

- DECISION -

Claimant:
MARIA EVITA M ISRAEL

Decision No.: 3696-BR-11

Date: July 08, 2011

Appeal No.: 1048980

S.S. No.:

Employer:
HOLY CROSS HOSPITAL OF S S INC

L.O. No.: 61

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: August 08, 2011

REVIEW ON THE RECORD

After a review on the record, the Board adopts the hearing examiner's 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(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). 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 its appeal, the employer reiterates its contentions from the hearing. The employer maintains that the claimant repeatedly failed to follow instructions, repeatedly failed to exercise proper care in performing her work and repeatedly made errors that should have been avoided. The employer notes that the increase in the claimant's job duties was concurrent with the elimination of other job duties such that the claimant was not expected to perform any more work than she had been expected to do previously.

The Board finds that the hearing examiner did not properly consider the claimant's repeated negligence in the analysis of whether the claimant was discharged for a disqualifying reason. A claimant does not have to act with willful or deliberate disregard for the employer. A claimant's actions or omissions which are repeatedly careless or negligent are sufficient to support a finding that the discharge occurred under disqualifying circumstances. In this case, the claimant was trained and retrained. She was warned and counseled. She was given additional support and shown, specifically, what the employer needed her to do. The claimant continued to make errors when she did not follow the employer's directives. These errors caused substantial inconvenience to the employer's medical staff and its patients.

The Board concludes that the claimant's actions were repeatedly careless in nature. This was gross misconduct for which she was ultimately discharged.

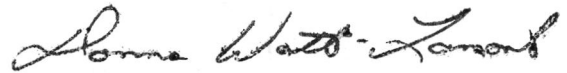
The Board notes that the hearing examiner did not offer or admit the *Agency Fact Finding Report* into evidence. The Board did not consider this document when rendering its decision.

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 gross misconduct within the meaning of § 8-1002. The decision shall be reversed for the reasons stated herein.

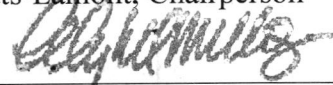
DECISION

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 November 14, 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.



Donna Watts-Lamont, Chairperson



Clayton A. Mitchell, Sr., Associate Member

RD/mw

Copies mailed to:

MARIA EVITA M. ISRAEL

HOLY CROSS HOSPITAL OF S S INC

HOLY CROSS HOSPITAL OF S S INC

Susan Bass, Office of the Assistant Secretary

UNEMPLOYMENT INSURANCE APPEALS DECISION

MARIA EVITA M ISRAEL

SSN #

Claimant

vs.

HOLY CROSS HOSPITAL OF S S 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: 1048980

Appellant: Claimant

Local Office : 61 / COLLEGE PARK
CLAIM CENTER

February 03, 2011

For the Claimant: PRESENT, ROSE NANGEL

For the Employer: PRESENT, ALEXANDER FREEMIRE

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, Maria Evita Israel was employed as a full-time cardio services unit coordinator with Employer, Holy Cross Hospital of Silver Spring Inc. from February 1997 to November 12, 2010. The claimant's rate of pay at the time of separation from this employment was \$16.48 per hour. The claimant was discharged from her position with this employer for incompetence in job duties.

The claimant's job duties, which the claimant was aware, required the claimant to coordinate with physicians, nurses, medical staff and patients for the scheduling of procedures for patients. On July 30, 2010, the claimant received a performance evaluation stating that the claimant needed improvement in scheduling and coordinating appointments for procedures. See Employer's Exhibit #1. The claimant had

made a number of errors and this was discussed with the claimant following the evaluation. The claimant was relocated to an area of the hospital that was closer to the claimant's manager, Nettie Cuervo. See Employer's Exhibit #2. With the move, the claimant also was given the tasks of scheduling for not just the Cath lab, but the Sleep lab, pulmonary, EEGs, EKGs, and echocardiograms as well. The claimant also underwent a 6-week re-training. See Employer's Exhibit #3. On October 8, 2010, after the claimant had completed the retraining, the claimant's supervisor reported to human resources that "it is my belief Maria is not capable of performing the scheduling position reliably." See Employer's Exhibit #2. The culminating incident that led to the claimant's discharge took place on or about November 3, 2010. On that day, the claimant notified physician, nurses and medical staff that a patient was scheduled for a procedure on November 11, 2010 at 9:30 a.m. See Employer's Exhibit #4. This date and time was booked, modified, confirmed and verified by the claimant. See Employer's Exhibit #4. However, the claimant was told that the procedure was scheduled for 12:30 p.m. The claimant's error was discovered when the patient did not arrive for the procedure at the correct time. The claimant was discharged as a result.

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 not been met.

The employer testified that the claimant was discharged for incompetence, specifically failure to properly coordinate schedules for procedures. The employer further testified that the claimant went through retraining and was still unable to properly coordinate the schedules for the procedures. The claimant admitted that she was having difficulty with coordinating the schedules. The claimant testified that she noted her errors, took notes, and made sure that she did not commit the same errors again. The claimant further testified that when she was moved closer to her manager, the employer added to her scheduling responsibilities. The claimant also testified that she was working to the best of her ability. When a claimant is working to the best of their ability, but is not capable of performing the job duties to the satisfaction of the employer, the claimant's discharge is not due to misconduct. See Cumor v. Computer Communications Group, 902-BH-87. The Hearing Examiner finds that the claimant was working to the best of her ability, was having difficulty with the scheduling process and procedures and in the mist of

retraining the claimant, the employer increased her workload. The Hearing Examiner finds that the employer has failed to show that the claimant committed any act of misconduct.

Accordingly, 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 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. Smith

S. Smith, 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 February 18, 2011. 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: January 24, 2011

DW/Specialist ID: WCP2T

Seq No: 001

Copies mailed on February 03, 2011 to:

MARIA EVITA M. ISRAEL

HOLY CROSS HOSPITAL OF S S INC

LOCAL OFFICE #61

HOLY CROSS HOSPITAL OF S S INC