

- DECISION -

Claimant:
TONYA B SMITH

Decision No.: 223-BR-11

Date: January 19, 2011

Appeal No.: 1033469

S.S. No.:

Employer:
CARROLL HOSPITAL CENTER

L.O. No.: 60

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: February 18, 2011

REVIEW ON THE RECORD

After a review on the record, the Board adopts the hearing examiner's findings of fact but finds that they warrant a different conclusion of law.

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)*.

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."

Discharging a claimant for inefficiency or incompetence is not misconduct. *Cumor v. Computers Communications Group*, 902-BH-87. A mere showing of substandard performance is not sufficient to prove gross misconduct or misconduct. *Todd v. Harkless Construction*, 714-BR-89; *Knight v. Vincent Butler, Esquire*, 585-BR-91. Failing to use good judgment, or an isolated case of ordinary negligence, in the absence of a showing of culpable negligence or deliberate action in disregard of the employer's interests is insufficient to prove misconduct. *Hider v. DLLR*, 115 Md. App. 258, 281 (1997); *Greenwood v. Royal Crown Bottling Company*, 793-BR-88.

Culpable negligence in the performance of one's job can constitute gross misconduct. See, e.g., *Jones v. Allstate Building Supply Company, Inc.*, 700-BR-89(after several expensive accidents, the claimant was on notice to adjust his behavior. The claimant failed to do so and caused another accident. Gross misconduct was supported); *Roberts v. Maryland Medical Lab, Inc.*, 1215-BR-88(when a claimant's work involves critical risks to the life and health of other persons, a higher degree of care is required).

The Board does not concur with the hearing examiner's legal analysis. In the instant case, the claimant's actions do not constitute mere ordinary negligence. The claimant had been counseled and warned regarding the absolute need for accuracy with registering patients and labeling specimens. Even though the claimant was involved with over 100 patient cases per week (or about 20 per day per five day work week), the claimant, in the face of warning, was on a heightened duty to insure the accuracy of her work.

The accuracy of the claimant's work involved critical risks to the life and health of the employer's patients. The claimant was required to observe and conform to a higher degree of care. The claimant's repeated actions do not constitute mere substandard performance or a failure to exercise good judgment.

The Board finds that facts of this case warrant a finding of gross misconduct.

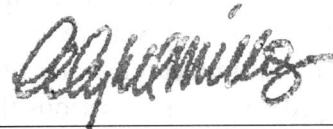
The Board notes that the hearing examiner did not offer or admit the *Agency Fact Finding Report* into evidence. The Board did not consider this document when rendering its decision.

The Board finds based on a preponderance of the credible evidence that the employer met its burden of demonstrating that the claimant's actions rose to the level of gross misconduct within the meaning of § 8-1002. The hearing examiner's decision shall be reversed for the reasons stated herein.

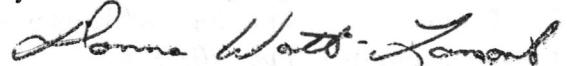
DECISION

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 July 18, 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.



Clayton A. Mitchell, Sr., Associate Member



Donna Watts-Lamont, Chairperson

RD

Copies mailed to:

TONYA B. SMITH

CARROLL HOSPITAL CENTER

JAMES A. STULLER

CARROLL HOSPITAL CENTER

Susan Bass, Office of the Assistant Secretary

UNEMPLOYMENT INSURANCE APPEALS DECISION

TONYA B SMITH

SSN #

Claimant

vs.

CARROLL HOSPITAL CENTER

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: 1033469

Appellant: Claimant

Local Office : 60 / TOWSON CALL
CENTER

October 22, 2010

For the Claimant: PRESENT

For the Employer: PRESENT, JAMESA. STULLER, TIFFANY BLOYER, MARTA COURSEY

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 worked for this employer from April 26, 2006 through July 20, 2010, her last day at work. At the time of separation, the claimant was working on a full time basis as a phlebotomist and was paid \$12.41 an hour. The claimant was terminated for negligence in the performance of her duties.

