

**- DECISION -**

Claimant:  
GEORGE D WILLIAMS

Decision No.: 2290-BR-12

Date: May 07, 2012

Appeal No.: 1142936

S.S. No.:

Employer:  
EBY BROWN COMPANY LLC

L.O. No.: 64

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: June 06, 2012

---

**REVIEW OF THE RECORD**

After a review of the record, and after deleting "or about" from the first and third sentences of the second paragraph, 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 his appeal, the claimant contends he "...was wrongfully terminated...my actions were neither deliberate nor willful...I did not incur repeated violations of company policy." The claimant also requests a new hearing to "...present the facts of the case..." On appeal, the Board reviews the evidence of record from the Lower Appeals hearing. The Board will only order a new hearing or the taking of additional evidence if there has been clear error, a defect in the record or a failure of due process. The Board has conducted a thorough review of the record and finds it to be complete. The parties were afforded their full due process rights. The claimant was given a chance to present his facts at the hearing. Although the Board does not concur with the hearing examiner's decision, the Board finds sufficient competent evidence in the record upon which it may render its own decision.

The hearing examiner unduly complicated the claimant's testimony by asking compound, confusing questions, and by not allowing the claimant to fully answer a question before proceeding with another question. However, the Board finds that the evidence establishes the claimant's discharge was for exceeding the points allowed under the employer's attendance points system. The claimant accrued points for his absences which occurred for a variety of reasons. The last several attendance points were assessed when the claimant no longer had his own transportation and was no longer riding with a co-worker. The claimant relied upon public transportation and, as a consequence, was sometimes late to work. The evidence did not show that the claimant was acting with any disregard for his employer. The claimant was making a diligent effort to get to work, on time and when scheduled. The claimant did not lose his prior means of transportation through any fault of the claimant.

The final incident which seemingly led to his separation occurred when the claimant did not call prior to the start of his shift and advise the employer he was unable to report for work. The claimant was having trouble with his phone and with his transportation. He called the employer, just not as early in the day as the employer preferred.

A discharge, like the claimant's, which occurs when an employee exceeds a certain number of points is not necessarily a discharge for disqualifying reasons. Such a discharge may well be within an employer's rights, but it is not, *per se*, gross misconduct or simple misconduct. The employer still has a burden to

prove the claimant's actions or omissions were either gross misconduct or simply misconduct under the provisions of the law. The employer did not appear at the hearing. The employer did not offer any evidence into the record. The employer did not, therefore, establish, by a preponderance of the evidence, 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 hearing examiner improperly read portions of this document into the record and questioned the claimant about these purported statements. The hearing examiner did not properly handle the document and the Board disregards the claimant's testimony and the hearing examiner's questions based upon this *Report*.

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

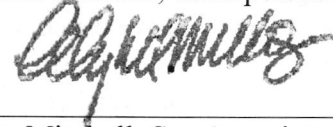
It is held that the claimant was discharged, but not for gross misconduct or misconduct connected with the work, within the meaning of Maryland Code Annotated, Labor and Employment Article, Title 8, Section 1002 or 1003. No disqualification is imposed based upon the claimant's separation from employment with EBY BROWN COMPANY, LLC.

The Hearing Examiner's decision is reversed.



---

Donna Watts-Lamont, Chairperson



---

Clayton A. Mitchell, Sr., Associate Member

RD

Copies mailed to:

GEORGE D. WILLIAMS

EBY BROWN COMPANY LLC

EBY BROWN COMPANY LLC

Susan Bass, Office of the Assistant Secretary

## **UNEMPLOYMENT INSURANCE APPEALS DECISION**

GEORGE D WILLIAMS

SSN #

**Claimant**

Vs.

EBY BROWN COMPANY 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: 1142936

Appellant: Claimant

Local Office : 64 / BALTOMETRO

CALL CENTER

December 28, 2011

**For the Claimant:** PRESENT, ROMELL TURNER

**For the Employer:**

**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, George Williams, filed a claim for benefits establishing a benefit year beginning October 30, 2011.

The claimant began working for the employer, Eby Brown Co., in or about July 2010. At the time of separation, the claimant was employed as an order selector. The claimant last worked for the employer on or about October 25, 2011, before being terminated for "exceeding the maximum number of attendance points" under the employer's policy. The claimant basically began accumulating points when he lost his carpool due to a co-worker's relocation. The employer was aware of the claimant's transportation issues. The claimant called out on October 25<sup>th</sup>, and did not notify the employer until after the start of his scheduled shift. The claimant's manager "did not like to hear" that he was going to be late or not coming in.

## 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 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

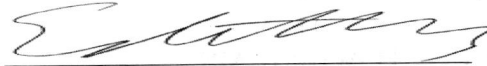
The Hearing Examiner considered all of the testimony and evidence of record in reaching this decision. Where the evidence was in conflict, the Hearing Examiner decided the Facts on the credible evidence as determined by the Hearing Examiner.

A claimant who has been terminated may be eligible to receive benefits unless it has been established, by a preponderance of the credible evidence, that the discharge was 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 this case, the employer was not present at the hearing to offer any evidence with regard to the circumstances of the claimant's separation. The claimant candidly acknowledged the attendance deficiencies which led to his violating the employer's policy. However, and in light of the mitigating circumstances established by his uncontroverted testimony, a determination of gross misconduct is not warranted. The claimant's breach of duty to the employer falls within the meaning and intent of Section 8-1003.

## 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 October 23, 2011 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](mailto: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.



E B Steinberg, 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 January 12, 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: December 19, 2011

AEH/Specialist ID: RBA9D

Seq No: 001

Copies mailed on December 28, 2011 to:

GEORGE D. WILLIAMS

EBY BROWN COMPANY LLC

LOCAL OFFICE #64