Maryland

DEPARTMENT OF ECONOMIC AND EMPLOYMENT DEVELOPMENT

1100 North Eutaw Street
Baltimore, Maryland 21201
(301) 333-5033



# — DECISION —

Decision No.: 527 -BH-89

Date: June 20, 1989

Claimant: Donald Keegan

Appeal No.: 8800578

S. S. No.:

Employer: Valspar Corporation
ATTN: Gary E. Gardner
Corporate Personnel Dir.
P.O. Box 1461
Minneapolis, MN 55440

L.O. No.: 40

Appellant: EMPLOYER

Issue:

Whether the claimant was discharged for gross misconduct or misconduct, connected with his work, within the meaning of Section 6(b) or 6(c) of the law; and whether the appealing party filed a timely appeal or had good cause for an appeal filed late within the meaning of Section 7(e) of the law.

## —NOTICE OF RIGHT OF APPEAL TO COURT —

YOU MAY FILE AN APPEAL FROM THIS DECISION IN ACCORDANCE WITH THE LAWS OF MARYLAND. THE APPEAL MAY BE TAKEN IN PERSON OR THROUGH AN ATTORNEY IN THE CIRCUIT COURT OF BALTIMORE CITY, IF YOU RESIDE IN BALTIMORE CITY, OR THE CIRCUIT COURT OF THE COUNTY IN MARYLAND IN WHICH YOU RESIDE.

THE PERIOD FOR FILING AN APPEAL EXPIRES AT MIDNIGHT ON July 20, 1989

## — APPEARANCES —

FOR THE CLAIMANT:

Donald Keegan, Claimant
Helen Keegan, Witness
Frank Cannizzaro, Jr., Attorney

FOR THE EMPLOYER:

Gary Gardner, Dir. of Personnel
Benjamin Hahn, Atty.
Ronald Anderson, Tech. Department
Linda Fisher, Pers. Manager

Carol Frye, Witness
Theresa Neilsen,
Secretary

PROCEDURAL ISSUES AND MOTION TO DISMISS

The original decision by Hearing Examiner Wolfe, finding that the claimant was not disqualified from unemployment insurance benefits, was issued on March 29, 1988. The last date to appeal was April 13, 1988. On April 5, 1988, the employer, through its attorney, Kathleen Hughes, filed an appeal to the Board of Appeals. After protest by the claimant's attorney on procedural issues, including whether the employer's appeal was timely, the Board issued an order on May 27, 1988, finding, inter alia, that the appeal was timely.

On September 26, 1988, the Board remanded the case to Hearing Examiner Wolfe "for a new decision, without a new hearing," because of what the Board determined to be "clearly erroneous findings of fact" in his decision. In that Remand Order, the Board noted, in a footnote:

> While the employer raised many additional issues on appeal, the Board considers the error in the findings of fact to be the most significant and is ruling only on this issue at this time.

Copies of that remand were sent to the claimant, the employer, the claimant's attorney and two attorneys for the employer, Kathleen Hughes and Benjamin Hahn.

On February 6, 1989, Hearing Examiner Wolfe issued a second decision in response to the Board remand. This decision again found that the claimant was not disqualified from benefits and listed February 21, 1989 as the last date to file an appeal. However, although copies of this decision were sent to the claimant, the employer and the claimant's attorney, no copies were mailed to either Ms. Hughes or Mr. Hahn, the employer's representatives of record.

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[1]There were many procedural and jurisdictional issues raised and ruled on by the Board, but they are not germane to this issue.

In a letter dated February 20, 1989, but postmarked February 22, 1989 the Corporate Personnel Director of the employer appealed[2] the Hearing Examiner's decision. He did not forward copies of that letter to the claimant, to his own attorneys or the claimant's attorney.[3]

In response to the letter of appeal and a subsequent motion to dismiss, filed by the claimant's attorney, the Board held a hearing on April 19, 1989. The issues to be decided by the Board included whether the employer filed a timely appeal to the Board.

The Board concludes that the employer did file a timely appeal to the Board of Appeals, despite the fact that the letter received from the corporate personnel director was postmarked February 22, 1989, which would normally make it a late appeal. However, in this case the Board concludes that the employer's attorneys were inadvertently misled by correspondence received from this agency. Specifically, the language contained in the Board's Remand Order, particularly in the footnote quoted above, was unintentionally ambiguous and could have led a reasonable person to conclude that the Board was retaining jurisdiction over the case and had merely remanded it to Hearing Examiner Wolfe to correct the findings of fact, thereby making a new appeal to the Board unnecessary. The employer's attorneys in fact did draw such a conclusion from the wording of the Remand. This ambiguity was further compounded again by agency error. The language that would have corrected this misinterpretation of the Board's remand, language that was contained in the Hearing Examiner's second decision, concerning appeal rights, **etc**., was not received by the employer's attorneys because the Hearing Examiner's decision inadvertently was never mailed to either of the employer's lawyers, although they were already representatives of record at that time. Therefore, the employer's attorneys did not have notice that they had to re-appeal to the Board.

