

- DECISION -

Claimant:
TONI M MOORE

Decision No.: 2283-BR-12

Date: May 07, 2012

Appeal No.: 1200415

S.S. No.:

Employer:
ASTYPALEA INC

L.O. No.: 65

Appellant: Claimant

Issue: Whether the claimant was discharged for misconduct or gross misconduct connected with the work within the meaning of Maryland Code, Labor and Employment Article, Title 8, Section 8-1002 or 1003.

- 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 06, 2012

REVIEW OF THE RECORD

After a review of the record, the Board adopts the hearing examiner's findings of fact. However, the Board concludes that these facts warrant a different conclusion 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); 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."

In her appeal, the claimant contends the employer provided "false testimony" and "unproven documentation of the incident." The claimant does not specify what she perceives as "false", nor does she explain what was "unproven" about the documentation submitted. The claimant makes no other contentions of error and does not cite to the evidence of record. On appeal, the Board reviews the evidence of record from the Lower Appeals hearing. That review reveals that the claimant was discharged for gross misconduct connected with her work.

The claimant was warned or counseled several times about her language while working. She was admonished to stop using rude, unprofessional and foul language to, or around, co-workers and guests. The claimant was repeatedly heard making comments about her work-place, its management and her co-workers, which was offensive and vulgar. Customers also complained to the employer about these same issues. Despite the warnings, the claimant continued and the employer ultimately discharged her.

The claimant worked directly with members of the public who were guests in the employer's restaurant. The employer's business success depends upon the good will of its customers. The claimant also interacted with the other employees. The claimant knew that her continued inappropriate language was offensive to others and was jeopardizing her continued employment. When the claimant did not correct this behavior, she was discharge was for gross misconduct.

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

The Board finds based on a preponderance of the credible evidence that the employer has 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 and in the hearing examiner's decision.

DECISION

It is held that the claimant was discharged for gross misconduct connected with the work, within the meaning of Maryland Code Annotated, Labor and Employment Article, Title 8, Section 1002. The claimant is disqualified from receiving benefits from the week beginning November 13, 2011 and until the claimant becomes re-employed, earns at least twenty times their weekly benefit amount and thereafter becomes unemployed through no fault of their own.

The Hearing Examiner's decision is reversed.



Donna Watts-Lamont, Chairperson



Clayton A. Mitchell, Sr., Associate Member

RD

Copies mailed to:

TONI M. MOORE

ASTYPALEA INC

Susan Bass, Office of the Assistant Secretary

UNEMPLOYMENT INSURANCE APPEALS DECISION

TONI M MOORE

SSN #

vs.

ASTYPALEA INC

Claimant

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: 1200415

Appellant: Employer

Local Office : 65 / SALISBURY

CLAIM CENTER

January 23, 2012

For the Claimant: PRESENT

For the Employer: PRESENT, TONY ATHANOSIOU

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, Toni M Moore, worked for this employer for approximately five years, and her last day worked was November 16, 2011. At the time of her discharge, the claimant worked full-time as a bartender, earning an hourly salary of \$6.00 plus tips.

The employer terminated the claimant from her position for using inappropriate language in the workplace. The employer received a complaint from a customer regarding the language used by the claimant during a visit to the employer's restaurant. The claimant was counseled about the use of profanity in the workplace, including the use of the expletive "fu**", and advised that this conduct was not appropriate and could lead to further disciplinary action. On November 16, 2011, the general manager personally overheard the

claimant use profanity in front of other employees and customers, specifically several references to “fu**ing” management and “fu**ing” employees.

The claimant was terminated for using inappropriate language in the workplace in front of management and customers.

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).

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.

The term “misconduct” (other than gross) is undefined in the statute. [See Allen v. CORE Target City Youth Program, 275 Md. 69, 338 A.2d 237 (1975)]. The Court of Appeals’ standard for misconduct is “...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, 314 A.2d 113 (1974)].

In Barnes v. St. Luke Lutheran Home, Inc., 235-BR-88, the Board of Appeals held “The claimant had been previously warned about having heated arguments with (co-workers). (On the day in question the) claimant became abusive and loud. She used foul language (and made) abusive remarks, disturbing others who were in their offices. This was gross misconduct.”

A claimant’s misconduct is not mitigated by the alleged fact that others also committed misconduct. Griffith v. State Employees’ Credit Union, 374-SE-92.

EVALUATION OF EVIDENCE

The employer had the burden to show, by a preponderance of the credible evidence, the claimant’s termination was for conduct which rose to the level of misconduct or gross misconduct, pursuant to the Maryland Unemployment Insurance Law. (See Hartman v. Polystyrene Products Company, Inc., 164-BH-83). In the case at bar, the employer met this burden.

The Board of Appeals’ precedent cases related to “Disruptive Behavior” and “Profane or Abusive Language” do not address the specific language which formed the basis for the employer’s discharge

decision in the case at bar. (See Noble v. The Bees Distributing Company, Inc., 672-BR-85, Richard v. DHMG Laboratories Administration, 422-BR-88, Shird v. F and H Contractors, Inc., 185-BH-88, Barnes v. St. Luke Lutheran Home, Inc., 235-BR-88, and Reed v. Saval Foods Corporation, 15-BR-91). Therefore, the Examiner must apply the general definitions of "Misconduct" and "Gross Misconduct," cited above, to the facts of the case at bar.

Although the claimant denied ever using the word "fu**" in the public areas of the workplace, she admitted she may have used other words such as "damn" or "hell" in the workplace. The general manager testified that he personally heard the claimant use the fu** word on several occasions, and asked the claimant to stop. The general manager personally heard the claimant use this language on previous occasions, and during the final incident which resulted in her termination. The preponderance of the credible evidence establishes that the claimant had been counseled on at least one other occasion about her language prior to the final incident resulting in her termination.

In the case at bar, the claimant's use of profanity in front of her manager and customers constitutes "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." What may be permissible and appropriate in a social setting is not always permissible and appropriate in a work or business setting. In the case at bar, the claimant crossed this line.

Accordingly, the employer met its burden in this case and the claimant's discharge was for using improper language in the workplace, constituting simple misconduct, warranting the imposition of a weekly penalty.

DECISION

IT IS HELD THAT the claimant was discharged for misconduct connected with the work within the meaning of Md. Code Ann., Labor & Emp. Article, Section 8-1003. Benefits are denied for the week beginning November 13, 2011 and for the fourteen (14) weeks immediately following. The claimant will then be eligible for benefits so long as all other eligibility requirements are met. The claimant may contact Claimant Information Service concerning the other eligibility requirements of the law at ui@dllr.state.md.us or call 410-949-0022 from the Baltimore region, or 1-800-827-4839 from outside the Baltimore area. Deaf claimants with TTY may contact Client Information Service at 410-767-2727, or outside the Baltimore area at 1-800-827-4400.

The determination of the Claims Specialist is reversed.

V. Nunez, Esq.

V. Nunez, 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 February 07, 2012. You may file your request for further appeal in person at or by mail to the following address:

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

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

Date of hearing : January 19,2012
TH/Specialist ID: USB1G
Seq No: 001
Copies mailed on January 23, 2012 to:
TONI M. MOORE
ASTYPALEA INC
LOCAL OFFICE #65