

- DECISION -

Claimant:
LILLIAN R JACOBS

Decision No.: 660-BR-12

Date: February 15, 2012

Appeal No.: 1103717

S.S. No.:

Employer:
BURKEYS TELEVISION
AND APPLIANCE CO INC

L.O. No.: 63

Appellant: CLAIMANT - REMAND FROM
COURT

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: March 16, 2012

REVIEW OF THE RECORD

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

The claimant was employed as a full-time sales representative from January 30, 1993 through December 20, 2010. The claimant is unemployed as the result of a discharge.

The employer informed its employees in the Fall of 2010 that no one was authorized to take vacation leave during the Christmas sales season in December 2010. Notwithstanding, the claimant's son, who is in military service, sent the claimant's husband two plane tickets so that the claimant and her husband could visit him in Alabama from December 23 through December 26, 2010.

The claimant approached her supervisor on December 13, 2010 in order to request those several days off. The claimant's supervisor was "thoroughly disappointed" that the claimant requested the time off, but did not deny or approve the leave request. The claimant stated to her supervisor that "this is my family and I have a different circumstance than everybody else because everybody else[']s family] is in the town." The claimant expressed her desire to go with or without the employer's permission. The supervisor ended the conversation, "rather than lose [his] temper."

On December 20, 2010, the employer discharged the claimant because he believed the claimant was going to be absent without approval from December 23 through December 26, 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*. The Board fully inquires into the facts of each particular case. *COMAR 09.32.06.03(E)(1)*.

A threshold issue in this case is whether the claimant voluntarily quit or whether the claimant was discharged. For the following reasons, the Board affirms the hearing examiner's decision on this issue.

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*.

When a claimant voluntarily leaves work, he has the burden of proving that he left for good cause or valid circumstances based upon a preponderance of the credible evidence in the record. *Hargrove v. City of*

Baltimore, 2033-BH-83; *Chisholm v. Johns Hopkins Hospital*, 66-BR-89. Purely personal reasons, no matter how compelling, cannot constitute good cause as a matter of law. *Bd. Of Educ. Of Montgomery County v. Paynter*, 303 Md. 22 (1985). An objective standard is used to determine if the average employee would have left work in that situation; in addition, a determination is made as to whether a particular employee left in good faith, and an element of good faith is whether the claimant has exhausted all reasonable alternatives before leaving work. *Board of Educ. v. Paynter*, 303 Md. 22 (1985); also see *Bohrer v. Sheetz, Inc.*, Law No. 13361, (Cir. Ct. for Washington Co., Apr. 24, 1984). The “necessitous or compelling” requirement relating to a cause for leaving work voluntarily does not apply to “good cause”. *Board of Educ. v. Paynter*, 303 Md. 22 (1985). A resignation in lieu of discharge is a discharge under §§ 8-1002, 8-1002.1, and 8-1003. *Miller v. William T. Burnette and Company, Inc.*, 442-BR-82.

The intent to discharge or the intent to voluntarily quit can be manifested by words or actions. “Due to leaving work voluntarily” has a plain, definite and sensible meaning, free of ambiguity. 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 and of his or her own free will, terminated the employment. *Allen v. Core Target Youth Program*, 275 Md. 69 (1975). A claimant’s intent or state of mind is a factual issue for the Board of Appeals to resolve. *Dept. of Econ. & Empl. Dev. v. Taylor*, 108 Md. 250(1996), *aff’d sub. nom.*, 344 Md. 687 (1997). An intent to quit one’s job can be manifested by actions as well as words. *Lawson v. Security Fence Supply Company*, 1101-BH-82. A resignation submitted in response to charges which might lead to discharge is a voluntary quit. *Hickman v. Crown Central Petroleum Corp.*, 973-BR-88; *Brewington v. Dept. of Social Services*, 1500-BH-82; *Roffe v. South Carolina Wateroe River Correction Institute*, 576-BR-88 (where a claimant quit because he feared a discharge was imminent, but he had not been informed that he was discharged is without good cause or valid circumstances); also see *Cofield v. Apex Grounds Management, Inc.*, 309-BR-91. When a claimant receives a medical leave of absence but is still believes she is unable to return upon the expiration of that leave and expresses that she will not return to work for an undefinable period, the claimant is held to have voluntarily quit. See *Sortino v. Western Auto Supply*, 896-BR-83.

The intent to discharge can be manifested by actions as well as words. The issue is whether the reasonable person in the position of the claimant believed in good faith that he was discharged. See *Dei Svaldi v. Martin Taubenfeld, D.D.S., P.A.*, 1074-BR-88 (the claimant was discharged after a telephone conversation during which she stated her anger at the employer and the employer stated to her, “If that’s the way you feel, then you might as well not come in anymore.” The claimant’s reply of “Fine” does not make it a quit). Compare, *Lawson v. Security Fence Supply Company*, 1101-BH-82. A quit in lieu of discharge is a discharge for unemployment insurance purposes. *Tressler v. Anchor Motor Freight*, 105-BR-83.

