

**- DECISION -**

Claimant:  
KEITH B DEWHART

Decision No.: 598-BR-14  
Date: March 26, 2014  
Appeal No.: 1332449  
S.S. No.:  
L.O. No.: 64  
Appellant: Claimant

Employer:  
LOADING DOCK INC

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).

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**- 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: April 25, 2014

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**REVIEW OF THE RECORD**

After a review of the record, and after deleting the second paragraph, the Board adopts the hearing examiner's modified findings of fact. The Board makes the following additional findings of fact:

The employer prohibits its workers from accepting any gratuities from customers or clients of the business. The claimant was aware of this and had refused offered tips in the past. The employer believed the claimant had accepted a tip after assisting a client to unload a truck on September 21, 2013. The employer viewed surveillance records and saw the

client slide "something" across the truck bed toward the claimant, which the claimant picked up. The employer concluded the claimant had accepted a tip and discharged him. The claimant requested an opportunity to view the surveillance record, but the employer refused this.

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*. Conclusory statements are insufficient evidence to meet an employer's burden of proof. *Cook v. National Aquarium in Baltimore, 1034-BR-91*. An employer must produce specific evidence of a claimant's alleged misconduct. *Id.*

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). 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 ^D.

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 offers no specific contentions of error as to the findings of fact or the conclusions of law in the hearing examiner's decision. He contends he was discharged due to "unethical practices" and denied benefits based upon "false allegations." The claimant reiterates his testimony from the hearing, argues that he was a good employee for nine years and asserts was treated unfairly. The claimant does not cite specifically to the evidence of record and makes no other contentions of error.

On appeal, the Board reviews the evidence of record from the Lower Appeals hearing. The Board will not order the taking of additional evidence or a new hearing unless there has been clear error, a defect in the record, or a failure of due process. The record is complete. Both parties appeared and testified. Both parties were given the opportunity to cross-examine opposing witnesses and to offer and object to documentary evidence. Both parties were offered closing statements. The necessary elements of due process were observed throughout the hearing. The Board finds no reason to order a new hearing or take additional evidence in this matter. Sufficient evidence exists in the record from which the Board may make its decision.

The Board has thoroughly reviewed the record from the hearing, but disagrees with the hearing examiner's decision. The hearing examiner placed undue reliance on a warning purportedly given to the claimant in March 2012 (see Employer's Exhibit #2). Not only did this ostensibly occur 18 months prior to the claimant's discharge, but there was no evidence the claimant actually received the warning. The employer witness did not give the warning to the claimant and did not present any evidence as to the facts underlying the issuance of that warning. The claimant did not sign the warning and, in fact, denied having received it. The Board does not find this exhibit to have evidentiary weight for the purpose for which it was offered.

The employer's witness testified to what he observed on the surveillance record. He stated he saw "something" slid to the claimant from the client. He testified he did not know what it was, did not confront the claimant, and did not ask the claimant. He presumed it was a gratuity and acted upon that presumption. The claimant credibly testified the client had given him a business card in relation to some of the claimant's off-duty, side jobs. The claimant credibly denied accepting tips, but acknowledged they were offered on occasion.

The claimant's testimony was somewhat confusing as he did not often provide direct answers to the questions posed. However, it was the only first-hand evidence presented concerning what occurred on September 21, 2013. The claimant consistently denied receiving tips from customers and specifically denied accepting any tip on September 21, 2013. The employer chose to not bring a copy of the surveillance record, chose not to allow the claimant to view it, and chose to not confront the claimant with its allegations, or offer the claimant an opportunity to explain what happened. Additionally, the employer could not establish what actually was offered to the claimant.

The employer elected to rely upon its supposition that the claimant had accepted a tip from a client in making its decision to discharge the claimant. Such an action may be within the employer's purview. However, to establish a benefit disqualification, the employer must present competent evidence in support of such a finding. Here, the employer presented only speculation and hearsay. The Board does not find this to be sufficient to support a finding that the claimant was discharged for any degree of 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 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 LOADING DOCK INC.

The Hearing Examiner's decision is reversed.



Donna Watts-Lamont, Chairperson



Clayton A. Mitchell, Sr., Associate Member

KJK

Copies mailed to:

KEITH B. DEWHART  
LOADING DOCK INC

Susan Bass, Office of the Assistant Secretary

**UNEMPLOYMENT INSURANCE APPEALS DECISION**

KEITH B DEWHART

SSN #

**Claimant**

vs.

LOADING DOCK 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: 1332449

Appellant: Claimant

Local Office : 64 / BALTOMETRO  
CALL CENTER

November 26, 2013

**For the Claimant: PRESENT**

**For the Employer: PRESENT, DAVID HOCKADAY**

**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, Keith Dewhart, began working for this employer on April 18, 2004. At the time of separation, the claimant was working as an outside receiver yard associate. The claimant last worked for the employer on September 26, 2013, before being terminated for accepting tips/kickbacks from customers.

The employer issued a verbal warning to the claimant on March 30, 2012 when the claimant accepted a tip after assisting a client load cinder blocks. The employer did not allow the acceptance of tips and the claimant was well aware of the policy. The culminating event occurred on September 21, 2013 when the claimant was again observed accepting a tip/kickback from a customer who he assisted in dumping trash.

The claimant was aware that customers were not allowed to dump trash; however, he did not discourage the customer and in fact assisted him on September 21, 2013. The customer was seen on video surveillance sliding something toward the claimant on the flatbed of his truck. The claimant was then seen removing the item that was slid in his direction. The claimant acknowledged that the customer attempted to provide him with a tip, but he denied accepting the tip.

## 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).

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).

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.

The claimant was terminated for accepting unauthorized tips from customers. The claimant was warned in 2012 and was well aware of the fact that the behavior was prohibited. On September 21, 2013, the claimant was seen on video surveillance accepting something from a customer who he assisted in dumping trash. The claimant did not discourage the customer even though he knew the dumping of trash was not allowed. Additionally, he acknowledged that the customer did offer him a tip and the employer credibly testified that the claimant did accept the tip as seen on surveillance. Upon assessment of the claimant's demeanor as a

**Notice of Right to Petition for Review**

This is a final decision of the Lower Appeals Division. Any party who disagrees with this decision 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 December 11, 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 : November 20,2013

TH/Specialist ID: RBA91

Seq No: 001

Copies mailed on November 26, 2013 to:

KEITH B. DEWHART  
LOADING DOCK INC  
LOCAL OFFICE #64



witness, the content of his testimony and the totality of evidence in this case, it is concluded that the claimant failed to present credible testimony. His actions demonstrate a willful disregard of 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 September 22, 2013 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 affirmed.

*M. Medvetz Esq.*

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M. Medvetz, 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.**