Maryland
DEPARTMENT OF LABOR

BOARD OF APPEALS
1100 North Eutaw Street, Room 515
Baltimore, MD 21201
Clayton A. Mitchell Sr., Chairman

04/29/2022

JONATHAN BUTLER
9701 APOLLO DR
STE 100
UPPER MARLBORO MD
20774-4785

40500940

Claimant:
NELDA E FINK
[redacted]

Decision No: 18977-BR-22
Appeal No: 2123148
S.S. No: XXX-XX-4109

Appellant: Claimant

Employer:
PEVCO SYSTEMS INTERNATIONAL INC
1401 TANGIER DR
MIDDLE RIVER MD 21220-2876

40500940

BOARD OF APPEALS DECISION
WARNING: IT IS IMPORTANT TO READ ALL PAGES OF THIS NOTICE

ESTO ES UN DOCUMENTO LEGAL IMPORTANTE CON RESPECTO A SU DERECHO DE RECIBIR LOS BENEFICIOS DEL SEGURO DEL DESEMPLEO. CONTIENE FECHAS CON QUALES USTED TIENE QUE CUMPLIR PARA ASEGURAR SUS DERECHOS. SI USTED TIENE DIFICULTAD COMPRENDIENDO ESTE DOCUMENTO EN INGLES, POR FAVOR LLAME (301) 313-8000 INMEDIATAMENTE

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).

REVIEW OF THE RECORD

The claimant, Nelda E. Fink, filed a timely appeal to the Board of Appeals from an Unemployment Insurance Lower Appeals Division Decision issued on February 22, 2022. That Decision held the claimant voluntarily quit her employment, without good cause or valid circumstances, within the meaning of *Md. Code Ann., Lab. & Empl. Art., §8-1001*. Benefits were denied from the week beginning May 9, 2021, and continuing thereafter until the claimant becomes reemployed, earns at least fifteen (15) times her Weekly

Benefit Amount (WBA), and becomes separated from that employment under non-disqualifying conditions.

On appeal, the Board reviews the evidence of record from the Lower Appeals Division Telephone Hearing. The Board reviews the record *de novo* and may affirm, modify or reverse the hearing examiner's Findings of Fact or Conclusions of Law, on the basis of the evidence submitted to the hearing examiner or the evidence the Board may direct to be taken. *Md. Code Ann., Lab. & Empl. Art., §8-5A-10*. The Board fully inquires into the facts of each particular case. *COMAR 09.32.06.02 (E) (1)*. Only if there has been clear error, a defect in the record or a failure of due process will the Board remand the matter for a new hearing or the taking of additional evidence. Under some limited circumstances, the Board may conduct its own hearing, take additional evidence or allow legal argument.

The General Assembly declared, 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)*.

In this case, the Board thoroughly reviewed the record from the Lower Appeals Division Telephone Hearing. The record is complete. Both parties appeared and testified. The hearing examiner gave both parties the opportunity to cross-examine opposing witnesses and to offer and object to documentary evidence. The hearing examiner gave both parties an opportunity to make a closing statement. The necessary elements of due process were observed throughout the hearing. The Board finds no reason to order a new hearing, to take additional evidence, to conduct its own hearing or to allow additional argument.

FINDINGS OF FACT

The Board finds the hearing examiner's Findings of Fact are not entirely supported by substantial evidence in the record and they are incomplete. The Board rejects the hearing examiner's Findings of Fact, in their entirety, and makes the following Findings of Fact, in their place:

> The claimant, Nelda E. Fink, began working for the employer, Pevco Systems International, Inc., on September 23, 2009, and her last day worked was May 12, 2021. At the time of her separation from employment, the claimant worked full-time as a Systems Analyst, earning an annual salary of $110,200.
>
> On November 18, 2020, the employer advised its employees one of its warehouse workers tested positive for COVID-19 and, although the employer did not believe the other workers were exposed, the employer was implementing a policy "requiring social distancing and mandatory wearing of masks while in the warehouse," effective immediately. (ER EX #1). The claimant was aware of the employer's mask wearing policy.

On March 1, 2021, the claimant advised the employer she had a medical condition that prevented her from wearing a face mask. In response to the employer's request for medical documentation to verify the claimant's assertion, she produced a letter dated March 3, 2021, under the signature of Dr. Mary Ann C. Ley. In the letter Dr. Ley advised the claimant to "refrain from wearing a face covering which will impede her (the claimant's) ability to breathe and function optimally, thus, compromising her health progress." (ER EX #3).

