

 **Maryland**
Department of Economic &
Employment Development

William Donald Schaefer, Governor
J. Randall Evans, Secretary

Board of Appeals
1100 North Eutaw Street
Baltimore, Maryland 21201
Telephone: (301) 333-5032

Board of Appeals
Thomas W. Keech, Chairman
Hazel A. Warnick, Associate Member
Donna P. Watts, Associate Member

— DECISION —

	Decision No.:	890-BR-89
	Date:	October 16, 1989
Claimant: Dan Krevere	Appeal No.:	8906775
	S. S. No.:	
Employer: MAD Intelligent Systems, Inc. ATTN: James Pelkey, V.P. Human Resources	L.O. No.:	50
	Appellant	CLAIMANT
Issue:	Whether the claimant was discharged for gross misconduct or misconduct, connected with his work, within the meaning of Section 6(b) or 6(c) of the law.	

—NOTICE OF RIGHT OF APPEAL TO COURT —

YOU MAY FILE AN APPEAL FROM THIS DECISION IN ACCORDANCE WITH THE LAWS OF MARYLAND. THE APPEAL MAYBE TAKEN IN PERSON OR THROUGH AN ATTORNEY IN THE CIRCUIT COURT OF BALTIMORE CITY, IF YOU RESIDE IN BALTIMORE CITY, OR THE CIRCUIT COURT OF THE COUNTY IN MARYLAND IN WHICH YOU RESIDE.

THE PERIOD FOR FILING AN APPEAL EXPIRES AT MIDNIGHT ON November 15, 1989

— APPEARANCES —

FOR THE CLAIMANT:

FOR THE EMPLOYER:

REVIEW ON THE RECORD

Upon review of the record in this case, the Board of Appeals reverses the decision of the Hearing Examiner.

The Board adopts the findings of fact of the Hearing Examiner. Based on these facts, however, the Board reaches different conclusions of law.

The Board agrees with the Hearing Examiner's conclusions of law with respect to the claimant's sales performance. A lack of sales success in itself is not misconduct. Where an employer has discharged an employee for a lack of sales success, the burden is on the employer to show that the lack of success resulted from some negligence on the part of the employee, or was the result of a failure to obey reasonable policies or directives with respect to promoting sales. Since the Hearing examiner has found as a fact that the claimant attempted to generate sales and that the employer has no persuasive evidence otherwise, the Board agrees with the Hearing Examiner's conclusion that there is no showing of misconduct in this regard.

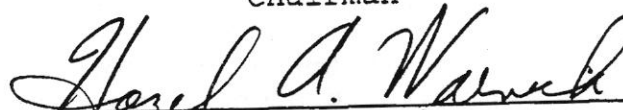
The findings of fact with respect to the "negative comments" do not justify a conclusion that the claimant committed misconduct. The fact that the claimant discussed his "dissatisfaction" with other regional managers is not, in and of itself, misconduct. The specific findings of fact are that the claimant expressed in these conversations that he was discouraged over four specific areas in which he felt the company was not adequately supporting its sales force. The Board concludes that there is no misconduct in these statements. Absent a finding that these statements were false, were made deliberately to undermine morale, or were a violation of a managerial duty the claimant had toward the company, this type of statement cannot be considered misconduct. Since there are no such findings made by the Hearing Examiner, the conclusion that the statements constitute misconduct cannot be sustained.

DECISION

The claimant was discharged, but not for any misconduct, connected with his work, within the meaning of Section 6(b) or 6(c) of the Maryland Unemployment Insurance Law. No disqualification is imposed based on his separation from employment with MAD Intelligent Systems, Inc.

The decision of the Hearing Examiner is reversed.


Chairman


Associate Member

COPIES MAILED TO:

CLAIMANT

EMPLOYER

OUT-OF-STATE CLAIMS

 **Maryland**
Department of Economic &
Employment Development

William Donald Schaefer
Governor
J. Randall Evans
Secretary

1100 North Eutaw Street
Baltimore, Maryland
21201

(301) 333-5040

—DECISION—

Date: Mailed: August 22, 1989
Decision No.: 8906775
S.S. No.: 485-52-7299
L.O. No.:
Appellant: 50
Claimant

Claimant: Dan A. Krevere
10515 Wickens Rd.
Vienna, VA 22180

Employer: MAD Intelligent Systems, Inc.
2950 Zanker Rd.
San Jose, CA 95134

Issue: Whether the claimant was discharged for gross misconduct connected with the work, within the meaning of Section 6(b) of the Law. Whether there is good cause to reopen this dismissed case, within the meaning of COMAR 24.02.06.02(N).

