

- DECISION -

Claimant:
JEFFREY A SASSE

Decision No.: 6042-BR-12

Date: December 19, 2012

Appeal No.: 1221670

S.S. No.:

Employer:
SAFELITE FULFILLMENT INC

L.O. No.: 63

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: January 18, 2013

REVIEW OF THE RECORD

After a review of the record, the Board adopts, except the last sentence, the hearing examiner's findings of fact. The Board makes the following additional finding of fact:

The claimant's use of the employer's van for personal errands was known to the claimant's manager.

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, as he did at the hearing, that the employer had allowed his personal use of the work van for quite some time. He contends the employer knew he transported his son to and from school in the van. The claimant contends the employer knew the claimant used the van for other personal purposes on occasion. He reiterates his contention that the accident was not his fault. The claimant also contends that his manager engaged in similar conduct.

The Board finds it irrelevant whether the claimant's manager used a work van for his personal purposes. The hearing examiner found, and the Board agrees, that the accident was not the claimant's fault. Those contentions have no bearing on the Board's decision in this matter.

The Board does find, however, that the hearing examiner erred in assigning misconduct to the claimant's personal use of the work van. The claimant may have been in technical violation of an employer policy, but that violation had been condoned for a sufficient period so that it no longer had efficacy. The claimant's manager allowed the claimant to use the work van for personal purposes. The manager knew the claimant transported his son to and from school. The manager, effectively, overrode the employer's policy. Whether the manager had the authority to do this was not the claimant's responsibility to know. The Board is of the opinion that the claimant reasonably relied upon his manager permission to use the work van for personal business. The claimant did not exhibit any degree of misconduct in continuing to do what he had been allowed to do by his manager.

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 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.

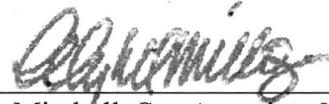
DECISION

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 SAFELITE FULFILLMENT, INC.

The Hearing Examiner's decision is reversed.



Donna Watts-Lamont, Chairperson



Clayton A. Mitchell, Sr., Associate Member

RD

Copies mailed to:

JEFFREY A. SASSE

SAFELITE FULFILLMENT INC

DESIREE MATTHEWS ESQ.

SAFELITE AUTO GLASS

Susan Bass, Office of the Assistant Secretary

UNEMPLOYMENT INSURANCE APPEALS DECISION

JEFFREY A SASSE

SSN #

Claimant

vs.

SAFELITE FULFILLMENT 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: 1221670

Appellant: Employer

Local Office : 63 / CUMBERLAND
CLAIM CENTER

July 27, 2012

For the Claimant: PRESENT

For the Employer: PRESENT , DAVID EYLER, DESIREE MATTHEWS ESQ., YVONNE HECKMAN

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, Jeffrey Sasse, opened a claim for unemployment insurance benefits and established a benefit year beginning May 13, 2012 and qualified for a weekly benefit amount of \$430.

The claimant worked for the employer, Safelite Fulfillment Inc., from October 22, 2001 through May 12, 2012, his last actual day of work. At the time of separation, the claimant was working full time as a glass technician and was paid \$17.94 an hour. The claimant was discharged for using the company vehicle to run a personal errand with his young child on board.

On May 10, 2012 at 4:30 p.m. the claimant left work in the company vehicle to go home. The claimant was allowed to use the vehicle to go to and from work. The claimant's home was only 1/8 of a mile from the employer. The claimant picked up his son and then drove to Williamsport about 7 miles away to meet his wife. On the way back home the claimant was involved in a traffic accident. The accident was not the

claimant's fault. The employer found out from the accident report that the claimant was using the vehicle after hours on a personal errand plus had a non company person on board with him. Both of these were violations of company policy and the claimant was discharged for them. The employer had let the claimant use the van in the past when he was moving into a new residence to haul furniture. The claimant also had used the van to take his son to school each morning. The claimant would drive by the employer's work site when he drove his son to school. One of the claimant's coworkers had a child's car seat removed from a company van by the employer. The employer did not know that the claimant was using the company vehicle to run short personal errands

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 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 shows 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).

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 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 key difference in testimony between the claimant and the employer was that the claimant testified that despite the company policy, the employer let its employees use a company vehicle assigned to them for work and to commute to work, for short personal errands. The employer disagreed and stated that it enforced its policy as written.

The employer admitted that it had let the claimant use the company vehicle to move furniture and other items on one occasion when he was changing his residence. It also admitted that it had another employee remove a child car seat from a company vehicle. But the employer maintained that the claimant and other

employees were not to use the company vehicle for personal errands nor to have non company personnel riding in the vehicle. The claimant testified that the employer must have known that he was transporting his son to school in the company vehicle as he passed the employer's worksite on the way to school in the morning before coming back to report to work. The employer denied knowing this. The claimant agreed that the employer's formal policy only allowed his using the company vehicle for commuting and for carrying out his usual work duties.

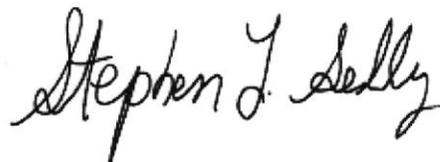
As the employer admitted that by letting the claimant use the company vehicle for a non business related reason when he moved it violated its own policy, it is in a weak position to accuse the claimant of serious misconduct when he used the vehicle after work to make a one way seven mile journey with his son. The claimant's hands in this case are not clean either as he used the vehicle not just for taking his son to school but for any old errand he had no matter that he was extending the employer's liability for any accidents he had with the vehicle. Therefore, it is held the claimant was discharged for simple misconduct in this case.

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 May 13, 2012 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.



S Selby, 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 August 13, 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 : July 09,2012
TH/Specialist ID: WCU17
Seq No: 001
Copies mailed on July 27, 2012 to:

JEFFREY A. SASSE
SAFELITE FULFILLMENT INC
LOCAL OFFICE #63
DESIREE MATTHEWS ESQ.
SAFELITE AUTO GLASS