-DECISION-

Claimant:
DANA E PARKER

Employer:
HEARN KIRKWOOD INC

Decision No.: 6116-BR-12

Date: February 4, 2013

Appeal No.: 1230073

S.S. No.:

L.O. No.: 61

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.

- 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 6, 2013

REVIEW OF THE RECORD

After a review of the record, the Board adopts the hearing examiner's 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).*

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 his appeal, the claimant offers no specific contentions of error as to the findings of fact or the conclusions of law in the hearing examiner's decision. The claimant does not cite to the evidence of record and makes no other contentions of error. The claimant simply states: "I wish to contest my 10 week denial."

On appeal, the Board reviews the evidence of 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. 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. Sufficient evidence exists in the record from which a decision may be made. The Board finds no reason to order a new hearing or take additional evidence in this matter.

The evidence established that the claimant had one unexcused absence without notice. The claimant believed another employee was covering that shift, so did not think there was any need to notify the employer of the absence. This was simply a misunderstanding between two supervisory employees. The evidence did not show, contrary to the hearing examiner's conclusion, that the claimant was derelict in his duty to the employer. The claimant did not have a history of missing work or otherwise failing to comply with the employer's expectations. This was a singular act, and while it was careless, it was 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 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 Hearn Kirkwood Inc

The Hearing Examiner's decision is reversed.

Donna Watts-Lamont, Chairperson

Clayton A. Mitchell, Sr., Associate Member

VD
Copies mailed to:
DANA E. PARKER
HEARN KIRKWOOD INC
HEARN KIRKWOOD INC
Susan Bass, Office of the Assistant Secretary

UNEMPLOYMENT INSURANCE APPEALS DECISION

DANA E PARKER

SSN #

Claimant

vs.

HEARN KIRKWOOD 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: 1230073
Appellant: Claimant
Local Office : 61 / COLLEGE PARK CLAIM CENTER

October 05, 2012

For the Claimant: PRESENT

For the Employer: PRESENT, GARY DANIEL, DANIEL TAYLOR, JACKIE CAVEY

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, Dana E Parker, began working for this employer, Hearn Kirkwood Inc, on November 19, 2010, and his last day worked was August 2, 2012. At the time of his discharge, the claimant worked full-time as a night warehouse supervisor, earning an annual salary of $45,000.00.

The claimant was discharged for having an unexcused absence from work. On August 3, 2012, the claimant failed to show for work without notifying the employer because he believed his coworker was covering his shift. The previous week, the other night supervisor had called out sick for several consecutive days and the claimant covered his shifts. When this supervisor returned to work the following week, he told the claimant he would take care of him "on the back end." The claimant took this to mean he would cover his fifth and last scheduled day for that week. However, the claimant never confirmed this with the other

supervisor. Instead, he assumed his shift was covered and failed to show for work.

Under the employer's policy, failure to show for work for three or more consecutive days without notice to the employer will result in discharge. Because the claimant was a supervisor, the employer elected to discharge him for this one absence.

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)].

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.

Section 8-1002 defines gross misconduct as (i) a deliberate and willful disregard of standards of behavior an employer has the right to expect, showing a gross indifference to the employer's interests; or (ii) repeated violations of employment rules proving a regular and wanton disregard of the employee's obligations. As stated in Department of Economic & Empl. Dev. v. Jones, 79 Md. App. 531, 535-536, 558 A.2d 739 (1989), "There are no hard and fast rules to determine what constitutes deliberate and willful misconduct." In Employment Security Board v. LeCates, 218 Md. 202, 145 A.2d 840 (1958), the Court of Appeals noted such a determination "will vary with each particular case." The Court went on to state: "Here we 'are not looking simply for substandard conduct...but for a willful or wanton state of mind accompanying the engaging in substandard conduct. ... [T]he wrongness of the conduct must be judged in the particular employment context. ... [C]ertain conduct will be so flagrant indulging in it will undoubtedly be misconduct whether or not a specific rule prohibiting it has been expressly formulated and posted or otherwise announced to the employees.'" [218 Md. at 208, 145 A.2d. at 844, quoting Sanders, Disqualification for Unemployment Insurance, 8 V. and L. Rev. 307, 334 (1955)]. The Court concluded that where the claimant's conduct evinced an utter disregard of an employee's duties and obligations to the employer and was calculated to disrupt the discipline and order requisite to the proper management of a company, a finding of gross misconduct is supported. In the case at bar, the claimant's single, unexcused absence from work does not reach the level warranting a finding of gross misconduct.

Nonetheless, the claimant "transgressed (an) established rule or policy of the employer" and as the Maryland Court of Appeals held in Rogers v. Radio Shack, 271 Md. 126, 314 A.2d 113 (1974), "...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" amounts to

misconduct. The decision in Rogers v. Radio Shack is consistent with the Board of Appeals decision in Lehman v. Baker Protective Services, Inc., 221-BR-89, wherein the Board held "The claimant bypassed one part of her duties, resulting in a customer's premises being unprotected by the alarm system for one night. This was misconduct. Without sufficient evidence of a willful and wanton disregard of her obligations or a gross indifference to the employer's interest, there can be no finding of gross misconduct."

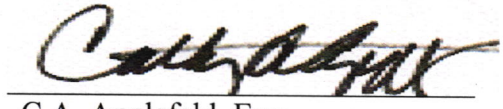
Similarly, in the case at bar, the claimant failed report to work as scheduled and assumed his coworker would cover his shift. While there appears to be some misunderstanding over which shift the other supervisor would cover, the claimant never confirmed the shift with the supervisor nor did he communicate the supposed change with the employer to insure that the shift was covered. The claimant's actions were a dereliction of duty warranting a finding of simple misconduct under the law, but his actions do not show the necessary deliberateness and willfulness to warrant a finding of gross misconduct.

Accordingly, the employer met its burden in this case and the claimant's discharge was for an unexcused absence from work, 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 July 29, 2012, and for the nine (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 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.



C A Applefeld, 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 October 22, 2012. 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: September 21, 2012
BLP/Specialist ID: WCP2B
Seq No: 001
Copies mailed on October 05, 2012 to:

DANA E. PARKER
HEARN KIRKWOOD INC
LOCAL OFFICE #61