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[2]The claimant's attorney raised the issue of whether this letter was even an appeal of the decision. The Board has always accepted almost any correspondence to the agency, complaining about a Hearing Examiner's decison, as an appeal to the Board.

[3]While these omissions were unfortunate, they were not fatal to the employer's appeal, because only attorneys or professional representatives are required to certify that copies are mailed to the other party; and also, even when an attorney fails to certify, the timeliness of the appeal is not affected. COMAR 24.02.06.01A(2).

In view of all these circumstances, and Section 7(g) of the law, which states, inter alia, that the Board ". . . shall not be bound . . . by technical rules of procedure, but any such hearing or appeal shall be conducted in such manner as to ascertain the substantial rights of the parties," the Board concludes that the employer did file a timely appeal to the Board. The Motion to Dismiss is denied. The Board will reach the merits of this case.

## EVALUATION OF EVIDENCE

The Board of Appeals has considered all of the evidence presented, including the testimony offered at the hearings. The Board has also considered all of the documentary evidence introduced in this case, as well as the Dpartment of Economic and Employment Development's documents in the appeal file.

At the hearing before the Board of Appeals, there were significant differences between the testimony of the claimant and that of the witnesses for the employer, the persons that the claimant was alleged to have sexually harassed. The Board finds the testimony of the employer's witnesses to be far more credible than the testimony of the claimant.

## FINDINGS OF FACT

The claimant was employed by Valspar Corporation as a project leader. He worked there approximately 25 years, until he was discharged on or about December 8, 1987.

The claimant was discharged because he had been sexually harassing two female employees of Valspar. Specifically, the claimant engaged in a number of incidents in which he made unwanted comments of a lewd and sexual nature and engaged in conduct that involved unwanted and lewd sexual touching of these employees.

The incidents involving Theresa Neilsen, a secretary in the claimant's lab, began in November, 1987 when she was giving him a ride home from work. Before he got out of her car, the claimant put his hand on her knee and asked her what she would do if he propositioned her. At that time she politely brushed him off and didn't think anymore of this incident until the next day when the claimant (who is married and whose wife also works at Valspar) came to her at work and asked her not to tell anyone about the incident. Ms. Neilsen did assure him that she didn't think anything of it at that time.

However, the next day a more serious incident occurred. While Ms. Neilsen was leaning over a cabinet at work, with her hand behind her back holding some papers, the claimant came up behind her, "jokingly" placed his hands around her neck and pressed his genitals into one of her hands. The employee was extremely shaken by this action and turned around as fast as she could. The claimant then took a folder out of her hands, squeezed her face and gave her a kiss on the lips, smiled and walked away.

Ms. Neilsen was extremely upset, and not knowing quite what to do (the claimant was one of four supervisors of Ms. Neilsen) she sought the advice of a former employee whom she trusted. He in turn suggested that she contact a fellow employee, Carol Frye, which she did.

The next day, when Ms. Neilsen saw the claimant, she told him that she wanted the advances to stop. He just smiled at her, and she told him she was serious. No further incidents occurred, but Ms. Neilsen only worked with the claimant six or seven days after that.

After discussing the incidents with Carol Frye, who had had similar problems with the claimant, Ms. Neilsen made a complaint to the laboratory manager, Ronald Anderson.

The claimant's contact with the other female employee, Carol Frye, started earlier. Ms. Frye had been employed at Valspar since 1977. She was most recently a customer service supervisor and was not supervised by the claimant but had almost daily contact with him in the course of her job.

Her earliest incident of unwanted sexual advances by the claimant occurred five or six years ago in a car enroute from a sales meeting to a downtown lounge, where Ms. Frye was going to meet her date (now her husband and also an employee of Valspar). While riding together, the claimant attempted to hug and kiss Ms. Frye. She rebuffed his advances and he did not persist at that time.

