-DECISION-

Claimant:
GEORGE H SPANGLER

Employer:
MONTGOMERY CO GOVERNMENT

Decision No.: 985-BR-11

Date: February 14, 2011

Appeal No.: 0933759

S.S. No.:

L.O. No.: 61

Appellant: Joint Employer and 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 16, 2011

REVIEW ON THE RECORD

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

> The claimant's job performance, and more particularly his relations with co-workers, supervisors and employees, deteriorated significantly over his last year of employment. The claimant engaged in repeated arguments with his supervisor about his disagreement with new policies. He resisted implementation and use of required assessment tools. He

threatened the job-security of his employees and engaged in behavior which those employees found intimidating. The claimant specifically refused to follow a required procedure despite having been clearly told to do so.

The claimant was specifically warned, through a Performance Improvement Plan, that he must cease arguing, follow the directives of his supervisor, and establish a better and more productive working relationship with his employees, peers and management. The claimant continued to make inappropriate comments, neglected to keep his subordinates informed, resisted utilizing required tools and argued with his supervisor.

The employer ultimately concluded that the accumulated and uncorrected problems with the claimant's work and behavior warranted his separation. The claimant was given an opportunity to resign prior to being discharged. Had he not resigned, his employment would have been terminated.

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(H)(1).* The Board fully inquires into the facts of each particular case. *COMAR 09.32.06.02(E).*

Although not specifically discussed by the hearing examiner, this was a discharge. The claimant did submit a resignation, but, for purposes of determining qualification for unemployment insurance benefits, a discharge in lieu of a certain discharge is analyzed based upon the reasons for the impending discharge.

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 contends that the final incident, of using profanity toward his supervisor, should not have been found to constitute misconduct. He argues that, because the supervisor had also used such language, it was condoned and therefore not a violation of the employer's workplace rules. He

argued the same point at the hearing, stating that it was simply an acceptable part of the culture of the workplace. The Board, while not condoning the use of rude, profane or offensive language in the workplace, agrees that had this been an isolated, singular occurrence, the final incident, of itself, was not misconduct.

The claimant does not make any other contentions of error as to the law or the facts. He, and the employer, both were afforded their respective full due process rights throughout the hearing. The hearing examiner allowed each party to testify, to cross-examine the other party, to offer documentary evidence and to make a closing statement. There were no procedural irregularities in the hearing which would constitute error.

The claimant's conduct during the hearing mirrored the employer's testimony of his uncooperative behavior, overly argumentative insistence, and resistance to direction. Despite being reminded on multiple occasions of the necessity to only ask questions during his cross-examination of the employer's witness, the claimant continued to testify. Despite being cautioned, the claimant persisted in arguing with the witness and with the hearing examiner. In spite of the hearing examiner's admonitions, the claimant continued to attempt to delve into matter previously rule irrelevant to the issue at the hearing.

In the employer's appeal, the contention is that the evidence supports a finding of gross misconduct based upon the claimant's "…repeated inability or rather unwillingness to accept the reasonable instructions that he was given…"

The evidence established that, despite a clear admonition, the claimant continued to passively resist, and actively oppose, the implementation of a required process. The claimant expressed his disagreement on multiple occasions, and continued to do so after he was specifically told that the matter was no longer open for discussion. An employer has the right to expect that reasonable, work-related directives, given in a civil manner, will be followed. A worker also has the right to request clarification and even to disagree with such directives. However, once the worker has been told to cease discussion and follow the supervisor's direction, the worker is expected to do so without further argument. Here, the claimant refused to stop his disagreement over the implementation of the assessment tool. The Board is of the opinion that the claimant's conduct was willfully insubordinate. Exacerbating this insubordination, was the claimant's failure to assure that the mediators under his supervision also used the assessment tool.

