DEPARTMENT OF EMPLOYMENT AND TRAINING

BOARD OF APPEALS
1100 NORTH EUTAW STREET
BALTIMORE, MARYLAND 21201

(301) 383-5032

STATE OF MARYLAND
HARRY HUGHES
Governor

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— DECISION —

Decision No.: 301-BH-85

Date: May 17, 1985

Claimant: Zollar Daniels

Appeal No.: 10582

S. S. No.:

Employer: Primary Alcoholism Treatment Program

L.O. No.: 1

Appellant: CLAIMANT

ATTN : Robert Ziemski, Coordinator

Issue: Whether the claimant was discharged for gross misconduct or misconduct, connected with the work, within the meaning of §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, OR THE CIRCUIT COURT OF THE COUNTY IN MARYLAND IN WHICH YOU RESIDE.

THE PERIOD FOR FILING AN APPEAL EXPIRES AT MIDNIGHT ON June 16, 1985

— APPEARANCES —

FOR THE CLAIMANT:

Zollar Daniels, Jr. - Claimant
Rick North - Student Attorney
Tom Bell - Student Attorney

FOR THE EMPLOYER:

Robert Ziemski - Coordinator
Clara Wanner - Asst. Admin.
Mark Herman - Attorney at Law

On his last day of work, the claimant allowed another passenger who was neither a co-employee or a client of the treatment center into the van when he was either on his way to or returning from delivering a client to Johns Hopkins Hospital.

The employer has the policy that an investigation or at least a meeting would be conducted between three management people and an employee prior to serious disciplinary action being taken. This procedure had been used before when the claimant had violated other disciplinary rules. Although the employer alleges that there is a policy that such a meeting or investigation can be dispensed with in the case of a person who has had prior disciplinary problems, the employer can point to no provision in its policy which so states. Therefore, the Board will find that the claimant was discharged using procedures which were in violation of the employer's policy.

CONCLUSIONS OF LAW

Since the claimant violated a serious policy of the employer by allowing an unauthorized passenger in the employer's van when that van was reserved for the emergency transportation of the acutely ill patients, and since the claimant was well aware of both the policy and the reasoning behind it, the claimant's violation will be found to be a deliberate violation of standards which his employer had a right to expect, showing a gross indifference to his employer's interest. This is gross misconduct within the meaning of §6(b) of the Maryland Unemployment Insurance Law.

Much of the evidence and argument presented was actually related to a different issue, i.e., whether or not the employer correctly followed the technicalities of its own discharge procedure when it summarily fired the claimant on August 14, 1984. Since the employer didn't follow the procedural rules set out in its policy to the letter of the law, the claimant argues that gross misconduct cannot be found.

The Board concludes that whether the employer followed the technicalities of its own discharge procedures is irrelevant to a determination of whether a claimant was fired for gross misconduct under §6(b) of the Law in any case in which the employer proves at the unemployment hearing that the claimant did, in fact, commit gross misconduct. Whether the employer followed the technicalities of its discharge procedures is irrelevant to the finding of misconduct in any case unless: (1) the failure to follow the requirements of the discharge procedures reflects on the credibility of the employer's evidence concerning the actual happening of an event of misconduct; (2) the employer's failure to follow the requirements of its discharge procedures reflects the fact that the employer has an ulterior motive for discharging the claimant. Neither of these factors is present in this case.

EVALUATION OF THE EVIDENCE

The Board of Appeals has considered all of the evidence presented, including the testimony offered at the hearings. The Board has also considered all of the documentary evidence introduced in this case, as well as Department of Employment and Training's documents in the appeal file.

The crucial question in this case is whether the claimant did or did not perform a certain act on the night of August 14, 1984, which was in violation of his employer's policies. There are only two witnesses, the claimant and the security officer for the employer, who allegedly observed the claimant during the alleged incident. The Appeals Referee credited the testimony of the security officer. The Board agrees with this credibility finding. The claimant was unable to come up with any good reason why the security officer would invent this elaborate story. The claimant, of course, has every reason to deny the incident.

In addition, the claimant made some questionable or misleading statements before the Board of Appeals. For example, the claimant presented misleading testimony at first which appeared to be a denial of knowledge of the employer's policy about admitting passengers into the employer's van while on work time. Only upon the closest cross examination did the claimant finally admit that he always had been aware of this policy. Also, while presenting his testimony about the collateral matter of the employer's adherence to its own discharge policy, the claimant clearly stated that he had never previously been suspended. On cross examination and upon confrontation with documentation of it, however, he retracted his statement and admitted that he had been suspended previously. The claimant did further testify that that particular suspension had later been reversed, but his testimony on the whole is not that of a person earnestly attempting to advise the Board of the whole truth of the matter.

FINDINGS OF FACT

The claimant was employed for over two years for the employer, the Primary Alcoholism Treatment Program. His last day of work was August 14, 1984.

The claimant's duties included driving intoxicated persons who were in acute medical need to the Johns Hopkins Hospital. The driving took place in one of the employer's vans. A strict rule concerning the use of the vans was that no unauthorized persons were ever to be allowed into the van at any time. The claimant knew that this was a rule of the employer and he knew that violation of the rule was considered an extremely serious matter on account of the fact that the vans were basically used for medical emergencies.

The Board has repeatedly ruled that an employer's policies are not binding on the Board of Appeals for unemployment insurance purposes and that a claimant's violation of the technicalities of an employer's policy is not in every case, misconduct under §6 of the law. Randall v. Nationwide Mutual Insurance, (1641-BR-82), Dawson v. Allied Chemicals, (612-BR-83) . Just as an employer cannot rely solely on technicalities to deny a claimant benefits, neither can a claimant rely on technicalities to excuse his conduct.

