

- DECISION -

Claimant:
JAMEL S GRANT

Decision No.: 911-BR-14

Date: May 7, 2014

Appeal No.: 1306034

S.S. No.:

Employer:
FAB-TECH INC

L.O. No.: 65

Appellant: EMPLOYER - REMAND FROM
COURT

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: June 6, 2014

PROCEDURAL HISTORY

On June 28, 2013, the Board of Appeals affirmed the Hearing Examiner's decision that the employer did not meet its burden of demonstrating that the claimant's actions rose to the level of misconduct. On July 26, 2013, the appellant/employer, appealed the decision of the Board of Appeals to the Circuit Court for Baltimore City. On January 30, 2014, the Board of Appeals filed a *Motion for Remand* to the Circuit Court for Baltimore City. Subsequently, the Circuit Court for Baltimore City issued an order remanding the case to the Board of Appeals for further review.

FINDINGS OF FACT

After a review of the record, the Board of Appeals adopts the following findings of fact and conclusions of law:

The claimant worked as a full time delivery and collection truck driver from February 17, 2007 until December 11, 2012 before being terminated for being charged with a crime of moral turpitude with a minor.

In July 2012, the police came to the employer's business to question the claimant concerning a complaint that they had received regarding their employee, Jamal Grant. The complaint alleged that the claimant had raped an underage female during company time and on company property. The employer was informed of the complaint against his employee. The employer was asked by the police to provide photos of the claimant's route. The employer co-operated with the police but took no action against the claimant at this time. The police later came back and took a sample of the claimant's "DNA" (Deoxyribonucleic acid).

On December 11, 2012, the claimant was arrested at his place of work. The employer was told by police that the claimant's DNA was a perfect match to the DNA found at the crime scene. When the employer was informed of the arrest and the fact that the DNA was a perfect match, the claimant was discharged the claimant.

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)*.

The Board of Appeals 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.

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); also see *Johns Hopkins University v. Board of Labor, Licensing and Regulation*, 134 Md. App. 653, 662-63 (2000)(psychiatric condition which prevented claimant from conforming his/her conduct to accepted norms did not except that conduct from the category of misconduct under § 8-1003). 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).

Aggravated misconduct is an amplification of gross misconduct where the claimant engages in "behavior committed with actual malice and deliberate disregard for the property, safety or life of others that...affects the employer, fellow employees, subcontractors, invitees of the employer, members of the public, or the ultimate consumer of the employer's products or services...and consists of either a physical assault or property loss so serious that the penalties of misconduct or gross misconduct are not sufficient."

In the instant case, the employer did not discharge the claimant when he was accused of the charge of rape in July 2012. It was not until the police arrested the claimant in December, when the DNA results came back positive, that the employer discharged the claimant. The burden of proof need not be met beyond a reasonable doubt. The employer may prove misconduct by a preponderance of the evidence that the claimant committed misconduct. *Weimer v. Department of Transportation, 869-BH-8.*

The Board of Appeals finds that the employer established by a preponderance of the evidence that the claimant was guilty of gross misconduct when the police informed the employer of the DNA match with the purported victim of rape. The crime of moral turpitude was committed with a minor during the hours of employment and on the employer's property. The claimant's behavior demonstrated a willful disregard of the standards that an employer has the right to expect. The claimant was discharged for gross misconduct.

Upon further review, the Board finds based on a preponderance of the credible evidence that the employer met its burden of demonstrating that the claimant's actions rose to the level of gross misconduct within the meaning of *Maryland Annotated, Labor & Employment Article, § 8-1002.* The decision shall be reversed for the reasons stated herein and in the hearing examiner's decision.

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 9, 2012 and until the claimant becomes re-employed, earns at least twenty five times their weekly benefit amount and thereafter becomes unemployed through no fault of their own.

The Hearing Examiner's decision is reversed.



Eileen M. Rehrmann, Associate Member



Donna Watts-Lamont, Chairperson

VD

Copies mailed to:

JAMEL S. GRANT

FAB-TECH INC

JAMEL S. GRANT

ANGELA D. PALLOZZI ESQ.

Susan Bass, Office of the Assistant Secretary

UNEMPLOYMENT INSURANCE APPEALS DECISION

JAMEL S GRANT

SSN #

Claimant

vs.

FAB-TECH 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: 1306034

Appellant: Claimant

Local Office : 65 / SALISBURY

CLAIM CENTER

March 25, 2013

For the Claimant: PRESENT

For the Employer: PRESENT, ROBERT GOODE

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 1002 - 1002.1 (Gross/Aggravated Misconduct connected with the work), 1003 (Misconduct connected with the work) or 1001 (Voluntary Quit for good cause).

FINDINGS OF FACT

Claimant, Jamel S. Grant, filed a claim for benefits establishing a benefit year beginning January 20, 2013, and qualified for a weekly benefit amount of \$430.00.

Claimant began working for employer, FAB-TECH INC., on or about February 17, 2007. At the time of separation, the claimant was working full time as a delivery and collection truck driver. The claimant last worked for the employer on December 11, 2012, before being terminated for being charged with a crime.

Employee's handbook (handbook), of which claimant was aware, gave as an example of misconduct that was subject to discipline up to including termination an employee charged or convicted of any offense which in the discretion of management makes the employee's association with the employer undesirable or

exposes employer to liability. See employer's exhibit 2.

In July 2012, the Police came to employer's office and questioned claimant about a complaint they received of sexual assault by claimant during work hours of a minor who lived on his eastern shore route. Employer was aware of the interview and the complaint, but took no disciplinary action against claimant.

On December 11, 2012, claimant was arrested at employer's office and charged with rape and sexual assault of a minor. See employer's exhibit 3. The minor alleged that the acts took place while claimant was on the job.

Employer terminated claimant on December 11, 2012 for being charged with rape and sexual assault which employer, in its discretion, determined to be a violation of the handbook provisions related to being charged with or convicted of a crime.

Claimant is out on bail and his trial is set for May 2013.

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 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.

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 not been met.

Claimant was charged with the crimes described in the Findings of Facts, above, but the evidence of his guilt or innocence will be presented at trial. Therefore, claimant may have violated the handbook by being charged with a crime, but employer did not establish by a preponderance of evidence that claimant committed the crimes for which he is charged and therefore, engaged in misconduct for the purpose of unemployment insurance benefits.

Employer did not meet its burden of proof.

I hold that the claimant did not commit a transgression of some established rule or policy of the employer, a forbidden act, a dereliction of duty, or engage 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. No 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 FURTHER 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 reversed.



B H Woodland-Hargrove, 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 April 09, 2013. 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 14, 2013
BLP/Specialist ID: USB1G
Seq No: 001
Copies mailed on March 25, 2013 to:

JAMEL S. GRANT
FAB-TECH INC
LOCAL OFFICE #65