

- DECISION -

Claimant:

CLARENCE JOHNSON

Decision No.: 3639-BR-12

Date: September 12, 2012

Appeal No.: 1214295

S.S. No.:

Employer:

SANTONIS MARKET INC

L.O. No.: 65

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 12, 2012

REVIEW OF THE RECORD

After a review of the record, the Board adopts the following findings of fact and conclusions of law and reverses the hearing examiner's decision:

The claimant was employed as a full time meat cutter from June 24, 2004 until March 13, 2012. The claimant was terminated for fighting on the job. On March 11, 2012 the claimant went out the front door of the employer's premises and approached a man that had been standing in the area for some time. The man owed the claimant money from a bet that he lost. The men started talking which led to a verbal

altercation between them. Instead of going back into the store and avoiding further escalation of the situation, the claimant took his hood off and prepared for further escalation of the situation. The verbal altercation turned into physical altercation. The individual lunged at the claimant, threw him off balance and punches were thrown. While holding each other up, both parties fell into a customer's car that was parked in the parcel pick up area. The manager tried to break up the fight but was unsuccessful. The fight ended when the owner of a car told them to watch out for his car.

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 fighting on the job which violated company policy.

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 gross misconduct within the meaning of *Maryland Annotated, Labor & Employment Article*, § 8-1002. The decision of the hearing examiner shall be reversed for the reasons stated herein.

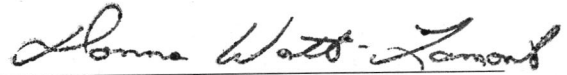
DECISION

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 March 11, 2012 and until the claimant becomes re-employed, earns at least twenty five times their weekly benefit amount and thereafter becomes unemployed through no fault of their own.

The Hearing Examiner's decision is reversed.



Eileen M. Rehrmann, Associate Member



Donna Watts-Lamont, Chairperson

RD

Copies mailed to:

CLARENCE JOHNSON

SANTONIS MARKET INC

CAROL STROUD

SANTONI'S SUPER MARKETS

Susan Bass, Office of the Assistant Secretary

UNEMPLOYMENT INSURANCE APPEALS DECISION

CLARENCE JOHNSON

SSN #

Claimant

vs.

SANTONIS MARKET 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: 1214295

Appellant: Claimant

Local Office : 65 / SALISBURY

CLAIM CENTER

May 11, 2012

For the Claimant: PRESENT

For the Employer: PRESENT, CAROL STROUD, DARLENE SEINKIEWICZ, DONNA BULCER

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, Clarence Johnson, began working for this employer, Santoni's Market, on June 24, 2004 and his last day worked was March 13, 2012. At the time of his termination, he was employed full-time as a first cutter in the meat department.

The employer terminated the claimant for allegedly fighting on the job. On March 11, 2012, the claimant went out the front door of the store to get a shopping cart. In the cart area, the claimant approached a man that had been standing in the area for some time. The claimant was acquainted with the individual, and previously they had bet on a game and the claimant had won the bet. The individual had not paid the claimant when he lost the bet. The claimant had seen the individual several times since then at the store and

had no incidents with the individual. When the claimant went outside that day, he greeted the individual. During the conversation with the claimant, the individual became agitated. The claimant became aware that the individual was upset, so he put down the hood of his sweatshirt and stepped back. As the claimant stepped back, the individual suddenly lunged at the claimant and pushed him off balance. Both men fell on to a car parked alongside the store in the grocery pickup area. The claimant tried to push the individual away, but the individual continued to hold on to the claimant and throw punches at him. A supervisor came out and demanded that both men separate and stop the altercation. The individual released his hold on the claimant and both men left the area. The employer investigated the incident and reviewed the video tape of the altercation. The employer terminated the claimant on March 13, 2012.

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).

In Forman v. Associated Catholic Charities, 935-BR-91, the claimant was verbally accosted by a coworker who was determined to provoke a fight with her. The coworker physically attacked the claimant who attempted to free herself, but did not hit the coworker. Reasonable acts of self-defense do not constitute gross misconduct, nor does one mild statement of retort made by the claimant.

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 not been met.

The employer provided the video recording of the altercation and testimony regarding the investigation. The employer's eyewitness testified that she came on the scene after the altercation had started and the two men separated at that time. The employer argued that the claimant had left the store with the intention to start a fight with the individual, and that the claimant was the aggressor in the incident. The video recording does not support the employer's allegations. The video recording shows that the individual had been loitering outside the store when the claimant approached him. The claimant's hands were at his side and he appears calm. In the next instant, the individual's hand is raised and he looked agitated. When the claimant pulls his hood down and steps back, the individual grabs him and pushes him backward on to a parked car. The claimant's movements are not aggressive and at one point, he is actually backing away from the individual. The individual is seen punching the claimant and the only time the claimant is seen raising his hand is when he tries to push the individual away. The employer alleges that the claimant should have known the individual was going to attack him and that the claimant should have left the area when he took his hood down. However, the video shows that there was no time for the claimant to leave between the time he stepped back and removed his hood and when the individual attacked him.

The claimant provided compelling and credible testimony that he went outside the store to get a shopping cart and had no intention to start a fight with the individual. The claimant testified that he had seen the individual at other times and the individual was civil and did not threaten him. The claimant was not too concerned that the individual did not pay him when he lost the bet because the claimant was not actually out any money. The claimant explained that he had no idea that the individual would attack him, and he would not have gone outside if he had any knowledge that the individual would cause a problem.

The evidence is insufficient to support a finding that the claimant started a fight with the individual. The testimony and video recording show that the claimant defended himself from an unprovoked attack. The claimant's actions in the incident do not rise to the level of misconduct. The evidence as presented fails to show that the discharge in this case was due to misconduct. Accordingly, I hold the employer has failed to meet its burden and no disqualification is warranted.

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.



E K Stosur, 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 29, 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 : May 03,2012
TH/Specialist ID: USB38
Seq No: 001
Copies mailed on May 11, 2012 to:

CLARENCE JOHNSON
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LOCAL OFFICE #65
CAROL STROUD
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