

- DECISION -

Claimant:	Decision No.:	6048-BR-12
KIMBERLY A LEWIS	Date:	December 19, 2012
	Appeal No.:	1214537
	S.S. No.:	
Employer:	L.O. No.:	65
ATLANTIC GENERAL HOSPITAL CORP	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: January 18, 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 her appeal, the claimant denies she was the only employee who worked for both of the doctors relative to this matter. She contends: "[Three named individuals] all worked at the time the prescription pads went missing. There are also other employees that filled in the offices during that time due to [several reasons]." The claimant implies that the Board will somehow review employment records from the employer. She lastly contends: "I was wrongly accused of a crime and terminated from my employer." The claimant reiterates her contention from the hearing that no criminal charges were filed against her in this matter.

On appeal, the Board reviews the evidence of record from the Lower Appeals Division hearing. 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. 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 closing statements. The necessary elements of due process were observed throughout the hearing. The Board finds no reason to order a new hearing or take additional evidence in this matter. Additionally, the Board will not *sua sponte* review employment records as they are related to this matter. The Board understands the claimant had difficulty with her telephone throughout the course of the hearing. The Board accepts this as the reason the claimant did not challenge the employer's testimony on this point. However, because the Board is reversing the hearing examiner's decision for reasons which are totally unrelated to this point, the Board will not further discuss whether other persons were present at any times material to the theft of prescription pads.

The Board has thoroughly reviewed the record from the hearing and finds the hearing examiner gave the employer's evidence significantly more evidentiary weight than was appropriate. The employer's decision to discharge the claimant was based upon what one person said to a second person, who told a third person who, then told someone from the employer. The employer interviewed persons two and three, but never spoke to the originator of the accusation. Only the fourth (last) person in this chain was present at the hearing and subject to cross-examination to verify the competency of her testimony. The witness had no information about the declarant (originator). The witness could not provide any reliable information as to the basis of that person's purported knowledge, or that person's credibility. Hearsay evidence is admissible in these types of administrative proceedings. However, it must be evaluated based upon its

reliability – the competency of the declarant, and each subsequent reporter. There must be indicia that the evidence is free from bias and is actually founded upon some factual basis, not rumor or innuendo. The hearing examiner gave weight to this fourth-hand hearsay. The Board does not.

The employer's evidence showed that, based upon this rumor, the claimant was investigated and later discharged. The employer presented no other competent evidence which demonstrated that the claimant had any connection to the loss or theft of any prescription pads other than her employment at the offices where the thefts occurred. The employer, certainly, could choose to discharge the claimant for this or any other legal reason. However, for there to be a benefit disqualification, the employer must bring forth some competent evidence of wrong-doing by the claimant. The employer in this matter offered no such evidence. The Board finds that the claimant was discharged at and for the convenience of the employer and not for any disqualifying reason.

The Board notes that the decision of whether to file or pursue criminal charges lies with the prosecuting attorney in any jurisdiction. The decision to not file charges is often made for a variety of reasons. The fact that the claimant was not criminally charged is not relevant and has no bearing on the Board's decision in this matter.

The Board also 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.

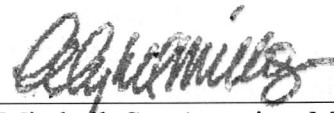
DECISION

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 ATLANTIC GENERAL HOSPITAL CORP.

The Hearing Examiner's decision is reversed.



Donna Watts-Lamont, Chairperson



Clayton A. Mitchell, Sr., Associate Member

The claimant's actions of stealing prescription pads from the employer on two (2) occasions showed a regular and wanton disregard of her obligations to her employer.

Therefore, I hold that the claimant's showed a regular and wanton disregard of her obligations to the employer and therefore constituted gross misconduct in connection with the work. An unemployment disqualification shall be imposed based on Md. Code, Ann., Labor & Emp. Article, Section 8-1002 pursuant to this separation from this 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)(ii). The claimant is disqualified from receiving benefits from the week beginning March 11, 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 Specialist is reversed.

N Grimes

N Grimes, 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 18, 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 27,2012
CH/Specialist ID: USB5F
Seq No: 001
Copies mailed on October 03, 2012 to:
KIMBERLY A. LEWIS
ATLANTIC GENERAL HOSPITAL CORP
LOCAL OFFICE #65

UNEMPLOYMENT INSURANCE APPEALS REMAND DECISION

KIMBERLY A LEWIS

SSN #

Claimant

vs.

ATLANTIC GENERAL HOSPITAL CORP

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: 1214537

Appellant: Claimant

Local Office : 65 / SALISBURY
CLAIM CENTER

October 03, 2012

For the Claimant: PRESENT

For the Employer: PRESENT , KRISTEN WORTHWAY, KIM CHEW

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).

PREAMBLE

A decision in this matter was originally issue by the Hearing Examiner on or about May 16, 2012. That decision was subsequently appealed to the Board of Appeals for a limited procedural hearing on the issue of whether "good cause" existed for the claimant's failure to appear at the original hearing on May 8, 2012. The Board found "good cause" existed and decided *inter alia* to remand the matter to the Chief Hearing Examiner for assignment to a Hearing Examiner for a hearing *de novo* on the merits to overcome the due process deficiency created by the lack of timely notice to the claimant of the prior hearing.

FINDINGS OF FACT

The claimant, Kimberly A. Lewis, filed a claim for benefits establishing a benefit year beginning April 1, 2012. She qualified for a weekly benefit amount of \$291.00.

The claimant worked for this employer, Atlantic General Hospital Corp., from December 15, 2008 to March 15, 2012. At the time she was terminated, she was working as a medical office assistant.

The employer terminated the claimant because she misappropriated prescription pads. The claimant first worked with Dr. Gillespie. During her tenure with Dr. Gillespie, his prescription pads disappeared. Later, she worked with Dr. Conrad. During her tenure with Dr. Conrad, his prescription pads disappeared.

Another employee of the employer, Jamie Bruckman, reported to Ms. Kim Chew, Director of Financial Operations, that her boyfriend had been taking a break from a meeting and was standing outside the building. Another individual was talking with him and asked where his wife worked. He replied that his girlfriend worked for the employer. This individual then asked him if he knew the claimant as he had purchased a blank prescription pad from her and understood that she was selling them about the State of Maryland. Ms. Bruckman's boyfriend then asked Ms. Bruckman about the claimant. Upon being informed of this information, Ms. Chew spoke with Ms. Bruckman's boyfriend who confirmed the information given to Ms. Chew about the claimant.

The employer began an investigation and confirmed that there was only one (1) employee, the claimant, who worked with Dr. Gillespie when his pads were stolen and also worked for Dr. Conrad when his pads were stolen. The employer terminated the claimant.

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 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, that burden has been met.

RD

Copies mailed to:

KIMBERLY A. LEWIS

ATLANTIC GENERAL HOSPITAL CORP

Susan Bass, Office of the Assistant Secretary