

**- DECISION -**

Claimant:  
ERNEST L SHOCKLEY

Decision No.: 4947-BR-13

Date: November 25, 2013

Appeal No.: 1327363

S.S. No.:

Employer:  
ESHAM FAMILY LIMITED  
PARTNERSHIP

L.O. No.: 64

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.

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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: December 25, 2013

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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 but modifies the 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.

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."

Unless an employer's request is illegal, unethical or ambiguous, *Hatfield v. Tri-State Oil*, 390-BR-82, *Leon v. Southern States Cooperative*, 885-BR-83, *Walker v. Domino's Pizza of Maryland, Inc.*, 200-BH-87, refusing to perform an assignment within the scope of one's job duties is insubordination and can constitute misconduct, *Gray v. Valley Animal Hospital, Inc.* 224-BR-90, or gross misconduct, *Romesberg v. Shaffer Ford, Inc.*, 48-SE-90; *Solomon v. Cantwell Cleary Company, Inc.*, 1027-BR-91; *Ishola v. AMI Doctors of Prince Georges County*, 487-BR-89, depending on the importance of the policy or instruction and the number of times the claimant violated the policy.

In the instant case, the Board finds the weight of the credible evidence supports a finding that the claimant did not comply with the clear and unambiguous instructions of his supervisor to remove caulk from a bathtub. The employer's primary reason for discharging the claimant was for this single insubordinate event. The Board finds mitigating that the claimant had an otherwise clean working record. Although the Board finds that the claimant's action was wrongful, the Board finds insufficient evidence that the claimant acted in gross disregard to his employer's interests. Therefore, a finding of simple but not gross misconduct is supported.

The Board finds that under the facts of this case, only the minimum ten-week penalty is measured and appropriate. The Board does not concur with the hearing examiner's conclusion that a thirteen-week penalty is warranted. The hearing examiner's decision shall be modified accordingly.

In the appeal to the Board, the claimant reiterates his testimony from the hearing. The Board is persuaded that the mitigating circumstances and the claimant's otherwise clean working record warrant a lesser penalty.

On appeal, the Board reviews the 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.

The Board has thoroughly reviewed the record from the hearing and concurs with the hearing examiner's findings of fact and conclusions of law but with a mitigated penalty period. A review of the record shows that the hearing examiner afforded each party the opportunity to testify, to cross-examine opposing witnesses, to offer documents and to make a closing argument or summary statement. All due process requirements were observed throughout the hearing. The Board finds that the hearing examiner afforded the parties a fair hearing in comport with due process and *Md. Code Ann., Lab. & Empl. Art., §§8-508(c)(a)(1) and 8-506(a)(1) and (2) (2008 Supp.)*.

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 met its burden of demonstrating that the claimant's actions rose to the level of misconduct within the meaning of § 8-1003. The minimum ten-week penalty is measured and appropriate on the facts of this case. The hearing examiner's decision shall be modified for the reasons stated herein.

### DECISION

It is held that the claimant was discharged for misconduct connected with the work, within the meaning of Section 8-1003 of the Labor and Employment Article Maryland Code Annotated, Title 8, Section 1003. The claimant is disqualified from receiving benefits from the week beginning August 4, 2013 and the nine weeks immediately following.

The Hearing Examiner's decision is modified.



Clayton A. Mitchell, Sr., Associate Member



Eileen M. Rehrmann, Associate Member

VD

Copies mailed to:

ERNEST L. SHOCKLEY  
ESHAM FAMILY LIMITED  
ESHAM FAMILY LIMITED  
Susan Bass, Office of the Assistant Secretary

about the tub; the claimant had failed to remove the old caulk as he had been instructed to do. The claimant did not think the matter was urgent and he was the only maintenance worker scheduled during that morning. The manager questioned the claimant about why he had failed to remove the caulk as instructed. At that time, the claimant made a comment about not having received a raise and the other many duties he had to do. The claimant did not refuse to perform the work, nor was he unwilling to perform the work, but after the conversation with his manager, he was not given the opportunity to do the work because he was terminated. The claimant failed to perform the duties assigned to him by the manager as instructed. The claimant was terminated as a result of this failure. The claimant had no prior warnings or reprimands for failing to follow instructions or refusing to perform work.

