

**- DECISION -**

Claimant:	Decision No.:	764-BR-12
CHARLES W PHELPS	Date:	April 27, 2012
	Appeal No.:	1130078
	S.S. No.:	
Employer:	L.O. No.:	63
FREDERICK AERIE #1067 FO E INC	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: May 27, 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.

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)*.

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."

In the instant case the claimant was separated from this employment due to a legal incarceration. The separation was as a result of a discharge, and not a voluntary quit. The claimant did not resign from this position and he did not have the requisite intent to quit.

The claimant was discharged as he was no longer able to report to work or perform the duties of his position. The Board has long held that absenteeism from employment due to a lawful incarceration rises to the level of gross misconduct. *Kennedy v. Baltimore City Wastewater Treatment Plant*, 990-BR-85 ;also see *Farmer v. Perdue Farms, Inc.*, 1563-BR-91.

In its appeal the claimant offers no contentions of error as to the findings of fact or the conclusions of law in the hearing examiner's decision. The claimant does not cite to the evidence of record and makes no other contentions of error. The claimant merely expresses his desire to appeal the hearing examiner's decision. On appeal, the Board reviews the evidence of record from the Lower Appeals Division hearing. The Board will not order the taking of additional evidence or a new hearing unless there has been clear error, a defect in the record, or a failure of due process. The Board has thoroughly reviewed the record from the hearing and concurs with the hearing examiner's findings of fact and conclusions of 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 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.

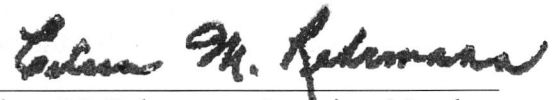
**DECISION**

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 September 26, 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.



Donna Watts-Lamont, Chairperson



Eileen M. Rehrmann, Associate Member

KJK/jm

Copies mailed to:

CHARLES W. PHELPS

FREDERICK AERIE #1067 FO E INC

FREDERICK AERIE #1067 FO E INC

Susan Bass, Office of the Assistant Secretary

**UNEMPLOYMENT INSURANCE APPEALS DECISION**

CHARLES W PHELPS

SSN #

**Claimant**

Vs.

FREDERICK AERIE #1067 FO E 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: 1130078

Appellant: Claimant

Local Office : 63 / CUMBERLAND  
CLAIM CENTER

September 21, 2011

**For the Claimant:** PRESENT

**For the Employer:** PRESENT, JOSEPH BAER

**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). Whether this appeal was filed timely within the meaning of Section 806 of the Labor and Employment Article.

**FINDINGS OF FACT**

A Notice of Benefit Determination was mailed to the parties (Charles Phelps) in this case. The determination had an appeal deadline of December 27, 2010. In this case, the appeal was filed by mail and postmarked on August 20, 2011. (Agency Exh. 1) The appellant offers as a reason for the late appeal that he was incarcerated at that time and was not aware of the appeal and was unable to file an appeal. The claimant was incarcerated October 1, 2010. He was sentenced to one year in jail. He was released July 2011.

The claimant, Charles Phelps, filed a claim for benefits establishing a benefit year beginning November 7, 2010. He qualified for a weekly benefit amount of \$430.00.

The claimant began working for this employer, Frederick Aerie #1067, on or about July 1, 2009. At the time of separation, the claimant was working as a Trustee. The claimant last worked for the employer on or about September 27, 2010, before voluntarily quitting when he was incarcerated and unable to fulfill his responsibilities to the organization.

As a trustee, the claimant served on the Board of this organization and was paid \$900.00 per year for his service. The claimant was found guilty of a crime and sentenced to a one year jail term on October 1, 2010. The claimant was immediately taken into custody. The claimant was unable to attend any meetings beyond that point. Bylaws of the organization states that any member that misses two consecutive meetings, unless for medical reasons, will be removed and replaced. Due to incarceration, the claimant was unable to fulfill his responsibilities.

### **CONCLUSIONS OF LAW**

Md. Code Ann., Labor & Emp. Article, Section 8-806(e) provides, in essence, that either a claimant or employer has 15 days after the date of the mailing of the benefit determination to file a timely appeal. COMAR 09.32.06.01(B) provides that an appeal is considered filed on the earlier of the following: (a) the date that is delivered in person to any office of the Department of Labor, Licensing and Regulation ("DLLR") that accepts appeals, or (b) the date on which it is postmarked by the U. S. Postal Service. Appeals filed after that date shall be deemed late and the determination shall be final, unless the appealing party meets the burden of demonstrating good cause for late filing. COMAR 09.32.06.01B(3) provides that "the period for filing an appeal from the Claims Specialist's determination may be extended by the Hearing Examiner for good cause shown." Good cause means due diligence in filing the appeal. Francois v. Alberti Van & Storage Co., 285 Md. 663 (1979) and Matthew Bender & Co. v. Comptroller of the Treasury, 67 Md. App. 693, 509 A.2d 702 (1986).

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.

Md. Code Ann., Labor & Emp. Article, Section 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).

### **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.

In the instant case, the appellant filed a late appeal within the meaning of Section 8-806 because that appeal was tendered after the deadline date.

Once an appeal has been filed late, the burden is on the appealing party to show by credible evidence that good cause exists. Cooper v. Holy Cross Hospital, 328-BR-86. In this case, the appellant has met this burden because he was unable to receive the benefit determination and unable to file an appeal due to incarceration. The late-filed appeal will be permitted.

The claimant had the burden to show, by a preponderance of the evidence, that 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, this burden has not been met.

The claimant voluntarily quit when he was incarcerated and unable to fulfill his responsibilities to the organization. The claimant was found guilty and incarcerated for a period of one year on October 1, 2010. The incarceration prevented the claimant from continuing in his job responsibilities as a trustee. The claimant indicated that he had been terminated. However, the claimant clearly was the moving party that caused the separation as he was unable to continue his function as a trustee. The claimant is considered to have voluntarily quit. Based upon the guilty finding, the claimant was at fault which caused his incarceration. The claimant has failed to show that his voluntary quit, due to being incarcerated, was either for good cause or for valid circumstances.

Accordingly, I hold the claimant voluntarily quit without good cause or valid circumstances. Benefits are, therefore, denied.

### DECISION

IT IS HELD THAT the appellant filed a late appeal with good cause within the meaning and intent of Md. Code Ann., Labor & Emp. Article, Section 8-806(e).

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 September 26, 2010, 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 Claim Specialist is reversed.



W M Greer, 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 06, 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  
AEH/Specialist ID: WCU54  
Seq No: 003  
Copies mailed on September 21, 2011 to:

CHARLES W. PHELPS  
FREDERICK AERIE #1067 FO E INC  
LOCAL OFFICE #63