-DECISION-

Claimant:
JERMAINE A CARROLL

Employer:
STAGS HEAD LLC

Decision No.: 2053-BR-11

Date: April 13, 2011

Appeal No.: 1024637

S.S. No.:

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: May 13, 2011

REVIEW ON THE RECORD

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

The claimant was employed as a full-time manager from June 1, 2009 through March 14, 2010. The claimant is unemployed as the result of a discharge.

> The claimant was discharged during a telephone call with his supervisor, Mr. Tyler. On March 14, 2010, Mr. Tyler informed the claimant that there would be "some changes" on Monday and that the two of them would "have a conversation". Mr. Tyler refused to discuss any details regarding the changes he wanted to implement. Being concerned that the employer owed him approximately $14,000 for the sale of a mobile trailer[1], the claimant pressed Mr. Tyler for more details regarding the changes. Mr. Tyler told the claimant that he did not "owe him a fucking thing" and abruptly ended the call. The claimant reasonably believed he was discharged.
>
> The claimant attempted to follow up with Mr. Tyler the following week in an attempt to retain his job. Despite an attempt to meet with Mr. Tyler at an agreed upon date (March 29), Mr. Tyler did not meet with the claimant. The claimant was discharged effective March 14, 2010.

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."

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[1] The claimant sold a trailer prior to his first day of work for the sum of $20,000. The claimant was to be paid $1000 per month for the trailer. The transaction was collateral to the claimant's employment.

The material portion of the employer's case was based purely on hearsay evidence. 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.

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."

> 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 Court's rejection of the administrative agency's use of hearsay evidence in *Kade* applies with equal force to the hearing examiner and the Board in this case.

The Board finds insufficient evidence to support a finding that the claimant was discharged for misconduct by a preponderance of the evidence in this case. The employer asserts that the claimant, "intentionally and with the intent to misappropriate, rang up" a forty dollar sale for forty cents; however, there is insufficient first-hand evidence to support this assertion. The employer relied upon statement made by witnesses not present at the hearing. The Board is persuaded that the claimant collected the correct amount of money ($40.00) but mistakenly rang the sale up as forty cents instead of forty dollars. This was an isolated incident of ordinary negligence that did not result in a loss to the employer.

The employer witnesses' hearsay statements regarding the alleged cash register "no sales" transactions were offered for the truth of the matter asserted and were not under oath or affidavit. The witness statements were not written and not under oath or affidavit. The witnesses were not present for cross-examination by the claimant's counsel. The employer referred to documentation regarding the sale during its testimony but submitted no documentation to support or to corroborate the hearsay witnesses' statements. The employer asserted there were many improper "no sales" but had insufficient evidence to support a finding that these were attributable to the claimant or that they occurred at all. The Board is persuaded that the only time the claimant rang up a "no sale" was to obtain change and not for an improper person. The employer admitted that the claimant was not the only one who had access to the cash register and the cash drawer. The employer's testimony regarding the alleged improper register transactions was too vague for the Board to give it any weight.

The employer's assertions regarding the claimant's alleged attendance violations were also based substantially on hearsay evidence. No time cards or records were submitted to support the employer's assertions in this regard. There is insufficient evidence that the claimant's move to Pennsylvania or his attendance at school resulted in attendance violations.

The claimant was never actually told the reason for his discharge. In the March 14, 2010 telephone conversation, Mr. Tyler asserted to the claimant that the claimant "knew what he [Mr. Tyler] was talking about".

The Board does not find Mr. Tyler's testimony credible. His testimony regarding when the claimant was discharged and whether the claimant was told that he was going to be transferred was not consistent. Mr. Tyler accused the claimant of being "a thief" without offering substantial, corroborated or probative evidence. A finding of theft must be based upon something more than hearsay; it requires credible first-hand testimonial or substantial documentary proof. The record lacks such proof.

Mr. Tyler's actions towards the hearing examiner additionally impeached his credibility. He filibustered over the hearing examiner's questions and instructions and he often vociferously and improperly argued with the hearing examiner. Together with the absence of documents to corroborate his hearsay testimony

and his inconsistent statements, the Board concluded that it shall afford more weight to the claimant's first-hand version of events. The Board finds the claimant's first-hand testimony consistent and credible.

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 did not meet its burden of demonstrating that the claimant's actions rose to the level of 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 STAGS HEAD, LLC.

The Hearing Examiner's decision is reversed.

Donna Watts-Lamont, Chairperson

Clayton A. Mitchell, Sr., Associate Member

RD
Copies mailed to:
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UNEMPLOYMENT INSURANCE APPEALS DECISION

JERMAINE A CARROLL

SSN #

Claimant

vs.

