# -DECISION-

Claimant:
HELEN E FORD

Employer:
SIGNATURE PAYROLL SERVICES LLC

Decision No.: 1682-BR-11

Date: March 21, 2011

Appeal No.: 1034614

S.S. No.:

L.O. No.: 60

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 20, 2011

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## REVIEW ON THE RECORD

After a review on the record, the Board adopts the hearing examiner's findings of fact but reaches a different conclusion of law. Additionally the Board finds that the claimant was discharged for the single incident of using inappropriate language to a co-worker in the workplace.

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(H)(1).* The Board fully inquires into the facts of each particular case. *COMAR 09.32.06.02(E).*

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).*

The employer did not sufficiently demonstrate that the claimant's actions were more than a mere isolated incident. *See Proctor v. Atlas Pontiac, 144-BR-87* (An instantaneous lapse in the performance of job duties does not constitute misconduct); *also see Gilbert v. Polo Grill, 192-BH-91* (One slight lapse in the claimant's performance is insufficient to support a finding of misconduct). In the light most favorable to the employer, the claimant failed to use good judgment by not notifying the employer of his physical condition and requesting a replacement. Failing to use good judgment, or an isolated case of ordinary negligence, in the absence of a showing of culpable negligence or deliberate action in disregard of the employer's interests in insufficient to prove misconduct. *Hider v. DLLR, 115 Md. App. 258, 281 (1997); Greenwood v. Royal Crown Bottling Company, 793-BR-88.*

The claimant admittedly responded in an inappropriate manner to a co-worker's statement. That statement was contrary to the employer's policies and the claimant reacted in kind. Both statements were made in a hallway, potentially within the hearing of residents, but no proof of this was offered. The claimant did not remain and enter into any altercation with the co-worker. Immediately after the words were exchanged, the claimant left the area to find her supervisor.

The employer witness providing the factual basis for the claimant's discharge was not an actual witness to the events which led to that discharge. The witness was testifying from other persons' reports. The claimant's former co-worker did not appear and testify. The only testifying witness with any first-hand information was the claimant. She provided a consistent and credible statement of the incident.

Certainly an employer retains the right to terminate the employment of any of its workers for any legal reason. However, the uncontroverted evidence of record established that the claimant had twenty-eight years with this employer, without disciplinary problems. The evidence showed that this was an isolated incident in which, arguably, the claimant was provoked. While this may be a sufficient basis to support the employer's decision to discharge her, it is not sufficient to meet the employer's burden of proof and support a finding that the claimant was discharged for misconduct.

The Board finds that this single isolated incident of the claimant's use of inappropriate language in the workplace, to a co-worker, does not rise to the level of 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 misconduct within the meaning of *§ 8-1003*. 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 SIGNATURE PAYROLL SERVICES, LLC.

The Hearing Examiner's decision is reversed.

Donna Watts-Lamont, Chairperson

Clayton A. Mitchell, Sr., Associate Member

RD/mw
Copies mailed to:
HELEN E. FORD
SIGNATURE PAYROLL SERVICES LLC
LAURA D ADKINS ESQ.
SIGNATURE PAYROLL SERVICES LLC
Susan Bass, Office of the Assistant Secretary

# *UNEMPLOYMENT INSURANCE APPEALS DECISION*

HELEN E FORD

**SSN #**

**Claimant**

vs.

SIGNATURE PAYROLL SERVICES LLC

**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: 1034614
Appellant: Claimant
Local Office : 60 / TOWSON CALL CENTER

October 22, 2010

**For the Claimant:** PRESENT, JAMES HEPNER, GREG BURTON, LAURA D. ADKINS, ESQ.

**For the Employer:** PRESENT, KELLY FRIEDMAN, KATRINA CLARK, ALLISON FENWICK

**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 began working for this employer on December 13, 1982, and her last day worked was August 1, 2010. At the time of her discharge, the claimant worked full-time as a Housekeeping Assistant, earning an hourly salary of $14.02. The employer terminated the claimant from her position for engaging in a verbal altercation with a co-worker, wherein she used profane language.

The employer has a written policy prohibiting employees from using profane or abusive language in the workplace (ER EX #1), a copy of which the claimant received at the start of hire (see ER EX #1, Page 3) and after each policy update or change. On July 31, 2010, several of the claimant's co-workers were having a discussion in one of the employer's hallways. The claimant joined this conversation, during which one of the claimant's co-workers threatened to "...slap the fuck out of you (the claimant)." (CL EX #1).

