-DECISION-

Claimant:
CESAR RICARDO PETROVICH SANCHEZ

Employer:
THRESHOLD SERVS INC

Decision No.: 632-BR-12

Date: February 24, 2012

Appeal No.: 1121006

S.S. No.:

L.O. No.: 62

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: March 26, 2012

REVIEW OF THE RECORD

After a review of the record, and after moving the last two paragraphs to the Evaluation of Evidence section of the Decision, the Board adopts the hearing examiner's modified 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 the claimant's appeal, his representative contends that the employer did not meet its burden of proof and establish that the claimant's actions amounted to either gross misconduct or simple misconduct. The Board agrees and finds that the decision should be reversed.

The claimant was reprimanded, two times, for different incidents which he did not realize could have been construed as sexually-harassing or unwanted. He did, as his representative contends, make a serious attempt to learn what was and was not acceptable in the workplace. He conformed his conduct to this standard, until he mentioned to a female co-worker that she was "gorgeous" or "beautiful" and inquired of her ethnic background. There was no sexual overtone to this comment and, while the co-worker was "embarrassed" she was not offended. The claimant did not know that such a statement would violate the employer's policy. The Board cannot find that the claimant should have known this, either.

As noted by the claimant's representative, conduct which may warrant a worker's discharge does not necessarily warrant a disqualification from benefits. An employer may have policies and rules, the violation of which warrant the worker's immediate discharge from employment. The qualification for unemployment insurance benefits is, however, determined based upon whether the claimant's act or omission was gross misconduct or simple misconduct. Gross misconduct has been defined as a deliberate, willful, grossly negligent or repeatedly careless disregard for the employer's expected standards of behavior or its expectations. Simple misconduct has been defined as a breach of the worker's duty to the employer, and does not have to be intentional.

Here, the claimant did apparently violate the employer's broad policy concerning sexual harassment. There was no showing that the claimant intended to violate the policy or that he even intended any sexual connotation in his comments. The claimant believed he was making a compliment to and about a co-worker. This was done in his attempt to foster positive relationships with his colleagues. The claimant's words were probably ill-chosen, but were not sexual harassment in the generally-accepted understanding of that concept.

The Board's review of the record establishes that there was insufficient evidence presented by the employer to meet its burden of proof. The employer has not demonstrated that the claimant was discharged for any disqualifying reason.

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 THRESHOLD SERVS INC.

The Hearing Examiner's decision is reversed.

Donna Watts-Lamont, Chairperson

Clayton A. Mitchell, Sr., Associate Member

KJK/mw
Copies mailed to:
CESAR RICARDO PETROVICH SANCHEZ
THRESHOLD SERVS INC
ALECIA FRISBY STAFF ATTY.
WALLENE WERNER UI CONSULTANT
Susan Bass, Office of the Assistant Secretary

UNEMPLOYMENT INSURANCE APPEALS DECISION

CESAR RICARDO PETROVICH SANCHEZ

SSN #

Claimant

vs.

THRESHOLD SERVS 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: 1121006
Appellant: Employer
Local Office : 62 / COLLEGE PARK CLAIM CENTER

July 19, 2011

For the Claimant: PRESENT , ALECIA FRISBY, STAFF ATTY., LINDSEY WARNES, ESQ., NANCY SUSHINSKY, DAN DUBRAVETZ

For the Employer: PRESENT , PAMELA MILLER, CRAIG KNOLL, ELIZABETH GATTI,

For the Agency: THAIS HALLER, INTERPRETER

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 8-1001 (voluntary quit for good cause), 8-1002 - 1002.1 (gross/aggravated misconduct connected with the work) or 8-1003 (misconduct connected with the work).

FINDINGS OF FACT

The claimant, Cesar Petrovich Sanchez, filed a claim for benefits establishing a benefit year beginning May 8, 2011. He qualified for a weekly benefit amount of $339.00.

The claimant was employed with Threshold Services, Inc. from August 10, 2009 to May 3, 2011. At the time of separation, he was working full time as a residential rehabilitation counselor, earning $16.47 per hour. The claimant resigned in lieu of discharge because of violation of the employer's sexual harassment policy.

The employer's policy prohibits all sexually oriented verbal, nonverbal and physical conduct at work and work-related social events. Prohibited conduct includes, but is not limited to, comments, innuendoes, casual remarks or games and nonverbal or physical behavior that has anything at all to do with sex or sexual attraction. This type of conduct is prohibited whether or not it is regular or repeated, whether or not anyone complains, whether or not it is unwelcome and whether or not anyone makes clear that it is unwanted or that it makes her/him uncomfortable. Whether or not any particular conduct constitutes illegal sexual harassment, it is prohibited at work and the employer's social events. The employer is not required to follow any prescribed disciplinary steps. Disciplinary action is at the discretion of the employer. These policies are stated in a handbook that the claimant received at the time of hire.

