-DECISION-

Claimant:
DEVALL W SATTERWHITE

Employer:
SUPER SHUTTLE INTERNATIONAL INC #329

Decision No.: 4477-BH-13

Date: October 25, 2013

Appeal No.: 1304995

S.S. No.:

L.O. No.: 61

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: November 25, 2013

- APPEARANCES -

FOR THE CLAIMANT:

Devall Satterwhite, Claimant
John Singleton, Esquire

FOR THE EMPLOYER:

Jacqueline Holloway, General Manager
Charles Watkins, Esquire

EVALUATION OF THE EVIDENCE

The Board of Appeals has considered all of the evidence presented, including the testimony offered at the hearing. The Board has also considered all of the documentary evidence introduced in this case, as well as the Department of Labor, Licensing and Regulation's documents in the appeal file.

In the instant case, the Board is not persuaded based upon a preponderance of the credible evidence that the claimant's actions rose to the level of misconduct. The employer argued that the claimant was not an employee but an independent franchisee. The issue of whether persons similarly situated to the claimant were employees or independent contractors for this employer was decided by prior collateral proceedings and shall not be re-addressed in this case. The claimant in the instant case performed services in covered employment.

The employer's witness testified that because she did not consider the claimant to be an employee there were no employment rules for the claimant to violate and the sole reason for the claimant's discharge was his failure to cure his financial default with the employer. While the Board finds the evidence supports a finding that default was the reason the claimant's discharge, the Board is not persuaded that it was due to circumstances within the claimant's control. The Board finds insufficient evidence that the claimant engaged in the commission of a forbidden act, engaged in a course of wrongful conduct, or breached his duty to the employer for a reason connected with the work. The claimant's financial obligations to the employer were separate and distinct from the performance of the work. The employer's witness did not dispute that the claimant worked to the best of his ability and that he accepted all available fares.

The employer's argument that the claimant should pay his financial obligations to the employer from his own bank account or from funds separate from his operating revenues (inferring the claimant should do so whether or not the claimant received a minimum wage) is an argument that the claimant was an independent contractor. The Board finds this issue *res judicata* and does not find it relevant to the issue at bar.

FINDINGS OF FACT

The claimant performed services in covered employment with this employer as a franchise-holding shuttle driver from July 22, 2008 through November 2, 2012. The claimant is unemployed as the result of a discharge.

The claimant executed a "Unit Franchise Agreement" with the employer on July 22, 2008. *See Employer's Exhibit 2.* The claimant had the non-exclusive right to operate a shuttle in a contractually-defined territory. The claimant was contractually responsible to make certain weekly payments to the employer. *See Claimant's Exhibit B-1.*

In order to obtain the territory rights and to operate under the Unit Franchise Agreement, the claimant had to pay a $35,000 non-refundable franchise fee. *See Employer's Exhibit 2, page 3.* In addition, the claimant was required to pay, *inter alia,* a weekly 10% revenue share fee, a weekly 17.5% "outbound fee", a weekly flat weekly $500 "system fee", a weekly booking fee, a weekly B2B commission, weekly insurance payments, weekly "Marsh" vehicle insurance payments, and a weekly communication reimbursement fee. *See Claimant's Exhibit B-1*; *Employer's Exhibit 2.* The claimant additionally leased his shuttle from a leasing company related to the employer and was required to pay a weekly $169.68 lease payment and to pay all operating and repair costs for the shuttle.

The claimant was required to obtain all of his fares from the employer through its fare booking system. The claimant "bid" on some fares and was assigned some fares. The claimant could accept or decline fares based on the regulated fare assigned to the route. Towards the end of his employment, the claimant often waited for eight hours or more before receiving a single fare from the employer. The claimant accepted all fares that were assigned or offered to him during the course of his employment.

The claimant worked to the best of his ability. Notwithstanding the acceptance of all possible fares, the claimant was unable to generate enough revenue to pay his financial obligations to the employer. There is insufficient evidence that the fare revenues paid the claimant a minimum wage. As a result, on October 22, 2012, the employer sent the claimant a *Notice of Default* letter and give seven days to cure the $1971,02 outstanding balance due and owing. *See Employer's Exhibit 3.* Because of the lack of adequate business, the claimant was not able to cure the default. As a result, the claimant was discharged on November 2, 2012 for breach of contract. *See Employer's Exhibit 4.* Regarding the performance of his work, the claimant did not violate a workplace rule or engage in a course of wrongful conduct.

