

**- DECISION -**

Claimant:  
ROLANDA M PAYNE

Decision No.: 933-BR-13

Date: March 08, 2013

Appeal No.: 1236786

S.S. No.:

Employer:  
DAVCO RESTAURANTS INC

L.O. No.: 64

Appellant: Claimant

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.

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**- 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 08, 2013

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**REVIEW OF THE RECORD**

After a review of the record, the Board deletes the last sentence in the findings of fact and moves it to the evaluation of the evidence. The Board instead finds that the claimant did not provide the safe combination to anyone. The Board adopts the hearing examiner's modified findings of fact and reverses 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 the appeal to the Board, the claimant denied that she gave out the safe combination. The Board finds merit in the claimant's argument because it is not contradicted by first-hand testimony in the hearing. The assertion that the co-worker may have observed the combination when the claimant used the safe is speculative. The employer's witness was not present during the alleged event and has no first-hand knowledge regarding the alleged event.

The employer offered out-of-court statements made by a co-worker witness who was allegedly provided the safe combination by the claimant; these statements were offered for the truth of the matter asserted and are hearsay. The employer's best evidence would have been to present the first-hand witness and have her subject to cross-examination. The Board gives more weight to the claimant's first-hand testimony.

Although the hearing examiner may rely on hearsay evidence in making his determination, the hearing examiner must, "first carefully consider[] its reliability and probative value." *Travers v. Baltimore Police Dept.*, 115 Md. App. 395, 413 (1997). "The Court has remained steadfast in reminding agencies that to be admissible in an adjudicatory proceeding, hearsay evidence must demonstrate sufficient reliability and probative value to satisfy the requirements of procedural due process." *Id.* at 411. See also *Kade v. Charles H. Hickey School*, 80 Md. App. 721, 725 (1989) ("[e]ven though hearsay is admissible, there are limits on its use. The hearsay must be competent and have probative force.").

One important consideration for a hearing body is the nature of the hearsay evidence. For instance, statements that are sworn under oath, see *Kade*, 80 Md. App. at 726, 566 A.2d at 151, *Eichberg v. Maryland Bd. of Pharmacy*, 50 Md. App. 189, 194, 436 A.2d 525, 529, or made close in time to the incident, see *Richardson v. Perales*, 402 U.S. 389, 402, 28 L. Ed. 2d 842, 91 S. Ct. 1420 (1971), or

corroborated, see *Consolidated Edison v. N.L.R.B.*, 305 U.S. 197, 230, 83 L. Ed. 126, 59 S. Ct. 206 (1938) ("mere uncorroborated hearsay or rumor does not constitute substantial evidence"); *Wallace v. District of Columbia Unemployment Compensation Bd.*, 294 A.2d 177, 179 (D.C. 1972), ordinarily is presumed to possess a greater caliber of reliability. Cited in *Travers* 115 Md. App. at 413. Also see *Parham v. Dep't of Labor, Licensing & Regulation*, 985 A.2d 147, 155 (Md. Ct. Spec. App. 2009). Also see *Cook v. National Aquarium in Baltimore*, 1034-BR-91 (the employer offered not a single specific example of the alleged misconduct as observed by either of the employer's witnesses and no documents were introduced relating to any specific instance of misconduct. The employer offered only conclusory statements that the claimant engaged in a certain type of misconduct).

The hearing examiner insufficiently relied upon the hearsay evidence in his evaluation of the evidence when finding misconduct. As the Court of Appeals has noted, for a reviewing court to perform properly its examination function, an administrative decision must contain factual findings on all the material issues of a case and a clear, explicit statement of the agency's rationale. *Harford County v. Preston*, 322 Md. 493, 505, 588 A.2d 772, 778 (1991). A fully explained administrative decision also fulfills another purpose; it recognizes the "fundamental right of a party to a proceeding before an administrative agency to be apprised of the facts relied upon by the agency in reaching its decision . . ." *Id.*; also see *Mehrling v. Nationwide Ins. Co.*, 371 Md. 40, 56 (2002); *Fowler v. Motor Vehicle Administration*, 394 Md. 331, 353 (2006); *Crumlish v. Insurance Commissioner*, 70 Md. App. 182, 187 (1987).

In *Kade v. Charles H. Hickey School*, the Court of Special Appeals reversed a decision by an administrative agency for similarly relying on hearsay evidence without establishing the reliability of that evidence. In *Kade*, a school employee appealed his suspension by his employer for disrespectful conduct towards a fellow employee. At the hearing before the administrative agency, the superintendent of the school was the only witness for the employer. The superintendent testified that he was not present on the night of the incident and that all of the information he possessed was based on statements given to him. The Court found the agency's reliance on the hearsay statements submitted by the superintendent to be improper.

Even though the statements were relevant, *there was no indication that this hearsay evidence was reliable, credible or competent.* The statements which were submitted by appellant's co workers are not under oath and do not reflect how they were obtained.... No reason was given as to why the declarants were unavailable.

