

-DECISION-

Claimant:
ZACHARY MCLEOD

Decision No.: 2162-BH-06

Date: October 02, 2006

Appeal No.: 0610292

Employer:
HOWARD COUNTY GOV'T

S.S. No.:

L.O. No.: 64

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: November 01, 2006

- APPEARANCES -

FOR THE CLAIMANT:

FOR THE EMPLOYER:
Jim Stuller- Employer Rep.

PRELIMINARY STATEMENT

This matter was scheduled before the Board of Appeals for a hearing for legal argument only, on September 12, 2006 at 1:00 pm. The claimant failed to appear. Mr. James A. Stuller, of Unemployment Tax Services, Inc., appeared on behalf of the employer, Howard County Government, and presented legal argument.

EVALUATION OF THE EVIDENCE

The Board of Appeals has considered all of the evidence presented, including the testimony offered at the hearing. The Board has also considered all of the documentary evidence introduced in this case, as well as the Department of Labor, Licensing and Regulation's documents in the appeal file.

FINDINGS OF FACT

The claimant was employed from September 26, 2005 until April 8, 2006 as a child care leader. The claimant was separated from employment as a result of a discharge.

On April 8, 2006 the claimant was arrested at the workplace by the Howard County Police. The employer was informed by the Howard County Police that the claimant was being arrested for a sexual offense. On April 10, 2006 the claimant returned to the workplace and was discharged by Barbara Moore.

The employer was required, pursuant to COMAR 13A.14.02.19-1,¹ to discharge any employee charged for the commission or attempted commission of a crime involving a child, a sex offense or abuse of a child. See Employer's Exhibit 1. The employer was not allowed to maintain the employee's employment while awaiting a final outcome of the charges.²

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.

In a case of a discharge the employer has the burden of proving, by a preponderance of credible evidence, that the claimant was discharged for actions that rose to the level of gross misconduct within the meaning of section 8-1002 of the law. The employer has met its burden in this case.

¹ The employer entered into evidence, as Employer's Exhibit 1, a copy of COMAR 07.04.02.19-1. This was the previous citation for this regulation when it was part of Title 7 of the regulations for the Department of Human Resources. This regulation has been moved to the regulations for the State Board of Education as part of Title 13A of the Code of Maryland Regulations. However, the language of this sub-section remained the same.

² The claimant was subsequently convicted of a third degree sex offense on August 2, 2006. See Employer's Exhibit B1

The Board of Appeal has held that a discharge based only on the fact that the claimant was arrested and/or charged with a criminal act will not support a finding of gross misconduct or even simple misconduct. The Board of Appeals has consistently held that an additional fact, such as a conviction or an admission by the claimant is necessary to sustain a finding of gross misconduct or misconduct. However, given the facts of this case, the Board of Appeals concludes that a finding of gross misconduct is warranted.

The employer has been placed in a position, pursuant to COMAR 13A.14.02.19-1, whereby they must discharge an individual solely upon the fact that there is a pending charge for a crime involving a child, a sex offense or abuse of a child and then be penalized by having their unemployment tax rate increased for discharging an employee for no misconduct. This is an untenable position for an employer to be placed in.

The Board of Appeals, based upon all the evidence now in this case, and given the particular facts of this case, reverses the decision of the Hearing Examiner and concludes that the claimant was discharged for actions that rose to the level of gross misconduct.

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. He is disqualified from receiving benefits from the week beginning April 9, 2006 and until he becomes re-employed, earns at least twenty times his weekly benefit amount and thereafter becomes unemployed through no fault of his own.

The decision of the Hearing Examiner is reversed.



Donna Watts-Lamont, Chairperson



Clayton A. Mitchell, Sr., Associate Member

Date of hearing: September 12, 2006

Copies mailed to:

ZACHARY MCLEOD

HOWARD COUNTY GOV'T

CAROL STROUD
HOWARD COUNTY GOV'T
Michael Taylor, Agency Representative

UNEMPLOYMENT INSURANCE APPEALS DECISION

ZACHARY MCLEOD

SSN #

Claimant

vs.

HOWARD COUNTY GOV'T

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: 0610292

Appellant: Employer

Local Office : 64 / BALTOMETRO

CALL CENTER

June 23, 2006

For the Claimant :

For the Employer : PRESENT , CAROL STROUD, BARBARA MOORE

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 was employed as a child care leader, by Howard County Government, from September 26, 2005 through April 8, 2006, earning wages in the amount of \$7.50 per hour. The claimant was employed on a part-time basis. The claimant was discharged from this employment.

On or about April 8, 2006, the claimant was arrested on the job by the Howard County Police. The arresting officer indicated that the claimant was being charged with a sexual offense.

On April 10, 2006, the claimant was brought into the office of Barbara Moore, manager. At that time she advised him that he was being discharged pursuant to the Maryland State Law.

The law she referred to indicates that "an child care center operator may not employ an individual who, as reported on or after October 1, 2005 has received a conviction, a probation before judgment disposition, a not criminally responsible disposition, or a pending charge for the commission or attempted commission of: a crime involving: (1) a child, (2) a sex offense;"

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).

EVALUATION OF EVIDENCE

In a discharge case the employer has the burden of showing simple, gross or aggravated misconduct by a preponderance of the credible evidence. In the instant case, the employer has failed to sustain this burden of proof.

The decision to discharge the claimant was based solely on the fact that he was arrested and charged with a sexual offense. Insufficient evidence has been presented concerning the claimant's conduct to justify a finding of misconduct. Accordingly, the claimant is not disqualified from receiving benefits.

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 Howard County Government. 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.

A K Thompson, 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 the overpayment within 30 days from the date the overpayment is established. This request may be made by contacting Overpayment Recoveries Unit at 410-949-0022 or 1-800-827-4839. 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.

Notice of Right to Petition for Review

Any party 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 July 10, 2006. 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

NOTE: Appeals filed by mail are considered timely on the date of the U.S. Postal Service postmark.

Date of hearing: June 13, 2006
CH/Specialist ID: RBA3H
Seq No: 001
Copies mailed on June 23, 2006 to:
ZACHARY MCLEOD
HOWARD COUNTY GOV'T
LOCAL OFFICE #64
CAROL STROUD