

- DECISION -

Claimant:
NANCY E KAMINSKI

Decision No.: 978-BR-11

Date: February 11, 2011

Appeal No.: 1034197

S.S. No.:

Employer:
LOCAL DEPART OPERATIONS 330700

L.O. No.: 60

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 14, 2011

REVIEW ON THE RECORD

After a review on the record, the Board adopts the hearing examiner's findings of fact. The Board makes the following additional findings of fact:

The claimant had actually performed her job duties for about two months. She was in training for about three months, and was still learning many of the specifics of her position. The claimant often needed guidance to complete some of her tasks. The claimant had difficulties prioritizing her work because nearly everything she was given had a high priority. The claimant was trying to complete her assigned work everyday and never refused any work or instruction given to her.

At the end of the claimant's first six months of employment, immediately before her discharge, she received a performance evaluation which stated that her work was "satisfactory" overall. The claimant had not been warned that there were any problems which placed her continued employment in jeopardy.

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(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). 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 her appeal, the claimant contends that the hearing examiner did not like her and was overly critical of her throughout both hearings. A review of the record does not reveal any overt bias by the hearing examiner to either party. The hearing examiner properly attempted to limit the scope of the claimant's testimony to relevant matters. The hearing examiner also tried to keep the claimant's focus on the specifics of the reasons for which the employer testified the claimant was discharged. There was no error by the hearing examiner in the manner in which the hearing was conducted.

The claimant also included, with her appeal, a written statement. She contends that she was not allowed to read this prepared statement to the hearing examiner. The claimant was, however, allowed to testify, at length, about her employment and her separation. All the information contained in the written statement was presented at the hearing. The claimant also had a full and fair opportunity to cross-examine the employer's witnesses.

Because the Board reaches a different conclusion of law in this matter, the claimant's contentions will not be further addressed.

The hearing examiner found that the claimant was insubordinate. The Board does not agree with this assessment. The hearing examiner adopted the employer's definition of insubordination: failure to follow

directives. The claimant never refused a directive from her supervisor. She was not resistant to direction, training, assignments or anything else from the employer or her supervisor. The claimant had little training on the tasks she was required to complete each day. She often needed assistance or guidance in performing some of her duties. The claimant was trying to complete everything in a timely manner. Each day the claimant received files, nearly all of which had priority. The claimant did not have enough experience or training to be able to ascertain which file actually had a higher priority. The claimant's "failure" to follow directives was the result of her inability, despite a good faith effort, to complete the tasks given to her.

If an employee is unable to perform due to incompetence or the employer's failure to provide adequate equipment or materials, there is no misconduct. If an employee is discharged because the employee is physically or mentally unable to perform the job, the discharge is not for misconduct. With respect to a pregnant employee, 26 U.S.C., Section 3304(a)(12), which mandates that no person shall be denied compensation under state law solely on the basis of pregnancy, only prohibits the state from singling out pregnancy for unfavorable treatment. See, **Wimberly v. Labor and Industrial Relations Commission of Missouri**, 479 U.S. 511, 107 S.Ct. 821 (1987).

A mere showing of substandard performance is not sufficient to prove gross misconduct or misconduct. **Todd v. Harkless Construction, Inc.**, 714-BR-89.

In **Knight v. Vincent Butler, Esq.**, 585-BR-91, the claimant was employed as a part-time office manager for a small law firm. She was discharged because the employer was unhappy with the claimant's work product. However, the claimant was working to the best of her ability and many of her problems were caused by a poorly equipped and disorganized office. The employer failed to show that the claimant committed any degree of misconduct.

Similarly, in **Cumor v. Computers Communications Group**, 902-BH-87, the claimant was unable to perform her job to the satisfaction of the employer. The claimant tried to do her job to the best of her ability, but was not capable of doing the job. The claimant did not have any previous experience doing clerical office work. There was no evidence that the claimant was discharged for any misconduct on her part.

In this case, the claimant had received training in some of the work she was expected to do, but not all the programs for which she had some responsibility. The claimant needed additional help and guidance periodically to complete all her tasks. The evidence showed that the claimant was working to the best of her ability; did not refuse assignments or resist direction. The claimant, simply, was not to the point where she was able to do the job to the employer's satisfaction. There was no insubordination. The claimant was discharged for her inability to perform all of her work in the time allotted. This 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.

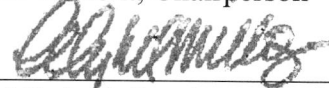
DECISION

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 LOCAL DEPART OPERATIONS.

The Hearing Examiner's decision is reversed.



Donna Watts-Lamont, Chairperson



Clayton A. Mitchell, Sr., Associate Member

RD/mw

Copies mailed to:

NANCY E. KAMINSKI
LOCAL DEPART OPERATIONS 330700
Susan Bass, Office of the Assistant Secretary

UNEMPLOYMENT INSURANCE APPEALS DECISION

NANCY E KAMINSKI

SSN #

Claimant

vs.

LOCAL DEPART OPERATIONS 330700

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: 1034197

Appellant: Claimant

Local Office : 60 / TOWSON CALL
CENTER

November 09, 2010

For the Claimant: PRESENT

For the Employer: PRESENT , BETTY BENNETT, CAROLE CLARK

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 worked for the above employer from January 27, 2010 to July 28, 2010. At separation, she served as a full-time family investment aide, earning \$1,073.67 biweekly. The claimant was discharged for insubordination.

The claimant's duties included customer service, food stamp processing, medical assistance and half hour intake classes for the public. Food stamp processing was a priority because each application had to be done within thirty days. Late applications triggered an "agency action," a service violation imposed on the agency for late filing of applications. For that reason, every day at the start of the shift, Supervisor Carole Clark gave each worker a list of applications due that day.

On July 22, 2010, the claimant received her applications, but did not complete one of them. When questioned by Mrs. Clark, the claimant described the application as complicated. Since an agency delay may lead to legal action, Mrs. Clark sent the claimant an email about the thirty day rule and asked her to make the food stamp applications a priority. On July 26, Mrs. Clarke sent out new print outs, assigning five cases to each worker, to be done by that afternoon. However, at 2:55 p.m., the claimant asked to leave right away, noting parenthetically that she did not complete her work because she was late, which she apparently intended to mean that her shortened day excused full performance. As a result, management decided to terminate her.

CONCLUSIONS OF LAW

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).

EVALUATION OF EVIDENCE

The employer had the burden to show, by a preponderance of the evidence, that the claimant was discharged for some degree of misconduct connected with the work under the meaning of the Maryland Unemployment Insurance Law. Ivey v. Catterton Printing Company, 441-BH-89. In this case, that burden was met as to gross misconduct.

In Solomon v. Cantwell Cleary Company, Inc., 1027-BR-91, the claimant was terminated after refusing to obey an order to perform duties related to his job duties, and the Board of Appeals upheld the claimant's termination for gross misconduct. This claimant gave no evidence of inability to complete the work as directed; she wanted to set her own priorities regardless of the supervisor's direction, which led directly to her termination.

The claimant showed a regular and wanton disregard of her obligations to the employer, which constituted gross misconduct in connection with the work. An unemployment disqualification will be imposed based on Md. Code, Ann., Labor & Emp. Article, Section 8-1002 pursuant to this separation from 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 July 25, 2010 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.

L. Brown Esq.

L. Brown, 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 November 29, 2010. 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 03,2010

TH/Specialist ID: WHG32

Seq No: 003

Copies mailed on November 09, 2010 to:

NANCY E. KAMINSKI

LOCAL DEPART OPERATIONS 330700

LOCAL OFFICE #60