-DECISION-

Claimant:
JAIME N GUERRERO

Decision No.: 594-BR-14

Date: March 26, 2014

Appeal No.: 1330373

S.S. No.:

Employer:
CLUSTER SPIRES BREWERY GROUP INC

L.O. No.: 62

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: April 25, 2014

REVIEW OF THE RECORD

After a review of the record, the Board adopts only the first paragraph of the hearing examiner's findings of fact. In lieu of the remaining findings of fact, the Board substitutes the following:

> The claimant was one of two kitchen supervisors. The other supervisor, Kevin, was responsible for making the schedule, and was expected to have both he and the claimant working at least 45 hours per week. The claimant had previously expressed his desire to work only one Sunday per month because of his family and church activities. The employer attempted to accommodate this, but it was not a guarantee. In the past, the

claimant had worked multiple Sundays during a month or had been able to trade shifts with other personnel to eliminate working on some Sundays.

When the schedule was posted for the week ending Sunday, September 15, 2013, the Operations Manager noticed that neither the claimant nor Kevin was scheduled to work 45 hours, nor was scheduled to work that Sunday. The Operations Manager spoke to the claimant and Kevin, advising them that the schedule needed to be changed. No changes were made and the Operations Manager then scheduled both men to work that Sunday. The claimant believed that, because it was Wednesday, and he had already worked two shifts, he would make up the lost hours the next week. He was surprised to find he was scheduled for that Sunday. The claimant went to the employer and stated he could not work because of some church obligation. The claimant did not specify what this obligation was, but simply stated he would not work.

The claimant did not report for work on September 15, 2013, and he was discharged for this reason.

The claimant's church obligation on September 15, 2013, was an evening rehearsal for a christening, in which the claimant was to be a godparent. The actual christening was to take place the following week.

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.* 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).* 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 its appeal, the employer contends the first he heard of the specifics of the claimant's request to be off work was at the hearing. The employer contends the hearing examiner's finding: "that the claimant had

arranged with the employer to work only one Sunday per month, this information is incorrect." The employer renews its objection to Claimant's Exhibit #1, contending that it should have been allowed to provide other work schedules for the claimant. The employer otherwise does not cite to the evidence of record and makes no other contentions of error.

On appeal, the Board reviews the evidence of record from the Lower Appeals hearing. The Board will not order the taking of additional evidence or a new hearing unless there has been clear error, a defect in the record, or a failure of due process. The record is complete. Both parties appeared and testified. Both parties were given the opportunity to cross-examine opposing witnesses and to offer and object to documentary evidence. Both parties were offered closing statements. The necessary elements of due process were observed throughout the hearing. The Board finds no reason to order a new hearing or take additional evidence in this matter. Sufficient evidence exists in the record from which the Board may make its decision.

The Board notes that the hearing examiner did not offer or admit the *Agency Fact Finding Report* into evidence. The Board further notes that the hearing examiner referred to this document and the claimant alluded to it. The Board finds the hearing examiner erred in not marking and receiving this document into evidence. The Board corrects this error by admitting this document as *Board Exhibit #1*.

The Board has thoroughly reviewed the record from the hearing but disagrees with the hearing examiner's decision. With respect to *Claimant's Exhibit #1*, the Board agrees with the employer's contention. The Board finds this document to have evidentiary value only as to what the claimant's schedule was for one particular week in August of 2013. The claimant testified this was his usual schedule, but presented no other corroborating evidence to counter the employer's equally credible testimony.

The claimant seemed to believe that he had an assurance from the employer that he would not have to work more than one Sunday per month. The employer tried to accommodate this, but expected the claimant to work when scheduled. The schedule for Sunday, September 15, 2013, was the result of the claimant and the other kitchen supervisor not arriving at an agreement about who would work what hours that week. The claimant thought he would make up hours the following week but did not discuss this with Kevin or the employer. The claimant made several presumptions about his schedule which were not based on any actual agreement or understanding.

Additionally, the claimant did not specify what his "church obligation" was on September 15, 2013. The claimant's participation in a rehearsal does not seem to rise to a level of interference with religious practices such that the claimant would be exempt from working. This was not a worship service, or other requirement of his religion. This was a practice for an event to take place the following week. The Board does not find the employer's insistence the claimant work that Sunday to have violated the claimant's rights to practice his religion.

