

- CORRECTED DECISION -

Claimant:
TAMISHA M BAKHSH

Decision No.: 1322-BR-11

Date: March 22, 2011

Appeal No.: 1013611

S.S. No.:

Employer:
BALTIMORE WASHINGTON MEDICAL

L.O. No.: 64

Appellant: Employer

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: April 21, 2011

REVIEW ON THE RECORD

After a review on the record, the Board adopts the hearing examiner's findings of fact. The Board makes the following additional findings of fact and reverses the hearing examiner's decision.

The claimant suffered from serious medical issues whereby she was prescribed several medications with severe side effects which included drowsiness, fatigue and lethargy.

Because of the claimant's illness, she was initially on an intermittent leave of absence under the Family Medical Leave Act (FMLA). In November, 2009 the claimant's FMLA was extended to full time leave through January 11, 2010. The claimant returned to work on January 11, 2010.

On January 13, 2010, the claimant fell asleep in her car during her lunch break. She was to return after 45 minutes but returned an hour and a half later. The claimant was given a written warning for this occurrence. (*Employer's Exhibit 2*)

On January 20, 2010, the claimant was given a written warning regarding exceeding her absences exclusive of her FMLA leave. The claimant was warned that any occurrences prior to April 3, 2010 would result in termination. (*Employer's Exhibit 3*).

The claimant was discovered by her supervisor asleep at a computer desk during her work hours. Her supervisor did not write her up for this occasion, but gave her a verbal warning.

A week prior to claimant's discharge, the claimant called her supervisor because of illness. Knowing that if the claimant had another absence she would be terminated, the supervisor, instead, gave the claimant a vacation day.

On the claimant's last day of work, March 1, 2010, the claimant was running personal errands. She arrived back to work from her lunch break approximately 45 minutes late. The claimant was discharged for arriving late from her break late.

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(H)(1)*. The Board fully inquires into the facts of each particular case. *COMAR 09.32.06.02(E)*.

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 failure to follow workplace rules or procedures can constitute gross misconduct. *See, e.g. Kidwell v. Mid-Atlantic Hambro, Inc., 119-BH-86; Ullman v. Anne Arundel County Public Schools, 498-BR-93.* Attendance violations may constitute gross misconduct. An employer has the right to insist that its employees report to work on time, adhere to a specified schedule and leave only when that schedule has been completed. An employee's decision to follow a come-and-go-as-I-please philosophy could clearly disrupt the orderly operation of the workplace. *Dept. of Econ. Dev. v. Propper, 108 Md. App. 595 (1996).*

Persistent and chronic absenteeism, where the absences are without notice or excuse and continue in the face of warning constitutes gross misconduct. *Watkins v. Empl. Security Admin., 266 Md. 223 (1972).* The failure to report or call into work without notice may constitute gross misconduct. *Hardin v. Broadway Services, Inc. 146-BR-89.* Employees who miss a lot of time from work, even for excused reasons, have a heightened duty not to miss additional time for unexcused reasons and to conform with the employer's notice requirements. *Daley v. Vaccaro's Inc., 1432-BR-93.*

A specific warning regarding termination is not required and a reasonable person should realize that such conduct leads to discharge. *Freyman v. Laurel Toyota, 608-BR-87.* A violation of an employer's attendance policy is not misconduct per se where that policy does not distinguish between absences which occurred because of legitimate medical reasons and absences for which there was no reasonable excuse. Where an employee has been absent for a day of scheduled work, the burden of proof shifts to the employee to explain the reason for the absence. *Leonard v. St. Agnes Hospital, 62-BR-86.*

Absenteeism due to illness is not misconduct. *DuBois v. Redden and Rizk, P.A., 71-BH-90.* (The claimant was absent from work and on maternity leave. Due to unexpected medical complications, the claimant was not able to return to work as early as anticipated. The claimant kept her employer informed of her medical condition. The employer could not hold the claimant's job until she could be able to return to work).

However, absenteeism not totally attributable to illness can be misconduct or gross misconduct. *Schools v. AMI-Sub of Prince George's County, 932-BR-90.* (The claimant had an excessive number of incidents of tardiness. During his last month of employment, his lateness was due entirely to a documented medical condition. The earlier incidents were due to transportation problems. The discharge was for misconduct); *Johnson v. United States Postal Service, 66-BR-91*(The claimant missed 11 of the last 34 days of work. The claimant had been injured and her assignments were adjusted within her capabilities. The amount of absenteeism was not justified by her injury. She had been counseled about the importance of avoiding absenteeism. The discharge was for gross misconduct). Even though a claimant's last absence was with good reason, a finding of gross misconduct is supported where the claimant was discharged for a long record of absenteeism without valid excuse or notice, which persisted after warnings. *Hamel v. Coldwater Seafood Corporation, 1227-BR-93.*

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 claimant was discharged for excessive tardiness and absenteeism. Although the claimant's tardiness and absenteeism were related to her medical condition, the claimant's final occurrence on March 1, 2010 was not related to her illness; nor was it related to the side effects from her prescription medication. The claimant failed to return timely from her lunch break because she ran into traffic after having run personal errands.

