

- DECISION -

Claimant:
SARA EDWARDS

Decision No.: 1141-BR-13

Date: March 27, 2013

Appeal No.: 1205548

Employer:
GREATER BALTIMORE MEDICAL CTR

S.S. No.:

L.O. No.: 65

Appellant: CLAIMANT - REMAND FROM
COURT

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: April 26, 2013

PROCEDURAL HISTORY

A Benefit Determination was issued on January 27, 2012 finding that the claimant, Sara Edwards was discharged on July 25, 2011 for gross misconduct under *Md. Code Ann., Lab. & Empl. Art., §8-1002*. The claimant was disqualified from receiving benefits.

The claimant timely appealed the benefit determination to the Lower Appeals Division. On February 28, 2012 a hearing was held. On March 1, 2012 a decision was rendered affirming the benefit determination.

The claimant filed a timely Petition for Review to the Board of Appeals. The Board denied that Petition on May 18, 2012.

The claimant filed a timely Petition for Judicial Review in the Circuit Court for Baltimore County.

On October 23, 2012, the Board accepted a remand to review the matter on the record.

REVIEW OF THE RECORD

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

FINDINGS OF FACT

The claimant, Sara Edwards, applied for a position with the employer Greater Baltimore Medical Center on July 25, 2011. The claimant did not begin work with the employer. She was discharged on July 27, 2011 during a required orientation meeting. The claimant was requested to attend the orientation meeting by her supervisor.

The claimant was asked to apply for a position with Greater Baltimore Medical Center by a previous supervisor. The claimant previously worked for the supervisor in this particular unit. The claimant's application process was rushed through and the claimant was given a pre-employment drug test. The claimant was told to attend an orientation meeting prior to the results of the drug test. However, the claimant was wrongly advised and when her drug test came up positive for marijuana, she was asked to leave the orientation. The employer discharged the claimant from employment based on the failed drug test.

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).

Misconduct which took place prior to the employment is not connected with the work. *Jacobs v. New Covenant Church of God*, 1524-BR-92.

The Board has been consistent that a failed pre-employment drug test does not constitute misconduct connected with the work as follows:

In *Weidman v. Village Import Cars*, 223-BR-91, the claimant was discharged because the insurance company would no longer cover him, due to conditions that the employer knew at the time of hire, was well aware of all along and had tolerated for quite some time. This is not misconduct within the meaning of Section 8-1003.

In *Allen v. Department of Transit and Traffic*, 722-BR-91, the claimant applied for a position as a parking control agent. On her application, she indicated that she did have a criminal conviction. The claimant was hired but the employer reserved the right to have the claimant's background checked. Based on the background check, the employer refused to commission her as a parking control agent. The employer was then required to discharge the claimant, which it did. The claimant had worked there for four months. There is no evidence that the claimant falsified her application, nor is there any evidence that she did any actions that would amount to misconduct after she became employed.

In *Thompson v. East Coast Ice Cream Company*, 1535-BR-93, the claimant took a pre-employment physical on April 5th, began work on April 6th and was discharged on June 14th because the lab test results from the physical showed the presence of a controlled dangerous substance in her body on April 5th. The claimant had, in fact, used painkiller pills prescribed for her father. The misconduct was not connected with the work, since there was no evidence that the claimant was intoxicated by the use of drugs, or that the drugs were in the claimant's system on any day of employment.

The instant case contains nearly the same facts as the *Thompson* case above. The claimant was required to take a pre-employment drug screening. The claimant then attended an orientation for the employer. The facts indicate that the claimant was erroneously attending the orientation because her drug screening results were not yet determined. However, the claimant was told to attend the orientation by her would-be supervisor.

When the results showed marijuana in the claimant's system, the claimant was asked to leave the orientation. The employer's witness specifically testified that the "offer of employment was rescinded". In essence, the employer would like to argue that the claimant was not "employed" with the employer because she was erroneously attending the orientation. The Board finds that no matter how the employer characterizes the claimant's attendance at the orientation, she was directed to attend and thus, for employment purposes was working for the employer. Attendance at that meeting constitutes employment.

Based on the Board's precedent, failing a pre-screening drug test does not constitute misconduct connected with the work. There is no evidence that the claimant was intoxicated by the use of drugs. Thus, the Board finds that the claimant was discharged, but not for misconduct connected with the 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.

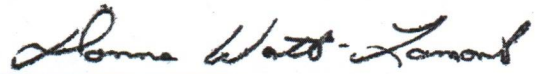
The Board finds based on a preponderance of the credible evidence that the employer has not met its burden of demonstrating that the claimant's actions rose to the level of gross misconduct within the meaning of § 8-1002. The employer has also not met its burden of showing that the claimant's discharge

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 GREATER BALTIMORE MEDICAL CTR.

The Hearing Examiner's decision is reversed.



Donna Watts-Lamont, Chairperson



Clayton A. Mitchell, Sr., Associate Member

KJK/mr

Copies mailed to:

SARA EDWARDS

GREATER BALTIMORE MEDICAL CTR

CHRISTINA N. BILLIET ESQ.