The claimant's refusal and failure to report for work on Sunday, September 15, 2013, without a valid or compelling excuse, was an act of deliberate and willful insubordination. As such, it constituted gross misconduct under the law.

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 September 8, 2013, 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.

Donna Watts-Lamont, Chairperson

Clayton A. Mitchell, Sr., Associate Member

KJK
Copies mailed to:
JAIME N. GUERRERO
CLUSTER SPIRES BREWERY GROUP
Susan Bass, Office of the Assistant Secretary

UNEMPLOYMENT INSURANCE APPEALS DECISION

JAIME N GUERRERO

SSN #

Claimant

vs.

CLUSTER SPIRES BREWERY GROUP 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: 1330373
Appellant: Employer
Local Office : 62 / COLLEGE PARK CLAIM CENTER

December 06, 2013

For the Claimant: PRESENT

For the Employer: PRESENT, GARY BROOKS

For the Agency: PRESENT, SORAYA SANCHEZ, INTERPRETER

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, Jaime N. Guerrero, began working for this employer, Cluster Spires Brewery Group Inc, on July 5, 2005, and his last day worked was September 14, 2013. At the time of his discharge, the claimant worked full-time as a kitchen supervisor, earning an annual salary of $47,000.00.

The claimant was discharged for being absent on his last scheduled day of work. The claimant had arranged with the employer to work only one Sunday per month because of church and family obligations. The claimant had already worked his scheduled Sunday for the month when the manager scheduled the claimant and the other kitchen supervisor to work Sunday, September 15, 2013.

The manager was upset that the two kitchen supervisors had not yet worked out a schedule for the week and

so the manager scheduled them both for Sunday. The claimant noticed several days beforehand that he had been scheduled to work that Sunday and he explained to the manager he could not work because of church obligations, including a Christening in which he was being named godparent. The manager nevertheless told the claimant he had to work that Sunday. When the claimant failed to report Sunday, he was discharged.

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 did not meet this burden.

An employee's violation of the employer's attendance policy does not automatically result in a finding of misconduct. If the employee is absent for a compelling reason the absence will be considered excused, even if it is counted as unexcused according to the employer's policy.

Such was the case in Martin v. Tabs Associates, Inc., 785-BR-91, where the Board of Appeals found "The claimant had a compelling personal reason to be absent and also provided documentary evidence of the excuse."

In Sherbert v. Verner, 374 U.S 398, 83 S. Ct. 1790 (1963), the claimant was discharged because he could not work on Sunday, as required by the employer, because of religious reasons. A state cannot constitutionally apply the eligibility provisions of the unemployment compensation statute so as to deny benefits to a claimant who refuses employment because the employment violates that claimant's religious beliefs prohibiting work on certain days. To do otherwise would be in violation of the guarantee of free exercise of religion under the First Amendment to the United States Constitution made applicable to the states by the Fourteenth Amendment. Therefore, benefits were allowed the claimant under the Maryland Constitution and the First and Fourteenth Amendments to the United States Constitution. (See Estes v. Fred and Harry's Restaurant, 789-BH-84)

In Robinson v. United States Fidelity and Guaranty Company, 975-BH-89, the claimant missed work for sincere religious reasons and was discharged. There was no misconduct.

Similarly, in the case at bar, the claimant was absent from work due to religious obligations. Moreover, the claimant and the employer had agreed that the claimant would only work one Sunday per month, which the

claimant had already satisfied. The employer failed to show the claimant was discharged for reasons which constitute misconduct under the law.

Accordingly, 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 the claimant was discharged, but not for gross misconduct or misconduct connected with the work, within the meaning of Md. Code Ann., Labor & Emp. Article, Section 8-1002 or 8-1003. No disqualification is imposed based upon the claimant's separation from employment with the employer. 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 affirmed.

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 to Petition for Review

This is a final decision of the Lower Appeals Division. Any party who disagrees with this decision may request a review 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 23, 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: November 25, 2013
BLP/Specialist ID: WCP8A
Seq No: 001
Copies mailed on December 06, 2013 to:

JAIME N. GUERRERO
CLUSTER SPIRES BREWERY GROUP
LOCAL OFFICE #62