

- DECISION -

Claimant:
GWENDOLYN P STEWART

Decision No.: 369-BR-12

Date: January 26, 2012

Appeal No.: 1027209

S.S. No.:

Employer:
RAINBOW ACADEMY INC

L.O. No.: 61

Appellant: EMPLOYER - REMAND FROM
COURT

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: February 27, 2012

REVIEW OF THE RECORD

Pursuant to the Order of the Circuit Court for Prince George's County and after a review of the record, the Board adopts the following findings of fact.

The claimant was employed as a full-time daycare teacher from September 29, 2008 through May 27, 2010. The claimant is unemployed as the result of a discharge.

Prior to the claimant's last day of work, the daycare's Director asked the claimant if she planned on opening her own daycare business. The claimant replied "no". The claimant's answer was not truthful. The claimant, in fact, was developing a "home daycare" business during all periods of time at issue. The business, however, was not operating. Subsequent to the conversation with the daycare Director, the employer learned that the claimant had taken concrete steps to open her own business. The claimant applied for a business license, an inspection, and for background checks on family members (who might work at her daycare). The claimant did not solicit the employer's clients.

Upon learning that the claimant intended to open her own daycare business, the employer discharged the claimant effective May 27, 2010 for lying to the Director.

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 salient issue in the case at bar is whether the claimant had an affirmative duty to disclose to her employer her future business or employment plans. On the facts of this case, the Board finds no controlling legal authority requiring the claimant to do so. When the Director asked the claimant about her business plans, the claimant answered (albeit untruthfully) "no". At this snapshot in time, the claimant was not competing against her employer.¹ The Board finds no requirement that the claimant

¹ Compare *Maryland Metals v. Metzner*, 282 Md. 31, 37-38 (1978)(discussing the law on the breach of loyalty to one's

must disclose her future employment plans with her employer. The claimant's preparation for establishing a future business did not violate a breach of loyalty to her employer. To find otherwise would be an anfractuious misapplication of *Mentzer*, supra.

The reason the claimant did not disclose her future plans was out of the reasonable fear she might lose her then-present employment. The Board finds that the claimant's "no" answer, albeit untruthful (but viewed in the totality of the circumstances), does not constitute a wrongful act, a course of wrongful conduct or a violation of employment rules.

There is insufficient evidence that the claimant solicited the employer's clients while employed. The employer's witness, Ms. Scott, testified that the claimant informed her that she "was going to be opening her own daycare". Ms. Scott testified that the claimant informed her (on a subsequent occasion) that "her daycare was coming along". There were no utterances by the claimant that would operate as a solicitation of Ms. Scott by the claimant to have her child leave Rainbow Academy and attend the claimant's daycare at any point in time.

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 did not meet its burden of demonstrating that the claimant's actions rose to the level of misconduct within the meaning of § 8-1003. The decision shall be reversed for the reasons stated herein.

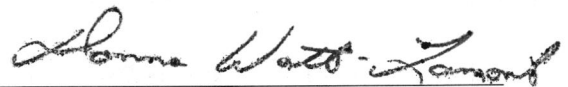
DECISION

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 RAINBOW ACADEMY, INC.

The Hearing Examiner's decision is reversed.



Clayton A. Mitchell, Sr., Associate Member



Donna Watts-Lamont, Chairperson

RD

Copies mailed to:

GWENDOLYN P. STEWART

RAINBOW ACADEMY INC

BRUCE J. LIPSTEIN ESQ.

Susan Bass, Office of the Assistant Secretary

UNEMPLOYMENT INSURANCE APPEALS DECISION

GWENDOLYN P STEWART

SSN #

Claimant

vs.

RAINBOW ACADEMY 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: 1027209

Appellant: Employer

Local Office : 61 / COLLEGE PARK

CLAIM CENTER

August 23, 2010

For the Claimant: PRESENT

For the Employer: PRESENT , KIMBERLY MITCHELL, PENNY SCOTT

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 began working for this employer on or about September 29, 2008. At the time of separation, the claimant was working as a Teacher. The claimant last worked for the employer on or about May 27, 2010 before being terminated under the following circumstances: Claimant was in the process of opening her own Day Care Home. Employer, which was in the same type of business, did not prohibit employees from doing that but, once an employee told employer of the intention to open her own business, the employer would require that the employee agree not to solicit employer's customers or otherwise harm the employer. In the past, the Director of employer had actually assisted others who wanted to open their own business.

Penny Scott, a client of employer, reported to the employer that claimant had alluded to the fact that she was going to open her own Day Care Home and indicated that shortly, she would be able to provide services to others, including Penny Scott.

Upon being advised of this by Penny Scott, the Director questioned claimant about her plans. Claimant was asked whether she was planning to open her own Day Care business. Claimant said "no". Employer later learned that claimant had, prior to the Director questioning her, taken concrete steps to be licensed by, for example, making applications to have her premises inspected and to have background checks on her and certain family members who might be at her Day Care Home.

CONCLUSIONS OF LAW

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 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).

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.

Claimant lied to her employer. Her argument that employer asked her whether she was opening a Day Care Center (as opposed to Day Care Home), even if believed, did not justify her in failing to disclose that she was indeed in the process of opening a business which would compete for Day Care business. Claimant would have one believe that if the Employer had asked about a "Home" as opposed to "Center", claimant's answer would have been different. That was not believable.

If claimant had answered truthfully, employer would not have discharged her. What it would have done would have claimant sign an agreement that she would not harm employer's current business by, for example, taking customers or making records from customer lists.

An employee owes a duty of loyalty and good faith to her employer. Misstatements, failing to disclose matters related to her employment and deceitfulness are violations of those duties which an employer has a right to expect.

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, the employer has demonstrated that the discharge was due to gross misconduct.

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 May 23, 2010 and until the claimant becomes reemployed and earns wages in covered employment that equal at least 20 times the claimant's weekly benefit amount.

The determination of the Claims Specialist is reversed.



G P Adams, 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 September 07, 2010. 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 : August 12,2010

TH/Specialist ID: WCP39

Seq No: 003

Copies mailed on August 23, 2010 to:

GWENDOLYN P. STEWART

RAINBOW ACADEMY INC

LOCAL OFFICE #61