

- DECISION -

Claimant:	Decision No.:	112-BR-15
MICHAEL D WATKINS	Date:	January 26, 2015
	Appeal No.:	1419221
	S.S. No.:	
Employer:	L.O. No.:	64
SPECTRUM SUPPORT INCORPORATED	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 25, 2015

REVIEW OF THE RECORD

The employer has filed a timely appeal to the Board from an Unemployment Insurance Lower Appeals Decision issued on September 3, 2014. That Decision held the claimant was discharged under non-disqualifying conditions within the meaning of *Md. Code Ann., Lab. & Empl. Art., §§8-1002 and 8-1003*. Benefits were allowed for the week beginning June 29, 2014, so long as other eligibility requirements were met.

On appeal, the Board reviews the evidence of record from the Lower Appeals hearing. The Board reviews the record *de novo* and may affirm, modify, or reverse the hearing examiner's findings of fact or

conclusions of law, on the basis of evidence submitted to the hearing examiner or evidence that the Board may direct to be taken. *Md. Code Ann., Lab. & Empl. Art., §8-510(d)*. The Board fully inquires into the facts of each particular case. *COMAR 09.32.06.03(E)(1)*. Only if there has been clear error, a defect in the record, or a failure of due process will the Board remand the matter for a new hearing or the taking of additional evidence. Under some limited circumstances, the Board may conduct its own hearing, take additional evidence or allow legal argument.

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)*.

In this case, the Board has thoroughly reviewed the record from the Lower Appeals hearing. 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 the opportunity to present closing statements. The necessary elements of due process were observed throughout the hearing. The Board finds no reason to order a new hearing, to take additional evidence, to conduct its own hearing, or allow additional argument. Sufficient evidence exists in the record from which the Board may render its decision.

After a review of the record, the Board makes the following findings of fact:

The claimant was employed as a full-time support specialist from February 17, 2012 through June 30, 2014. The claimant is unemployed as the result of a discharge.

The employer has a workplace policy that requires its employees to report incidents of abuse of its individuals with disabilities by other employees. The failure to report abuse is subject to disciplinary action including termination.

On June 20, 2014, a supervisor was physically aggressive towards an individual with developmental disabilities. The supervisor pushed and grabbed the individual and subsequently picked up the individual by his sweatshirt and shook him. The incident took place less than 10 feet of the claimant. The claimant witnessed the incident. The claimant was standing on a ramp adjacent to the individual looking down upon him and the supervisor. When the supervisor picked up the individual and shook him, the claimant could see what transpired.

After investigation, the employer discharged the claimant on June 30, 2014 for failing to report the incident of abuse.

The Board finds these facts warrant a reversal of the hearing examiner's decision.
Md. Code Ann., Lab. and Empl. Art., Title 8, Section 1002 provides:

- (a) Gross misconduct...
 - (1) Means conduct of an employee that is:
 - i. 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
 - ii. repeated violations of employment rules that prove a regular and wanton disregard of the employee's obligations...

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).

Md. Code Ann., Lab. and Empl. Art., Title 8, Section 1003 provides:

- (a) Grounds for disqualification – an individual who otherwise is eligible to receive benefits is disqualified from receiving benefits if the Secretary finds that unemployment results from discharge or suspension as a disciplinary measure for behavior that the Secretary finds is misconduct in connection with employment but that is not:
 - (1) Aggravated misconduct...or
 - (2) Gross misconduct...

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 the employment relationship, during hours of employment or on the employer's premises, within the meaning of *Md. Code Ann., Lab. and Empl. Art., Title 8, Section 1003*. (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 its appeal, the employer contends, "...the video evidence for the hearing does establish that the claimant had a clear view of the incident." The Board agrees. The Board does not concur with the hearing examiner's *Evaluation of Evidence*. The hearing examiner found, "...the claimant's view was obstructed by the railing and the angle of the ramp." The Board disagrees with this conclusion for several reasons. First, the incident of abuse was not a static event; the supervisor first pushed and grabbed the individual while standing next to the claimant on the ramp. Second, the supervisor grabbed and picked up the individual before he shook him. The Board finds neither the angle of the ramp nor the railing materially obscured the claimant's view during this incident. Third, the "shaking" incident took place within approximately ten feet of the claimant, who from the ramp had more of a "bird's eye view". The supervisor picked up the individual from a sitting position and brought him face-to-face with him before shaking him. The Board is persuaded that, even if the claimant's view was momentarily obscured, at some point during the lifting of the individual the claimant witnessed the abuse. The video evidence supports a conclusion that the claimant witnessed improper physical abuse of the individual. It does not support a conclusion that the ramp and the railing precluded him was witnessing the supervisor's improper behavior.

