

- DECISION -

Claimant:
WILLIAM SMITH

Decision No.: 925-BR-13

Date: March 15, 2013

Appeal No.: 1233964

S.S. No.:

Employer:
JOSEPH J MAGNOLIA INC

L.O. No.: 64

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: April 14, 2013

REVIEW OF THE RECORD

After a review of the record, the Board adopts the following findings of fact and reverses the hearing examiner's decision.

The claimant was employed as a full-time plumber from July 1, 2011 through August 24, 2012. The claimant is unemployed as the result of a discharge.

The claimant was discharged for allegedly failing a drug test after an on-the-job accident. The claimant did not fail the drug test. The claimant was not properly informed of his opportunity to have the same sample of the drug test results re-tested.

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); 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."

Failing a drug or alcohol test may be gross misconduct. *Lucas v. Gladney Transportation*, 577-BH-90. An employee's refusal to submit to a drug screening test may be grounds for a finding of gross misconduct. *Stauffer v. Noxell Corp.*, 1111-BH-88; *Gintling v. BGE*, 913-BH-92; *Deluca v. Montgomery County Public Schools*, 1632-BR-93.

The employer must adhere to the provisions of *Md. Code Ann., Health-Gen. art., § 17-214* in order to have the test results be considered as evidence of misconduct. This section requires, among other things, that the employer give the employee written notice of his right to resubmit the same test sample to a laboratory of the employee's choosing. If the employer fails to offer this option to the employee, the test may not be used as competent evidence of or as a basis for a finding of misconduct. *Webe v. Anderson Oldsmobile Company*, 88-BR-91. However, whether the claimant was informed of, or given the opportunity to have a second testing of the same sample is irrelevant when the claimant does not deny that the results of the drug test are accurate. *Boyd v. Cantwell Cleary Company, Inc.*, 1845-BH-92; *Nolan v. Lyon, Conklin and Company, Inc.*, 115-BR-95; *Jones v. Race Track Payroll Account, Inc.*, 2204-BR-95.

In the instant case, there is insufficient evidence that the employer complied with the provisions of *Md. Code Ann., Health-Gen. art., § 17-214*. As a result, evidence of the drug test cannot be considered. The drug test results were not offered or admitted into evidence and the employer's substance abuse policy was not entered or admitted into evidence. Notwithstanding the hearing examiner reading an excerpt of the employer's policy into the record – a written policy that was not entered into evidence - the hearing examiner's statements are not evidence and cannot be considered. *See Heard v. Foxshire Associates, LLC, 145 Md. App. 695, 707 (2002)*. At the hearing and in his appeal before the Board, the claimant disputes the results of the drug test.

The Board additionally notes that the hearing examiner was overly and improperly argumentative with the claimant to the point where she lost her neutrality and became prosecutorial, especially towards the end of the hearing. Notwithstanding, the claimant shall prevail on the merits of the evidence in the record.

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 did not meet its burden of demonstrating that the claimant's actions rose to the level of 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 JOSEPH J MAGNOLIA INC.

The Hearing Examiner's decision is reversed.



Clayton A. Mitchell, Sr., Associate Member



Donna Watts-Lamont, Chairperson

KJK

Copies mailed to:

WILLIAM SMITH

JOSEPH J MAGNOLIA INC

Susan Bass, Office of the Assistant Secretary

UNEMPLOYMENT INSURANCE APPEALS DECISION

WILLIAM SMITH

SSN #

Claimant

vs.

JOSEPH J MAGNOLIA 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: 1233964

Appellant: Claimant

Local Office : 64 / BALTOMETRO

CALL CENTER

November 29, 2012

For the Claimant: PRESENT

For the Employer: PRESENT, JENNIFER TYSON, MARK TARENNER

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).

REOPENING PREAMBLE

On the hearing notice, the "ISSUES" section indicates that an issue associated with the present matter is whether the case should be reopened pursuant to COMAR 09.32.06.02N. Because the reopening issue was resolved in the appellant's favor by an Order dated October 17, 2010, that issue will not be re-adjudicated here.

FINDINGS OF FACT

Claimant William Smith filed a claim for benefits establishing a benefit year beginning September 2, 2012 with a weekly benefit amount of \$430.

The claimant worked for Joseph J. Magnolia from July 1, 2011 through August 24, 2012 as a full time plumber, earning \$28 per hour. He remained in that position until he was separated for conduct including an accident and a positive screen for cocaine taken due to the accident.

On August 23, 2012, the claimant was involved in an accident with a forklift. He was taken to the routine testing facility where he tested positive for cocaine. He denied the outcome, but offered no contrary evidence and was removed from his job.

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).

Section 17-214.1(c)(1)(iv) of the Health-General Article of the Annotated Code of Maryland provides that an employer, after having required an employee to be tested for the use or abuse of any controlled dangerous substance, and who receives notice that the employee has tested positive, after confirmation of that test result, shall provide the employee with:

- (i) a copy of the laboratory test indicating the test results;
- (ii) a copy of the employer's written policy on the use or abuse of controlled dangerous substances or alcohol by employees,...;
- (iii) If applicable, written notice of the employer's intent to take disciplinary action, terminate employment, or change the conditions of continued employment; and
- (iv) a statement or copy of the provisions set forth in subsection (d) of this section permitting an employee to request independent testing of the same sample for verification of the test result.

Where a claimant does not dispute the fact that he failed a random drug test by testing positive for a controlled dangerous substance, the undisputed drug test result is itself enough to support a finding of gross misconduct even without testimony from the employer at the hearing. The test result speaks for itself. Jones v. Race Track Payroll Account, Inc., 2204-BR-95.

Whether the claimant is informed of, or given the opportunity to have a second testing of the same sample is irrelevant when the claimant does not deny that the results of the drug test are accurate. Boyd v. Cantwell Cleary Company, Inc., 1845-BH-92.

EVALUATION OF EVIDENCE

The employer had the burden to show, by a preponderance of the 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 this case, that burden was met as to gross misconduct.

The claimant tested positive for cocaine on August 23, 2012, in violation of the employer's known and reasonable policy. The claimant's actions constituted a deliberate and willful disregard of standards that an employer has a right to expect, showed a gross indifference to the employer's interests, and therefore constituted gross misconduct in connection with his work in accordance with Section 8-1002. Benefits are denied accordingly.

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 August 19, 2012, 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 affirmed.

L BROWN

L Brown, 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 14, 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: November 05, 2012

BLP/Specialist ID: RWD1D

Seq No: 002

Copies mailed on November 29, 2012 to:

WILLIAM SMITH
JOSEPH J MAGNOLIA INC
LOCAL OFFICE #64