

- DECISION -

Claimant:
ANGELA M MORFE

Decision No.: 1555-BR-11

Date: March 23, 2011

Appeal No.: 0928356

Employer:
ST JOSEPH MEDICAL CENTER INC

S.S. No.:

L.O. No.: 60

Appellant: Claimant

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 22, 2011

REVIEW ON THE RECORD

After a review on the record, the Board modifies the hearing examiner's findings of fact by deleting "or about" from the first and third sentences of the first paragraph, and from the first sentence of the fourth paragraph. The Board deletes the third paragraph and the last sentence of the fourth paragraph. The Board makes the following additional findings of fact:

On February 12, 2009, the employer gave the claimant a final written warning for several performance problems, including improper delivery of medication, an inappropriate use of the internet and the use of unacceptable language in the workplace. (Employer's Exhibit

#2) The claimant had denied, or explained, each of these allegations to the employer at the time of the warning. The claimant followed the directions of her supervising pharmacist with respect to the preparation and delivery of medications. Some medication was not properly stored on February 6, 2009, because the claimant was not aware of it as another technician had actually prepared the medication. One of the supervisors had taken offense to technicians referring to a co-worker, named Richard, as "Dick". There was other, mild profanity routinely used within the work-place by the claimant and other employees.

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(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). 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).

The Board finds that the hearing examiner improperly relied upon vague, speculative testimony, some of which was based upon hearsay, in making his decision in this matter. The employer did not establish, conclusively, that the claimant had used the internet during her work hours to access information about another employee. The employer accused the claimant of this, and of spreading gossip about this employee, but could provide no specifics of the time of day the claimant was supposed to have been using the internet. Similarly, the employer testified that it "appeared" it was the claimant who had sent the IV medication via "tube", on June 13 and 14, 2009, because of the timing of the tube records and the claimant's work shift. No one had observed the claimant do this and the claimant credibly denied this action.

In her appeal, the claimant contends that, if the employer had a specific policy prohibiting certain actions, the employer should have provided those policies to the hearing examiner. The Board agrees. The employer offered only a "checklist" from an orientation which does not establish the content of any particular policy. That document (Employer's Exhibit #1) simply demonstrates that the claimant attended an orientation.

A thorough review of the testimony of all witnesses does not support the hearing examiner's conclusion that the employer has met its burden of proof in this matter. The claimant presented credible and consistent testimony that she followed the procedures of which she was aware and that she complied with the directions of her supervising pharmacists. The evidence, taken as a whole, does not support a finding that the claimant was discharged for misconduct connected with the work.

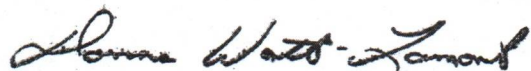
The Board notes that the hearing examiner did not offer or admit the *Agency Fact Finding Report* into evidence. The Board did not consider this document when rendering its decision.

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 ST. JOSEPH MEDICAL CENTER, INC.

The Hearing Examiner's decision is reversed.



Donna Watts-Lamont, Chairperson



Clayton A. Mitchell, Sr., Associate Member

RD/mw

Copies mailed to:

ANGELA M. MORFE
ST JOSEPH MEDICAL CENTER INC
ST JOSEPH MEDICAL CENTER INC
L. PAUL SNYDER
Susan Bass, Office of the Assistant Secretary

UNEMPLOYMENT INSURANCE REMAND APPEALS DECISION

ANGELA M MORFE

SSN #

Claimant

vs.

ST JOSEPH MEDICAL CENTER 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: 0928356

Appellant: Employer

Local Office : 60 / TOWSON CALL
CENTER

August 3, 2010

For the Claimant: PRESENT

For the Employer: PRESENT, CYNTHIA HALLEGEN, BARBARA BARTELS

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).

PREAMBLE

In accordance with the Board of Appeals Remand Order issued on June 4, 2010, Hearing Examiner Adam Zimmerman has reviewed the record and is issuing the following decision based on his findings.