The Board finds by not reporting the incident of clear abuse, the claimant's actions constituted a knowing and deliberate disregard of the standards that his employer had the right to expect and showed a gross indifference to his employer's interests and a gross disregard of the claimant's obligations to his employer.

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 upon a preponderance of the credible evidence, that the employer did meet its burden of proof and show that the claimant was discharged for gross misconduct within the meaning of *Md. Code Ann., Lab. and Empl. Art., §8-1002*. The decision shall be reversed, for the reasons stated herein.

DECISION

The Board holds that the claimant was discharged for gross misconduct within the meaning of *Md. Code Ann., Lab. and Empl. Art., Title 8, Section 1002*. The claimant is disqualified from the receipt of benefits

from the week beginning June 29, 2014, and until the claimant has earned twenty-five times his weekly benefit amount and become unemployed under non-disqualifying conditions.

The Hearing Examiner's decision is Reversed.



Clayton A. Mitchell, Sr., Associate Member



Donna Watts-Lamont, Chairperson

VD

Copies mailed to:

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SPECTRUM SUPPORT INCORPORATED
SPECTRUM SUPPORT INCORPORATED
Susan Bass, Office of the Assistant Secretary

UNEMPLOYMENT INSURANCE APPEALS DECISION

MICHAEL D WATKINS

SSN #

Claimant

vs.

SPECTRUM SUPPORT INCORPORATED

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: 1419221

Appellant: Employer

Local Office : 64 / BALTOMETRO

CALL CENTER

September 03, 2014

For the Claimant: PRESENT

For the Employer: PRESENT , D'OTTA DAVIS

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, Michael Watkins, began working for this employer, Spectrum Support, on February 17, 2012 and his last day worked was June 30, 2014. At the time of his termination the claimant was employed full-time as a support specialist.

The claimant was terminated for allegedly violating the employer's policy. The employer's policy requires an employee to report incidents of abuse committed by other employees. Failure to report an incident of abuse will result in disciplinary action, and possible termination.

On June 20, 2014, a supervisor was physically aggressive towards an individual with development disabilities. The supervisor pushed the individual, and then lifted the individual up by the front of his sweatshirt and shook him. The incident took place on the side of a ramp leading up to a door, and at that time the claimant was standing at the top of the ramp in the doorway of the entrance. The claimant did not have a clear view of the supervisor until after he walked around the side of the ramp with the individual. The claimant observed the supervisor grab the individual's arm, and escort the individual up the ramp. The claimant did not report any incident of abuse. The employer investigated the incident on June 23, 2014, and reviewed the video tape. The video tape showed the view from the bottom and side of the ramp. The employer interviewed the claimant on June 23, 2014 regarding the incident. The employer terminated the claimant on June 30, 2014 for allegedly failing to report an incident of abuse.

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.

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 employer provided testimony and a video tape alleging the claimant witnessed an incident of abuse, and then failed to report the incident. The claimant argued his view was obstructed by the ramp, and denied he saw an incident of abuse. The employer argued the claimant had a clear view of the incident, but did not provide a video tape of the view from the doorway where the claimant was standing. The video tape in

evidence shows the view from the bottom and side of the ramp, and shows the claimant's view was obstructed by the railing and the angle of the ramp. Absence evidence to the contrary, the evidence shows the claimant's view was obstructed and I find it credible that he did not see the incident of abuse. Therefore, the claimant did not violate policy, and it cannot be concluded that the separation was due to any degree of misconduct. Accordingly, I hold the employer has failed to meet its burden and no disqualification is warranted.

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 affirmed.



E K Stosur, 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 September 18, 2014. 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 : August 26,2014
TH/Specialist ID: RBA15
Seq No: 001
Copies mailed on September 03, 2014 to:

MICHAEL D. WATKINS
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