-DECISION-

Claimant:
JOAN INDILISANO

Employer:
CHARLESTOWN COMMUNITY INC

Decision No.: 1903-BR-11

Date: April 13, 2011

Appeal No.: 1028452

S.S. No.:

L.O. No.: 61

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 13, 2011

REVIEW ON THE RECORD

After a review on the record, the Board adopts the following findings of facts and conclusions of law. The hearing examiner's decision is reversed.

The claimant was employed as an occupational therapist with the employer, Charlestown Community, Inc. from May, 2000 through May, 2010. The employer is a long term care provider.

The claimant's employment was without incident until September, 2009, when the claimant's new rehabilitation manager, Susan Doherty began her employment. At that time, there was some and a personality conflict between the new manager and the claimant.

Ms. Doherty complained of two incidents where the claimant was allegedly rude and disrespectful towards her and co-workers.

On April 13, 2010 the claimant arrived at her normal shift time to begin work. On April 12, 2010, she had been assigned a normal work load of patients to evaluate. However, the claimant was subsequently asked by her assistant manager, Ronda Anthony-Langston, to evaluate two more patients.

The claimant explained that she was not sure she had time to evaluate the additional patients. Instead, the claimant requested that a co-worker do the evaluations because the co-worker had fewer patients to evaluate. The claimant went directly to the co-worker and requested that she perform another evaluation. The claimant and the co-worker split the task so neither was overly burdened. The task was completed and the patients were evaluated appropriately.

Ms. Doherty placed an "Erickson Performance Counseling Form" (*Employer Exhibit 1)* in the claimant's personnel file. "Review Start Date" was April 13, 2010. The "Review End Date" was May 13, 2010. The claimant was unaware that there was an "incident" on April 13, 2010. The claimant was never given an opportunity to dispute any of the allegations brought against her regarding this alleged incident on April 13, 2010. The counseling form was unsigned by the claimant as well as Ms. Doherty.

On May 25, 2010 the claimant was asked to provide a wheelchair evaluation for a patient. The claimant did so without hesitation and in fact spent approximately one hour with the patient. The claimant was unable to have the wheelchair maintenance provider immediately to fix the patient's wheelchair. Consequently the claimant issued another wheelchair to the patient.

On May 26, 2010, the unit's head nurse, Cheryl Adams, called the claimant (while the claimant was evaluating and working with other patients) and loudly complained that the chair was the wrong chair for the patient. Ms. Adams insisted that the claimant come immediately to the floor and fix the problem.

The claimant explained to Ms. Adams that she was currently seeing patients and that she would do so when she had the opportunity. Ms. Adams notified Ms. Doherty (claimant's supervisor) of the alleged insubordination and failure of the claimant to follow a direct order.

> On May 27, 2010 when the claimant arrived to work, she requested a meeting with Lenita Gaines-Hargett, senior human resources manager for the employer regarding some issues that she was having with her immediate managers and regarding the May 26th incident. When the claimant arrived at her meeting with Ms. Gaines-Hargett, Ms. Doherty and Ms. Anthony-Langston were present. The claimant was not told by the human resources manager that her managers were going to be present at the meeting.
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> During that meeting, the claimant became aware of an "alleged" April 13, 2010 "incident" that was recorded and placed in her personnel file. She was also read the complaint from Ms. Adams about the alleged "incident of insubordination" on May 25th & May 26th. The claimant was told by Ms. Gaines-Hargett that she was being placed on paid suspension for three (3) days pending an "investigation" into the May 25th & May 26th incidents.
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> The claimant was discharged on June 2, 2010 for alleged insubordination.[1]

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.

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[1] The Board finds this is reason for the claimant's termination. The employer did not provide any written documentation regarding the final reason for the claimant's discharge. The Board notes that there is a myriad of documentation regarding the alleged incidents of misconduct, but there is no documentation relating to the final "outcome" of the alleged investigation of the claimant's "insubordination".

> 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 employer's case was substantially hearsay. While hearsay is admissible in an administrative proceeding, it is usually given less weight than credible, first-hand testimony. Although the hearing examiner may rely on hearsay evidence in making his determination, the hearing examiner must, "first carefully consider[] its reliability and probative value." *Travers v. Baltimore Police Dept., 115 Md. App. 395, 413 (1997)*; *also see Kade v. Charles H. Hickey School, 80 Md. App. 721, 725 (1989)* ("[e]ven though hearsay is admissible, there are limits on its use. The hearsay must be competent and have probative force.").

