

- DECISION -

Claimant:
KERRY L WALSH

Decision No.: 3073-BR-14

Date: December 03, 2014

Appeal No.: 1411135

S.S. No.:

Employer:
JASON PHARMACEUTICALS INC

L.O. No.: 64

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: January 02, 2015

REVIEW OF THE RECORD

The employer has filed a timely appeal to the Board from an Unemployment Insurance Lower Appeals Division Decision issued on June 13, 2014. That Decision held the claimant was discharged for misconduct within the meaning of *Md. Code Ann., Lab. & Empl. Art., §8-1003*. Benefits were denied for the week beginning December 9, 2013, and the following nine weeks.

On appeal, the Board reviews the evidence of record from the Lower Appeals hearing. The Board reviews the record *de novo* and may affirm, modify, or reverse the hearing examiner's 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. *Md. Code Ann., Lab. & Empl. Art., §8-510(d)*. The Board

fully inquires into the facts of each particular case. *COMAR 09.32.06.03(E)(1)*. Only if there has been clear error, a defect in the record, or a failure of due process will the Board remand the matter for a new hearing or the taking of additional evidence. Under some limited circumstances, the Board may conduct its own hearing, take additional evidence or allow legal argument.

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)*.

In this case, the Board has thoroughly reviewed the record from the Lower Appeals hearing. The record is complete. Both parties appeared and testified. Both parties were given the opportunity to cross-examine opposing witnesses and to offer and object to documentary evidence. Both parties were offered the opportunity to present closing statements. The necessary elements of due process were observed throughout the hearing. The Board finds no reason to order a new hearing, to take additional evidence, to conduct its own hearing, or allow additional argument.

The Board finds the hearing examiner's Findings of Fact are supported by substantial evidence in the record. Those facts are sufficient to support the hearing examiner's Decision. The Board adopts the hearing examiner's findings of fact and conclusions of law.

Md. Code Ann., Lab. and Empl. Art., Title 8, Section 1002 provides:

- (a) Gross misconduct...
 - (1) Means conduct of an employee that is:
 - i. 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
 - ii. repeated violations of employment rules that prove a regular and wanton disregard of the employee's obligations...

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)*.

Md. Code Ann., Lab. and Empl. Art., Title 8, Section 1003 provides:

- (a) Grounds for disqualification – an individual who otherwise is eligible to receive benefits is disqualified from receiving benefits if the Secretary finds that unemployment results from discharge or suspension as a disciplinary measure for behavior that the Secretary finds is misconduct in connection with employment but that is not:
- (1) Aggravated misconduct...or
 - (2) Gross misconduct...

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 the employment relationship, during hours of employment or on the employer's premises, within the meaning of *Md. Code Ann., Lab. and Empl. Art., Title 8, Section 1003*. (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 the employer's appeal, its representative contends the claimant, knowing he was on a final disciplinary warning, should have made a greater effort to report for work. The representative contends the claimant had alternatives available to him to which he did not attempt to avail himself. The employer representative does not cite specifically to the evidence of record and makes no other contentions of error. The representative argues that the claimant's actions demonstrated. "a gross indifference to the best interest of the employer" and warrant the maximum disqualification.

The Board agrees with the contentions of the employer's representative. The claimant knew his attendance was problematic for the employer and knew he faced termination for additional absences. The claimant may have been able to be excused for the first day of this final absence, but not for the next three days. The claimant knew he did not have transportation to work, but did not take any steps to find an alternative. The claimant did not ask any co-workers; he did not try to take a taxi. The claimant concluded that he could not afford a taxi even though the distance was less than six miles. He argued that, because of his low pay and his other bills, he could not spend money on a taxi, even though that likely

would have preserved his employment. He did not take a bus because he would still have had to walk between two and four miles and did not think he could this because of his back problems.

The Board concludes that the claimant's unwillingness to find and utilize an alternative method to get to work, despite his prior attendance warnings, was indicative of gross negligence and was contrary to the employer's interests and its expectations. The employer discharged the claimant for reasons which constitute 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 upon a preponderance of the credible evidence, that the employer did meet its burden of proof and show that the claimant was discharged for gross misconduct within the meaning of *Md. Code Ann., Lab. and Empl. Art., §8-1002*. The decision shall be reversed for the reasons stated herein and in the hearing examiner's decision.

