-DECISION-

Claimant:	Decision No.:	1471-BR-14
YULON WIMBUSH	Date:	May 28, 2014
	Appeal No.:	1330814
	S.S. No.:	
Employer:		
KFHP MID ATLANTIC STATES INC	L.O. No.:	65
	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 27, 2014

REVIEW OF THE RECORD

After a review of the record, after correcting the last sentence of the penultimate paragraph by deleting, “her termination” and substituting, “...appropriate remedial steps consistent with [the employer’s] disciplinary policies and practices”, and after deleting the last paragraph, the Board adopts the hearing examiner’s modified 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.* Conclusory statements are insufficient evidence to meet an employer's burden of proof. *Cook v. National Aquarium in Baltimore, 1034-BR-91.* An employer must produce specific evidence of a claimant's alleged misconduct. *Id.*

> 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).* 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).*

In her appeal, the claimant offers multiple specific contentions of error as to the findings of fact and the conclusions of law in the hearing examiner's decision. The claimant reiterates much of her testimony from the hearing. The claimant notes that the hearing examiner did not actually comply with the Board's prior remand order in terms of supporting his conclusions regarding the weight of the hearsay evidence. The Board generally agrees with the claimant's contentions, but will not fully address each of those contentions in this decision.

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. Both parties appeared and testified. Both parties were given the opportunity to cross-examine opposing witnesses and to offer and object to documentary evidence. Both parties were offered closing statements. The necessary elements of due process were observed throughout the hearing. The Board finds no reason to order a new hearing or take additional evidence in this matter. Sufficient evidence exists in the record from which the Board may make its decision.

The Board has thoroughly reviewed the record from the hearing but disagrees with the hearing examiner's decision. The hearing examiner's use of the unexplained terms "demeanor and body language" to support his credibility conclusions about what the claimant thought compared to her testimony, was merely a bootstrap argument devoid of any substance. Demeanor based credibility assessments are weak, by their nature. If demeanor is relied upon, it must be specifically explained what it was about the person's demeanor which led to the conclusion at issue so that others, not personally present, may understand. Merely saying "demeanor" is pointless. The same is true for "body language".

Factors which actually have been shown to have value in the assessment of relative credibility, for both hearings and first-hand evidence, are competency, consistency, corroboration, probability, absence of bias, availability of first-hand witness, observation, reporting, comprehension, and context.

This case presents two different, yet necessary, credibility questions. The first, discussed above, was whether the claimant's testimony was credible. The Board finds that she was. The claimant certainly was the first-hand witness to her own thoughts, deeds and word. The claimant's testimony was consistent, both internally, and with that of her witness. Her testimony was not inconsistent with the first-hand testimony of the employer's witness. The claimant's witness corroborated the claimant's testimony. The Board concludes that the claimant did not demonstrate a belief that Ms. Butler was racist through her "demeanor and body language". The Board disregards the hearing examiner's unsupported conclusion to the contrary. Further, the Board notes that while the claimant's testimony may have been "self-serving", most all testimony, including that of the employer's witness in this matter, was equally self-serving. To discount a party's evidence because it may be self-serving is to moot the entire point of have a party present his or her evidence to a neutral fact-finder. It was the hearing examiner's responsibility to ferret out the facts by questioning the witnesses and properly weighing their respective evidence.

The second, and equally important, credibility assessment which must be made concerns the evidentiary weight to be afforded to Employer's Exhibit #3, the apparent last page of the investigative report. The hearing examiner accepted the employer's redaction of the names of employees interviewed. The Board agrees, in principle, with this. However, the Board finds it would have been quite useful to have had one of the investigators or the author of the report present to provide, at least, second-level hearsay rather than the hearsay within hearsay within hearsay offered by the employer's witness. The Board is not suggesting that the witness was not truthful. The Board is asserting that the witness was too far removed from the actual source of the information as to be competent to offer credible testimony.

The investigation was conducted by a person or persons not present to offer testimony or be cross-examined. The investigators obtained information, much of it conclusory, from persons not present to offer testimony or be cross-examined. The testifying witness did not divulge the methodology used, the questions asked, or the process by which the results were compiled. This may have been, as the employer's witness testified, the most intensive investigation ever seen by that witness, but that does not, *per se*, make it reliable. Without more evidence about the nature and scope of the investigation, as well as the accuracy and propriety of the reported conclusions, the Board does not find this to be a compelling piece of evidence. The hearing examiner's reliance upon this document was misplaced and inappropriate.

The evidence showed that the claimant was, in her capacity as a union representative, working with a co-worker (JS) concerning that JS' belief that a supervisor was acting in an improper, racially motivated, discriminatory manner toward employees. Although ultimately found to be incorrect, JS' belief was a serious matter which the claimant was expected to handle in a proper manner. The claimant needed to discuss this with JS in order to understand the basis for JS' opinion. Other employees certainly may have overheard these discussions, and may have been part of the claimant's inquiries. What the claimant did was functionally no different than what the investigators did in trying to arrive at the underlying facts of this allegation.