In the instant case, the claimant did not, by her words or actions, sufficiently evince the requisite intent to quit her job. The claimant expressed a desire to visit her son with or without the employer’s approval. However, the expressed desire falls short of an unequivocal act of voluntarily resigning. The Board is persuaded that as of December 20, 2010, the employer has not acted upon the claimant’s leave request other than expressing his disappointment with the claimant. The Board finds the weight of the evidence supports a finding that the claimant was discharged on December 20, 2010.

Finding that the claimant was discharged, the Board will now examine whether it was for a disqualifying reason.

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."

Timing is everything. Had the claimant not reported to work on December 23, 2010, the circumstances surrounding the absence could have supported a finding that the claimant, by her then-present action of abandoning her job, manifested the intent to voluntarily quit without good cause or valid circumstances or that the claimant's absence was committed as a deliberate violation of the employer's attendance policy rising to the level of gross misconduct. But that is not what happened.

The claimant was discharged on December 20, 2010 but not for violating a workplace rule. Discharging an employee for anticipating that she will violate a workplace rule sometime in the near future is not misconduct. Because the claimant had not tendered a resignation on or before December 20, 2010, the Board finds that the weight of the evidence in this case supports a finding that the claimant was discharged for legitimate business reasons, but not for an act of 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 Board finds based on a preponderance of the credible evidence that the employer did not meet its burden of demonstrating that the claimant's actions rose to the level of misconduct within the meaning of § 8-1003. The hearing examiner's decision shall be reversed for the reasons stated herein.

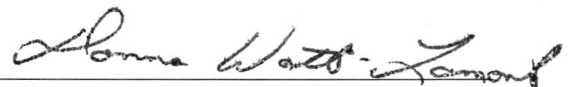
DECISION

It is held that the claimant was discharged, but not for gross misconduct or misconduct connected with the work, within the meaning of Maryland Code Annotated, Labor and Employment Article, Title 8, Section 1002 or 1003. No disqualification is imposed based upon the claimant's separation from employment with BURKEYS TELEVISION AND APPLIANCE CO., INC.

The Hearing Examiner's decision is reversed.



Clayton A. Mitchell, Sr., Associate Member



Donna Watts-Lamont, Chairperson

RD

Copies mailed to:

LILLIAN R. JACOBS

BURKEYS TELEVISION

ANDREW DANSICKER ESQUIRE

BURKEYS TELEVISION

Susan Bass, Office of the Assistant Secretary

UNEMPLOYMENT INSURANCE APPEALS DECISION

LILLIAN R JACOBS

SSN #

Claimant

Vs.

BURKEYS TELEVISION
AND APPLIANCE 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: 1103717
Appellant: Claimant
Local Office : 63 / CUMBERLAND
CLAIM CENTER

February 24, 2011

For the Claimant: PRESENT

For the Employer: PRESENT, JOHN BURKEY

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, Lillian Jacobs, began working for this employer, Burkeys Television and Appliance Co Inc., on or about January 30, 1993. At the time of separation, the claimant was working as a Sales Representative, earning \$350 per week plus commission. The claimant last worked for the employer on or about December 20, 2010, before being terminated for taking an unauthorized vacation.

In the Fall of 2010, John Burkey, President, notified all sales representatives that everybody was needed during the month of December before Christmas so no one would be able to take vacation. When Mr. Burkey posed the December 2010 in November 2010, the schedule showed that no one was off in December 2010 before Christmas. On December 13, 2010, the claimant notified Mr. Burkey that she and her husband received plane tickets to Alabama as Christmas gift from their son to visit him and his family

for the period of December 21, 2010 through December 26, 2010. Mr. Burkey reminded the claimant that no one was permitted to take vacation during that period and stated how disappointed he was and how unfair it was to other staff members. The claimant responded that she was taking off and going regardless. Nothing further was said at that time as Mr. Burkey walked away from the claimant. On December 20, 2010, Mr. Burkey terminated the claimant's employment as she was going to be taking an unauthorized vacation.

CONCLUSIONS OF LAW

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.

The employer credibly testified that advance notice was given to all staff members that no one was to be off in December 2010. The claimant knew the employer's policy and directly violated it when she informed the employer that she was going to Alabama regardless. Although the Hearing Examiner is sympathetic to the claimant's desire to be with her family for the holidays, this does not mitigate the claimant's behavior. The claimant's behavior was a deliberate and willful disregard of the standards of behavior the employer had a right to expect.

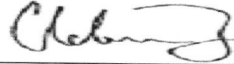
I hold that the claimant's actions showed a deliberate and willful disregard of the standards the employer had a right to expect, showed a gross indifference to the employer's interests and therefore constituted gross misconduct in connection with the work. An unemployment disqualification shall be imposed 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)(i). The claimant is disqualified from receiving benefits from the week beginning December 19, 2010 and until the claimant becomes reemployed and earns wages in covered employment that equals at least 20 times the claimant's weekly

benefit amount.

The determination of the Claims Specialist is affirmed.



A C Zimmerman, 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 March 11, 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: February 16, 2011

AEH/Specialist ID: WCU53

Seq No: 001

Copies mailed on February 24, 2011 to:

LILLIAN R. JACOBS
BURKEYS TELEVISION
LOCAL OFFICE #63