

- DECISION -

Claimant:
VANESSA K DASHIELL

Decision No.: 1655-BR-13

Date: April 19, 2013

Appeal No.: 1302800

S.S. No.:

Employer:
MOUNTAIRE FARMS OF

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: May 20, 2013

REVIEW OF THE RECORD

After a review of the record, and after deleting the entire second paragraph, the Board adopts the hearing examiner's modified findings of fact. The Board makes the following additional findings of fact:

On November 12, 2012, about one hour after the claimant had begun her work shift, her supervisor noticed the smell of alcohol emanating from the claimant. Another supervisor verified this and a "Reasonable Suspicion" Report was prepared (*Employer's Exhibit #1*). The claimant was sent to the employer's nurse for testing. A breathalyzer test was administered at 10:22, approximately two hours after the claimant's shift had begun. The

result of that test was an alcohol level of 0.106. A second breathalyzer test was administered fifteen minutes later with a result of 0.099. (See *Employer's Exhibit #2*) The legal limit defining impairment is 0.08.

The claimant was aware of the employer's policy prohibiting working or reporting for work under the influence of alcohol or illegal drugs (*Employer's Exhibit #4*). The claimant had been drinking heavily the night before this incident. The claimant was suspended, based upon the two test results, pending the employer's consideration of appropriate disciplinary action (*Employer's Exhibit #3*). Because of the severity of the alcohol level, the employer discharged the claimant.

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). 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 offers specific contentions of error as to the findings of fact and the conclusions of law in the hearing examiner's decision. The employer specifically cites to the evidence of record and reiterates the testimony from the hearing. Because the Board agrees with the employer's contentions, the Board will not further address those contentions.

On appeal, the Board reviews the evidence of record from the Lower Appeals Division 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 record from the hearing. The Board finds the hearing examiner erred in her decision. The evidence clearly and specifically established that the claimant was working at the time she was observed smelling of alcohol. The claimant was working at the time her alcohol levels were tested at 0.106 and 0.099. The claimant was most certainly under the influence of alcohol while on duty. This poses a danger to the claimant, her co-workers and the employer in general.

The claimant reported to work in an intoxicated state with alcohol levels above that at which she legally would be allowed to operate a motor vehicle. The Board finds this to be gross negligence and further finds her discharge to have been for 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 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 November 11, 2012 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

VD

Copies mailed to:

VANESSA K. DASHIELL

MOUNTAIRE FARMS OF

Susan Bass, Office of the Assistant Secretary

UNEMPLOYMENT INSURANCE APPEALS DECISION

VANESSA K DASHIELL

SSN #

Claimant

vs.

MOUNTAIRE FARMS OF

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: 1302800

Appellant: Claimant

Local Office : 65 / SALISBURY

CLAIM CENTER

February 22, 2013

For the Claimant: PRESENT

For the Employer: PRESENT, ELIZABETH ABULARACH

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, Vanessa K. Dashiell, began working for this employer, Mountaire Farms of, on September 7, 2012, and her last day worked was November 12, 2012. At the time of her discharge, the claimant worked full-time as an Associate in Tray Pack Department, earning an hourly salary of \$8.55.

Employer has a Substance Abuse Policy that prohibits an employee from being under the influence of illegal drugs or alcohol during working hours. Claimant was aware of the policy and acknowledged its receipt on September 10, 2012. On November 12, 2012 at approximately 9:20 am, employer required claimant to submit to a reasonable suspicion alcohol screening. While claimant submitted to an alcohol screenings using a breathalyzer, the results of the breathalyzer are unknown. On November 11, 2012 at

10:22 pm and 10:39 pm, claimant submitted to alcohol screenings using a breathalyzer. While the results of the two breathalyzers were positive, it is unknown whether claimant was working during the period the tests were conducted.

On November 14, 2012, employer discharged claimant for being under the influence of illegal drugs or alcohol during working hours in violation of their Substance Abuse Policy.

CONCLUSIONS OF LAW

Maryland Code Annotated, Labor and Employment Article, § 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).

Maryland Code Annotated, Labor and Employment Article, § 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 show 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).

An employer must demonstrate not only that a claimant committed misconduct, but also that the misconduct was "connected with the work." In determining whether an employee's actions are connected with the work, the following circumstances should be considered:

- 1) Whether there was a breach of duty to the employer;
- 2) Whether the act occurred during the hours of employment;
- 3) Whether the act occurred on the employer's premises;
- 4) Whether the act occurred while the employee was engaged in his work; and
- 5) Whether the employee took advantage of the employment relation in order to commit the act. Employment Security Board v. LeCates, 218 Md. 202, 145 A.2d 840 (1958).

Conclusory statements of the employer are not sufficient evidence to meet the employer's burden of proof. An employer must produce specific evidence that the claimant had engaged in the alleged misconduct. Cook v. National Aquarium in Baltimore, 1034-BR-91.

EVALUATION OF EVIDENCE

The employer had the burden to show, by a preponderance of the credible evidence, the claimant's discharge was for conduct which rose to the level of misconduct or gross misconduct, pursuant to the Maryland Unemployment Insurance Law. Hartman v. Polystyrene Products Company, Inc., 164-BH-83. In this case, the employer failed to meet this burden.

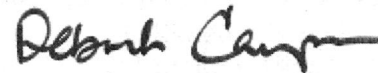
An employer who alleges that a claimant is ineligible for unemployment compensation by reason of simple, gross, or aggravated misconduct has the burden of proof on this issue by a preponderance of the evidence. The employer's burden of proof includes the production of evidence as to the employer's expectations of the employee and that these expectations were communicated to the employee. In this respect, evidence of clear work rules and their specific violations are particularly relevant.

The employer failed to proffer sufficient evidence to support their conclusion that claimant engaged in work connected misconduct. While claimant's actions may have been objectionable to employer, there was no showing of concrete instances in which the claimant's actions and/or inactions rose to the level of misconduct. Accordingly, I hold the employer has failed to meet its burden in this case to prove that the claimant was discharged for any degree of misconduct connected with the work and benefits are, therefore, granted.

DECISION

IT IS HELD THAT the claimant was discharged, but not for misconduct connected with the work within the meaning of Maryland Code Annotated, Labor and Employment Article, § 8-1003. No disqualification is imposed based upon this separation from employment with Mountaire Farms of. The claimant is eligible to receive benefits so long as all other eligibility requirements are met. The claimant may contact Claimant Information Service concerning other eligibility requirements at ui@dllr.state.md.us or telephone (410) 949-0022 from the Baltimore region, or (800) 827-4839 from outside the Baltimore region. Deaf claimants with TTY may contact Client Information Service at (410) 767-2727, or outside the Baltimore region at (800) 827-4400.

The determination of the Claims Specialist is reversed.



D F Camper, 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 March 11, 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: February 12, 2013
DW/Specialist ID: USB38
Seq No: 002
Copies mailed on February 22, 2013 to:
VANESSA K. DASHIELL
MOUNTAIRE FARMS OF
LOCAL OFFICE #65