

- DECISION -

Claimant:
NONI A KEYS

Decision No.: 1755-BR-12

Date: June 08, 2012

Appeal No.: 1144080

S.S. No.:

Employer:
BELLO MACHRE 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: July 09, 2012

REVIEW OF THE RECORD

After a review of the record, the Board adopts the following findings of fact and reverses the hearing examiner's decision.

The claimant was employed as a full time "awake overnight specialist" from September 12, 2010 through September 15, 2011. The claimant is unemployed as the result of a discharge.¹

¹ The claimant resigned in lieu of discharge which is a discharge for unemployment insurance purposes. *Tressler v. Anchor*

The claimant was discharged for attempting to report to work under the influence of alcohol. On September 15, 2011, the claimant was commuting to work and was arrested en route for allegedly driving under the influence of alcohol. The claimant was not on company time, was not on company property, was not performing a job-related duty and her commute was not incident to a company purpose. The claimant was not convicted of driving under the influence of alcohol at the time of her separation from employment.

After an employer-conducted investigation, the claimant was discharged effective September 15, 2011.

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 09.32.06.02(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).

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."

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 are 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 with her work; and (5) whether the employee took advantage of the employment relationship in order to commit the act. *Empl. Security Bd. v. LeCates, 218 Md. 202 (1958)*.

In the instant case, the Board finds insufficient evidence that the claimant's actions on September 15, 2011 were connected with the work. The claimant was not discharged for reporting late to work, for an unauthorized absence, or other attendance violation. The claimant was discharged for *attempting* to report to work under the influence of alcohol. The Board finds insufficient evidence that the claimant's actions were connected with the work. The claimant's actions during her commute were not on company time or on the employer's premises. The claimant was not performing a work-related task. The claimant had not yet reported to work. The claimant was arrested on her personal time. The claimant was not in a company vehicle. The "driving under the influence" charge does not constitute a conviction and there is insufficient evidence that the claimant breached a duty to her employer at any time during her commute.

Although the employer may have a valid business reason for discharging the claimant, it does not constitute misconduct connected with the work for unemployment insurance purposes.

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 BELLO MACHRE, INC.

The Hearing Examiner's decision is reversed.



Clayton A. Mitchell, Sr., Associate Member



Donna Watts-Lamont, Chairperson

RD/mr

Copies mailed to:

NONI A. KEYS

BELLO MACHRE INC

ROBERT SAUER

BELLO MACHRE INC

Susan Bass, Office of the Assistant Secretary

UNEMPLOYMENT INSURANCE APPEALS DECISION

NONI A KEYS

SSN #

Claimant

vs.

BELLO MACHRE 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: 1144080

Appellant: Employer

Local Office : 64 / BALTOMETRO
CALL CENTER

January 10, 2012

For the Claimant:

For the Employer: PRESENT, ROBERT SAUER, BRANDY LIVEZEY, CRYSTAL BROWNLEE

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, Noni Keys, filed a claim for benefits establishing a benefit year beginning November 6, 2011. She qualified for a weekly benefit amount of \$281.

The claimant began working for the employer, Bello Machre Inc., on September 12, 2010. At the time of separation, claimant worked full-time as an "awake overnight" specialist. Claimant last worked for this employer on September 15, 2011, before being terminated under the following circumstances:

The employer provides services for vulnerable adults with developmental disabilities. The employer has a drug and alcohol-free workplace policy of which claimant is aware. (Employer Exhibit #3)

On September 15, 2011 claimant was scheduled to work from 11:00 p.m. to 8:00 a.m. shift. Claimant was arrested on her way to work for driving under the influence of alcohol. (Employer Exhibit #1) Prior to her arrest, the claimant called the employer to report that she was "running late" because she overslept. Claimant had been drinking alcohol since 11:00 a.m. that day. Claimant self-reported to the employer that she had been charged with driving under the influence of alcohol on her way to work.

On September 23, 2011 the employer met with claimant to continue its investigation of the incident leading to claimant's arrest for DUI. Claimant reported that she was on her way to work because "she did not think the alcohol was still in her system". The claimant was given an option to resign in lieu of termination for being intoxicated for reporting to work under the influence of alcohol. (Employer Exhibit #2)

CONCLUSIONS OF LAW

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 v. Hager, 96 Md. App. 362, 625 A.2d 342 (1993).

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).

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 Tressler v. Anchor Motor Freight, 105-BR-83, the Board of Appeals, citing the Maryland Court of Appeals decision in Allen v. CORE Target City Youth Program, 275 Md. 69, 338 A.2d 237 (1975), held "A claimant who resigns in lieu of discharge does not show the requisite intent to quit." Therefore, a resignation in lieu of discharge is treated as a discharge for the allocation of the burden of proof.

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.

Although the claimant was off duty, her conduct was connected to work. Claimant was on her way to work when she was arrested for being under the influence of alcohol. Claimant worked with adults who have developmental disabilities which is sufficient to hold her accountable from coming to work while intoxicated. Misconduct need not take place during hours of employment or on the work premises in order to be work connected. (See Stinson v. Towson Inn Restaurants Corporation, 1602-BR-92) The claimant was on her way to work in an intoxicated state which showed a deliberate and willful disregard of the standards the employer had a right to expect which constitutes gross misconduct. The claimant technically violated the employer's policy by her arrest while on her way to work for driving under the influence of alcohol. The DUI arrest raises the presumption that claimant was either intoxicated or under the influence of alcohol, as proof that claimant was unfit to work that day.

The claimant failed to appear at the hearing to rebut the evidence presented by the employer.

I hold that 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 September 11, 2011, 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.



P A Butler, 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 January 25, 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: January 04, 2012
BLP/Specialist ID: RBA2M
Seq No: 001
Copies mailed on January 10, 2012 to:

NONI A. KEYS
BELLO MACHRE INC
LOCAL OFFICE #64
ROBERT SAUER