

- DECISION -

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|-------------------------|---------------|-------------------|
| Claimant: | Decision No.: | 5074-BR-12 |
| MIA V SMITH | Date: | December 12, 2012 |
| | Appeal No.: | 1224058 |
| | S.S. No.: | |
| Employer: | L.O. No.: | 65 |
| SONCO WHLESLE FENCE INC | Appellant: | Claimant |

Issue: 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).

- 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: January 11, 2013

REVIEW OF THE RECORD

After a review of the record, the Board deletes the first sentence of the second paragraph and “and Ms. Adams’ firm replaced her at no cost to the employer” from the end of the last sentence of the last paragraph. The Board also changes the third sentence of the second paragraph to state: “Specifically, the claimant’s co-workers complained that the claimant was seen...” The Board adopts the hearing examiner’s modified 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 her appeal, the claimant contends: "Neither of the witnesses could corroborate the allegations because neither worked in my office." The Board finds this to be an important point.

The hearing examiner inexplicably relied on unsubstantiated hearsay in reaching his decision. The employer witnesses testified from what they were told by persons who were not present at the hearing. The employer did not bring any documentation of time the claimant spent on her work computer performing personal tasks. The employer engaged in speculation and made conclusions based on that speculation. The only first-hand evidence offered by the employer was that the claimant was not accomplishing as much work as the position required.

This may have been a good reason for the employer to choose to discharge the claimant. However, the employer did not show that the claimant was actually unable to complete her work because she was involved in other personal matters. The employer did not show that the claimant was acting in a manner which could be construed as a deliberate disregard for its interests or expected standards of behavior. The employer did not establish that the claimant violated some known work-place rule. The employer did not meet its burden of proof and demonstrate that the claimant was discharged for some reason which would constitute disqualifying misconduct.

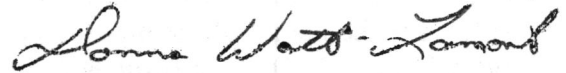
The Board notes that the hearing examiner did not offer or admit the *Agency Fact Finding Report* into evidence. The Board did not consider this document when rendering its decision.

The Board finds based on a preponderance of the credible evidence that the employer has not met its burden of demonstrating that the claimant's actions rose to the level of gross misconduct within the meaning of § 8-1002. The employer has also not met its burden of showing that the claimant's discharge was for misconduct within the meaning of § 8-1003. The decision shall be reversed for the reasons stated herein.

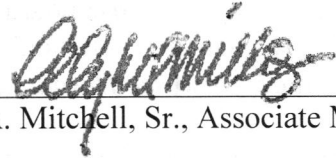
DECISION

It is held that the claimant was discharged, but not for gross misconduct or misconduct connected with the work, within the meaning of Maryland Code Annotated, Labor and Employment Article, Title 8, Section 1002 or 1003. No disqualification is imposed based upon the claimant's separation from employment with SONCO WHOLESALE FENCE, INC.

The Hearing Examiner's decision is reversed.



Donna Watts-Lamont, Chairperson



Clayton A. Mitchell, Sr., Associate Member

RD

Copies mailed to:

MIA V. SMITH

SONCO WHLESLE FENCE INC

SONCO FENCE

Susan Bass, Office of the Assistant Secretary

UNEMPLOYMENT INSURANCE APPEALS DECISION

MIA V SMITH

SSN #

Claimant

vs.

SONCO WHLESLE FENCE 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: 1224058

Appellant: Employer

Local Office : 65 / SALISBURY

CLAIM CENTER

August 15, 2012

For the Claimant: PRESENT

For the Employer: PRESENT , KELLIE LONG, RICK MCCANN

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 8-1001 (voluntary quit for good cause), 8-1002 - 1002.1 (gross/aggravated misconduct connected with the work) or 8-1003 (misconduct connected with the work).

FINDINGS OF FACT

The claimant, Mia Smith, worked for the above captioned employer, Sonco Wholesale Fence Inc., from February 20, 2012 until May 16, 2012 as a vinyl assistant/purchaser earning \$16.35 per hour in a full time capacity. The claimant was terminated for failing to meet expectations and conducting personal business while at work.

The claimant was placed with this employer by Nancy Adams, a recruiter, and there was a fee paid for that service by the employer. The employer had concerns that the claimant was not meeting the demands of her position and some of the co-workers in the vinyl department complained to Bill Long, a supervisor, that the claimant was doing personal business while on her computer. Specifically the claimant was seen working

on a spread sheet for personal finances on multiple occasions as well as talking on the phone about non-business issues. The employer speculates that the claimant was also working on planning a vacation and/or high school reunion while at work and dealing with her son who is described as an aspiring actor.

The employer also looked at the claimant's work output and determined that she was not accomplishing as much work as the position required. This issue was discussed at the management level and with the claimant. Ultimately the employer decided to terminate the claimant for failing to meet their expectations and Ms. Adams' firm replaced her at no cost to the employer.

CONCLUSIONS OF LAW

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 evidence presented shows that the employer discharged the claimant. In a termination case the employer has the burden of proving, by a preponderance of the credible evidence, that the discharge was for some degree of misconduct connected with the work within the meaning of Maryland Unemployment Insurance Law. Ivey v. Catterton Printing Company, 441-BH-89. In the case at bar, that burden has been met.

The employer's witnesses credibly testified that the claimant was observed and overheard conducting personal business while at work. They measured her output and likewise concluded that she was not productive at a minimum rate for their purposes. This was likely due to her engaging in non-work related matters like planning trips and working on her personal finances. This type of behavior demonstrates an overall indifference to the employer's interests and was a deliberate and willful disregard of the standards of behavior that the employer had a right to expect.

I hold that the claimant's actions show a regular and wanton disregard of her obligations to the employer and constitute gross misconduct in connection with the work. An unemployment disqualification shall be imposed based on Md. Code, Ann., Labor & Employment Article, Section 8-1002 pursuant to this separation from employment.

DECISION

IT IS HELD THAT the claimant was discharged for gross misconduct connected with the work within the meaning of Md. Code Ann., Labor & Emp. Article, Section 8-1002(a)(1)(i). The claimant is disqualified from receiving benefits from the week beginning May 13, 2012 and until the claimant becomes reemployed and earns wages in covered employment that equal at least 25 times the claimant's weekly benefit amount.

The determination of the Claims Examiner is reversed.



P G Randazzo, 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 August 30, 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 : July 31,2012

TH/Specialist ID: USB7S

Seq No: 002

Copies mailed on August 15, 2012 to:

MIA V. SMITH
SONCO WHLESLE FENCE INC
LOCAL OFFICE #65
SONCO FENCE