The claimant responded "You're not going to slap the fuck out of me." (CL EX #1). The verbal altercation between the claimant and her coworker continued as the parties moved from the hallway into the employer's dinning area. Both employees and patients at the employer's Long Term Care Facility were within earshot of the verbal altercation. Although the claimant had no prior violations of the employer's policies, the employer deemed the aforementioned transgression significant enough it discharged the claimant on August 2, 2010.

## CONCLUSIONS OF LAW

Md. Code Ann., Labor & Emp. Article, Section 8-1003 provides for a disqualification from benefits where the employer discharged or suspended the claimant 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, 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 met this burden.

In Brooks v. Conston of Maryland, Inc., 377-BR-88, the Board of Appeals held "The claimant was discharged for engaging in a shouting match with a security guard hired by the employer. The shouting disrupted the employer's business. The claimant lost her temper and engaged in inappropriate conduct, but did not start the argument. She was seriously provoked by the security guard who blatantly violated orders. This constitutes misconduct." Similarly, in the case at bar, the claimant engaged in a verbal altercation with a co-worker. Although the altercation resulted from co-worker provocation and was the first such incident in the claimant's twenty-eight (28) year tenure with this employer, the claimant used profane and abusive language during the altercation.

The Board of Appeals' precedent cases related to "Disruptive Behavior" and "Profane or Abusive Language" do not address the specific language which formed the basis for the employer's discharge decision in the case at bar. (See Noble v. The Bees Distributing Company, Inc., 672-BR-85, Richard v. DHMG Laboratories Administration, 422-BR-88, Shird v. F and H Contractors, Inc., 185-BH-88, Barnes v. St. Luke Lutheran Home, Inc., 235-BR-88, and Reed v. Saval Foods Corporation, 15-BR-91). Therefore, the Examiner must apply the general definitions of "Misconduct" and "Gross Misconduct" to the facts of the case at bar.

In the case at bar, the claimant's singular statement "You're not going to slap the fuck out of me," was not "willful or wanton," nor "an utter disregard of an employee's duties and obligations to the employer (,) calculated to disrupt the discipline and order requisite to the proper management of a company." Therefore, a finding of "gross misconduct" is not warranted.

The claimant's usage was, however, "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." What may be permissible and appropriate in a social setting is not always permissible and appropriate in a work or business setting. In the case at bar, the claimant crossed this line.

At the hearing on this matter, the claimant argued the employer did not strictly follow its disciplinary policy when it discharged the claimant for her single offense. Similarly, in Daniels v. Primary Alcoholism Treatment Program, 301-BH-85, "The claimant argued since the employer did not follow its own procedural rules in discharging the claimant, gross misconduct cannot be found. (However, the Board of Appeals held w)hether the employer followed the technicalities of its own discharge procedures is irrelevant to a finding of misconduct in any case in which the employer proves the claimant did, in fact, commit misconduct." Therefore, the employer's deviation in the case at bar is equally irrelevant.

The claimant further argued other employees similarly violated the employer's policy against using profane language in the workplace and were not discharged. In Griffith v. State Employees' Credit Union, 374-SE-92, the Board of Appeals held "A claimant's misconduct is not mitigated by the alleged fact others also committed misconduct." Therefore, the claimant's argument others committed similar misconduct does not excuse the claimant's misconduct.

Lastly, the claimant argued she uttered "You're not going to slap the fuck out of me," in response to her coworker's threat he would "...slap the fuck out of you (the claimant)," and was therefore an act of self-defense and not misconduct. Clearly, the claimant had the right to respond to her co-worker's statement and "verbally" defend herself; however, she did not have the right to use profane or abusive language it that response.

Accordingly, I hold the employer met its burden in this case and the claimant's discharge was for a single incident of using profane or abusive language while engaged in a verbal altercation with a co-worker, constituting simple misconduct, warranting the imposition of a weekly penalty.

## DECISION

IT IS HELD the employer discharged the claimant 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 July 25, 2010, and for the nine (9) 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 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 modified.

D J Doherty, III, 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 November 08, 2010. 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: October 13, 2010
BLP/Specialist ID: WCU54
Seq No: 001
Copies mailed on October 22, 2010 to:
HELEN E. FORD
SIGNATURE PAYROLL SERVICES LLC
LOCAL OFFICE #60