

DECISION

Claimant:
JASON N BUTCHER

Decision No.: 4119-SE-13

Date: September 27, 2013

Appeal No.: 1309935

Employer:
GREENE TURTLE WEST INC

S.S. No.:

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 28, 2013

- APPEARANCES -

FOR THE CLAIMANT: failed to appear

FOR THE EMPLOYER:
Chad Rogers, general manager
Kelly Rogers, office manager

PROCEDURAL HISTORY

On March 27, 2013, the claimant, Jason N. Butcher, filed a timely appeal of the March 12, 2013, Benefit Determination disqualifying him from unemployment compensation benefits.

A Lower Appeals Division hearing was conducted on April 22, 2013. On April 30, 2013, the Lower Appeals Division issued a decision reversing the Agency's initial determination finding for the claimant and qualifying him to receive unemployment benefits pursuant to *Maryland Code Annotated, Labor & Employment Article, §8-1002(a)(1)(i)*.

On May 8, 2013, the employer filed a timely appeal to the Board of Appeals ("Board"). The Board scheduled a hearing before a Special Examiner to hear additional evidence and testimony regarding the issues established in the matter. The Special Examiner hearing was held on August 12, 2013. The claimant failed to appear at the hearing.

REVIEW OF THE RECORD

After a review of the record and in consideration of the additional testimony and evidence presented at the Special Examiner's hearing, the Board adopts the following findings of facts and conclusions of law. The hearing examiner's decision is reversed.

FINDINGS OF FACTS

The claimant, Jason N. Butcher, began working for the employer, Greene Turtle West, Inc., on March 12, 2012. His last day of work was January 5, 2013. The claimant worked for the employer on a full-time basis as a line-cook.

The claimant was discharged by the general manager, Chad Rogers, for supplying alcoholic beverages to two underage co-workers. One minor was 15 years old and the other minor was 14 years old.

On December 30, 2012, the claimant was working a shift that ended at 12:15 a.m. The claimant went on a break at 8:30 p.m. While on break, the claimant went to Marlin Market, a convenience store adjacent to the restaurant, and made two purchases.

The claimant made one purchase consisting of beer came back to the counter and made another purchase consisting of a malt liquor drink. The claimant placed the malt liquor next to the employer's dumpster in the rear of the restaurant. The kitchen manager subsequently observed two under aged boys consuming the malt liquor at which time he confronted the claimant and questioned him as to whether he purchased the malt liquor for the boys. The claimant denied that he had purchased the alcoholic beverages.

The kitchen manager reported the incident to Chad Rogers. Mr. Rogers interviewed the staff regarding the incident. Mr. Rogers then went next door to Marlin Market to view the

videotape recording of the claimant. He personally observed on the videotape the claimant making the two purchases on the evening of the incident. The under aged employees later told Mr. Rogers that the claimant was the individual who provided them with the malt liquor

Mr. Rogers spoke with the claimant about what he observed. The claimant continued to deny that he had purchased the malt liquor. Mr. Rogers explained that he observed the claimant on the videotape. He told the claimant that it was illegal to provide alcoholic beverages to minors and discharged the claimant for this illegal activity.

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 Board held in *Robinson v. Realty Investment Company, Inc.*, 853-BR-90, that the claimant was discharged for gross misconduct for lying to his employer. The claimant was on the employer's premises but absent from his actual duty post (the building he was supposed to be cleaning). He had time to clean the buildings, but did not do so. When questioned by his supervisor, the claimant lied, informing his supervisor that he had cleaned the buildings. Although the claimant had a valid excuse for not cleaning the buildings on that particular day, there was no excuse for not reporting the problem and lying to his supervisor.

The Board has also held that a claimant engaging in illegal activity during work hours, also constitutes gross misconduct. In *Hill v. Baltimore Box Company, 2073-BR-83*, the claimant's possession of a handgun, on the employer's premises, was in violation of the employer's rules and contrary to state law, and therefore constitutes gross misconduct. In *Martz v. Maryland State Department of Personnel, 324-BH-85*, the claimant correctional officer was suspended pending charges for removal for aiding the escape of inmates by providing blades and hacksaws. This was gross misconduct.