Because Dr. Ley did not elaborate upon the claimant's actual medical condition, the employer requested Dr. Ley provide additional medical information regarding the claimant's medical condition. In response, Dr. Ley informed the employer, by a letter dated March 30, 2021:

> There is not sufficient scientific evidence that wearing a face covering will protect (*sic*) the spread of infection especially from a distance as you are suggesting. In fact, there is ample scientific evidence that masks can in fact, contribute to secondary bacterial infections. (ER EX #7).

Dr. Ley again declined to provide any additional information regarding the claimant's underlying medical condition. Dr. Ley is a Doctor of Chiropractic; not a licensed physician.

Because the claimant would not comply with the employer's mask wearing policy, the claimant chose to work remotely, from her residence, and to supplement her time by taking intermittent leave. The claimant later determined this arrangement was not suitable for completing her assigned tasks and inquired about the employer renting a separate office space, where the claimant could isolate herself in an office setting.

Although the employer explored this alternative, the employer decided it was too costly and asked the claimant to return to its primary place of business. When the claimant declined, again citing Dr. Ley's advice, the employer informed the claimant, on May 12, 2021:

> I regret to inform you that your employment with Pevco will end today. You will be paid through 5/21/21 (end of the current pay period). We wish you the best of luck in the future. (ER EX #10).

The Board concludes these Findings of Fact warrant different Conclusions of Law and a Reversal of the hearing examiner's Decision, from a voluntary quit, without good cause or valid circumstances, to a discharge.

CONCLUSIONS OF LAW

In a discharge case, the employer has the burden of demonstrating 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*; and *Ivey v. Catterton Printing Co., 441-BH-89*.

When a claimant voluntarily leaves work, he or she has the burden of proving they 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*; and *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 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)*.

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*.

Likewise, 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 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*.

Md. Code Ann., Lab. and Empl. Art., Title 8, Section 1002, provides:

(a) Gross misconduct…
  (1) Means conduct of an employee that is:
    i. 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
    ii. repeated violations of employment rules that prove a regular and wanton disregard of the employee's obligations...

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)*.

Md. Code Ann., Lab. and Empl. Art., Title 8, Section 1003 provides:

> (a) Grounds for disqualification – an individual who otherwise is eligible to receive benefits is disqualified from receiving benefits if the Secretary finds that unemployment results from discharge or suspension as a disciplinary measure for behavior that the Secretary finds is misconduct in connection with employment but that is not:
> (1) Aggravated misconduct…or
> (2) Gross misconduct…

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 the employment relationship, during hours of employment or on the employer's premises, within the meaning of *Md. Code Ann., Lab. and Empl. Art., Title 8, Section1003*. (*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)*.

The Board of Appeals has consistently held, unless a request is illegal, unethical or ambiguous, (see *Hatfield v. Tri-State Oil, 390-BR-82, Leon v. Southern States Cooperative, 885-BR-83,* and *Walker v. Domino's Pizza of Maryland, Inc., 200-BH-87,* respectively) a claimant's failure to follow an employer's reasonable instruction(s) constitutes misconduct. (See *Gray v. Valley Animal Hospital, Inc., 224-BR-90),* "A violation of the (employer's reasonable) procedures requires an explicit authorization. The claimant's failure to get such authorization amounts to misconduct."

Depending on the importance of the policy or instruction involved and the number of times the claimant violated the subject policy, failure to act in accordance with the employer's instruction(s) can constitute gross misconduct. (See *Dunavent v. Federal Armored Express, Inc., 949-BR-85*).

A written statement from a chiropractor does not meet the requirements of *Section 8-1001*, which provides that in the case of a health problem, the claimant must produce written or other documentary evidence of that health problem from a physician or a hospital. While the Board would normally construe this requirement liberally to cover all health care professionals, the Board is bound by a decision of the Maryland Court of Special Appeals which specifically held that a chiropractor is not a physician. *Beverungen v. Briele, 25 Md. App. 233, 333 A.2d 664 (1975)*. The decision in this case is prompted only by the specific ruling of the Court and the Board is not ruling that other recognized health professionals connected with physicians and hospitals cannot supply sufficient evidence under *Section 8-1001*. *Rice v. Baltimore City Board of Education, 1025-BH-82*.

EVALUATION OF THE EVIDENCE

In her appeal to the Board, the claimant contends she did not quit, but was discharged from employment. Because the burden of proof in any separation case is allocated according to whether the claimant voluntarily quit or whether the employer discharged the claimant, this is a threshold issued which must be decided first.

