-DECISION-

Claimant:
BRIAN W IMES

Employer:
WASHINGTON CO BOARD EDUCATION

Decision No.: 1726-BR-11

Date: April 06, 2011

Appeal No.: 1024706

S.S. No.:

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: May 06, 2011

REVIEW ON THE RECORD

After a review on the record, the Board adopts the following findings of facts and conclusions of law. The hearing examiner's decision is reversed.

The claimant was employed as a bus driver for the employer, the Washington County Board of Education, from September 6, 2006 through May 21, 2010. The claimant was discharged for alleged verbal abuse, bullying and harassment of a co-worker.

The claimant and the co-worker had a long history of aversion to each other. In April, 2008 the claimant filed a sexual harassment claim against a co-worker with the school board. In July, 2008, both the claimant and the co-worker received a reprimand letter from the employer regarding these incidents.

The co-worker continued to harass the claimant and his wife. The co-worker made false allegations about the claimant's sexual orientation and his alleged physical abuse of his wife. In addition the co-worker stalked the home of the claimant and his wife. The co-worker threatened the claimant and his wife. The co-worker continued to use derogatory and offensive slurs against the claimant on school property and via emails.

The incident that led to the claimant's discharged stems from alleged derogatory comments that the claimant allegedly made, outside of his normal work hours, against the co-worker on the social networking website "Facebook". The co-worker filed a claim of sexual harassment against the claimant on January 29, 2010. This claim led to the claimant's discharge.

The employer discharged the claimant for a violation of their sexual harassment policy which states as follows:

> Harassment of any individual by any person or group of people will not be tolerated in Washington County Public School System. His policy is in effect on school grounds, school system property, or on property within the jurisdiction of the school system; while on school-owned and/or operated buses, vehicles or chartered buses; while attending or engaged in school activities, and while away from school grounds if the misconduct directly affects the learning environment, management, and welfare of the school or school system.

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(H)(1).* The Board fully inquires into the facts of each particular case. *COMAR 09.32.06.02(E).*

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."

At a company picnic in a public place, he claimant became involved in a fight with another patron of the establishment over the patron's use of inappropriate language in the presence of the claimant's children. The claimant was discharged for violating the employer's rule prohibiting fighting "on company time and premises." *Hart v. Vista Chemical Company, 391-BH-85.* In the instant case, the claimant was not in the course of his employment at the time of the incident; rather he was in the course of a social activity with persons with whom he happened to work. Therefore, the claimant's act was not connected with the work and no disqualification is appropriate.

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).* "The Court has remained steadfast in reminding agencies that to be admissible in an adjudicatory proceeding, hearsay evidence must demonstrate sufficient reliability and probative value to satisfy the requirements of procedural due process." *Id. at 411. See also 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.").

One important consideration for a hearing body is the nature of the hearsay evidence. For instance, statements that are sworn under oath, see *Kade, 80 Md. App. at 726, 566 A.2d at 151, Eichberg v. Maryland Bd. of Pharmacy, 50 Md. App. 189, 194, 436 A.2d 525, 529*, or made close in time to the incident, see *Richardson v. Perales, 402 U.S. 389, 402, 28 L. Ed. 2d 842, 91 S. Ct. 1420 (1971)*, or corroborated, see *Consolidated Edison v. N.L.R.B, 305 U.S. 197, 230, 83 L. Ed. 126, 59 S. Ct. 206 (1938)* ("mere uncorroborated hearsay or rumor does not constitute substantial evidence"); *Wallace v. District of Columbia Unemployment Compensation Bd., 294 A.2d 177, 179 (D.C. 1972)*, ordinarily is presumed to posses a greater caliber of reliability. *Cited in Travers 115 Md. App. at 413. Also see Parham v. Dep't of Labor, Licensing & Reg[ulation], 985 A.2d 147, 155 (Md. Ct. Spec. App. 2009). Also see Cook v. National Aquarium in Baltimore, 1034-BR-91*(the employer offered not a single specific example of the alleged misconduct as observed by either of the employer's witnesses and no documents were introduced relating to any specific instance of misconduct. The employer offered only conclusory statements that the claimant engaged in a certain type of misconduct).

