

**- DECISION -**

Claimant:  
NIESHA R MACKEY

Decision No.: 3640-BR-12

Date: October 01, 2012

Appeal No.: 1215047

S.S. No.:

Employer:  
AUTOZONERS LLC

L.O. No.: 60

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.

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**- 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: October 31, 2012

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**REVIEW OF THE RECORD**

After a review of the record, the Board adopts the hearing examiner's findings of fact and conclusions of law.

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)*.

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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."

Since the burden of proof to prove rests with the employer, it must be found that the employer failed to meet its burden. The employer presented conflicting witness statements and did not present any statement from the complaining employee and the District Manager who appeared had no personal knowledge of the incident.

The employer submitted an appeal, disagreeing with the decision and requesting the Board review and issuance of a decision on appeal, the Board reviews the evidence of record from the Lower Appeals Division hearing. The Board has thoroughly reviewed the record and finds no reason to disturb the decision of the hearing examiner. There has been no clear error, no defect on the record, and no failure of due process. Both parties appeared at the hearing. Both parties were given the opportunity to testify, cross examine the other party, to offer documentary evidence and make a closing statement. The Board concurs with the hearing examiner's finding of fact and conclusions of law.

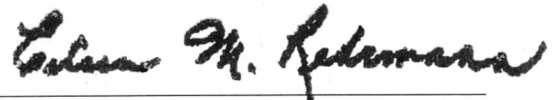
The Board notes that the hearing examiner did not offer or admit the *Agency Fact Finding Report* into evidence. The Board did not consider this document when rendering its decision.

The Board finds based on a preponderance of the credible evidence that the employer did not meet its burden of demonstrating that the claimant's actions rose to the level of gross misconduct or misconduct within the meaning of *Maryland Annotated, Labor & Employment Article, § 8-1002 or 1003*. The decision shall be affirmed for the reasons stated herein and in the hearing examiner's decision.

### 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 AUTOZONERS, LLC.

The Hearing Examiner's decision is affirmed.



Eileen M. Rehrmann, Associate Member



Donna Watts-Lamont, Chairperson

RD

Copies mailed to:

NIESHA R. MACKEY

AUTOZONERS LLC

AUTOZONERS LLC

Susan Bass, Office of the Assistant Secretary

**UNEMPLOYMENT INSURANCE APPEALS DECISION**

NIESHA R MACKEY

SSN #

**Claimant**

vs.

AUTOZONERS 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: 1215047

Appellant: Claimant

Local Office : 60 / LARGO

May 21, 2012

**For the Claimant:** PRESENT

**For the Employer:** PRESENT , KEITH COCHRAN

**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**

The claimant, Niesha Mackey, began working for this employer, Autozoners, LLC, on August 18, 2008 and her last day worked was March 15, 2012. At the time of her termination, she was employed full-time as an assistant hub coordinator, earning an hourly salary of \$10.89.

The claimant was terminated for allegedly threatening another employee. On February 2, 2012, a newer employee, Nicole Wise, asked the claimant if the claimant needed help picking orders. Ms. Wise advised the claimant that she had been trained on picking orders. The claimant showed her what to work on and then left her alone. The claimant later discovered that Ms. Wise had made some errors; she therefore told Ms. Wise that she no longer needed her help. When Ms. Wise questioned whether she had done anything wrong, the claimant explained that Ms. Wise had not done anything "wrong" but that the claimant needed to

straighten out some things that she had done. The claimant then repeated, "I don't need you no more." As Ms. Wise walked away, she said, "And happy birthday to you too." The claimant thanked her, as it was her birthday. Ms. Wise later approached and asked if she could have some of the birthday cake other co-workers had brought in for the claimant and the claimant readily acquiesced to this request.

On February 6, 2012, Ms. Wise advised the store manager, Gary Lipton, that on February 2, 2012, the claimant had become upset with her, became "abusive" and took a scan gun away from her. She did not go into further details, other than to say that the claimant was waving the scan gun around as if she was going to hit Ms. Wise with it. (Employer's Exhibit No. 4) Later that month, Human Resources was notified of Ms. Wise's allegations and began an investigation.

Ms. Wise told the Human Resources representative that the claimant had threatened to "split your shit down to the white meat." On February 29, 2012, the claimant was interviewed and denied making any threat, because she had not done so. (Employer's Exhibit No. 1) The employer interviewed two (2) other alleged witnesses. One of them, Jasmine Morgan, asserted that the claimant had told Ms. Wise to "get the fuck out of my face" and conceded that she had not heard the threat as reported by Ms. Wise. (Employer's Exhibit No. 2)

The other witness, Erin White, denied hearing the claimant make any threat toward Ms. Wise. (Employer's Exhibit No. 3) However, the employer determined that the claimant had indeed made a threat, thereby violating several of the employer's policies and terminated her on March 15, 2012.

## 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. 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 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 THE 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.

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 not been met.

The employer asserted that the claimant had threatened Ms. Wise, which violated several employer policies and led to her discharge. In support of this, the employer witness, Keith Cochran, the district manager, proffered statements of two (2) alleged witnesses' to the incident. Mr. Cochran himself had no personal knowledge of the incident and neither Ms. Wise nor either of the other witnesses appeared to testify. The witness statements are conflicting, in that one witness asserts that she heard the claimant direct profanity toward Ms. Wise, although she did not hear her make a threat; and the other witness denied hearing the claimant make any threat or use any profanity. The employer presented no statement from Ms. Wise, the complaining employee.

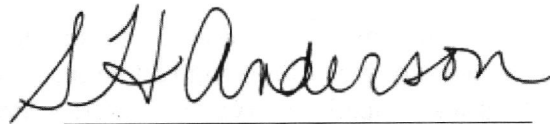
On the other hand, the claimant presented credible, first hand testimony explaining that there was no altercation, that she did not use profanity or make any threats toward Ms. Wise. In support of this testimony, she points to the fact that Ms. Wise later shared birthday cake with her and waited several days to report her alleged concerns. The employer's hearsay evidence is insufficient to overcome the claimant's persuasive, first hand account of what actually occurred. Therefore, I hold the employer has failed to meet its burden and no disqualification is warranted.

## 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 the above-identified employer. 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](mailto: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.



S H Anderson, 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 June 05, 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 : May 11,2012

CH/Specialist ID: WHG62

Seq No: 001

Copies mailed on May 21, 2012 to:

NIESHA R. MACKEY

AUTOZONERS LLC

LOCAL OFFICE #60

AUTOZONERS LLC