

-DECISION-

Claimant:
DEVALL W SATTERWHITE

Decision No.: 4477-BH-13

Date: October 25, 2013

Appeal No.: 1304995

Employer:
SUPER SHUTTLE INTERNATIONAL
INC #329

S.S. No.:

L.O. No.: 61

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: November 25, 2013

- APPEARANCES -

FOR THE CLAIMANT:

Devall Satterwhite, Claimant
John Singleton, Esquire

FOR THE EMPLOYER:

Jacqueline Holloway, General Manager
Charles Watkins, Esquire

EVALUATION OF THE EVIDENCE

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

In the instant case, the Board is not persuaded based upon a preponderance of the credible evidence that the claimant's actions rose to the level of misconduct. The employer argued that the claimant was not an employee but an independent franchisee. The issue of whether persons similarly situated to the claimant were employees or independent contractors for this employer was decided by prior collateral proceedings and shall not be re-addressed in this case. The claimant in the instant case performed services in covered employment.

The employer's witness testified that because she did not consider the claimant to be an employee there were no employment rules for the claimant to violate and the sole reason for the claimant's discharge was his failure to cure his financial default with the employer. While the Board finds the evidence supports a finding that default was the reason the claimant's discharge, the Board is not persuaded that it was due to circumstances within the claimant's control. The Board finds insufficient evidence that the claimant engaged in the commission of a forbidden act, engaged in a course of wrongful conduct, or breached his duty to the employer for a reason connected with the work. The claimant's financial obligations to the employer were separate and distinct from the performance of the work. The employer's witness did not dispute that the claimant worked to the best of his ability and that he accepted all available fares.

The employer's argument that the claimant should pay his financial obligations to the employer from his own bank account or from funds separate from his operating revenues (inferring the claimant should do so whether or not the claimant received a minimum wage) is an argument that the claimant was an independent contractor. The Board finds this issue *res judicata* and does not find it relevant to the issue at bar.

FINDINGS OF FACT

The claimant performed services in covered employment with this employer as a franchise-holding shuttle driver from July 22, 2008 through November 2, 2012. The claimant is unemployed as the result of a discharge.

The claimant executed a "Unit Franchise Agreement" with the employer on July 22, 2008. *See Employer's Exhibit 2*. The claimant had the non-exclusive right to operate a shuttle in a contractually-defined territory. The claimant was contractually responsible to make certain weekly payments to the employer. *See Claimant's Exhibit B-1*.

In order to obtain the territory rights and to operate under the Unit Franchise Agreement, the claimant had to pay a \$35,000 non-refundable franchise fee. *See Employer's Exhibit 2, page 3*. In addition, the claimant was required to pay, *inter alia*, a weekly 10% revenue share fee, a weekly 17.5% "outbound fee", a weekly flat weekly \$500 "system fee", a weekly booking fee, a weekly B2B commission, weekly insurance payments, weekly "Marsh" vehicle insurance payments, and a weekly communication reimbursement fee. *See Claimant's Exhibit B-1; Employer's Exhibit 2*. The claimant additionally leased his shuttle from a leasing company related to the employer and was required to pay a weekly \$169.68 lease payment and to pay all operating and repair costs for the shuttle.

The claimant was required to obtain all of his fares from the employer through its fare booking system. The claimant "bid" on some fares and was assigned some fares. The claimant could accept or decline fares based on the regulated fare assigned to the route. Towards the end of his employment, the claimant often waited for eight hours or more before receiving a single fare from the employer. The claimant accepted all fares that were assigned or offered to him during the course of his employment.

The claimant worked to the best of his ability. Notwithstanding the acceptance of all possible fares, the claimant was unable to generate enough revenue to pay his financial obligations to the employer. There is insufficient evidence that the fare revenues paid the claimant a minimum wage. As a result, on October 22, 2012, the employer sent the claimant a *Notice of Default* letter and give seven days to cure the \$1971,02 outstanding balance due and owing. *See Employer's Exhibit 3*. Because of the lack of adequate business, the claimant was not able to cure the default. As a result, the claimant was discharged on November 2, 2012 for breach of contract. *See Employer's Exhibit 4*. Regarding the performance of his work, the claimant did not violate a workplace rule or engage in a course of wrongful conduct.

