

- DECISION -

Claimant:
ROD S GALDO

Decision No.: 4368-BR-12

Date: November 16, 2012

Appeal No.: 1213670

Employer:
MATTRESS WAREHOUSE INC

S.S. No.:

L.O. No.: 65

Appellant: Claimant

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: December 17, 2012

REVIEW OF THE RECORD

After a review of the record, the Board adopts the hearing examiner's findings of fact. However 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.

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 his appeal, the claimant contends what he did, in terms of reporting his commission, was consistent with what other employees did and what management allowed. He also contends he has others who will, if subpoenaed, testify that the claimant's actions were consistent with the employer's regular practices.

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 claimant's opportunity to have his witnesses subpoenaed to testify was at this prior hearing. The Board finds there is sufficient evidence in the record from which a decision may be made. The Board finds no reason to order a new hearing or take additional evidence in this matter.

The Board notes that, even if the Board were not reversing the hearing examiner's decision in this matter in the claimant's favor, the Board would not grant another hearing for the reasons stated in the claimant's appeal.

The evidence showed that the claimant was discharged for reporting 2% greater commission than that to which he was entitled on one sale. The evidence established that the report, showing this commission, was sent to the employer's accounting office without the claimant having reviewed it. The claimant was responsible for reviewing these reports prior to their submission. The hearing examiner found the combination of these two factors sufficient to support a finding of misconduct. The Board disagrees.

First, the Board finds the claimant reasonably and honestly believed he was entitled to claim the additional 2% commission on the sale in question. Second, based upon that belief, even if he had reviewed the commission report prior to its submission, he would have had no reason to make any changes. The Board does not consider the claimant's actions in this matter to have been indicative of misconduct; rather the claimant acted on a reasonable, but mistaken, belief that what he did was correct. Such a mistake is not a disqualifying reason for a discharge.

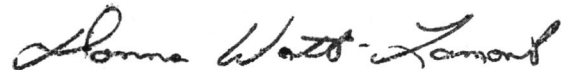
The Board notes that the hearing examiner did not offer or admit the *Agency Fact Finding Report* into evidence. The Board did not consider this document when rendering its decision.

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 MATTRESS WAREHOUSE INC.

The hearing examiner's decision is Reversed.



Donna Watts-Lamont, Chairperson



Clayton A. Mitchell, Sr., Associate Member

TBW

Copies mailed to:

ROD S. GALDO

MATTRESS WAREHOUSE INC

Susan Bass, Office of the Assistant Secretary

UNEMPLOYMENT INSURANCE APPEALS DECISION

ROD S GALDO

SSN #

Claimant

vs.

MATTRESS WAREHOUSE 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: 1213670

Appellant: Employer

Local Office : 65 / SALISBURY

CLAIM CENTER

May 22, 2012

For the Claimant: PRESENT

For the Employer: PRESENT , TAREK ELSHAFFEY, SPARTA S. TRUMAN

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, Rod S Galdo, worked for this employer, Mattress Warehouse Inc, for approximately two years, and his last day worked was February 25, 2012. At the time of his discharge, the claimant worked full-time as a store manager.

The claimant was terminated for allegedly reporting commissions that he was not entitled to according to the employer's policies. The incidents in question occurred on February 5, 2012 when the claimant (the store manager) and one other associate were on duty at one of the employer's stores. On this day, the store had a total of two (2) sales. One of the sales made by the claimant was to an individual whom he had a personal relationship with outside of his employment with this employer as documented in Order #463126.

According to the employer's "Personal Trade" policy, this sale was solely attributable to the claimant and for which he was entitled to claim the total sale commissions. The other sale, was also attributed solely to the claimant however, in that instance, the employer determined that the claimant had reported an extra percentage of commission (2%) to which he was not entitled (Order #463118).

This employer utilizes an "UP System" of commissions whereby each employee in a store takes a turn to assist a customer as they walk into the store. If that employee is unable to make a sale, and another employee makes the sale, both employees split the total commission on the sale. An exception to this rule is the employer's "Personal Trade" policy.

This employer periodically has company wide promotions wherein employees are offered an additional percentage on particular models of mattresses. Those promotions are normally for limited models and brands and are company wide. As a general matter, there is no additional commission for any particular brand or model of mattress offered to employees with the exception of the aforementioned company wide promotions.

In August 2011, the claimant was counseled regarding the reporting and claiming of commissions. The employer detected certain additional amounts that had been claimed by the claimant to which he was not entitled. The claimant was made aware of his obligation to accurately report any commissions claimed by him.

The paperwork for the two sales on February 5, 2012 was prepared by the other associate working with the claimant on the following day. When the associate faxed the paperwork in to the central office, he did not attribute any commission to himself for either sale on February 5, 2012. As store manager, the claimant was responsible for reviewing any ledger or commission log faxed to the central office, and making any necessary corrections.

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)].

The Board of Appeals has consistently held, unless a request is illegal, unethical or ambiguous, (See Hatfield v. Tri-State Oil, 390-BR-82, Leon v. Southern States Cooperative, 885-BR-83, and Walker v. Domino's Pizza of Maryland, Inc., 200-BH-87, respectively) a claimant's failure to follow an employer's reasonable instruction(s) constitutes misconduct. [See Gray v. Valley Animal Hospital, Inc., 224-BR-90, "A violation of the (employer's reasonable) procedures requires an explicit authorization. The claimant's failure to get such authorization amounts to misconduct."]. Depending on the importance of the policy or instruction involved and the number of times the claimant violated the subject policy, failure to act in accordance with the employer's instruction(s) can constitute gross misconduct. (See Dunavent v. Federal Armored Express, Inc., 949-BR-85).

EVALUATION OF THE EVIDENCE

The employer had the burden to show, by a preponderance of the credible evidence, the claimant's separation from employment 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.

In the case at bar, the claimant failed to follow the employer's reasonable instruction(s) regarding the reporting of commissions on one of the sales on February 25, 2012. The claimant had previously been counseled on the reporting of commissions and as a store manager, was responsible for reviewing, verifying and correcting any commission reports submitted to the central office. The claimant admitted that he paid himself an additional 2% for the sale on Order 463118. The employer's witnesses, both regional managers, denied that any employee was entitled to a 2% additional commission on any model or brand of mattress during the time period in question, or that the claimant was ever advised as such. Therefore, although the claimant successfully argued that one of the sales was a personal trade sale, allowing him to claim the full commission, the claimant still violated a reasonable employer policy, when he claimed an additional 2% commission without authorization to do so. Although the claimant testified that the other associate submitted the ledger and commission logs for the sales on the day in question, as the store manager, the claimant was responsible for reviewing and correcting any commission logs submitted to the employer and his failure to do so supports a finding of simple misconduct

Accordingly, the employer met its burden in this case and the claimant's discharge was for failure to follow an employer's reasonable instruction and policy regarding the reporting of commissions, constituting simple misconduct, warranting only 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 February 19, 2012 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.

V. Nunez

V. Nunez, 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 June 06, 2012. 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 : May 11,2012
CH/Specialist ID: USB7X
Seq No: 001
Copies mailed on May 22, 2012 to:
ROD S. GALDO
MATTRESS WAREHOUSE INC
LOCAL OFFICE #65