One important consideration for a hearing body is the nature of the hearsay evidence. For instance, statements that are sworn under oath, see *Kade, 80 Md. App. at 726, 566 A.2d at 151, Eichberg v. Maryland Bd. of Pharmacy, 50 Md. App. 189, 194, 436 A.2d 525, 529*, or made close in time to the incident, see *Richardson v. Perales, 402 U.S. 389, 402, 28 L. Ed. 2d 842, 91 S. Ct. 1420 (1971)*, or corroborated, *see Consolidated Edison v. N.L.R.B, 305 U.S. 197, 230, 83 L. Ed. 126, 59 S. Ct. 206 (1938)* ("mere uncorroborated hearsay or rumor does not constitute substantial evidence"); *Wallace v. District of Columbia Unemployment Compensation Bd., 294 A.2d 177, 179 (D.C. 1972)*, ordinarily is presumed to posses a greater caliber of reliability. *Cited in Travers 115 Md. App. at 413. Also see Parham v. Dep't of Labor, Licensing & Reg[ulation], 985 A.2d 147, 155 (Md. Ct. Spec. App. 2009)*; *Cook v. National Aquarium in Baltimore, 1034-BR-91*(the employer offered not a single specific example of the alleged misconduct as observed or testified to by either of the employer's witnesses and no documents were introduced relating to any specific instance of misconduct. The employer offered only conclusory statements that the claimant engaged in a certain type of misconduct).

Where an employer discharges a claimant for a variety of actions alleged to constitute misconduct, but where some of these actions were not proven or cannot be considered as misconduct, the remaining actions should be considered, and if they amount to misconduct, the claimant was discharged for misconduct. *Edmonds v. Anne Arundel County Government, 1476-BH-92.*

The Board has held that when a claimant was discharged for misconduct where there was a pattern of arguing with his coworkers, which continued in the face of warnings. However, without evidence of the nature of the arguments, who was at fault in initiating them, whether profanity was used, and whether they interfered with the work process, there can be no finding of gross misconduct. *Green v. Harford Memorial Hospital, 320-BR-84.*

Furthermore, the Board has held that when a claimant was discharged in July, 1991 because the employer felt she had a bad attitude. Where only three incidents of actual conduct were cited, one of which occurred in 1985 or 1986 and one of which occurred in 1989. These incidents were too remote in time to reasonably justify a discharge in 1991. In July, 1991, the claimant was discharged after she curtly responded to a coworker's question. The employer failed to show concrete instances in which the claimant's attitude affected her work performance.

The one incident in July, 1991 was not misconduct. *Beasley v. Genesis Health Ventures, 1477-BR-91.* 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.

In the instant case, the claimant had a decade-long employment relationship with the employer. The claimant's history was without incident until September, 2009 when Ms. Doherty began her employment. Unfortunately, because Ms. Doherty was not at the April 13th "incident" nor the May 25th/26th "incident" she is unable to provide any first hand knowledge of the claimant's speech or tone when speaking with any individual. The only evidence of the claimant's alleged "insubordination" is from statements by individuals who were not present at the Lower Appeals' hearing of August 17, 2010. Those statements were offered for the truth of the matter asserted and were not under oath or affidavit. Because the employer's witnesses could only provide hearsay evidence, the Board gives it less weight than the claimant's first-hand knowledge of the incidents.

The Board finds that the alleged "insubordination" does not rise to the level of either gross misconduct or misconduct. As cited in *Beasley v. Genesis Health Ventures, 1477-BR-91,* it is difficult for the Board to believe that after a decade long, seemingly impeccable employment history, that the claimant suddenly became insubordinate and disrespectful of her co-workers, her managers, and her supervisors.

The Board acknowledges that the claimant and her new manager had a difficult time with each other personally; but that was not with the claimant's performance of her duties. In fact, the claimant attempted to remedy the situation when she requested a meeting with Ms. Gaines-Hargett. Instead, upon her arrival to discuss the situation, the claimant was blind-sided when Ms. Doherty and Ms. Anthony-Langston were also present at the meeting.

The claimant was not given an opportunity in that meeting to explain her side of the story. She was presented with a written statement from Ms. Adams regarding the May 25th/26th incident. The claimant was also presented with a written "Erickson Performance Counseling Form" about an alleged April 13th incident. The claimant was unaware of an incident on April 13th.

