DEPARTMENT OF EMPLOYMENT AND TRAINING

STATE OF MARYLAND
1100 NORTH EUTAW STREET
BALTIMORE, MARYLAND 21201

383-5032

STATE OF MARYLAND
HARRY HUGHES
Governor

—DECISION-

DECISION NO.: 389-BH-84

DATE: April 12, 1984

CLAIMANT: Alice Nelson

APPEAL NO.: 08903

S.S. NO.:

EMPLOYER: Wyman Park Health System, Inc .
ATTN: Peter Liveright,
Director of Personnel

L.O. NO.: 1

APPELLANT: EMPLOYER

ISSUE: Whether the Claimant was discharged for gross misconduct, connected with her work, within the meaning of §6(b) of the Law.

NOTICE OF RIGHT OF APPEAL TO COURT

YOU MAY FILE AN APPEAL FROM THIS DECISION IN ACCORDANCE WITH THE LAWS OF MARYLAND. THE APPEAL MAYBE TAKEN IN PERSON OR THROUGH AN ATTORNEY IN THE CIRCUIT COURT OF BALTIMORE CITY, OR THE CIRCUIT COURT OF THE COUNTY IN MARYLAND IN WHICH YOU RESIDE.

THE PERIOD FOR FILING AN APPEAL EXPIRES AT MIDNIGHT May 12, 1984

-APPEARANCE-

FOR THE CLAIMANT:

Alice Nelson,
Claimant;
Norris Ramsey, Attorney

FOR THE EMPLOYER:

Saul Gilstein,
Attorney;
Sandra Wilkens,
EKG technician;
Aileen Frank,
Medical Machine
Tech. ;
Peter Liveright,
Dir. of Pers.

EVIDENCE CONSIDERED

The Board of Appeals has considered all of the evidence presented, including the "testimony offered at the hearings. The Board has also considered all of the documentary evidence introduced into this case, as well as the Department of Employment and Training's documents in the appeal file.

The employer's evidence included testimony by an impartial third party who witnessed the alleged incident and who testified that the Claimant struck another employee, Aileen Frank. The Claimant denied striking Ms. Frank and testified that Ms. Frank hit the Claimant on the nose. The Board finds the employer's evidence to be more convincing and credible.

FINDINGS OF FACT

The Claimant was employed by the Wyman Park Health System as an administrative assistant. She worked there from September 29, 1981 until she was discharged effective June 14, 1983.

On or about June 6, 1983, the Claimant was standing in the front office in the Department of Cardiology talking in a loud voice, when Aileen Frank, an EKG Technician, came out of her office and asked the Claimant to be quiet, because patients were out in the hall . The Claimant walked over to Ms. Frank and hit her on the left side of her face. Ms. Frank did not touch the Claimant at all prior to being struck, or after being struck. Ms. Frank then backed away, left her office, and sought medical help. The entire incident was witnessed by another employee, a Ms. Sandra Wilkens.

This incident was reported to the employer, and as a result the Claimant was discharged.

CONCLUSIONS OF LAW

The striking of a co-worker, unless done in reasonable self-defense , is clearly a deliberate and willful disregard of standards of behavior which her employer had a right to expect, showing a gross indifference to the employer's interest and is gross misconduct connected with the work within the meaning of §6(b) of the law.

Here, the Board finds that the Claimant struck another employee deliberately and without provocation. Thus her conduct falls squarely within §6(b).

DECISION

The Claimant was discharged for gross misconduct, connected with the work, within the meaning of §6(b) of the Maryland Unemployment Insurance Law. She is disqualified from receiving benefits from the week beginning June 10, 1983, and until she becomes re-employed, earns at least ten times her weekly benefit amount and thereafter becomes unemployed through no fault of her own.

The decison of the Appeals Referee is reversed.

Hazel A. Warwick
Associate Member

Thomas W. Keech
Chairman

W:K

DISSENTING OPINION

The Claimant worked in a department where she was, apparently, the only black employee. She had hired Sandra Wilkens and was her supervisor. This Sandra Wilkens testified against the Claimant and for the employer at the hearing before the Board of Appeals. Sandra Wilkens is the witness who is referred to as an "impartial third party" in the decision of the majority.