The Board finds that too much emphasis was placed on a prior incident between the claimant and the supervisor in question. Previously, the claimant had lodged a complaint against that supervisor for what the claimant believed was the release of inappropriate and personal information to another member of management when the claimant attempted to obtain a transfer. The claimant may have continued to harbor bad feelings about that supervisor, but the employer did not show that the claimant actions with respect to JS' complaint were motivated by anything other than JS' complaint.

Of great significance to the Board is the fact that the claimant had no opportunity to change her behavior or explain her actions prior to her summary discharge. The claimant believed she was properly performing her duties as a union shop steward. The claimant did not act with malice and had no idea, until she was discharged, that there was any concern about her actions. The claimant had no way to know that her pursuit of JS' complaint was upsetting others or causing anyone discomfort. The claimant was never cautioned that she might be over-stepping her authority or that she was jeopardizing her continued employment. The claimant was never asked about her conduct and never afforded an opportunity to conform to the employer's expectations.

The Board concludes that the employer did not meet its burden of proof in this matter and establish that the claimant acted with any degree of disregard for the employer's interests or its expected standards of behavior. Neither did she act with gross negligence or repeated carelessness. The claimant, if she did violate an employer rule, was not aware her conduct was in violation of a rule as she was never cautioned about her actions or afforded an opportunity to correct her behavior.

The claimant was discharged based upon the employer's conclusions about her actions. The employer did not provide a preponderance of competent and credible evidence to show that those actions constituted misconduct or gross misconduct under Maryland 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 has not 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 not 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, but not for gross misconduct or misconduct connected with the work, within the meaning of Maryland Code Annotated, Labor and Employment Article, Title 8, Section 1002 or 1003. No disqualification is imposed based upon the claimant's separation from employment with KFHP MID ATLANTIC STATES INC.

The Hearing Examiner's decision is reversed.

Donna Watts-Lamont, Chairperson

Clayton A. Mitchell, Sr., Associate Member

VD
Copies mailed to:
YULON WIMBUSH
KFHP MID ATLANTIC STATES INC
KAISER PERMANENTE
Susan Bass, Office of the Assistant Secretary

UNEMPLOYMENT INSURANCE APPEALS CORRECTED DECISION

YULON WIMBUSH

SSN #

Claimant

vs.

KFHP MID ATLANTIC STATES 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: 1330814
Appellant: Claimant
Local Office : 65 / SALISBURY CLAIM CENTER

February 07, 2014

For the Claimant: PRESENT, JESSICA STATION

For the Employer: PRESENT, GARY CAMPBELL

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 8-1001 (voluntary quit for good cause), 8-1002 - 1002.1 (gross/aggravated misconduct connected with the work) or 8-1003 (misconduct connected with the work).

PREAMBLE

The Board of Appeals has remanded this case to the Lower Appeals Division and this Hearing Examiner for a revised decision with findings of facts that "are succinct statements, culled from the record, in support of well-explained conclusions of law, evaluation of evidence and decision." Also, the Board has instructed this Hearing Examiner to "sufficiently explain his rationale for weighing the hearsay evidence against the first hand testimony citing legal authority when appropriate in the new decision".

FINDINGS OF FACT

The claimant, Yulon Wimbush, worked for the above captioned employer, KFHP Mid Atlantic, d/b/a Kaiser Permanente, from October 25, 2009 until September 10, 2013 as a receptionist earning $19.83 per

hour in a full time capacity. The claimant was terminated for making inappropriate remarks about her supervisor in the work environment outside of her capacity as a union shop steward.

The claimant was a shop steward for her union at the employer's location. In her capacity as a union official the claimant had discussion with Jessica Station, a co-worker, about Ms. Station's belief that Kathy Butler, the office administrator, was a racist. Ms. Butler is white and the claimant and Ms. Station are black. Ms. Station admitted to the claimant that she strongly believed that Ms. Butler is a racist and was working adversely against her on that presumption.

The employer was advised through employee complaints at that location that Ms. Butler was being called a racist by employees. In an effort to address this very serious situation the corporate human relations sent some people to that location to investigate whether Ms. Butler was not treating employees fairly and if some employees had, in fact, referenced her as a racist in the work environment. Gary Campbell, the practice manager, contacted the employer's corporate Human Resources (HR) department because he was concerned about the serious nature of the allegations and he wanted impartial investigation by outsiders who did not work at that location.

The claimant, Ms. Station and other employees at that location were interviewed. Ms. Station admitted in her interview that she called Ms. Butler a racist and she explained that she had done so because she believed that Ms. Butler gave advantages to white employees at the expense of black employees. During her interview, the claimant admitted that she believed that Ms. Butler had worked against her in a transfer or promotion opportunity by telling another supervisor that the claimant used a lot of FMLA (family medical leave). In her interview the claimant did not admit to directly calling Ms. Butler a racist although she admitted to her conversation with Ms. Station. The claimant did have conversations with other co-workers where she discussed Ms. Station's allegation that Ms. Butler was a racist.

