

**- DECISION -**

Claimant:  
BERNARD WILLIAMS II

Decision No.: 516-BR-11

Date: April 06, 2011

Appeal No.: 1035453

S.S. No.:

Employer:  
COMMUNICATIONS ELECTRONICS INC

L.O. No.: 65

Appellant: Joint Employer and 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: May 06, 2011

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**REVIEW ON THE RECORD**

After a review on the record, the Board adopts the following findings of fact and reverses the hearing examiner's decision.

The claimant was employed as a full-time salesperson from June 23, 2008 through July 20, 2010. The claimant is unemployed as the result of a discharge.

The claimant was discharged for alleged anonymous customer complaints for alleged poor attitude and alleged rudeness towards customers. The claimant neither evinced a poor attitude towards customers nor was he rude to customers. Notwithstanding, based on the

complaints from unidentified customers, the claimant was discharged effective July 20, 2010.

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(H)(1)*. The Board fully inquires into the facts of each particular case. *COMAR 09.32.06.02(E)*.

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."

Discharging a claimant for inefficiency or incompetence is not misconduct. *Cumor v. Computers Communications Group*, 902-BH-87. A mere showing of substandard performance is not sufficient to prove gross misconduct or misconduct. *Todd v. Harkless Construction*, 714-BR-89; *Knight v. Vincent Butler, Esquire*, 585-BR-91. Failing to use good judgment, or an isolated case of ordinary negligence, in the absence of a showing of culpable negligence or deliberate action in disregard of the employer's interests is insufficient to prove misconduct. *Hider v. DLLR*, 115 Md. App. 258, 281 (1997); *Greenwood v. Royal Crown Bottling Company*, 793-BR-88.

In the instant case, the employer's case was based on hearsay evidence. The employer's witness was not present at the alleged events. The claimant's first-hand testimony does not support a finding that the claimant's actions rose to the level of misconduct. Although the hearing examiner may rely on hearsay evidence in making his determination, the hearing examiner must, "first carefully consider[] its reliability and probative value." *Travers v. Baltimore Police Dept.*, 115 Md. App. 395, 413 (1997). "The Court has

remained steadfast in reminding agencies that to be admissible in an adjudicatory proceeding, hearsay evidence must demonstrate sufficient reliability and probative value to satisfy the requirements of procedural due process." *Id.* at 411. See also *Kade v. Charles H. Hickey School*, 80 Md. App. 721, 725 (1989) ("[e]ven though hearsay is admissible, there are limits on its use. The hearsay must be competent and have probative force.").

One important consideration for a hearing body is the nature of the hearsay evidence. For instance, statements that are sworn under oath, see *Kade*, 80 Md. App. at 726, 566 A.2d at 151, *Eichberg v. Maryland Bd. of Pharmacy*, 50 Md. App. 189, 194, 436 A.2d 525, 529, or made close in time to the incident, see *Richardson v. Perales*, 402 U.S. 389, 402, 28 L. Ed. 2d 842, 91 S. Ct. 1420 (1971), or corroborated, see *Consolidated Edison v. N.L.R.B.*, 305 U.S. 197, 230, 83 L. Ed. 126, 59 S. Ct. 206 (1938) ("mere uncorroborated hearsay or rumor does not constitute substantial evidence"); *Wallace v. District of Columbia Unemployment Compensation Bd.*, 294 A.2d 177, 179 (D.C. 1972), ordinarily is presumed to possess a greater caliber of reliability. Cited in *Travers* 115 Md. App. at 413. Also see *Parham v. Dep't of Labor, Licensing & Regulation*, 985 A.2d 147, 155 (Md. Ct. Spec. App. 2009). Also see *Cook v. National Aquarium in Baltimore*, 1034-BR-91 (the employer offered not a single specific example of the alleged misconduct as observed by either of the employer's witnesses and no documents were introduced relating to any specific instance of misconduct. The employer offered only conclusory statements that the claimant engaged in a certain type of misconduct).

The hearing examiner made no such examination into the reliability of the hearsay evidence in his evaluation of the evidence in this case. As the Court of Appeals has noted, for a reviewing court to perform properly its examination function, an administrative decision must contain factual findings on all the material issues of a case and a clear, explicit statement of the agency's rationale. *Harford County v. Preston*, 322 Md. 493, 505, 588 A.2d 772, 778 (1991). A fully explained administrative decision also fulfills another purpose; it recognizes the "fundamental right of a party to a proceeding before an administrative agency to be apprised of the facts relied upon by the agency in reaching its decision . . . ." *Id.*; also see *Mehrling v. Nationwide Ins. Co.*, 371 Md. 40, 56 (2002); *Fowler v. Motor Vehicle Administration*, 394 Md. 331, 353 (2006); *Crumlish v. Insurance Commissioner*, 70 Md. App. 182, 187 (1987).

In *Kade v. Charles H. Hickey School*, the Court of Special Appeals reversed a decision by an administrative agency for similarly relying on hearsay evidence without establishing the reliability of that evidence. In *Kade*, a school employee appealed his suspension by his employer for disrespectful conduct towards a fellow employee. At the hearing before the administrative agency, the superintendent of the school was the only witness for the employer. The superintendent testified that he was not present on the night of the incident and that all of the information he possessed was based on statements given to him. The Court found the agency's reliance on the hearsay statements submitted by the superintendent to be improper.

