

-DECISION-

Claimant:
SYLVIA E MURPHY

Decision No.: 1204-BH-11

Date: February 25, 2011

Appeal No.: 1031420

Employer:
FALLSTON NURSING & REHAB CTR
INC

S.S. No.:

L.O. No.: 61

Appellant: Joint Employer and 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: March 28, 2011

- APPEARANCES -

FOR THE CLAIMANT:

SYLVIA E. MURPHY

FOR THE EMPLOYER:

NICK PINDALE, HR Director
GARY NELSON, Manager

EVALUATION OF THE EVIDENCE

The Board of Appeals has considered all of the evidence presented, including the testimony offered at the hearing. The Board has also considered all of the documentary evidence introduced in this case, as well as the Department of Labor, Licensing and Regulation's documents in the appeal file. The Board of Appeals finds the testimony of the employer's witnesses to be more credible than that of the claimant.

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)*.

FINDINGS OF FACT

The claimant was employed from July 29, 1999 until June 17, 2010 as a housekeeper. The claimant became separated from employment as a result of a discharge.

The claimant was employed at a nursing home. The employer had very specific protocols, some of which are required by State guidelines, for the cleaning of residents' rooms and public areas of the nursing home. *Employer's Exhibit 1*.

For many years the claimant performed her job duties as required by the employer. However beginning in early 2010, the claimant began a pattern of not cleaning rooms as required. The claimant was warned and knew that her continued failure to perform her job duties could lead to her discharge.

On February 24, 2010, the claimant was suspended for one day for failing to properly clean a patient's room on February 18, 2010. This warning included a notice to the claimant that continued violation of work rules and requirements could lead to her discharge. *Employer's Exhibit 1*.

On March 19, 2010, the claimant was issued two disciplinary actions. One was for insubordination and the other for failing to complete her assigned duties and again failing to follow proper cleaning procedures. As a result of these two disciplinary actions, the claimant was suspended for five days. The disciplinary actions again warned the claimant that continued violation of work rules and requirements could lead to her discharge. *Employer's Exhibit 1*.

On June 17, 2010, the claimant was assigned to perform a detailed cleaning on a room. Upon inspection the room had not been cleaned properly. On June 18, 2010, the employer issued a final disciplinary action discharging the claimant. *Employer's Exhibit 1*.

CONCLUSIONS OF LAW

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 the instant case the claimant knowingly violated the employer's requirements as to how rooms were to be cleaned. The claimant had been employed since 1999. The claimant had performed her job duties in an acceptable manner for years. The claimant knew how to do her job correctly. In spite of warnings and notice that she was putting her employment in jeopardy, the claimant continued to perform her work in an unsatisfactory manner.

The Board does not find credible the claimant's responses to the disciplinary actions taken by the employer nor does it find her testimony before the Hearing Examiner or the Board to be credible.

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 gross misconduct within the meaning of § 8-1002. The decision shall be reversed for the reasons stated herein.

DECISION

It is held that the claimant was discharged for gross misconduct connected with the work, within the meaning of Maryland Code Annotated, Labor and Employment Article, Title 8, Section 1002. The claimant is disqualified from receiving benefits from the week beginning June 13, 2010 and until the claimant becomes re-employed, earns at least twenty times their weekly benefit amount and thereafter becomes unemployed through no fault of their own.

The Hearing Examiner's decision is reversed.



Donna Watts Lamont, Chairperson



Clayton A. Mitchell, Sr., Associate Member

RD

Date of hearing: February 15, 2011

Copies mailed to:

SYLVIA E. MURPHY

FALLSTON NURSING & REHAB CTR

Susan Bass, Office of the Assistant Secretary

UNEMPLOYMENT INSURANCE APPEALS DECISION

SYLVIA E MURPHY

SSN #

Claimant

vs.

FALLSTON NURSING & REHAB CTR
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: 1031420
Appellant: Claimant
Local Office : 61 / COLLEGE PARK
CLAIM CENTER

September 21, 2010

For the Claimant: PRESENT

For the Employer: PRESENT, NICK PINDALE

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). Whether this appeal was filed timely within the meaning of Section 806 of the Labor and Employment Article.

FINDINGS OF FACT

A Notice of Benefit Determination was mailed to the parties in this case. The determination had an appeal deadline of August 2, 2010. In this case, the appeal was filed by facsimile on August 19, 2010. The appellant offers as a reason for the late appeal that she did not receive the Notice of Benefit Determination and filed her appeal after being advised to do so by a member of the Bel Air Workforce Center.

The claimant began working for this employer on or about July 29, 1999. At the time of separation, the claimant was working as a Housekeeper, earning \$10.08 per hour. The claimant last worked for the employer on or about June 17, 2010, before being terminated for failure to follow proper procedures.

