-DECISION-

Claimant:
SHATYRA B HENRY

Decision No.: 89-BR-13

Date: February 13, 2013

Appeal No.: 1229758

S.S. No.:

Employer:
MAPLE SHAPE YOUTH & FAMILY SERVICES INC

L.O. No.: 64

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: March 15, 2013

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); 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 her appeal, the claimant provides the name and telephone number of the other person present during the telephone call leading to the complaint and the claimant's termination. The Board will not independently contact a potential witness outside of hearing. More importantly, the hearing examiner did not use this incident as the basis for her decision that the claimant had been discharged for gross misconduct.

The claimant also contends she is under "…a financial hardship…" as a result of her discharge. The economic circumstances of a claimant are not a factor which is considered in determining whether a claimant is qualified and eligible to receive unemployment insurance benefits.

The claimant also contends she, "…worked very hard…" for the employer. This was not the issue before the hearing examiner and is not before the Board. The claimant was not discharged for a failure to perform her work to the best of her ability.

The claimant offers no specific contentions of error as to the findings of fact or the conclusions of law in the hearing examiner's decision. The claimant does not cite to the evidence of record and makes no other contentions of error. The claimant refers to documents submitted during the hearing which she contends "…have a racial overtone…" The Board does not see the relevance of this contention.

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.

The Board has thoroughly reviewed the evidence of record from the Lower Appeals hearing. The hearing examiner discounted the warning given to the claimant in April 2012, and did not consider that as part of the reason for her decision. The hearing examiner did not find the complaint about the claimant's conduct to be persuasive. The Board agrees on both of these points. However, the hearing examiner found gross misconduct based upon the claimant leaving three clients unattended for a brief period of time, contrary to the employer's requirements. The Board would agree, but for the fact that this occurred two weeks prior to her discharge. The Board is of the opinion that, if the employer had believed this to have been such an egregious act, the discharge logically would have been immediate.

The evidence established that the claimant was discharged for the accumulation of three warnings under the employer's progressive disciplinary system. While that may certainly establish a basis for the employer's decision to discharge the claimant, it does not, of itself, demonstrate misconduct. The underlying reason for the termination is what will determine whether misconduct, or gross misconduct, was the reason for discharge.

The hearing examiner properly disregarded the first and last warnings. The hearing examiner improperly based her decision on an event which occurred on May 22, 2012, but for which the claimant was not immediately discharged. This event was only one of the factors the employer considered in reaching its decision. The Board cannot find that this event warrants a finding of gross 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 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 Washington Metro ARA Tran Auth.

The Hearing Examiner's decision is reversed.

Donna Watts-Lamont, Chairperson

Clayton A. Mitchell, Sr., Associate Member

VD
Copies mailed to:
SHATYRA B. HENRY
MAPLE SHAPE YOUTH & FAMILY
NIC B. KUVSHINOFF ESQ.
MAPLE SHAPE YOUTH & FAMILY
Susan Bass, Office of the Assistant Secretary

UNEMPLOYMENT INSURANCE APPEALS DECISION

SHATYRA B HENRY

SSN #

Claimant

vs.

MAPLE SHAPE YOUTH & FAMILY SERVICES 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: 1229758
Appellant: Employer
Local Office : 64 / BALTOMETRO CALL CENTER

September 27, 2012

For the Claimant: PRESENT

For the Employer: PRESENT, NIC B. KUVSHINOFF, ESQ., LOURYN OVERSTREET, ANGELA BOPP

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, Shatyra B. Henry, began working for this employer, Maple Shape Youth & Family Services Inc. on November 23, 2011. At the time of separation, the claimant was working as a residential counselor. The claimant last worked for the employer on June 1, 2012, before being discharged under the following circumstances:

The claimant worked at the employer's therapeutic group home complex, primarily in a building which housed six teenaged boys which were placed there by the Department of Juvenile Services or the

Department of Human Services for 24 hour monitoring. The youths are to be monitored by residential counselors, with no more than three youths to a counselor.

During the week of April 15, 2012, the claimant was doing her laundry in the employer's laundry facility while the youths were at a school. That day, the recently appointed acting Program Director observed the claimant folding her laundry in an office and realized that the claimant must have done her laundry in the employer's laundry facility. However, unbeknownst to the Program Director, the previous Program Director had given the claimant permission to do her laundry while at work and the Program Director had the claimant's shift lead speak to her and tell her that she was not to do her personal laundry while at work. The Program Director later verbally warned the claimant for the incident on April 24, 2012.

On May 17, 2012, the claimant was on duty and assigned to supervise six youths along with another employee. As the claimant was in the car outside of the group home, preparing to take three boys to another location, the claimant's coworker came out of the group home and asked the claimant to help her get on the computer in the school. When the coworker exited the group home, she left the other three youths in the home unattended. The claimant then left her three boys in the car and went inside the school to assist her coworker in the office. While the claimant assisted her coworker, she watched the boys in the car from the window. After the claimant finished assisting her coworker, the claimant left the school and transported the three boys in the car to the other location. After the claimant left, the claimant's coworker counted the petty cash and signed off on the count. The coworker then left the petty cash unsecured and as a result, $300.00 was stolen from the petty cash. When the claimant reported for her next shift on May 22, 2012, the claimant was given a written warning for leaving youths without supervision and failing to secure the office and petty cash.

