

- DECISION -

Claimant:
VICTOR STONE

Decision No.: 651-BR-11

Date: February 04, 2011

Appeal No.: 1035294

S.S. No.:

Employer:
WICOMICO CO MD

L.O. No.: 65

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 but, for the reasons set forth herein, finds that they warrant a different conclusion of law.

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."

Culpable negligence in the performance of one's job can constitute gross misconduct. See, e.g., *Jones v. Allstate Building Supply Company, Inc.*, 700-BR-89(after several expensive accidents, the claimant was on notice to adjust his behavior. The claimant failed to do so and caused another accident. Gross misconduct was supported); *Roberts v. Maryland Medical Lab, Inc.*, 1215-BR-88(when a claimant's work involves critical risks to the life and health of other persons, a higher degree of care is required).

The Board does not concur with the hearing examiner's evaluation of evidence and the weight the hearing examiner gave to the credible evidence regarding the severity of the claimant's actions.

The claimant, as an experienced and trained correctional officer, "should have known, regardless of his medical transporting duties, that an unrestrained inmate poses a security threat". The Board finds the 46 minutes the claimant left an unrestrained inmate unattended as a serious neglect of the claimant's duties. Because the life and health of others is at risk in a correctional facility, the claimant is held to a higher degree of care. The Board finds the claimant's actions were culpably negligent and engaged with gross disregard to his employer's interests. This action alone would constitute gross misconduct.

In consideration of the claimant's other workplace violations, the Board finds that the employer clearly demonstrated that the claimant's actions rose to the level of gross misconduct.

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 claimant's overpayment in this case is directly attributable to the employer not responding with any evidence prior to the claims examiner's initial benefit determination. Because the employer subsequently succeeded on appeal, the claimant was placed in overpayment status. There is no "request for separation

information" documentation in the record. The Board refers the issue of whether the employer has complied with Sections 8-627(a), 8-629(b), and 8-1302(2) of the Maryland Unemployment Insurance Law to the local office for an initial determination and 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.

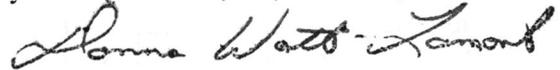
DECISION

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 27, 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:

VICTOR STONE

WICOMICO CO MD

WICOMICO CO MD

Susan Bass, Office of the Assistant Secretary

UNEMPLOYMENT INSURANCE APPEALS DECISION

VICTOR STONE

SSN #

Claimant

vs.

WICOMICO CO MD

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: 1035294

Appellant: Employer

Local Office : 65 / SALISBURY

CLAIM CENTER

October 28, 2010

For the Claimant: PRESENT

For the Employer: PRESENT, CAROL STROUD, STEVEN THOMPSON, GEORGE KALOROU MAKIS, MICHAEL HALTERLEIN

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 December 3, 1993, and his last day worked was June 29, 2010. At the time of his discharge, the claimant worked full-time as a Correctional Officer Sergeant, earning an annual salary of \$50,769.00.

Employer is a correctional facility. Employer requires its employees to observe safety precautions to ensure the safety of its employees and others. One such safety precaution requires persons in claimant's position to monitor inmates. The frequency of monitoring is dependant upon the level of the inmate's restraint. On June 12, 2010 claimant was assigned to monitor Lee Shockley, an unrestrained inmate. Claimant failed to monitor Mr. Shockley for significant period(s) of time.

During the period(s) that Mr. Shockley was not monitored, claimant was transporting other inmates for the medical staff.

On August 5, 2010, employer made a business decision to discharge claimant for failing to observe safety precautions.

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).

Where an employer discharges a claimant for a variety of actions alleged to constitute misconduct, but where some of these actions were not proven or cannot be considered as misconduct, the remaining actions should be considered, and if they amount to misconduct, the claimant was discharged for misconduct. Edmonds v. Anne Arundel County Government, 1476-BH-92.

Violations of reasonable work rules have been held to be willful and intentional misconduct. Painter v. Department of Employment and Training, 68 Md. App. 356, 511 A.2d 585 (1986).

EVALUATION OF EVIDENCE

The employer had the burden to show, by a preponderance of the credible evidence, the claimant's termination 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 met this burden.

Violations of reasonable work rules have been held to be willful and intentional misconduct. Painter, supra. The evidence establishes that the claimant failed to observe safety precautions when he did not appropriately monitor an unrestrained inmate. The issue before the Hearing Examiner is whether the claimant's misconduct was willful and intentional within the meaning of the Maryland Unemployment Insurance Law.

The claimant subjectively believed he provided adequate safety precautions. As such, the evidence fails to establish that the claimant engaged in conduct that demonstrated a deliberate and willful disregard of standards that an employer has a right to expect or that it showed a gross indifference to the employer's interests. The evidence fails to establish that the claimant's actions demonstrated a regular and wanton disregard of the employee's obligations to the employer. However, as a seasoned Officer, claimant should have known, regardless of his medical transporting duties, that an unrestrained inmate poses a security threat. As such, the evidence does establish that the claimant did engage in wrongful conduct within the scope of his employment relationship, which constitutes misconduct connected with the work within the meaning of the Maryland Unemployment Insurance Law. Accordingly, I hold the employer met its burden in this case and the claimant's discharge was for failing to observe safety precautions, constituting misconduct connected with the work and benefits are, therefore, denied.

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, § 8-1003 (Supp. 1996). Benefits are denied for the week beginning June 27, 2010, and for the nine 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 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 reversed.



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 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 November 12, 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: October 21, 2010
BLP/Specialist ID: USB5J
Seq No: 001
Copies mailed on October 28, 2010 to:

VICTOR STONE
WICOMICO CO MD
LOCAL OFFICE #65