

- DECISION -

Claimant:
MAURICE A EASON

Decision No.: 648-BR-11

Date: February 04, 2011

Appeal No.: 1030967

S.S. No.:

Employer:
MOUNTAIRE FARMS OF

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: March 07, 2011

REVIEW ON THE RECORD

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

Since January 1, 2010, the claimant incurred unexcused absences or latenesses on: January 5; February 25; March 15; April 22; May 28; June 3; June 8; and July 1. *See Employer's Exhibit 4, page 2.*

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. Transportation problems do not excuse numerous incidents of absenteeism and lateness. *Williams v. Frances Scott Key Medical Center*, 942-BR-91.

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 Board finds that the claimant's overall attendance record should have been considered in the calculus of the prior decision. The evidence established that the claimant missed a considerable amount of time from work within the 6 months prior to his discharge. While the claimant was frequently absent due to documented illness, he was on a heightened duty not to miss work for unexcused reasons. The Board finds insufficient evidence that the claimant's actions were wanton or deliberate; therefore, a finding of gross misconduct is not supported. However, there is sufficient evidence that the claimant's actions, in the face of warning, demonstrated a violation of workplace rules and a course of wrongful conduct; therefore, a finding of simple misconduct is supported.

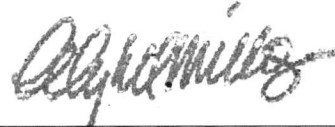
The Board notes that the hearing examiner did not offer or admit the *Agency Fact Finding Report* into evidence. The Board did not consider this document when rendering its decision.

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 misconduct within the meaning of § 8-1003. The ten week penalty is measured and appropriate on the facts of this case. The hearing examiner's decision shall be reversed for the reasons stated herein.

DECISION

It is held that the claimant was discharged for misconduct connected with the work, within the meaning of Section 8-1003 of the Labor and Employment Article Maryland Code Annotated, Title 8, Section 1003. The claimant is disqualified from receiving benefits from the week beginning July 4, 2010 and the nine weeks immediately following.

The Hearing Examiner's decision is reversed.



Clayton A. Mitchell, Sr., Associate Member



Donna Watts-Lamont, Chairperson

RD

Copies mailed to:

MAURICE A. EASON
MOUNTAIRE FARMS OF
Susan Bass, Office of the Assistant Secretary

UNEMPLOYMENT INSURANCE APPEALS DECISION

MAURICE A EASON

SSN #

Claimant

vs.

MOUNTAIRE FARMS OF

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: 1030967

Appellant: Employer

Local Office : 63 / CUMBERLAND
CLAIM CENTER

September 16, 2010

For the Claimant: PRESENT

For the Employer: PRESENT, ROLAND PALMER

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 began working for this employer on May 11, 2009, and his last day worked was June 29, 2010. At the time of his discharge, the claimant worked full-time in the Day Shift, Tray Pack Department, earning an hourly salary of \$10.55.

Employer has an attendance policy that prohibits the accumulation of 3 days of unapproved absence in 60 days and/or 5 days of overall absence, including approved, in 30 days period. Violation of the aforementioned policy following a 3rd warning results in termination. On June 8, 2010 claimant had received his 3rd warning for violation of the attendance policy. On June 14, 24, 28, 30, 2010 and July 1, 2010, claimant was absent. Claimant informed employer regarding these absences. The claimant's

violations of employer's attendance policy were due to his/family illnesses that were both documented and undocumented.

Ultimately the claimant's absences from work negatively impacted the employer's business and employer made a business decision to discharge the claimant's employment effective July 5, 2010 due to violations of the attendance policy.

CONCLUSIONS OF LAW

Maryland Code Annotated, Labor and Employment Article, § 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).

Maryland Code Annotated, Labor and Employment Article, § 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).

An employer has a right to insist that its employees will report to work on time and adhere to a specified schedule and leave only when that schedule has been completed and that the failure of an employee to do so can be evidence of gross misconduct. Department of Economic and Employment Development v. Propper, 108 Md. App. 595, 673 A.2d 713 (1996).

A violation of an employer's attendance policy is not misconduct per se; however, 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.

EVALUATION OF EVIDENCE

The employer had the burden to show, by a preponderance of the credible evidence, the claimant's discharge was for conduct which rose to the level of misconduct or gross misconduct, pursuant to the Maryland Unemployment Insurance Law. Hartman v. Polystyrene Products Company, Inc., 164-BH-83. In this case, the employer failed to meet this burden.

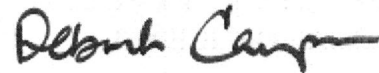
An employee's violation of the employer's attendance policy does not automatically result in a finding of misconduct even if it is counted as unexcused according to the employer's policy. In this case, the claimant was absent from work due to his/family illness. Absenteeism due to illness is not misconduct. DuBois,

supra. Although the employer's business may have been negatively impacted by claimant's absences from work, this does not mean the nature of the claimant's discharge is a disqualifier for the receipt of unemployment insurance benefits. The reasons for the absences support a finding of no misconduct. Accordingly, I hold the employer has failed to meet its burden in this case to prove that the claimant was discharged for any degree of misconduct connected with the work and benefits are, therefore, granted.

DECISION

IT IS HELD THAT the claimant was discharged, but not for misconduct connected with the work within the meaning of Maryland Code Annotated, Labor and Employment Article, § 8-1003. No disqualification is imposed based upon this separation from employment with Mountaire Farms of. The claimant is eligible to receive benefits so long as all other eligibility requirements are met. The claimant may contact Claimant Information Service concerning other eligibility requirements at ui@dllr.state.md.us or telephone (410) 949-0022 from the Baltimore region, or (800) 827-4839 from outside the Baltimore region. Deaf claimants with TTY may contact Client Information Service at (410) 767-2727, or outside the Baltimore region at (800) 827-4400.

The determination of the Claims Specialist is affirmed.



D F Camper, 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 October 01, 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: September 13, 2010
DW/Specialist ID: WCU61
Seq No: 001
Copies mailed on September 16, 2010 to:
MAURICE A. EASON
MOUNTAIRE FARMS OF
LOCAL OFFICE #63