Susan Bass, Office of the Assistant Secretary

UNEMPLOYMENT INSURANCE APPEALS DECISION

SARA EDWARDS

SSN #

Claimant

Vs.

GREATER BALTIMORE MEDICAL CTR

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: 1205548

Appellant: Claimant

Local Office : 65 / SALISBURY

CLAIM CENTER

March 1, 2012

For the Claimant: PRESENT

For the Employer: PRESENT, CHERYL WILLIAMS, GRETCHEN BELL, KARAN MACKIE

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

FINDINGS OF FACT

The claimant, Sara Edwards, began working for this employer, on July 25, 2011, and her last day worked was July 27, 2011. At the time of her discharge, the claimant was to work full-time as a unit secretary. The employer terminated the claimant from her position for testing positive for marijuana, a controlled substance, during a pre-employment drug screening.

Pursuant to the employer's policy, the claimant was submitted to pre-employment drug testing. The drug test was administered on July 22, 2011 and submitted to Quest Lab for testing. The employer was advised by Quest Lab that the sample submitted was diluted and another sample would be required. The claimant submitted a second sample on July 25, 2011 which tested positive for marijuana. The claimant had used marijuana on one occasion during a party some time prior to the drug test. The employer verbally advised

the claimant of her right to a re-test of the split sample, at the claimant's expense, when it advised the claimant of her positive drug test results. The claimant attended a complete one day orientation session with this employer, for which the claimant was compensated.

The employer discharged the claimant for violation of the employer's workplace drug policy. (ER EX #1).

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).

Section 17-214.1(c)(1)(iv) of the Health-General Article of the Annotated Code of Maryland provides that an employer, after having required an employee to be tested for the use or abuse of any controlled dangerous substance, and who receives notice that the employee has tested positive, after confirmation of that test result, shall provide the employee with:

- (i) a copy of the laboratory test indicating the test results;
- (ii) a copy of the employer's written policy on the use or abuse of controlled dangerous substances or alcohol by employees,...;
- (iii) If applicable, written notice of the employer's intent to take disciplinary action, terminate employment, or change the conditions of continued employment; and
- (iv) a statement or copy of the provisions set forth in subsection (d) of this section permitting an employee to request independent testing of the same sample for verification of the test result.

In Lucas v. Gladney Transportation, 577-BH-90, the Board of Appeals held "The claimant drove a bus for the employer. Two days after he was hired, he took a physical which revealed chemical evidence of the use of cocaine. When the employer learned the results of the claimant's physical, the claimant was discharged. This was held to be gross misconduct." In Gordon v. Baines Management Company, 487-BR-93, the Board of Appeals held "The employer's rule forbidding employees to report to work with a detectable residue of illegal drugs in their systems was reasonable." Both the Circuit Court and the Court of Special Appeals for the State of Maryland affirmed the Board of Appeals' finding.

Whether the claimant is informed of, or given the opportunity to have a second testing of the same sample is irrelevant when the claimant does not deny that the results of the drug test are accurate. Boyd v. Cantwell Cleary Company, Inc., 1845-BH-92.

The claimant was not given an opportunity to refute the results of his drug test, however he does not dispute the drug test results. The fact that he did not see an actual copy of the lab report and was not informed of his right to retest the sample is not relevant when the claimant does not dispute any of the results or allegations and admits to a continuation of drug abuse. Nolan v. Lyon, Conklin and Company, Inc., 115-BR-95.

The claimant does not dispute the fact that he failed a random drug test by testing positive for cocaine. The undisputed drug test result is itself enough to support a finding of gross misconduct even without testimony from the employer at the hearing. The test result speaks for itself. Jones v. Race Track Payroll Account, Inc., 2204-BR-95.

EVALUATION OF THE EVIDENCE

The employer had the burden to show, by a preponderance of the credible evidence, the claimant's termination was for conduct which rose to the level of misconduct or gross misconduct, pursuant to the Maryland Unemployment Insurance Law. In the case at bar, the employer met this burden.

In the case at bar, the claimant tested positive for a controlled substance, marijuana during a pre-employment drug test administered under the employer's drug testing policy. The claimant admitted during the hearing that she had used marijuana prior to the administration of the drug test, but argued that she had only done so on one occasion, and was not a habitual user of drugs. Although the employer failed to prove that it offered the claimant an opportunity for a re-test, at the claimant's expense, in writing, in accordance with Maryland Health General Article, Section 17-214.1(c)(1)(iv), the claimant admitted to marijuana use before the drug test was administered.

Accordingly, the employer met its burden in this case and the claimant's discharge was for testing positive for a controlled substance, constituting gross misconduct. Benefits are, therefore, denied.

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 July 24, 2011 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 Claims Specialist is affirmed.

V. Nunez

V. Nunez, 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 to Petition for Review

Any party may request a review 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 March 16, 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: February 28, 2012

AEH/Specialist ID: USB37

Seq No: 004

Copies mailed on March 1, 2012 to:

SARA EDWARDS
GREATER BALTIMORE MEDICAL CTR
LOCAL OFFICE #65