

- DECISION -

Claimant:
AMANDA M DARBY

Decision No.: 1203-BR-14

Date: May 14, 2014

Appeal No.: 1334338

S.S. No.:

Employer:
THERAPEUTIC SOULUTIONS INC

L.O. No.: 64

Appellant: Employer

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: June 13, 2014

REVIEW OF THE RECORD

After a review of the record, and after deleting “despite applying her best efforts” from the first sentence of the third paragraph, the Board adopts the hearing examiner’s modified findings of fact. The Board makes the following additional findings of fact:

The claimant either refused to perform, or complained about, some of the tasks to which she was assigned. The employer gave the claimant several informal warnings about her job performance in addition to the Performance Improvement Plan in July 2013. She was placed on a six-week probation period to show improvement. The claimant did perform

her work to the employer's satisfaction during that period of time, but then failed to complete tasks in a timely manner after the probation ended.

The claimant believed she would be moved quickly into a human resources management position with the employer. The claimant arrived at this conclusion for her own reasons. The employer gave the claimant a detailed job description [See Employer's Exhibit #4] when she was hired. The employer made no other promises or assurances beyond the position for which the claimant was hired.

It is critical to the employer's business that contacts from clients and requests for services or assistance be handled quickly, accurately, and properly. It is also important that insurance matters be handled promptly and properly. The claimant did not comply with the employer's expectations in either of these areas.

The claimant spent a significant amount of her work time on the internet on non-work websites. The claimant did not believe this interfered with her job performance. The employer had no specific prohibition against the personal use of its internet service by its employees, but did expect employees to focus on their work duties as a priority.

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); 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 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).

Aggravated misconduct is an amplification of gross misconduct where the claimant engages in "behavior committed with actual malice and deliberate disregard for the property, safety or life of others that...affects the employer, fellow employees, subcontractors, invitees of the employer, members of the public, or the ultimate consumer of the employer's products or services...and consists of either a physical assault or property loss so serious that the penalties of misconduct or gross misconduct are not sufficient."

In its appeal, the employer offers multiple specific contentions of error as to the findings of fact in the hearing examiner's decision. The employer disputes the hearing examiner's decision and contends the claimant was discharged for gross misconduct. The employer otherwise 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. The Board disagrees with the hearing examiner's decision. First, the hearing examiner disregarded the significance and purpose of the evidence concerning the claimant's internet usage. The employer clearly testified it offered this information to show that the claimant was spending an excessive amount of time on non-work-related internet activities. The employer did not offer this evidence to support a reason for discharge, but to show how the claimant was using her time. Second, the hearing examiner placed too much emphasis on the wording in the termination letter given to the claimant. The employer testified clearly and consistently as to all the reasons for the discharge. The employer was not required to specify all of this in the letter and the testimony should have been given greater evidentiary weight. The evidence established that the claimant could properly and timely perform her duties, but did not on several occasions. Most telling was the simple fact that, while on the six-week probation, she performed her work to the employer's satisfaction. At the end of that probation, the claimant's performance reverted to being unsatisfactory. Clearly, the claimant was not working to the best of her ability at all times. The Board finds the claimant was derelict in her duty to the employer. The Board concludes that the claimant was discharged for misconduct connected with her work.

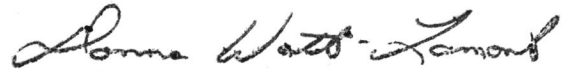
The Board notes that the hearing examiner did not offer or admit the *Agency Fact Finding Report* into evidence. The Board did not consider this document when rendering its decision.

The Board finds based on a preponderance of the credible evidence that the employer has met its burden of demonstrating that the claimant's actions rose to the level of 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 for misconduct connected with the work, within the meaning of Section 8-1003 of the Labor and Employment Article Maryland Code Annotated, Title 8, Section 1003. The claimant is disqualified from receiving benefits from the week beginning October 6, 2013, and the fourteen weeks immediately following.

The Hearing Examiner's decision is reversed.



Donna Watts-Lamont, Chairperson



Clayton A. Mitchell, Sr., Associate Member

KP/MW

Copies mailed to:

AMANDA M. DARBY
THERAPEUTIC SOULUTIONS INC
ANDREAS LUNDSTEDT ESQ.
DITTE MOELLER
Susan Bass, Office of the Assistant Secretary

UNEMPLOYMENT INSURANCE APPEALS DECISION

AMANDA M DARBY

SSN #

Claimant

vs.

THERAPEUTIC SOULUTIONS 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: 1334338

Appellant: Employer

Local Office : 64 / BALTOMETRO

CALL CENTER

January 08, 2014

For the Claimant: PRESENT , ANDREAS LUNDSTEDT, ESQ.

For the Employer: PRESENT , DITTE MOELLER, HSIN-LUN SANFT

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).

FINDINGS OF FACT

The claimant, Amanda Darby, began working for this employer, Therapeutic Solutions, Inc., on May 14, 2012. At the time of separation, the claimant was working as an administrative coordinator. The claimant last worked for the employer on October 9, 2013, before being terminated for not completing tasks in a timely manner.

On July 23, 2013, the claimant was placed on probation because she failed to complete a number of tasks in a timely manner. The claimant notified the employer that she frequently felt overwhelmed by the position. The employer made efforts to help the claimant succeed in her work. As a result, the claimant improved

upon her performance and the employer was happy with her performance until the final week of her employment.

During that time, the claimant failed to complete a number of regularly assigned tasks in a timely manner, despite applying her best efforts. The employer then told the claimant that she was being terminated because she did not meet minimal expectations for the position and was not a good fit for the employer's needs (See Cl. Ex. #1). The claimant was terminated.

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 not been met.

The employer testified in the hearing that it terminated the claimant because she was not completing her work in a timely manner. However, the employer's testimony conflicts with its statement in the claimant's termination letter, which simply states that the claimant was terminated because she was not a "good fit" for the position. The claimant credibly testified that she was making her best efforts to perform her job well.

The employer acknowledged that after putting the claimant on probation in July 2013 for her performance, that the claimant's performance improved. The claimant credibly testified that just before her final week, the employer was "happy" with her performance. Nevertheless, the claimant was terminated after she failed to complete her tasks in a timely manner during her final week of employment.

As the claimant credibly testified that she was making her best efforts to perform her job and as the claimant's letter of termination states that she was terminated simply because she was not a "good fit", it is found that the employer failed to show by a preponderance of the evidence that the claimant was terminated for misconduct.

DECISION

IT IS HELD THAT the claimant was discharged, but not for misconduct connected with the work within the meaning of Md. Code Ann., Labor & Emp. Article, Section 8-1003. No disqualification is imposed based upon the claimant's separation from employment with the above-identified employer. The claimant is 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 affirmed.

H Abramson

H Abramson, 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

This is a final decision of the Lower Appeals Division. Any party who disagrees with this decision 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 January 23, 2014. 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: January 02, 2014
CH/Specialist ID: RBA91
Seq No: 001
Copies mailed on January 08, 2014 to:

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ANDREAS LUNDSTEDT ESQ.