In October 2009, a residential counselor, Wendy Hestick, reported to the associate program director, Becky Maguire, that she was uncomfortable with comments that the claimant made about her appearance. In a memorandum signed by Ms. Maguire, Ms. Maguire stated that she contacted the claimant and told him about this complaint. She further told him that he should not make comments about any female coworker's appearance in any way. The claimant reported to her that he was not aware of making such comments and apologized for making anyone uncomfortable. Mr. Craig Knoll, the CEO, was aware of this incident at the time it occurred.

In December 2009, the claimant's coworker, Tiffany Washington, reported that she felt upset and uncomfortable after an interaction where the claimant insisted upon massaging her. She was alone in a staff office with the claimant. He offered to give her a massage in an attempt to "console" her and "make her feel better" because she was frustrated about a problem she was having with her computer. She declined the offer, but the claimant "continuously offered" and she felt sexually harassed.

Elizabeth Gatti, human resource manager investigated the allegation. She met with the claimant and verified that he offered to massage Ms. Washington. She discussed with the claimant why this was inappropriate and offered, through role playing, specific examples of what not to say to female coworkers. She advised the claimant to limit all discussions with corkers to work-related topics. The claimant agreed to do so. She also required the claimant to take an on-line training class in sexual harassment and she gave him a copy of the employer's policy. She told the claimant that his job could be in jeopardy if he violated the policy in the future.

On April 20, 2011, Pamela Miller, a program director, e-mailed Ms. Gatti that she wanted to file a complaint about the claimant's behavior toward her several weeks earlier. Subsequently, Ms. Miller met with Ms. Gatti and told her that Ms. Miller was uncomfortable with the claimant's comments to her about her appearance. She reported that the claimant came up to her and told her she was beautiful. He asked her what her ethnicity was and she replied that her mother is Mexican and Chinese. He said, "Look at those eyes" and told her she had beautiful hair. He said, "You're so gorgeous" and told a client who was present in the room, "Look at her. She's so gorgeous." Ms. Miller did not say anything.

Subsequently, the claimant met with Mr. Knoll, Ms. Gatti and Carrie Cho, the COO. The employer questioned the claimant about Ms. Miller's complaint. The claimant did not deny that he commented on her appearance. The employer advised the claimant that he would be discharged and offered him the opportunity to reign in lieu of discharge, which he accepted.

At the appeal hearing, the claimant denied any knowledge of the first incident in October 2009. With respect to the second incident in December 2009, he admitted that he offered to give Ms. Washington a "digital acupuncture massage" to ease her neck pain. With respect to the final incident in April 2011, he denied making any comments about Ms. Miller's appearance. He admitted asking her about her ethnicity.

Daniel Dubravetz, a counselor, testified at the appeal hearing under the claimant's subpoena. He stated that he was present for part of the time when the claimant spoke to Ms. Miller. He heard the claimant ask her about her ethnicity and heard the claimant tell her she was beautiful.

CONCLUSIONS OF LAW

A claimant who resigns in lieu of discharge does not show the requisite intent to quit under Allen v. CORE Target City Youth Program, 275 Md. 69, 338 A.2d 237 (1975). Therefore, a resignation in lieu of discharge shall be treated as a termination under Sections 8-1002 or 8-1003 of the law. Miller v. William T. Burnette & Company, Inc., 442-BR-82.

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 THE EVIDENCE

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 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 employer produced sufficient credible evidence that the claimant continued to violate the employer's policy, despite receiving warnings and retraining. Although the claimant denied any knowledge of the first warning, the employer's recollection of the incident was credible and supported by a signed memorandum from the individual who counseled the claimant. With respect to the second incident, the claimant admitted the inappropriate behavior and that he received a warning and retraining as a result of it. With respect to the final incident, the employer produced credible first-hand testimony from the individual who made the complaint, as well as corroboration from another coworker who heard the comments. The claimant's denial of making any comments was not credible.

I hold that the claimant's showed a regular and wanton disregard of his obligations to the employer and therefore 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 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)(ii). The claimant is disqualified from receiving benefits from the week beginning May 1, 2011 and until the claimant becomes reemployed and earns wages in covered employment that equal at least 25 times the claimant's weekly benefit amount.

The determination of the Claims Specialist is reversed.

R. Tabackman

R M Tabackman, 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 August 03, 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 12,2011
CH/Specialist ID: WCP6E
Seq No: 001
Copies mailed on July 19, 2011 to:
CESAR RICARDO PETROVICH SANCHEZ
THRESHOLD SERVS INC
LOCAL OFFICE #62
ALECIA FRISBY STAFF ATTY.
THRESHOLD SERVS INC