-DECISION-

Claimant:
DANIEL J ALBRITTAIN

Decision No.: 3698-BR-11

Date: July 08, 2011

Appeal No.: 1043705

S.S. No.:

Employer:
WTL INC

L.O. No.: 65

Appellant: Employer

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 08, 2011

REVIEW ON THE RECORD

After a review on the record, after deleting "or about" from the first and third sentences of the first paragraph, after deleting the entire fourth paragraph, after deleting the second sentence of the sixth paragraph, and after substituting "You Tube" for "U-tube" in the second paragraph, the Board adopts the hearing examiner's modified findings of fact. The Board makes the following additional findings of fact:

> The claimant was not seen on the video posted on You Tube. His voice, however, was clearly heard by several employees of the employer. Additionally, the video was narrated by the claimant's wife (or girlfriend).

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).

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 its appeal, the employer reiterates its contentions from the hearing and restates its testimony. The employer argues that the totality of the claimant's conduct constitutes gross misconduct for which the claimant should be disqualified. The Board agrees and will not specifically address each of the employer's contentions.

The totality of the credible evidence of record establishes that the claimant had a history of not complying with the employer's requests concerning his attire, his job performance, his cooperation or his care for the employer's equipment. The claimant was warned on multiple occasions for these various infractions, but neither his performance nor his attitude improved. The claimant made no discernable effort to conform his behavior or his performance to the employer's standards, although he possessed the ability to do both. The evidence demonstrates that the claimant continued to act in a manner which exhibited a willful disregard for the employer's interests and, therefore, his discharge was for gross misconduct under Maryland law.

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 met its burden of demonstrating that the claimant's actions rose to the level of gross misconduct within the meaning of *§ 8-1002.* The decision shall be reversed for the reasons stated herein.

DECISION

It is held that the claimant was discharged for gross misconduct connected with the work, within the meaning of Maryland Code Annotated, Labor and Employment Article, Title 8, Section 1002. The claimant is disqualified from receiving benefits from the week beginning August 29, 2010 and until the claimant becomes re-employed, earns at least twenty times their weekly benefit amount and thereafter becomes unemployed through no fault of their own.

The Hearing Examiner's decision is reversed.

Donna Watts-Lamont, Chairperson

Clayton A. Mitchell, Sr., Associate Member

RD/mw
Copies mailed to:
DANIEL J. ALBRITTAIN
WTL INC
Susan Bass, Office of the Assistant Secretary

UNEMPLOYMENT INSURANCE APPEALS DECISION

DANIEL J ALBRITTAIN

SSN #

Claimant

vs.

WTL 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: 1043705
Appellant: Employer
Local Office : 65 / SALISBURY CLAIM CENTER

February 02, 2011

For the Claimant: PRESENT

For the Employer: PRESENT , SUSAN COLLIER, TAMARA MYERS

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 began working for this employer on or about August 6, 2009. At the time of separation, the claimant was working as a Mechanic. The claimant last worked for the employer on or about September 4, 2010. When hired, he worked four (4) to five (5) days a week, approximately six (6) hours per day at an hourly rate of $7.25. He was terminated under the following circumstances:

On July 10, 2010, there was a birthday party held at the home of the daughter of a recently discharged and disgruntled ex- employee/manager, John Fox. At the party, there was a display of a shirt, with employer's logo/name, on fire on a make-shift cross. It denigrated employer's name. It found its way on U-Tube or similar type of medium.

When John Fox was fired, claimant's attitude changed for the worse. He liked John and objected to his being discharged. At one point, following the discharge of John Fox in July 2010, claimant stated in front of a manager, "what do I have to do to get fired?"

Contrary to employer's belief, claimant was not present during the burning and had nothing to do with it or its publication on the U-Tube or other medium. Claimant was at the party for one hour during the day. The burning occurred at night.

Claimant participated in the repair of sophisticated equipment. Some was recently purchased by employer at a cost of over one-half million dollars. The wearing of baggy clothing by mechanics was risky because it could more easily get caught in the moving parts of the equipment injuring the mechanic and damaging the equipment.

Claimant did not meet employer's expectations. There was a "lack of work ethic", to quote employer. On July 6, 2010, claimant appeared at the work site without a belt. This made his trousers baggy. Employer brought this inappropriate dress to claimant's attention. He corrected it in the immediate future by wearing a belt. However, following this warning, he came to work, on occasion, with baggy trousers, even though with a belt, and was warned.

On or about July 24, 2010, claimant was advised of OSHA requirements regarding the wearing of goggles and ear plugs. He was required to sign a form acknowledging his knowledge of these requirements. On two separate occasions, he refused to sign the form. There was no good reason why he delayed in signing the acknowledgement form. On July 31, 2010, the third request, he signed the acknowledgement form.

Employer discharged claimant for the accumulation of acts or omissions described above.
Employer cut claimant's hours back in late July 2010. Claimant filed for partial unemployment. Employer did not discharge claimant for filing for partial unemployment.

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).

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 as to simple misconduct but not gross misconduct has been met.

Employer was incorrect in ascribing blame to claimant for the U-Tube matter. At least, it was not proven in this case. As to the OSHA form, claimant delayed in signing a simple acknowledgement, but he eventually signed it. He was wrong in delaying, but that doesn't rise to the level of gross misconduct. Employer was convincing that claimant wore baggy trousers despite being warned. Claimant was wrong there too, but that doesn't rise to the level of gross misconduct. If the employer had issued uniforms and claimant didn't wear the issued uniform, that would be a different matter.

Claimant, it appeared, wanted to be fired and join in the ranks of John Fox. That is a bad attitude, for sure. It appears that his work ethic was not to be commended, but that, in itself, doesn't mandate a finding of gross misconduct.

Considering it all, in this somewhat vigorously presented case, with the evidence in dispute, simple misconduct was proven.

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 FURTHER 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 August 29, 2010 and for the nine (9) 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.

G P Adams, 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 February 17, 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 : January 20,2011
TH/Specialist ID: WCU4T
Seq No: 001
Copies mailed on February 02, 2011 to:
DANIEL J. ALBRITTAIN
WTL INC
LOCAL OFFICE #65