

DECISION

Claimant:
JESSICA D RICHARD

Decision No.: 550-SE-14

Date: February 28, 2014

Appeal No.: 1323212

Employer:
CARROLL HOSPITAL CENTER

S.S. No.:

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.

- 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: March 31, 2014

- APPEARANCES -

FOR THE CLAIMANT:
Not Present

FOR THE EMPLOYER:
James Stuller
Tracy Ellison, Vice-President of HR
Christine Mulligan, Observer

EVALUATION OF THE EVIDENCE

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

FINDINGS OF FACT

After a review of the record, and a supplemental hearing, the Board adopts the first paragraph of the hearing examiner's findings of fact. The Board makes the following additional findings of fact:

The employer was advised by the local sheriff's office that several fraudulent prescriptions had been presented to a local pharmacy. There initially were three prescriptions which were on pages from pads identified as belonging to the employer and included DEA (U. S. Drug Enforcement Agency) numbers from physicians at the employer's facility. A fourth similar prescription was later reported. A DEA number is assigned to a physician and is required for many prescriptions. Only the doctor to whom the number is assigned may use the number, and there are substantial legal repercussions for improper use of such a number. In addition, a doctor may be held liable for the negative consequences of a patient's use of such prescribed medication which is traceable to his or her DEA number.

The claimant's estranged husband was the person attempting to fill these prescriptions and he told the sheriff's office the claimant had given the prescriptions to him. The claimant's husband did not work for the employer and had not been a patient at the employer's facility. The claimant's husband had no actual access to the pharmacy or the employer's prescription pads.

Based on the Sheriff's report, the employer initiated an internal investigation. The employer discovered that the prescription pages were from pads which the claimant had signed out as part of her job to provide these pads to the employer's staff. The claimant, in her position, also had access to the DEA numbers for doctors at the facility.

The sheriff's office also had advised the Maryland Board of Pharmacy (Pharmacy Board) of this situation. The Pharmacy Board then initiated its own investigation. As a result of that investigation, the Pharmacy Board concluded that the claimant's employment, her access to prescription pads and physician DEA numbers, her signature on the log records of the prescription pads used, and the fact that those fraudulent prescriptions were presented by her husband, made her complicit in this activity. They determined the claimant was the only person who could connect the employer to the fraudulent prescriptions. The Pharmacy Board advised the employer to suspend the claimant for 30 days, pending her right to appeal. Criminal charges were also filed against the claimant.

The employer suspended the claimant on June 4, 2013, subsequently discharging her for abuse of her position, fraudulent use of physician DEA numbers, and theft of employer property.

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*. Conclusory statements are insufficient evidence to meet an employer's burden of proof. *Cook v. National Aquarium in Baltimore, 1034-BR-91*. An employer must produce specific evidence of a claimant's alleged misconduct. *Id.*

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 the employer's appeal, its representative contends:

The claimant was discharged for gross misconduct...the claimant and the claimant alone had all the necessary contacts and access to materials that were used in this situation...there is absolute [sic] no other conclusion or rational [sic] to explain how these acts were accomplished without the direct involvement of the claimant.

The Board agrees with the contentions of the employer's representative.

On appeal, the Board will not order the taking of additional evidence or a new hearing unless there has been clear error, a defect in the record, or a failure of due process. Here, the Board felt it necessary to hold a supplemental hearing specifically to obtain more information about the Maryland Board of Pharmacy investigation and the results of that investigation. Notice of this supplemental hearing was sent to both parties. The employer appeared, but the claimant did not. Additional evidence was taken from the employer's witness.

The Board also reviews the evidence of record from the Lower Appeals hearing. Both parties appeared and testified at the Lower Appeals hearing. Both parties were given the opportunity to cross-examine opposing witnesses and to offer and object to documentary evidence. Both parties were offered closing

statements. The necessary elements of due process were observed throughout the Lower Appeals hearing, and the Board's supplemental hearing.

The Board has thoroughly reviewed the record from both hearings, but disagrees with the hearing examiner's findings of fact and conclusions of law. As noted by the employer's representative in the employer's appeal, there is no other connection between the employer and the fraudulent prescriptions but the claimant. The employer did not have first-hand evidence, but the employer did present substantial, competent, consistent, and credible evidence sufficient to meet its burden of proof. The employer established that the claimant was the person responsible for the prescription pads from which the pages were obtained and used; she signed for them in the employer's log records. The employer's evidence demonstrated the claimant had access to DEA numbers used by physicians at the employer's facility. And the evidence established the claimant's connection to the person presenting the fraudulent prescriptions. The Board of Pharmacy concluded the claimant's actions warranted criminal charges and suspension of her pharmacy technician's license. The employer concluded the claimant's actions warranted her discharge from its employment.

The Board concludes the greater weight of the credible evidence in the record is sufficient to support a finding that the claimant's actions, which led to her discharge, constituted gross misconduct under Maryland law.

