DEPARTMENT OF EMPLOYMENT AND TRAINING

BOARD OF APPEALS
1100 NORTH EUTAW STREET
BALTIMORE, MARYLAND 21201

(301) 383-5032

STATE OF MARYLAND
HARRY HUGHES
Governor

— DECISION —

Decision No.: 27-BH-85

Date: January 22, 1985

Claimant: Theatus M. Brown

Appeal No.: 03176

S. S. No.:

Employer: Garrison Valley Center, Inc.

L.O. No.: 45

Appellant: EMPLOYER

Issue:

Whether the claimant was discharged for misconduct connected with her work, within the meaning of §6(c) of the Law.

— NOTICE OF RIGHT OF APPEAL TO COURT —

YOU MAY FILE AN APPEAL FROM THIS DECISION IN ACCORDANCE WITH THE LAWS OF MARYLAND. THE APPEAL MAY BE TAKEN IN PERSON OR THROUGH AN ATTORNEY IN THE CIRCUIT COURT OF BALTIMORE CITY, OR THE CIRCUIT COURT OF THE COUNTY IN MARYLAND IN WHICH YOU RESIDE.

THE PERIOD FOR FILING AN APPEAL EXPIRES AT MIDNIGHT ON February 21, 1985

— APPEARANCES —

FOR THE CLAIMANT:
Theatus Brown

FOR THE EMPLOYER:
Carl Silverman, Esq.;
Ida Campanella, Admin./Owner;
Mildred Cook, Witness

EVALUATION OF EVIDENCE

The Board of Appeals has considered all of the evidence presented, including the testimony offered at the hearings. The Board has also considered all of the documentary evidence introduced in this case, as well as the Department of Employment and Training's documents in the appeal file.

The testimony in this case differed sharply on the issues of what the policy of the employer was, how the policy was communicated (if at all) to the claimant, and whether the policy was actually enforced. The findings of fact made below are based on the Board's view of the most credible testimony and evidence in the case.

FINDINGS OF FACT

The claimant was employed from July 4, 1982 until February 21, 1984 as a nursing assistant for the Garrison Valley Center, Inc. She was discharged for violation of an employer rule which called for immediate dismissal in the case of negligent or willful inattention to patients.

The employer is a 76-bed comprehensive care facility set up for those persons who need 24-hour care by licensed personnel. The claimant was a certified nursing assistant, having attended the nursing assistant training program and received her certification in November of 1982.

As part of the claimant's training, she was instructed that she was never to leave a patient unattended in the bathtub. In addition, every employee of the facility was aware of this restriction, which was reiterated frequently at staff meetings. In addition, one nursing assistant had been fired in 1979 for leaving a patient unattended in the bathtub and an additional assistant had been fired for simply leaving a patient unattended in the bathroom (although not in the tub). On February 21, 1984, at approximately 10:00 a.m., the claimant was bathing a patient of the Center. This patient had an IQ of nine, was a dwarf, and was a hydrocephalic with a congestive heart failure condition. This patient was known to need close supervision, as he was wont to pick up trash and eat it and was known for climbing. The claimant was assigned the task of bathing this patient in a bather, which is essentially a bathtub, but slightly higher off the ground than an ordinary bathtub. While the patient was in the bathtub, the claimant deliberately left the bathroom and walked 40 feet down the hallway and into a laundry room in order to obtain some items from there. When this was discovered, the claimant was terminated by the owner of the facility.

The owner of the facility was not aware of any union organizing activity at the time the claimant was terminated.

CONCLUSIONS OF LAW

The claimant, who was well aware not only of her employer's strict policy against leaving patients unattended in the tub, but also of the dangers to any patient (and to this patient in particular) of so doing, committed a deliberate violation of employment rules which her employer had a right to expect, showing a gross indifference to her employer's interests. This is gross misconduct within the meaning of §6(b) of the Maryland Unemployment Insurance Law.

DECISION

The claimant was discharged for gross misconduct, connected with the work, within the meaning of §6(b) of the Maryland Unemployment Insurance Law. She is disqualified from the receipt of benefits from the week beginning February 19, 1984 and until she becomes re-employed, earns ten times her weekly benefit amount ($870), and thereafter becomes unemployed through no fault of her own.

