

- DECISION -

Claimant:	Decision No.:	1029-BR-15
DERRICK L TRICE JR	Date:	May 8, 2015
	Appeal No.:	1422653
	S.S. No.:	
Employer:	L.O. No.:	60
WAL-MART ASSOCIATES INC	Appellant:	Claimant

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: June 08, 2015

REVIEW OF THE RECORD

The claimant has filed a timely appeal to the Board from an Unemployment Insurance Lower Appeals Division Decision issued on December 10, 2-14. That Decision held the claimant was discharged for gross misconduct within the meaning of *Md. Code Ann., Lab. & Empl. Art., §8-1002*. Benefits were denied for the week beginning July 20, 2014, and until the claimant becomes reemployed, earns twenty-five times his weekly benefit amount, and then becomes unemployed under non-disqualifying conditions.

On appeal, the Board reviews the evidence of record from the Lower Appeals 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 of the hearing examiner on the basis of evidence submitted to the hearing examiner or evidence that the Board may direct to be taken. *Md. Code Ann., Lab. & Empl. Art., §8-510(d)*. The Board fully inquires into the facts of each particular case. *COMAR 09.32.06.03(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 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)*.

On appeal, the Board reviews the evidence of record from the Lower Appeals 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 record is complete. The claimant appeared and testified. The claimant was afforded the opportunity to offer documentary evidence and to present 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 legal argument in this matter.

The Board finds the hearing examiner's Findings of Fact are supported by substantial evidence in the record. Those facts, however, are insufficient to support the hearing examiner's Decision. The Board adopts the hearing examiner's findings of fact but concludes that these facts warrant different conclusions of law and a reversal of the hearing examiner's decision.

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, Section 1003*. (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. *Emp. 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 his appeal, the claimant contends, "I think its [sic] unfair that I have to go without food and a chance of losing my house because of Wal-mart changing their story and not allowing me to collect my unemployment. Now I filed a leave request and the manager did not put it in the system, I think its [sic] because I'm black. first [sic] wal-mart said they fired me after 3 days of no show now they're sayin [sic] that I was discharge [sic] for failing to report after 5 days. I think its [sic] wrong because I was a very hard worker, but they want to keep the people who do drugs and get high on the job. They would let some people take longer breaks than they should. The manager is alcoholic [sic] and drinks on the job. I am not the only 1 who has had problems with Wal-Mart. there [sic] are prople who work for Wal-Mart who has sued them and still work there, they have also let people have numours [sic] No-call no-show with out

[sic] calling. I really believe [sic] that they let me go because I'm black and not a gay male. I have witness that can prove everything I say." The claimant also request that the Board, "...do an investigation on Wal-Mart and their employees."

The Board finds the facts in this case support a conclusion that the claimant failed to report to work in the absence of approved leave. The Board does not concur with the hearing examiner that the claimant's actions were a deliberate and willful disregard of the standards the employer had the right to expect or that the claimant's actions evinced a gross disregard to the employer's interests. Therefore, a finding of gross misconduct is not supported. However, the claimant, by his own admission, failed to report to work without approved leave. A finding of simple misconduct is supported.

The employer, duly notified of the date, time and place of the hearing, failed to appear. The only statement from the employer is contained in the Agency Fact Finding Report. *See Agency Exhibit 1*. Although the Agency Fact Finding Report is a public document, the statements contained therein are hearsay. While hearsay is admissible in an administrative proceeding, it is usually given less weight than credible, first-hand testimony. Although the hearing examiner may rely on hearsay evidence in making his determination, the hearing examiner must, "first carefully consider[] its reliability and probative value." *Travers v. Baltimore Police Dept.*, 115 Md. App. 395, 413 (1997); also see *Kade v. Charles H. Hickey School*, 80 Md. App. 721, 725 (1989) ("[e]ven though hearsay is admissible, there are limits on its use. The hearsay must be competent and have probative force."). In the instant case, the Board finds the hearing examiner gave too much weight to the employer's statement in the fact-finding report when finding that the claimant's actions were gross misconduct. The Board reversed the hearing examiner's gross misconduct decision and finds that the claimant's actions were simple misconduct.

The claimant's argument that the employer "chang[ed] their story" is without merit. There is only one statement from the employer in the record. *See Agency Exhibit 1*. The claimant's contention that he was fired, "...because I'm black and not a gay male" is not supported by a scintilla of evidence in the record.

The Board finds, based upon a preponderance of the credible evidence, that the employer did not meet its burden of proof and show that the claimant was discharged for gross misconduct within the meaning of *Md. Code Ann., Lab. and Empl. Art., §8-1002*. The employer did meet its burden of proof and show that the claimant, by the claimant's admissions, was discharged for misconduct within the meaning of *Md. Code Ann., Lab. and Empl. Art., §8-1003*. The 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 20, 2014 and the fourteen weeks immediately following.

The Hearing Examiner's decision is Reversed.



Clayton A. Mitchell, Sr., Associate Member



Donna Watts-Lamont, Chairperson

VD

Copies mailed to:

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