-DECISION-

Claimant:
EVA A OHL

Employer:
PIZZA HUT OF MARYLAND INC

Decision No.: 447-BR-13

Date: January 31, 2013

Appeal No.: 1212571

S.S. No.:

L.O. No.: 65

Appellant: Claimant

Issue: 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).

- 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 04, 2013

REVIEW OF THE RECORD

After a review of the record, and after deleting "or about" from the first and third sentences of the first paragraph, the Board adopts the hearing examiner's modified findings of fact. However, 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).*

A threshold issue in this case is whether the claimant voluntarily quit or whether the claimant was discharged. The evidence does not support the hearing examiner's conclusion that the claimant voluntarily quit her employment. The Board finds that the employer was the moving party, discharging the claimant for her refusal to leave her other, part-time employment.

The burden of proof in this case is allocated according to whether the claimant voluntarily quit or whether the employer discharged the claimant. 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).* 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, her representative offers specific contentions of error as to the findings of fact and the conclusions of law in the hearing examiner's decision. The Board has found, as noted above, that the claimant was discharged from her employment. The claimant's counsel also contends the employer did not meet its burden of establishing what the employer's policy was, that the claimant actually violated the policy, or that the claimant knew or should have known of the policy. The Board agrees and will not discuss the contentions in great detail.

On appeal, the Board reviews the evidence of record from the Lower Appeals Division 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.

The Board has thoroughly reviewed the record from the hearing but disagrees with the hearing examiner's findings of fact and conclusions of law. The evidence established that the claimant did have a second job which was violative of an employer policy. However, the evidence did not demonstrate that the claimant knew of this policy prior to the meeting at which she was terminated from employment.

The claimant did not consider this second job to be an actual job. She holds an active real estate license, but did not believe that this position occupied sufficient time to be a job. She believed, and her counsel argued, that the claimant had sufficient flexibility to be able to attend to any and all of her duties as a

general manager for the employer. All of this notwithstanding, the claimant did have a second job. Even if the claimant had all the flexibility she needed to comply with the employer's needs, she was in violation of its policy. However, the evidence did not show that the claimant knew or should have known that this second position violated a policy.

For a discharge to be simple misconduct or gross misconduct, there must be evidence that the claimant was aware of the employer's rules and expectations. There was no such evidence in the record. The Board cannot find that the claimant acted with any disregard for the employer's interests or expectations. The claimant did not knowingly breach her duty or violate any employment rules. The employer did not present sufficient evidence to establish that the claimant was discharged for any disqualifying reason.

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 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 PIZZA HUT OF MARYLAND INC.

The Hearing Examiner's decision is reversed.

Donna Watts-Lamont, Chairperson

Clayton A. Mitchell, Sr., Associate Member

KJK
Copies mailed to:
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UNEMPLOYMENT INSURANCE APPEALS DECISION

EVA A OHL

SSN #

Claimant

vs.

PIZZA HUT OF MARYLAND INC

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: 1212571
Appellant: Claimant
Local Office : 65 / SALISBURY CLAIM CENTER

May 01, 2012

For the Claimant: PRESENT, ANDREAS LUNDSTEDT ESQ.

For the Employer: PRESENT, ERIKA HAHN

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, Eva Ohl, began working for this employer, Pizza Hut of Maryland, on or about March 28, 2000. At the time of separation, the claimant was working as a general manager. The claimant last worked for the employer on or about February 28, 2012, before being quitting when given the choice of keeping her job and quitting a second job or being terminated from this employer to keep her second job.

The claimant worked as the general manager of a restaurant for the employer. The employer has a policy forbidding outside employment for employees in the claimant's position. The claimant has a second job as a real estate agent and is affiliated with Long and Foster brokerage. The employer became aware that the claimant had another job when an auditor of the employer arrived unannounced at the claimant's workplace on February 24, 2012. The claimant was not present when the auditor arrived even though the claimant was

punch in. The claimant told the assistant manager that the claimant was going to the bank. The bank was within ten to fifteen minutes away, round trip, from the claimant's workplace. The auditor was at the claimant's workplace for over two hours and the claimant did not return. The auditor attempted to call the claimant repeatedly, but the claimant did not answer her cell phone. The auditor discovered the claimant's cell phone voicemail identified her as a real estate agent for Long and Foster.

The claimant, who is diabetic, realized after leaving the workplace that her blood sugar was low and she became ill. The claimant went to a local Giant grocery store and was in the bathroom for an extended period. The claimant did not return the auditor's call until after 5:00 p.m. Since the auditor discovered the claimant's second job, an interview was set up with the employer's human resources office. When interviewed the claimant told the employer that the claimant was sick but had no reason for not answering her cell phone. The claimant admitted to having a second job. The employer reminded the claimant of the employer's policy and gave the claimant the opportunity to quit her second job but the claimant refused to quit her real estate job. The claimant was offered a different job but it would have been a substantial reduction in pay. The claimant chose to be terminated for violating the employer's policy rather than giving up her real estate job.

CONCLUSIONS OF LAW

The Md. Code Ann., Labor & Emp. Article, Section 8-1001 provides that an individual is disqualified from receiving benefits when unemployment is due to leaving work voluntarily. The Court of Appeals interpreted Section 8-1001 in Allen v. CORE Target City Youth Program, 275 Md. 69, 338 A.2d 237 (1975): "As we see it, the phrase 'leaving work voluntarily' has a plain, definite and sensible meaning…; it expresses a clear legislative intent that to disqualify a claimant from benefits, the evidence must establish that the claimant, by his or her own choice, intentionally, of his or her own free will, terminated the employment." 275 Md. at 79.

The Md. Code Ann., Labor & Emp. Article, Section 8-1001 provides that an individual shall be disqualified for benefits where unemployment is due to leaving work voluntarily without good cause arising from or connected with the conditions of employment or actions of the employer, or without valid circumstances. A circumstance is valid only if it is (i) a substantial cause that is directly attributable to, arising from, or connected with conditions of employment or actions of the employing unit; or (ii) of such necessitous or compelling nature that the individual has no reasonable alternative other than leaving the employment.

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.

The claimant had the burden to show, by a preponderance of the evidence, that she voluntarily quit his position for reasons that constitute either good cause or valid circumstances pursuant to the Maryland Unemployment Insurance Law. Hargrove v. City of Baltimore, 2033-BH-83. In this case, this burden has not been met.

The claimant and her counsel argued that the claimant was terminated. However careful analysis of the