The decision of the Appeals Referee is reversed.

Thomas W. Keech
Chairman

Hazel O. Warnick
Associate Member

K:W
kbm

DISSENTING OPINION

I must dissent.

The claimant had been the "ringleader" of a movement to organize her co-workers to become members of Local 1199E of the National Union of Hospital and Health Care Employees, an affiliate of the AFL/CIO, on the premises where she was employed. On the day before she was discharged, her co-workers warned her that the employer's owner was aware of her union organizing activities, and that she had better watch herself.

On the next day, February 21, 1984, the claimant was the only nursing assistant assigned to attend twelve patients. One of these patients needed a bath. Sometime prior thereto, the employer had installed "bathers" because they were considered safer than ordinary bathtubs. After the patient had gotten into the

bather, the claimant, exercising all due care and caution under the circumstances, walked approximately 35-40 feet to a laundry room to deposit the patient's laundry. Upon doing so, she immediately returned to the room where the patient was safely taking his bath. The walk to the laundry room and back occurred in "less than a minute." However, suddenly, in that period of time, the owner just happened to be on the scene making her "rounds" which she made now and then, as the need arose. The owner protested that the patient was left "unattended" to the claimant, as she returned from her 35-40 feet walk. Solely for this reason, it is alleged, the owner discharged the claimant, citing a rule prohibiting "negligent or willful inattention to patients." The claimant had been employed there with a good record for one and one-half year.

At the hearing before the Board, the owner testified that the claimant's act demonstrated "inexcusable judgment." She also testified that she personally had no knowledge of the claimant's union organizing activities at the time of the discharge and learned of that only after the claimant had been dismissed. She testified that the claimant's union activities "wouldn't have made any difference." However, the owner later testified that when she got the "first inkling" that union organizing was afoot on her premises, she "called my attorney." (Even though, at that time, the claimant would have been dismissed.) She further testified that others had been discharged for leaving patients in bathtubs. However, the claimant was not aware of either of these dismissals.

In her testimony, the claimant gave a long list of other employees who had left patients unattended in bathtubs and were not fired. She also testified that much of this occurred in the presence of Ms. Cook, a supervisor, who was aware of the practice. I think that constitutes sufficient knowledge to the employer, as an entity, regardless of any personal knowledge of its owner. Moreover, for purposes of a denial of unemployment insurance benefits, an employer's rules must be applied to all employees without discrimination. Woodson v. Unemployment Compensation Board of Review, 461 Pa. 439, 336 A.2d 867 (1975). The claimant was generally aware that there was a rule somewhere prohibiting "negligent or willful inattention to patients." However, she did not know that her 35-40 feet walk, lasting "less than a minute," for the purpose of putting that patient's clothes in the laundry room, while attending eleven other patients at the same time, was in violation of that rule.

I have fully reviewed the entire record in this case, and I carefully observed the demeanor of all the witnesses. Likewise, I have taken into consideration the apparent interests of the witnesses; the inherent probabilities in light of other events. I have also considered the consistencies or inconsistencies within the testimony of each witness, and between the testimony of each and that of other witnesses.

Assuming the truth of the employer's version, the discharge was a plain overreaction under the circumstances. This tends to support the claimant's general thrust, that the reason given for her dismissal was a mere pretext for the real reason therefor, the discouragement of union organizing in the work place. At all times, the patient was in the conscious presence of the claimant. Considering the quality of the claimant's act, with its obvious intent, at a time when the claimant believed that she was being watched, I would affirm the decision of the Appeals Referee, Mr. Hordes, that there is insufficient evidence that the claimant was discharged for misconduct, much less, gross misconduct, within the contemplation of the Maryland Unemployment Insurance Law.

For these reasons, I must dissent.

Maurice E. Dill

Associate Member

D
kbm
Date of Hearing: September 11, 1984

COPIES MAILED TO:

CLAIMANT

EMPLOYER

Carl Silverman. Esq.