The second incident occurred in the summer of 1987. While she was at work, the claimant followed her into a darkened office (where she had gone to get a memo) and reached out and grabbed her crotch. Ms. Frye backed away and attempted to walk in a different direction to avoid the claimant, but he tried to head her off. She pushed her way past him and went back to her desk. She did not report this incident at that time, although she was extremely offended and upset by it.

in addition to these two major incidents, the claimant also verbally harassed Ms. Frye over a period of time. In January, 1987, the claimant told her that she was his New Year's resolution and added, "You know what I mean." After that, at the beginning of each month, he would frequently remind her of his resolution and say that their time was running out. He also frequently made offensive comments about her body, called her on the phone and commented about how she looked in a sweater, and made other lewd comments about her body. One time, she called him at work about a problem she was having with a shipment of paint, that she needed help with immediately. All she got from the claimant in response was his repeated uttering her name over and over again into the phone. She had to hang up on him and seek assistance from someone else. He would also make comments if he ran into her in the hallways at work, he would ask her about joining him in the men's room, and he would sometimes raise his hands up towards her chest as if he was going to touch her, and leer at her as she passed by in the hall.

After Ms. Neilsen talked to Ms. Frye about her problems with the claimant, Ms. Frye decided that it was time to complain about the claimant's behavior, and she too went to Ronald Anderson and told him what had. been going on. Prior to this she had not complained because she had not felt seriously threatened, although she had been terribly offended and insulted and she felt that she could handle the situation. She had also hesitated to complain because both her husband and the claimant's wife worked for Valspar, and she was reluctant for them to learn of the claimant's behavior.

Even after she complained to Mr. Anderson, another incident occurred. In late November or early December, 1987, the claimant came up to Ms. Frye at her desk and put his hands on her thigh and jammed his hand down forcefully between her legs. She shoved him away and stood up and yelled at him. The claimant responded in a tiny voice and asked her why she was hitting him. She left her desk to get away from him.

After the lab manager received these complaints, he consulted with personnel. Personnel investigated the charges, including talking with the claimant. He admitted some of these allegations but denied the more serious ones. The employer completed its investigation and discharged the claimant for sexual harassment of two employees.

## CONCLUSIONS OF LAW

The Board concludes that the claimant was discharged because he sexually harassed two female employees of Valspar Corporation. This is clearly gross misconduct, within the meaning of Section 6(b) of the law.

In the Board decision McCaughey v. Charles E. Brooks Law Office, 405-BH-84, a case involving a claimant who quit her job due to sexual harassment, the Board grappled with determining what conduct is and is not sexual harassment. In McCaughey, the Board cited as guidelines regulations promulgated by the Equal Employment Opportunity Commission pursuant to 42 USC Section 2000(e) et. seq. (Title VII). Under Title VII, sexual harassment may be a form of illegal discrimination. According to the regulations, one of the definitions of sexual harassment is:

> Unwelcome sexual advances, request for sexual favors and other verbal or physical conduct of a sexual nature . . . when . . . such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment. 29 C.F.R. Section 1604.11(a) (1980).

Clearly, the. claimant's conduct meets this definition of sexual harassment, regardless of whether he had supervisory authority over the employees, regardless of whether he could hire or fire them, and regardless of whether all the incidents occurred on the premises. If the employer had allowed such conduct to continue once aware of it, the employer could have been subject to charges of sexual harassment under Title VII, by the employees being harassed.

The claimant's entire pattern of conduct towards these employees, even where some of these incidents occurred off the premises, created an offensive and intolerable working atmosphere for them. Therefore, the decision of the Hearing Examiner is reversed and the Board will find that the claimant was discharged for gross misconduct. See also, Cofsky V. Ponderosa Steak House, 1081-BH-82 (gross misconduct is clearly shown where the claimant is discharged for taking indecent and unwanted liberties with female employees).

## DECISION

The employer filed a timely appeal within the meaning of Section 7(e) of the Maryland Unemployment Insurance Law.

The claimant was discharged for gross misconduct, connected with his work, within the meaning of Section 6(b) of the Maryland Unemployment Insurance Law. He is disqualified from receiving benefits from the week beginning December 6, 1987

and until he becomes re-employed, earns at least ten times his weekly benefit amount ($1,950) and thereafter becomes unemployed through no fault of his own.

The decision of the Hearing Examiner is reversed.