### 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).

The Board of Appeals has consistently held, unless a request is illegal, unethical or ambiguous, (See Hatfield v. Tri-State Oil, 390-BR-82, Leon v. Southern States Cooperative, 885-BR-83, and Walker v. Domino's Pizza of Maryland, Inc., 200-BH-87, respectively) a claimant's refusal to follow an employer's reasonable instruction(s) constitutes misconduct. Depending on the importance of the policy or instruction involved, failure to act in accordance with the instruction can constitute gross misconduct. (See Dunavent v. Federal Armored Express, Inc., 949-BR-85). Misconduct still attaches to failure to follow a reasonable instruction when the employee knew or reasonably believed the instruction was not in the employer's best interest; although such facts if adequately supported by testimony and/or documentation would be mitigating factors in the severity of the penalty imposed. (See Duncan v. Grossman's, Inc., 661-BR-88, and Forest v. Tys, Inc., 452-BR-89).

### EVALUATION OF EVIDENCE

The employer had the burden to show, by a preponderance of the credible evidence; the claimant's separation from employment was for conduct which rose to the level of misconduct or gross misconduct, pursuant to the Maryland Unemployment Insurance Law. (See Hartman v. Polystyrene Products Company, Inc., 164-BH-83). In the case at bar, the employer met this burden.

## **UNEMPLOYMENT INSURANCE APPEALS DECISION**

ERNEST L SHOCKLEY

SSN #

**Claimant**

Vs.

ESHAM FAMILY LIMITED  
PARTNERSHIP

**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: 1327363  
Appellant: Claimant  
Local Office : 64 / BALTOMETRO  
CALL CENTER

October 11, 2013

**For the Claimant:** PRESENT

**For the Employer:** PRESENT, DEAN WHITTON, ELEANOR BASHARDS

**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, Ernest L Shockley, worked for this employer, Esham Family Limited Partnership, for three years and his last day worked was August 5, 2013. At the time of his discharge, the claimant worked for this employer as a full-time maintenance worker.

The claimant was discharged for failing to follow an employer's reasonable instructions and/or rules. This employer operates a hotel in Ocean City, Maryland. On August 5, 2013, the employer received a complaint from a patron regarding certain conditions in her room including the need to re-caulk the bathtub. The facilities manager had the claimant work on the fan in the room and instructed the claimant to remove the caulk from the patron's tub while he went to the store to buy the silicone necessary to caulk the tub. While the manager was gone, the claimant went on to complete other duties including a problem with a leaking toilet in another room and picking up dirty linens. When the manager got back, he questioned the claimant

In the case at bar where the claimant failed to follow the employer's reasonable instruction because he believed the matter was not urgent and it was not in the employer's best interest since there were other more urgent matters he needed to take care of. Although the claimant's failure to follow an instruction he believed to be wrong was well intended, the claimant was not in a position to make such a business decision and the failure of the claimant to follow his supervisor's specific instructions amounts to misconduct.

Accordingly the employer met its burden in this case and the claimant's discharge was for failure to follow an employer's reasonable instructions, constituting simple misconduct, warranting the imposition of a weekly penalty.

### DECISION

IT IS HELD THAT the 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 twelve (12) weeks immediately following. The claimant will then be 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.

*V. Nunez*

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V. Nunez, 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 October 28, 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 03, 2013  
DW:ah/Specialist ID: RWD2E  
Seq No: 001  
Copies mailed on October 11, 2013 to:

ERNEST L. SHOCKLEY  
ESHAM FAMILY LIMITED  
LOCAL OFFICE #64