

- DECISION -

Claimant:
MICHAEL E ARNOLD

Decision No.: 4360-BR-12

Date: November 16, 2012

Appeal No.: 1215051

S.S. No.:

Employer:
MARS SUPER MARKETS INC

L.O. No.: 60

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: December 17, 2012

REVIEW OF THE RECORD

After a review of the record, the Board adopts the hearing examiner's findings of fact. However the Board concludes that these facts warrant different conclusions of law and a reversal of the hearing examiner's 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.

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 employer's appeal, its representative contends:

It is the employer's position that it is the offensive conduct committed by the claimant, and not the dollar amount involved, which establishes the claimant's level of culpability. This principle is articulated in other cash-handling cases...there is evidence that the claimant deliberately took the money in question for his own use in willful violation of the employer's policy...a finding of gross misconduct is fully supported by the evidence in this case.

The Board has conducted a thorough review of the evidence of record from the Lower Appeals hearing and is in agreement with the employer's representative.

The hearing examiner mistakenly drew a distinction between stealing a little and stealing a lot. That is a distinction not made in the law. It is a distinction without a difference, and it is improper. Any willful or intentional misappropriation, by a claimant, of funds belonging to an employer, is tantamount to theft and is gross misconduct.

It is inconsequential that the claimant thought this extra change was not really the employer's money because other customers sometimes left their extra change. The change was in the register. All funds in the register are the property of the employer. There is no difference between the claimant's action in taking six cents, taking six dollars or taking six hundred dollars.

The evidence established that the claimant knew the employer's cash-handling policies. The claimant deliberately took six cents from the employer's register drawer to make up the short-fall he needed to purchase a snack. The claimant knew or should have known this action, regardless of how small, would be considered improper. The claimant's action was gross misconduct under Maryland law.

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 March 25, 2012, and until the claimant becomes re-employed, earns at least twenty times their weekly benefit amount and thereafter becomes unemployed through no fault of their own.

The Hearing Examiner's decision is Reversed.



Donna Watts-Lamont, Chairperson



Clayton A. Mitchell, Sr., Associate Member

TBW

Copies mailed to:

MICHAEL E. ARNOLD

MARS SUPER MARKETS INC

MARS SUPER MARKETS INC

Susan Bass, Office of the Assistant Secretary

UNEMPLOYMENT INSURANCE APPEALS DECISION

MICHAEL E ARNOLD

SSN #

Claimant

vs.

MARS SUPER MARKETS 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: 1215051
Appellant: Claimant
Local Office : 60 / LARGO

May 17, 2012

For the Claimant: PRESENT

For the Employer: PRESENT, THOMAS VEYSTEK, JESSICA LIBERATORE

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 filed for unemployment insurance benefits establishing a benefit year beginning April 1, 2012 with a weekly benefit amount of \$185.00.

The Claimant was employed part-time from September 26, 2011 until March 26, 2012 as a cashier with Mars Supermarkets, Inc. (Employer). The Claimant earned \$7.25 per hour.

The Employer has a written security policy that applies to all cashiers and which prohibits cashiers from ever adding or removing any money from their cash register for personal reasons. The policy also prohibits cashiers from making change for themselves from the registers. (Employer exhibit 2) The Claimant was made aware of the policy at the time of hire. In the event a cashier's register's funds are over what the cashier has rung during its shift, the Employer retains the funds. In the event a register is short of funds at

the end of a cashier's shift, the cashier is responsible for any shortage over \$1.00.

On March 26, 2011, the Claimant wanted to purchase candy but was short by six cents. The Claimant removed the six cents from his register in order to make the purchase. The Claimant signed a statement admitting that he removed the money from his register. The Claimant believed that his action was permissible because his register had an overage due to customers leaving change behind.

CONCLUSIONS OF LAW

Md. Code Ann., Labor & Empl. 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

In reaching this decision, I considered the testimony of the Employer's witness and the Claimant and the Employer's exhibits. Where the evidence was in conflict, I made credibility determinations.

The Employer has 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 misconduct.

The Claimant violated the Employer's security policy when he removed six cents from his till in order to purchase candy. Although the amount of money removed from the register was miniscule, the Claimant's action was in direct violation of the Employer's security policy. However, given the circumstances of the incident was not so willful or serious to rise to the level of gross misconduct. The Claimant believed that because customers frequently leave small change behind which is often left on top of the register to cover other customer's small shortages, he did not believe that removing the six cents from his register that he knew to have an overage compromised the Employer's interest.

DECISION

IT IS HELD THAT the Claimant was discharged for misconduct connected with the work within the meaning of Md. Code Ann., Labor & Empl. Article, Section 8-1003. Benefits are denied for the week beginning March 25, 2012 and for the nine 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.

G Klauber

G Klauber
Administrative Law Judge

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 June 01, 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: May 07, 2012

BLP/Specialist ID: RWD2E

Seq No: 001

Copies mailed on May 17, 2012 to:

MICHAEL E. ARNOLD
MARS SUPER MARKETS INC
LOCAL OFFICE #60