

- DECISION -

Claimant:
KHALLENA C GOODISON

Decision No.: 1877-BR-13

Date: April 30, 2013

Appeal No.: 1240569

S.S. No.:

Employer:
PAYPAL INC

L.O. No.: 63

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: May 30, 2013

REVIEW OF THE RECORD

After a review of the record, and after deleting, "Ms. Lewis" from the first sentence of the first paragraph, the Board adopts the hearing examiner's modified findings of fact. The Board also deletes the "Preamble." 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)*; 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."

In her appeal, the claimant reiterates her testimony from the hearing and again explains the reasons for her various absences and instances of tardiness. She contends the employer was made aware of the previously-scheduled appointments at the time she was hired and that the employer agreed those would not be "an issue". The claimant contends she was willing to work on her scheduled days off to make up for missed time. She also asserts a financial need for benefits. The claimant does not cite to the evidence of record and makes no other contentions of error.

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 and concurs with the hearing examiner's findings of fact and conclusions of law. The evidence did not establish that the claimant was acting with disregard for the employer, or that she was grossly negligent with respect to her attendance. The evidence demonstrated that, with the exception of the final tardiness, her absences, and tardiness, was beyond her control. The claimant was first late because of previously-schedule court appearance about which the employer was made aware. The claimant was absent because her small child was ill with the flu and the claimant had no where to place the child. The claimant was then absent because of medical condition for which she was hospitalized. The claimant was then tardy because of doctor's appointment related to her

medical condition. There was some confusion about a requested day off and whether that was approved and whether the claimant was made aware of it. The Board disregards this absence because the claimant's confusion was understandable. None of the above instances of absence or tardiness were within the claimant's control.

Only the final incident, being 7 minutes tardy on October 21, 2012, may be attributed to the claimant. Although she asserted it was because she had difficulty logging in, the employer has a system in place whereby the actual arrival time can be entered by a supervisor. However, the Board finds this to have been a singular instance and insufficient to support a finding of any degree of misconduct.

The employer may have had good reasons to discharge the claimant because of her erratic attendance during the first few months of her employment. Those reasons, however, will not sustain the employer's burden of proof and establish that the claimant was discharged for simple misconduct or gross misconduct.

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 PAYPAL INC

The Hearing Examiner's decision is reversed.



Donna Watts-Lamont, Chairperson



Clayton A. Mitchell, Sr., Associate Member

Copies mailed to:
KHALLENA C. GOODISON
PAYPAL INC
ROBERT SAUER
PAYPAL INC
Susan Bass, Office of the Assistant Secretary

UNEMPLOYMENT INSURANCE APPEALS DECISION

KHALLENA C GOODISON

SSN #

Claimant

vs.

PAYPAL 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: 1240569

Appellant: Employer

Local Office : 63 / CUMBERLAND

CLAIM CENTER

January 18, 2013

For the Claimant: PRESENT

For the Employer: PRESENT , ROBERT SAUER, SETH HIDEY

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

It should be noted that there is some contradiction as to the evidence and testimony as between the claimant and the employer's representative. The Findings of Fact are based upon the competent evidence as determined by the Hearing Examiner.

FINDINGS OF FACT

The claimant, Ms. Lewis, began her employment with PayPal on July 23, 2012. The claimant's position was a customer service representative in the employer's call center. The claimant earned \$13.00 per hour.

The claimant was discharged from her employment on November 1, 2012. The sole reason for the claimant's discharge was as a result of attendance issues. This included the following:

1. On the claimant's second day of employment (July 24, 2012), while still in training, she was 5 minutes late to work. The claimant had a court matter that caused her to be late. The claimant was given a written "Conversation Memo" stressing the importance of the attendance policy guidelines. The claimant signed the document and acknowledged receipt of it. The claimant made no comments in the area on the form which was provided for her to do so.