FINDINGS OF FACT

The claimant began working for this employer on or about May 9, 2005. At the time of separation, the claimant was working as a Pharmacy Technician, earning \$15.00 per hour. The claimant last worked for the employer on or about June 25, 2009, before being terminated for violating the employer's policies and procedures.

At the beginning of the claimant's employment, the employer provided the claimant an employee

handbook, which included the standards of conduct, and the Department's policies and procedures. The Department's policy provides that IV medication is to be delivered personally to each patient care unit and to be properly stored. The employer's policy prohibits profanity in the workplace. The use of the internet for personal reasons is not allowed except on personal time. The employer's progressive discipline procedures follow through verbal warning, written warning, final warning, and then termination. The employee handbook provides that the employer may accelerate the disciplinary process based on the severity of the offenses/infractions.

On February 12, 2009, the employer issued the claimant a final written warning for: (1) failing to deliver medication in accordance with procedure on February 6, 2009; (2) failing to follow a pharmacist's directions; (3) violation of standards of conduct relating to use of profanity in the department; and (4) inappropriate use of the internet at work on February 10, 2009. On February 6, 2009, the claimant pulled medication for delivery to the operating room but failed to deliver or properly store the medication. The claimant's failure to properly store the medication resulted in a loss to the employer in excess of \$1,000.00. The claimant's explanation was that another technician prepared the medication, and that if she had realized the medication was not refrigerated, she would have put it away. The claimant had failed to follow instructions on numerous occasions stating that she felt the procedures did not apply to her. The claimant's explanation was that she routinely followed the instructions of the pharmacist. The employer had previously counseled the claimant and other staff about use of profanity and conducting inappropriate conversations in the workplace. The claimant's explanation regarding use of profanity was that she called her colleague Richard by the nickname "Dick" and otherwise did not use profanity. The claimant used the computer to search criminal history of a co-worker and herself during non-break, working work hours. The claimant's explanation about her computer use was that she only used the internet for personal reasons during her breaks.

On or about June 15, 2009, Cynthia Hall, Pharmacy Manager, received a complaint regarding the claimant's improper delivery of medication on June 13 and 14, 2009. The claimant sent IV medication that was to be personally delivered via "tube" instead. Ms. Hall investigated the "tube" records and found that the claimant made the delivery via tube rather than in person. Ms. Hall reviewed the claimant's record, consulted with Human Resources ("HR"), and then made the decision to terminate the claimant's employment because of the policy violation. On June 25, 2009, the claimant was asked to go to HR with Ms. Hall to discuss the incident. The claimant's explanation was that she had sent IV medication to the designated locations in a similar fashion other times and that she was not told to not use the "tube" for IV medication.

CONCLUSIONS OF LAW

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 not been met.

The employer credibly testified that the claimant repeatedly violated the employer's policies. Specifically, the claimant violated the employer's internet policy, profanity in the workplace policy, and medication distribution procedures. The claimant knew or should have known the employer's policies. The employer warned the claimant about her policy violations but her behavior persisted. Upon assessment of the claimant's demeanor as a witness, the content of her testimony, and the totality of the evidence in this case, it is concluded that the claimant's testimony is not credible. Therefore, the claimant's behavior rises to the level of gross misconduct.

I hold that the claimant's showed a regular and wanton disregard of her obligations to the employer 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 employ

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)(ii). The claimant is disqualified from receiving benefits from the week beginning June 21, 2009, and until the claimant becomes reemployed and earns wages in covered employment that equals at least 20 times the claimant's weekly benefit amount.

The determination of the Claims Specialist is reversed.

A C Zimmerman

A C Zimmerman, 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 August 18, 2009. 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: October 14, 2009

BLP/Specialist ID: UTW2V

Seq No: 001

Copies mailed on August 2, 2009 to:

ANGELA M. MORFE
ST JOSEPH MEDICAL CENTER INC
LOCAL OFFICE #60