

- DECISION -

Claimant:
JEROME ROGERS

Decision No.: 831-BR-12

Date: February 24, 2012

Appeal No.: 1122217

S.S. No.:

Employer:
JOHNS HOPKINS BAYVIEW MED CTR

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: March 26, 2012

REVIEW OF THE RECORD

After a review of the record, the Board adopts the hearing examiner's findings of fact. However 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 reiterates his testimony from the hearing. He contends the employer did not provide sufficient proof to support the finding of gross misconduct. The claimant does confuse the different court proceedings with the Lower Appeals hearing, but the Board agrees with his contentions.

The Board has conducted a thorough review of the evidence of record from the prior hearing. The Board concludes that the hearing examiner placed undue reliance upon the employer's hearsay evidence, and gave that evidence more weight than it deserved in light of the claimant's credible denials. Certainly hearsay is admissible in administrative proceedings such as this. However, for that hearsay to be given significant evidentiary weight, sufficient to overcome credible first-hand evidence, it must be competent and credible.

The employer's evidence conclusively established the following:

1. The claimant placed a box, from the basement, on his cart
2. The claimant removed that box from the basement
3. A new vacuum, in a box, was reported missing from inventory in the basement the following day
4. The employer reviewed surveillance video and concluded the claimant took the vacuum, without permission
5. The employer discharged the claimant for theft (or the unauthorized removal of the employer's property)

The employer's evidence, however, did not establish the following:

1. The new vacuum was in the box the claimant placed on his cart
2. The new vacuum was in the box the claimant removed from the basement
3. The new vacuum was in the box, seen on the claimant's cart, in the video
4. The claimant committed any theft or conversion of the employer's property

The employer did not offer the video into evidence. The employer's witness testified about what was on the video, but that testimony was unsupported hearsay. The employer's evidence was insufficient to establish, beyond speculation, conjecture and circumstantial evidence, that the new vacuum was in the box on the claimant's cart or that it was ever in the claimant's control or possession. The evidence only established that the claimant removed a box from the basement, which was part of his job.

The employer may believe that the claimant committed this theft. However, the employer did not present sufficient competent evidence to meet its burden of proof and convince the Board of the claimant's involvement in any inappropriate activity.

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 JOHNS HOPKINS BAYVIEW MEDICAL CENTER.

The Hearing Examiner's decision is reversed.



Donna Watts-Lamont, Chairperson



Clayton A. Mitchell, Sr., Associate Member

RD

Copies mailed to:

JEROME ROGERS

JOHNS HOPKINS BAYVIEW MED CTR

JOHNS HOPKINS BAYVIEW MED CTR

Susan Bass, Office of the Assistant Secretary

UNEMPLOYMENT INSURANCE APPEALS DECISION

JEROME ROGERS

SSN #

Claimant

Vs.

JOHNS HOPKINS BAYVIEW MED CTR

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: 1122217

Appellant: Employer

Local Office : 61 / COLLEGE PARK
CLAIM CENTER

July 20, 2011

For the Claimant: PRESENT

For the Employer: PRESENT, GARY KULIK, PHILLIP SHIELDS, LOLITA MARTIN, BARRY
MAYER

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 began working for this employer on August 3, 1987, and his last day worked was February 2, 2011. At the time of his discharge, the claimant worked full-time as a maintenance technician earning \$22.32 per hour. The employer terminated the claimant from his position for theft.

On January 29, 2011, at approximately 5:22 am, the claimant removed a box from the basement of Building B. Environmental Services used the basement of the building to store incoming inventory. The claimant removed and placed the box on a cart. Later the same day, it was reported that a box containing a new vacuum was missing from the basement. The employer conducted an investigation. Video was reviewed. The employer determined that the claimant removed the box in question and discharged him.

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 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).

EVALUATION OF THE EVIDENCE

The claimant was discharged. Therefore, the employer had the burden to show, by a preponderance of the credible evidence; the claimant's termination was for conduct which rose to the level of misconduct or gross misconduct, pursuant to the Maryland Unemployment Insurance Law. (See Hartman v. Polystyrene Products Company, Inc., 164-BH-83). In the case at bar, the employer met this burden.

The Board of Appeals has consistently held theft from one's employer is a disqualifier from the receipt of unemployment insurance benefits. (See Decker v. Maryland Cup Corporation, 347-BR-87, Reno v. Lorenzo's, Inc., 434-BR-88, Angel v. Service Merchandise Company, Inc., 57-BH-90, Hanlin v. Jake's Service Station, 1213-BR-90, and Eaddy v. Hertz Corporation, 83-BH-92).

In the case at bar, the credible evidence establishes that the claimant removed the missing vacuum box. The claimant committed theft. He was unable to account for the whereabouts of the box after the fact. The employer never recovered the vacuum.

Accordingly, I hold the employer met its burden in this case and the claimant's discharge was for theft from the employer, constituting gross, and benefits are, therefore, denied.

DECISION

IT IS HELD THAT the claimant was discharged for gross misconduct connected with the work within the meaning of Md. Code Ann., Labor & Emp. Article, Section 8-1002(a)(1)(i). The claimant is disqualified from receiving benefits from the week beginning January 30, 2011 and until the claimant becomes reemployed and earns wages in covered employment that equal at least 25 times the claimant's weekly benefit amount.

The determination of the Claims Specialist is reversed



C E Edmonds, 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 04, 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: July 08, 2011
AEH/Specialist ID: WCP3A
Seq No: 001
Copies mailed on July 20, 2011 to:

JEROME ROGERS
JOHNS HOPKINS BAYVIEW MED CTR
LOCAL OFFICE #61