

- DECISION -

Claimant:
TIFFANY Y DUBOSE

Decision No.: 1506-BR-12

Date: March 14, 2012

Appeal No.: 1140152

S.S. No.:

Employer:
GREATER BALTIMORE MEDICAL CTR

L.O. No.: 63

Appellant: Claimant

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 13, 2012

REVIEW OF THE RECORD

After a review of the record, the Board adopts the hearing examiner's findings of fact, but concludes that these facts warrant different conclusions of law and 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.

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."

The failure to follow workplace rules or procedures can constitute gross misconduct. See, e.g. *Kidwell v. Mid-Atlantic Hambro, Inc.*, 119-BH-86; *Ullman v. Anne Arundel County Public Schools*, 498-BR-93. Attendance violations may constitute gross misconduct. An employer has the right to insist that its employees report to work on time, adhere to a specified schedule and leave only when that schedule has been completed. An employee's decision to follow a come-and-go-as-I-please philosophy could clearly disrupt the orderly operation of the workplace. *Dept. of Econ. Dev. v. Propper*, 108 Md. App. 595 (1996).

Persistent and chronic absenteeism, where the absences are without notice or excuse and continue in the face of warning constitutes gross misconduct. *Watkins v. Empl. Security Admin.*, 266 Md. 223 (1972). The failure to report or call into work without notice may constitute gross misconduct. *Hardin v. Broadway Services, Inc.* 146-BR-89. Employees who miss a lot of time from work, even for excused reasons, have a heightened duty not to miss additional time for unexcused reasons and to conform with the employer's notice requirements. *Daley v. Vaccaro's Inc.*, 1432-BR-93.

A specific warning regarding termination is not required and a reasonable person should realize that such conduct leads to discharge. *Freyman v. Laurel Toyota*, 608-BR-87. 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 her appeal, the claimant contends: "...during the hearing I was denied the opportunity to present my reason for the unexcused absence, lateness and the inappropriate use of a time clock." This contention is

without merit. The hearing examiner allowed the claimant to testify about her absence, her tardiness and her use of the alternative time clock. He asked the claimant, at least two times, if she had anything else she wished to say, and she replied "no". However, the Board finds that the hearing examiner applied too strict an interpretation of the reasons for the claimant's discharge.

Here, the evidence established that the claimant was discharged because she had accumulated disciplinary points in excess of that allowed by the employer. The evidence did not show that the claimant had acted with any willful, deliberate, repeatedly careless or grossly negligent manner with respect to her employer's interests or expectations. The evidence also did not show that the claimant was derelict in her duties.

An employer may certainly choose to adopt whatever system it wishes, within reason, to discipline and to discharge its employees. In this case, the claimant had amassed points sufficient to warrant termination from employment consistent with the employer's progressive discipline process. However, the infractions for which the claimant was assessed these points were of two different types. The employer did not give any consideration to the reasons for some of the claimant's tardiness; and did not give consideration to the fact that the claimant used the different time clock in an effort to not be found tardy. The accumulation of a specified number of disciplinary actions or points is not necessary evidence of misconduct or gross misconduct.

Some of the disciplinary actions imposed against the claimant were for her attendance and timeliness. The claimant missed some work for reasons which were understandable and not necessarily within her control. However, the final incident which led to her termination was her use of a different time clock.

The claimant's explanation, with respect to her choice of time clocks, was reasonable and understandable. The claimant knew she had been warned about her tardiness. The time clock she was supposed to use was often crowded and would cause her to clock in a few minutes past her starting time. She used a closer time clock to avoid this. Certainly, the employer can require its workers to use a particular time clock and the employer can elect to discharge an employee who fails to comply. The claimant was trying to avoid a discharge by clocking in, on time, at a different time clock. This was not an act in deliberate disregard for the employer's interests or expectations. The act for which the claimant was discharged was not an act of misconduct or gross misconduct.

The Board draws a distinction between a discharge which occurs based upon the employer's progressive disciplinary system and a discharge which occurs based upon an act or omission by the claimant. To be disqualifying, the claimant's discharge had to have been for misconduct or gross misconduct. The Board does not find that the employer has presented sufficient evidence to support such a finding.

The claimant also contends she has a financial need for benefits. Unemployment insurance benefits are not paid to a claimant based upon her need. Benefits are paid if a claimant is qualified and eligible. In this case, the Board finds the claimant qualified. If she is otherwise eligible, the claimant may receive unemployment benefits.

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 or misconduct within the meaning of §8-1003. The decision shall be reversed for the reasons stated herein.

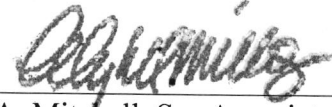
DECISION

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 CENTER.

The Hearing Examiner's decision is reversed.



Donna Watts-Lamont, Chairperson



Clayton A. Mitchell, Sr., Associate Member

RD

Copies mailed to:

TIFFANY Y. DUBOSE
GREATER BALTIMORE MEDICAL CTR
Susan Bass, Office of the Assistant Secretary

UNEMPLOYMENT INSURANCE APPEALS DECISION

TIFFANY Y DUBOSE

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: 1140152

Appellant: Employer

Local Office : 63 / CUMBERLAND
CLAIM CENTER

December 07, 2011

For the Claimant: PRESENT

For the Employer: PRESENT , ANGELA BROWN, ARONA CARROLL

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, Tiffany Dubose, filed a claim for benefits establishing a benefit year beginning October 16, 2011. She qualified for a weekly benefit amount of \$353.

The claimant began working for this employer, Greater Baltimore Medical Center, on March 15, 2005. At the time of separation, the claimant was working as a housekeeper. The claimant last worked for the employer on October 14, 2011, before being terminated for repeated violations of the employer's rules and policies. The employer assigned a point value to each step of their progressive disciplinary process. A verbal warning has a point value of one, a written warning has a point value of three and a disciplinary probation has a point value of five. An employee is terminated if he or she accumulates twelve points in a

rolling twelve month period. The claimant was provided with a copy of this policy when she was hired.

The claimant was discharged for accumulating twelve points. The claimant received a verbal warning for being absent on January 10, 2011. She received a written warning on February 24, 2011 for another absence. A verbal warning was issued for lateness on April 8, 2011. Another verbal warning was issued on April 11, 2011, for use of an inappropriate time clock. A written warning was issued on April 29, 2011 for another lateness. A final written warning was issued on October 14, 2011, when the claimant once again clocked in using the wrong time clock. That gave the claimant a total of twelve points and she was then discharged.

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 8-1002 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 THE 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 been met.

The claimant was discharged for repeated violations of the employment rules and policies which continued in spite of several warnings. The claimant was aware of the employer's policy regarding discharge for repeated violations and she continued to disregard the employer's rules. Her repeated violations showed a regular and wanton disregard of her obligations to the employer and therefore constituted gross misconduct in connection with the work. An unemployment disqualification shall be imposed based on Md. Code, Ann., Labor & Emp. Article, Section 8-1002 pursuant to this separation from this employment.

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)(ii). The claimant is disqualified from receiving benefits from the week beginning October 9, 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 reversed.

S Weber

S Weber, 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 December 22, 2011. 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 29,2011
CH/Specialist ID: WCU61
Seq No: 001
Copies mailed on December 07, 2011 to:
TIFFANY Y. DUBOSE
GREATER BALTIMORE MEDICAL CTR
LOCAL OFFICE #63