

- DECISION -

Claimant:
LISA M KLEEBERG

Decision No.: 690-BR-14

Date: March 12, 2014

Appeal No.: 1331715

S.S. No.:

Employer:
FORWARD TRANSIT LLC
6310 STEVENS FOREST RD
COLUMBIA, MD 21046-1036

L.O. No.: 65

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: April 11, 2014

REVIEW OF THE RECORD

After a review of the record, the Board rejects all but the first paragraph of the hearing examiner's findings of fact, as they contain recitations of testimony from the hearing. The Board also deletes the "Preamble" as unnecessary. The Board makes the following additional findings of fact:

On February 18, 2013, the employer gave the claimant a written counseling statement due to some concerns with the claimant's work performance. The claimant signed this document.

On August 27, 2013, the employer discovered some new problems and some invoices that the claimant had not completed. The Operations Manager issued a verbal warning to the claimant and assisted her in resolving the identified issues.

On September 20, 2013, the employer concluded the claimant was not handling invoices and other accounting duties in a proper and timely manner. The employer prepared a counseling statement and presented it to the claimant on September 23, 2013. The employer had no intention of discharging the claimant at this time.

On September 24, 2013, the employer believed the claimant was being consistently tardy in reporting to work. Based on the prior counseling and this conclusion, the employer discharged the claimant. No prior warning had been given to the claimant concerning her attendance. The claimant believed her attendance was within the employer's acceptable standards.

Occasionally, the claimant could not pay invoices because there were insufficient funds available in the account. On other occasions, the claimant could not get answers to questions from anyone in a higher position. The claimant did make some errors in her work, but tried to perform her duties in a proper and correct manner throughout her employment.

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*. Conclusory statements are

insufficient evidence to meet an employer's burden of proof. *Cook v. National Aquarium in Baltimore, 1034-BR-91*. An employer must produce specific evidence of a claimant's alleged misconduct. *Id.*

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 offers specific contentions of error as to the findings of fact and the conclusions of law in the hearing examiner's decision, consistent with her testimony at the hearing. The claimant disputes the finding of misconduct and questions how the hearing examiner arrived at that decision. 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. Sufficient evidence exists in the record from which the Board may make its decision

The Board has thoroughly reviewed the record from the hearing but disagrees with the hearing examiner's findings of fact and conclusions of law. The Board finds merit in the claimant's contentions. The evidence showed only three occasions on which the claimant was counseled about her performance. She had no opportunity to improve following the final warning as she was discharged the next day. The employer had come to an erroneous conclusion concerning her starting time and used that as part of its reason for discharge. Neither the February nor August counseling statement was said to have been of a critical nature. Nothing was shown, in the evidence, that would support a finding that the claimant neglected her duties, or in some manner breached those duties. The claimant had some performance problems which she tried to correct over time. The inability of the claimant to perform all of her work to the employer's satisfaction was not caused by any willful or intentional act and was not the result of carelessness or negligence.

The Board cannot find, from the hearing record, sufficient evidence to support a finding that the claimant was discharged for any degree of disqualifying misconduct under Maryland law.

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.

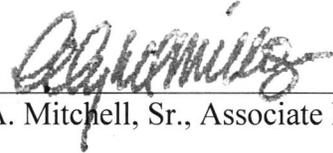
DECISION

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 FORWARD TRANSIT LLC.

The Hearing Examiner's decision is reversed.



Donna Watts-Lamont, Chairperson



Clayton A. Mitchell, Sr., Associate Member

KP/MW

Copies mailed to:

LISA M. KLEEBERG

FORWARD TRANSIT LLC

Susan Bass, Office of the Assistant Secretary

UNEMPLOYMENT INSURANCE APPEALS DECISION

LISA M KLEEBERG

SSN #

Claimant

Vs.

FORWARD TRANSIT 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: 1331715

Appellant: Employer

Local Office : 65 / SALISBURY

CLAIM CENTER

December 05, 2013

For the Claimant: PRESENT

For the Employer: PRESENT, RYAN PATTAN, SCOTT MELVILLE

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 a substantial contradiction as to the evidence and testimony as between the claimant and the employer's representatives. The Findings of Fact are based upon the competent evidence as determined by the Hearing Examiner.

FINDINGS OF FACT

The claimant, Ms. Kleeberg, began her employment with Forward Transit on July 9, 2012. The employer engages in supply chain management shipping its clients' products with various transportation carriers. The claimant's position was a bookkeeper (accounts payable and accounts receivable). The claimant has a B.A. degree in accounting. The claimant earned \$16.00 per hour.

