

- DECISION -

Claimant:	Decision No.:	2789-BR-14
JONEL C REYES	Date:	November 5, 2014
	Appeal No.:	1409814
	S.S. No.:	
Employer:	L.O. No.:	61
FORT WASHINGTON MEDCL CTR INC	Appellant:	Employer

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: December 5, 2014

REVIEW OF THE RECORD

The employer has filed a timely appeal to the Board from an Unemployment Insurance Lower Appeals Division Decision issued on May 12, 2014. That Decision held the claimant was discharged for misconduct within the meaning of *Md. Code Ann., Lab. & Empl. Art., §8-1003*. Benefits were denied for the week beginning March 23, 2014, and the following nine weeks.

On appeal, the Board reviews the evidence of record from the Lower Appeals hearing. The Board reviews the record *de novo* and may affirm, modify, or reverse the hearing examiner's 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. *Md. Code Ann., Lab. & Empl. Art., §8-510(d)*. The Board fully inquires into the facts of each particular case. *COMAR 09.32.06.03(E)(1)*. Only if there has been clear error, a defect in the record, or a failure of due process will the Board remand the matter for a new hearing or the taking of additional evidence. Under some limited circumstances, the Board may conduct its own hearing, take additional evidence or allow legal argument.

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)*.

In this case, the Board has thoroughly reviewed the record from the Lower Appeals hearing. 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 the opportunity to present closing statements. The necessary elements of due process were observed throughout the hearing. The Board finds no reason to order a new hearing, to take additional evidence, to conduct its own hearing, or allow additional argument. Sufficient evidence exists in the record from which the Board may render its decision.

The Board finds the hearing examiner's Findings of Fact are supported by substantial evidence in the record. The Board makes the following additional findings of fact:

The claimant was not the initial aggressor in the incident. However, the claimant knowingly and deliberately participated in the disruptive behavior and in the physical altercation with the coworker. The claimant and the coworker battered one another. The claimant took insufficient steps to avoid the confrontation with the coworker. The claimant actively and deliberately participated in the physical and verbal altercation. The claimant's actions were not in self-defense.

Md. Code Ann., Lab. and Empl. Art., Title 8, Section 1002 provides:

- (a) Gross misconduct...
 - (1) Means conduct of an employee that is:
 - i. 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
 - ii. repeated violations of employment rules that prove a regular and wanton disregard of the employee's obligations...

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).

Md. Code Ann., Lab. and Empl. Art., Title 8, Section 1003 provides:

- (a) Grounds for disqualification – an individual who otherwise is eligible to receive benefits is disqualified from receiving benefits if the Secretary finds that unemployment results from discharge or suspension as a disciplinary measure for behavior that the Secretary finds is misconduct in connection with employment but that is not:
- (1) Aggravated misconduct...or
 - (2) Gross misconduct...

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 the employment relationship, during hours of employment or on the employer's premises, within the meaning of *Md. Code Ann., Lab. and Empl. Art., Title 8, Section 1003*. (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 its appeal, the employer contends that the hearing examiner failed to consider the entire definition of "gross misconduct". The employer argues that the claimant's actions constituted a "deliberate and willful disregard of the standards of behavior that an employer has a right to expect and shows a gross indifference to the employer's interests." The Board agrees.

A claimant's insubordinate behavior and offensive language to a supervisor may constitute gross misconduct. *Hagberg v. Liberty Homes, Inc.*, 135-BH-89. Deliberate disruptive behavior may constitute gross misconduct. *Richard v. DHMG Laboratories Admin.*, 422BR-88. The use of inappropriate language in the workplace may constitute gross misconduct. *Reed v. Saval Foods Corp.*, 15-BR-91; also see *Shird v. F and H Contractors, Inc.*, 185-BH-88; *Barnes v. St. Luke Lutheran Home, Inc.*, 235-BR-88.

The striking of a coworker, unless done in reasonable self-defense, clearly meets the definition of gross misconduct. *Nelson v. Wyman Park Health System, Inc.*, 389-BH-84.

A determination of what is or is not inappropriate language in the workplace is dependent upon past practices, the type of working environment, and what previously has been accepted in the work place. Conversely, there are words which are offensive to nearly all persons in nearly all situations. Workers are expected to be considerate of others and to comport themselves in a manner appropriate to their surroundings. Some words are only offensive to the very sensitive. A worker cannot be expected to know the sensitivities of all of his or her co-workers without some advance knowledge. Each situation must be assessed on its own merits as what may be acceptable in one working environment among one group of workers but reasonably could be offensive in another situation.

Concepts such as inappropriate or offensive are conclusions. It is incumbent upon the employer to provide the specific factual circumstances used by it to reach those types of conclusions. This does not mean that the employer must restate words or re-enact scenes, but the employer is obligated to provide sufficient information to the hearing examiner so that the hearing examiner and the Board may reach the same conclusion. For the Board to find disqualifying misconduct, it is simply not enough for the employer to assert the claimant's act or language was inappropriate.

