

Maryland

DEPARTMENT OF ECONOMIC AND EMPLOYMENT DEVELOPMENT

1100 North Eutaw Street
Baltimore, Maryland 21201
(301) 333-5033



William Donald Schaefer, Governor
J. Randall Evans, Secretary

BOARD OF APPEALS

Thomas W. Keech, Chairman
Hazel A. Warnick, Associate Member
Donna P. Watts, Associate Member

— DECISION —

Decision No: 220-BH-89
Date: March 28, 1989
Appeal No.: 8804099
S. S. No.:
Claimant: Wayne Polston
Employer: Johns Hopkins Hospital
ATTN: Ann Falander, Emp. Rel.
600 N. Wolfe Street
Baltimore, MD 21205
L. O. No: 1
Appellant: CLAIMANT

Issue: Whether the claimant was discharged for gross misconduct or misconduct, connected with his work, within the meaning of Section 6(b) or 6(c) of the law.

—NOTICE OF RIGHT OF APPEAL TO COURT —

YOU MAY FILE AN APPEAL FROM THIS DECISION IN ACCORDANCE WITH THE LAWS OF MARYLAND. THE APPEAL MAY BE TAKEN IN PERSON OR THROUGH AN ATTORNEY IN THE CIRCUIT COURT OF BALTIMORE CITY, IF YOU RESIDE IN BALTIMORE CITY, OR THE CIRCUIT COURT OF THE COUNTY IN MARYLAND IN WHICH YOU RESIDE.

April 27, 1989

THE PERIOD FOR FILING AN APPEAL EXPIRES AT MIDNIGHT ON

— APPEARANCES —

FOR THE CLAIMANT:

Wayne Polston - Claimant
Nancy Mathias - Attorney
Wylie Campbell - Witness

FOR THE EMPLOYER:

Ronald Taylor -
Attorney
G. Lou Magsamen -
Mgr., E.E.O.-A.A.

EVALUATION OF EVIDENCE

The Board of Appeals has considered all of the evidence presented, including the testimony offered at the hearings. The Board has also considered all of the documentary evidence introduced in this case, as well as the Department of Economic and Employment Development's documents in the appeal file.

Three witnesses testified before the Board: Mr. Polston, the claimant; Mr. Wylie Campbell, the claimant's witness; and Ms. Garnett Magsamen, Manager for E.E.O.C. and Affirmative Action for Johns Hopkins Hospital. The Board finds Mr. Polston and his witness to be very credible. On the other hand, the Board finds Ms. Magsamen a less credible witness, due to the fact that she did not personally observe any incidents of sexual harassment between the claimant and Ms. Feller. Neither did Ms. Magsamen have any personal knowledge of sexual harassment of other co-workers by the claimant. Ms. Magsamen testified that during the course of her investigation, she gave Ms. Feller more credibility clue to the fact that she had been told the claimant had sexually harassed other co-workers. None of these co-workers or Ms. Feller presented any testimony before the Board of sexual harassment by the claimant.

FINDINGS OF FACT

The claimant was employed from January 29, 1968 until March 17, 1988. The claimant was discharged due to a complaint of sexual harassment by a fellow employee.

On February 25, 1988, a Thursday, the claimant and Renee Feller, the employee who filed the sexual harassment charge which led to the claimant's separation from employment, made plans to meet and did in fact meet at Gampy's Restaurant after work. Ms. Feller was leaving the employ of Johns Hopkins Hospital and this was to be a meeting to have a good-bye drink. The claimant did not expect to see Ms. Feller again after this evening.

Based on the credible testimony presented by both the claimant and his witness, Mr. Wylie Campbell, who was present and observed the claimant and Ms. Feller at Gampy's Restaurant, the Board finds the following facts to be true. The claimant and Ms. Feller were at the restaurant for about an hour having drinks. They were seated next to each other at the bar, and during the course of the time that they were present, engaged in conversation with their faces close to each other, held hands, and exchanged a friendly kiss. Ms. Feller did not push the claimant away or indicate either verbally or physically that she did not welcome his attention.

The claimant and Ms. Feller left Gampy's together. The claimant walked Ms. Feller to her car. Ms. Feller got into her car and then let the claimant in. They talked, held hands and touched. At some point and for some reason not explained to the Board, Ms. Feller started to cry. The claimant got out of the car and Ms. Feller drove off.