CONCLUSIONS OF LAW

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); also see *Johns Hopkins University v. Board of Labor, Licensing and Regulation*, 134 Md. App. 653, 662-63 (2000)(psychiatric condition which prevented claimant from conforming his/her conduct to accepted norms did not except that conduct from the category of misconduct under § 8-1003). 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).

Aggravated misconduct is an amplification of gross misconduct where the claimant engages in "behavior committed with actual malice and deliberate disregard for the property, safety or life of others that...affects the employer, fellow employees, subcontractors, invitees of the employer, members of the public, or the ultimate consumer of the employer's products or services...and consists of either a physical assault or property loss so serious that the penalties of misconduct or gross misconduct are not sufficient."

Discharging a claimant for inefficiency or incompetence is not misconduct. *Cumor v. Computers Communications Group*, 902-BH-87. A mere showing of substandard performance is not sufficient to prove gross misconduct or misconduct. *Todd v. Harkless Construction*, 714-BR-89; *Knight v. Vincent Butler, Esquire*, 585-BR-91. Failing to use good judgment, or an isolated case of ordinary negligence, in the absence of a showing of culpable negligence or deliberate action is disregard of the employer's interests in insufficient to prove misconduct. *Hider v. DLLR*, 115 Md. App. 258, 281 (1997); *Greenwood v. Royal Crown Bottling Company*, 793-BR-88.

Culpable negligence in the performance of one's job can constitute gross misconduct. *See, e.g., Jones v. Allstate Building Supply Company, Inc.*, 700-BR-89(after several expensive accidents, the claimant was on notice to adjust his behavior. The claimant failed to do so and caused another accident. Gross misconduct was supported); *Roberts v. Maryland Medical Lab, Inc.*, 1215-BR-88(when a claimant's work involves critical risks to the life and health of other persons, a higher degree of care is required).

In the instant case, the Board finds insufficient evidence that the claimant's actions constituted a violation of a workplace rule, a course of wrongful conduct or a breach of duty to his employer regarding the performance of his work. The preponderance of the evidence establishes that the claimant worked to the best of his ability and accepted all fares that were made available for him by the employer. Notwithstanding accepting all available work and working with due diligence, the claimant was not able to generate sufficient revenue to pay all the required fees, commissions and expenses related to the performance of the work. As a result, the claimant was not able to pay the employer its fees under the franchise agreement or pay himself a minimum wage.

The Board finds insufficient evidence that the claimant was culpably negligent in his job duties. The evidence supports a finding that the business climate and the dilution of the claimant's share of available fares did not supply him with the requisite revenue to keep his route in profitability. The evidence supports a finding that the claimant's shuttle route's financial condition was not within the claimant's control because the available fares derived from the employer or from the occasional "walk up" fare.

The employer admitted that the claimant and shuttle drivers were discharged for failing to pay the required commissions and fees under the Unit Franchise Agreement and other collateral notes or financing instruments regardless of the reason for the shuttle drivers' failure or inability to pay. The Board finds the claimant's financial obligations to the employer are collateral to the claimant's course of performance of the work in which he was engaged on behalf of the employer. *Arguendo*, even if the claimant's obligations to his employer were connected with the work, the claimant's failure to pay his financial obligations to the employer was not directly or substantially due to the claimant's actions; it was due to a lack of work or available fares. Therefore, the Board concludes that a finding of misconduct cannot be supported.

The Board notes that the hearing examiner, the claimant or the employer did not offer the *Agency Fact Finding Report* for admission 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 did not meet its burden of demonstrating that the claimant's actions rose to the level of misconduct within the meaning of § 8-1003. The hearing examiner's 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 SUPER SHUTTLE INTERNATIONAL

The Hearing Examiner's decision is reversed.



