

- DECISION -

Claimant:
JOSEPH A SWIFT

Decision No.: 2846-BR-12

Date: August 01, 2012

Appeal No.: 1204437

S.S. No.:

Employer:
CENTER FOR SOCIAL CHANGE INC

L.O. No.: 63

Appellant: Claimant

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: August 31, 2012

REVIEW OF THE RECORD

After a review of the record, after deleting "or about" from the first and third sentences of the first paragraph, and after deleting the last sentence of the second paragraph, the Board adopts the hearing examiner's modified findings of fact. However 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, 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 argument from the hearing. The claimant cites relevant portions of the Oklahoma law in support of his contentions about his criminal history in that state. The Board has thorough reviewed the evidence of record in this matter. The Board agrees with claimant's contentions and will not specifically address them further.

The hearing examiner found the claimant had been dishonest with his employer when he failed to reveal an Oklahoma conviction in his 1996 application for employment. The claimant did not believe he had been convicted because the Court in Oklahoma did not enter a judgment of guilty, instead, the Court deferred his sentence. Additionally, the claimant explained this entire situation to the employer in 1998. Any possible omission of critical information from his application was cured by the 1998 discussion and following memorandum.

This was the basis for the hearing examiner's decision that the claimant committed a transgression, a forbidden act, a dereliction of duty, or engaged in a course of wrongful conduct. There is, in the opinion of the Board, no basis for any such decision. The Board does not find that the claimant falsified his application, initially. The Board further finds that the claimant answered the employer's questions truthfully, as he believed that truth to be. The claimant was honest and forthcoming with his employer at the time he made his application for employment. The Board does not find any degree of misconduct in the reasons for the claimant's discharge from this employment.

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 CENTER FOR SOCIAL CHANGE INC.

The Hearing Examiner's decision is reversed.



Donna Watts-Lamont, Chairperson



Clayton A. Mitchell, Sr., Associate Member

VD

Copies mailed to:

JOSEPH A. SWIFT
CENTER FOR SOCIAL CHANGE INC
DAVID W. CLAYTON ESQ.
Susan Bass, Office of the Assistant Secretary

UNEMPLOYMENT INSURANCE APPEALS DECISION

JOSEPH A SWIFT

SSN #

Claimant

vs.

CENTER FOR SOCIAL CHANGE 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: 1204437
Appellant: Employer
Local Office : 63 / CUMBERLAND
CLAIM CENTER

February 29, 2012

For the Claimant: PRESENT

For the Employer: PRESENT, DAVID W. CLAYTON, ESQ., JAI MODM NIBBER

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, Joseph Swift, began working for this employer, Center For Social Change, on or about October 4, 1996. At the time of separation, the claimant was working as a job coach and direct care provider. The claimant last worked for the employer on or about January 6, 2012, before being terminated for allegedly being dishonest.

The employer provides services at various homes throughout Maryland for vulnerable individuals that are both adults and children. The State of Maryland has stringent requirements for employees in this industry and special provision for those working with juveniles. When the claimant was hired in October 1996 he

completed a job application that asked if he had any convictions. The claimant marked the application, "No" but was in fact convicted of a crime in January 1996 in Oklahoma. At the time of hire, the claimant also supplied the employer with a criminal background check done by the State of Maryland, whose date is unclear, that showed the claimant had no prior convictions. Subsequently the claimant told the employer about the Oklahoma conviction and a memorandum was generated by the employer and signed by the claimant on March 10, 1998 regarding the Oklahoma conviction. Part of the memorandum required the claimant to submit fingerprints for a new background check. It is unclear if the employer had another background check performed.

In 2011 the claimant was involuntarily switched from the adult group home where had worked to a juvenile group home. As part of the mandates from the State of Maryland, the employer is required to have a full criminal history of each individual who works with juveniles on file. The employer had another background check completed on the claimant and it showed an arrest from 1995 in Howard County that was placed on the "Stet" or inactive docket. The claimant was then terminated for failing to disclose the charge even though the claimant never signed a document indicating he had not been charged. The claimant had also not been asked by the employer if he had ever been charged with a crime.

CONCLUSIONS OF LAW

The 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).

EVALUATION OF THE 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 not been met.

The employer terminated the claimant because they believed he was dishonest despite the fact that he had worked for them for almost eighteen years and not had any disciplinary issues. The claimant did falsify his employment application in 1996 but this was subsequently addressed by the employer in a memo in 1998 and the claimant was not discharged due to this dishonesty. As part of the 1998 memorandum, the claimant had to submit to another background check. This background check was not in the claimant's personnel file which indicates the employer did one and decided the claimant's 1995 arrest in Howard County, Maryland was not relevant or that the employer was negligent and failed to perform the check in 1998. What is clear is that the employer did not have any documentation that the claimant signed requiring him to disclose any

arrests. When the claimant was involuntarily moved from working with adults to working with juveniles in 2011 a subsequent background check revealed a 1995 arrest in Howard County that the employer decided this was now relevant. Despite never asking the claimant about his arrest history, the employer terminated the claimant based on his failure to disclose the arrest. I find that the claimant was not dishonest with the employer with regard to his Howard County arrest. However the claimant was terminated due to the combination of the 1996 Oklahoma conviction and the 1995 Howard County arrest. The claimant's dishonesty on his 1996 application was a contributing factor in the discharge and the misrepresentation on the application did transgress a policy of the employer.

Therefore I hold that the claimant committed a transgression of some established rule or policy of the employer, a forbidden act, a dereliction of duty, or engaged 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. An 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 HELD THAT the claimant was discharged for misconduct connected with the work within the meaning of Md. Code Ann., Labor & Emp. Article, Section 8-1003. Benefits are denied for the week beginning January 1, 2012 and for the nine weeks immediately following. The claimant will then be 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.

E.P. Melcavage

E. P. Melcavage, 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 March 15, 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: February 21, 2012
DAH/Specialist ID: WCU51
Seq No: 001
Copies mailed on February 29, 2012 to:
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LOCAL OFFICE #63
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