— NOTICE OF RIGHT OF FURTHER APPEAL —

ANY INTERESTED PARTY TO THIS DECISION MAY REQUEST A FURTHER APPEAL AND SUCH APPEAL MAYBE FILED IN ANY EMPLOYMENT SECURITY OFFICE. OR WITH THE APPEALS DIVISION. ROOM 515, 1100 NORTH EUTAW STREET. BALTIMORE. MARYLAND 21201. EITHER IN PERSON OR BY MAIL

THE PERIOD FOR FILING A PETITION FOR REVIEW EXPIRES AT MIDNIGHT ON September 6, 1989

— APPEARANCES —

FOR THE CLAIMANT:

Dan A. Krevere - Claimant

FOR THE EMPLOYER:

James Pelkey,
V.P. of Human
Resources

FINDINGS OF FACT

A telephone conference call hearing was scheduled for July 11, 1989 and the claimant called to the Unemployment Insurance Appeals Division and gave another telephone number where he could be reached. He was never called. He was out of town. Next notice that the claimant received was a dismissal notice of July 12, 1989.

The claimant then wrote a letter dated June 17, 1989 but actually prepared and mailed on or about July 17, 1989 asking, in effect, for reopening of his appeal.

The claimant worked from August 22, 1988 until April 12, 1989, as a regional director of the Federal System Division of MAD Intelligent Systems Inc. His annual salary was \$75,000 a year, he was terminated from employment. The reason for his termination are threefold: (a) lack of measurable progress in sales in his assigned territory; (b) his refusal to use personal contacts to bring about sales and (c) his negative comments about the company and its future to outside salespersons and to MAD personnel. He was terminated from employment.

The claimant, in fact, tried to generate sales and there is no way that the employer has to measure whether he actually used the best of his efforts or not. He did issue a weekly sales report and asked for feedback and never received it. The first indication that he had from the company that he was not doing his job properly was a discharge letter of April 7, 1989 from the Vice President of Sales. The claimant used, to the best of his ability, his previous personal contact in the field to generate sales. There is no evidence to the contrary, the claimant did discuss with the New York, regional manager/director and the Northwest regional director his dissatisfaction with the company. He was concerned that there was no demonstration material; the company was not delivering products; and the claimant was discouraged about the lack of support he was receiving from headquarters and the lack of the equipment to instrument the sales generation activities that he desired. He expressed himself in these dissatisfactions to the Northwest and the regional manager/directors.

The claimant was fired from the employment.

The claimant then asked for three months severance pay which he believed totaled \$18,750 plus office expenses and phone cost totally \$3,125. He took a settlement of \$15,000.

CONCLUSIONS OF LAW

The overwhelming preponderance of the evidence clearly supports a finding that the claimant has good cause for reopening this dismissed appeal pursuant to regulation 24.02.06.02 (N) of the Code of Maryland Regulations.

The Unemployment Insurance Appeals Division failed to call the claimant when it should have and, therefore, it dismissed the case through an error.

The evidence supports the only logical finding, that while the claimant probably deserved to be terminated from employment, his conduct does not equate to misconduct connected with the work, within the meaning of Section 6(c) in the area of his lack of sales progress and in the area of his failure to use personal contacts to bring about sales. However, clearly when the claimant made negative comments about the company to both current employee and to others, his conduct constitutes misconduct connected with the work, within the meaning of Section 6(c) of the Law.

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. (See Rogers v. Radio Shack 271 Md. 126, 314 A.2d 113).

The claimant's conduct in this case, in using negative comments about the company, constitutes misconduct.

The question of whether or not the claimant has received dismissal payment or wages in lieu of notice within the meaning of Section 6(h) of the Law and whether the \$15,000 that he did receive is disqualifying is a matter that will be referred to the local office for its consideration.

DECISION

Good cause is demonstrated for reopening this dismissed case pursuant to regulation .02.06.02(N) of the Code of Maryland Regulations.

The claimant was discharged for misconduct connected with his work, within the meaning of Section 6(c) of the Maryland Unemployment Insurance Law.

Benefits are denied for the week beginning April 9, 1989 and nine weeks immediately thereafter.

The question of whether the claimant, who has received \$15,000 in settlement of claims for dismissal payment in lieu of notice, within the meaning of Section 6(h) of the Maryland Unemployment Insurance, will be referred to the local office for its review and consideration and determination.

J. Martin Whitman
Hearing Examiner

8906775

Date of Hearing: August 8, 1989
bch/Specialist ID: 50520
Cassette No: 6762
Copies mailed on August 22, 1989 to:

Claimant
Employer
Out of States Claims - (MABS)