-DECISION-

Claimant:
COURTNEY P JONES

Employer:
ANNAPOLIS CLEANING SERVICE INC

Decision No.: 5751-BR-11

Date: October 19, 2011

Appeal No.: 1111256

S.S. No.:

L.O. No.: 63

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: November 18, 2011

REVIEW ON THE RECORD

After a review on the record, and after deleting "or about" from the first and third sentences of the first paragraph, the Board adopts the hearing examiner's modified findings of fact. However, 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).*

In her appeal, the claimant requests a new hearing and that a witness and documents be subpoenaed. The claimant also reiterates her contention that she was following the directions of a supervisor with respect to providing the doctor's note after she was released to return to work. The claimant also expresses her financial need for unemployment benefits.

The proper time to have requested a subpoena for a witness or for a document was prior to the hearing. This was explained in the Notice of Hearing. The Board will only order a new hearing or the taking of additional evidence if the Board finds that the record is incomplete or if there was a fundamental error. The Board has thoroughly reviewed the record in this matter. Although the Board disagrees with the hearing examiner's decision, the Board finds the record to be complete and sufficient.

The hearing examiner gave undue weight to the employer's attendance policy and insufficient consideration to the reason for the claimant's final absence which led to her termination. An employer's policy is informative as to the employer's expectations and a worker's understanding of those expectations. However, a policy violation is not definitive of misconduct. In this case, the claimant did violate the employer's attendance policy. She did so because she was injured in an automobile accident and because she was ill.

The claimant did, certainly, have an obligation to her employer to appear for work on a regular and consistent basis. This duty was heightened because of the claimant's prior extended absence. However, the claimant's final absence was for reasons beyond her control and cannot be found to be deliberate, willful, repeatedly careless or grossly negligent. The claimant was ill due to an ovarian cyst. Her doctor recommended surgery and scheduled that surgery quickly. The claimant advised her employer of the situation and was prepared to submit a doctor's note when she was released to return to work. The claimant's understanding, from her supervisor, was that this was the process to follow. Before the claimant was able to return with this note, she was discharged.

The hearing examiner found that the claimant did not provide an excuse for missing the days between her diagnosis and her surgery. The hearing examiner also found that the claimant failed to contact the employer on those days. The evidence demonstrates that the claimant was absent for the same, continuing

medical problem from February 8, 2011, through her surgery. The employer knew her condition, and knew she was scheduled to have surgery within a week. The employer was on notice of the claimant's absence; there was no reason for the claimant to keep calling the employer to tell them the same thing every day.

The fact that the claimant's attendance was in serious violation of the employer's policy may have been a legitimate business reason for the employer to terminate her employment. It was not, however, disqualifying misconduct. Absenteeism due to illness is not misconduct. *DuBois v. Redden and Rizk, P.A., 71-BH-90*(The claimant was absent from work and on maternity leave. Due to unexpected medical complications, the claimant was not able to return to work as early as anticipated. The claimant kept her employer informed of her medical condition. The employer could not hold the claimant's job until she could be able to return to work).

As to the claimant's contention of financial need, the Board notes that benefits are not paid based upon the needs of claimants. Benefits are only awarded if a claimant is qualified based upon her separation from employment and if a claimant is eligible based upon compliance with other Agency requirements. Here, the claimant's separation was non-disqualifying. If the Agency finds her otherwise eligible, she will be entitled to benefits.

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 ANNAPOLIS CLEANING SERVICE INC.

The Hearing Examiner's decision is reversed.

Donna Watts-Lamont, Chairperson

Clayton A. Mitchell, Sr., Associate Member

VD
Copies mailed to:
COURTNEY P. JONES
ANNAPOLIS CLEANING SERVICE INC
ANNAPOLIS CLEANING SERVICE
Susan Bass, Office of the Assistant Secretary

UNEMPLOYMENT INSURANCE APPEALS DECISION

COURTNEY P JONES

SSN #

Claimant

vs.

ANNAPOLIS CLEANING SERVICE 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: 1111256
Appellant: Claimant
Local Office : 63 / CUMBERLAND CLAIM CENTER

April 29, 2011

For the Claimant: PRESENT

For the Employer: PRESENT, LESLIE WILSON

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 1001 (Voluntary Quit for good cause), 1002 - 1002.1 (Gross/Aggravated Misconduct connected with the work), or 1003 (Misconduct connected with the work).

FINDINGS OF FACT

Courtney P. Jones (Claimant) began working for this employer, Annapolis Cleaning Service, on or about October 20, 2010. At the time of separation, the claimant was working as a commercial janitor earning $8.50 per hour. The claimant last worked for the employer on or about February 8, 2011, before being terminated for excessive absenteeism.

During the course of her employment the claimant was absent thirty one out of sixty-seven days. She was repeatedly counseled about her attendance but continued to be absent from work. The claimant was involved in a major motor vehicle accident and was absent from work, with a note from her doctor, from December 9, 2010 through January 3, 2011. On February 8, 2011 the claimant became ill and was

diagnosed with a cyst on her ovaries. She informed her supervisor that she needed surgery and she remained off work until after her surgery. On February 15, 2011 the employer terminated the claimant because she had not contacted the employer since February 8, 2011. The claimant had surgery on February 16, 2011 and her doctor gave her a note saying she should remain off work from February 16, 2011 through February 19, 2011. The claimant delivered this note to her employer and left it in the log book.

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.

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. T

he employer presented credible, evidence showing that the claimant violated the employer's attendance policy and that the violations continued despite receipt of warnings. The claimant credibly testified that she missed a full month of work due to a motor vehicle accident in December, 2010. Having missed so much time from work, the claimant owed a duty to her employer not to miss further time from work except in extraordinary circumstances.

On February 8, 2011 the claimant was diagnosed with an ovarian cyst. Although she testified credibly that she informed her supervisor about this illness, she did not produce any medical documentation to establish that she was unable to work between February 8, 2011 and the time she had her surgery. Furthermore, she failed to keep in touch with her employer after February 8, 2011 until after her surgery on February 16, 2011. She was terminated prior to her surgery on February 15, 2011. Accordingly, it cannot be concluded that her absences between February 8, 2011 and February 15, 2011 were due to necessitous and compelling reasons. 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 February 6, 2011 and until the claimant becomes reemployed and earns wages in covered employment that equal at least 20 times the claimant's weekly benefit amount.

The determination of the Claims Specialist is reversed.

M. Mckennan, Esq.

M. Mckennan, 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 May 16, 2011. 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 : April 15,2011
TH/Specialist ID: WCU51
Seq No: 001
Copies mailed on April 29, 2011 to:
COURTNEY P. JONES
ANNAPOLIS CLEANING SERVICE INC
LOCAL OFFICE #63
ANNAPOLIS CLEANING SERVICE