

- DECISION -

Claimant:	Decision No.:	254-BR-14
DIANE GEORGE	Date:	February 3, 2014
	Appeal No.:	1327630
	S.S. No.:	
Employer:	L.O. No.:	64
ALIF MANEJWALA LLC	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.

- 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: March 5, 2014

REVIEW OF THE RECORD

After a review of the record, and after deleting "or about" from the first sentence of the second paragraph, the Board adopts the hearing examiner's modified findings of fact. The Board makes the following additional findings of fact:

When the claimant assisted the resident in straightening out his social security, the resident asked her to hold on to his debit card. The resident asked the claimant to make his monthly cash rent payments to the facility and also to make small, personal purchases, on occasion, for him. The resident had little or no use of his hands and could not perform any financial

transactions without the assistance of another person. The resident never requested the claimant return his debit card and never complained to the employer, even when asked about the location of his debit card. The resident knew the claimant had the card and wished her to keep it to use for him at his request. There were no funds missing from the resident's account and he was satisfied with the arrangement he had made with the claimant.

The Board concludes that these facts warrant different conclusions of law and a reversal of 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*. The Board fully inquires into the facts of each particular case. *COMAR 09.32.06.03(E)(1)*.

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*. Conclusory statements are insufficient evidence to meet an employer's burden of proof. *Cook v. National Aquarium in Baltimore, 1034-BR-91*. An employer must produce specific evidence of a claimant's alleged misconduct. *Id.*

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). 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).

In the claimant's appeal, the claimant's attorney contends:

...she had been given *permission* to do so by the resident himself. The resident did not need *money*, but he did need someone to go and purchase small things for him from time to time – something the facility declined to do. The resident...needed was someone to do exactly what claimant was doing for him, *viz.*, pay his rent and make small purchases. The resident had asked that claimant keep his card and use it when he directed her to do so. It was the facility, apparently failing to understand or appreciate what "assisted living" means that wanted to deprive the resident of the only means at his disposal to overcome his physical helplessness. [emphasis in original]

Counsel further contends: "It is transparent that the policy [prohibiting employees from handling financial matters for residents] is one which is invoked at the convenience of the facility, and ignored when it is to the facility's advantage to do so." Counsel also notes the provisions of the Code of Maryland Regulations (COMAR) 10.07.14.38(2) which provides that a person such as the resident, here, may choose any individual...to handle the resident's financial affairs. Counsel argues the claimant was merely acting at

the behest of the resident, in a personal capacity, unrelated to her employment relationship. In addition, counsel argues the resident, in essence, had no choice because he could not handle his own financial affairs due to his physical impairment and the employer refused to handle finances of its residents. The only option available to the resident, to pay his rent and obtain personal goods, was to designate someone to perform these tasks for him. He selected the claimant.

On appeal, the Board reviews the evidence of record from the Lower Appeals hearing. The Board will not order the taking of additional evidence or a new hearing unless there has been clear error, a defect in the record, or a failure of due process. The record is complete. Both parties appeared and testified. Both parties were given the opportunity to cross-examine opposing witnesses and to offer and object to documentary evidence. Both parties were offered closing statements. The necessary elements of due process were observed throughout the hearing. The Board finds no reason to order a new hearing or take additional evidence in this matter. Sufficient evidence exists in the record from which the Board may render its decision.

The Board has thoroughly reviewed the record from the hearing but disagrees with the hearing examiner's decision. In general, the Board agrees with the contentions made by the claimant's attorney in the claimant's appeal. The employer knew, for several months, that the claimant had and was using the resident's debit card. The employer repeatedly accepted cash from the claimant for the resident's rent, knowing the claimant was using the resident's debit card. The employer would not consent to handle the resident's finances, knowing he could not, and left the resident with no other options.

The employer presented no evidence that the claimant breached any fiduciary duty to the resident; the employer presented no evidence that the claimant was acting in a manner contrary to the resident's interests. The employer presented no evidence of what its policy actually said. The employer's witness testified, in generalities, as to the content of the policy, but for reasons which remain inexplicable, the witness elected not to bring a copy of the document central to its reason for terminating the claimant's employment. Absent the actual policy, the Board cannot find that the claimant violated it.

The evidence established that the claimant was asked, by the resident, to handle some financial matters for him because he physically could not. The evidence established that the claimant did precisely what the resident requested; she did no more and no less. The evidence established that the employer was aware of this alleged violation for several months, but chose to take no steps beyond demanding the claimant return the debit card to the resident who wanted the claimant to keep the card. The employer witness testified that the claimant's actions warranted immediate termination, but did not explain why the employer waited several months to discharge the claimant when it knew about her handling of the resident's finances. In essence, the employer condoned the claimant's actions for which it later discharged her. Nothing happened between the time the employer became aware of the claimant's actions and the date of her termination which would elevate the reason for her discharge to some level of misconduct.

The employer's evidence was insufficient to meet its burden of proof in this matter. The employer did not demonstrate that the reasons for the claimant's discharge were misconduct or gross misconduct.

The Board notes that the hearing examiner did not offer or admit the *Agency Fact Finding Report* into evidence. This document was referred to by the hearing examiner and by the parties several times throughout the hearing. The hearing examiner should have marked and received this into evidence, but she did not. The hearing examiner had received a copy of this document into evidence in the prior hearing involving the claimant and a different, prior employer, but did not do so in this hearing. The Board will correct this error by receiving the Agency Fact Finding Report into evidence as Board Exhibit #1.

