

- DECISION -

Claimant:
ANTHONY D CUNNINGHAM

Decision No.: 5928-BR-12

Date: February 8, 2013

Appeal No.: 1229676

S.S. No.:

Employer:
DOCTORS HOSPITAL INC

L.O. No.: 61

Appellant: Claimant

Issue: 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).

- 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 11, 2013

REVIEW OF THE RECORD

After a review of 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*. 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, 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 his appeal, the claimant contends he missed work, most recently, due to emergency reasons. The claimant contends he was under a doctor's care and that the employer was aware of this. The claimant also questions how it is possible, under the employer's no fault attendance system, to give two weeks notice of an emergency event.

The Board has conducted a thorough review of the evidence of record from the Lower Appeals hearing. That evidence does not support the hearing examiner's conclusions. The evidence did show that the claimant had a history of poor attendance, for which he was warned. The evidence also showed that the employer maintained a "no fault" attendance system whereby absences, regardless of cause, are counted against a worker. The evidence further demonstrated that the employer had tried to work with the claimant, granting him some flexibility while he attempted to correct his attendance problems.

All of this notwithstanding, the claimant's final absence was for an emergency. The claimant had a recurring problem with an abscess on his hand. The employer was aware of this situation. The claimant's final absences were caused by unforeseen surgery on and recovery of this hand. Even though this absence may have caused the claimant to exceed the allowed number of attendance points, it was not deliberate, willful, careless, negligent, a dereliction of duty, or breach of the rules of conduct such that a finding of any misconduct would be appropriate. The last absence may certainly have been a sufficient reason for the employer to discharge the claimant, but it does not support a finding of disqualification from unemployment benefits.

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 not met its burden of demonstrating that the claimant's actions rose to the level of gross misconduct within the meaning of § 8-1002. The employer has also not met its burden of showing that the claimant's discharge was for misconduct within the meaning of § 8-1003. The decision shall be reversed for the reasons stated herein.

DECISION

It is held that the claimant was discharged, but not for gross misconduct or misconduct connected with the work, within the meaning of Maryland Code Annotated, Labor and Employment Article, Title 8, Section 1002 or 1003. No disqualification is imposed based upon the claimant's separation from employment with Doctor Hospital.

The Hearing Examiner's decision is reversed.



Donna Watts-Lamont, Chairperson



Clayton A. Mitchell, Sr., Associate Member

VD

Copies mailed to:

ANTHONY D. CUNNINGHAM
DOCTORS HOSPITAL INC
Susan Bass, Office of the Assistant Secretary

UNEMPLOYMENT INSURANCE APPEALS DECISION

ANTHONY D CUNNINGHAM

SSN #

Claimant

vs.

DOCTORS HOSPITAL 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: 1229676

Appellant: Employer

Local Office : 61 / COLLEGE PARK

CLAIM CENTER

September 27, 2012

For the Claimant: PRESENT

For the Employer: PRESENT, DELACE BURETT, TERRY DOWDELL

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, Anthony Cunningham, worked for the above captioned employer, Doctor's Hospital, from October 11, 2010 until July 23, 2012 as an EVS Technician earning \$13.92 per hour in a full time capacity. The claimant was terminated for attendance issues for which he was previously warned.

The claimant had a history of absenteeism for which he was given verbal and written warnings including those issued on July 20, 2011 and January 10, 2012. (See Emp. Ex. #1 and 5) In fact the employer gave the claimant "flexibility" with his schedule from September to November 2011 in a memo to his employee file dated September 20, 2012 where the employer noted that he would not be reprimanded during this period of time. (See Emp. Ex. #4)

The claimant was absent on February 15 and 16, 2012 followed by an absence on May 15 and 16, 2012 but when the employer went to give him a warning he was absent on May 19 and 20, 2012 as well so they dated the warning for May 15 but he signed it on May 21, 2012. (See Emp. Ex. #1) Under the employer's no-fault attendance policies warnings can be issued for employees who are absent for legitimate medical issues. (See Emp. Ex. #2-3) The claimant was absent without prior notice on July 5 and then had to miss one week of work between July 14 and 19, 2012 for a surgical procedure on his hand. (See Cl. Ex. #1) The employer followed their policies and terminated the claimant for repeated poor attendance.

CONCLUSIONS OF LAW

Md. Code, Ann., Labor & Emp. Article, Section 8-1002 provides that an individual shall be disqualified from receiving benefits when he or she was discharged or suspended from employment because of behavior that demonstrates gross misconduct. The statute defines gross misconduct as repeated violations of employment rules that prove a regular and wanton disregard of the employee's obligations.

EVALUATION OF EVIDENCE

The evidence presented shows that the employer discharged the claimant. In a termination case the employer has the burden of proving, by a preponderance of the credible evidence, that the discharge was for some degree of misconduct connected with the work within the meaning of Maryland Unemployment Insurance Law. Ivey v. Catterton Printing Company, 441-BH-89. In the case at bar, that burden has been met.

The claimant did not dispute the attendance and disciplinary records offered by the employer. He did dispute the policies to the extent that he did not understand fully the complexities of the employer's "no-fault" attendance policy. However, the employer has demonstrated that the claimant was warned on several occasions about his attendance and failed to modify his behavior. He was absent on July 5, 2012 and the employer combined that absence with his final attendance occurrence and decided to terminate.

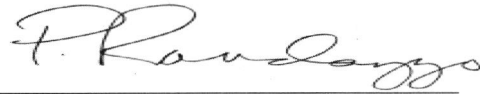
This type of behavior demonstrates an overall indifference to the employer's interests and was a deliberate and willful disregard of the standards of behavior that the employer had a right to expect.

I hold that the claimant's actions show a regular and wanton disregard of his obligations to the employer and constitute gross misconduct in connection with the work. An unemployment disqualification shall be imposed based on Md. Code, Ann., Labor & Employment Article, Section 8-1002 pursuant to this separation from employment.

DECISION

IT IS HELD THAT the claimant was discharged for gross misconduct connected with the work within the meaning of Md. Code Ann., Labor & Emp. Article, Section 8-1002(a)(1)(i). The claimant is disqualified from receiving benefits from the week beginning July 22, 2012, and until the claimant becomes reemployed and earns wages in covered employment that equal at least 25 times the claimant's weekly benefit amount.

The determination of the Claims Examiner is reversed.



P G Randazzo, 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 October 12, 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: September 19, 2012
BLP/Specialist ID: WCP2B
Seq No: 001
Copies mailed on September 27, 2012 to:

ANTHONY D. CUNNINGHAM
DOCTORS HOSPITAL INC
LOCAL OFFICE #61