

- DECISION -

Claimant:
DASHAMIR CANO

Decision No.: 1083-BR-14

Date: September 12, 2014

Appeal No.: 1338054

S.S. No.:

Employer:
WIDEWATERS FREDERICK HOTEL

L.O. No.: 63

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: October 14, 2014

REVIEW OF THE RECORD

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

The claimant worked as a full-time, salaried maintenance engineer, earning \$43,000.00 annually. The claimant was observed by the general manager playing solitaire on the company's computer for over fifteen minutes. The employer's policy prohibits the use of

the employer's computers for personal use. The claimant had been employed at the hotel for over eight years and no prior disciplinary record.

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."

The weight of the credible evidence established that the claimant violated his employer's policy on the use of computers. The claimant asserted that he did not know that it was against policy to use the employer's computers for personal use. However, the employer presented evidence that the claimant acknowledged receipt of the handbook which sets forth the policy. (See Employer's Exhibit #1).

In the claimant's appeal to the Board, the claimant and his legal representative assert that the telephone interpreter did "not serve to properly present Mr. Cano's position". The claimant asked for an interpreter on Tuesday, only three business days before the appeal hearing. The hearing notice states that if a party needs and interpreter, to contact the Appeals Department: "Requests must be made at least five working days prior to the hearing". When the claimant informed the hearing examiner of his request, the hearing examiner was able to secure an Albanian interpreter telephonically for the claimant. The recording of the hearing was reviewed. At no time, during the appeal hearing, did the claimant raise a concern over the interpreter's language skills. In addition, the claimant understood and spoke English. At any time during the hearing, the claimant could have raised any concerns directly to the hearing examiner. He did not.

The weight of the credible evidence demonstrated that the claimant used a company computer for personal use. Since this is a first time offense and the employer presented no other warnings or disciplinary actions against the claimant, the Board finds that the claimant transgressed the established policy of the employer on personal use of company computers. The Board finds given the circumstances, the claimant actions do not evince the gross disregard to the employer's interest necessary to support a finding of gross misconduct. However, intentional behavior is not necessary to support a finding of misconduct. *Johns Hopkins University v. Board of Labor Licensing & Regulation, 134 Md. App. 653, 622-63 (2000)*. The Board finds sufficient evidence to support a finding 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 met its burden of demonstrating that the claimant's actions rose to the level of misconduct within the meaning of *Maryland Annotated, Labor & Employment Article, § 8-1003*. The decision shall be reversed for the reasons stated herein and in the hearing examiner's decision.

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 November 10, 2013 and the nine weeks immediately following.

The Hearing Examiner's decision is reversed.



Eileen M. Rehrmann, Associate Member



Donna Watts-Lamont, Chairperson

VD

Copies mailed to:

DASHAMIR CANO

WIDEWATERS FREDERICK HOTEL

JUDD G. MILLMAN ESQ.

Susan Bass, Office of the Assistant Secretary

UNEMPLOYMENT INSURANCE APPEALS DECISION

DASHAMIR CANO

SSN #

Claimant

vs.

WIDEWATERS FREDERICK HOTEL

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: 1338054

Appellant: Claimant

Local Office : 63 / CUMBERLAND
CLAIM CENTER

February 06, 2014

For the Claimant: PRESENT

For the Employer: PRESENT, YOLANDA GAINERY

For the Agency: PRESENT, EFTI (ALBANIAN INTERPETER)

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, Dashamir Cano, began working for this employer, Wide Waters Frederick Hotel Management Company, LLC on August 30, 2013. At the time of discharge, the claimant worked full-time as a maintenance engineer. He earned \$43,000.00 per year. The claimant last worked for the employer on November 13, 2013 before being terminated under the following circumstances:

The employer's policy states in pertinent part that the Company computer is to be used solely for the Company's purposes and to use such property only for authorized purposes. The claimant was made aware of this policy at the time of hire. (Employer Exhibit #1)

On November 8, 2013 the claimant violated this policy. Specifically, around 9:00 a.m. the claimant was observed in a dark office (no lights on) by Meghan DeParis (Director of Sales) and Roann Feigo (Sales Manager). (Employer Exhibit #3) The General Manager, Yolanda Gainey, was unable to locate the claimant and was informed by staff that the claimant did not have a radio. Ms. Gainey was later informed by Roann and Meghan that the claimant was sitting in a dark office on the computer. The office is located in the restaurant kitchen that is no longer in use.

Ms. Gainey personally observed the claimant sitting in the dark office playing solitaire on the computer for fifteen (15) minutes. The claimant immediately exited out of the computer when Ms. Gainey asked him what he was doing. (Employer Exhibit #2) The claimant was terminated for violation of company policy.

The claimant offered as a reason for his conduct that he was on break and not on company time. The claimant was not on break when he was found using the company computer.

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).

In Hanlon v. Department of Commerce, 759-BH-89, the Board of Appeals held "The claimant was discharged for unauthorized use of the employer's computer equipment and materials, unauthorized conduct of personal business while on duty, insubordination and misuse of administrative/judicial procedures. The claimant used the employer's equipment to generate more than 100 documents for the claimant's personal use. This was done despite a memorandum from the employer prohibiting this type of activity and a warning from the claimant's supervisor. The claimant was discharged for gross misconduct."

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's evidence was substantially more persuasive than the claimant's version of events. The claimant was playing cards on the computer, in an area that is not used regularly by the employer. The claimant was located in a dark office with the lights out which is demonstrative of his intent to hide his actions. The claimant was aware that this type of activity was strictly against the employer's policy which

was designed to discourage the very type of activity in which the claimant was engaged. The claimant's conduct showed a deliberate and willful disregard of the standards that the employer has a right to expect rising to the level of gross misconduct. The claimant has provided insufficient mitigating factors to warrant a lesser penalty.

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 November 10, 2013 and until the claimant becomes reemployed and earns wages in covered employment that equal at least 25 times the claimant's weekly benefit amount.

The determination of the Claims Specialist is affirmed.



P A Butler, 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

This is a final decision of the Lower Appeals Division. Any party who disagrees with this decision 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 February 21, 2014. 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: January 27, 2014

DAH/Specialist ID: WCU1Q

Seq No: 001

Copies mailed on February 06, 2014 to:

DASHAMIR CANO
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LOCAL OFFICE #63