The hearing examiner made no such examination into the reliability of the hearsay evidence in his evaluation of the evidence in this case. As the Court of Appeals has noted, for a reviewing court to perform properly its examination function, an administrative decision must contain factual findings on all the material issues of a case and a clear, explicit statement of the agency's rationale. *Harford County v. Preston, 322 Md. 493, 505, 588 A.2d 772, 778 (1991).* A fully explained administrative decision also fulfills another purpose; it recognizes the "fundamental right of a party to a proceeding before an administrative agency to be apprised of the facts relied upon by the agency in reaching its decision . . . ." *Id.*; *also see Mehrling v. Nationwide Ins. Co., 371 Md. 40, 56 (2002)*; *Fowler v. Motor Vehicle Administration, 394 Md. 331, 353 (2006)*; *Crumlish v. Insurance Commissioner, 70 Md. App. 182, 187 (1987).*

In *Kade v. Charles H. Hickey School,* the Court of Special Appeals reversed a decision by an administrative agency for similarly 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.

> Even though the statements were relevant, *there was 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.... No reason was given as to why the declarants were unavailable.

The hearing examiner bases his credibility determination on what he perceives as conflicting statements. The hearing examiner's credibility determinations are not demeanor-based.

Because the hearing examiner's credibility determinations were not demeanor-based, the Board does not owe the hearing examiner "special deference" as to his findings in this regard. *See Dept. of Health and Mental Hygiene v. Shrieves, 100 Md. App. 283, 299 (1994).* The Court of Appeals distinguishes between: (1) testimonial inferences, "credibility determinations based on demeanor," and (2) derivative inferences, "inferences drawn from the evidence itself." *Shrieves, 100 Md. App. at 299* (citations omitted). The Court explained:

> Weight is given the administrative law judge's determinations of credibility for the obvious reason that he or she "sees the witnesses and hears them testify, while the Board and the reviewing court look only at the cold records."....But it should be noted that the administrative law judge's opportunity to observe the witnesses' demeanor does not, by itself, require deference with regard to his or her derivative inferences. Observation makes weighty only the observers testimonial inferences.

Shrieves, 100 Md. App. at 299-300.

The hearing examiner derived his credibility determinations in this regard from what he perceived as conflicting evidence in the record:

> The employer offered credible testimony with supporting documentary evidence that the claimant engaged in behavior which clearly violated its Harassment Policy and created a hostile work environment. In addition, the employer showed through credible evidence that the claimant had engaged in similar behavior in the past, received a warning for such behavior, and was told that if he engaged in similar behavior in the future that he would be termination.
>
> The claimant offered credible evidence that the victim of his most recent act was involved with other individuals who were former co-workers of the claimant who disliked him (See Claimant Exhibit #1). The claimant also testified that it is possible (*sic*)[1], from what he has been told by computer experts, to capture a "screen-shot" of a Face Book page and modify it through computer software. However, the claimant was not able to produce credible or compelling evidence that the victim and the other co-workers did alter the Face Book pages presented as evidence of the claimant's offensive language aimed at the victim in this case. While the claimant's hypothesis that he was framed by the victim is plausible, no evidence was presented to show that it is probably or more likely than not. Further, the claimant was unable to show that his behavior was reasonable or appropriate, even if the victim disliked him.

The Board does not adopt the hearing examiner's credibility determinations regarding the employer's witnesses.

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 will first consider the employer's evidence. The employer's entire case is based on hearsay. None of the individuals that witnessed the alleged harassment of the co-worker were present at the hearing. The only evidence the employer presented was documentary evidence of alleged misbehavior on the social networking site, Facebook, which could not be authenticated.[2] There was no reason given as to why the witnesses to this alleged harassment were not available for the hearing. Without credible corroborating testimony, the Board gives less weight to the employer's hearsay evidence.[3]

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[1] Based on the reading of this sentence and the follow up sentence the Board believes that "possible" should be "impossible".

[2] The employer's witness, Tim Thornburg, was the supervisor of employee and labor relations. He was not a computer expert. He testified that he was told by his IT department that the Facebook "screen shot" was authentic and unaltered. However, the claimant also credibly testified that he did not write the comments on Facebook. That a "screen shot" could not be printed out from a Facebook page. Mr. Thornburg agreed that the victim provided a "word" document of the page. However, she then later provided him with the "screen shot". No one from the employer's IT department at the hearing to testify as to the authenticity of the alleged page. And the alleged victim of the claimant's abuse was also not at the hearing to authenticate the document or testify as to the claimant's alleged harassment.