As a phlebotomist working at the hospital, the claimant was required to draw blood samples and correctly identify patients. She was also required to register patients. The claimant was required to review requisitions for blood tests and correctly label samples drawn based on the information contained in the requisitions. Patients were not always present to confirm information as some requisitions came from outside the hospital.

The employer's policy for misidentification of patients states that: "It is the policy of Carroll Hospital Center that misidentification of patients or patient samples during the drawing and/or labeling process will result in activation of the disciplinary process." The policy further states that the first two errors in a 12 month period will result in written warnings for each occurrence. A third error in a 12 month period will result in termination.

On August 16, 2009, the claimant received a first written warning when she labeled a specimen with two different names. This could have resulted in the mistreatment of a patient. The error occurred on July 10, 2009.

On March 24, 2010, the claimant received a first written warning when she failed to update a patient registration. The patient had previously been seen when he or she was a minor. The designated "guarantor" in the file was a parent. When the claimant saw the patient, the patient was an adult and should have been listed as guarantor. The result was deemed to be a HIPPA violation. The date of the occurrence was March 3, 2010.

On May 19, 2010, the claimant received a second written warning when she a patient was registered under the wrong name. A test had been ordered for a patient but her husbands name had been entered instead. The employer deemed that this could have led to the mistreatment of the patient. The claimant was warned that any further identification or labeling error which occurred before March 2011, would lead to her termination. The error occurred on May 18, 2010.

On July 19, 2010, the final error which led to the claimant's termination was discovered. On this occasion the claimant registered the wrong patient. A patient with the same last name and the same first name, though differently spelled, as another patient, was registered under the wrong name though both patients had different birth dates. The claimant was required to check and verify the identity of a sample by matching both a name and the birth date. On this occasion, the patient was not present and the claimant was required to properly review the requisition form. While the disciplinary form indicated that the error occurred on July 19, 2010, the claimant was not working on that day.

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 been met.

The claimant did not deny that she made the errors. The claimant argued that the errors were not intentional and that the employer could have chosen to move her to another post where she would just be required to draw blood samples and not be responsible for registering patients as well. The employer argued that its policy was correctly applied in this case and the claimant was aware that her job was in jeopardy.

In this case three of the four errors cited by the employer could have affected the patient safety. So, while the claimant's actions were unintentional, they could have had serious consequences. The central issue presented in this case is not whether the policy was correctly applied, it was; but whether claimant's actions amounted to simple or gross misconduct under the law.

The claimant testified that she had as many as 100 patients or requisitions a week and because of the quantity of work, anyone was bound to make errors. The law does not define simple misconduct. It does define gross misconduct, as noted above in the Conclusions of Law. In this case, the Hearing Examiner believes that claimant's actions do not fit the definition of being "deliberate and willful" or "regular and wanton". Therefore, it is held the claimant was discharged for simple misconduct in this case.

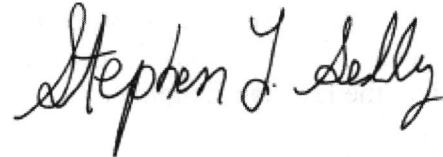
I hold that the claimant committed a transgression of some established rule or policy of the employer, a forbidden act, a dereliction of duty, or engaged in a course of wrongful conduct within the scope of the claimant's employment relationship, during hours of employment, or on the employer's premises. An 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 claimant was discharged for misconduct connected with the work within the meaning of Md. Code Ann., Labor & Emp. Article, Section 8-1003. Benefits are denied for the week beginning July 18, 2010 and for the nine weeks immediately following. The claimant will then be 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.



S Selby, 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 November 08, 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: October 14, 2010

DW/Specialist ID: WCU25

Seq No: 001

Copies mailed on October 22, 2010 to:

TONYA B. SMITH

CARROLL HOSPITAL CENTER

LOCAL OFFICE #60

JAMES A. STULLER

CARROLL HOSPITAL CENTER

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«ADDRESS3»

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«ADDRESS5»

Zip code not valid!