Even though the statements were relevant, *there was no indication that this hearsay evidence was reliable, credible or competent.* The statements which were submitted by appellant's co workers are not under oath and do not reflect how they were obtained.... No reason was given as to why the declarants were unavailable.

The Court's rejection of the administrative agency's use of hearsay evidence in *Kade* applies with equal force to the hearing examiner and the Board in this case.

The Board gives the claimant's first-hand testimony more weight than the employer's hearsay evidence. The claimant's interactions with the customers were appropriate; the customers were either "difficult" customers or impatient customers. None of the customers were present at the hearing to testify and be present for cross-examination; the customers' hearsay complaints were submitted for the fact of the matter asserted; the customer complaints were not under oath or affidavit; there is no indication that the customer complaints were sufficiently reliable, credible or competent to constitute probative evidence. Viewed in the light most favorable to the employer, the claimant's actions would constitute mere substandard performance. This is not misconduct.

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 misconduct within the meaning of § 8-1003. The hearing examiner's 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 COMMUNICATIONS ELECTRONICS, INC.

The Hearing Examiner's decision is reversed.



Clayton A. Mitchell, Sr., Associate Member



Donna Watts-Lamont, Chairperson

RD

Copies mailed to:

BERNARD WILLIAMS II  
COMMUNICATIONS ELECTRONICS INC  
CAROL STROUD  
COMMUNICATIONS ELECTRONICS INC  
Susan Bass, Office of the Assistant Secretary

**UNEMPLOYMENT INSURANCE APPEALS DECISION**

BERNARD WILLIAMS II

SSN #

**Claimant**

vs.

COMMUNICATIONS ELECTRONICS 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: 1035453

Appellant: Claimant

Local Office : 65 / SALISBURY

CLAIM CENTER

October 29, 2010

**For the Claimant:** PRESENT

**For the Employer:** PRESENT, CAROL STROUD, JOHN COLE

**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 was employed between June 23, 2008 and July 20, 2010 as a sales representative. The claimant worked on a full-time basis, earning \$7.25 per hour. The employer discharged the claimant.

The employer operates an A T & T wireless retail location. The employer expects all employees to behave in a positive and professional manner at all times, as the retail store is the "front line" of the company, and the employer's reputation as a company depends upon the employees' interaction with its customers.

On June 12, 2009, the employer received a complaint about the service that the claimant had given to a

customer. The customer complained that the claimant was in a bad mood and had a poor attitude. The employer reviewed this customer complaint with the claimant, and provided the claimant with its customer service expectations. The employer considered this discussion with the claimant to be a "verbal warning." The claimant was not feeling well on this day. The claimant could not recall all of the details surrounding this particular incident, but recalled that the customer had been upset because the claimant had not been more enthusiastic.

On June 28, 2009, the employer again received feedback from a customer regarding the claimant's job performance. This customer complained that the claimant had an unsatisfactory attitude toward him. The customer and his children had come into the store minutes before the store was scheduled to close. The claimant attempted to assist the customer. The customer wanted to read through the sales contract, even though the claimant had explained the contract details to him. The claimant was impatient, and the customer complained that the claimant had a poor attitude. The employer discussed this feedback with the claimant and advised the claimant that any further complaint would result in his termination.

The final incident occurred on July 17, 2010. The customer in this instance called the store requesting a particular type of phone, which the claimant set aside for the customer. The customer then came into the store for the phone, but the power had gone out in the interim and the claimant was having difficulty assisting the customer with her requests. The employer spoke with the claimant's co-worker, who advised that this customer had been a "difficult" customer.

Because the employer had received three customer complaints about the claimant's service to customers, the employer discharged the claimant.

### **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).

### **EVALUATION OF EVIDENCE**

The employer had the burden to show, by a preponderance of the credible evidence, the claimant's termination 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.

A discharge for rudeness or poor attitude on the job may result in a finding of gross misconduct, simple misconduct or no misconduct, depending on the circumstances. Generally, disruptive behavior and the use of profane or abusive language have been found to be at least misconduct.

In Schisler v. E.C. Decker Service, Inc., 780-BH-87, the claimant was discharged for showing up drunk at a customer's home, using bad language, and failing to perform, even after complaints and a warning. This was gross misconduct. Likewise, in Butler v. Levenson and Klein, Inc., 494-BR-90, the claimant was a switchboard operator who supervised other operators. She was discharged due to three incidents of rudeness to customers on the telephone. The claimant admitted that she was the offending operator. The claimant had previously received warnings about this type of behavior. The claimant was discharged for gross misconduct.

In the present case, while the claimant had received two warnings prior to his discharge, the first two warnings were remote in time (over one year prior) to the claimant's discharge. The final incident involved a customer, who was, admittedly, a "difficult customer." The claimant did not use profane or abusive language and therefore, a finding of gross misconduct is not supported. The claimant's behavior in the final instance was not a deliberate and willful disregard of standards that an employer has a right to expect and which shows a gross indifference to the employer's interests.

However, the claimant was on notice that rudeness was unacceptable, and even though the customer was difficult, the claimant's job was to deal with customers who, at times, may be difficult. The claimant's failure to do this in this instance constitutes misconduct.

## 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 July 18, 2010 and for the 9 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.



K A Holmes, 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 November 15, 2010. 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 18, 2010

CC/Specialist ID: USB5M

Seq No: 001

Copies mailed on October 29, 2010 to:

BERNARD WILLIAMS II  
COMMUNICATIONS ELECTRONICS INC  
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