

- DECISION -

Claimant:
MARCELL L THOMAS

Decision No.: 819-BR-14

Date: March 21, 2014

Appeal No.: 1330364

S.S. No.:

Employer:
BIG LOTS STORES INC

L.O. No.: 61

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: April 21, 2014

REVIEW OF THE RECORD

After a review of the record, after deleting "or about" from the first sentence of the first paragraph, after deleting the third, fourth, and fifth sentences of the second paragraph, and after deleting the entire third paragraph, the Board adopts the hearing examiner's modified findings of fact. The Board makes the following additional findings of fact:

Neither the claimant, nor his co-workers, was allowed to ring up a personal purchase on the cash register. To purchase a beverage for consumption, the claimant needed a manager to

ring up the sale. The manager was busy and did not ring up the sale. At the end of the claimant's shift, he reminded the manager he had not paid for a soda he had drunk earlier, but the manager told him to not worry about it.

The claimant had, at the manager's direction, taken a battery from inventory for the manager's personal use. The claimant did not keep or possess the battery.

One of the claimant's other duties was to test returned merchandise, including ear buds, to make sure they were saleable. He returned them to inventory after testing. The claimant did not keep or possess any ear buds belonging to the employer.

In the conversation with Mr. Myers, the claimant attempted to explain these actions, but his explanation was misunderstood.

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*. Conclusory statements are insufficient evidence to meet an employer's burden of proof. *Cook v. National Aquarium in Baltimore, 1034-BR-91*. An employer must produce specific evidence of a claimant's alleged misconduct. *Id.*

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 attorney contends the hearing examiner's findings of fact were inconsistent with the testimony. Claimant's counsel offers specific contentions of error as to the findings of fact and the conclusions of law in the hearing examiner's decision. The claimant's attorney specifically cites to the evidence of record and argues the claimant's discharge was for non-disqualifying reasons. Because the Board agrees with the contentions in the claimant's appeal, the Board will not further discuss those contentions.

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

The Board has thoroughly reviewed the record from the hearing but disagrees with the hearing examiner's findings of fact and conclusions of law. The employer did not prove that the claimant took any property belonging to the employer with the intention of depriving the employer of that property. The only items the claimant actually took were two sodas. The claimant tried to pay for the soda, but his manager did not ring up the sale and later told him to not worry about it. The claimant did not commit theft.

The evidence established that the employer discharged the claimant because the employer believed he had stolen soda, a battery and a set of ear buds. The employer, however, did not prove, by a preponderance of competent evidence that this actually happened. Therefore, the Board cannot find that any degree of misconduct was the basis for the claimant's discharge from this employment.

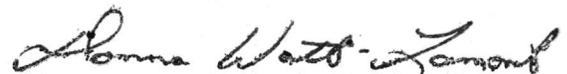
The Board notes that the hearing examiner did not offer or admit the *Agency Fact Finding Report* into evidence. The Board did not consider this document when rendering its decision.

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 BIG LOTS STORES INC

The Hearing Examiner's decision is reversed.



Donna Watts-Lamont, Chairperson



Clayton A. Mitchell, Sr., Associate Member

VD

Copies mailed to:

MARCELL L. THOMAS

JENNIFER S. SMITH ESQ.

BIG LOTS STORES INC

Susan Bass, Office of the Assistant Secretary

UNEMPLOYMENT INSURANCE APPEALS DECISION

MARCELL L THOMAS

SSN #

Claimant

Vs.

BIG LOTS STORES 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: 1330364

Appellant: Claimant

Local Office : 61 / COLLEGE PARK
CLAIM CENTER

November 21, 2013

For the Claimant: PRESENT, JENNIFERS. SMITH, ESQ.

For the Employer: PRESENT, JEFF MYERS

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, Marcell Thomas, began working for this Employer, Big Lots Stores Inc., on or about September 22, 2011. At the time of separation, the Claimant was working as a customer service representative, earning wages in the amount of \$8.80 per hour. The Claimant last worked for the Employer on August 27, 2013, before being terminated for theft.

On August 15, 2013, the District Office Manager, Jeff Meyers, was investigating the cause of a \$100.00 shortage. He spoke to the Claimant regarding the missing money. During the conversation, the Claimant admitted taking some items without paying. The total value of the items was \$6.80. The items included 2 sodas @ 1.65 each, 1 battery @ .50 and 1 pair of ear buds @ 3.00. The Claimant was suspended on August 26, 2013.

The Claimant took one of the sodas while he was working alone as a cashier. He did not pay for the soda. After the Manager counted his drawer, he told her he forgot to pay. The Manager responded don't worry. The Claimant used the pair of air buds and later put it back.

The Claimant was discharged on August 27, 2013.

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 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.

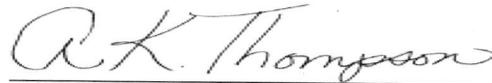
The credible testimony presented indicated that the Claimant did consume and use company property without paying while on duty for this Employer. The Claimant's explanation that he forgot and would have paid after the fact and that he returned an item he used, does not excuse his behavior. The Claimant's actions clearly were not in the best interests of the Employer and do constitute gross misconduct.

I hold that the Claimant's actions showed a deliberate and willful disregard of the standards the Employer had a right to expect, showed a gross indifference to the Employer's interests 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)(i). The Claimant is disqualified from receiving benefits from the week beginning August 25, 2013 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 affirmed.



A K Thompson, 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

This is a final decision of the Lower Appeals Division. Any party who disagrees with this decision 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 December 06, 2013. 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: November 06, 2013
AEH/Specialist ID: WHG3C
Seq No: 001
Copies mailed on November 21, 2013 to:

MARCELL L. THOMAS
BIG LOTS STORES INC
LOCAL OFFICE #61
JENNIFER S. SMITH ESQ.