

DECISION

Claimant:
DWIGHT E FOOTE

Decision No.: 5247-SE-13

Date: January 29, 2014

Appeal No.: 1319289

Employer:
PPE CASINO RESORTS MD LLC

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: February 28, 2014

- APPEARANCES -

FOR THE CLAIMANT:
Dwight E. Foote

FOR THE EMPLOYER:
Jill King, Human Resources

FINDINGS OF FACT

The claimant worked for PPE Casino Resorts MD, LLC from May 15, 2012 to May 23, 2013 as a customer service supervisor. The claimant was discharged from this position. At the time of his discharge, the claimant was earning \$14.00 per hour.

The claimant was terminated for theft. From April 1, 2013 to May 25, 2013, the claimant issued Players Cards, (cards for free casino play) to his friends and family. The cards were created by the claimant using another employee's computer log-in and using fictitious names and addresses devised by the claimant. The claimant gave cards of varying amounts for free play to friends and family. The unauthorized free play cards issued by the claimant totaled \$13,835.00. The claimant admitted his activities to the employer when confronted but denied any monetary benefit from his acts.

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 THE EVIDENCE

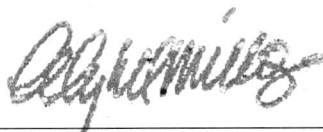
The Board of Appeals finds the testimony and documentation presented by the employer in the Special Examiner Hearings both sufficient and credible to support that the claimant was discharged for gross misconduct connected with the work, within the meaning of *Maryland Code Annotated, Labor and Employment Article, Title 8, Section 1002*. This conclusion is based upon the sworn testimony of the employer as corroborated by Special Examiner *Employer Exhibit #1* – a digital recording of an interview of the claimant by the employer wherein the claimant admitted that he knew what he “did was wrong” and that he “knew he was caught”. The claimant admitted that he had made up names and addresses to assign to “free play” cards and gave those cards to friends and family over a period of time. The total “free play” on those cards totaled \$13,835.00.

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.

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 or 1003*. The claimant is disqualified from receiving benefits the week beginning May 25, 2013, and until the claimant becomes reemployed and earns wages in covered employment that equal at least 25 times the claimant's weekly benefit amount and thereafter becomes unemployed through no fault of the claimant.

The decision of the Hearing Examiner is reversed.



Clayton A. Mitchell, Sr., Associate Member



Eileen M. Rehrmann, Associate Member

KJK/ps

Date of hearing: November 18, 2013

Copies mailed to:

DWIGHT E. FOOTE

PPE CASINO RESORTS MD LLC

JILL B. KING HR BUSINESS PARTNER

Susan Bass, Office of the Assistant Secretary

UNEMPLOYMENT INSURANCE APPEALS DECISION

DWIGHT E FOOTE

SSN #

Claimant

vs.

PPE CASINO RESORTS MD LLC

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: 1319289

Appellant: Claimant

Local Office : 65 / SALISBURY

CLAIM CENTER

July 29, 2013

For the Claimant: PRESENT

For the Employer: PRESENT, JILL KING

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 (Dwight Foote) filed a claim for benefits establishing a benefit year beginning May 26, 2013. He qualified for a weekly benefit amount of \$288.00.

The Claimant began working for this Employer (PPE Casino Resorts MD, LLC) on May 15, 2012. At the time of separation, the Claimant was working as a Player Club Lead. The Claimant last worked for the Employer on May 23, 2013, before being terminated for allegedly being under the influence of alcohol at work and theft.

The Employer has a drug and alcohol policy which the Claimant signed for prior to starting his employment on April 18, 2012. (Employer's Exhibit 2). On May 23, 2013, the Employer was advised that the Claimant appeared to be acting unusual. The Employer believed that the Claimant's speech was slurred and he demonstrated erratic gestures. The Claimant admitted that he had drunk some alcohol prior to reporting to work that day. The Employer did not send the Claimant for drug or alcohol screening. The Employer sent the Claimant home.

The Employer then used video surveillance footage to observe the Claimant's behavior. The Employer used its computer programs, printouts and other computerized investigatory tools and made a determination that the Claimant was permitting his friends and family to commit theft by giving them a free slot play. The Employer further used video surveillance and computer programs and made a determination that the Claimant had logged onto various employees computers to accomplish theft. The Claimant denied engaging in theft. The Claimant's reason for the free slot play was that the Employer often mailed promotional flyers for free slot play to its customers or would grant certain customers a free slot play as a compensation for being an appreciated customer.

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).

The Maryland Code of Regulations Section 09.32.06.02F(2) on Hearings before the Hearing Examiner and Board of Appeals provides:

(2) Electronically Stored Records. A party who seeks to enter into evidence videotapes, audiotapes, or other electronically stored records shall produce at the hearing the equipment necessary to allow review of the contents of the records. The party offering the records shall have the continuing obligation to produce the equipment necessary to review the records if further administrative proceedings occur. If the party offering the records fails to produce the equipment necessary to review the records, the records may be excluded from consideration.

EVALUATION OF THE EVIDENCE

The Hearing Examiner considered all of the testimony and evidence of record in reaching this decision. Where the evidence was in conflict, the Hearing Examiner decided the facts on the credible evidence as determined by the Hearing Examiner.

The employer had 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, that burden has not been met.

The Claimant did not engage in misconduct. Without having conducted a drug or alcohol screening, the Employer has failed to prove with a reasonable certainty that the Claimant was in fact under the influence of drugs or alcohol.

As to the theft allegations, the Employer used computerized and electronic records as proof the Claimant having committed theft. The Claimant vehemently denies that he unlawfully gave away free slot play. The Employer used video surveillance and computer records to establish that the Claimant had committed theft. Even though the Employer produced a copy of its investigatory report, under COMAR Section 09.32.06.02F(2), the Employer sought to enter information into evidence from electronically stored records and was obligated to produce the equipment at the hearing necessary to allow for review of the contents of the records. The Employer failed to produce the computer(s) in question to permit the Agency an opportunity to review the information allegedly viewed on its computer concerning the Claimant. The Employer had the continuing obligation to produce the equipment necessary to review the records if further administrative proceedings occur. Since the Employer, failed to produce the equipment necessary to review the records, the records were excluded from consideration whereas the Employer's theft charges was based upon the contents of the electronically stored records. The Claimant also had a right to review and cross examine the Employer about the information placed on the computers(s). Without the computer(s) and video surveillance footage, the Claimant provided more credible evidence than the Employer. Hence, the Employer failed to meet its burden of proof.

I hold that the Claimant did not commit a transgression of some established rule or policy of the employer, a forbidden act, a dereliction of duty, or engage in a course of wrongful conduct within the scope of the Claimant's employment relationship, during hours of employment, or on the employer's premises. No unemployment disqualification shall be imposed based on Md. Code, Ann., Labor & Emp. Article, Section 8-1003 pursuant to this separation from this employment.

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.

L. Williamson

L. Williamson, 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 August 13, 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: July 17, 2013
DAH/Specialist ID: USB7P
Seq No: 001
Copies mailed on July 29, 2013 to:

DWIGHT E. FOOTE
PPE CASINO RESORTS MD LLC
LOCAL OFFICE #65