

**- DECISION -**

Claimant:  
MELVAL LUCAS

Decision No.: 3448-BR-12

Date: August 08, 2012

Appeal No.: 1206377

S.S. No.:

Employer:  
HEARTLAND EMPLOYMENT SRVCS LLC

L.O. No.: 63

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.

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**- 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: September 07, 2012

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**REVIEW OF THE RECORD**

After a review of the record, and after correcting the claimant's last name in the first sentence of the first paragraph to "Lucas", the Board adopts the hearing examiner's modified findings of fact. However, the Board concludes that these facts warrant different conclusions of law and a 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, 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).

In the employer's appeal, its representative contends:

At the time of the test the claimant [sic] blood alcohol lever [sic] was .022, however test was administered more than three hours after the claimant arrive [sic] to work, therefore her blood alcohol level could have been hire [sic] when she first arrived to work...The mere fact that the claimant was under the state alcohol limit does not negate the fact that alcohol could have impaired her ability [to] function and or to perform her job duties.

The representative makes other contentions related to the employer's reasons for requesting that the claimant submit to an alcohol test and the reasonableness of that request. The employer's representative further contends the claimant could have exposed the employer to liability based upon the employer's "...responsibility to insure the safety and well being of all patients and staff..."

The Board finds some merit in some of the representative's contentions.

The evidence established that the claimant was in a position of dealing directly with patients of the employer's facility. The evidence showed that the claimant was under the influence of alcohol at the time she was tested. The evidence demonstrated that the employer has a "zero-tolerance" policy for workers who are "...under the influence of...alcohol on company premises..." See *Employer's Exhibit #7, page 1*.

The Board finds the hearing examiner placed undue reliance upon the fact that the claimant's blood-alcohol level was well below the threshold for the criminal charge of operating a motor vehicle under the influence of alcohol. The Board also finds the hearing examiner should have taken official notice of the well-established scientific principles that, over time, a blood-alcohol measure will decrease. If the claimant's blood tested .022 three hours after the start of her shift, it had to have been higher when she reported for work, unless it could be established she was consuming alcohol after she reported for work.

The hearing examiner cited the relevant portion of the law concerning the proper administration of drug and alcohol tests. However, that was not the issue in this matter. The question before the hearing examiner, and now the Board, is whether the claimant reported for work under the influence of alcohol in violation of the employer's work-place rules with which the claimant was familiar.

The evidence established that the claimant was aware of the employer's policy. The evidence showed that the claimant tested positive for alcohol three hours after reporting for work, thus establishing that she reported for work under the influence of alcohol. The logical conclusion, here, is that the claimant violated a known work-place rule. This is simple misconduct.

The next question is whether the claimant deliberately violated the employer's policy, elevating the reason for her discharge to gross misconduct. The Board does not find any evidence of a willful disregard for the employer's interests under these circumstances. Also, this was not shown to have been repeated conduct. It was not established that the claimant knew or should have known that consuming alcohol the night before reporting for work would leave traces of that alcohol in her blood sufficient to result in a positive test. This remains simple 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 has met its burden of demonstrating that the claimant's actions rose to the level of simple misconduct within the meaning of §8-1003. The claimant is disqualified from the receipt of benefits for the week beginning January 1, 2012, and for the next nine weeks thereafter. 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 1, 2012, and the nine weeks immediately following.

The Hearing Examiner's decision is reversed.



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Donna Watts-Lamont, Chairperson



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Clayton A. Mitchell, Sr., Associate Member

VD

Copies mailed to:

MELVA L. LUCAS

HEARTLAND EMPLOYMENT SRVCS LLC

GAYLE TUREK

SHENEKQUA JOHNSON ACCOUNT MGR.

Susan Bass, Office of the Assistant Secretary

**UNEMPLOYMENT INSURANCE APPEALS DECISION**

MELVA L LUCAS

SSN #

**Claimant**

vs.

HEARTLAND EMPLOYMENT SRVCS LLC

**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: 1206377

Appellant: Claimant

Local Office : 63 / CUMBERLAND  
CLAIM CENTER

March 12, 2012

**For the Claimant:** PRESENT

**For the Employer:** PRESENT , GAYLE TUREK, VIVIAN LEWIS

**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, Melva Lane worked for Heartland Employment Services, LLC from June 22, 2005 until January 10, 2012. The claimant earned \$8.78 per hour while working full time as a dietary aid.