At approximately 11:00 p.m. on May 30, 2012, two police officers visited the employer's facility and stated that they had received a call regarding one of the employer's youths. The claimant, other staff and officers went to the youth's location, made sure he was okay, and sent him back to bed. Afterwards, the claimant answered a phone call from another mental health professional who called out of concern for the youth in question. The claimant identified herself when answering the phone and was polite and professional, although the caller had an attitude and proceeded to get smart with the claimant. One of the officers then spoke to the caller and updated the caller on the situation. The claimant had never dealt with this type of incident before, so she asked a coworker who had been working for the employer longer if they were to complete an incident report, and the coworker said that it was not necessary. No employee contacted a supervisor regarding this police visit.

On June 1, 2012, the Program Director received a complaint from the mental health professional, alleging that the claimant had been rude during the phone call the night before, and that the claimant did not identify herself when answering the phone. Prior to this phone call, the Program Director was unaware that the police had been to the employer's facility. The employer's written policies state that if the police are on the grounds, employees are to contact the Medical Director. In addition, a sign stating that employees are to call the Program Director immediately if the police are on the grounds for any reason after business hours was visibly posted in the employer's facility. The claimant received a copy of the employee handbook containing these policies on November 23, 2011.

The employer's disciplinary procedure provides that an employee shall be given a verbal warning for the first incident of misconduct, a written warning for the second incident, and termination for the third

incident. However, if there is a thirty day lapse between incidents of misconduct, the disciplinary action goes back to a verbal warning. On June 1, 2012 the claimant was written up for being rude to the caller, failing to call a Director on May 30, 2012, and failing to write an incident report. The claimant was then 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).

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).

Md. Code, Ann., Labor & Emp. Article, Section 8-1002 provides that an individual shall be disqualified from receiving benefits when he or she was discharged or suspended from employment because of behavior that demonstrates gross misconduct. The statute defines gross misconduct as repeated violations of employment rules that prove a regular and wanton disregard of the employee's obligations.

EVALUATION OF 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 been met.

In the case at bar, the claimant was discharge for a variety of actions which allegedly occurred on three different occasions in April and May of 2012. With regard to the April incident of the claimant doing her laundry at work, using the employer's facilities, the credible evidence indicates that the claimant's previous supervisor had given her permission to do her laundry at work and that the claimant had not been told that she could no longer do her laundry at work, prior to being spoken to by her shift lead. When an employee is given permission to do something and is never informed that permission has been revoked, the claimant does not commit misconduct by doing the thing that she was originally given permission to do. *See* Joiner v. Santoni's Market, Inc., 466-BH-89.

Where an employer discharges a claimant for a variety of actions alleged to constitute misconduct, but where some of these actions were not proven or cannot be considered as misconduct, the remaining actions should be considered, and if they amount to misconduct, the claimant was discharged for misconduct. Edmonds v. Anne Arundel County Government, 1476-BH-92. With regard to the May 30, 2012 incident, there is insufficient evidence to establish that the claimant failed to identify herself when answering the phone, or that she was in anyway rude the caller that later complained about her. The employer's witness was not present at the time of the phone call, and was only able to offer testimony as to the hearsay statements of the individual whom made the complaint, whereas the claimant provided credible firsthand testimony that she was polite and professional. The claimant's credible firsthand testimony received greater evidentiary weight than the hearsay statements of the complaining caller whom could not be subject to cross examination as the claimant was. However, although there is insufficient evidence to establish that the claimant should have known to write an incident report regarding the police visit, the credible evidence indicates that the claimant should have known that she was responsible for calling the Medical or Program Director to report the police visit and the claimant candidly admitted that she failed to do so. The claimant was not solely responsible for reporting the police visit, and the police visit in this case was due an outside report that turned out to be a false alarm. The claimant's failure to call a Director amounts to misconduct.

With regard to the May 17, 2012 incident, the claimant cannot be held responsible for her coworker's failure to secure the office and the petty cash. The credible evidence indicates that there was a general duty to make sure that the office and petty cash were secure, but there is no evidence that the claimant was responsible for checking behind the employee that was last working in the office with the petty cash. However, during the May 17, 2012 incident, the claimant did leave the three youths she was supervising unattended in a car and she also failed to act when her coworker obviously left the other three youths unattended in the group home. One of the claimant's essential job duties was to provide 24 hour monitoring of the youths, but the claimant failed to do so on this occasion. When a claimant has a position where she is responsible for the security and safety of others, particular those in an at-risk category, an expectation that the claimant will fulfill her duties properly can and should be expected by employers. *See* Puth v. Montgomery Investigative, 2625-BR-94. The claimant's failure to properly monitor the youths showed gross negligence and amounts to gross misconduct.

The claimant's actions showed a deliberate and willful disregard of the standards the employer had a right to expect, showed a gross indifference to the employer's interests and therefore constituted gross misconduct in connection with the work. An unemployment disqualification shall be imposed based on Md. Code, Ann., Labor & Emp. Article, Section 8-1002 pursuant to this separation from this 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 27, 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 Specialist is reversed.

J. Nappier
J. Nappier, 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 October 12, 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: September 18, 2012
DAH/Specialist ID: RWD1D
Seq No: 001
Copies mailed on September 27, 2012 to:
SHATYRA B. HENRY
MAPLE SHAPE YOUTH & FAMILY
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