

- DECISION -

Claimant:
GLENN A MCGANEY

Decision No.: 421-BR-14

Date: February 19, 2014

Appeal No.: 1329958

S.S. No.:

Employer:
WAL-MART ASSOCIATES INC

L.O. No.: 63

Appellant: Claimant

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: March 21, 2014

REVIEW OF THE RECORD

After a review of the record, the Board adopts the hearing examiner's findings of fact and conclusions of law, but modifies the decision.

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. Conclusory statements are insufficient evidence to meet an employer's burden of proof. *Cook v. National Aquarium in Baltimore*, 1034-BR-91. An employer must produce specific evidence of a claimant's alleged misconduct. *Id.*

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."

In the instant case, the Board finds that the claimant's testimony and admissions of repeated lateness, production problems and foul language towards a co-worker was sufficient to make the employer's case for misconduct. The Board concurs with the hearing examiner's evaluation of the evidence.

In the appeal to the Board, the claimant contends that she as "treated unfairly in being terminated by Wal-Mart." The claimant's own testimony does not support this contention.

The Board finds that because the employer was not present to present evidence on the severity of the claimant's infractions, only the minimum ten-week penalty is warranted. The hearing examiner's decision shall be modified accordingly.

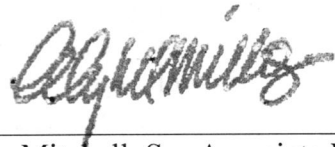
The Board notes that the hearing examiner did not offer or admit the *Agency Fact Finding Report* into evidence. The Board did not consider this document when rendering its decision.

The Board finds based on a preponderance of the credible evidence that the employer met its burden (through the claimant's testimony and admissions) of demonstrating that the claimant's actions rose to the level of misconduct within the meaning of § 8-1003. The Board finds the minimum ten-week penalty measured and appropriate on the facts of this case. The hearing examiner's decision shall be modified for the reasons stated herein.

DECISION

It is held that the claimant was discharged for misconduct connected with the work, within the meaning of Section 8-1003 of the Labor and Employment Article Maryland Code Annotated, Title 8, Section 1003. The claimant is disqualified from receiving benefits from the week beginning September 8, 2013 and the nine weeks immediately following.

The Hearing Examiner's decision is modified.



Clayton A. Mitchell, Sr., Associate Member



Eileen M. Rehrmann, Associate Member

VD

Copies mailed to:

GLENN A. MCGANEY

WAL-MART ASSOCIATES INC

WAL-MART ASSOCIATES INC

Susan Bass, Office of the Assistant Secretary

UNEMPLOYMENT INSURANCE APPEALS DECISION

GLENN A MCGANEY

SSN #

Claimant

vs.

WAL-MART ASSOCIATES 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: 1329958

Appellant: Claimant

Local Office : 63 / CUMBERLAND
CLAIM CENTER

November 12, 2013

For the Claimant: PRESENT

For the Employer:

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, Glenn A McGaney, began working for this employer, Wal-Mart Associates Inc, on February 14, 2012, and his last day worked was September 12, 2013. At the time of his discharge, the claimant worked full-time as a stocker, earning an hourly salary of \$9.60.

The claimant was discharged for engaging in an altercation with a co-worker. Approximately one week before his discharge, the claimant was involved in a verbal altercation with the cashier when he was making a purchase. While checking out, the claimant heard the cashier mumble words about him under her breath, and he responded, "Well you don't have to be a b*tch." The claimant said nothing more and proceeded to the break room.

The claimant had been previously warned for lateness and failure to meet the work production quota, but was not aware he was on a final warning. The claimant was notified by the employer on September 12, 2013, that he was being discharged for having too many infractions.

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)].

EVALUATION OF EVIDENCE

The employer had the burden to show, by a preponderance of the credible evidence that 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 met this burden.

As stated in Department of Economic & Empl. Dev. v. Jones, 79 Md. App. 531, 535-536, 558 A.2d 739 (1989), "There are no hard and fast rules to determine what constitutes deliberate and willful misconduct." In Employment Security Board v. LeCates, 218 Md. 202, 145 A.2d 840 (1958), the Court of Appeals noted such a determination "will vary with each particular case." The Court went on to state: "Here we 'are not looking simply for substandard conduct...but for a willful or wanton state of mind accompanying the engaging in substandard conduct.... [T]he wrongness of the conduct must be judged in the particular employment context.... [C]ertain conduct will be so flagrant indulging in it will undoubtedly be misconduct whether or not a specific rule prohibiting it has been expressly formulated and posted or otherwise announced to the employees.'"

The Board of Appeals' precedent cases related to "Disruptive Behavior" and "Profane or Abusive Language" do not address the specific language which formed the basis for the employer's discharge decision in the case at bar. (See Noble v. The Bees Distributing Company, Inc., 672-BR-85, Richard v. DHMG Laboratories Administration, 422-BR-88, Shird v. F and H Contractors, Inc., 185-BH-88, Barnes v. St. Luke Lutheran Home, Inc., 235-BR-88, and Reed v. Saval Foods Corporation, 15-BR-91). Therefore, the Examiner must apply the general definitions of "Misconduct" and "Gross Misconduct," cited above, to the facts of the case at bar.

In Brooks v. Conston of Maryland, Inc., 377-BR-88, the Board of Appeals held "The claimant was discharged for engaging in a shouting match with a security guard hired by the employer. The shouting disrupted the employer's business. The claimant lost her temper and engaged in inappropriate conduct. This constitutes misconduct."


In the case at bar, the claimant made inappropriate comments to a coworker in response to her negative words about him. The altercation was brief but was clearly not proper conduct in the workplace. The claimant had been previously warned for poor work production and lateness. He was not aware he was on a final warning. The employer failed to appear at the hearing to present evidence that would support a finding of gross misconduct. However, the evidence presented at the hearing shows the claimant engaged in wrongful conduct on the job and warrants a finding of simple misconduct.

Accordingly, the evidence presented shows the claimant's discharge was for actions which constitute simple misconduct, warranting the imposition of a weekly penalty.

DECISION

IT IS HELD THAT the claimant was discharged for misconduct connected with the work within the meaning of Md. Code Ann., Labor & Emp. Article, Section 8-1003. Benefits are denied for the week beginning September 8, 2013, and for the fourteen (14) weeks immediately following. The claimant will then be 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.



C A Applefeld, 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 of the Lower Appeals Division. Any party who disagrees with this decision 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 December 02, 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: October 29, 2013

DW/ceh/Specialist ID: WCU1Q

Seq No: 001

Copies mailed on November 12, 2013 to:

GLENN A. MCGANEY
WAL-MART ASSOCIATES INC
LOCAL OFFICE #63
WAL-MART ASSOCIATES INC