Clayton A. Mitchell, Sr., Associate Member



Eileen M. Rehrmann, Associate Member



Donna Watts-Lamont, Chairperson

VD

Date of hearing: October 08, 2013

Copies mailed to:

DEVALL W. SATTERWHITE
SUPER SHUTTLE INTERNATIONAL
SARAH E. MOONEY ESQ.
CHARLES M. WATKINS ESQ.
Susan Bass, Office of the Assistant Secretary

UNEMPLOYMENT INSURANCE APPEALS DECISION

DEVALL W SATTERWHITE

SSN #

Claimant

vs.

SUPER SHUTTLE INTERNATIONAL
INC #329

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: 1304995
Appellant: Employer
Local Office : 61 / COLLEGE PARK
CLAIM CENTER

April 22, 2013

For the Claimant: PRESENT, NEIL BLAKE, KENNETH HOLMES

For the Employer: PRESENT, SARAHE. MOONEY, ESQ., JACQUELINE HOLLOWAY, CHALRES WATKINS, ESQ.

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 (Devall Satterwhite) filed a claim for benefits establishing a benefit year beginning October 28, 2012. He qualified for a weekly benefit amount of \$430.00.

The Claimant began working for this Employer (Super Shuttle International, Inc.) on July 22, 2008. At the time of separation, the Claimant was working as a Franchisee Holder. The Claimant last worked for the Employer on November 22, 2013 before being terminated for failing to comply with the terms of the contract of employment.

The Claimant entered into a Franchise Agreement with the Employer on July 22, 2008. (Employer's Exhibit 2, pgs. 15 - 16, 23 and 37), wherein the Claimant originally agreed to pay a \$563.00 licensing fee per week to the Employer in consideration of the Employer providing use of its services, communication systems, and the Employer's business name such that the Claimant could earn income. The Employer then made a concession and reduced the Claimant's monthly obligation to \$500.00. In October 2012, the Claimant began to fall behind in his monthly payments to the Employer and accumulated an arrearage. With the week ending October 14, 2012, the Claimant was past due in his payments in the sum of \$1,971.02. The Claimant later had an arrearage in the sum of \$1,780.66 with the week ending October 21, 2012 and with week ending October 28, 2012, the Claimant's final amount owed was \$1,645.14 to the Employer. (Employer's Exhibit 1). On October 22, 2012, the Employer sent the Claimant a letter advising him of his history of arrearages and requesting that he cure the breach of the employment agreement by paying the past due amount. (Employer's Exhibit 3). At said time, the Claimant only owed the \$1,645.14. The Claimant was either unable to or decided not to comply with the Employer's request for payment. On November 2, 2012, the Employer sent the Claimant a letter terminating the Claimant's contract of employment. (Employer's Exhibit 4).

CONCLUSIONS OF LAW

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 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.

The Claimant engaged in gross misconduct by failing to comply with the terms of his employment as agreed. The Claimant agreed to pay the Employer a percentage of what he earned each week pursuant to the term of the Franchise Agreement. On three (3) separate occasions, the Claimant fell behind in his payments and never caught up with the payments owed to the Employer. Even after the Employer contacted the Claimant to request that he cure the default of his failure to pay, the Claimant failed to do so. If the Claimant had gone out of business and had no earnings, my finding would be that he committed simple misconduct. However, based upon the Claimant having had actual earnings for the weeks in questions and failing to pay the percentage that he promised to pay, I can only find that the Claimant's actions demonstrated a gross indifference to the Employer's interests.

I hold that the Claimant's actions showed a deliberate and willful disregard of the standards the Employer had a right to expect, showed a gross indifference to the Employer's interests 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)(i). The Claimant is disqualified from receiving benefits from the week beginning November 18, 2012 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.

L Williamson

L Williamson, 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 May 07, 2013. 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: April 11, 2013
DW/Specialist ID: WCP6E
Seq No: 002
Copies mailed on April 22, 2013 to:
DEVALL W. SATTERWHITE
SUPER SHUTTLE INTERNATIONAL
LOCAL OFFICE #61
SARAH E. MOONEY ESQ.