The Claimant's co-workers did not like her. On the date of the incident in question, Aileen Frank, one of the Claimant's co-workers , yelled to the Claimant through a closed door "That's right , nobody here likes you." Words were exchanged between the Claimant and Frank. Frank opened the door, came into the room where the Claimant was working, approached the Claimant shaking her finger until her finger struck the Claimant on the nose. Whereupon, the Claimant pushed Frank on or about the face with her right hand. The Claimant admitted that she struck Frank, but testified that she did so because Frank struck her first. All of this occurred in the presence of Wilkens, who testified that she was in a state of shock . Wilkens is still working for the employer.

The Director of Personnel investigated the incident. During the investigation , the Claimant told him that Frank struck her first. However, the Claimant was discharged for striking Frank, which he stated was a "major infraction" of the employer's rules . He later admitted that there were no written rules covering the incident. He simply exercised his discretion. Frank was not discharged but was merely warned for "arguing" with the Claimant.

I have carefully considered all of the evidence in this case, including the undisputed fact that Frank opened the door and came into the room where the Claimant was already present; the fact that she was angry when she did that; her statement that no one there (obviously, including her) liked the Claimant, and the Claimant's testimony that Frank struck her first, and I conclude that it was Frank who was the aggressor and struck the first blow. It is also apparent that when Frank stated that no one

there liked the Claimant, she did so in the presence of Wilkens, and there is no evidence that Wilkens spoke up to disavow the remark, even though the Claimant had hired her, and was her supervisor.

Thus, I conclude that the Claimant struck the co--worker in self-defense, and used only that degree of force which reasonably appeared to be necessary to repel the unlawful aggression of the co--worker. The use of self-defense against unlawful force is not misconduct, and this Board has so held in the past. Winchester v. Joseph J. Hock. Co., 232-BH-83.

It is a reasonable rule which prohibits employees from fighting on the job. However, not only must an employer's rules be reasonable, but they must be applied to all employees without discrimination. Woodson v. Unemployment Compensation Board of Review 461 Pa. 439,336 A.2d 867 (1975). In Woodson four black brothers were discharged allegedly for excessive absenteeism and lateness. Five white employees had absenteeism records as delinquent as those of the brothers, but none of those white employees were fired. These brothers argued that they were not fired for violating their employer's rules, but rather because they were black. When the brothers applied for unemployment insurance benefits, the Board of Review denied their applications because, according to the Board, they had been discharged by the employer for "willful misconduct". The brothers appealed their case to the Supreme Court of Pennsylvania, which held that only one conclusion could be drawn from the record; that the employer required one. standard of conduct of 'black employees and another standard of conduct of white employees. The Court agreed with the brothers that they had been fired because they were black. The Court went on to hold that, although we look to the reasonable rules of an employer to determine whether an employee has committed willful misconduct, it could not sanction the Board's acceptance of an employer's rules which expects certain conduct from black employees, but not from white employees. The use of such rules to determine entitlement to unemployment insurance benefits, the Court held, constituted state action based on the racially discriminating policies of an employer which was prohibited. The Court ordered the payment of unemployment insurance benefits to the brothers.

Here, the black Claimant struck the white co-worker using reasonable self-defense and was fired. The co-worker, who struck the first blow, was not fired. I draw only one conclusion from this record. There was one standard of conduct for the Claimant, and another standard for the co-worker.

Indeed, I note it has been held that minor fights between employees did not constitute such misconduct as to disqualify a discharged employee for unemployment insurance benefits. Henton v. Brown, 157 So.2d 238 (1963); Williams v. Brown, 157 So. 237 (1963); Georgia-Pacific Corp. v. Employment Division, Or. App. 533 P.2d 829 (1975).

For the foregoing reasons, I decline to implicate the State of Maryland with the policies of this employer, in this case. I would allow benefits to the Claimant also because the employer failed to establish that its rules apply to all employees without discrimination.

Maurice E. Hill
Associate Member

D
kbm
Date of Hearing: March 13, 1984
COPIES MAILED TO:

CLAIMANT

EMPLOYER

Norris Ramsey, Esq.

