.

The claimant was a no call/no show on April 29 and May 2, 2011. Brooke Daugherty, the store manager, left voicemail messages for the claimant both days, but got no response. Subsequently, the employer terminated the claimant.

The claimant was discharged from the hospital on May 5, 2011. He received Ms. Daugherty's voicemail messages on his cell phone when he returned home and called her back. She advised him of his termination. The claimant never gave the employer any medical documentation of his hospitalization.

The claimant declined to specify his medical condition that led to his hospitalization. He was conscious, mobile and not in pain while hospitalized, but did not attempt to contact the employer or ask his sister, with whom he lives, to bring his cell phone to him.

### **CONCLUSIONS OF LAW**

Md. Code Ann., Labor & Emp. Article, Section 8-1001 provides that an individual is disqualified from receiving benefits when unemployment is due to leaving work voluntarily. The Court of Appeals interpreted Section 8-1001 in Allen v. CORE Target City Youth Program, 275 Md. 69, 338 A.2d 237 (1975): "As we see it, the phrase 'leaving work voluntarily' has a plain, definite and sensible meaning...; it expresses a clear legislative intent that to disqualify a claimant from benefits, the evidence must establish that the claimant, by his or her own choice, intentionally, of his or her own free will, terminated the employment." 275 Md. at 79.

Md. Code Ann., Labor & Emp. Article, Section 8-1001 provides that an individual shall be disqualified for benefits where unemployment is due to leaving work voluntarily without good cause arising from or connected with the conditions of employment or actions of the employer, or without valid circumstances. A circumstance is valid only if it is (i) a substantial cause that is directly attributable to, arising from, or connected with conditions of employment or actions of the employing unit; or (ii) of such necessitous or compelling nature that the individual has no reasonable alternative other than leaving the employment.

### **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.

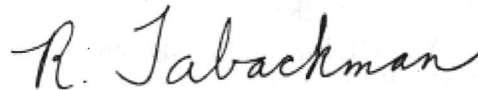
The claimant had the burden to show, by a preponderance of the evidence, he voluntarily quit his position for reasons that constitute either good cause or valid circumstances pursuant to the Maryland Unemployment Insurance Law. Hargrove v. City of Baltimore, 2033-BH-83. In this case, the claimant failed to meet this burden.

The credible evidence shows the claimant failed to notify the employer of his absence for two consecutive scheduled work days and failed to respond to the employer's voicemail messages. The employer had no idea when the claimant would return to work and received no medical documentation. The claimant produced no explanation for why he failed to contact the employer.

### DECISION

IT IS HELD THAT the claimant's unemployment was due to leaving work voluntarily without good cause or valid circumstances within the meaning of Md. Code Ann., Labor & Emp. Article, Section 8-1001. Benefits are denied for the week beginning April 24, 2011, and until the claimant becomes reemployed and earns at least 15 times the claimant's weekly benefit amount in covered wages and thereafter becomes unemployed through no fault of the claimant.

The determination of the Claims Specialist is reversed.



R M Tabackman, 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 October 05, 2011. 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: September 14, 2011

BLP/Specialist ID: WCP2B

Seq No: 001

Copies mailed on September 20, 2011 to:

JACOB A. ATTIKO  
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LOCAL OFFICE #61  
JEFF SCHER