The employer's testimony showed that the claimant had become increasingly difficult to work with over his last two years of employment. The employer attempted to provide guidance and direction to him in order to preserve his employment. The claimant disregarded the employer's instructions and suggestions and chose to continue to act based upon his own initiatives. The claimant knew what the employer expected. The claimant could have complied had he chosen to do so. The Board is of the opinion that the claimant's continued refusal and failure to follow the reasonable directives of the employer was 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 has met 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 for gross misconduct connected with the work, within the meaning of Maryland Code Annotated, Labor and Employment Article, Title 8, Section 1002. The claimant is disqualified from receiving benefits from the week beginning April 26, 2009 and until the claimant becomes re-employed, earns at least twenty times their weekly benefit amount and thereafter becomes unemployed through no fault of their own.

The Hearing Examiner's decision is reversed.

Donna Watts-Lamont, Chairperson

Clayton A. Mitchell, Sr., Associate Member

RD/mw
Copies mailed to:
GEORGE H. SPANGLER
MONTGOMERY CO GOVERNMENT
MONTG CO GOVERNMENT
L. PAUL SNYDER
Susan Bass, Office of the Assistant Secretary

court mediators. The claimant resigned in lieu of discharge. The claimant was to conduct intake on all referrals for mediation program to determine appropriate level of service for initial, post judgment and high conflict cases; screen out all cases where domestic violence is an issue.

On November 20, 2008, the claimant was given a Performance Improvement Plan because on November 17,2008, the claimant informed his supervisor that he was scheduled to mediate a case where an active protective order existed between the mother and father of the child.

On December 15, 2008, the claimant was given an addendum to the Performance Improvement Plan dated November 20,2008, for the impropriety of directly approaching employees in other departments of the Court to perform work related services for him.

Montgomery County Government submitted an email from Melissa Henderson, a court mediator, dated March 6,2009 which indicated that the claimant was disrespectful to her. The claimant used profanity when he spoke to his supervisor in March 2009. The claimant was not disrespectful to the court mediators.

The claimant believed that he worked in a hostile work environment. The claimant did not file a formal complaint that he worked in a hostile work environment. The hearing examiner find as a fact that claimant did not work in a hostile work environment.

The claimant received six weeks of Severance Pay.

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 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 claimant's conduct to use profanity when he spoke to his supervisor in March 2009 constitutes misconduct under section 8-1003 of the law. There is insufficient evidence to conclude gross misconduct

UNEMPLOYMENT INSURANCE APPEALS REMAND DECISION

GEORGE H SPANGLER

SSN #

Claimant

vs.

MONTGOMERY CO GOVERNMENT

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: 0933759
Appellant: Employer
Local Office : 61 / COLLEGE PARK CLAIM CENTER

December 10, 2010

For the Claimant: PRESENT

For the Employer: PRESENT , JAMES A. STULLER, MADELEINE JONES

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 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).

PREAMBLE

This case has been remanded by the Board of Appeals for a de novo hearing.

FINDINGS OF FACT

The claimant began working for this employer on or about September 25,2000. At the time of separation, the claimant was working as a managing custody/ access mediator. The claimant last worked for the employer on or about April 28,2009, before being terminated for being disrespectful to his supervisor and

under section 8-1002 of the law. There is insufficient evidence to conclude that claimant was disrespectful to the court mediators.

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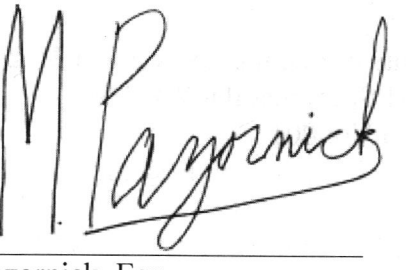
I hold that the claimant committed a transgression of some established rule or policy of the employer, a forbidden act, a dereliction of duty, or engaged in a course of wrongful conduct within the scope of the claimant's employment relationship, during hours of employment, or on the employer's premises. An unemployment disqualification shall be imposed based on Md. Code, Ann., Labor & Emp. Article, Section 8-1003 pursuant to this separation from this employment.

DECISION

IT IS FURTHER 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 April 26,2009, and for the nine 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.



M I Pazornick, 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 December 27, 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 16,2010
CH/Specialist ID: WCP2B
Seq No: 001
Copies mailed on December 10, 2010 to:
GEORGE H. SPANGLER
MONTGOMERY CO GOVERNMENT
LOCAL OFFICE #61
MONTG CO GOVERNMENT
L. PAUL SNYDER