-DECISION-

Claimant:
VARSHE D TAYLOR

Employer:
FOOD ARAMA OF BALTIMORE INC

Decision No.: 1050-BR-12

Date: April 11, 2012

Appeal No.: 1135469

S.S. No.:

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: May 11, 2012

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 and a reversal of the hearing examiner's decision.

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 employer/appellant submitted additional evidence with its letter to the Board. The employer did not submit this evidence at the Lower Appeals Division hearing.

The Board only considered the evidence submitted to the hearing examiner when rendering its decision. *Md. Code Ann., Lab. & Empl. Art., § 8-510(d)(1).* The parties, duly noticed of the date, time and place of the hearing, were afforded a full and fair opportunity to present their case before the hearing examiner. Notwithstanding the Board's discretion to take new evidence, *Md. Code Ann., Lab. & Empl. Art., § 8-510(d)(2),* "the presentation of evidence must come to an end at some point". *Maryland State Police v. Zeigler, 330 Md. 540, 556 (1993).*

The appellant in the instant case had clear notice of the obligation to present a case before the DLLR Hearing Examiner. *DLLR v. Woodie, 128 Md. App. 398, 411 (1999).* The hearing notice provided,

> This hearing is the last step at which either the claimant or the employer has an absolute right to present evidence. The decision will be made on the evidence presented. The decision will affect the claimant's claim for benefits, and it may affect the employer's contribution tax rate or reimbursement account.

In addition, the notice stated, in bold print, that additional "important information" could be found on the reverse side of the notice. Because the appellant was on notice that the only absolute opportunity to present evidence was before the DLLR Hearing Examiner, the appellant had no legitimate justification for the failure to present the evidence in the first hearing. *See DLLR v. Woodie, 128 Md. App. 398, 401 (1999).*

A claimant's misconduct is not mitigated by the alleged fact that others also committed misconduct. *Griffith v. State Employees' Credit Union, 374-SE-92.*

In *Chavis v. Walter P. Carter Center, 767-BH-89*, the claimant resigned in lieu of discharge during an extended probationary period. The claimant's attendance and job performance were poor, and she had a bad attitude. She failed to properly notify the employer of absences, reported late for work and incurred incidents of leave without pay. Additionally, the claimant failed to maintain work schedules and files and failed to proofread her correspondence before sending it out. When she failed to improve during her extended probationary period, she was asked to resign. The claimant was discharged for gross misconduct.

In *Butler v. Levenson and Klein, Inc., 494-BR-90*, the claimant was a switchboard operator who supervised other operators. She was discharged due to three incidents of rudeness to customers on the telephone. The claimant admitted that she was the offending operator. The claimant had previously received warnings about this type of behavior. The claimant was discharged for gross misconduct.

In the instant case, the claimant was discharged for a culminating incident of being rude to a customer. The facts were not in dispute. Both the employer's witnesses and the claimant testified that the claimant was rude to the customer (who was a difficult, demanding customer). The store policy was that the "customer was always right". All employees were aware of this policy.

However, the employer's witnesses credibly testified that the claimant was suspended twice previously and was written up 11 times for other incidents of policy violations and failing to follow instructions. The claimant had one previous warning for being rude to customers. The claimant was discharged for this final incident of being rude and argumentative with a customer.

The claimant did not dispute that she was previously reprimanded by the employer for failing to follow instructions, rudeness to customers and policy violations. The claimant failed to respond to the employer's testimony.

The Board finds 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 Board finds based on a preponderance of the credible evidence that the employer has met its burden of demonstrating that the claimant's actions rose to the level of gross misconduct within the meaning of *§ 8-1002*. The employer has also met its burden of showing that the claimant's discharge was for misconduct within the meaning of *§ 8-1003*. 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 4, 2011 and until the claimant becomes re-employed, earns at least twenty five 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

Clayton A. Mitchell, Sr., Associate Member

KJK/mr
Copies mailed to:
VARSHE D. TAYLOR
FOOD ARAMA OF BALTIMORE INC
Susan Bass, Office of the Assistant Secretary

UNEMPLOYMENT INSURANCE APPEALS DECISION

VARSHE D TAYLOR

SSN #

Claimant

vs.