The claimant was discharged from her employment on September 24, 2013. There were various reasons for the claimant's termination from her employment. These reasons include the following:

1. The employer issued a written "counseling statement" to the claimant on February 18, 2013 (approximately seven months after beginning her employment). The employer raised a myriad of issues regarding the claimant's work performance pertaining to the handling of the employer's accounting matters (employer exhibit number one). The claimant acknowledged the warning by signing the document.
2. After the February 18, 2013 counseling, there is no evidence of any problems with the claimant's work performance or any other counselings until a verbal counseling on August 27, 2013 (approximately six months after the prior counseling statement). Mr. Pattan (operations manager) found problems with the claimant's work product and discovered invoices that had not been worked on by the claimant. Mr. Pattan assisted the claimant in resolving these issues and confirmed the verbal counseling in an e-mail to the claimant.
3. The employer wrote a "counseling statement" to the claimant on September 20, 2013. The document was not presented to the claimant until Monday, September 23. The employer believed that the claimant was not handling invoices and other accounting matters in a proper and timely manner. It was not the employer's intention to discharge the claimant at that time. However, the employer decided to terminate the claimant from her employment the following morning.
4. Part of the reason for the claimant's discharge was that the employer believed that the claimant was late to work on a regular basis. The employer thought that the claimant was to begin her work shifts at 8:30 AM. However, it was the claimant's understanding that she could appear at work by 9:00 AM. This issue was raised in the written warning of February 18, 2013 (with no specificity), and then not again brought to the claimant's attention until the day prior to her discharge in the written counseling presented to her on September 23.

The claimant found her work duties for the employer to be challenging at times. There were occasions when there were insufficient funds to pay the employer's invoices that were owed to the employer's transportation suppliers. There were occasions when the claimant had questions regarding her work duties, but was unable to obtain answers from Mr. Melville (chief executive officer). The claimant acknowledges that she did make errors in the course of her work for the employer, but she was attempting to engage in her work duties to the best of her ability.

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).

A mere showing of substandard performance is not sufficient to prove gross misconduct or misconduct. Todd v. Harkless Construction, Inc., 714-BR-89.

Although the record supported a conclusion that the claimant made some mistakes in the performance of his job duties as a machinist, the employer failed to prove, by the number or type of mistakes, that the mistakes were due to the claimant's negligence. Therefore, no disqualification is appropriate. Keller v. Eastport International, 264-BH-85.

In Cortez v. American Cooperage and Steel Drum, 765-BH-84, the Board of Appeals held "Since the employer acquiesced to the claimant's conduct, it cannot be considered simple or gross misconduct within the meaning of Sections 8-1002 or 8-1003."

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 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 claimant was discharged from her employment on September 24, 2013. The claimant had been employed for more than one year as the sole bookkeeper handling accounts payable and receivable for the employer. The employer noted a first written counseling to the claimant on February 18, 2013, regarding issues that the claimant's performance of her job duties was problematic. However, the employer did not again express a concern about the claimant's work performance until a verbal discussion on August 27, 2013. Almost another month elapsed before the claimant was given a final written counseling on September 23. The employer then decided to discharge the claimant the next day. There is competent evidence that on occasion the claimant failed to properly engage in her work duties and handle the invoices and other documentation regarding the employer's accounting matters.

As to the claimant's attendance at work, there is no showing of any wrongdoing by her. The claimant believed that she was appearing at work at a time as expected by the employer. Although the employer's belief was otherwise, this issue was raised in the written warning of February 18, 2013 (with no specificity), and then not again brought to the claimant's attention until the day prior to her discharge. Based upon the applicable precedent as cited above, Cortez supra, even if the claimant was late for work, such continuing

and ongoing actions by her were condoned by the employer.

In viewing the totality of the circumstances, including the claimant's experience and training, and the length of the claimant's employment, the employer has not met the burden of proof of showing that her actions constitute a deliberate and willful disregard of the standards that the employer had a right to expect showing a gross indifference to the employer's interests. Therefore, gross misconduct does not apply pursuant to Section 1002 of the Maryland Unemployment Insurance Law. However, the claimant's actions do constitute 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 Law. Only the minimum penalty is warranted to pursuant to that section of the law.

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 September 22, 2013 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

This is a final decision of the Lower Appeals Division. Any party who disagrees with this decision 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 December 20, 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: November 15, 2013

AEH/Specialist ID: USB37

Seq No: 001

Copies mailed on December 05, 2013 to:

LISA M. KLEEBERG
FORWARD TRANSIT LLC
LOCAL OFFICE #65