The claimant's explanation was that she performed her job properly and that someone came in thereafter to make the areas unclean again. On June 30, 2009, Mr. Nelson gave the claimant and other staff a training regarding proper cleaning techniques.

On February 24, 2010, Mr. Nelson issued the claimant a one-day suspension for failure to properly clean rooms on February 18, 2010. The claimant's explanation was that she did clean 119B and 129B and somebody was trying to set her up.

On March 19, 2010, Mr. Nelson issued the claimant a five-day suspension for insubordination. On March 18, 2010, Wendy Macie, Assistant Director of Nursing, asked the claimant what she was doing and why was she performing her job as she was. The claimant responded, "because I want to." The claimant refused to elaborate further. The employer simultaneously disciplined the claimant for her failure to complete duties and follow proper cleaning procedures. The claimant's explanation was that Ms. Macie came at her about her mask and Ms. Macie had it in for her. The claimant's explanation was that they had it in for her and she had performed her job.

On June 17, 2010, Mr. Nelson performed a periodic investigation of various rooms, and, Mr. Nelson found that the room assigned to the claimant was not cleaned properly. On June 18, 2010, Mr. Nelson terminated the claimant's employment. The claimant's explanation was that she did mop the floor.

CONCLUSIONS OF LAW

Md. Code Ann., Labor & Emp. Article, Section 8-806(e) provides, in essence, that either a claimant or employer has 15 days after the date of the mailing of the benefit determination to file a timely appeal. COMAR 09.32.06.01(B) provides that an appeal is considered filed on the earlier of the following: (a) the date that is delivered in person to any office of the Department of Labor, Licensing and Regulation ("DLLR") that accepts appeals, or (b) the date on which it is postmarked by the U. S. Postal Service. Appeals filed after that date shall be deemed late and the determination shall be final, unless the appealing party meets the burden of demonstrating good cause for late filing. COMAR 09.32.06.01B(3) provides that "the period for filing an appeal from the Claims Specialist's determination may be extended by the Hearing Examiner for good cause shown." Good cause means due diligence in filing the appeal. Francois v. Alberti Van & Storage Co., 285 Md. 663 (1979) and Matthew Bender & Co. v. Comptroller of the Treasury, 67 Md. App. 693, 509 A.2d 702 (1986).

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.

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

In the instant case, the appellant filed a late appeal within the meaning of Section 8-806 because that appeal was tendered after the deadline date. Once an appeal has been filed late, the burden is on the appealing party to show by credible evidence that good cause exists. Cooper v. Holy Cross Hospital, 328-BR-86. In this case, the appellant has met this burden because the claimant has credibly testified that she did not receive the Notice of Benefit Determination. Further, the Hearing Examiner finds that she exercised due diligence in filing her appeal when she became aware of her right to file. Therefore, the late-filed appeal will be permitted.

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 credibly testified that the claimant had ongoing issues with poor work performance. The employer warned the claimant about her poor work performance but it persisted. The employer demonstrated that the claimant's work performance was substandard but failed to provide sufficient evidence to demonstrate that her poor work performance was a deliberate and willful disregard of the standards of behavior the employer had a right to expect or a regular and wanton disregard of her employment obligations. Therefore, the claimant's behavior does not rise to any level of misconduct.

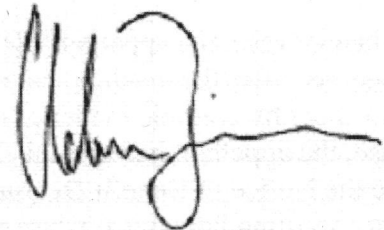
I hold that the claimant did not commit a transgression of some established rule or policy of the employer, a forbidden act, a dereliction of duty, or engage in a course of wrongful conduct within the scope of the claimant's employment relationship, during hours of employment, or on the employer's premises. No unemployment disqualification shall be imposed based on Md. Code, Ann., Labor & Emp. Article, Section 8-1003 pursuant to this separation from this employment.

DECISION

IT IS HELD THAT the appellant filed a late appeal with good cause within the meaning and intent of Md. Code Ann., Labor & Emp. Article, Section 8-806(e), thus allowing the Hearing Examiner to reach and rule upon the substantive issues in this case.

IT IS FURTHER 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 reversed.



A C Zimmerman, 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 October 06, 2010. 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: September 16, 2010

DW/Specialist ID: WHG6B

Seq No: 001

Copies mailed on September 21, 2010 to:

SYLVIA E. MURPHY

FALLSTON NURSING & REHAB CTR

LOCAL OFFICE #61