-DECISION-

Claimant:
TIFFANY J LINTZ

Employer:
CITIZENS NURS HOME OF
HARFORD COUNTY

Decision No.: 0-BR-00

Date: December 22, 2014

Appeal No.: 1419007

S.S. No.:

L.O. No.: 60

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: January 21, 2015

REVIEW OF THE RECORD

The claimant has filed a timely appeal to the Board from an Unemployment Insurance Lower Appeals Division Decision issued on September 9, 2014. That Decision held the claimant was discharged for misconduct within the meaning of *Md. Code Ann., Lab. & Empl. Art., §8-1003*. Benefits were denied for the week beginning July 6, 2014, and for the following eleven weeks.

On appeal, the Board reviews the evidence of record from the Lower Appeals hearing. The Board reviews the record *de novo* and may affirm, modify, or reverse the hearing examiner's 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. *Md. Code Ann., Lab. & Empl. Art., §8-510(d).* The Board fully inquires into the facts of each particular case. *COMAR 09.32.06.03(E)(1).* Only if there has been clear error, a defect in the record, or a failure of due process will the Board remand the matter for a new hearing or the taking of additional evidence. Under some limited circumstances, the Board may conduct its own hearing, take additional evidence or allow legal argument.

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).*

In this case, the Board has thoroughly reviewed the record from the Lower Appeals hearing. The record is complete. The employer appeared and offered testimonial evidence. The employer was afforded the opportunity to offer documentary evidence and to present a closing statement. The necessary elements of due process were observed throughout the hearing. The Board finds no reason to order a new hearing, to take additional evidence, to conduct its own hearing, or allow additional legal argument. Sufficient evidence exists in the record from which the Board may render its decision.

The Board finds the hearing examiner's Findings of Fact are supported by substantial evidence in the record. Those facts, however, are insufficient to support the hearing examiner's Decision. The Board adopts the hearing examiner's findings of fact. The Board makes the following additional findings of fact:

> The employer maintained what is commonly known as a "No Fault" attendance policy. An absence due to illness was not excused. Per the employer's own policy had the claimant not been sent home on her last day of work, she would not have been discharged.
>
> The employer provided care to the "frail and elderly" and as such could not have someone ill working with their clients. Therefore the employer sent the claimant home.

The Board concludes that these facts warrant a reversal of the hearing examiner's decision.

An employer has the right to create, implement and maintain any legal policies for the operation of its business and the conduct its workers. Similarly, an employer may establish policies which define the reasons for which a worker may be discharged or otherwise disciplined. Those policies, generally known as "no-fault" policies, assess points for rule infractions, regardless of the reason and establish particular point totals which call for progressively greater discipline. The Board does not determine whether such policies are proper. The existence of a policy is useful as evidence of the employer's expectations, and of whether the claimant knew or should have known of the expectation. However, the Board looks beyond the employer's policy to determine whether a claimant has been discharged for a disqualifying reason. A no-fault policy violation may be sufficient to support the termination of a claimant's employment, but may not, necessarily, be indicative of misconduct or gross misconduct. If the underlying reason for the

claimant's separation is not an act or omission which constitutes disqualifying misconduct, the claimant will not be disqualified from benefits even though the claimant violated the employer's policy.

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. 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.*

In the case at bar, it is true that the claimant had a poor attendance record and she had been warned. The claimant knew that one more absence would lead to her discharge. Knowing this, even though she was ill, the claimant reported to work rather than calling out sick. It was the employer's decision to send the claimant home because they could not risk her exposing their clients to a possible illness. However there was no misconduct on the claimant's part for this last occurrence.

Md. Code Ann., Lab. and Empl. Art., Title 8, Section 1002 provides:

(a) Gross misconduct…
  (1) Means conduct of an employee that is:
    i. 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
    ii. repeated violations of employment rules that prove a regular and wanton disregard of the employee's obligations...

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).*

Md. Code Ann., Lab. and Empl. Art., Title 8, Section 1003 provides:

(a) Grounds for disqualification – an individual who otherwise is eligible to receive benefits is disqualified from receiving benefits if the Secretary finds that unemployment results from discharge or suspension as a disciplinary measure for behavior that the Secretary finds is misconduct in connection with employment but that is not:
  (1) Aggravated misconduct…or
  (2) Gross misconduct…

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 the employment relationship, during hours of employment or on the employer's premises, within the meaning of *Md. Code Ann., Lab. and Empl. Art., Title 8, Section1003*. (*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 her appeal, the claimant offers no specific contentions of error as to the findings of fact. The claimant's letter of appeal concurs with the employer's testimony at the hearing that though ill, she reported to work, she was sent home by the employer and was discharged for this final absence. The claimant argues that she did not violate the employer's policy since she reported to work. The Board agrees.

On the claimant's last day of work she was ill. She reported to work. The employer sent her home. There was no misconduct on the part of the claimant on her last day of work.

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 upon a preponderance of the credible evidence, that the employer did not meet its burden of proof and show that the claimant was discharged for gross misconduct within the meaning of *Md. Code Ann., Lab. and Empl. Art., §8-1002,* or for misconduct within the meaning of *Md. Code Ann., Lab. and Empl. Art., §8-1003*. The decision shall be reversed, for the reasons stated herein.

DECISION

The Board holds that the claimant was discharged, but not for gross misconduct or misconduct connected with the work, within the meaning of *Md. Code Ann., Lab. and Empl. Art., Title 8, Section 1002 or 1003*. No disqualification is imposed based upon the claimant's separation from employment with this employer.

The Hearing Examiner's decision is Reversed.

Eileen M. Rehrmann, Associate Member

Donna Watts-Lamont, Chairperson

VD
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