Associate Member

Associate Member

Chairman

HW:W:K
kbm
Date of Hearing: April 19, 1989
COPIES MAILED TO:

CLAIMANT

EMPLOYER

Benjamin Hahn, Esq.
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Baltimore, MD 21202

Frank Cannizzaro, Jr., Esq.
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The Valspar Corporation
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ATTN: Ronald Anderson
Technical Department

UNEMPLOYMENT INSURANCE - EASTPOINT

APPEALS DIVISION
1100 NORTH EUTAW STREET
BALTIMORE, MARYLAND 21201
(301) 383-5040

STATE OF MARYLAND
William Donald Schaefer
Governor

# — DECISION —

Date: Mailed: 2/6/89

Claimant: Donald E. Keegan

Appeal No.: 8800578

S.S. No.:

Employer: Valspar Corporation
Attn: Personnel
P.O. Box 1461
Minneapolis, Maryland 55440

L.O. No.: 40

Appellant: Employer

Issue:

Whether the claimant was discharged for gross misconduct connected with the work, within the meaning of Section 6(b) of the Law.

## - NOTICE OF FURTHER APPEAL -

ANY INTERESTED PARTY TO THIS DECISION MAY REQUEST A FURTHER APPEAL AND SUCH APPEAL MAY BE FILED IN ANY EMPLOYMENT SECURITY CLAIMS OFFICE OR WITH THE APPEALS DIVISION, ROOM 515, 1100 NORTH EUTAW STREET, BALTIMORE, MARYLAND 21201, EITHER IN PERSON OR BY MAIL.

THE PERIOD FOR FILING A FURTHER APPEAL EXPIRES AT MIDNIGHT 2/21/89

NOTICE: APPEALS FILED BY MAIL, INCLUDING SELF-ADDRESSED MAIL, ARE CONSIDERED FILED ON THE DATE OF THE U.S. POSTAL SERVICE POSTMARK.

## -APPEARANCE -

FOR THE CLAIMANT:

Claimant-Present
Frank Cannozzaro, Esquire

FOR THE EMPLOYER:

Ronald Anderson
Laboratory Manager

PREAMBLE

This is a remand order dated September 26, 1988, in which the Board of Appeals requested this Hearings Examiner to prepare a new decision without a new hearing. It indicated that the record contained other omissions of facts which could constitute sexual harassment.

The new decision now includes additional Findings of Faces. This decision was rendered based solely on the record of the case.

## FINDINGS OF FACT

The claimant filed an original claim for unemployment insurance benefits, effective January 3, 1988.

The claimant was employed by Valspar Corporation for approximately twenty-five years, his last job classification as a Project Leader at annual earnings of $44,800. He last worked for this employer on or about December 8, 1987.

The claimant was terminated from his employment after an investigation was performed by corporate personnel who determined that the claimant was sexually harassing two female employees.

This dismissal was based solely on complaints by the two employees who indicated that the claimant was sexually harassing them and on occasions physically touching them.

The claimant had no supervising capacity over the complainants nor did he perform any evaluations which may have led to increased salaries or promotions.

The complainants were not present at the hearing and the only admission made by the claimant was touching one of complainants out of the work place several years ago after returning home from a social function and a three day episode prior to Thanksgiving of 1987 in which the claimant remembers engaging in "boy g-rl" activity with another complainant involving some physical touching both on and off the premises after being driven home by this individual.

There is no competent evidence presented that any actions committed by the claimant was unwelcomed by the complainer.ts and that such actions pervaded the work place in such a manner which would interfere with the proper performance of the assigned tasks. The above acts admitted by the claimant failed to meet any definition of the term "sexual harrassment. "

The claimant's wife works for the same employer at the same location.

## CONCLUSIONS OF LAW

As the employer failed to provide competent evidence that the claimant was, in fact, sexually harassing co-workers, there is no evidence to indicate that the claimant-s reasons for being terminated constituted any acts of misconduct or gross misconduct

in connection with the claimant's work, within the meaning of Section 6(b) or 6(c) of the Maryland Unemployment Insurance Law.

Under the above facts, the determination of the Claims Examiner shall be reversed.

DECISION

The claimant was terminated from his employment, but not for any acts demonstrating misconduct or gross misconduct, in connection with the work, within the meaning of Section 6(b) or 6(c) of the Maryland Unemployment Insurance Law. The denial of benefits for the week beginning December 6, 1987 and until the claimant again becomes re-employed, and earns at least ten times his weekly benefit amount is rescinded.

The determination of the Claim Examiner is reversed.

Selig A. Wolfe
Hearing Examiner

Date of hearing: 3/1/88
rc
(1200)-Specialist-ID: 40310
Copies mailed on 2/6/89 to:

Claimant
Employer
Unemployment Insurance - Eastpoint - MABS

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Board of Appeals