2. On October 11, 2012, the claimant received a "Corrective Counseling Memo-Attendance." The claimant called off from work on September 13 and 16, 2012. This was because the claimant's three year old daughter was sick with the flu. The claimant had no one else available to watch the child while she was sick. It was also noted that the claimant missed work on October 7, 8, and 9. The claimant was in the emergency room on October 7. She has medical issues with her liver. That claimant had fainted on her way to work. As a result thereof, she was unable work for medical reasons on October 7, 8, and 9.

3. The claimant was given correspondence advising her of her discharge effective immediately on November 1, 2012. In addition to the prior incidents, it was noted that on October 12, 2012 the claimant was an hour and half late to work (this was because the claimant needed to see her physician regarding her liver issue that had occurred a few days prior thereto). On October 21, 2012 the claimant was 7 minutes late punching into the employer's computer telephone system.

CONCLUSIONS OF LAW

Md. Code Ann., Labor & Emp. Article, Section 8-1002 provides that an individual shall be disqualified from receiving benefits where he or she is discharged or suspended from employment because of behavior which demonstrates gross misconduct. The statute defines gross misconduct as conduct that is a deliberate and willful disregard of standards that an employer has a right to expect and that shows a gross indifference to the employer's interests. Employment Sec. Bd. v. LeCates, 218 Md. 202, 145 A.2d 840 (1958); Painter v. Department of Emp. & Training, et al., 68 Md. App. 356, 511 A.2d 585 (1986); Department of Economic and Employment Dev. v. Hager, 96 Md. App. 362, 625 A.2d 342 (1993).

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 held in Daley v. Vaccaro's, Inc., 1432-BR-93, "Employees who miss a lot of time, even for excused reasons, have a heightened duty not to miss additional time...and to conform to the employer's notice requirements." The Board of Appeals further held in Kinsey v. Nordstrom, Inc., 1103-BR-90, "An employee who misses a large number of work days, even if excused, has a heightened duty not to miss any work for unexcused reasons. The claimant was discharged for misconduct."

The claimant had an excessive number of incidents of tardiness. However, during his last month of employment, his lateness was entirely due to his documented medical condition. The earlier incidents of tardiness were due to transportation problems. The claimant was discharged for misconduct. Schools v. AMI-Sub of Prince George's County, 932-BR-90.

The claimant was absent nine times and late 17 times within a year. She received three written warnings and a suspension. The claimant had problems with transportation which led to her absences and latenesses. Transportation problems do not excuse numerous incidents of absenteeism and lateness. The claimant was discharged for gross misconduct. Williams v. Francis Scott Key Medical Center, 942-BR-91.

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. .

EVALUATION OF THE EVIDENCE

The claimant was discharged from her employment with PayPal as of November 1, 2012. The sole reason for the claimant's discharge was as a result of attendance violations. The claimant was employed for less than four months. Nevertheless, the claimant received two written attendance counselings in addition to her discharge document on November 1. Although there were some extenuating circumstances as to many of the attendance violations, the claimant failed to fully advise the employer of the nature and extent of the reasons that caused her to miss time from work.

In viewing the totality of the evidence, it will not be held that the claimant's actions leading to her discharge rise to the level of gross misconduct as defined above. Therefore, no penalty will be imposed pursuant to Section 1002 of the Maryland Unemployment Insurance Law. However, the claimant's actions regarding her attendance do constitute a transgression of established rules and policies of the employer, the commission of a forbidden act, a dereliction of duty, and a course of wrongful conduct committed by an employee within the scope of the employment relationship. Misconduct will apply pursuant to Section 1003 of the Maryland Unemployment Insurance.

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 October 28, 2012 and for the nine 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.



S B Karp, 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 February 04, 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 20,2012

CH/Specialist ID: WCU1J

Seq No: 001

Copies mailed on January 18, 2013 to:

KHALLENA C. GOODISON

PAYPAL INC

LOCAL OFFICE #63

ROBERT SAUER

PAYPAL INC