The next day, at the hospital, the claimant saw Ms. Feller and asked her if he could talk with her. They went into a music room at Ms. Feller's suggestion. The claimant and Ms. Feller were in this room for less than one minute. During the time that they were in the music room, the claimant touched her by shaking her hand and giving her a hug. It was a mutual hug good-bye. The claimant had leaned over to give Ms. Feller a kiss on the cheek, and when she pulled away, he did not persist. The claimant instead said, "Aren't we even going to hug good-bye?" at which point they hugged and he left the room.

Ms. Feller never gave the claimant any indication that she was put off by his attention.

CONCLUSIONS OF LAW

The acts of the claimant do not amount to sexual harassment of a co-worker. The facts of the case show that Ms. Feller willingly went with Mr. Polston to Gampy's Restaurant on the evening of February 25, 1988. There is no testimony to indicate that she was forced to go out with him or to remain at Gampy's if in fact she felt she was being sexually harassed by the claimant. Ms. Feller certainly did not have to allow the claimant into her car if she thought she was in danger of being sexually harassed. On the following Friday morning, if the claimant was in fear of sexual harassment by the claimant, she did not have to agree to enter the music room with him. There is no testimony that the claimant was in a supervisory capacity over Ms. Feller. In fact the testimony presented was that she was leaving the employment of Johns Hopkins University. Therefore, the Board cannot conclude that she had any reason to fear repercussions or retaliation if she rebuffed the claimant's advances.

Based on the findings of fact the Board concludes that there was no sexual harassment committed by the claimant, and the claimant was discharged from his employment with Johns Hopkins Hospital for no misconduct connected with his work.

DECISION

The claimant was discharged from his employment with Johns Hopkins Hospital, but not for gross misconduct or misconduct connected with his work, within the meaning of Section 6(b) or 6(c) of the Maryland Unemployment Insurance Law. No disqualification will be imposed based on his separation from employment with Johns Hopkins Hospital. The claimant may contact his local office to determine if he meets the other requirements of the law.

The decision of the Hearing Examiner is reversed.

DW:W:K

kbm

Date of Hearing: February 7, 1989

COPIES MAILED TO:

CLAIMANT

EMPLOYER

Nancy D. Mathias, Esq.
Suite 315
9470 Annapolis Road
Lanham, MD 20706

Ronald W. Taylor, Esquire
Venable, Baetjer and Howard
1800 Mercantile Bank & Trust Bldg.
2 Hopkins Plaza
Baltimore, MD 21201

UNEMPLOYMENT INSURANCE - BALTIMORE

STATE OF MARYLAND
APPEALS DIVISION
1100 NORTH EUSTAW STREET
BALTIMORE, MARYLAND 21201
(301) 383-6048

STATE OF MARYLAND
William Donald Schaefer
Governor

-DECISION-

Date: June 9, 1988

Claimant: Wayne L. Polston

Appeal No.: 8804099

S.S. No.:

Employer: Johns Hopkins Hospital
c/o The Gibbens Co., Inc.
Post Office Box 4628
Baltimore, MD 21212

L.O. No: 01

Appellant: Claimant

Issue: Whether the claimant was discharged for gross misconduct connected with the work under Section 6 (b) of the Law.

- NOTICE OF RIGHT TO PETITION FOR REVIEW -

ANY INTERESTED PARTY TO THIS DECISION MAY REQUEST A REVIEW AND SUCH PETITION FOR REVIEW MAY BE FILED IN ANY EMPLOYMENT SECURITY OFFICE OR WITH THE APPEALS DIVISION, ROOM 518, 1100 NORTH EUSTAW STREET, BALTIMORE, MARYLAND 21201, EITHER IN PERSON OR BY MAIL.

THE PERIOD FOR FILING A PETITION FOR REVIEW EXPIRES AT MIDNIGHT ON

June 24, 1988

NOTICE, APPEALS FILED BY MAIL, INCLUDING SELF-METERED MAIL, ARE CONSIDERED FILED ON THE DATE OF THE U.S. POSTAL SERVICE POSTMARK.

