

- DECISION -

Claimant:
MEGHAN G SULLIVAN

Decision No.: 5793-BR-11

Date: October 05, 2011

Appeal No.: 1124927

S.S. No.:

Employer:
COSMIC CONCEPTS LTD

L.O. No.: 63

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: November 04, 2011

REVIEW ON THE RECORD

After a review on the record, the Board adopts the following findings of fact and conclusions of law. The hearing examiner's decision is reversed.¹

The claimant, Meghan Sullivan, began working as an assistant program manager for the employer, Cosmic Concepts on October 12, 2010. The claimant was discharged on May

¹ The Board also corrects the inaccurate identification of Andreas Lundstedt, Esquire as the employer's representative. Mr. Lundstedt was, at the Lower Appeals' hearing, representing the claimant.

16, 2011 for alleged insubordination towards her immediate supervisor, Devon Anderson.

On May 11, 2011, the employer was promoting cigarettes at a large venue bar. Part of the claimant's duties were to take pictures, assist with promotional competitions, and assist Mr. Anderson with the collection of patron signatures on promotional materials. Because the venue was so large and there were a significant amount of customers, Mr. Anderson became agitated towards the customers as well as Ms. Sullivan. Ms. Sullivan reminded Mr. Anderson that his behavior was off putting and he needed to stay calm and composed.

At no time during the event did Ms. Sullivan use foul or abusive language towards Mr. Anderson, nor did she storm away and remain absent for a prolonged period of time. The event continued successfully until its scheduled conclusion.

On May 16, 2011, Ms. Sullivan was called into a meeting with Mr. Anderson and Ms. Cindy Crothers, a human resources representative for the employer. Ms. Crothers presented the claimant with a termination notice based on the claimant's alleged insubordination towards her immediate supervisor, Mr. Anderson on the evening of May 11, 2011.

The termination notification was based on Mr. Anderson's recollection of Ms. Sullivan's use of foul language towards him as well as her storming away from him and abandoning her post for a prolonged period of time. Despite the claimant's vehement denial of any use of foul language or abandoning her post, she was discharged from her job.

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."

The hearing examiner bases his credibility determination on what he perceives as conflicting statements. The hearing examiner's credibility determinations are not demeanor-based.

Because the hearing examiner's credibility determinations were not demeanor-based, the Board does not owe the hearing examiner "special deference" as to his findings in this regard. *See Dept. of Health and Mental Hygiene v. Shrieves, 100 Md. App. 283, 299 (1994)*. The Court of Appeals distinguishes between: (1) testimonial inferences, "credibility determinations based on demeanor," and (2) derivative inferences, "inferences drawn from the evidence itself." *Shrieves, 100 Md. App. at 299* (citations omitted). The Court explained:

Weight is given the administrative law judge's determinations of credibility for the obvious reason that he or she "sees the witnesses and hears them testify, while the Board and the reviewing court look only at the cold records."...But it should be noted that the administrative law judge's opportunity to observe the witnesses' demeanor does not, by itself, require deference with regard to his or her derivative inferences. Observation makes weighty only the observers testimonial inferences.

Shrieves, 100 Md. App. at 299-300.

The hearing examiner derived his credibility determinations in this regard from what he perceived as conflicting evidence in the record:

The employer witnesses were more persuasive than the testimony and other hearsay evidence presented by the claimant as to the cursing and leaving her supervisor without permission after being told that he needed her help.

The Board does not adopt the hearing examiner's credibility determinations regarding the employer's witnesses.

The hearing examiner gives no reason or explanation as to why the employer's witnesses were more persuasive. There were two employees present during the alleged insubordination – the claimant and Mr. Anderson. The situation boils down to a "he said/she said". The Board finds the claimant's testimony more credible than that of Mr. Anderson.

Mr. Anderson has changed his story several times. First, he said that the claimant cursed at him and stormed away throwing a chair and that she was missing for an hour and a half. Then he said that Miss Sullivan cursed at him and was missing for a half an hour (that there was no incident regarding a chair). Finally, he said that she just cursed at him. From the beginning, the claimant denied ever cursing at Mr. Anderson; she denied throwing a chair; and she denied being absent from her duties.

