

**- DECISION -**

Claimant:  
KAREN A BURNETT

Decision No.: 1755-BR-13

Date: April 29, 2013

Appeal No.: 1240011

S.S. No.:

Employer:  
GREATER BALTIMORE MEDICAL CTR

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).

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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 29, 2013

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**REVIEW OF THE RECORD**

After a review of the record the Board adopts the hearing examiner's findings of fact. The Board makes the following additional findings of fact:

The claimant had requested a change in her starting time, shortly before she was discharged, but this was never approved. The claimant was late on several occasions because she felt it was better to report late than not at all. The claimant was trying to work through her treatment for stress and bi-polar disorder instead of taking additional time away from her work.

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.

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 her appeal, the claimant reiterates her testimony from the hearing. The claimant also expresses a financial need for unemployment benefits and emphasizes the quality of her work performance. The Board notes that neither a financial need, nor historical work performance, are considerations in determining whether a claimant is qualified to receive benefits.

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 Board finds no reason to order a new hearing or take additional evidence in this matter.

The Board has thoroughly reviewed the record from the hearing. The Board does not find the claimant actions rose to the level necessary to support a finding of gross misconduct. The claimant's tardiness was the result of circumstances beyond her reasonable control. Just as a discharge solely for absences due to illness is not a disqualifying discharge, a discharge solely for tardiness due to illness is not a disqualifying discharge. The claimant established that she was late to work because of the problems she was having during her treatment for her recently-diagnosed bi-polar disorder. The claimant was trying to comply with the employer's requirements, but was simply unable to do so. Her erratic timeliness may have provided sufficient grounds for the employer to terminate the employment relationship, but it does not support a finding of simple misconduct or gross misconduct. The employer was aware of the claimant's personal medical issues and the parties discussed a later starting time for the claimant. An agreement was never reached and the claimant was never approved for the later time.

The Board concludes that the claimant's repeated tardiness was due to her illness over which she had no reasonable control and for which she was being treated. The claimant did not act with any disregard for the employer's interests or expectations. The claimant did not intentionally breach her duty to the employer. Her discharge was for non-disqualifying reasons.


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 simple misconduct within the meaning of §8-1003 or 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, 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 GREATER BALTIMORE MEDICAL CTR.

The Hearing Examiner's decision is reversed.



Donna Watts-Lamont, Chairperson



Clayton A. Mitchell, Sr., Associate Member

KJK/mw

Copies mailed to:

KAREN A. BURNETT

GREATER BALTIMORE MEDICAL CTR

ANDREAS LUNDSTEDT ESQ.

Susan Bass, Office of the Assistant Secretary

**UNEMPLOYMENT INSURANCE APPEALS DECISION**

KAREN A BURNETT

Before the:

**Maryland Department of Labor,  
Licensing and Regulation**

**Division of Appeals**

1100 North Eutaw Street

Room 511

Baltimore, MD 21201

(410) 767-2421

SSN #

**Claimant**

vs.

GREATER BALTIMORE MEDICAL CTR

Appeal Number: 1240011

Appellant: Employer

Local Office : 60 / LARGO

**Employer/Agency**

December 28, 2012

**For the Claimant:** PRESENT, ANDREAS LUNDSTANDT, ESQ

**For the Employer:** PRESENT, MONICA KEEFER, PHIL KOMENDA, FAYE CARY, LETICIA ARMSTRONG

**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, Karen Burnett, began working for this employer on August 13, 2001. At the time of separation, the claimant was working as a radiographer. The claimant last worked for the employer on October 26, 2012, before being terminated for violating the employer's attendance policy when she accrued more than the allowable number of points.

The employer's attendance policy is a "no fault" policy in that employees receive an occurrence for an absence unless the absence is covered under family medical leave or falls under the limited family days that an employee is entitled to utilize.

The employer did issue progressive disciplinary action prior to termination and allowed the claimant a later start time in an attempt to correct her lateness. On February 6, 2012, the claimant was issued two warnings. One of the warnings was for failing to clock in on three separate occasions. The claimant forgot to do so despite being on time. The second warning was due to four occurrences of lateness on January 19, 2012, January 27, 2012, February 3, 2012, and February 6, 2012. Another written warning was issued on April 30, 2012 due to five additional occurrences of lateness on February 9, 2012, March 14, 2012, March 16, 2012, April 18, 2012, and April 21, 2012. On July 9, 2012, the claimant received a written warning due to four occurrences of absenteeism not covered by FMLA. On September 4, 2012, another written warning was issued for three additional missing time stamps (failure to clock in). On September 24, 2012, the claimant received a written warning due to four occurrences of lateness. When the claimant was again warned on October 2, 2012 for another incident of lateness, she was told that her job was in jeopardy and offered a later start time; however, the parties did not come to an agreement regarding the later start time. The claimant was again late on October 24, 2012 and October 25, 2012 and the employer proceeded with termination. The employer did not allow any grace period relative to lateness. Lastly, the claimant was diagnosed with bipolar disorder and was approved for intermittent leave in August 2011. She was also hospitalized from October 4, 2012 through October 10, 2012.

### 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).

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.

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. However, 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 & Rizk, P.A., 71-BH-90.

### 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, the employer has demonstrated that the discharge was due to gross misconduct. The employer presented credible evidence showing that the claimant violated the employer's "no fault" attendance policy and that the violations continued despite receipt of warnings. The claimant was given multiple opportunities to reform her behavior and she was offered a later start time on multiple occasions. The fact that the employer does not have a grace period for lateness does not excuse the claimant's behavior. Additionally, the fact that the claimant was diagnosed with a mental impairment does not excuse her repeatedly arriving late to work. She was approved for intermittent leave; however, the employer had a reasonable expectation that the claimant would arrive to work in a timely manner. There was no misconduct related to the missing time stamps; however, the continued lateness in the face of warnings constitutes gross misconduct. The claimant's violations of the employer's attendance policy, therefore, showed a regular and wanton disregard of her obligations to the employer and therefore constituted gross misconduct in connection with the work.

### 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 October 21, 2012, and until the claimant becomes reemployed and earns wages in covered employment that equal at least 25 times the claimant's weekly benefit amount.

The determination of the Claims Specialist is reversed.



M M Medvetz, 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 January 14, 2013. 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: December 18, 2012

BLP/Specialist ID: WHG3C

Seq No: 003

Copies mailed on December 28, 2012 to:

KAREN A. BURNETT  
GREATER BALTIMORE MEDICAL CTR  
LOCAL OFFICE #60