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 June 16, 2013, 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

KP/MW

Date of hearing: February 20, 2014

Copies mailed to:

JESSICA D. RICHARD

CARROLL HOSPITAL CENTER

JAMES A. STULLER

CARROLL HOSPITAL CENTER

Susan Bass, Office of the Assistant Secretary

UNEMPLOYMENT INSURANCE APPEALS DECISION

JESSICA D RICHARD

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: 1323212
Appellant: Employer
Local Office : 63 / CUMBERLAND
CLAIM CENTER

August 22, 2013

For the Claimant: PRESENT

For the Employer: PRESENT, JAMES A. STULLER, TRACEY ELLISON, CHRISTINE MULLIGAN

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, Jessica D Richard, began working for this employer, Carroll Hospital Center, on May 29, 2007, and her last day worked was June 4, 2013. At the time of her suspension and subsequent discharge, the claimant worked full-time as a certified pharmacy technician.

The claimant was suspended and subsequently discharged for suspected of abuse of access to prescription drug materials and information belonging to the employer, and doctors of this employer, for purposes of illegally obtaining, or aiding a third party to obtain, prescription medications. The employer learned from the local sheriff's office that several fraudulent prescriptions had been presented to a local pharmacy using

prescription pages from pads belonging to the employer, and containing the DEA numbers of physicians of the employer. The three prescriptions in question had the DEA numbers belonging to three doctors of this employer, and were written on prescription pages from a prescription pad property of this employer. The individual who presented the prescriptions at the pharmacy is the estranged husband of the claimant. The estranged husband reported to the authorities that it was the claimant who had allegedly provided him with the prescriptions and the information contained in same. The sheriff's office contacted the employer to find out if the wife of this individual, the claimant, was an employee of the employer which the employer investigated and advised the authorities that in fact she was. Subsequently, the employer received a third report of a fourth prescription presented at a local pharmacy under similar circumstances.

The employer conducted its own internal investigation into the matter and determined that the claimant's estranged husband had not been admitted or received treatment at the hospital during the time period in question. Based on the information utilized to present the fraudulent prescriptions in question, the sequence of the prescription pad pages used, and the fact that the claimant, as a pharmacy technician, had access to the doctors' DEA numbers, the employer concluded that it was the claimant who provided the information and materials necessary to her estranged husband in violation of the employer's policy and the law. The employer found no corroborative information or independent proof to establish that in fact that the claimant was the individual who provided the prescriptions in question to her estranged husband.

The Maryland Board of Pharmacy sent an investigator to investigate the matter as well. The investigator visited the hospital on May 31 and June 3, 2013 to investigate the matter; the investigator is the mother of the claimant's estranged husband. Criminal charges were filed against the claimant however, the matter has yet to be adjudicated.

The claimant was suspended on June 4, 2013 and subsequently terminated for alleged abuse of access to prescription drug related information and materials.

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).

In Hartman v. Polystyrene Products Company, Inc., 164-BH-83, the claimant was discharged with no warnings. The burden is on the employer in a gross misconduct case to show that the claimant's actions

were deliberate and willful.

In Scruggs v. Division of Correction, 347-BH-89, the claimant correctional officer was discharged because three female inmates alleged that the claimant had sexual relations with each of them. The three inmates did not testify at the hearing. The employer's witnesses had no personal knowledge about the alleged misconduct. The claimant denied having sexual relationships with these inmates. There was insufficient evidence to sustain a finding of misconduct or gross misconduct.

In Fitzgerald v. Marten's Motors, Inc., 904-BH-89, the claimant was discharged due to a loss of insurance bonding resulting from a charge of robbery. The claimant had not been convicted at the time of the discharge. There was no misconduct connected with the work.

EVALUATION OF EVIDENCE

The employer had the burden to show, by a preponderance of the credible evidence that the claimant's termination was for conduct which rose to the level of misconduct or gross misconduct, pursuant to the Maryland Unemployment Insurance Law. (See Hartman v. Polystyrene Products Company, Inc., 164-BH-83). In the case at bar, the employer did not meet this burden.

As explained in Hartman, the burden of proof in a discharge lies with the employer. In this case, the employer's witnesses admitted that during the result of its internal investigation, it failed to discover any proof that in fact it was the claimant who provided the materials and information in question to her estranged husband. The employer first learned of the matter from the sheriff's department and upon the filing of criminal charges against the claimant, and a visit from an investigator from the Maryland Board of Pharmacy. Thereafter, the claimant was suspended and terminated. The employer based its decision to terminate the claimant on the information provided to it by the authorities. The criminal charges filed against the claimant have not yet been proven. The employer failed to establish by a preponderance of the credible evidence that in fact it was the claimant who provided the prescription drug materials in question to her estranged husband in violation of the employer's policy and the law. The evidence presented by the employer in this case is insufficient to show that the claimant engaged in any misconduct. Therefore, no disqualification is imposed.

Accordingly, the employer failed to meet its burden in this case and the claimant's discharge was for non-disqualifying reasons. Benefits are, therefore, allowed.

DECISION

IT IS HELD the claimant was discharged, but not for gross misconduct or misconduct connected with the work, within the meaning of Md. Code Ann., Labor & Emp. Article, Section 8-1002 or 8-1003. No disqualification is imposed based upon the claimant's separation from employment with this employer Carroll Hospital Center. 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 affirmed.

V. Nunez

V. Nunez, 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 to Petition for Review

This is a final decision of the Lower Appeals Division. Any party who disagrees with this decision may request a review 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 September 06, 2013. 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: August 19, 2013

DW/Specialist ID: WCU4T

Seq No: 001

Copies mailed on August 22, 2013 to:

JESSICA D. RICHARD
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