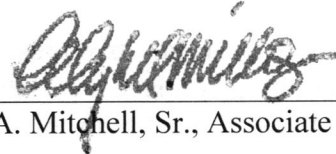
DECISION

The Board holds that the claimant was discharged for gross misconduct within the meaning of *Md. Code Ann., Lab. and Empl. Art., Title 8, Section 1002*, The claimant is disqualified from the receipt of benefits from the week beginning December 9, 2013, and until the claimant becomes reemployed, earns twenty-five times his weekly benefit amount and becomes unemployed through no fault of his own.

The Hearing Examiner's decision is Reversed.



Donna Watts-Lamont, Chairperson



Clayton A. Mitchell, Sr., Associate Member

VD

Copies mailed to:

KERRY L. WALSH

JASON PHARMACEUTICALS INC

JAMES A. STULLER

JASON PHARMACEUTICALS INC

Susan Bass, Office of the Assistant Secretary

UNEMPLOYMENT INSURANCE APPEALS DECISION

KERRY L WALSH

SSN #

Claimant

Vs.

JASON PHARMACEUTICALS 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: 1411135

Appellant: Employer

Local Office : 64 / BALTOMETRO

CALL CENTER

June 13, 2014

For the Claimant: PRESENT

For the Employer: PRESENT, JAMES STULLER, MARC STALLINGS

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 began working for this employer, Jason Pharmaceuticals Inc, on June 3, 2013. At the time of separation, the claimant was working as a customer service representative, earning \$14.25 per hour. The claimant last worked for the employer on December 11, 2013, before being terminated for violation of the employer's attendance policy.

The employer's attendance policy provides a progressive disciplinary process for violations. After reaching six points, the employee could be terminated. The claimant signed the acknowledgment of the policy on June 12, 2013.

On September 3, 2013, LsSonya Kirby, supervisor, issued the claimant a warning after being late on June 15, 2013 (woke up late) and July 11, 2013 (woke up late) and absent on June 18 and 19, 2013 (doctor's orders to be out due to pneumonia and submitted medical documentation to support his absences) and August 28 through 31, 2013 (back issues and presented employer medical documentation substantiating his absences).

On November 6, 2013, Ms. Kirby issued the claimant a warning for being absent on November 3, 2013. The claimant's explanation was that he was absent due to having a flat tire and when he changed his tire he threw his back out.

On December 11, 2013, Marc Stallings, supervisor, issued warning after the claimant was absent on December 9, 2013. The claimant's message to the employer for his absence was that he hurt his back shoveling snow. The claimant's explanation at the hearing was he was having a problem with his car.

On December 16, 2013, Mr. Stallings terminated the claimant after he was absent on December 12, 13, 14, and 16, 2013. The claimant's explanation was that he was absent due to "car issues." The claimant was having ongoing car issues. The claimant tried other employees to get a ride into work; the other employees were unable to assist him. The claimant had no alternative methods of transportation to the employment. The claimant notified the employer each day that he was absent.

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).

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.

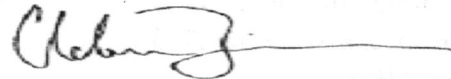
The employer's witness set forth credible and competent testimony of the claimant's repeated attendance infractions and the employer issuing him warnings for such infractions. Despite the employer's repeated warnings, the claimant's absences persisted. The claimant was able to provide an explanation for a majority of his attendance infractions. Therefore, the claimant's conduct is mitigated. The claimant's behavior warrants a finding of misconduct with a mitigated penalty.

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 December 8, 2013 and for the nine (9) 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.



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

This is a final decision of the Lower Appeals Division. Any party who disagrees with this decision 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 June 30, 2014. 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: June 06, 2014

AEH/Specialist ID: RBA85

Seq No: 001

Copies mailed on June 13, 2014 to:

KERRY L. WALSH
JASON PHARMACEUTICALS INC
LOCAL OFFICE #64
JAMES A. STULLER