

- DECISION -

Claimant:
COLIN G WRIGHT

Decision No.: 1758-BR-13

Date: April 29, 2013

Appeal No.: 1239903

S.S. No.:

Employer:
SHOP RITE OF GLEN BURNIE LLC

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 29, 2013

REVIEW OF THE RECORD

After a review of the record, and after deleting the penultimate sentence of the third paragraph, the Board adopts the hearing examiner's modified findings of fact. The Board also deletes references, in the Evaluation of Evidence, to the claimant grabbing or shaking the woman by the shoulders. 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)*. 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 his appeal, the claimant disputes the findings of fact and the conclusions of law in the hearing examiner's decision. The claimant does not cite to the evidence of record and makes no other contentions of error. The claimant contends: "...I did not shove her down and shake her by her shoulders." The Board agrees that the claimant did not shake the woman, but he did push her away and she fell. The claimant lastly contends: "I also feel that my employer failed to protect me from potential harm..."

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.

The Board has thoroughly reviewed the record from the hearing. The Board does not find the claimant actions rose to the level necessary to support a finding of gross misconduct. The only connection between the claimant's action and the employer was that the altercation occurred on the employer's premises. The evidence established that the claimant attempted to walk away and ignore the woman. The claimant had tried to avoid contact with her, but someone else allowed her in the facility. The two argued and the woman escalated the situation by throwing something at the claimant. Granted, the best course of action for the claimant at that point would have been to go to a supervisor or someone in authority and ask that the woman be removed. Instead, he pushed her and she fell. Her garment was accidentally cut and she asked that the police be called. The claimant was discharged solely as a result of this incident.

As to the claimant's last contention, the Board could agree if the claimant had made it clear to the employer that the woman was dangerous, or could become dangerous. The claimant did not take this step and did not ask that the employer not allow her to enter or, once she entered, did not ask the employer to have her removed. An employer cannot protect workers from dangers about which it has no actual or implied knowledge.

The claimant could have avoided this situation if he had simply continued to walk away, going to a member of management and asking that the claimant be removed. When the claimant elected to confront the woman, and pushed her, he acted in breach of his duties to the employer. This was simple misconduct for which the claimant should be assessed a benefit penalty.

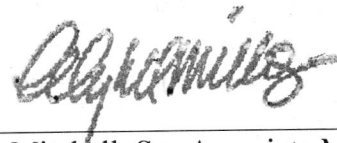
The Board notes that the hearing examiner did not offer or admit the *Agency Fact Finding Report* into evidence. The Board did not consider this document when rendering its decision.

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 simple misconduct within the meaning of §8-1003. 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 decision shall be reversed for the reasons stated herein.

DECISION

It is held that the claimant was discharged for misconduct connected with the work, within the meaning of Section 8-1003 of the Labor and Employment Article Maryland Code Annotated, Title 8, Section 1003. The claimant is disqualified from receiving benefits from the week beginning October 7, 2012, and the nine weeks immediately following.

The Hearing Examiner's decision is reversed.



Clayton A. Mitchell, Sr., Associate Member



Donna Watts-Lamont, Chairperson

KJK/mw

Copies mailed to:

COLIN G. WRIGHT

SHOP RITE OF GLEN BURNIE LLC

SHOP RITE OF GLEN BURNIE

Susan Bass, Office of the Assistant Secretary

UNEMPLOYMENT INSURANCE APPEALS DECISION

COLIN G WRIGHT

SSN #

Claimant

vs.

SHOP RITE OF GLEN BURNIE LLC

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: 1239903

Appellant: Employer

Local Office : 63 / CUMBERLAND
CLAIM CENTER

January 08, 2013

For the Claimant: PRESENT

For the Employer: PRESENT, BETHANY PETERSON, JOHN CONDE, RANDALL STAICES

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, Colin Wright, opened a claim for unemployment insurance benefits and established a benefit year beginning October 21, 2012 and qualified for a weekly benefit amount of \$186.

The claimant worked for the employer, Shop Rite of Glen Burnie LLC, from August 29, 2010 through October 11, 2012, his last actual day of work. At the time of separation, the claimant was working part time, 32 hours a week, as an overnight stocker and was paid \$9.20 an hour. The claimant was discharged for fighting in the store.

The employer closes its doors to customers at midnight. A woman, who had been a friend of the claimant

and was a former employee at the store, came into the store at about 11:45 p.m. to talk to the claimant. The woman had been calling the claimant that day but the claimant had not returned her calls. At about 11:55 p.m. the woman found the claimant while he was working and stocking shelves and tried to talk him into giving her money to buy cigarettes. The claimant tried to avoid her and walked away several times which only made the woman more upset. Eventually, the woman picked up a small package of yogurt and threw it at the claimant. The package did not strike the claimant but he heard it as it whizzed by. The claimant then went to the woman shoved her hard enough to knock her backwards, and she fell to the floor. He then grabbed her by the shoulders and pulled her up. The claimant had a box cutter in his hand which he used to do his job and it cut into the woman's coat several inches.

The woman then went to the store manager and asked that the police be called. The police were called and the claimant was arrested. He was charged with second degree assault and is due to appear in court to be tried in January 2013. The claimant was also discharged the next day.

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.

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

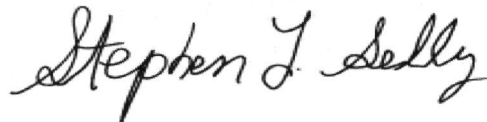
burden has been met.

The claimant testified that he was only trying to fend the woman off when she fell to the floor and that he never tried to use his box cutter to harm her. However, the manager on duty reviewed the video of the incident on the night it happened and saw the claimant come back towards the woman and shoved her after she threw the yogurt package at him. It does not appear that the claimant tried to cut the woman with the box cutter but that he lost his temper and shoved her down and then shook her by her shoulders. The claimant should have gone to the security officer in the store or to a supervisor to ask to have her removed instead of just letting things build up. The woman had a reputation for abusing alcohol and the claimant testified that it appeared that she had been drinking but the employer's witness who dealt with her that night could not confirm this. Striking or shoving a person as the claimant did is clearly wrong and he was not doing it in self-defense but out of anger. Therefore it must be held that he was discharged for gross misconduct in this case.

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 October 7, 2012, 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 reversed.



S Selby, 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 January 23, 2013. 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: December 17, 2012
BLP/Specialist ID: WCU60
Seq No: 001
Copies mailed on January 08, 2013 to:

COLIN G. WRIGHT
SHOP RITE OF GLEN BURNIE LLC
LOCAL OFFICE #63