CONCLUSIONS OF LAW

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)*; *also see Johns Hopkins University v. Board of Labor, Licensing and Regulation, 134 Md. App. 653, 662-63 (2000)*(psychiatric condition which prevented claimant from conforming his/her conduct to accepted norms did not except that conduct from the category of misconduct under *§ 8-1003*). 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)*.

Aggravated misconduct is an amplification of gross misconduct where the claimant engages in "behavior committed with actual malice and deliberate disregard for the property, safety or life of others that…affects the employer, fellow employees, subcontractors, invitees of the employer, members of the public, or the ultimate consumer of the employer's products or services…and consists of either a physical assault or property loss so serious that the penalties of misconduct or gross misconduct are not sufficient."

Discharging a claimant for inefficiency or incompetence is not misconduct. *Cumor v. Computers Communications Group, 902-BH-87.* A mere showing of substandard performance is not sufficient to prove gross misconduct or misconduct. *Todd v. Harkless Construction, 714-BR-89*; *Knight v. Vincent Butler, Esquire, 585-BR-91.* Failing to use good judgment, or an isolated case of ordinary negligence, in the absence of a showing of culpable negligence or deliberate action is disregard of the employer's interests in insufficient to prove misconduct. *Hider v. DLLR, 115 Md. App. 258, 281 (1997)*; *Greenwood v. Royal Crown Bottling Company, 793-BR-88.*

Culpable negligence in the performance of one's job can constitute gross misconduct. *See, e.g., Jones v. Allstate Building Supply Company, Inc., 700-BR-89*(after several expensive accidents, the claimant was on notice to adjust his behavior. The claimant failed to do so and caused another accident. Gross misconduct was supported); *Roberts v. Maryland Medical Lab, Inc., 1215-BR-88*(when a claimant's work involves critical risks to the life and health of other persons, a higher degree of care is required).

In the instant case, the Board finds insufficient evidence that the claimant's actions constituted a violation of a workplace rule, a course of wrongful conduct or a breach of duty to his employer regarding the performance of his work. The preponderance of the evidence establishes that the claimant worked to the best of his ability and accepted all fares that were made available for him by the employer. Notwithstanding accepting all available work and working with due diligence, the claimant was not able to generate sufficient revenue to pay all the required fees, commissions and expenses related to the performance of the work. As a result, the claimant was not able to pay the employer its fees under the franchise agreement or pay himself a minimum wage.

The Board finds insufficient evidence that the claimant was culpably negligent in his job duties. The evidence supports a finding that the business climate and the dilution of the claimant's share of available fares did not supply him with the requisite revenue to keep his route in profitability. The evidence supports a finding that the claimant's shuttle route's financial condition was not within the claimant's control because the available fares derived from the employer or from the occasional "walk up" fare.

The employer admitted that the claimant and shuttle drivers were discharged for failing to pay the required commissions and fees under the Unit Franchise Agreement and other collateral notes or financing instruments regardless of the reason for the shuttle drivers' failure or inability to pay. The Board finds the claimant's financial obligations to the employer are collateral to the claimant's course of performance of the work in which he was engaged on behalf of the employer. *Arguendo,* even if the claimant's obligations to his employer were connected with the work, the claimant's failure to pay his financial obligations to the employer was not directly or substantially due to the claimant's actions; it was due to a lack of work or available fares. Therefore, the Board concludes that a finding of misconduct cannot be supported.

The Board notes that the hearing examiner, the claimant or the employer did not offer the *Agency Fact Finding Report* for admission 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 did not meet its burden of demonstrating that the claimant's actions rose to the level of misconduct within the meaning of *§ 8-1003*. The hearing examiner's 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 SUPER SHUTTLE INTERNATIONAL

The Hearing Examiner's decision is reversed.

Clayton A. Mitchell, Sr., Associate Member

Eileen M. Rehrmann, Associate Member

Donna Watts-Lamont, Chairperson

VD
Date of hearing: October 08, 2013
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