The employer has a zero tolerance policy pertaining to drug and alcohol use by employees. A copy of the written policy prohibiting the use of alcohol or being under the influence of alcohol on company premises at any time was supplied to the claimant at the time she was hired.

On January 3, 2012, the human resources director was informed that an odor of an alcoholic beverage was noticed on the claimant's person. The director then made a brief contact with the claimant in the kitchen where she worked and noted an odor, but could not immediately discern what it was. The director then had the claimant's supervisor ask her to come into the director's office and it was at that point that the odor of an alcoholic beverage was noted. The claimant was interviewed about the employer's suspicions concerning consumption of alcohol and she stated that she had consumed drinks within the preceding 24 hours. Specifically, she told the employer she stopped drinking the night before around mid-night. She reported to work the next day between noon and 1:00 pm. She was asked to sign a consent to test her for alcohol and she did so, acknowledging that she understood the employer's policy concerning drug and alcohol use, that she could request that she be re-tested at her expense and that she could be disciplined, including termination, if she tested positive for alcohol. She was then taken to a testing facility where she was given a breathalyzer test that registered a .022 blood alcohol result. A copy of the test was supplied to her. She was suspended on January 3, 2012 for violation of the employer's policy and terminated on January 10, 2011.

### 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).

Section 17-214.1(c)(1)(iv) of the Health-General Article of the Annotated Code of Maryland provides that an employer, after having required an employee to be tested for the use or abuse of any controlled dangerous substance, and who receives notice that the employee has tested positive, after confirmation of that test result, shall provide the employee with:

- (i) a copy of the laboratory test indicating the test results;
- (ii) a copy of the employer's written policy on the use or abuse of controlled dangerous substances or alcohol by employees,...
- (iii) If applicable, written notice of the employer's intent to take disciplinary action, terminate employment, or change the conditions of continued employment; and
- (iv) a statement or copy of the provisions set forth in subsection (d) of this section permitting an employee to request independent testing of the same sample for verification of the test result.

Where a claimant does not dispute the fact that he failed a random drug test by testing positive for a controlled dangerous substance, the undisputed drug test result is itself enough to support a finding of gross misconduct even without testimony from the employer at the hearing. The test result speaks for itself. Jones v. Race Track Payroll Account, Inc., 2204-BR-95.

Whether the claimant is informed of, or given the opportunity to have a second testing of the same sample is irrelevant when the claimant does not deny that the results of the drug test are accurate. Boyd v. Cantwell Cleary Company, Inc., 1845-BH-92.

## 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, the employer has failed to demonstrate that the discharge was due to misconduct.

The evidence establishes that the claimant tested positive for alcohol consumption at some point in time, the test results measuring .022. The claimant stated that she had been drinking the night before at her residence when she was off from work. The claimant exhibited no overt evidence or indications of being under the influence of alcohol other than the odor of an alcoholic beverage when she reported for work. The employer's policy prohibits consuming or being under the influence of alcohol during working hours on the employer's premises. No evidence was presented of consumption or impairment. No evidence was presented concerning the significance of the blood alcohol reading of .022. Without some evidence concerning the significance of this reading or observations beyond merely an odor of an alcoholic beverage, there can be no finding that the claimant violated employer policy.

I hold that the claimant did not commit a transgression of some established rule or policy of the employer, a forbidden act, a dereliction of duty, or engage 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. No 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, but not for misconduct connected with the work within the meaning of Md. Code Ann., Labor & Emp. Article, Section 8-1003. No disqualification is imposed based upon the claimant's separation from employment with the above-identified employer. The claimant is 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](mailto: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.

*B. Taylor*

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B. Taylor, 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 March 27, 2012. 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: March 07, 2012  
CH/Specialist ID: WCU1P  
Seq No: 001  
Copies mailed on March 12, 2012 to:  
MELVA L. LUCAS  
HEARTLAND EMPLOYMENT SRVCS LLC  
LOCAL OFFICE #63  
GAYLE TUREK  
HEARTLAND EMPLOYMENT SRVCS LLC