

- DECISION -

Claimant:
DAVID A LAVIS II

Decision No.: 3298-BR-12

Date: August 08, 2012

Appeal No.: 1205544

S.S. No.:

Employer:
HAYDEN MECHANICAL SVCS INC

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: September 07, 2012

REVIEW OF THE RECORD

After a review of the record, the Board adopts the first two paragraphs of the hearing examiner's findings of fact. The Board rejects the remainder of the findings of fact and the Board makes its own additional findings of fact:

The employer believed the claimant had threatened a co-worker on two occasions. When asked by the employer, the claimant denied the accusations and the employer did not pursue the matter further. The employer received two complaints, in October 2011, from customers about the claimant, and three complaints about the claimant's driving in October and December 2011.

The employer believed the claimant had been falsifying his time records and used the GPS in the claimant's work vehicle to make calculations in support of this.

The employer has a policy which sets forth its expectations concerning the maintenance of the vehicles driven by its employees. The claimant was aware of and adhered to those requirements. The employer conducted its own inspection of the claimant's vehicle. The employer found the claimant's vehicle to be unsatisfactory on October 31, 2011 and again on November 18, 2011. This was part of the reason for the claimant's discharge on January 5, 2012.

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

claimant's vehicle. Most importantly, the hearing examiner did not explain how the vehicle inspection in November 2011, was the causal connection to the claimant's discharge in January 2012, such that misconduct could be found.

The evidence only established that the employer had some general dissatisfaction with the claimant and his work. The employer had received some complaints, made some conclusions, then discharged the claimant. That is certainly within the employer's rights. However, to establish gross misconduct or even simple misconduct, the employer is obligated to bring forth competent evidence of some act or omission by the claimant which will support a benefit penalty or disqualification. The employer's evidence in this case is insufficient to establish any disqualifying misconduct.

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 HAYDEN MECHANICAL SVCS INC.

The Hearing Examiner's decision is reversed



Donna Watts-Lamont, Chairperson



Clayton A. Mitchell, Sr., Associate Member

VD

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DAVID A. LAVIS II

HAYDEN MECHANICAL SVCS INC

Susan Bass, Office of the Assistant Secretary

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, 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: "...by lack of providing any specific supporting evidence, the employer again has not met the burden of proof for any ... alleged misconduct." And, he notes that most of the employer's evidence was "unsubstantiated comments". The Board has conducted a thorough review of the evidence of record from the Lower Appeals hearing and generally agrees with the claimant's contentions.

The employer's evidence was virtually all uncorroborated hearsay and speculation. The employer made conclusions based upon this speculation and presented it to the hearing examiner as though it were fact. The hearing examiner properly found that much of the employer's evidence was insufficient to meet its burden of proof. However, the hearing examiner did make a finding of simple misconduct based upon the claimant's work vehicle failing an inspection.

The Board does not find this to be controlling here. The employer did not offer a copy of its policy for the hearing examiner's consideration. The employer did not specify what the problem was with the

UNEMPLOYMENT INSURANCE APPEALS DECISION

DAVID A LAVIS II

SSN #

Claimant

Vs.

HAYDEN MECHANICAL SVCS 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: 1205544

Appellant: Employer

Local Office : 64 / BALTOMETRO

CALL CENTER

March 09, 2012

For the Claimant: PRESENT

For the Employer: PRESENT, EARL HAYDEN

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).

FINDINGS OF FACT

The Claimant, David Lavis, II, filed a claim for benefits establishing a benefit year beginning January 8, 2012. He qualified for a weekly benefit amount of \$430.00.

The Claimant began working for this Employer (Hayden Mechanical Services, Inc.) on August 1, 2010. At the time of separation, the Claimant was working as a Service Technician. The Claimant last worked for the Employer on January 5, 2012, before being terminated for unsatisfactory work performance.

On October 26, 2011, the Claimant allegedly threatened a co-worker. The President (Earl Hayden) spoke with the Claimant about the matter and the Claimant denied the accusation. The Claimant allegedly threatened the same co-worker on June 2, 2011. On October 16, 2011 and October 28, 2011, the Employer

received customer complaints regarding the Claimant at particular job sites. On October 24, 2011, October 27, 2011, and December 19, 2011, the Employer received reckless driving complaints concerning the Claimant. From November 28, 2011, through December 4, 2011, the Claimant allegedly falsified his time records. Said calculations were made by the Employer using the GPS records from the vehicle the Claimant was driving. Said records were not produced at the hearing on this matter. On November 17, 2011, the Claimant was allegedly yelling profanities to himself while working at a particular job site. The Employer has no first-hand knowledge of what the Claimant allegedly said. The Employer issued one write-up to the Claimant on October 31, 2011, but not for any of the aforementioned allegations. The Claimant was never provided with any other written reprimands for any of his alleged workplace infractions.

The Employer has an inspection policy regarding the upkeep and maintenance of its vehicles. The Claimant admitted being aware of the Employer's policy. The Claimant was given an Employee Handbook on his first day of work and signed for it. On October 31, 2011, the Claimant's van failed the Employer's inspection. On November 18, 2011, the Claimant's van failed the inspection a second time.

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).

The Maryland Code of Regulations Section 09.32.06.02F (2) on Hearings before the Hearing Examiner and Board of Appeals provides:

(2) Electronically Stored Records. A party who seeks to enter into evidence videotapes, audiotapes, or other electronically stored records shall produce at the hearing the equipment necessary to allow review of the contents of the records. The party offering the records shall have the continuing obligation to produce the equipment necessary to review the records if further administrative proceedings occur. If the party offering the records fails to produce the equipment necessary to review the records, the records may be excluded from consideration.

EVALUATION OF THE EVIDENCE

The employer had the burden to show, by a preponderance of the credible evidence, 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 not been met.

The Claimant engaged in simple misconduct when he violated the Employer's Vehicle Maintenance policy. The Claimant was aware of said policy and had also received the policy in the Employer's Handbook. On

the first occasion, the Employer made the Claimant aware that his vehicle did not pass the Employer's inspection. Almost three (3) weeks later, the Employer conducted another inspection of the Claimant's vehicle and it still did not meet the Employer required standards. Consequently, the Claimant's violated the Employer's vehicle policy.

As to the Employer's allegations of the Claimant not accurately reporting his time, the Employer has based much of this assertion upon electronic GPS records. In contrast to COMAR 09.32.06.02F (2) the Employer failed to produce the electronically stored records at the hearing for review, therefore the records were excluded from consideration. Finally, the Employer is deemed to have condoned any of the other allegations against the Claimant whereas, the Employer failed to document or institute any punitive actions against the Claimant for any of the alleged infractions. Finally, some the allegations stem from hearsay from customers and other persons, because the Employer no actual proof or first-hand knowledge of the events in question.

I hold 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 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 January 1, 2012 and for the nine (9) 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.

L. Williamson

L. Williamson, 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 March 26, 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: February 29, 2012
AEH/Specialist ID: WHG3D
Seq No: 001
Copies mailed on March 09, 2012 to:

DAVID A. LAVIS II
HAYDEN MECHANICAL SVCS INC
LOCAL OFFICE #64