

**- DECISION -**

Claimant:  
WALTER PFAFF

Decision No.: 829-BR-14

Date: April 30, 2014

Appeal No.: 1335762

S.S. No.:

Employer:  
ARS ACQUISITION HOLDINGS LLC

L.O. No.: 63

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.

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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: May 30, 2014

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**REVIEW OF THE RECORD**

After a review of the record, the Board adopts the following findings of fact and conclusions of law and modifies the hearing examiner's decision.

The claimant worked as a full-time service technician for this employer from March 29, 2013 until September 23, 2013.

On May 29, 2013, the employer gave the claimant a written warning for two incidents. There is a Driver Cam installed in the claimant's truck that turns on when the driver breaks

sharply. In the first instance, the Drive Cam was triggered when the claimant braked sharply. In the second incident, the Drive Cam was triggered when he braked sharply and the Drive Cam showed that the claimant was using his cell phone in violation of company policy.

On August 8, 2013, the claimant was given a warning for triggering the Drive Cam while using his cell phone. The event was a repeat offense and the claimant was placed on probation for thirty days.

On September 23, 2013, the claimant was driving and rear ended a vehicle when it stopped suddenly in front of him. The claimant was on his cell phone at the time, in violation of company policy. The claimant was then discharged for continued use of his cell phone, in violation of company policy.

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*.

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."

The Board finds the employer's two first-hand witnesses to be more credible than the claimant. Both of the employer's two first-hand witnesses were credible when they described in detail that they carefully reviewed the videos from the Drive Cam that showed the claimant was using his cell phone in his cab while driving. The claimant had received multiple warnings about his cell phone use. The claimant admitted he was on his cell phone but claimed he was using it for "GPS" purposes. The Board does not

find this statement credible. The claimant had been warned not to use his cell phone for this purpose and that he should purchase a separate GPS unit.

The weight of the credible evidence established that the claimant continued to use his cell phone in violation of company policy. The claimant's behavior demonstrated a willful disregard of the standards that an employer has the right to expect.

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 met its burden of demonstrating that the claimant's actions rose to the level of gross misconduct within the meaning of *Maryland Annotated, Labor & Employment Article, § 8-1002*. The decision shall be reversed for the reasons stated herein and in the hearing examiner's decision.

### 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 September 22, 2013 and until the claimant becomes re-employed, earns at least twenty-five times their weekly benefit amount and thereafter becomes unemployed through no fault of their own.

The Hearing Examiner's decision is reversed.



Eileen M. Rehrmann, Associate Member



Donna Watts-Lamont, Chairperson

VD

Copies mailed to:

WALTER PFAFF

ARS ACQUISITION HOLDINGS LLC

ARS ACQUISITION HOLDINGS LLC

Susan Bass, Office of the Assistant Secretary

**UNEMPLOYMENT INSURANCE APPEALS DECISION**

WALTER PFAFF

SSN #

**Claimant**

vs.

ARS ACQUISITION HOLDINGS LLC

**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: 1335762

Appellant: Employer

Local Office : 63 / CUMBERLAND  
CLAIM CENTER

January 15, 2014

**For the Claimant:** PRESENT

**For the Employer:** PRESENT, DONNA KLAUZA, MARK BARTHOLME, ROBERT CALLAN

**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, Walter Pfaff, began working for this employer, ARS Acquisition Holdings, on March 29, 2013 and his last day worked was September 23, 2013. At the time of his discharge, the claimant worked full-time as a service technician.

The employer terminated the claimant from his position for failure to follow company policy. The employer's vehicles were equipped with a DriveCam, a video camera that turned on when the driver braked sharply. The employer's policy prohibited drivers from using their cell phones when driving. On May 29, 2013, the employer gave the claimant a written warning for two incidents. The first incident occurred on

May 24, 2013, when the DriveCam was triggered by the claimant braking sharply. The claimant did not have an accident, however, the employer alleged the claimant was not looking far enough ahead. The second incident occurred when the claimant braked sharply and the DriveCam was triggered on May 24, 2013. The video showed the claimant was using his cell phone.

On August 8, 2013, the employer gave the claimant a written warning for triggering the DriveCam on August 3, 2013. The employer alleged the claimant was on his cell phone. On September 23, 2013, the claimant was driving and traffic became backed up. The claimant rear ended a vehicle when it stopped suddenly in front of him. The claimant was not given a traffic citation for the incident. The employer alleged the claimant was on his cell phone before he had the accident, and terminated the claimant on September 25, 2013.

## 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).

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).

In Dreher v. Provident Bank of Maryland, 1216-BR-88, the employer failed to prove that the claimant's neglect was accompanied by a gross indifference to the employer's interest or resulted from a regular and wanton disregard of her obligations. The claimant was discharged for misconduct.

## EVALUATION OF EVIDENCE

The employer had the burden to show, by a preponderance of the credible evidence, the claimant's termination was for conduct which rose to the level of misconduct or gross misconduct, pursuant to the Maryland Unemployment Insurance Law. (See Hartman v. Polystyrene Products Company, Inc., 164-BH-83). In the case at bar, the employer met this burden.

The employer provided testimony and documentation that the claimant had triggered the DriveCam on numerous occasions. The employer alleged the claimant was on his cell phone in three of the incidents. The claimant admitted using his cell phone in one instance, and denied he used his cell phone while he was driving after he had been warned. The employer alleged the claimant was on his cell phone when he rear ended a vehicle in the final incident. The claimant denied he was using his cell phone, and testified he was

not given a traffic citation for the accident. The credible evidence shows the claimant was using his cell phone in one instance in violation of policy, and this constitutes misconduct. The employer has failed to show that the claimant used his cell phone while driving after he had been warned, and has not shown the claimant had a regular and wanton disregard of his obligations. Therefore a finding of gross misconduct is not warranted. Accordingly, I hold the employer met its burden in this case and the claimant's discharge was for misconduct, warranting the imposition of a weekly penalty.

### DECISION

IT IS 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 September 22, 2013 and for the 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](mailto: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.



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E K Stosur, 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**

This is a final decision of the Lower Appeals Division. Any party who disagrees with this decision 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 January 30, 2014. 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 06,2014  
TH/Specialist ID: WCU22  
Seq No: 001  
Copies mailed on January 15, 2014 to:

WALTER PFAFF  
ARS ACQUISITION HOLDINGS LLC  
LOCAL OFFICE #63  
ARS ACQUISITION HOLDINGS LLC