In the instant case, the overwhelming evidence establishes that the claimant illegally purchased alcoholic beverages for under age co-workers and then lied to the employer about the incident. Because the claimant's actions were illegal and untruthful, and pursuant to the Board's precedent noted above, the Board finds that the claimant was discharged for gross misconduct.

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 §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 30, 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.



Clayton A. Mitchell, Sr., Associate Member



Donna Watts-Lamont, Chairperson

VD/mr

Date of hearing: September 12, 2013

Copies mailed to:

JASON N. BUTCHER

GREENE TURTLE WEST INC

Susan Bass, Office of the Assistant Secretary

UNEMPLOYMENT INSURANCE APPEALS DECISION

JASON N BUTCHER

SSN #

Claimant

vs.

GREENE TURTLE WEST 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: 1309935

Appellant: Claimant

Local Office : 65 / SALISBURY

CLAIM CENTER

April 30, 2013

For the Claimant: PRESENT

For the Employer: PRESENT , CHAD ROGERS

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, Jason Butcher, began working for this employer, Greene Turtle West, Inc., on March 12, 2012, and his last day worked was on January 5, 2013. The claimant worked full-time as a line cook.

The employer terminated the claimant for allegedly providing alcohol to minors. On December 30, 2012, the claimant was working a shift that ended at closing time around 12:15 a.m. At about 8:30 p.m., the claimant went on break and purchased beer at the store next to the restaurant. The claimant placed the beer on the ground outside of the back entrance of the restaurant. Later that night, the kitchen manager observed two under aged co-workers outside of the restaurant behind the dumpster retrieving a brown bag that contained beer. The kitchen manager assumed that someone had left the beer for the co-workers and asked the claimant if he had left the beer by the dumpster for the two under aged co-workers. The claimant told the kitchen manager he did not supply the co-workers with beer and the claimant still had the beer he had

purchased earlier. The kitchen manager reported the incident to the employer and the employer interviewed the staff on duty at the time. The general manager reviewed the security video of the store next to the restaurant and observed the claimant buying the same kind of beer that had been left by the dumpster for the under-aged co-workers. The employer terminated the claimant on January 5, 2013.

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).

EVALUATION OF EVIDENCE

The employer had the burden to show, by a preponderance of the credible evidence, the claimant's termination was for conduct which rose to the level of misconduct or gross misconduct, pursuant to the Maryland Unemployment Insurance Law. (See Hartman v. Polystyrene Products Company, Inc., 164-BH-83). In the case at bar, the employer did not meet this burden.

The employer provided testimony but the claimant had allegedly left beer outside the restaurant for two under aged co-workers. The general manager testified that he observed the claimant buying the same kind of beer that had been left outside by the dumpster for the co-workers. The general manager acknowledged he did not see the claimant leave the beer by the dumpster for the co-workers or give the beer directly to the co-workers. The witnesses with first-hand knowledge of the incident were not present to testify. While the general manager's testimony regarding the witnesses' statements is admissible, the testimony is given less weight than if the witnesses were present. The claimant admitted that he purchased beer for himself, but denied that he had provided beer for the co-workers. The claimant argued that he still had the beer he purchased for himself and did not purchase any additional beer for the co-workers. The credible evidence provided does not prove by a preponderance of the evidence that the claimant supplied beer to two under aged co-workers. In the absence of any evidence of the claimant's misconduct, no disqualification is warranted. Accordingly, I hold the employer failed to meet its burden in this case and the claimant's discharge was for non-disqualifying reasons, and benefits are, therefore, allowed.

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

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 May 15, 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 : April 22,2013
TH/Specialist ID: USB26
Seq No: 001
Copies mailed on April 30, 2013 to:

JASON N. BUTCHER
GREENE TURTLE WEST INC
LOCAL OFFICE #65