

**- DECISION -**

Claimant:  
SHAKIRA L BYRD

Decision No.: 3812-BR-12

Date: August 24, 2012

Appeal No.: 1205043

S.S. No.:

Employer:  
DELMARBY 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.

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**- 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 24, 2012

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**REVIEW OF THE RECORD**

After a review of the record, the Board adopts the hearing examiner's findings of fact. The Board makes the following additional findings of fact and reverses the hearing examiner's decision.

The claimant was told by her supervisors to remain in her work area. The claimant entered the work area of her co-worker, Ms. Cross, and pointed her finger in Ms. Cross' face causing Ms. Cross to strike the claimant. The claimant's action escalated the conflict into a physical altercation.

When first hired, the claimant signed an acknowledgement of specific conduct that would result in automatic termination, including fighting with a co-worker while at work or on company property. The claimant was made aware of the employer's expectations of employees and consequences for violation were clearly communicated to the employee. *Employer's Exhibit 1 and Employer's Exhibit 2.*

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 the instant case, the Board finds that the claimant was discharged for fighting with a co-worker, a transgression of an established rule and policy of the employer.

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 has met its burden of demonstrating that the claimant's actions rose to the level of gross misconduct within the meaning of §8-1002. The decision 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 December 25, 2011 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/lj

Copies mailed to:

SHAKIRA L. BYRD

DELMARBY INC

CAROL STROUD

ARBY'S ROAST BEEF RESTR

Susan Bass, Office of the Assistant Secretary

**UNEMPLOYMENT INSURANCE APPEALS DECISION**

SHAKIRA L BYRD

SSN #

**Claimant**

vs.

DELMARBY 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: 1205043

Appellant: Claimant

Local Office : 65 / SALISBURY

CLAIM CENTER

March 07, 2012

**For the Claimant:** PRESENT

**For the Employer:** PRESENT , CAROL STROUD, REGINA TRADER, LUCY MILES

**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, Shakira L. Byrd, began working for this employer, Delmarby, Inc., on March 29, 2009, and her last day worked was December 27, 2011. At the time of her discharge, the claimant worked full-time as a Crew Member, earning an hourly salary of \$7.50.

Employer has an Employee Conduct and Work Rules policy that prohibits fighting or threatening violence in the workplace. On December 27, 2011, claimant and a co-worker, Taylor Cross, were on the employer's premises during working hours. Ms. Cross verbally taunted claimant throughout the workday. Claimant reported Ms. Cross' behavior to three members of management on one or more occasions. On each occasion, claimant was directed to "just make it through her work shift." Subsequent to Ms. Cross' final

verbal taunt, claimant approached Ms. Cross and directed her to stop. Ms. Cross stuck claimant in the face and a physical fight ensued.

On December 27, 2011, employer made a business decision to discharge claimant for fighting in the workplace in violation of the Employee Conduct and Work Rules policy.

### CONCLUSIONS OF LAW

Maryland Code Annotated, Labor and Employment Article, § 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).

Maryland Code Annotated, Labor and Employment Article, § 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).

An individual may use non-deadly force in self-defense anytime he reasonably believes that unlawful force is about to be used against him. This is true even where one is defending himself against an attack on the job. Winchester v. Joseph J. Hock Company, 232-BH-83.

### EVALUATION OF EVIDENCE

The employer had the burden to show, by a preponderance of the credible evidence, the claimant's discharge was for conduct which rose to the level of misconduct or gross misconduct, pursuant to the Maryland Unemployment Insurance Law. Hartman v. Polystyrene Products Company, Inc., 164-BH-83. I find that employer has not met its burden.

An employer who alleges that a claimant is ineligible for unemployment compensation by reason of simple, gross or aggravated misconduct has the burden of proof on this issue by a preponderance of the evidence. The employer's burden of proof includes the production of evidence as to the employer's expectations of the employee and that these expectations were communicated to the employee. In this respect, evidence of work rules and their violations are particularly relevant.

An individual may use nondeadly force in self-defense anytime she reasonably believes that unlawful force is about to be used against her. This is true even where one is defending herself against an attack on the job. Winchester supra. Employer failed to produce sufficient evidence to support their position that claimant was discharged for any degree of misconduct connected with the work. On the contrary, claimant credibly testified that she was not the aggressor and defended herself against an assault. Accordingly, I hold the

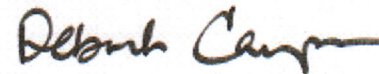


employer has failed to meet its burden in this case to prove that the claimant was discharged for any degree of misconduct connected with the work and benefits are, therefore, granted.

### DECISION

IT IS HELD THAT the claimant was discharged, but not for misconduct connected with the work within the meaning of Maryland Code Annotated, Labor and Employment Article, § 8-1003. No disqualification is imposed based upon this separation from employment with Delmarby, Inc. The claimant is eligible to receive benefits so long as all other eligibility requirements are met. The claimant may contact Claimant Information Service concerning other eligibility requirements at [ui@dllr.state.md.us](mailto:ui@dllr.state.md.us) or telephone (410) 949-0022 from the Baltimore region, or (800) 827-4839 from outside the Baltimore region. Deaf claimants with TTY may contact Client Information Service at (410) 767-2727, or outside the Baltimore region at (800) 827-4400.

The determination of the Claims Specialist is reversed.



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D F Camper, 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 March 22, 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 : February 23,2012  
TH/Specialist ID: USB7P  
Seq No: 001  
Copies mailed on March 07, 2012 to:  
SHAKIRA L. BYRD  
DELMARBY INC  
LOCAL OFFICE #65  
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ARBY'S ROAST BEEF RESTR