-DECISION-

Claimant:
PATRICIA A REED

Employer:
PORTLEY'S LLC

Decision No.: 3118-BR-12

Date: September 26, 2012

Appeal No.: 1211189

S.S. No.:

L.O. No.: 63

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: October 26, 2012

REVIEW OF THE RECORD

After a review of the record, the Board adopts the hearing examiner's findings of fact and conclusions of law.

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."

The claimant was discharged because she was a no call/ no show for one day of work. This incident was the single occurrence, during the claimant's eight years of employment.

The Board finds that gross misconduct is not supported in this case as there is insufficient evidence of the claimant's actions being deliberate, wanton or in gross disregard to her employer's interests. However, even in the absence of deliberate intent, a finding of misconduct is supported. *John Hopkins University v. Board of Labor Licensing & Regulation, 134 Md. App. 653, 622-63 (2000). The claimant*

The Courts of Appeals stated that a standard for misconduct as follows: "… a transgression of some established rule or policy of the employer, the commission of a forbidden act, a dereliction of duty, or course of wrongful conduct committed by an employee, within the scope of his employment relationship or on the employer's premises." *Rogers v. Radio Shack, 271 Md. 126, 314 A. 2d 113 (1974).* The claimant was derelict in her duty to report to work.

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 met its burden of demonstrating that the claimant's actions rose to the level of misconduct within the meaning of *Maryland Annotated, Labor & Employment Article, § 8-1003.* 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 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 January 15, 2012 and the nine weeks immediately following.

The Hearing Examiner's decision is reversed.

Donna Watts-Lamont, Chairperson

Clayton A. Mitchell, Sr., Associate Member

RD
Copies mailed to:
PATRICIA A. REED
PORTLEY'S LLC
STACIE D. TRAGESER
RAVEN INN
Susan Bass, Office of the Assistant Secretary

UNEMPLOYMENT INSURANCE APPEALS DECISION

PATRICIA A REED

SSN # 218-68-6761

Claimant

vs.

PORTLEY'S 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: 1211189
Appellant: Claimant
Local Office : 63 / CUMBERLAND CLAIM CENTER

April 24, 2012

For the Claimant: PRESENT, STACIE D. TRAGESER

For the Employer: PRESENT, RAYMOND HIERSTETTER, KEVIN ZINKAND

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, Patricia A Reed, worked for this employer for approximately eight years, and her last day worked was January 14, 2012. At the time of her discharge, the claimant worked part-time as a cook.

The employer terminated the claimant from her position for a single "no call/no show." The claimant was scheduled to work on the morning of January 16, 2012; normally, the claimant did not work on Monday. The claimant overslept and failed to report for work by her scheduled time, 8:00 a.m. At approximately 8:15 a.m., the owner walked over to the claimant's home since she only lives a few yards from the restaurant. The owner knocked on the door and spoke with the claimant's roommate who advised the owner the claimant had overslept. The owner advised the claimant's roommate to let the claimant know

that she was to report for work as soon as possible. The claimant's roommate advised her that she was to report for work or she'd be terminated. The manager of the restaurant made additional attempts to contact the claimant by telephone and by knocking on her windows in her basement apartment to no avail. The claimant never reported for work on January 16, 2012. The claimant was terminated for her failure to report to work on January 16, 2012.

The claimant received no prior disciplinary actions for attendance issues. Nonetheless, when the claimant was a "no call/no show" on January 16, 2012, the employer discharged her for this single attendance event.

CONCLUSIONS OF LAW

"The phrase 'leaving work voluntarily' has a plain, definite, and sensible meaning, free of ambiguity. It expresses a clear legislative intent that to disqualify a claimant from benefits, the evidence must establish the claimant, by his (or her) own choice, intentionally, of his (or her) own free will, terminated the employment." [Allen v. CORE Target City Youth Program, 275 Md. 69, 338 A.2d 237 (1975)].

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).

In Hardin v. Broadway Services, Inc., 146-BR-89, the Board of Appeals held "The employer's policy, of which the claimant should have been aware, provided that an employee who neither reported to work nor called for three consecutive days would be terminated. The claimant failed to report to work or call in for four consecutive days. This was gross misconduct."

In Gray v. Valley Animal Hospital, Inc., 224-BR-90, the Board of Appeals held "A violation of the normally authorized procedures requires an explicit authorization. The claimant's failure to get such authorization amounts to misconduct."

EVALUATION OF EVIDENCE

This matter initially presented itself as a voluntary quit; however, the testimony of the parties supports a finding of discharge. Accordingly, this matter will be treated as a discharge for the allocation of the burden of proof.

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.

In the case at bar, the claimant was terminated after a single no call/no show. The claimant asserted that she in no way voluntarily quit her position but that she failed to report for work on January 16, 2012 based on a conversation with her roommate who was not present to testify at the hearing. The owner credibly established that he advised the claimant's roommate to advise to report for work but did not give her a deadline by which to report for work. In addition, the restaurant manager credibly established that he made several attempts to contact the claimant on January 16, 2012 to no avail. The claimant's explanation that she assumed she was terminated when she failed to report on time on January 16, 2012 is not supported by testimony taking into consideration the preponderance of the credible evidence presented at the hearing. However, because the discharge event was a single event, with no history of attendance issues, a finding of misconduct, rather than gross misconduct is appropriate. See Gray, supra.

Accordingly, the employer met its burden in this case and the claimant's discharge was for a single event of "no call/no show," constituting simple misconduct, warranting the imposition 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 January 15, 2012, 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

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 May 09, 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: April 13, 2012
BLP/Specialist ID: WCU61
Seq No: 001
Copies mailed on April 24, 2012 to:

PATRICIA A. REED
PORTLEY'S LLC
LOCAL OFFICE #63
STACIE D. TRAGESER