The claimant provided statements from the owner of the bar as well as a patron who was involved in the activities of the evening. Each statement was consistent with Ms. Sullivan's account of what transpired that evening.

The Board acknowledges that these statements are entirely hearsay and that the individuals were not available for examination by the employer. However, the employer did not object to the admission of the statements and did not even inquire as to whom the individuals were who made the statements.

Given the claimant's continued denial of the alleged insubordination, coupled with her witness statements, and Mr. Anderson's changing testimony, the Board finds the claimant more credible.

Therefore, because Mr. Anderson was the only witness to the claimant's alleged insubordination, and the claimant's alleged insubordination was the reason for the claimant's discharge, the Board finds that the claimant was discharged but not for misconduct or gross 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 gross misconduct within the meaning of § 8-1002. 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 COSMIC CONCEPTS, LTD.

The Hearing Examiner's decision is reversed.



Donna Watts-Lamont, Chairperson



Clayton A. Mitchell, Sr., Associate Member

Copies mailed to:

MEGHAN G. SULLIVAN

COSMIC CONCEPTS LTD

ANDREAS LUNDSTEDT ESQ.

Susan Bass, Office of the Assistant Secretary

UNEMPLOYMENT INSURANCE APPEALS DECISION

MEGHAN G SULLIVAN

SSN #

Claimant

Vs.

COSMIC CONCEPTS LTD

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: 1124927

Appellant: Claimant

Local Office : 63 / CUMBERLAND
CLAIM CENTER

August 08, 2011

For the Claimant: PRESENT

For the Employer: PRESENT, CINDY CROTHERS, ANDREAS LUNDSTEDT, ESQ., DEVON
ANDERSON

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, Meghan Sullivan, began working for this employer, Cosmic Concepts, on or about October 12, 2010. At the time of separation, the claimant was working as an Assistant Program Manager. The claimant last worked for the employer on or about May 16, 2011, before being discharged under the following circumstances:

On May 11, 2011, the employer was promoting cigarettes at a bar. The claimant was to take pictures at the event and was doing so. Her supervisor needed help to collect signatures for prizes being given to patrons at the bar. The supervisor therefore instructed claimant to help him with signature forms. The supervisor noticed errors on the signature form and informed the claimant of the errors twice. After the second time of

pointing out errors, the claimant said to her supervisor, "Fuck you, "Kiss my ass," and "You can go fuck yourself." The claimant then left her supervisor for about half an hour without permission. The claimant's behavior was heard by patrons and violated the employer's policy of acting professional and, in addition, presented a poor public image.

On May 16, 2011, the employer met with Ms. Sullivan, who admitted to speaking to her supervisor in the manner described above. The claimant was discharged for the cursing and leaving without permission.

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 EVIDENCE

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 been met.

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 witnesses were more persuasive than the testimony and other hearsay evidence presented by the claimant as to the cursing and leaving her supervisor without permission after being told that he needed her help. As to the amount of time that the claimant was gone, the claimant was actually more persuasive given the detailed testimony on this point.

The claimant cursed at her supervisor in front of patrons and stopped helping him without permission,

which was insubordinate. The claimant's actions showed a deliberate and willful disregard of the standards the employer had a right to expect and a gross indifference to the employer's interests in projecting a professional image and having employees follow the reasonable instructions of supervisors. Therefore, the Claimant's behavior constituted gross misconduct in connection with the work. An unemployment disqualification shall be imposed based on Md. Code, Ann., Labor & Emp. Article, Section 8-1002 pursuant to this separation from this employment.

DECISION

IT IS FURTHER HELD THAT the claimant was discharged for gross misconduct connected with the work within the meaning of Md. Code Ann., Labor & Emp. Article, Section 8-1002(a)(1)(i). The claimant is disqualified from receiving benefits from the week beginning May 15, 2011 and until the claimant becomes reemployed and earns wages in covered employment that equal at least 20 times the claimant's weekly benefit amount.

The determination of the Claims Specialist is affirmed.



C. Morrison, 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 to Petition for Review

Any party may request a review 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 August 23, 2011. 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: July 28, 2011

AEH/Specialist ID: WCU3C

Seq No: 003

Copies mailed on August 08, 2011 to:

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