-DECISION-

Claimant:
STEVEN R SURMA

Employer:
MARYLAND MESSENGER SERVICE INC

Decision No.: 3094-BR-11

Date: July 8, 2011

Appeal No.: 1019765

S.S. No.:

L.O. No.: 65

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: August 8, 2011

REVIEW ON THE RECORD

After a review on the record, the Board adopts the hearing examiner's Findings of Fact. The Board makes the following additional finding of fact:

The claimant was not late on the 2nd 5th of April, 2010.

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(H)(1).* The Board fully inquires into the facts of each particular case. *COMAR 09.32.06.02(E).*

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).

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).*

The instant case involves two versions of the claimant's discharge from employment due to lateness. The employer rested his case on three written warnings dated March 15, 2010, April 5, 2010, and April 15, 2010 and his testimony that the claimant was late so many times he couldn't count them all. Other than the aforementioned dates, the employer failed to offer evidence of other lateness, stating he had been very liberal with employee lateness. On March 15, 2010, the claimant was 7 minutes late and on April 15th, 2010, he was 12 minutes late. The claimant was not late on April 5th. The Board notes that two of the three written warnings relied upon by the employer were written after the new start time became effective. But, the second warning dated April 5, 2010 was for a lateness on April 2nd for which no proof was offered on the record to show that the claimant was late that date. The claimant was terminated on April 15th for being 12 minutes late on the 15th.

The employer's wife, and company CFO and custodian of records, testified that information on other lateness might be contained in payroll records which were not brought to the hearing.

The claimant's version of the discharge is that he worked for 4 years without any problem with timeliness, but by March 2010, the business began to feel the effects of the recession, the claimant's hours were cut back and his starting times changed. In his view, he was discharged not for so many incidents of lateness that couldn't be counted but as a response to the economic reality described by claimant's counsel, as a "pre-text" for the separation. A review of *Employer's Exhibit 1*, dated March 31, 2010 confirms the claimant's position. *Employer Exhibit* 1 provides the claimant's new start time of 9:15 a.m. Monday – Friday, states the reason for the new time as "due to a lack of business", and concludes with "when business picks up, we can resume normal start time of 8:00-8:30."

In the claimant's appeal to the Board the claimant denies saying he was late on numerous occasions, a statement that found its way into the hearing examiner's written decision. The Board reviewed the hearing and finds no support for inclusion of that statement in the record. Absent payroll or personnel records proving the claimant's excessive absenteeism, there is no definitive proof that the claimant was discharged for a disqualifying reason. In the face of the claimant's adamant denial of excessive absenteeism, the employer's bare assertions and conclusory statements do not meet the burden of proof.

Absent evidence of wanton and willful disregard of an employee's obligation or gross indifference to the employer's interest, there can be no finding of gross misconduct.

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 failed to meet its burden of demonstrating that the claimant's actions rose to the level of gross misconduct within the meaning and intent of Md. Code Ann., Labor & Emp. Article *§ 8-1002*. 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 MARYLAND MESSENGER SERVICE, INC.

The Hearing Examiner's decision is reversed.

Donna Watts-Lamont, Chairperson

Clayton A. Mitchell, Sr., Associate Member

RD/lj
Copies mailed to:
STEVEN R. SURMA
MARYLAND MESSENGER
RICHARD I MARTEL JR ESQ.
Susan Bass, Office of the Assistant Secretary

UNEMPLOYMENT INSURANCE APPEALS DECISION

STEVEN R SURMA

SSN #

Claimant

vs.

MARYLAND MESSENGER SERVICE 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: 1019765
Appellant: Claimant
Local Office : 65 / SALISBURY CLAIM CENTER

June 11, 2010

For the Claimant: PRESENT , RICHARD I MARTEL, JR, ESQ.

For the Employer: PRESENT , PHILLIP KRAMER, MARIE KRAMER

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

The claimant was employed as a full-time driver with Maryland Messenger Service from May 2006 to April 14, 2010. The claimant's rate of pay at the time of separation from this employment was $14.00 per hour. The claimant was discharged from his position with this employer for excessive tardiness.

The employer's policy requires employees be on time to work. On March 15, 2010, the claimant was scheduled to work at 7:15 a.m. and notified of this arrival time. The claimant arrived at work at 7:22 a.m. The claimant mixed up the arrival time and this caused him to be late. The claimant was issued a written warning on that day. On April 5, 2010, the claimant was issued a final warning informing the claimant that if he was late one more day he would be terminated. On April 15, 2010, the claimant was scheduled to

work at 9:15 a.m. and arrived to work at 9:27 a.m. The claimant offered as reasons for his tardiness that he overslept, or took a friend to work or was stuck in traffic.

The claimant would notify the employer that he would be late.

CONCLUSIONS OF LAW

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.

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 been met.

A claimant discharged for being late to work despite warnings from the employer is discharged for gross misconduct. Freyman v. Laurel Toyota, Inc., 608-BR-87. The claimant admitted that he was late to work on numerous days. The claimant testified that he received a written warning from the employer on March 15, 2010. The claimant also testified that he received a written warning on April 5, 2010 informing him that if he was late again he would be terminated. The claimant further testified that he was late again on April 15, 2010. The claimant argued that although he was late, he called and notified the employer of his tardiness. This does not excuse the claimant's absences. The claimant testified that he was late due to over sleeping, taking a friend to work and, due to traffic. The employer credibly testified that none of the claimant's tardiness were excused.

I hold that the claimant's showed a regular and wanton disregard of his obligations to the employer and therefore constituted gross misconduct in connection with the work. An unemployment disqualification shall be imposed based on Md. Code, Ann., Labor & Emp. Article, Section 8-1002 pursuant to this separation from this employment.

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)(ii). The claimant is disqualified from receiving benefits from the week beginning April 11, 2010 and until the claimant becomes reemployed and earns wages in covered employment that equal at least 20 times the claimant's weekly benefit amount.

The determination of the Claims Specialist is affirmed.

S. Smith
S Smith, 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 to Petition for Review

Any party may request a review 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 June 28, 2010. 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 : June 03,2010
CH/Specialist ID: WCU2E
Seq No: 001
Copies mailed on June 11, 2010 to:
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MARYLAND MESSENGER
LOCAL OFFICE #65
RICHARD I MARTEL JR ESQ.