Saul Gilstein, Esq.
Gallagher, Evelius & Jones

UNEMPLOYMENT INSURANCE - BALTIMORE

STATE OF MARYLAND
HARRY HUGHES
Governor
KALMAN R. HETTLEMAN
Secretary

DEPARTMENT OF HUMAN RESOURCES
EMPLOYMENT SECURITY ADMINISTRATION
1100 NORTH EUTAW STREET
BALTIMORE, MARYLAND 21201
383-5040

BOARD OF APPEALS
THOMAS W. KEECH
Chairman
MAURICE E. DILL
HAZEL A. WARNICK
Associate Members
SEVERN E. LANIER
Appeals Counsel
MARK R. WOLF
Administrative
Hearings Examiner

– DECISION –

DATE: November 28, 1983

CLAIMANT: Alice Nelson

APPEAL NO.: 08903

S. S. NO.:

EMPLOYER: Wyman Park Health System, Inc.

L. O. NO.: 1

APPELLANT: Claimant

ISSUE: Whether the claimant was discharged for gross misconduct connected with her work within the meaning of Section 6(b) of the Law.

NOTICE OF RIGHT OF FURTHER APPEAL

ANY INTERESTED PARTY TO THIS DECISION MAY REQUEST A FURTHER APPEAL AND SUCH APPEAL MAYBE FILED IN ANY EMPLOYMENT SECURITY OFFICE, OR WITH THE APPEALS DIVISION, ROOM 515, 1100 NORTH EUTAW STREET, BALTIMORE, MARYLAND 21201, EITHER IN PERSON OR BY MAIL.

THE PERIOD FOR FILING A FURTHER APPEAL EXPIRES AT MIDNIGHT ON December 13, 1983

– APPEARANCES –

FOR THE CLAIMANT:

Alice Nelson - Claimant
Norris Ramsey - Attorney

FOR THE EMPLOYER:

Peter Liveright - Director of Personnel and Saul Gilstein - Attorney

FINDINGS OF FACT

The claimant worked for the employer from September 29, 1981 until June 14, 1983. At time of separation, she was employed as an administrative assistant, earning $17,000.00 per year. The claimant was scheduled to work from 9 A. M. to 5 P. M., Monday through Friday.

On June 6, 1983, the claimant became involved in a dispute with a co-employee. During this dispute, the co-employee waved her finger in the claimant's face, touching the claimant's nose. The claimant responded by pushing her co-employee away from her.

The claimant had been afraid that something like this would occur because of a previous incident that occurred earlier in the. day when the claimant had opened a drawer near where her co-employee was standing and the co-employee had accused her of hitting her with the drawer when she opened it.

CONCLUSIONS OF LAW

The direct evidence presented in this case indicates that the claimant was provoked into attempting to stop her co-employee from harassing and intimidating her by pushing her away from her. The employer failed to present direct testimony of either the other party involved, of the witness or the medical reports that may or may not have been compiled. In the absence of direct testimony to refute the claimant's version of the incident, it cannot be found that the claimant either deliberately or willfully disregarded standards of behavior which the employer had a right to expect or participated in a series of repeated violations of employment rules which the employer had a right to expect. The only evidence presented in this case does support contention that the claimant pushed her co-employee who was waving her finger in her face, and may have touched the claimant while doing so. The act of pushing a co-employee in such a situation is not a deliberate or willful disregard for the standards of behavior which her employer has a right to expect, but is a response mechanism to an aggravated situation being caused by a co-employee. While the claimant could have exercised restrain or walked away from the situation, and failed to do so, she will be found to have been discharged for misconduct. The determination of the Claims Examiner will, therefore, be reversed.

DECISION

The claimant was not discharged for gross misconduct connected with her work within the meaning of Section 6(b) of the Law. The claimant was discharged for misconduct connected with her work within the meaning of Section 6(c) of the Law. Benefits are denied for the week beginning June 10, 1983 and for the nine weeks immediately thereafter.

The determination of the Claims Examiner is reversed.

This denial of unemployment insurance benefits for a specified number of weeks will also result in ineligibility for Extended Benefits, and Federal Supplemental Compensation (FSC), unless the claimant has been employed after the date of hte disqualification.

John T. McGucken
Appeals Referee

Date of hearing: 11/16/83
amp/3484
(Graves)
8695
Copies mailed to:

Claimant
Employer
Unemployment insurance - Baltimore

Norris Ramsey, Esquire

Saul Gilstein, Esquire
Gallagher, Evelius and Jones