In the instant case, the Board is persuaded that the claimant knowingly, deliberately and actively participated in the verbal and physical altercation with a coworker. The claimant's testimony was insufficient to support a finding that the claimant acted in self-defense. In fact, the claimant's testimony corroborated the employer's material argument that the claimant deliberately engaged in a verbal and violent physical confrontation with a coworker. This behavior is wholly unacceptable in a medical facility. The Board finds that the claimant's actions were a deliberate and willful disregard of the standards of behavior that his employer had the right to expect and evinced a gross disregard to his employer's interests. Because the claimant willfully engaged in the confrontation, the coworker's initial aggression is not mitigating.

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 upon a preponderance of the credible evidence, that the employer met its burden of proof and showed that the claimant was discharged for gross misconduct within the meaning of *Md. Code Ann., Lab. and Empl. Art.*, §8-1002. The decision shall be reversed, for the reasons stated herein.

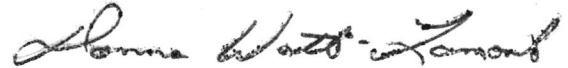
DECISION

The Board holds that the claimant was discharged for gross misconduct within the meaning of *Md. Code Ann., Lab. and Empl. Art., Title 8, Section 1002*. The claimant is disqualified from the receipt of benefits from the week beginning March 23, 2014, and until the claimant has earned twenty-five times his/her weekly benefit amount and becomes unemployed under non-disqualifying conditions.

The Hearing Examiner's decision is Reversed.



Clayton A. Mitchell, Sr., Associate Member



Donna Watts-Lamont, Chairperson

VD

Copies mailed to:

JONEL C. REYES

FORT WASHINGTON MEDCL CTR INC

RANDY KLEINERT

FORT WASHINGTON MEDCL CTR INC

Susan Bass, Office of the Assistant Secretary

UNEMPLOYMENT INSURANCE APPEALS DECISION

JONEL C REYES

SSN #

Claimant

vs.

FORT WASHINGTON MEDCL CTR INC

Employer/Agency

Before the:

**Maryland Department of Labor,
Licensing and Regulation**

Division of Appeals

1100 North Eutaw Street

Room 511

Baltimore, MD 21201

(410) 767-2421

Appeal Number: 1409814

Appellant: Employer

Local Office : 61 / COLLEGE PARK

CLAIM CENTER

May 12, 2014

For the Claimant: PRESENT

For the Employer: PRESENT, RANDY KLEINERT, KRISTIN CONNOR

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, Jonel Reyes, began working for this employer, Fort Washington Medical center Inc, on March 23, 2009. At the time of separation, the claimant was working as a full-time Unit Secretary, earning \$15.37 per hour. The claimant last worked for the employer on March 27, 2014, before being terminated.

The claimant had a heated discussion with a coworker about cleaning a resident room. The claimant and the coworker exchanged words. When both men were standing outside the pantry, the coworker pushed the claimant with his shoulder and the claimant pushed him back. The employer discharged the claimant for violating the employer's workplace violence policy.

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 and his coworker got into a public argument at work. The argument escalated to physical contact when the coworker pushed the claimant with his shoulder and the claimant pushed him back. The exchange was within view of at least one other employee. The claimant was not the aggressor in this situation but his behavior was inappropriate. The claimant should not have argued at work and should not have escalated the conversation to physical assaults. In viewing the totality of the evidence, it will not be held that the claimant's actions leading to his discharge rise to the level of gross misconduct as defined above. The employer has failed to show that the claimant willfully and deliberately violated the employer's policy. Therefore, no penalty will be imposed pursuant to Section 1002 of the Maryland Unemployment Insurance Law. However, the claimant's actions do constitute a transgression of established rules and policies of the employer, the commission of a forbidden act, a dereliction of duty, and/or a course of wrongful conduct committed by an employee within the scope of the employment relationship. Misconduct

will apply pursuant to Section 1003 of the Maryland Unemployment Insurance Law.

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 March 23, 2014, and for the nine 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.

K Boettger

K. Boettger, 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

This is a final decision of the Lower Appeals Division. Any party who disagrees with this decision may request a further appeal either in person, by facsimile or by mail with the Board of Appeals. Under COMAR 09.32.06.01A(1) appeals may not be filed by e-mail. Your appeal must be filed by May 27, 2014. You may file your request for further appeal in person at or by mail to the following address:

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

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

Date of hearing: May 06, 2014

BLP/Specialist ID: WCP3A

Seq No: 001

Copies mailed on May 12, 2014 to:

JONEL C. REYES
FORT WASHINGTON MEDCL CTR INC
LOCAL OFFICE #61
RANDY KLEINERT