

- DECISION -

Claimant:
PHILLIP R MORRIS

Decision No.: 4948-BR-13

Date: November 25, 2013

Appeal No.: 1325753

S.S. No.:

Employer:
CITY OF HAGERSTOWN

L.O. No.: 63

Appellant: Employer

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: December 25, 2013

REVIEW OF THE RECORD

After a review of the record, the Board adopts the hearing examiner's findings of fact. The Board adopts the following additional findings of fact and reverses the hearing examiner's decision.

The test readings are essential to insure water quality for the public's use. Good water quality is essential for the public health and safety.

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)*; 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."

Sleeping on the job may constitute gross misconduct. See, e.g., *Taylor v. Fort Howard Cup Corporation*, 1215-BR-91; *Hawkins v. Charles County Comm'rs*, 1053-BR-93; *Ingram v. Union Memorial Hospital*, 1680-BR-93. Sleeping on the job without any mitigating circumstances can amount to gross misconduct. *Taylor v. Fort Howard Cup Corporation*, 1215-BR-91. Repeated acts of falling asleep on the job can constitute gross misconduct. *Bradley v. Liberty Medical Center, Inc.* 706-BR-89. Evidence of concealment, reflecting a deliberate intent to sleep can constitute gross misconduct. *Taylor v. Fort Howard Cup Corp.*, 1215-BR-91.

A person in a position of responsibility and trust who falls asleep may have committed gross misconduct. *Ingraham v. Union Memorial Hospital*, 1680-BR-93 (emergency telephone operator); *Harris v. BPS Guard Services, Inc.* 563-BR-92 (a security guard).

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).

Falsification of or making false statements in work records may constitute gross misconduct. *Younger v. Washington Suburban Sanitary Comm'n*, 259-BH-91.

In the appeal to the Board, the employer's representative argues, "...the fact that [the claimant] compounded the events of that night by falsifying that he did something when he did not, instead of confiding in his supervisor what transpired, his actions rise to the level of gross misconduct". The Board agrees.

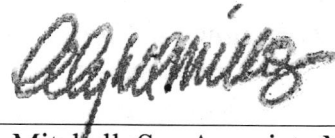
The claimant was in a position of responsibility to take test readings to insure the water quality for the health and safety of the public. The Board finds mitigating the claimant's circumstances for falling asleep on the job, but does not find the circumstances warrant mitigation of the falsification of test readings of water quality. The claimant knowingly misrepresented the false test reading to his employer because he "didn't want to get fired". See *Employer's Exhibit 1*. The Board concurs with the employer's representative's argument that these two events together evince a gross disregard to the employer's interests and a wanton disregard of the standards of behavior the employer had the right to expect.

The Board finds based on a preponderance of the credible evidence that the employer met its burden of demonstrating that the claimant's actions rose to the level of gross misconduct within the meaning of § 8-1002. The hearing examiner's simple misconduct decision shall be reversed for the reasons stated herein.

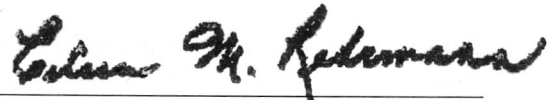
DECISION

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 July 21, 2013 and until the claimant becomes re-employed, earns at least twenty five times their weekly benefit amount and thereafter becomes unemployed through no fault of their own.

The Hearing Examiner's decision is reversed.



Clayton A. Mitchell, Sr., Associate Member



Eileen M. Rehrmann, Associate Member

VD

Copies mailed to:

PHILLIP R. MORRIS

CITY OF HAGERSTOWN

CITY OF HAGERSTOWN

Susan Bass, Office of the Assistant Secretary

UNEMPLOYMENT INSURANCE APPEALS DECISION

PHILLIP R MORRIS

SSN #

Claimant

vs.

CITY OF HAGERSTOWN

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: 1325753

Appellant: Claimant

Local Office : 63 / CUMBERLAND
CLAIM CENTER

September 24, 2013

For the Claimant: PRESENT

For the Employer: PRESENT, SUSAN DELAUTER, ROBIN BRODINSKY

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, Phillip R. Morris, filed a claim for benefits establishing a benefit year beginning July 28, 2013. He qualified for a weekly benefit amount of \$430.00.

The Claimant began working for this Employer, City of Hagerstown, on or about November 22, 2010. At the time of separation, the Claimant was working full time as a Water Treatment Plant Operator III. The Claimant last worked for the Employer on July 26, 2013 before being terminated for sleeping on the job.

The Claimant's wife has cancer and was hospitalized during the July 4, 2013 weekend. The Claimant had applied for, and been granted intermittent leave under the Family Medical Leave Act, to care for his wife. He had exhausted all of his paid leave and the family was in financial distress due to his wife's medical expenses. On July 7, 2013 the Claimant reported for his shift from midnight to 7:00 a.m. He was exhausted from being at the hospital with his wife all weekend. Around 4:00 a.m. he asked a co-worker to cover his duties for him. He went into the lunch room and fell asleep. He slept from approximately 4:00 a.m. to 6:00 a.m. The Claimant was required to take test readings every four hours. While sleeping he missed one of the required readings. However, he logged a reading based on the trend between the earlier reading and later reading. As a result of sleeping and falsifying the log, the Claimant was discharged.

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).

A security guard falling asleep on the job is generally regarded as gross misconduct. However, mitigating factors do arise in exceptional circumstances. In this case, the claimant had recently worked an unusually high number of hours at the employer's request and his falling asleep was unintentional. While the responsibility for staying awake lies with the claimant, this particular failure lacks deliberateness, and therefore warrants a lesser finding of simple misconduct. Harris v. BPS Guard Services, Inc., 563-BR-92.

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 candidly admitted that he fell asleep during his shift for at least two hours on July 7, 2013. However, he credibly testified that he was exhausted from having been at the hospital all weekend with his wife who has cancer. He testified that he thought he would be able to make it through his shift and did not call out because his family needed the money due to the medical expenses being incurred as a result of his wife's illness. The Claimant credibly testified that he asked a co-worker to monitor his work station. This demonstrates both the fact that the Claimant deliberately made the decision that he was going to sleep but also demonstrates that he took steps to ensure that his work station was covered and the water system continued to operate safely.

Although there is evidence that the Claimant deliberately fell asleep on the job and this would generally be regarded as gross misconduct, mitigating factors due arise in exceptional circumstances. In this case, there is no history of similar conduct or neglect of his duties in the past and the Claimant was exhausted from caring for his wife and under significant emotional and financial stress due to her illness. These facts warrant a mitigated penalty.

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 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 July 21, 2013 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 McKennan, 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

This is a final decision of the Lower Appeals Division. Any party who disagrees with this decision 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 October 09, 2013. 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: September 20, 2013
DW/Specialist ID: WCP4B
Seq No: 001
Copies mailed on September 24, 2013 to:

PHILLIP R. MORRIS
CITY OF HAGERSTOWN
LOCAL OFFICE #63
CITY OF HAGERSTOWN