Maryland
Department of Economic & Employment Development

William Donald Schaefer, Governor
Mark L. Wasserman, Secretary

Board of Appeals
1100 North Eutaw Street
Baltimore, Maryland 21201

Telephone: (410) 333-5032

— DECISION —

Decision No.: 118-BR-93

Date: January 22, 1993

Claimant: Julia Hamby

Appeal No.: 9219262

S. S. No.:

Employer: Seth H. Lourie, et al.
ATTN: Barbara Taylor

L. O. No.: 23

Appellant: CLAIMANT

Issue: Whether the claimant was discharged for gross misconduct or misconduct, connected with the work within the meaning of §8-1002 or 8-1003 of the Labor and Employment Article.

— NOTICE OF RIGHT OF APPEAL TO COURT —

YOU MAY FILE AN APPEAL FROM THIS DECISION IN ACCORDANCE WITH THE LAWS OF MARYLAND. THE APPEAL MAY BE TAKEN IN PERSON OR THROUGH AN ATTORNEY IN THE CIRCUIT COURT OF BALTIMORE CITY, IF YOU RESIDE IN BALTIMORE CITY, OR THE CIRCUIT COURT OF THE COUNTY IN MARYLAND IN WHICH YOU RESIDE.

THE PERIOD FOR FILING AN APPEAL EXPIRES February 21, 1993

— APPEARANCES —

FOR THE CLAIMANT:

FOR THE EMPLOYER:

REVIEW ON THE RECORD

Upon review of the record in this case, the Board of Appeals reverses the decision of the Hearing Examiner.

The Board does not agree that the claimant in this case falsified her credentials or led her employer to believe that she had skills which she did not possess. The claimant, while applying for a job as a lab technician, told her employer at the interview that she had drawn blood before, and had done microscopic examination of urine samples. She gave the employer two references from places where she had done this work. The claimant had, in fact, done these procedures before in the course of her employment.

The level of the claimant's skill, however, was much less than the employer expected. In five days, the employer was satisfied that the claimant could, in fact, draw blood, but she could not do it without hurting the elderly patients. She was not able to properly identify abnormal cells under the microscope. The microscope, however, was a difficult one to adjust to. The employer concluded that it would take an intensive training program before the claimant could be trusted alone, and that the best course would be to discharge her right away.

The employer has not proven any misconduct. The claimant made no false statement on her application, and no specific false statements on her interview. The fact that the claimant exuded confidence that she could do these things comfortably, when in fact she became nervous when faced with the actual tasks, is not sufficient proof of a false statement.

The fact that she did not adjust to the employer's "difficult" microscope in five days does not show that she was falsifying her abilities in this regard. The claimant obviously interviewed well and made the most of her minimal experience. But she made no false statements of fact, and no misconduct has been shown.

DECISION

The claimant was discharged, but not for any misconduct, connected with the work, within the meaning of §8-1003 of the Labor and Employment Article. No disqualification is imposed based upon her separation from employment with Seth H. Lourie, et al.

The decision of the Hearing Examiner is reversed.

Thomas W. Keech
Chairman

Associate Member

K:HW
kbm
COPIES MAILED TO:

CLAIMANT

EMPLOYER

UNEMPLOYMENT INSURANCE - COLUMBIA

Maryland
Department of Economic & Employment Development

William Donald Schaefer, Governor
Mark L. Wasserman, Secretary

Gary W. Wiedel, Administrator
Louis Wm. Steinwedel, Chief Hearing Examiner

Room 501
1100 North Eutaw Street
Baltimore, Maryland 21201

Telephone: (410) 333-5040

—DECISION—

Date: Mailed: 11/18/92

Claimant: Julia L. Hamby

Appeal No.: 9219262

S. S. No.:

Employer: Seth H. Lourie, et al.

L. O. No.: 023

Appellant: EMPLOYER

Issue: Whether the claimant was discharged for misconduct connected with the work, within the meaning of Section 1003.
Whether there is good cause to reopen this dismissed case, within the meaning of COMAR 24.02.06.02(N).

— NOTICE OF RIGHT OF FURTHER APPEAL —

ANY INTERESTED PARTY TO THIS DECISION MAY REQUEST A FURTHER APPEAL AND SUCH APPEAL MAY BE FILED IN ANY OFFICE OF THE DEPARTMENT OF ECONOMIC AND EMPLOYMENT DEVELOPMENT, OR WITH THE BOARD OF APPEALS, ROOM 515, 1100 NORTH EUTAW STREET, BALTIMORE, MARYLAND 21201, EITHER IN PERSON OR BY MAIL.

THE PERIOD FOR FILING A FURTHER APPEAL EXPIRES ON December 3, 1992

NOTICE: APPEALS FILED BY MAIL, INCLUDING SELF-METERED MAIL, ARE CONSIDERED FILED ON THE DATE OF THE U.S. POSTAL SERVICE POSTMARK.

