

- DECISION -

Claimant:
BRANDON L KIRBY

Decision No.: 862-BR-11

Date: February 11, 2011

Appeal No.: 1039199

S.S. No.:

Employer:
CHESAPEAKE SERVICE CENTER LLC

L.O. No.: 63

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 14, 2011

REVIEW ON THE RECORD

After a review on the record, the Board deletes "or about" from the first sentence and both times from the third sentence of the first paragraph. The Board adopts the hearing examiner's modified findings of fact. The Board makes the following additional findings of fact:

During his 3-month review, the claimant was cautioned about his excessive cell phone use while trying to perform repair work. He attempted to minimize this and was not warned about it again through the final eight months of employment. At his discharge, the employer stated that things were just not working out, that the claimant's performance was too slow, and that the claimant was not billing enough hours for the pay he was receiving.

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(H)(1)*. 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 his appeal, the claimant reiterates his contentions from the hearing that he was not afforded enough opportunity to learn the specifics of his job duties. The claimant had asked for and expected more training and assistance from the owner. The claimant had some experience prior to accepting this position, but was still fairly new to this type of work. The claimant was unsure about many things and needed more guidance. Because the Board agrees that the claimant's discharge was not for misconduct or gross misconduct, we will not further address the claimant's contentions.

The employer's evidence established that he was warned about his excessive cell phone usage after 90 days of employment. The claimant then attempted to minimize that in order to better concentrate on his work duties. No further warnings or cautions were made by the employer about his cell phone distracting him from his job.

The employer's evidence also showed that the employer was generally dissatisfied with the quality and quantity of the claimant's work production. The employer felt that the claimant should have been much faster at performing many of his duties. The employer also believed that the claimant made too many errors which caused customers to bring vehicles back for additional repair. The employer further concluded that the claimant was not generating enough billable hours to justify the pay he was receiving. However, the employer also testified that he thought the claimant was working to the best of his ability most of the time, but simply did not have sufficient skills to perform up to the employer's expectations. The employer further testified that, although the claimant would sometimes perform well, the claimant never really improved or "got good" at his job.

The employer ultimately concluded that it was costing too much to keep the claimant on the payroll based upon his minimal billable hours. When he discharged the claimant, the employer stated that things were "not working out". The employer offered the claimant the chance to work through the end of that week, but the claimant declined. It is not logical to assert that a worker has committed misconduct, or gross misconduct, and at the same time have offered that worker the opportunity to stay for several more days. The employer's evidence, as a whole, does not support the finding that the claimant's discharge was for any disqualifying reason.

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.

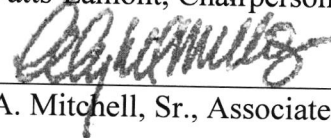
DECISION

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 CHESAPEAKE SERVICE CENTER, LLC.

The Hearing Examiner's decision is reversed.



Donna Watts-Lamont, Chairperson



Clayton A. Mitchell, Sr., Associate Member

RD/mw

Copies mailed to:

BRANDON L. KIRBY

CHESAPEAKE SERVICE CENTER LLC

Susan Bass, Office of the Assistant Secretary

UNEMPLOYMENT INSURANCE APPEALS DECISION

BRANDON L KIRBY

SSN #

Claimant

vs.

CHESAPEAKE SERVICE CENTER LLC

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: 1039199

Appellant: Employer

Local Office : 63 / CUMBERLAND
CLAIM CENTER

December 10, 2010

For the Claimant: PRESENT

For the Employer: PRESENT , WILLIAM CAIN, JOANELE DOTTS

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 or about November 2, 2009. At the time of separation, the claimant was working as a full-time shop technician for which the claimant was paid \$600.00 a week. The claimant last worked for the employer on or about September 6, 2010, before being terminated on or about September 7, 2010 under the following circumstances:

The claimant's production was far below reasonable and customary expectations of the employer. Despite being given time to become acclimated to the job and despite being given several warnings and counselings that his performance was way below expectations, the claimant was unable to improve his performance. His work was slow and inaccurate for standards in the automobile industry for his level of training and experience.

Contributing to his substandard performance, was the claimant's substantial use of his cell phone while working. He was often found with his cell phone in one hand while servicing an automobile with the other hand. This led to an excessive number of improper repair jobs that had to be re-done when customers returned to the employer's shop with complaints.

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.

A mere showing of substandard performance is not sufficient to prove gross misconduct or misconduct. Todd v. Harkless Construction, Inc., 714-BR-89.

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 credible evidence indicates that the claimant's level of productivity – both in sense of quantity and quality – was well below that expected in his position. The credible evidence also indicates that the claimant did not work to the best of his ability, allowing himself to be distracted from his work by

substantial use of a cell phone while working. The employer has the right to expect a technician working on customers' motor vehicles to give his undivided attention to the job at hand. The claimant failed to do this on a continual basis, costing the employer time, money, and potentially customers; it also exposed the employer to possible legal repercussions from negligently performed auto service and the potential for serious injury and property damage that could result.

I hold that the claimant's actions showed a regular and wanton disregard of his obligations to the employer and therefore constituted gross misconduct in connection with the work. An unemployment disqualification shall be imposed based on Md. Code, Ann., Labor & Emp. Article, Section 8-1002 pursuant to this separation from this employment.

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)(ii). The claimant is disqualified from receiving benefits from the week beginning September 5, 2010 and until the claimant becomes reemployed and earns wages in covered employment that equal at least 20 times the claimant's weekly benefit amount.

The determination of the Claims Specialist is reversed.



D A Fisher, 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 December 27, 2010. 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 : December 06,2010
TH/Specialist ID: WCU6H
Seq No: 002
Copies mailed on December 10, 2010 to:
BRANDON L. KIRBY
CHESAPEAKE SERVICE CENTER LLC
LOCAL OFFICE #63