UNEMPLOYMENT INSURANCE - PIMLICO

STATE OF MARYLAND
HARRY HUGHES
Governor
KALMAN R. HETTLEMAN
Secretary

DEPARTMENT OF HUMAN RESOURCES
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BOARD OF APPEALS
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Hearings Examiner

– DECISION –

DATE: May 14, 1984

CLAIMANT: Theatus M. Brown

APPEAL NO.: 03176

S. S. NO.:

EMPLOYER: Garrison Valley Center, Inc.

L. O. NO.: 45

APPELLANT: Claimant

ISSUE: Whether the claimant was discharged for misconduct connected with her work within the meaning of Section 6(c) of the Law.

NOTICE OF RIGHT OF FURTHER APPEAL

ANY INTERESTED PARTY TO THIS DECISION MAY REQUEST A FURTHER APPEAL AND SUCH APPEAL MAY BE FILED IN ANY EMPLOYMENT SECURITY OFFICE, OR WITH THE APPEALS DIVISION, ROOM 515, 1100 NORTH EUTAW STREET, BALTIMORE, MARYLAND 21201, EITHER IN PERSON OR BY MAIL.

THE PERIOD FOR FILING A FURTHER APPEAL EXPIRES AT MIDNIGHT ON May 29, 1984

– APPEARANCES –

FOR THE CLAIMANT:
Present, accompanied by Witnesses, Barbara Roles & Judith McBride, Dist. 99E, National Union of Hospital & Health Care Employees

FOR THE EMPLOYER:
Not Represented

FINDINGS OF FACT

The claimant was discharged from her job as a nursing assistant by the Garrison Valley Center, Inc., on or about February 21, 1984, after one and one-half years of employment there, after she was charged by the employer with leaving a retarded patient unattended in a bathtub. There is no hospital rule forbidding a nursing assistant to leave a retarded patient unattended in a bathtub. The patient, in this case, although slightly retarded, is self-sufficient in that although he cannot talk, he can communicate by the use of his hands and by making sounds. The

patient was capable of getting in and out of the bathtub himself and washing himself and even dressing himself and feeding himself without assistance. Moreover, it is a common practice, among the hospital employees, to leave patients in the bathtub unattended if, the patient is perfectly capable of taking care of himself without having an attendant immediately present. Neither the claimant nor any other nursing assistant have ever been reprimanded or warned because of poor judgment in leaving a retarded patient in the bathtub unattended for any period of time. The claimant had been playing an active role in organizing a union and attempting to induce co-employees to join Local #1199E of the National Union for Hospital and Health Care Employees, AFL/CIO.

CONCLUSIONS OF LAW

It is concluded from the undisputed evidence that the claimant was discharged for reasons other than misconduct connected with her work within the meaning of Section 6(c) of the Maryland Unemployment Insurance Law. No probative evidence was submitted to show any wrongdoing on the part of the claimant regarding an alleged failure to meet her obligations to her employer. No probative evidence was submitted to challenge or to dispute the sworn testimony of the claimant and the witnesses present, that there was no hospital rule prohibiting employees from leaving patients unattended in the bathtub. No probative evidence was submitted to challenge or to dispute the sworn testimony of the claimant and her witnesses present denying that any attendant had ever been reprimanded for leaving a patient unattended in the bathtub. No probative evidence was submitted to challenge or to dispute the sworn testimony of the claimant that the particular patient involved was perfectly capable of taking care of himself and that his life or well-being was not being jeopardized because she left him unattended in the bathtub. No probative evidence was submitted to challenge or to dispute the claimant's sworn testimony that she had a perfect record, while employed by the Garrison Valley Center, and that the only reason why she was discharged was because she was active in organizing her fellow employees to join District 99E of the National Union of Hospital and Health Care Employees.

DECISION

The claimant was unemployed because she was discharged for reasons other than misconduct connected with her work within the meaning of Section 6(c) of the Maryland Unemployment Insurance Law. Benefits are payable to the claimant as of February 19, 1984, if she was otherwise eligible under the Maryland Unemployment Insurance Law.

The disqualification imposed by the Claims Examiner under Section 6(c) of the Law is rescinded.

Sanford Hordes
Appeals Referee

Date of hearing: April 13, 1984
jlt
(2190B-Shannon)

Copies mailed to:
Claimant
Employer
Unemployment Insurance - Pimlico