

- DECISION -

Claimant:
LYNESHEA F MARSHALL

Decision No.: 3314-BR-13

Date: August 19, 2013

Appeal No.: 1238679

S.S. No.:

Employer:
JASON PROPERTIES LLC

L.O. No.: 63

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: September 18, 2013

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 different conclusions of law and a reversal of the hearing examiner's decision. The Board notes that the first paragraph of the hearing examiner's Evaluation of Evidence is unnecessary.

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)*. 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).

In her appeal, the claimant contends: "The employer has again, [sic] failed to show evidence to support the claim against me for discharge on the grounds of gross misconduct." The claimant requests a new hearing be held in person. The claimant notes that the employer witness testified there were other witnesses to the incident which led to her termination, but failed to provide those witnesses at the hearing.

On appeal, the Board reviews the evidence of record from the Lower Appeals hearing. The Board will not order the taking of additional evidence or a new hearing unless there has been clear error, a defect in the record, or a failure of due process. 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 closing statements. The necessary elements of due process were observed throughout the hearing. The Board finds no reason to order a new hearing or take additional evidence in this matter. Sufficient evidence exists in the record, from which the Board may make its decision. The claimant's request for a new hearing is denied.

The Board has thoroughly reviewed the record from the hearing. The Board does not find the employer presented sufficient evidence to meet its burden of proof. The employer's first-hand evidence was that the claimant used inappropriate language, including profanity. The claimant's first-hand evidence was that she did not use inappropriate language or profanity. The employer could have provided corroborating evidence, but chose not to do so. The employer witness testified that they "reached out" to the customer who witnessed much of the exchange, but that person declined to participate in the hearing. The employer witness did not offer any explanation for not requesting a subpoena for this important supporting witness. Although the hearing examiner did not draw a negative inference from this, the Board does.

The employer had the burden to prove the claimant's discharge was for a disqualifying reason. The employer knew or should have known that a corroborating witness would be crucial toward meeting this burden. Consequently, the Board draws the inference that the witness would not have been fully supportive of the employer's testimony. The employer witness' testimony that there was an independent, third-party witness to an event does not, of itself, make the employer witness' testimony about that event more factual.

The hearing examiner stated that the claimant made a broad denial of the employer's allegations, but, "offered no evidence to support her claim." It was not the claimant's responsibility to offer evidence that she did not do something. It was the employer's responsibility to offer evidence that she did. The Board is hard-pressed to discern what type of evidence, beyond her own testimony, the claimant could offer to prove the negative here. The employer had control over the identity and location of the purported third-party witness. The claimant did not. The employer had the burden of proof in this matter. The claimant did not.

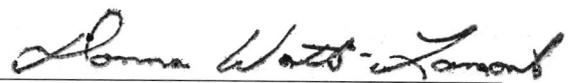
The Board does not find that the employer has met its burden of proof. The Board does not find sufficient evidence in the record to support the hearing examiner's decision. The Board concludes the claimant was discharged under non-disqualifying conditions.

The Board finds based on a preponderance of the credible evidence that the employer has not met its burden of demonstrating that the claimant's actions rose to the level of gross misconduct within the meaning of § 8-1002. The employer has also not met its burden of showing that the claimant's discharge was for misconduct within the meaning of § 8-1003. The decision shall be reversed for the reasons stated herein.

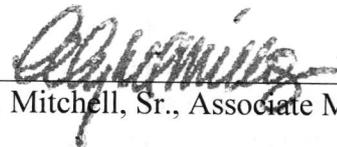
DECISION

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 JASON PROPERTIES LLC.

The Hearing Examiner's decision is reversed.



Donna Watts-Lamont, Chairperson



Clayton A. Mitchell, Sr., Associate Member

KP/MW

Copies mailed to:

LYNESHEA F. MARSHALL

JASON PROPERTIES LLC

JAMES A. STULLER

MEDIFAST WEIGHT CONTROL CENTER

Susan Bass, Office of the Assistant Secretary

UNEMPLOYMENT INSURANCE APPEALS REMAND DECISION

LYNESHEA F MARSHALL

SSN #

Claimant

vs.

JASON PROPERTIES 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: 1238679

Appellant: Claimant

Local Office : 63 / CUMBERLAND
CLAIM CENTER

May 21, 2013

For the Claimant: PRESENT

For the Employer: PRESENT , JAMES A. STULLER, SONYA HARGESS, MAGGIE BROOKE

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).

PREAMBLE

The Board of Appeals remanded this case to the Lower Appeals Division for a de novo hearing.

FINDINGS OF FACT

The Claimant, Lyneshea Marshall, was employed by Jason Properties LLC on February 13, 2012. At the time of her separation from employment on July 28, 2012, she earned \$16.25 per hour as a Sales Manager.

The Claimant was discharged for using profanity toward her supervisor. On July 28, 2012 the Claimant asked her supervisor, Sonya Hargress, if she could leave to go to the bank, which was one of her job duties. Sonya Hargress told her that she couldn't and the Claimant told her to "shut up and listen" and began to use profane language when Sonya Hargress attempted to explain that the bank was closed. The Claimant then went into her office and slammed the door.

Later, Sonya Hargress observed the Claimant texting on her phone and asked her to stop. The Claimant again, used profanity toward Sonya Hargress and slammed her door. Sonya Hargress saw the Claimant texting again and told her to stop. At that time the Claimant stated that her father was sick and that she was not texting. At that point, Sonya Hargress sent the Claimant home. After the Claimant was instructed to go home she entered the office where Sonya Hargress was consulting with a client and began talking in a loud tone, again using profanity.

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 was discharged for using profanity toward her supervisor several times and after being told to go home, using loud profane language toward her supervisor in the presence of a client. The Claimant denies the Employer's allegations, stating broadly that Employer was lying but offered no evidence to support her claim. When asked specific questions about the events that led to her termination the Claimant responded that she didn't remember because the events happened over a year ago. On the other hand, the Employer presented sufficient credible testimony to support a finding that the Claimant did, indeed, use profanity on the job and engaged in loud belligerent conduct in the presence of a client.

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 July 22, 2012 and until the claimant becomes reemployed and earns wages in covered employment that equal at least 25 times the claimant's weekly benefit amount.

The determination of the Claims Specialist is reversed.



S. Moreland, 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. 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 June 05, 2013. 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, 2013
CH/Specialist ID: WCU4D
Seq No: 002
Copies mailed on May 21, 2013 to:
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