

-DECISION-

Claimant:
DANIEL R MARTIN

Decision No.: 5585-BH-11

Date: October 03, 2011

Appeal No.: 1106110

Employer:
TOWN OF ELKTON MAYOR OF COMMIS

S.S. No.:

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: November 02, 2011

- APPEARANCES -

FOR THE CLAIMANT:

DANIEL R. MARTIN

FOR THE EMPLOYER:

KEVIN McCORMICK, Esq.
LAURA BROWN, Director of Human Resources
STEVEN REPLE, Director of Finance
CATHY SINAIL, Human Resources
MARK TURNBULL

PRELIMINARY STATEMENT

This matter was scheduled for a continued hearing, before the Board of Appeals (Board) on Tuesday, September 13, 2011, at 11:00 a.m. EDT. Notice of the time and place of the hearing was mailed to all parties at their addresses of record, by U.S. Postal Service, pre-paid, first class mail. No notices have been returned to the Board as being non-deliverable. The employer appeared and gave credible testimony in this matter. The claimant and the Agency did not appear.

The Board 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. The Board finds the testimony of the employer's witnesses to be more credible than that of the claimant.

FINDINGS OF FACT

The claimant was employed by the employer, Town of Elkton Mayor of Commissions, from January 20, 2009 until January 3, 2011, as a full time Maintenance Worker II. The claimant became separated from this employment as a result of a discharge.

On December 24, 2010, the employer purchased sixty feet of copper tubing from the Dover Supply Company. *See, Employer's Exhibit B2.* The claimant subsequently stole the copper and several brass water meters from the employer and sold them to Elton Recycling, Inc. *See, Employer's Exhibit 3.* The claimant was not authorized by the employer to remove any of the cooper or brass water meters, nor was the claimant authorized to sell any of the items taken. The claimant was discharged for his actions that were in violation of the employer's Work Rules. *See, Employer's Exhibit 4.*

The claimant was charged with theft of the cooper and brass water meters in the Circuit Court for Cecil County, Maryland. On July 7, 2011, the claimant pled guilty to the charges.

CONCLUSIONS OF LAW

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 09.32.06.02(E).*

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 the instant case the claimant knowingly violated the employer's policy by stealing property belonging to the employer and selling it for his own profit. The claimant was convicted of theft of property in the Circuit Court for Cecil County.

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

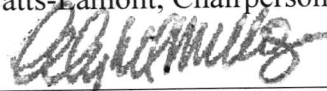
DECISION

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 December 28, 2010 and until the claimant becomes re-employed, earns at least twenty times their weekly benefit amount and thereafter becomes unemployed through no fault of their own.

The Hearing Examiner's decision is reversed.



Donna Watts-Lamont, Chairperson



Clayton A. Mitchell, Sr., Associate Member



Eileen M. Rehrmann, Associate Member

RD

Date of hearing: September 13, 2011

Copies mailed to:

DANIEL R. MARTIN
TOWN OF ELKTON MAYOR OF COMMIS
JAMES A. STULLER
KEVIN C. MCCORMICK ESQ.
Susan Bass, Office of the Assistant Secretary

UNEMPLOYMENT INSURANCE APPEALS DECISION

DANIEL R MARTIN

SSN #

Claimant

vs.

TOWN OF ELKTON MAYOR OF COMMIS
SIONERS ATTN BETH MORAN

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: 1106110
Appellant: Employer
Local Office : 63 / CUMBERLAND
CLAIM CENTER

March 24, 2011

For the Claimant: PRESENT

For the Employer: PRESENT, MARK TURNBULL, KATHY SAIENNI, J C MCCORMICK, ESQ.

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

Claimant Daniel Martin worked for employer the Town of Elkton Mayor of Commis from January 20, 2009 through January 3, 2011. At separation, he served as a full time maintenance worker II, earning \$15.69 per hour. The claimant was terminated due to misuse of town property.

The claimant worked for the town of Elkton for two years. On December 28, 2010, Public Works Director Mark Turnbull learned that a subordinate believed the claimant had removed copper from a town vehicle. The vehicle had been left with another town employee James Moore. On December 29, Mr. Turnbull talked to Mr. Moore who reported that the copper pipes were missing. In an effort to determine if the claimant had stolen town property, town workers visited a local recycling plant. The plant was known to purchase

building supplies including copper pipes. When the clerk working in the plant was approached about the sale of copper by the claimant, he produced a ledger showing numerous sales of scrap and other metal by the claimant.

The claimant denied removing any copper from any town vehicle. He sold scrap to the recycling plant on numerous occasions, but denied ever having taken any new copper piping to sell to anyone. The claimant admitted being near the truck from which the missing copper pipes were taken, but when the pipes he sold to the recycling plant were examined, they were identical to the missing copper, which made a definitive identification very elusive.

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 show 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).

EVALUATION OF EVIDENCE

The employer had the burden to show, by a preponderance of the 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 this case, that burden was not met.

Misconduct requires a degree of intent to violate a rule or policy and behavior consistent with that intent. Nothing in the record establishes that the claimant acted in a way that justified denial of benefits. The employer had the burden to show that the claimant sold a specific set of copper pipes. By his testimony, Mr. Turnbull acknowledged that there was insufficient evidence to connect the claimant to the copper piping recovered from the recycling plant because nothing on the pipes made them unique or different and they could have come from anywhere.

DECISION

IT IS HELD THAT the claimant was discharged, but not for misconduct connected with the work within the meaning of Md. Code Ann., Labor & Emp. Article, Section 8-1003. No disqualification is imposed based upon the claimant's separation from employment with the above-identified employer. The claimant is 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 affirmed.

L Brown

L Brown, 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 to Petition for Review

Any party may request a review 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 April 08, 2011. 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: March 15, 2011

DW/Specialist ID: WCU3P

Seq No: 001

Copies mailed on March 24, 2011 to:

DANIEL R. MARTIN

TOWN OF ELKTON MAYOR OF COMMIS

LOCAL OFFICE #63

TOWN OF ELKTON MAYOR OF COMMIS