

- DECISION -

Claimant:
VEDA M WILSON

Decision No.: 864-BR-13

Date: March 8, 2013

Appeal No.: 1235844

S.S. No.:

Employer:
MIDWAY INDUSTRIES LLC

L.O. No.: 63

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: April 08, 2013

REVIEW OF THE RECORD

After a review of the record, the Board adopts the first paragraph of the hearing examiner's findings of fact. The Board moves the remainder of the Findings of Fact to the Evaluation of Evidence section of the Decision. The Board also deletes the "Preamble" as unnecessary. The Board makes the following additional findings of fact:

The claimant was discharged following a verbal altercation between the claimant and co-worker. The incident was initiated by the other worker, but the claimant also became loud and argumentative. This was an isolated incident.

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 her appeal, the claimant expresses her confusion over the hearing examiner's statements that the employer had not met its burden of proof, yet disqualified the claimant. The claimant contends she was separated because the employer had only intended her position to be temporary. She further contends the employer did not pay the promised "starting bonus". The claimant also includes a copy of a letter of recommendation given to her by the employer at the time of her separation.

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.

The Board has thoroughly reviewed the record from the hearing. That evidence does not support the hearing examiner's conclusions, for different reasons than those contained in the claimant's contentions. The evidence only established the occurrence of one incident – the verbal altercation with a co-worker. The evidence did not demonstrate that the claimant was unduly argumentative or that the claimant initiated the confrontation. The claimant may have reacted inappropriately to the co-worker, but this was the first, and only, occurrence. The evidence demonstrated that the employer elected to discharge the claimant at this time because of her short tenure. The evidence did not demonstrate that the claimant knew or should have known that this argument was a breach of her duty or a serious violation of some work rule. Misconduct cannot be found under these circumstances.

For the claimant's information, the Board notes that the perceived inconsistencies in the hearing examiner's analysis and explanation were the result of the hearing examiner attempting to draw a distinction between the elements of gross misconduct and those of simple misconduct. An employer has the burden of proof in any discharge case to establish facts which support a finding of either gross or simple misconduct. An employer may meet that burden with respect to simple misconduct (as the hearing examiner found here) but fail to meet that burden as it applies to gross misconduct.

The evidence does not support the claimant's contention that this position was only intended to be temporary. Further, the Board has no jurisdiction with respect to any alleged "signing bonus".

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 Midway Industries LLC.

The Hearing Examiner's decision is reversed.



Donna Watts-Lamont, Chairperson



Clayton A. Mitchell, Sr., Associate Member

VD

Copies mailed to:

VEDA M. WILSON

MIDWAY INDUSTRIES LLC

MIDWAY INDUSTRIES LLC

Susan Bass, Office of the Assistant Secretary

UNEMPLOYMENT INSURANCE APPEALS DECISION

VEDA M WILSON

SSN #

Claimant

vs.

MIDWAY INDUSTRIES LLC

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: 1235844

Appellant: Claimant

Local Office : 63 / CUMBERLAND
CLAIM CENTER

November 19, 2012

For the Claimant: PRESENT, JAMES BRINKLEY

For the Employer: PRESENT, DARYL WHITE

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

It should be noted that there is a substantial contradiction as to the evidence and testimony as between the claimant and the employer's representative. The employer's representative at this hearing, Mr. White, has little personal knowledge regarding the matters for which the claimant was terminated from her employment. The claimant's supervisor, Mr. Svehla, did not provide any testimony at this hearing. The Findings of Fact are based upon the competent evidence as determined by the Hearing Examiner.

FINDINGS OF FACT

The claimant, Ms. Wilson, began her employment with Midway Industries on July 30, 2012. The employer engages in providing lighting and maintenance supplies to its customers. The claimant's position was as an administrative assistant in customer service. The claimant earned \$12.00 per hour.

The claimant was discharged from her employment on August 21, 2012. There were a number of reasons for the claimant's discharge. These include the following:

1. The employer has an undated, unsigned document, which was not shown to the claimant regarding an alleged incident on August 7, 2012. Mr. Svehla, customer service manager and the claimant's supervisor, indicated that he believed that the claimant was improperly engaging in a cell phone conversation during her work hours. There is insufficient evidence that such an incident took place.
2. The employer has an unsigned document, which was not shown to the claimant regarding an alleged incident on August 8, 2012. Mr. Svehla, believed that that the claimant was not in her "seat" at the start of her work time at 8:30 a.m. The claimant was assessed half an occurrence for this incident. There is insufficient evidence that such an incident took place.
3. The employer has a document, which was not shown to the claimant regarding an alleged incident on August 15, 2012. Mr. Metzger signed a statement that he observed the claimant sleeping at a picnic table at the employer's premises. There are no details as to the time or nature of such an incident. There is insufficient evidence that such an incident took place.
4. The employer has an unsigned document, which was not shown to the claimant regarding an incident on August 21, 2012. Mr. Svehla believed that that the claimant was "signing out folders incorrectly on a consistent basis." The claimant was assessed half an occurrence for this incident. The claimant was attempting to engage in her work duties to the best of her ability.
5. On or about August 16, 2012, the claimant had a verbal altercation with another employee, Ms. Thurston. Ms. Thurston initiated a verbal confrontation with the claimant. The claimant did respond by also engaging in a loud argument with Ms. Thurston. Both of the individuals were spoken to regarding this matter. Since the claimant was only employed for a few weeks, it was decided that her discharge was warranted.

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).

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).

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

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.

EVALUATION OF EVIDENCE

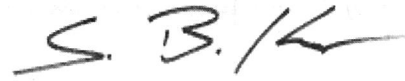
The claimant was discharged from her employment with Midway Industries as of August 21, 2012. The claimant had only been employed for a few weeks. As noted in Ivey supra, the employer has the burden of proof to establish the claimant engaged in actions constituting a degree of misconduct. The employer has failed to do so with any competent evidence other than the incident involving the verbal altercation with Ms. Thurston.

As to the incident on or about August 16, 2012, the claimant did engage in a loud verbal altercation with Ms. Thurston. However, there is insufficient evidence as to the full nature and extent of the claimant's participation regarding this incident. Therefore, in viewing the totality of the circumstances, and the length of the claimant's employment, the employer has not met the burden of proof of showing that her actions constitute a deliberate and willful disregard of the standards that the employer had a right to expect showing a gross indifference to the employer's interests. Therefore, gross misconduct does not apply pursuant to Section 1002 of the Maryland Unemployment Insurance Law. However, the claimant's actions do constitute the commission of a forbidden act and a course of wrongful conduct committed by an employee within the scope of the employment relationship. Misconduct will apply pursuant to Section 1003 of the Maryland Unemployment Insurance Law. Only the minimum penalty is warranted pursuant to that section of the law.

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 August 19, 2012 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 modified.



S B Karp, 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 04, 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: November 07, 2012

DW/Specialist ID: WCU4D

Seq No: 004

Copies mailed on November 19, 2012 to:

VEDA M. WILSON

MIDWAY INDUSTRIES LLC

LOCAL OFFICE #63

MIDWAY INDUSTRIES LLC