There is insufficient evidence in the record to suggest the claimant ever entertained the notion of resigning her position. In fact, the record is replete with the claimant's efforts to maintain her employment, despite her medical concerns; and she took a number of steps in furtherance of continuing her employment. Additionally, the employer's communication of May 12, 2021, clearly states "I regret to inform you that your employment with Pevco will end today." (ER EX #10). Therefore, the Board concludes the employer discharged the claimant on May 12, 2021, with an effective date of "5/21/21 (end of the current pay period)." (ER EX #10). Accordingly, this separation must be considered in light of the provisions of *Md. Code Ann., Lab. & Empl. Art., §§8-1002* and *8-1003*.

The record reflects the employer imposed a social distancing and mask wearing policy on November 18, 2020, when an employee tested positive for COVID-19. The Board finds the employer's reaction to the positive test to be reasonable and, as a reaction to an actual positive test and not as a proactive measure designed to stem a speculative, potential exposure, the employer's policy was important enough to satisfy the requirements under *Dunavent v. Federal Armored Express, Inc.,* above.

The claimant's response to the employer's mask wearing policy was to submit documentation from her Chiropractor, Dr. Ley. *Md. Code Ann., Lab. & Empl. Art., §§8-1002* and *8-1003,* are silent as to the credentials necessary for a medical opinion to carry sufficient weight to meet the evidentiary burden of proof. However, *Md. Code Ann., Lab. & Empl. Art., §8-1001 (c) (2),* sets forth the medical documentation necessary to support a voluntary quit, stating "…an individual who leaves employment because of the health of the individual or another for whom the individual must care, the individual shall submit a written statement or other documentary evidence of the health problem from a hospital or physician." The Board finds no meaningful distinction between a separation from employment by discharge and a separation from employment by voluntary quit, as far as the need for medical evidence is concerned. Therefore, the

Board finds the medical, evidentiary burden of proof in a discharge to be the same as that for a voluntary quit.

As stated, the claimant submitted medical statements from her Chiropractor. The Board is bound by a decision of the Maryland Court of Special Appeals which specifically held that a chiropractor is not a physician. (See *Beverungen v. Briele,* 25 Md.App. 233, 333 A2d 664 (1975)). The written statement from a chiropractor does not meet the requirement that the claimant produce written or other documentary evidence of that health problem from a physician or a hospital. Therefore, the Board must find the claimant's medical documentation does not meet the burden of proof.

Accordingly, the claimant produced deficient justification for her refusal to comply with the employer's reasonable, workplace, health policy. In accordance with *Dunavent v. Federal Armored Express, Inc.,* above, the Board finds the claimant deliberately and willfully disregarded the standards of behavior the employing unit rightfully expected of its employees and showed a gross indifference to the interests of the employing unit.

Therefore, the Board finds, based upon a preponderance of the credible evidence, the employer met its burden of proof and showed it discharged the claimant for gross misconduct, within the meaning of *Md. Code Ann., Lab. and Empl. Art., § 8-1002.* The Decision shall be Reversed, from a voluntary quit, without good cause or valid circumstances, to a discharge for gross misconduct, for the reasons stated herein.

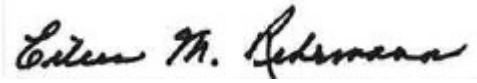
DECISION

40500940

The Board holds the employer discharged the claimant for gross misconduct connected with the work, within the meaning of *Md. Code Ann., Lab. and Empl. Art., Title 8, Section 1002 (a) (1) (i)*. The claimant is disqualified from receiving benefits from the week beginning May 9, 2021, and continuing thereafter until the claimant becomes re-employed, earns at least twenty-five (25) times her Weekly Benefit Amount (WBA), and becomes unemployed again, under non-disqualifying conditions.

The Hearing Examiner's Decision is Reversed, from a voluntary quit, without good cause or valid circumstances, to a discharge for gross misconduct.
.

CLAYTON A. MITCHELL, SR., CHAIRMAN



EILEEN M. REHRMANN, ASSOCIATE MEMBER

Notice to Claimants of Right to Request Waiver of Overpayment

The Department of Labor 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 410-949-0022 or 1-800-827-4839. 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.

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: 05/31/2022

Copies of this Decision was provided to:
NELDA E FINK (Claimant)
PEVCO SYSTEMS INTERNATIONAL INC
JONATHAN BUTLER (Claimant Representative)

40500940