- APPEARANCES -

FOR THE CLAIMANT:

Present

FOR THE EMPLOYER:

Represented by
Martha Young, The
Gibbens Company; Ann
Marie Falander, Em-
ployees Relations
Manager; Barbara
DiPasquale, Head
Nurse; Lew Magsamen,
Manager EEO Office;
and Pat Kelly,
Observer

FINDINGS OF FACT

The claimant began employment January 29, 1968 and most recently performed services as a psychiatric nursing aide. He last held this employment on March 17, 1988 and was separated through discharge.

The claimant was discharged for violation of "major rule" of the employer, sexual harassment of a fellow employee (see employer's Exhibit #1 - Rule #15). The discharge was based upon an incident which occurred on the employer's premises on Friday, February 26, 1988. On that date, the complainant, Ms. Renee Feller, arrived for her last day of work with the employer of record, shortly thereafter to began a new assignment at another hospital. The claimant approached her and asked to confer with her and the two of them spoke in the nursing office, to which the claimant closed the door. The claimant approached the complainant, placed his left hand around her and attempted to kiss her. She resisted this advance and the claimant attempted to hug her and the claimant left the room.

Ms. Feller thereafter initiated a formal complaint of sexual harassment, an investigation was begun and the claimant was placed on a five-day suspension which was subsequently extended for an additional five-day period. At the conclusion of the suspension, the claimant was terminated. The investigation showed that the claimant had received a verbal warning for a similar offense in 1981, and had subsequently been observed by employees to engage in activity of a sexually suggested nature on the employer's premises. The credibility of both the claimant and the complainant constituted a portion of the investigation and the claimant was regarded by fellow employees as "a serious professional." During the course of the continuing investigation, another nurse, Ms. Collins, reported that the claimant had come to her and "put his hand down the back of her garment" and had asked her to "go out" with him. Prior to the investigation, Ms. Collins had not initiated a complaint based on the incident, but had related it to the EEO Investigator.

The evidence shows that the complainant, Renee Feller, had been invited out "for a good bye drink" by the claimant on Thursday, February 25, 1988, and had spent several hours with the claimant in eating and drinking establishments on North Charles Street and some measure of affection appeared to have been exchanged between them. A letter, not in affidavit form, (claimant's Exhibit #1) is offered to establish this circumstance and is largely counter-balanced by the complainant's affidavit.

CONCLUSIONS OF LAW

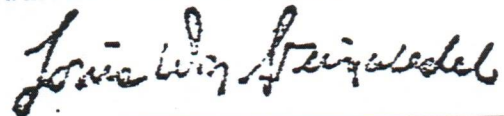
The claimant was discharged for events which took place on the employers premises on February 26, 1988 and not for events which may have occurred the prior evening. The evidence in this case shows that the claimant asked the complainant to an area of privacy in the work place, closed the door behind him and made sexual advancements to her, which fall within the employer's major Rule #15, consisting of "harassment (or) unwelcome advances." The preponderance of the credible evidence does not show that the complainant, Ms. Feller, invited or condoned the actions of the claimant taken in the work place and even the claimant's testimony shows that the complainant resisted his attempts to kiss her.

The conclusion based on the evidence presented must be that the claimant's actions of February 26, 1988 do constitute a violation of the employer's major disciplinary Rule #15 and that such action constitutes a deliberate and willful disregard of standards which the employer has a right to expect as to constitute gross misconduct within the meaning of Section 6 (b) of the Law.

DECISION

The claimant was discharged for gross misconduct connected with the work within the meaning of Section 6 (b) of the Maryland Unemployment Insurance Law. Benefits are denied for the week beginning March 13, 1988 and until such time as the claimant becomes re-employed and earns at least ten times his weekly benefit amount (\$1950), and thereafter becomes unemployed through no fault of his own.

The determination of the Claims Examiner is affirmed.



Louis W. Steinwedel
HEARING EXAMINER

DATE OF HEARING - 5/17/88
cd
2828, 2829/Groves

COPIES MAILED ON 6/9/88 TO:

Claimant
Employer
Unemployment Insurance - Baltimore (MABS)

The Gibbens Company, Incorporated
ATTN: Martha Young
Post Office Box 4628
Baltimore, Maryland 21212

Johns Hopkins Hospital
600 North Wolfe Street
Baltimore, Maryland 21205