

- DECISION -

Claimant:	Decision No.:	1158-BR-12
VIRGIL J HUNTER	Date:	March 07, 2012
	Appeal No.:	1133478
	S.S. No.:	
Employer:	L.O. No.:	65
CHRISTMAS TREE SHOPS INC	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 06, 2012

REVIEW OF THE RECORD

After a review of the record, and after deleting the fifth sentence of the second paragraph and the entire third paragraph, the Board adopts the hearing examiner's modified findings of fact. The Board makes the following additional findings of fact:

Approximately eight weeks after the claimant began his employment, the employer received the results of his background check. The background check was run using the claimant's name, social security number and date of birth. That report showed that the

claimant had been convicted of multiple felonies. That report also showed that the claimant was incarcerated for 10 years between 1997 and 2010.

The claimant had been employed, at various occupations, between 1997 and 2010. The claimant had not been convicted of any felonies during this, or any other, period. Someone else had been using the claimant's identity. The claimant has been pursuing relief from this, but could not have his name cleared within the 48 hours the employer gave him to have this accomplished.

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 and contentions from the hearing. The hearing examiner, inexplicably, continued to ask the claimant to provide evidence that he was not the person in the report. The claimant testified consistently and credibly that he was not that person. He explained that he had been employed during the same periods of time this other person was incarcerated. He explained that he was pursuing legal remedies to have this cleared up. The claimant was providing all the evidence necessary by virtue of his own first-hand testimony.

The claimant did not know who had stolen his identity. The claimant only knew that he had no convictions and that he was not incarcerated. It was not reasonable for the claimant to be expected to have resolved this within 48 hours.

The employer's evidence was almost entirely hearsay within hearsay. The employer's witness testified to the content of a report about which she had no personal knowledge. No one from the company who had conducted the background search appeared and explained how the search was conducted or what, if any, precautions were taken to assure the accuracy of the results of that report. The report was hearsay. The witness' testimony about that report was hearsay. Hearsay within hearsay has virtually non evidentiary value. The hearing examiner erred in basing findings of fact on evidence of such a spurious nature.

The employer's evidence was insufficient to establish that the claimant acted with any disregard for the employer's interests or its expectations. The employer's evidence was insufficient to establish that the claimant falsified anything on his application for employment. The employer's evidence did not demonstrate that the claimant's discharge was based upon any disqualifying act or omission.

The Board does not question the employer's right to terminate the claimant's employment. However, the Board does find that the claimant's separation occurred under non-disqualifying conditions.

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.

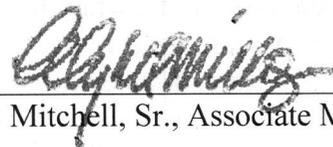
DECISION

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 CHRISTMAS TREE SHOPS, INC.

The Hearing Examiner's decision is reversed.



Donna Watts-Lamont, Chairperson



Clayton A. Mitchell, Sr., Associate Member

RD

Copies mailed to:

VIRGIL J. HUNTER

CHRISTMAS TREE SHOPS INC

PIXIE ALLAN

CHRISTMAS TREE SHOPS INC

Susan Bass, Office of the Assistant Secretary

UNEMPLOYMENT INSURANCE APPEALS DECISION

VIRGIL J HUNTER

SSN #

Claimant

Vs.

CHRISTMAS TREE SHOPS 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: 1133478

Appellant: Employer

Local Office : 65 / SALISBURY

CLAIM CENTER

December 14, 2011

For the Claimant: PRESENT

For the Employer: PRESENT, PIXIE ALLAN, TRACY MILESKI

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). Whether the appeal should be reopened pursuant to COMAR 09.32.06.02 N.

PREAMBLE

The issue of timeliness of appeal was erroneously indicated on the Hearing Notice. Therefore, this issue is moot and will not be addressed in this decision.

FINDINGS OF FACT

The claimant, Virgil J Hunter, began working for this employer, Christmas Tree Shops Inc, on March 8, 2011, and his last day worked was May 12, 2011. At the time of his discharge, the claimant worked full-time as a department manager, earning a bi-weekly salary of \$1576.92.

The claimant was discharged for falsifying his employment application. When the claimant applied for employment with the employer, he was asked to complete an application. The claimant indicated on his application he had never been convicted of a crime. The claimant was made aware that falsification of information would result in termination of employment. At that time, the claimant had been convicted of nine separate crimes, including felony charges. The employer used a reputable agency to conduct criminal background checks on its new employees.

Approximately eight weeks later, the employer learned of the claimant's prior convictions. The employer confronted the claimant and he denied being the same person identified in the criminal records. The employer gave the claimant 48 hours to offer proof of mistaken identity. The claimant failed to provide any information to support his claim that he was not the person indicated in the records, whose name, birth date and social security number matched the claimant. The claimant was therefore discharged for falsifying his employment application.

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).

EVALUATION OF THE EVIDENCE

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.

In Johnson v. Minneapolis Postal Data Center, 83-BH-89, the Board of Appeals held "On the claimant's job application, he answered 'No' to a question asking whether he had ever been convicted of any offense against the law. Subsequently, the employer learned that the claimant had a prior conviction for receiving stolen goods. A falsification of a criminal record is more serious than misrepresenting one's age and is always material. This was gross misconduct."

Similarly, in the case at bar, the claimant falsely denied on his employment application his prior

convictions. Such information is germane to the employer's decision to hire. According to case law, such an omission is tantamount to gross misconduct.

Accordingly, the employer met its burden in this case and the claimant's discharge was for falsifying his employment application, constituting gross misconduct, 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 May 8, 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 A Applefeld, 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 29, 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: November 29, 2011

AEH/Specialist ID: USB25

Seq No: 001

Copies mailed on December 14, 2011 to:

VIRGIL J. HUNTER
CHRISTMAS TREE SHOPS INC
LOCAL OFFICE #65
PIXIE ALLAN