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 gross misconduct within the meaning of § 8-1002. The employer has also not met its burden of showing that the claimant's discharge was for 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 ALIF MANEJWALA LLC

The Hearing Examiner's decision is reversed.



Donna Watts-Lamont, Chairperson



Clayton A. Mitchell, Sr., Associate Member

VD

Copies mailed to:

DIANE GEORGE

ALIF MANEJWALA LLC

PAUL F. NEWHOUSE ESQ.

Susan Bass, Office of the Assistant Secretary

UNEMPLOYMENT INSURANCE APPEALS DECISION

DIANE GEORGE

SSN #

Claimant

Vs.

ALIF MANEJWALA 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: 1327630

Appellant: Claimant

Local Office : 64 / BALTOMETRO

CALL CENTER

October 28, 2013

For the Claimant: PRESENT, PAUL F. NEWHOUSE, ESQ.

For the Employer: PRESENT , JENNIFER MULHALL

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

Claimant, Diane George, filed a claim for benefits establishing a benefit year beginning, August 4, 2013, and qualified for a weekly benefit amount of \$430.00.

Claimant began working for employer, New Life Healthy Living LLC formerly, Alive Manejwala LLC, which operated an assisted living facility, on or about April 12, 2013. At the time of separation, claimant was working as a case manager. Claimant last worked for employer on August 5, 2013, before being terminated for violation of employer's policy prohibiting employees from helping residents with their personal finances.

According to employer's handbook, employees were not allowed to handle money, credit or debit cards that belonged of the residents unless accompanied by the resident (financial policy). Violation of the policy was grounds for immediate termination. Claimant received a copy of the handbook.

In April 2013, claimant's supervisor asked claimant to accompany one of the residents to the Social Security Office to help the resident straighten out his benefits because he had not received money to pay his room and board.

After the matter was resolved with Social Security, claimant met the resident several days later at his bank and helped him withdraw \$1960.00 in cash from the ATM which he used to pay his room and board (employer only accepted payment in cash).

Claimant continued to help the resident with his finances and kept his debit card. She withdrew money from the ATM and made purchases for him without the resident accompanying her. Employer was aware of claimant's behavior, and accepted cash from her for the resident's room and board. Her supervisor told claimant several times to give the card back to the resident, but claimant maintained possession of the card.

After several months, when claimant did not return the card to the resident, she was terminated for violation of the financial policy.

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).

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

Md. Code, Ann., Labor & Emp. Article, Section 8-1002 provides that an individual shall be disqualified from receiving benefits when he or she was discharged or suspended from employment because of behavior that demonstrates gross misconduct. The statute defines gross misconduct as repeated violations of employment rules that prove a regular and wanton disregard of the employee's obligations.

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.

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, the burden has been met with respect to misconduct.

Claimant described her actions as helping the resident even though claimant was aware that what she was doing was outside of her responsibilities as a case worker. Even though claimant received a handbook, she testified that she was not aware of the financial policy until she was terminated. Claimant stated employer, including her supervisor and Ms. Mulhall, Business Manager, was aware of what she was doing, continued to accept money for the resident's room and board from her and did not say anything to her verbally or in writing regarding the impropriety of her actions.

Employer asked claimant to accompany the resident on errands not to take over his personal finances. Ms. Mulhall testified that claimant's supervisor told claimant several times to return the card to the resident. Ms. Mulhall did witness the verbal warnings.

Even though claimant maintained she was not aware of the financial policy claimant knew or should have known that there is an inherent conflict of interest, impropriety or appearance of impropriety when an employee exercises influence over the finances of a resident for whom the employee provides services. Claimant had no right to keep the resident's card in her possession and leave the resident dependent upon her when he needed money. Further, claimant had a duty to seek clarification from the handbook and/or employer before assuming responsibilities outside of her job description.

Claimant engaged in a wrongful course of conduct within the scope of her employment and thereby engaged in misconduct when she managed the personal finances of a resident, kept his debit card and placed employer at risk for any liability that may have arisen out of claimant handling the resident's money.

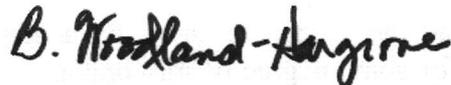
I find claimant committed a transgression of some established rule or policy of the employer, a forbidden act, a dereliction of duty, or engaged in a course of wrongful conduct within the scope of claimant's employment relationship, during hours of employment, or on the employer's premises. An unemployment disqualification shall be imposed based on Md. Code, Ann., Labor & Emp. Article, Section 8-1003 pursuant to this separation from this employment.

DECISION

IT IS HELD THAT claimant was discharged 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, August 4, 2013, and for the 14 weeks immediately following. Claimant will then be eligible for benefits so

long as all other eligibility requirements are met. 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 reversed.



B H Woodland-Hargrove, 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

This is a final decision of the Lower Appeals Division. Any party who disagrees with this decision 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 13, 2013. 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 08, 2013
DAH/Specialist ID: RBA3H
Seq No: 002
Copies mailed on October 28, 2013 to:

DIANE GEORGE
ALIF MANEJWALA LLC
LOCAL OFFICE #64