Complicating the situation further, several co-workers told the investigators that they had heard the claimant refer to Ms. Butler as a racist in the office and it was not done in her capacity as a shop steward. After their investigation the employer decided to terminate Ms. Station and the claimant for making statements of an unprofessional and defamatory nature. (See Emp. Ex. #1) The report recommending her termination included names of the co-workers who made the statements about the claimant but their names were redacted to protect their privacy. (See Emp. Ex. #1)

The findings also concluded that Ms. Butler had not operated in a racist or unfair manner in her position in the office. Specifically, the employer's investigation, which was the most intensive investigation ever at that location as witnessed by Mr. Campbell, the practice manager, held that the claimant referred to Ms. Butler as a racist with other employees outside of her capacity as a union official. (See Emp. Ex. #3)

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).

EVALUATION OF EVIDENCE

The evidence presented shows that the employer discharged the claimant. In a termination case the employer has the burden of proving, by a preponderance of the credible evidence, that the discharge was for some degree of misconduct connected with the work within the meaning of Maryland Unemployment Insurance Law. Ivey v. Catterton Printing Company, 441-BH-89. In the case at bar, that burden has been met.

In Kade v. Charles H. Hickey School, the Court of Special Appeals reversed a decision by an administrative agency for relying on hearsay evidence without establishing the reliability of that evidence. In Kade, a school employee appealed his suspension by his employer for disrespectful conduct towards a fellow employee. At the hearing before the administrative agency, the superintendent of the school was the only witness for the employer. The superintendent testified that he was not present on the night of the incident and that all of the information he possessed was based on statements given to him. The Court found the agency's reliance on the hearsay statements submitted by the superintendent to be improper.

Although the claimant denied that she called Ms. Butler a racist, she testified in this hearing that she does, in fact believe Ms. Butler had treated her unfairly and that was why she investigated transfer options. The employer's investigation was commenced at the corporate level and the evidence came from an impartial investigation conducted by corporate personnel into allegations going both ways: whether Butler was unfair or whether employees had called her a racist.

Mr. Campbell for the employer credibly testified that he was so concerned about the serious nature of the allegations that he called for a corporate HR investigation and the one that was conducted was by far the most intensive and thorough he had ever seen during his time with the employer.

The evidence offered by both parties supports the conclusion that the claimant had, in fact, called Ms. Butler a racist in the office with other employees present. The claimant's denial of this allegation was less credible than the employer's evidence of the investigation which included numerous interviews. Specifically, the claimant admitted in the hearing that she strongly believes that Ms. Butler worked against her and other black employees in their efforts to move up within the organization. Furthermore, the claimant admitted in the hearing that she discussed with other people Ms. Station's allegations that Ms. Butler was a racist. However, these conversations cannot be within the scope of her purview as a union shop steward if they were casual conversations with co-workers as she described.

Lastly, referring to the Kade decision, the superintendent in that case brought hearsay evidence that the Court referenced as having "no indication that this hearsay evidence was reliable, credible or competent. The statements which were submitted by appellant's co-workers are not under oath and do not reflect how they were obtained." In the present case we know exactly how the statements were obtained: although they may not have been under oath, they were the taken during a far-reaching investigation into very serious allegations. The employer was attempting to find out if Ms. Butler was a racist or acting to the detriment of employees on the basis of race. They determined that she was not and had not.

Conversely, the employer sought to discover if Ms. Station and the claimant had referenced Ms. Butler as a racist in the workplace through interviews with all of the parties. They determined that they had. And more specifically, the employer held that the claimant had referenced Ms. Bulter as a racist in conversations with co-workers outside of her capacity as a union official. The claimant admitted as much when she stated during this hearing that she repeated Ms. Station's complaints to other employees. The claimant's co-workers gave candid interviews to the employer and although their names were redacted in the copy given to the claimant in the hearing, they were present in the document that resulted from the investigation.

On the issue of the claimant's denial that she directly called Ms. Butler a racist I find her testimony to be wholly self-serving and lacking in truth. Based upon her demeanor and body language in the hearing it was clear to this Hearing Examiner that she did, in fact, believe Ms. Butler was a racist and had referred to her as such to other employees. The fact that she was a union shop steward does not excuse her actions in this regard.

Referencing a supervisor as a racist in the work environment is the type of behavior that demonstrates an overall indifference to the employer's interests and was a deliberate and willful disregard of the standards of behavior that the employer had a right to expect.

There is sufficient credible direct and hearsay evidence to show misconduct on the part of the claimant and, therefore, an unemployment disqualification shall be imposed based on Md. Code, Ann., Labor & Employment Article, Section 8-1002 pursuant to this separation from 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 September 8, 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 Examiner is reversed.

P Randazzo

P Randazzo
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

This is a final decision of the Lower Appeals Division. Any party who disagrees with this decision 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 February 20, 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: November 5, 2013
blp/Specialist ID: USB37
Seq No: 001
Copies mailed on February 05, 2014 to:

YULON WIMBUSH
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LOCAL OFFICE #65
KAISER PERMANENTE