Although the employer's witnesses couch the claimant's actions as "insubordination" it is difficult for the Board to see how the claimant was insubordinate. Was Ms. Adams the claimant's direct supervisor? No. Did the claimant refuse to evaluate a patient? No. Did the claimant perform the task as requested? Yes. These are insufficient to support a finding of insubordination.

What the claimant did not do was respond immediately when Ms. Adams said "fix the problem." The reason for this failure to rush immediately in response to Ms. Adams' directive was because the claimant was evaluating other patients. It was impossible to immediately respond to Ms. Adams' order. The claimant explained that to Ms. Adams; but is seems that Ms. Adams did not like that answer and thus reported the claimant to Ms. Doherty as being "insubordinate".

The definition of insubordinate is as follows: not submitting to authority; disobedient.

Therefore, to evaluate whether the claimant's actions were insubordinate, it would have been important for Ms. Adams to actually have authority over the claimant. The employer did not present any evidence as to whether Ms. Adams was in a supervisory position over the claimant. The claimant was not disobedient. The task that Ms. Adams requested of the claimant was completed by the claimant.

The Board finds based on a preponderance of the credible evidence that the employer did not meet its burden of demonstrating that the claimant's actions rose to the level of misconduct or gross misconduct within the meaning of *§ 8-1002* or *§ 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 CHARLESTOWN COMMUNITY, INC.

The Hearing Examiner's decision is reversed.

Donna Watts-Lamont, Chairperson

Clayton A. Mitchell, Sr., Associate Member

RD/mr
Copies mailed to:
JOAN INDILISANO
CHARLESTOWN COMMUNITY INC
JAMES R. LUPINEK ESQ.
JAMES A. STULLER
CHARLESTOWN COMMUNITY INC
Susan Bass, Office of the Assistant Secretary

UNEMPLOYMENT INSURANCE APPEALS DECISION

JOAN INDILISANO

SSN #

Claimant

vs.

CHARLESTOWN COMMUNITY 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: 1028452
Appellant: Employer
Local Office : 61 / COLLEGE PARK CLAIM CENTER

August 26, 2010

For the Claimant: PRESENT, JAMES R. LUPINEK, ESQ.

For the Employer: PRESENT, JAMES A. STULLER, LENITA GAINES-HARGETT, SUSAN DOHERTY

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 began working for this employer on or about May 15, 2000. At the time of separation, the claimant was working part time as an occupational therapist. The claimant last worked for the employer on or about May 27, 2010, before being terminated under the following circumstances:

In her 2009 annual evaluation, claimant received a rating of "Inconsistent Performance" in the area documentation. The manager of claimant's unit (manager) told claimant at the evaluation she must improve her documentation skills at a pace and manner satisfactory to manager. As of claimant's last day of work, the claimant's skills had not improved to the satisfaction of manager. The claimant worked to the best of her ability.

Employer is a long term care facility. On April 13, 2010, claimant complained about her workload in a discussion with the assistant manager of her unit in front of residents. On May 25 and 26, 2010, claimant and a nurse from the quality control unit argued over the phone and in person about the claimant's recommendations in a wheelchair evaluation of a patient performed by claimant. The Director of Nursing sent claimant's manager an email expressing her dismay about claimant's behavior.

On May 27, 2010, claimant was suspended with pay for three (3) days while the employer investigated these incidents. At the conclusion of its investigation, the employer contacted claimant by telephone on June 2, 2010 and informed her that the decision had been made to terminate claimant because of a lack of improvement in her documentation skills and the incidents on April 13, May 25 and 26, 2010.

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 been met with respect to misconduct.

Claimant's performance was hampered by her inability to effectively communicate with her supervisors, co – workers and employees outside of her unit and the lack of improvement to her documentation skills. Claimant worked to the best of her ability, but not to the satisfaction of employer. Except for the incident on April 13, claimant's failure to perform to the satisfaction of manager does not constitute misconduct.

Claimant engaged in misconduct on April 13, 2010 when she complained about her workload in front of residents. It was highly inappropriate for claimant to discuss patient care matters such as workload in front of the residents.

I hold that the claimant committed a transgression of some established rule or policy of the employer, a forbidden act, a dereliction of duty, or engaged 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. An 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 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 May 23, 2010 and for the five (5) 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.

B. Woodland-Hargrove

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 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 September 10, 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: August 17, 2010
DA/Specialist ID: WCP39
Seq No: 001
Copies mailed on August 26, 2010 to:

JOAN INDILISANO
CHARLESTOWN COMMUNITY INC
LOCAL OFFICE #61
JAMES R. LUPINEK ESQ.
JAMES A. STULLER