—APPEARANCES—

FOR THE CLAIMANT: Claimant/Not Present

FOR THE EMPLOYER: Barbara Taylor, Office Manager

FINDINGS OF FACT

This case was previously scheduled for October 13, 1992 at 11:30 a.m. before Hearing Examiner, Marsha Thompson. At that time, the appellant/employer failed to appear and the Hearing Examiner

dismissed the case. The employer presents as a reason for its failure to appear that on October 9, 1992, Ms. Taylor from the employer's office called the appeals division and spoke with Ms. Wright. The employer was inquiring whether she should appear at the hearing because she had written a letter explaining the reason for the claimant's discharge. She was told by Ms. Wright that the employer did not have to appear and the letter would be used as exhibit #1. Relying on this information, the employer did not attend the hearing.

The claimant was employed between May 13, 1992 and May 19, 1992 as a medical assistant/lab technician earning $8.25 per hour. The claimant was separated through discharge. During the interview between the claimant and the employer, the employer stressed that the claimant must be able to draw blood well. The employer is in the practice of rheumatology and as such has many elderly patients. Elderly people tend to have small veins which are not easily located. Because of this it is difficult to draw blood. The claimant advised the employer that she was well experienced in drawing blood and that would be no problem. In addition, it was also stressed to the claimant that she would be responsible for performing urinalysis. She would be responsible for finding abnormal cells through the microscope. The claimant told the employer that her father was a uroligist and that she had not problem with this task because she did it at his office. The employer checked the claimant's references and was told that the claimant could perform these two tasks. The employer was looking for an employee who could work independently in a satellite office. The employer would not have any instruction or supervision and the employer sought someone who was qualified and experienced in this field.

Immediately upon the claimant's beginning work, the employer noticed that the claimant nervous. The claimant acted as if she was in a new atmosphere and as if nothing was familiar. The employer thought that this was first day on the job nervousness and dismissed it. However, the employer received complaints from patients who had been hurt by the claimant when the claimant drew their blood. The employer discussed this with the claimant and told the claimant that she would need to improve her skills. However, the claimant did not appear to catching on. The employer felt that if the claimant had performed the work to the level she stated during her interview, that after refreshing her skills, the claimant would have no problem. However this did not turn out to be the case. The claimant, while trying to learn the skills, appeared that she would be able to learn the job but it would take too long. As the employer has specifically interviewed the claimant for a position requiring experience, the employer felt

that the claimant had misrepresented her level of ability and let her go. The claimant led the employer to believe that she had skills which she did not possess or that the level of her skills was superior to that of what she actually possessed.

CONCLUSIONS OF LAW

A request for the reopening of a dismissed case may be granted if a party received the hearing notice on or after the date of the hearing as a result of an untimely or incorrect mailing of the hearing notice by the appeals division or a delay in delivery of the hearing notice by the United States Postal Service. If an emergency or other unforeseen and unavoidable circumstance prevents the party from attending the hearing and requesting postponement of the hearing, good cause exist reopening of a dismissed case. Misreading of a properly prepared hearing notice as to the date, time, and place of the hearing is not good cause for reopening a dismissed.

In the instant case, the appellant/employer does not have any of these reasons set forth. However, the employer contacted the appeals division and a representative of the appeals division told the employer it was not necessary for her to attend the hearing but that a letter would be submitted as an exhibit. This is incorrect information. The claimant relied on this information and therefore did not appear at the hearing.

The Code of Maryland, Labor and Employment Article, Title 8, Section 1002 (a)(1)(i) provides that an individual shall be disqualified from benefits where he/she is discharged from employment because of behavior which demonstrates a deliberate and willful disregard of standards which the employer has a right to expect. The preponderance of the credible evidence in the instant case will support a conclusion that the claimant was discharged for actions which meet this standard of the Law.

In a case involving misconduct or gross misconduct, it is the employer's burden to prove by a preponderance of the evidence that the claimant committed the misconduct or gross misconduct alleged. In the instant case, the employer has satisfactorily met its burden. The claimant was not present and did not offer any testimony regarding her separation from employment. The employer's uncontradicted, sworn testimony is that the claimant was very confident during her interview and led the employer to believe that she had skills which she did not possess. This represents a deliberate and willful disregard of standards which the employer had the right to expect and therefore, constitutes gross misconduct. In the health care industry, when an employer

hires a person with the understanding that they are able to draw blood, the employer should be able to perform that task. The evidence presented at the hearing demonstrates that the claimant was unable to perform the task without hurting patients. The claimant's deliberate misrepresentation constitutes gross misconduct.

DECISION

It is held that good cause exists for the reopening of the dismissed case as provided in COMAR 24.02.06.020(N).

It is further held that the claimant was discharged for gross misconduct connected with the work, within the meaning of the Code of Maryland, Labor and Employment Article, Title 8, Section 1002. She is disqualified from receiving benefits from the week beginning May 17, 1992 and until she becomes re-employed, earns at least ten times her weekly benefit amount ($1,340.00) in covered employment and thereafter becomes unemployed through no fault of her own.

The determination of the Claims Examiner is reversed.

Katherine Holmes-KE
Katherine Holmes
Hearing Examiner

Date of Hearing: 11/10/92
ke/Specialist ID: 23380
(Cassette Attached to File)

Copies mailed on 11/18/92 to:

Claimant
Employer
Unemployment Insurance - Columbia (MABS)