FOOD ARAMA OF BALTIMORE 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: 1135469
Appellant: Claimant
Local Office : 65 / SALISBURY CLAIM CENTER

November 07, 2011

For the Claimant: PRESENT , TOWANDA GOODS

For the Employer: PRESENT , RUBY KOLB, MYRON BANKS, ABRAHAM HERSHKOVITZ

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, Varshe Taylor, filed a claim for benefits establishing a benefit year beginning September 11, 2011. She qualified for a weekly benefit amount of $239.00.

The claimant began working for this employer, Food Arama of Baltimore Inc., on or about May 14, 2008. At the time of separation, the claimant was working full-time as a deli clerk. The claimant last worked for the employer on September 10, 2011, before being terminated for rudeness to a customer.

On September 9, 2011, the claimant serviced a customer who later complained to the front-end manager that the claimant gave him the wrong deli order. Other deli employees previously reported to management

that this particular customer tended to give them a hard time and would get an attitude with them. On this day, the customer and the front-end manager came back to the deli department regarding the order. The claimant explained that the customer requested meat bologna and that she discussed the thickness of the cut with him before cutting the meat. The claimant had even cut a sample piece to confirm the thickness of the cut. Notwithstanding, the customer complained about the meat and the cut. The front-end manager directed the claimant to provide him what he wanted. The claimant then pulled beef bologna and began slicing it in the manner previously requested by the customer. The customer then complained that the cut was not right. The claimant explained to him that the cut was as he previously requested. The front-end manager told the claimant to just cut it how he wanted it. The customer then told the claimant to "do her job" and to "do as she was told." The claimant responded that she did not take orders from anyone but her supervisor. Generally, when an employee has an issue with a customer, (s)he is supposed to seek a member of management to intervene or to get another employee to assist that customer. A member of management was present, and the other deli workers did not step-in to assist because they did not want to help the customer. The claimant finished the order and went back to work. The customer later called the store and spoke to the store owner, Abraham Hershkovitz, who then referred the matter to Ruby Kolb, the Manager, to investigate. After an investigation, which included speaking with the front-end manager, it was determined that the claimant had been indeed rude to the customer with her responses. As the claimant had been suspended twice previously and written up 11 times, the claimant was then terminated.

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).

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.

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 not been met.

The claimant was terminated for rudeness to a customer. The claimant became engaged with a customer who made a rude remark to her. The claimant responded with a less than professional response. While the claimant was provoked to some degree, the claimant should have exercised restraint under the circumstances. Notwithstanding the employer's policy, no one intervened on behalf of the claimant to help diffuse the situation. The front-end manager was present as well as other employees. The claimant's response was not so egregious to support a finding of misconduct based upon this one-time isolated incident. The employer asserted the claimant had been suspended twice previously and written up 11 times. The employer presented no evidence regarding those incidents or reprimands. Accordingly, I hold the claimant's termination based on this one incident does not rise to the level of misconduct.

I hold that the claimant did not commit a transgression of some established rule or policy of the employer, a forbidden act, a dereliction of duty, or engage in a course of wrongful conduct within the scope of the claimant's employment relationship, during hours of employment, or on the employer's premises. No unemployment disqualification shall be imposed based on Md. Code, Ann., Labor & Emp. Article, Section 8-1003 pursuant to this separation from this employment.

DECISION

IT IS HELD THAT the claimant was discharged, but not for misconduct connected with the work within the meaning of Md. Code Ann., Labor & Emp. Article, Section 8-1003. No disqualification is imposed based upon the claimant's separation from employment with the above-identified employer. The claimant is eligible for benefits so long as all other eligibility requirements are met. The claimant may contact Claimant Information Service concerning the other eligibility requirements of the law at ui@dllr.state.md.us or call 410-949-0022 from the Baltimore region, or 1-800-827-4839 from outside the Baltimore area. Deaf claimants with TTY may contact Client Information Service at 410-at 410-767-2727, or outside the Baltimore area at 1-800-827-4400.

The determination of the Claims Specialist is reversed.

W E Greer

W E 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 November 22, 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 : October 26,2011
CH/Specialist ID: USB7A
Seq No: 001
Copies mailed on November 07, 2011 to:
VARSHE D. TAYLOR
FOOD ARAMA OF BALTIMORE INC
LOCAL OFFICE #65