The Court's rejection of the administrative agency's use of hearsay evidence in *Kade* applies with equal force to the hearing examiner and the Board in this case. The Board finds that the employer provided insufficient evidence of a course of wrongful conduct or the commission of a forbidden act by the claimant.

On appeal, the Board reviews the 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 Board has thoroughly reviewed the record from the hearing. A review of the record shows that the hearing examiner afforded each party the opportunity to testify, to cross-examine opposing witnesses, to offer documents and to make a closing argument or summary statement. All due process requirements were observed throughout the hearing. The Board finds that the hearing examiner

afforded the parties a fair hearing in comport with due process and *Md. Code Ann., Lab. & Empl. Art.*, §§8-508(c)(a)(1) and 8-506(a)(1) and (2) (2008 Supp.).

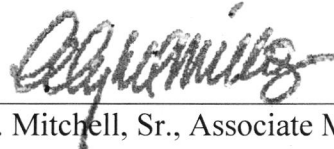
The Board notes that the hearing examiner did not offer or admit the *Agency Fact Finding Report* into evidence. The Board did not consider this document when rendering its decision.

The Board finds based on a preponderance of the credible evidence that the employer did not meet its burden of demonstrating that the claimant's actions rose to the level of misconduct within the meaning of § 8-1003. The hearing examiner's decision shall be reversed for the reasons stated herein.

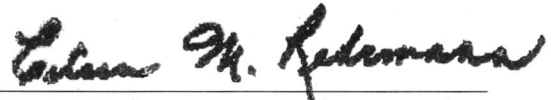
### DECISION

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 DAVCO RESTAURANTS INC.

The Hearing Examiner's decision is reversed.



Clayton A. Mitchell, Sr., Associate Member



Eileen M. Rehrmann, Associate Member

KJK

Copies mailed to:

ROLANDA M. PAYNE  
DAVCO RESTAURANTS INC  
WENDYS OLD FASH HAMBGRS  
Susan Bass, Office of the Assistant Secretary

Young, confirmed that the crew member was aware of the code. (The combination was subsequently changed.) The claimant denied to Mr. Young that she had given out the combination, though she acknowledged having briefly been out of the store (smoking in her car).

## 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 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.

In the case of a discharge, 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 this case, the burden has been met as to simple misconduct. The employer's witness presented credible testimony regarding an employee (not present at the hearing) who had alleged that the claimant had given her the combination to the store safe, an act which would constitute a serious violation of an established safety policy. Nevertheless, the claimant offered an adamant, and seemingly credible, denial of having done so, while suggesting a plausible explanation (crew member may have seen her opening the safe). While Mr. Young may have reasonably chosen to accept the crew member's account, the reliability of the hearsay evidence must be questioned in terms of its sufficiency to meet the aforementioned standard of proof. Accordingly, and in light of the claimant's longstanding tenure with the employer, she shall be afforded the benefit of the doubt as to whether she intentionally disclosed the code to a subordinate. In recognizing, however, that she may have unknowingly allowed the combination to be discovered, along with her admission in regard to briefly leaving the store, the claimant has acknowledged a breach of duty within the meaning of Section 8-1003. The statute imposes a mitigated penalty.



**UNEMPLOYMENT INSURANCE APPEALS DECISION**

ROLANDA M PAYNE

SSN #

**Claimant**

vs.

DAVCO RESTAURANTS 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: 1236786

Appellant: Claimant

Local Office : 64 / BALTOMETRO

CALL CENTER

November 29, 2012

**For the Claimant:** PRESENT

**For the Employer:** PRESENT , LLOYD YOUNG

**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, Rolanda Payne, filed a claim for benefits establishing a benefit year beginning September 23, 2012.

The claimant began working for the employer, Davco Restaurants (d/b/a "Wendy's"), on or about February 1, 2001. At the time of separation, the claimant was employed as an assistant manager. The claimant last worked for the employer on or about September 21, 2012, before being terminated for an alleged violation of the company's security and safety policy. The employer took this action after a subordinate crew chief reported to the general manager that the claimant had given her (the crew member) the combination to the restaurant's safe prior to taking a break to relax outside the store. The employer's district manager, Lloyd

## DECISION

IT IS HELD THAT the claimant was discharged for misconduct connected with the work within the meaning of Md. Code Ann., Labor & Emp. Article, Section 8-1003. Benefits are denied for the week beginning September 16, 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](mailto: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.



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E B Steinberg, 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 December 14, 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 : November 19,2012  
CH/Specialist ID: RWD1D  
Seq No: 001  
Copies mailed on November 29, 2012 to:  
ROLANDA M. PAYNE  
DAVCO RESTAURANTS INC  
LOCAL OFFICE #64  
WENDYS OLD FASH HAMBGRS