STAGS HEAD 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: 1024637
Appellant: Claimant
Local Office : 65 / SALISBURY CLAIM CENTER

December 21, 2010

For the Claimant: PRESENT , VICTORIA R. ROBINSON ESQ

For the Employer: PRESENT , ERNESTINE TAYLOR, ANGELA EISENBOCK

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 1001 (Voluntary Quit for good cause), 1002 - 1002.1 (Gross/Aggravated Misconduct connected with the work), or 1003 (Misconduct connected with the work).

FINDINGS OF FACT

The claimant began employment as a cook for the employer's deli stall in Lexington Market. In October 2009, the employer promoted the claimant to manager. The claimant supervised two to three employees and had a weekly salary of $1,000.00. The claimant was unsupervised as Angela Eisennock and Ernest Tyler, the employer's owner, did not work on site at Lexington Market.

The claimant's last day of work for the employer was Friday, March 12, 2010. On Wednesday, March 10, 2010, two employees who worked with the claimant contacted Tyler. The employees informed Tyler that a customer purchased $40.00 worth of delicatessen in a cash transaction. The claimant only rang a sale of

$.40 and took the remaining cash. After one of the employees confronted the claimant, the claimant rang a sale for $39.60 on the cash register. The claimant acknowledged that he acted as alleged by the employer. The claimant contended that the transactions were a mistake that he corrected when the employee brought the error to the claimant's attention. The claimant's testimony was not credible particularly as the employer established the employees had contacted Tyler previously because the claimant was not ringing the full amount on the register for cash sales.

Tyler and Eisennock met with the two employees later on March 10, 2010. At that time, Tyler and Eisennock also reviewed the tape from the register for the previous two months. Tyler and Eisennock observed that the claimant rang approximately 30 "no sales" on a daily basis during the previous two months. The employer established that this conduct was highly unusual as the only time someone is to open the cash register is to ring up a sale.

Before March 10, 2010, the employer decided to change the claimant's position because he was late for work and left early. After the employer hired the claimant, the claimant moved 75 miles from Lexington Market. After his move, the claimant was consistently late to work as established by Tyler who called the employees at 10:00 a.m. on a daily basis. The claimant had never arrived to work by then.

After he was hired, the claimant also registered for fulltime cooking school. The claimant had classes that began at 6:00 p.m. on three days during the week. The employer agreed the claimant could work 6:00 a.m. to 3:00 p.m. on the three days in order to accommodate the claimant. However, the claimant failed to live up to his end of the bargain because he was never at work by 6:00 a.m.

Prior to March 10, 2010, Tyler told the claimant that he intended to change the claimant's position and would provide the details to the claimant in a meeting that he would arrange in the near future. Tyler had another business that was a catering company. Tyler intended to offer a chef position for the catering business to the claimant. The employer did not want the claimant to handle money for the employer in the future.

The claimant and Tyler had a telephone conversation on March 21, 2010. Tyler intended to schedule the meeting with the claimant during the telephone conversation. Tyler also planned to offer the new job to the claimant. However, Tyler hung the telephone up after the two began to argue about whether Tyler owed money to the claimant for a piece of equipment purchased from the claimant. Tyler was also angry about the claimant's mishandling of the cash on March 10, 2010 and for the previous months.

After Tyler ended the telephone call, the claimant concluded the employer had terminated him. The claimant failed to report to work subsequent to the telephone conversation.

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, the employer discharged the claimant due to gross misconduct. The employer intended to change the claimant's position due to the claimant consistently arriving late to work and leaving early. The employer failed to convey this offer to the claimant after the conversation ended on the telephone on March 21, 2010. Tyler hung up the telephone because he was angry about the claimant's misappropriation of funds from the employer and the parties' transaction concerning the claimant's sale of equipment to the employer. The claimant misappropriated money from the employer on March 10, 2010. The claimant acknowledged that he only rang $.40 for a $40.00 transaction and took steps to rectify the situation only because a co-worker confronted the claimant. The employer established that the claimant regularly hit the "no sale" button on the cash register for two months previously when an employee should ring the "no sale" button on a very limited basis. 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 March 7, 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.

G R Smith, 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 05, 2011. You may file your request for further appeal in person at or by mail to the following address:

Board of Appeals
1100 North Eutaw Street
Room 515
Baltimore, Maryland 21201
Fax 410-767-2787
Phone 410-767-2781

NOTE: Appeals filed by mail are considered timely on the date of the U.S. Postal Service postmark.

Date of hearing : December 02,2010
CH/Specialist ID: RWD3M
Seq No: 002
Copies mailed on December 21, 2010 to:

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