The claimant advances the argument that the employer and the claimant had entered into a contract of employment and that the claimant's violation of one part of the contract (the unauthorized admittance of a passenger into the van) cannot be considered misconduct where the employer also violated the contract (by failing to observe the technicalities of its discharge procedure). Even if this were contract law, the argument would fail. The purpose of the discharge procedure was to give the claimant an opportunity (however informal) to prove that he had not committed the act in question or to show facts in mitigation of the penalty to be imposed. In this case, however, the employer has proved before the Board of Appeals that the claimant did in fact commit the action. The claimant asks for no mitigation, since he denies the act. The employer's breach of its own policy by short-cutting the technicalities of its discharge procedures, even if considered as a contractual breach, was an immaterial breach in the light of the fact that the claimant did commit the act that he was charged with. The policy which the claimant violated was conceded by the claimant to be a serious concern for the employer. In the light of the fact that the claimant did commit the act, the fact that the employer failed to follow the technicalities of its own discharge procedures was totally immaterial.

DECISION

The claimant was discharged, for gross misconduct within the meaning of §6(b) of the Maryland Unemployment Insurance Law. He is disqualified from receiving benefits from the week beginning August 12, 1984 and until he becomes reemployed, earns at least ten times his weekly benefit amount ($1,280.00) and thereafter becomes unemployed through no fault of his own.

The decision of the Appeals Referee is affirmed.

Thomas W. Keech

Hazel A. Warnick
Associate Member

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K:W
kmb

DATE OF HEARING: April 16, 1985

COPIES MAILED TO:

CLAIMANT

EMPLOYER

Rick North
Tom Bell
Student Attorneys
Clinical Law Program

Mark Herman, Esquire

UNEMPLOYMENT INSURANCE - BALTIMORE

DEPARTMENT OF EMPLOYMENT AND TRAINING

STATE OF MARYLAND
1100 NORTH EUTAW STREET
BALTIMORE, MARYLAND 21201

(301) 383-5040

— DECISION —

Date: Mailed 10/22/84

Claimant: Zollar Daniels, Jr.

Appeal No.: 10582-JAVA

S. S. No.:

Employer: Primary Alcoholism Treatment Program

LO. No.: 01

Appellant: Claimant

Issue: Whether the claimant was discharged for gross misconduct connected with the work within the meaning of Section 6 (b) of the Law.

— NOTICE OF RIGHT TO PETITION FOR REVIEW —

ANY INTERESTED PARTY TO THIS DECISION MAY REQUEST A REVIEW AND SUCH PETITION FOR REVIEW MAY BE 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 November 7, 1984

— APPEARANCES —

FOR THE CLAIMANT:

Present - Represented by Michael Milleman, Esquire; and Thomas M. Bell, Student Attorney - University of Maryland School of Law

FOR THE EMPLOYER:

Represented by Robert Ziemski, Co-Ordinator: Michael Cormer, Physician Assistant; and Mark Herman, Esquire

EVALUATION OF THE EVIDENCE

The evidence submitted, both that of the claimant and the employer, and testimony received has been reviewed and evaluated. The employer's chief witness testified that an unauthorized, unrecognized, unknown black male, wearing a tee shirt and beige shorts jumped into the employer's van, operated

by the claimant, while the van was parked at the Johns Hopkins Hospital, and the claimant drove away and did not report back to the employer's facility for at least 45 minutes. The claimant denies that anyone entered his van as he was leaving the Johns Hopkins Hospital, and that he was on his lunch break at the time, which he had reported to his supervisor. All other testimony, and evidence is deemed extraneous and secondary to the principal issue of misuse of a program vehicle.

FINDINGS OF FACT

The claimant filed an original claim for unemployment insurance benefits at Baltimore, effective August 19, 1984.

The claimant had been employed by Primary Alcoholism Treatment Program for a period of two years as a Medical Technician, at a pay rate of $420.00 bi-weekly.

The claimant was summarily discharged, without notice, suspension or prior disciplinary procedures on the grounds that he had been observed by Robert Ziemski, Co-ordinator and Security Officer, permitting an unauthorized individual to enter the company's van, and ride with the claimant to an unknown destination.

The Appeals Referee finds as fact that the claimant did, at approximately 4 a.m. on August 14, 1984, permit an unauthorized black male, wearing tee shirt and beige shorts to enter the employer's van and ride with the claimant, contrary to company policy.

CONCLUSIONS OF LAW

All other evidence being considered equal, the Appeals Referee believes the independent and objective testimony of the employer's witness that a particularly described black male, unauthorizedly was permitted by the claimant to ride in the employer's van, contrary to company policy. Such is considered to be a serious breach of employer's rules, deliberately undertaken by the claimant, showing a gross indifference to the employer's interest. Therefore, it is concluded that the determination of the Claims Examiner was warranted and shall be affirmed.

DECISION

The claimant was discharged for gross misconduct connected with the work within the meaning of Section 6 (b) of the Law.

Benefits are denied for the week beginning August 12, 1984 and until he becomes re-employed, earns at least ten times his weekly benefit amount ($1280), and thereafter becomes unemployed through no fault of his own.

The determination of the Claims **Examiner is affirmed.**

Robin L. Brodinsky
APPEALS REFEREE

Date of Hearing - 10/9/84
cd/9297
(7473 & 7474/Merryman)

COPIES MAILED ON 10/22/84 TO:

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