-DECISION-

Claimant:
OCTAVIA E GHEE

Employer:
JOHNS HOPKINS HOSPITAL

Decision No.: 1941-BR-12

Date: April 05, 2012

Appeal No.: 0909581

S.S. No.:

L.O. No.: 60

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: May 07, 2012

PRELIMINARY STATEMENT

This matter comes before the Board of Appeals (Board) pursuant to an Order Of Court of the Circuit Court for Baltimore City. The Circuit Court's Order vacated the Board's previous decision in this case which held that the claimant had been discharged for gross misconduct within the meaning of *8-1002 of the Labor and Employment Article of the Md. Code Ann.,* and remanded this case to the Board for further proceedings consistent with its ruling.

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 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).*

The Board finds the testimony of the employer's witnesses to be more credible than that of the claimant. The claimant's testimony in many instances belies credibility and is unsupported by any corroborating evidence. For example the claimant testified that leave granted to her pursuant to the Family Medical Leave Act (FMLA) was to cover incidents of lateness. However when disciplined for incidences of lateness the claimant signed the disciplinary documents *(Employer's Exhibits 1 and 2)* without comment. The claimant further testified that her supervisor, Mr. Wilfredo Ferrer, gave her permission to arrive late for work. However, the January 9, 2008, written reprimand, (*Employer's Exhibit 2*), which notes at least ten incidents of lateness, is signed by Mr. Ferrer. The claimant did not pursue with the employer's Human Relations Department that she is being unfairly disciplined for incidents of lateness for which she should be excused per FMLA leave. These are not the actions of an individual that believes they are being unjustly disciplined.

FINDINGS OF FACT

The claimant was employed from April 27, 2007 until January 29, 2009, as a lab technician. The claimant became separated from employment as a result of a discharge.

The claimant, from early in her employment, developed an attendance problem. On November 9, 2007, the claimant was counseling for having three occurrences, (*See, Employer's Exhibit 1, page one, for the definition of an occurrence)* within a twelve months period. *Employer's Exhibit 2.*

The claimant was next disciplined on January 9, 2008. The claimant received a written reprimand for having five occurrences in a twelve month period. *See Employer's Exhibit 2.* On July 12, 2008, the claimant received a written warning with a one day suspension for having had seven occurrences within a twelve month period. *See Employer's Exhibit 2 and 3.*

The claimant applied for and was granted leave pursuant to the Family Medical Leave Act (FMLA) beginning April 15, 2008 and continuing until on or about October 15, 2008. The claimant's approval of FMLA leave specifically provided that:

2. You FML has been approved for:
   4/15/2008: 1-2 episodes per month lasting 1-2 days per episode
   Required to be medically certified in 6 month – Deadline: 10-/15/2008

The claimant knew that she had a deadline of October 15, 2008 to submit documentation to have her FMLA leave request extended beyond October 15, 2008. The claimant failed to submit any documentation that would have extended her FMLA leave beyond October 15, 2008.

On January 28, 2009, the claimant was discharged for having eight occurrences within a twelve month period.

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).*

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).*

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.*

Absenteeism not totally attributable to illness can be misconduct or gross misconduct. *Schools v. AMI-Sub of Prince George's County, 932-BR-90*(The claimant had an excessive number of incidents of tardiness. During his last month of employment, his lateness was due entirely to a documented medical condition. The earlier incidents were due to transportation problems. The discharge was for misconduct); *Johnson v. United States Postal Service, 66-BR-91*(The claimant missed 11 of the last 34 days of work.

The claimant had been injured and her assignments were adjusted within her capabilities. The amount of absenteeism was not justified by her injury. She had been counseled about the importance of avoiding absenteeism. The discharge was for misconduct. Even though a claimant's last absence was with good reason, a finding of gross misconduct is supported where the claimant was discharged for a long record of absenteeism without valid excuse or notice, which persisted after warnings. *Hamel v. Coldwater Seafood*

Corporation, 1227-BR-93.

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.

In the instant case the claimant continued a pattern of lateness in spite of warnings. The claimant had nine incidences of lateness between a written warning with suspension on July 12, 2008 and her discharge on January 28, 2009. The claimant did not submit any evidence to support her contention that her latenesses should have been excused pursuant to FMLA.

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 January 25, 2008 and the nine weeks immediately following.

The Hearing Examiner's decision is reversed.

Donna Watts-Lamont

Donna Watts-Lamont, Chairperson

Eileen M. Rehrmann

Eileen M. Rehrmann, Associate Member

RD
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Susan Bass, Office of the Assistant Secretary

-DECISION-

Claimant:
OCTAVIA E GHEE

Employer:
JOHNS HOPKINS HOSPITAL

Decision No.: 1941-BH-12

Date: April 25, 2011

Appeal No.: 0909581

S.S. No.:

L.O. No.: 60

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The period for filing an appeal expires: May 25, 2011

- APPEARANCES -

FOR THE CLAIMANT:

OCTAVIA E. GHEE
JOHN MORRIS, Esq.

FOR THE EMPLOYER:

DONNA HENRY, Employer Rep.
DORRIS PENDERGRASS, HR Mgr.
LYDIA NELSON, Cor. Lab Mgr
WILFREDO FERRER, Former Sup.

PRELIMINARY STATEMENT

This matter comes before the Board of Appeals (Board) pursuant to an Order of Court of the Circuit Court for Baltimore City. The Circuit Court's Order vacated the Board's previous decision in this case which held that the claimant had been discharged for gross misconduct within the meaning of *Md. Code Ann., Labor and Employment Article, Title 8, Section 1002* and remanded this case to the Board for further proceedings consistent with its ruling.

EVALUATION OF THE EVIDENCE

The Board 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 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).*

The Board finds the testimony of the employer's witnesses to be more credible than that of the claimant. The claimant's testimony in many instances belies credibility and is unsupported by any corroborating evidence. For example the claimant testified that leave granted to her pursuant to the Family Medical Leave Act (FMLA) was to cover incidents of lateness. However when disciplined for incidences of lateness the claimant signed the disciplinary documents *(Employer's Exhibits 1 and 2)* without comment. The claimant further testified that her supervisor, Mr. Wilfredo Ferrer, gave her permission to arrive late for work. However, the January 9, 2008, written reprimand, (*Employer's Exhibit 2*), which notes at least ten incidents of lateness, is signed by Mr. Ferrer. The claimant did not pursue with the employer's Human Relations Department that she is being unfairly disciplined for incidents of lateness for which she should be excused per FMLA leave. These are not the actions of an individual that believes they are being unjustly disciplined.

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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 January 25, 2008 and the nine weeks immediately following.

The Hearing Examiner's decision is reversed.

Donna Watts-Lamont, Chairperson

Eileen M. Rehrmann, Associate Member

RD
Date of hearing: October 12, 2010
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