

- DECISION -

Claimant:
TOYRIA E CROMER

Decision No.: 2087-BR-11

Date: May 16, 2011

Appeal No.: 1033054

S.S. No.:

Employer:
CROSSWOOD INC

L.O. No.: 61

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: June 15, 2011

REVIEW ON THE RECORD

After a review on the record, the Board deletes "or about" from the first and third sentences of the first paragraph. The Board also deletes "despite her best efforts" from the second sentence of the second paragraph. The Board also corrects the claimant's separation date to be June 25, 2010. The Board adopts the hearing examiner's modified findings of fact. The Board makes the following additional findings of fact:

The claimant was a teacher, licensed by the State of Maryland. The claimant's recertification was required in order for the employer to continue to utilize her as a teacher.

The claimant was aware of this requirement and aware of the classes she needed to take, although an additional class arose for her. The claimant had more than a year to complete her recertification, but did not exercise sufficient diligence in pursuing this. The claimant believed that the employer would seek an extension, but did not inquire about this and one was not pursued by the employer. The claimant had already worked for year under a conditional certification.

The claimant did not act diligently in preparing herself for this exam or in registering for it sufficiently in advance of when she knew she needed to take and pass it. The claimant could have taken parts of the exam on-line, but thought she might change her luck by waiting and taking it on paper later in the summer.

The Board concludes that these facts warrant a different conclusion of law 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(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).

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."

Where a claimant is required to have certification from a government agency to keep his job, the claimant has a duty to his employer to conduct himself in such a way as to maintain his certification. *Davis v. National Security Agency, 853-BR-92*. Where the credible evidence establishes that a claimant schoolteacher is separated from her job for failing to obtain and/or maintain her certification by the State of Maryland as a classroom teacher, the burden of proof shifts to the claimant to establish that the claimant made good faith efforts to comply with the requirements of the certification. *Abraham v. Prince George's County Public Schools, 487-BH-85*. A claimant who fails to obtain licensure or certification due to circumstances beyond his control or due to no fault of their own is not misconduct. *Id.*

If the claimant establishes that she made good faith efforts to comply with the requirements of certification, the separation is without misconduct within the meaning of § 8-1003. *Davis v. National Security Agency, 853-BR-92; Prince George's County Public Schools, 487-BH-85*. If the evidence fails to establish that the claimant made good faith efforts to comply with the requirements of certification, the claimant's conduct constitutes misconduct or gross misconduct connected with the work within the meaning of § 8-1003 or § 8-1002 depending upon the facts and circumstances of the claimant's conduct. *Id.*

In the instant case, the employer appeared to be willing to work with the claimant and grant her additional time, but the employer clearly could not wait until after the start of the school year to know whether the claimant had her certification.

Evidence was also adduced that the employer had offered the claimant a teaching assistant position, at \$4,000 per year less salary, but with similar benefits, since she was no longer licensed to teach. The claimant declined this position for personal reasons. The issue of whether the claimant refused an offer of suitable work, without good cause, was not before the hearing examiner and is not before the Board at this time. The Agency, however, may wish to further investigate this question.

The Board notes that the employer witness had little first-hand testimony to offer at the hearing. The witness' knowledge of the claimant's separation was almost entirely from the notes of the Director of the school. However, the claimant's testimony corroborated the employer witness' statements, rendering the hearsay testimony credible and competent.

The claimant had ample opportunity to prepare for and to take the Praxis exam prior to the end of her contract year. The claimant did not act with sufficient diligence to preserve her employment. The claimant's failure to obtain the required certification was gross misconduct under Maryland law.

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 *Section 8-1002*, and consistent with *Davis v. National Security Agency, 853-BR-92* and *Prince George's County Public Schools, 487-BH-85* (above). 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 June 20, 2010 and until the claimant becomes re-employed, earns at least twenty 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

RD/mw

Copies mailed to:

TOYRIA E. CROMER

CROSSWOOD INC

C/O COMPREHENSIVE ACCTG

Susan Bass, Office of the Assistant Secretary