[3] Further, assuming *arguendo*, that the claimant engaged in the alleged misconduct, by violating the employer's policy "while

The Board weighed the credible evidence in the record and finds the parties' evidence is in equipoise. Therefore, the Board finds that because the claimant was discharged, the employer did not meet its burden of demonstrating upon a preponderance of the evidence that the claimant's actions rose to the level of misconduct within the meaning of Section 8-1003.

The Board finds that the claimant's behavior did not rise to the level of misconduct.

The Board finds based on a preponderance of the credible evidence that the employer did not meet its burden of demonstrating that the claimant's actions rose to the level of gross misconduct within the meaning of *§ 8-1002*. 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 WASHINGTON CO. BOARD OF EDUCATION.

The Hearing Examiner's decision is reversed.

Donna Watts-Lamont, Chairperson

Clayton A. Mitchell, Sr., Associate Member

RD/mr
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away from school grounds if the misconduct directly affects the learning environment, management, and welfare of the school or school system", the alleged derogatory material was not incident to the claimant's employment or connected with his work. It was not posted while he was working. See *Hart v. Vista Chemical Company, 391-BH-85.*

UNEMPLOYMENT INSURANCE APPEALS DECISION

BRIAN W IMES

SSN #

Claimant

vs.

WASHINGTON CO BOARD EDUCATION

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: 1024706
Appellant: Employer
Local Office : 63 / CUMBERLAND CLAIM CENTER

August 13, 2010

For the Claimant: PRESENT , TIMOTHY D. THORNBURG, TIMM IMES

For the Employer: PRESENT, JAMESA. STULLER, HEIDA BLACK

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).

FINDINGS OF FACT

The claimant began working for this employer on or about September 6, 2006. At the time of separation, the claimant was working as a bus driver. The claimant last worked for the employer on or about May 21, 2010, before being terminated for violation of company policy.

The claimant was terminated when it was found that he was harassing and bullying a co-worker. The claimant, through the Face Book social networking website, created a hostile work environment when he aimed offensive, defamatory, and threatening language at a female co-worker, referring to her as a "vd queen," "prostitute," "whore", and "low life trash." The claimant also indicated that he wanted the co-worker to "die off" (See Employer Exhibit #3). The victim was a co-worker who the claimant is aware has a

strong dislike for him, with whom he has had verbal spats in the past, and who he believes is stalking and conspiring with others to harm him.

This behavior was in direct violation of the employer's Harassment Policy, of which the claimant was made aware prior to his violation of the Policy (See Employer Exhibit #1). The Policy includes actions which occur away from school grounds, but which may affect the welfare of the school or school system as behavior which may result in disciplinary action. The claimant received a warning for engaging in similar behavior prior to this incident on July 14, 2008. He was informed at that time that if he engaged in another similar incident that he would be terminated.

CONCLUSIONS OF LAW

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).

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 8-1002 provides that an individual shall be disqualified from receiving benefits when he or she was discharged or suspended from employment because of behavior that demonstrates gross misconduct. The statute defines gross misconduct as repeated violations of employment rules that prove a regular and wanton disregard of the employee's obligations.

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.

In the case of a discharge, the employer has 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 offered credible testimony with supporting documentary evidence that the claimant engaged in behavior which clearly violated its Harassment Policy and created a hostile work environment. In addition, the employer showed through credible evidence that the claimant had engaged in similar behavior

in the past, received a warning for such behavior, and was told that if he engaged in similar behavior in the future that he would be terminated.

The claimant offered credible evidence that the victim of his most recent act was involved with other individuals who were former co-workers of the claimant who disliked him (See Claimant Exhibit #1). The claimant also testified that it is possible, from what he has been told by computer experts, to capture a "screen-shot" of a Face Book page and modify it through computer software. However, the claimant was not able to produce credible or compelling evidence that the victim and the other co-workers did alter the Face Book pages presented as evidence of the claimant's offensive language aimed at the victim in this case. While the claimant's hypothesis that he was framed by the victim is plausible, no evidence was presented to show that it is probable or more likely than not. Further, the claimant was unable to show that his behavior was reasonable or appropriate, even if the victim disliked him.

Because the claimant was aware of the employer's Harassment Policy and because he had engaged in and received a warning for similar behavior in the past, 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, his actions 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 May 16, 2010 and until the claimant becomes reemployed and earns wages in covered employment that equal at least 20 times the claimant's weekly benefit amount.

The determination of the Claims Specialist is reversed.

H Abromson, 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 August 30, 2010. 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: August 04, 2010
DW/Specialist ID: WCU10
Seq No: 001
Copies mailed on August 13, 2010 to:
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