

- DECISION -

Claimant:	Decision No.:	5298-BR-12
JENNIFER M DIBLASIO	Date:	January 30, 2013
	Appeal No.:	1207235
	S.S. No.:	
Employer:	L.O. No.:	65
PENINSULA HOME CARE LLC	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: March 1, 2013

REVIEW OF THE RECORD

After a review of the record, the Board adopts the hearing examiner's findings of fact. The Board corrects the decision to reflect that the employer was the appellant and that only one witness appeared for the employer, Ms. Therese Ganster. However the Board concludes that these facts warrant different conclusions of law and a reversal of the hearing examiner's decision. The Board also notes that the hearing examiner incorrectly stated that the prior Lower Appeals decision was "affirmed". That decision was not at issue and it was vacated upon the issuance of the decision on appeal here.

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)*. 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 contends: "...nothing I said was in the final decision." She also contends: "The original decision was fired – simple or no misconduct." She further contends: "The initial report with unemployment does not match the appeal report that took place on March 7th, 2012." Lastly she is, "...requesting an appeal hearing that I will be notified of and will be able to attend..."

The Board has conducted a thorough review of the evidence of record from the Lower Appeals hearing from August 30, 2012. That hearing record is the only evidence upon which any decision may be made. The fact that the Fact Finding Report (initial report with unemployment) did not match the decision issued from the March 7, 2012 hearing is immaterial. The Board remanded the matter after the March hearing, upon concluding there had been a failure of due process. As the Board stated, and as the hearing examiner confirmed, this was a *de novo*, or new proceeding. Only relevant and competent evidence presented at the August 30, 2012 hearing may be used to render a decision. Additionally, the Board notes that the Findings of Fact in a decision are not a summation of the testimony of either party. These Findings are supposed to reflect the facts, as found by the hearing examiner, concerning what occurred which led to the claimant's separation.

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 claimant's request for another hearing is denied.

The Board has thoroughly reviewed the record from the hearing but reaches a different conclusion. The employer's evidence was completely hearsay. That is not to say that it was unreliable or lacked veracity. Much of that evidence was documentary in nature and fell within the business-record exception to hearsay evidence. However, the witness could not testify beyond her interpretation of the information contained in those records. The witness did request the hearing examiner to review the testimony from the prior hearing where the witness' predecessor from the employer had testified. The hearing examiner properly explained that he could not do so in this proceeding. The employer could certainly have subpoenaed this

former employee as a witness, or at least could have obtained a written statement from this former employee. A written statement would still have been hearsay, but not hearsay within hearsay.

The Board does not doubt the veracity of the employer's witness at the hearing. However, the witness' information was all second-hand and much of it appeared to be based on speculation and conjecture. Such evidence lacks the requisite reliability in order for the Board to afford it the evidentiary weight necessary to support factual findings. It was, as noted above, the employer's burden to prove that the claimant's discharge was for disqualifying reasons. Thus, it was the employer's responsibility to proffer sufficient competent and credible evidence to meet that burden. Absent such evidence, the record will not support the hearing examiner's conclusions. The Board finds the claimant was discharged under non-disqualifying conditions.

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 PENINSULA HOME CARE LLC.

The Hearing Examiner's decision is Reversed.



Donna Watts-Lamont, Chairperson



Clayton A. Mitchell, Sr., Associate Member

TBW

Copies mailed to:

JENNIFER M. DIBLASIO

PENINSULA HOME CARE LLC

PENINSULA HOME CARE LLC

Susan Bass, Office of the Assistant Secretary

UNEMPLOYMENT INSURANCE REMAND APPEALS DECISION

JENNIFER M DIBLASIO

SSN #

Claimant

vs.

PENINSULA HOME CARE LLC

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: 1207235

Appellant: Claimant

Local Office : 65 / SALISBURY
CLAIM CENTER

September 11, 2012

For the Claimant: PRESENT

For the Employer: PRESENT, KATHRYN SATCHELL, THERESE GANSTER

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

On February 2, 2012, a Claims Specialist issued a benefit determination finding that the claimant was discharged for non-disqualifying reasons. The employer filed an appeal and a hearing was held by telephone on March 7, 2012. A Hearing Examiner issued a decision on March 16, 2012, finding that the claimant was discharged for gross misconduct. The claimant appealed the decision and the Board of Appeals held a limited procedural hearing by telephone on July 17, 2012 to determine if the claimant had good cause for her failure to appear for the telephone hearing on March 7, 2012. A remand order was issued on August 8, 2012, with the finding that the claimant did have good cause for her failure to appear at the prior hearing and thus, a de novo hearing was scheduled before this Examiner.

FINDINGS OF FACT

The claimant, Jennifer Diblasio, began working for this employer on January 25, 2010. At the time of separation, the claimant was working as a registered nurse case manager. The claimant last worked for the employer on January 13, 2012, before being terminated for improper patient care and failure to complete proper documentation following a final warning.

The culminating event occurred as the result of a patient complaint on January 10, 2012. The patient no longer wished to utilize the employer's services due to the fact that the patient was not given adequate care by the claimant who failed to look at the patient's wound, failed to measure the patient's incision, and failed to provide care instructions. The employer conducted an investigation and the patient's complaints were corroborated.

Prior to the culminating event, the employer did issue disciplinary action. A corrective action plan was instituted on April 4, 2011 due to incomplete documentation, failure to call reports timely, and failure to write orders timely. These areas were noted to be improved in the claimant's June 30, 2011 evaluation; however, she was issued a written warning on September 21, 2011 due to lateness and failure to follow policy. On January 6, 2012, the employer issued a memorandum to clarify that the claimant must improve her performance in order to maintain her job. It was noted that the memorandum would serve as a final warning.

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 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 8-1002 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 been met.

The claimant was given multiple warnings regarding several issues including job performance. Despite being told that her job was in jeopardy on January 6, 2012, less than one week later the employer received a credible complaint from a patient demonstrating that the claimant failed to provide adequate care for the patient. The claimant's actions demonstrate a willful disregard of the employer's interests.

I hold that the claimant's actions showed a deliberate and willful disregard of the standards the employer had a right to expect, showed a gross indifference to the employer's interests 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 employment.

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)(i). The claimant is disqualified from receiving benefits from the week beginning January 8, 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 prior Hearing Examiner on March 16, 2012 is affirmed and the Claims Specialist decision 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 September 26, 2012. 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 30, 2012
DAH/Specialist ID: USB39
Seq No: 001
Copies mailed on September 11, 2012 to:
JENNIFER M. DIBLASIO
PENINSULA HOME CARE LLC
LOCAL OFFICE #65