The employer was accommodating towards the claimant regarding her medical condition. The claimant should have been more diligent in her actions during her lunch break – she should have given her employer the same consideration that they had given her regarding her medical condition.

Given the claimant's absences from employment due to illness, she had a heightened duty to be present at work as scheduled on those occasions when she was not ill. *See Daley v. Vaccaro's, Inc., 1432-BR-93.*

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 § 8-1002. The decision shall be reversed for the reasons stated herein.

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 February 28, 2010 and until the claimant becomes re-employed, earns at least twenty times her weekly benefit amount and there after becomes unemployed through no fault of her own.

The Hearing Examiner's decision is reversed.



Donna Watts-Lamont, Chairperson



Clayton A. Mitchell, Sr., Associate Member

RD/mr

Copies mailed to:

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BALTIMORE WASHINGTON MEDICAL
T. BRUCE GODFREY ESQ.
Susan Bass, Office of the Assistant Secretary

UNEMPLOYMENT INSURANCE APPEALS DECISION

TAMISHA M BAKHSH

SSN #

Claimant

vs.

BALTIMORE WASHINGTON MEDICAL

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: 1013611
Appellant: Claimant
Local Office : 64 / BALTOMETRO
CALL CENTER

August 4, 2010

For the Claimant: PRESENT, HEATHER ROGERS, MR. GODFREY, ESQ.

For the Employer: PRESENT , KEITH PERON, TIM MARGENTHLER

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).

PREAMBLE

The initial hearing for this appeal occurred on April 19, 2010. The hearing was continued for claimant to complete her testimony, give employer opportunity to cross exam claimant, and for the parties to make their final statements. The second hearing took place and was completed on July 6, 2010.

FINDINGS OF FACT

The claimant began working for this employer on or about December 13, 2003. At the time of separation, the claimant was working as a full time nuclear medicine assistant. The claimant last worked for the

employer on or about March 1, 2010 before being terminated under the following circumstances:

In October 2009, claimant started a leave of absence under the Family Medical Leave Act (FMLA) for a serious illness which was later diagnosed as depression. At first claimant's absences were intermittent, approximately 2 to 3 days a week, but in November 2009 the claimant left work completely for the remainder of her leave of absence. During that time claimant was under a doctor's care.

The claimant was released by her doctor to return to work on January 11, 2010. Claimant provided medical documentation signed by her physician that even though she had been cleared to return to work, claimant remained on a number of medications that caused fatigue and lethargy.

On January 13, 2010, claimant was 45 minutes late returning from lunch and was found sleeping in her car. On January 20, 2010, claimant received a written warning from employer for 7 absences from January 13 to 20, 2010. On February 25, 2010, claimant was found sleeping on the job in front of patients. Claimant received a verbal warning for the incident.

On March 1, 2010, claimant was 45 minutes late returning from lunch. Claimant was terminated due to the prior incidents and her tardiness on March 1st.

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).

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 not been met.

Claimant's violations of employer's policies and standards were not deliberate or willful, but due to the side effects of her medication. The claimant did not engage in misconduct.

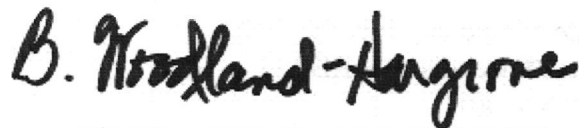
I hold that the claimant did not commit a transgression of some established rule or policy of the employer, a

forbidden act, a dereliction of duty, or engage in a course of wrongful conduct within the scope of the claimant's employment relationship, during hours of employment, or on the employer's premises. No unemployment disqualification shall be imposed based on Md. Code, Ann., Labor & Emp. Article, Section 8-1003 pursuant to this separation from this employment.

DECISION

IT IS HELD THAT the claimant was discharged, but not for misconduct connected with the work within the meaning of Md. Code Ann., Labor & Emp. Article, Section 8-1003. No disqualification is imposed based upon the claimant's separation from employment with the above-identified employer. The claimant is 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.



B H Woodland-Hargrove, 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 to Petition for Review

Any party 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 August 19, 2010. 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: July 06, 2010
DAH/Specialist ID: RBA11
Seq No: 001
Copies mailed on August 4, 2010 to:
TAMISHA M. BAKHSH
BALTIMORE WASHINGTON MEDICAL
LOCAL OFFICE #64
T. BRUCE GODFREY ESQ.