

- DECISION -

Claimant:
JARRED E TRICE

Decision No.: 3300-BR-14

Date: December 22, 2014

Appeal No.: 1415278

S.S. No.:

Employer:
GOTT COMPANY, THE

L.O. No.: 61

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: January 21, 2015

REVIEW OF THE RECORD

The employer has filed a timely appeal to the Board from an Unemployment Insurance Lower Appeals Decision issued on July 28, 2014. That Decision held the claimant was discharged under non-qualifying conditions within the meaning of *Md. Code Ann., Lab. & Empl. Art., §§8-1002 and 8-1003*. Benefits were allowed for the week beginning May 18, 2014, so long as other eligibility requirements were met.

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 make its decision.

The Board, after deleting "or about" from the first and third sentences of the first paragraph, finds the hearing examiner's Findings of Fact are supported by substantial evidence in the record. Those facts are insufficient to support the hearing examiner's Decision. The Board adopts the hearing examiner's modified findings of fact but concludes that these facts warrant different conclusions of law and a reversal of the hearing examiner's decision.

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. *Emp. 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 offers multiple contentions of error in the hearing examiner's findings of fact and his conclusions of law. The employer contends: "If the claimant intended to comply with the policy, he would not have worn the earring. His action was deliberate since he reported to work with the piercing in in his nostril and allowed it to become visible." The employer also contends:

[the employer] has never witnessed any other employee at that store location nor at any other store locations with any facial piercings. He has witnessed the claimant two times and his wife witnessed the claimant once wearing his piercing and each time he contacted

[the manager] regarding the issue. [The employer] takes its employees appearance serious and as such no one has been permitted to wear a nose, lip or eye piercing while on duty.

The employer further contends: "The discharge was for violation of company policy which is misconduct."

The Board agrees with the employer's contentions. The evidence established that the claimant was warned to not wear his facial jewelry while on duty. He was warned that his piercings were never to be visible while at work. Despite this, he continued to wear the jewelry thinking that if he kept it hidden, he would not be caught. The claimant miscalculated because he was observed with the jewelry visible contrary to the employer's requirements. The employer's contention, that if the claimant intended to comply with the policy he would simply have removed the jewelry, is quite logical and persuasive.

The claimant's argument, during the hearing, that he was the victim of discrimination in this regard was without merit. Persons with body and facial piercings are not a protected class and this does not constitute a status warranting legal protection. His testimony that other employees had piercings but were not disciplined was not persuasive. The employer competently testified that when it observed or became aware of visible piercing jewelry, it acted with respect to any employee. The claimant's bald assertions of his own conclusions do not constitute facts.

The evidence clearly demonstrated that the claimant did not comply with the employer's personal appearance policy. This was not accidental as the claimant easily could have avoided this by removing the piercing jewelry when he arrived at work and put on his uniform. The Board concludes the employer discharged the claimant for a knowing violation of its work-place rules and that this was disqualifying misconduct.

The employer had also contended that the hearing examiner foreclosed a particular line of testimony by one of its witnesses. The Board finds this not the case. The hearing examiner merely stopped one of the employer's witnesses from asking leading questions of the other employer witness. This was proper and well within the scope of the hearing examiner's duties.

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 did not meet its burden of proof and show that the claimant was discharged for gross misconduct within the meaning of *Md. Code Ann., Lab. and Empl. Art., §8-1002*. The employer did meet its burden of proof and show that the claimant was discharged for misconduct within the meaning of *Md. Code Ann., Lab. & Empl. Art., §8-1003*. The decision shall be reversed for the reasons stated herein.

DECISION

The Board holds that the claimant was discharged for misconduct within the meaning of *Md. Code Ann., Lab. and Empl. Art., Title 8, Section 1003*, but not 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 May 18, 2014, and for the next fourteen weeks thereafter.

The Hearing Examiner's decision is Reversed.



Donna Watts-Lamont, Chairperson



Clayton A. Mitchell, Sr., Associate Member

VD

Copies mailed to:

JARRED E. TRICE

GOTT COMPANY THE

ANGELA BEVERLY HR MANAGER

Susan Bass, Office of the Assistant Secretary

of the nostrils. Prior to being terminated the operations manager, Stewart Everngam, lost his composure and called the claimant "a faggot" prior to firing him.

The shift supervisor, Cabine Barnes, customarily displayed lip piercings during work hours without any disciplinary action being taken. A co-worker of the claimant's, Christian Vilos, also had nose piercings and he was allowed to display them out of his nose, visible to customers, without retribution.

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 8-1003 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 APPEALS DECISION

JARRED E TRICE

SSN #

Claimant

vs.

GOTT COMPANY, THE

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: 1415278

Appellant: Claimant

Local Office : 61 / COLLEGE PARK

CLAIM CENTER

July 28, 2014

For the Claimant: PRESENT

For the Employer: PRESENT, ANGELA BEVERLY, CHRISTINE KELLY

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

FINDINGS OF FACT

The claimant, Jarred Trice, began working for The Gott company on or about September 26, 2012. At the time of separation, the claimant was working part-time as a sales associate, making \$8.00 an hour. The claimant last worked for the employer on or about May 22, 2014, before being terminated.

The claimant was fired after the owner of the company John Gott Jr. came into the store on May 22, 2014 and noticed that the claimant's nose piercings were visible. The claimant had been warned previously, on January 10, 2014, that piercings should not be visible.

The claimant's nose piercings are lodged inside his nose and can be stored inside the nostrils, out of sight. In this one instance, the claimant had wiped his face and the piercings momentarily became visible, outside

Unemployment Insurance Law. Ivey v. Catterton Printing Company, 441-BH-89. In the case at bar, that burden has not been met.

The credible testimony and evidence established that the claimant had a lapse when he wiped his face, which caused his (usually hidden) piercings to become visible to the owner of the company. This was a mishap and an accident. The claimant did not knowingly or intentionally display his piercings; in fact, they were purposely hidden during the workday. Another mitigating issue is that the employer did not enforce the policy with all of its employees, as illustrated by a co-worker and a shift manager being allowed to display piercings without facing any disciplinary action. The employer failed to meet its burden in this matter.

I hold that the claimant did not commit a transgression of some established rule or policy of the employer, a forbidden act, a dereliction of duty, or engage in a course of wrongful conduct within the scope of the claimant's employment relationship, during hours of employment, or on the employer's premises. No unemployment disqualification shall be imposed based on Md. Code, Ann., Labor & Emp. Article, Section 8-1003 pursuant to this separation from this employment.

DECISION

IT IS HELD THAT the claimant was discharged, but not for misconduct connected with the work within the meaning of Md. Code Ann., Labor & Emp. Article, Section 8-1003. No disqualification is imposed based upon the claimant's separation from employment with the above-identified employer. The claimant is 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.



W. Rosselli, 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 August 12, 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: July 14, 2014
BLP/Specialist ID: WCP5C
Seq No: 003
Copies mailed on July 28, 2014 to:

JARRED E. TRICE
GOTT COMPANY THE
LOCAL OFFICE #61
A & B QUICK MART