

-DECISION-

Claimant:
AMY J MEDINA

Decision No.: 958-BH-14

Date: May 14, 2014

Appeal No.: 1331463

Employer:
BROADWAY SERVICES INC

S.S. No.:

L.O. No.: 63

MD

Appellant: Claimant

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 June 13, 2014

- APPEARANCES -

FOR THE CLAIMANT:

Amy J Medina

FOR THE EMPLOYER:

Donna Klauza – Employer Rep
Thomas McNamee-VP HR
Fran Humphrey-Medical Srvs.

EVALUATION OF THE EVIDENCE

This matter came before the Board of Appeals (“Board”) pursuant to an appeal filed by the claimant, Amy Medina. After reviewing the record in this case, the Board determined that additional evidence was required to address the issues raised by the claimant in her appeal.

The Board issued its *Notice of Hearing* on January 23, 2014, noting a hearing before the Board to be held on February 11, 2014. In addition to the issue noticed the *Notice of Hearing* stated the following in bold:

Note: The Board is particularly interested in medical documentation advising the claimant that she did not have to disclose her medical disorders at the time of recertification.

The Board does not find any of the many documents entered into evidence on behalf of the claimant either credible and/or supportive of her position that she was not required to disclose her medical disorders at the time of recertification.

Claimant’s Exhibit B1 is an undated letter that allegedly was written on letterhead of Concentra Medical Centers (MD) and signed by Bobby Mosley. The document is neither notarized nor under affidavit and Bobby Mosley’s position is not stated. The document is also numbered (2) in the upper right hand corner and it is evident that another page or pages were attached that were not submitted by the claimant. The Board finds this document is of no probative value.

Claimant’s Exhibits B2, B5, B6, B7, B8, B9, and B10 do not address whether the claimant did not have to disclose her medical disorders at the time of recertification.

Claimant’s Exhibits B3 and B4 are incomplete documents allegedly printed from the internet. *Claimant’s Exhibit B3* is page 8 of a 9 page document and *Claimant’s Exhibit 4* is 4 pages of a 5 page document. Neither *Claimant’s Exhibit 3* nor *Exhibit 4* contain the first page of the document and neither provides information that addresses whether the claimant did not have to disclose her medical disorders at the time of recertification.

The Board finds the testimony of the employer’s witnesses to be more credible than that of the claimant.

FINDINGS OF FACT

The claimant was employed as a full-time Transit Coach Driver from April, 2012 until June 5, 2013. The claimant became separated from this employment as a result of a discharge.

The claimant was discharged for falsification of her *Medical Examination Report*, which was completed on April 4, 2012, as part of the claimant’s required initial employment paperwork. In response to whether or not the claimant had a nervous or psychiatric disorder, the claimant checked the box indicating she did not. In response to the request to list medications, the claimant left that part of the form blank. See *Employer’s Exhibit 1*. The claimant was diagnosed in November 2011 with Bipolar Disorder, anxiety and depression. The claimant has been treated for these disorders with medication. See *Employer’s Exhibit 4*.

The claimant intentionally falsified her *Medical Examination Report* as to her mental health and what medications she was taking.

The falsification of the *Medical Examination Report* came to the employer's attention in July, 2013 after the claimant had filed her *Request for Family and Medical Leave* ("FMLA"). See *Employers Exhibit 4*. The Certification of Health Care Provider that is part of the FMLA form was completed by Doctor Shamsa Ally and is dated June 24, 2013. Doctor Ally stated in that document that the claimant had been diagnosed "...with [Bipolar Disorder] & is currently on medication to stabilize symptoms of... (two words that are not legible) ...anxiety and depression." Dr. Ally further states that these conditions commenced as of November 2011 and that the "... duration is ongoing however managed with medication and therapy." See *Employer's Exhibit 4*.

The employer has a Major Rules policy that specifically prohibits the falsification of records. The claimant was aware of this policy and signed an acknowledgment of having received a copy of the Major Rules on April 4, 2012. See *Employer's Exhibit 7*.

The claimant was discharged on September 4, 2013.

CONCLUSIONS OF LAW

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 Board of Appeals has long held that falsification of information on a job application can be gross misconduct within the meaning of *Maryland Code Ann. Labor & Empl. Article, Title 8, Section 8-1002*. While falsification of an employment application is misconduct, the degree of misconduct (simple or gross) depends on the materiality of the information falsified. See *Hill v. First National Bank, 1958-BR-92*.

In the case at bar, the claimant applied for and was hired as a driver. This position required the claimant to operate vehicles owned by the employer on public streets. The claimant's physical and mental health as well as what medications the claimant was taking were important and material to whether or not the claimant could safely perform the duties for which she was being hired. The claimant had an obligation to respond fully and honestly to the questions regarding her health and what medications she was taking. The claimant failed to disclose the fact that she had been diagnosed with BiPolar Disorder, anxiety and depression and that she was taking medications to manage these disorders.

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).

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)*.

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.

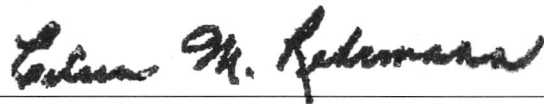
DECISION

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 2, 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.

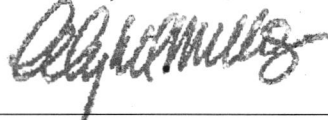
The Hearing Examiner's decision is reversed.



Donna Watts-Lamont, Chairperson



Eileen M. Rehrmann, Associate Member



Clayton A. Mitchell, Sr., Associate Member

VD

Date of hearing: February 11, 2014

Copies mailed to:

AMY J. MEDINA
BROADWAY SERVICES INC
BROADWAY SERVICES INC
Susan Bass, Office of the Assistant Secretary

UNEMPLOYMENT INSURANCE APPEALS DECISION

AMY J MEDINA

SSN #

Claimant

vs.

BROADWAY SERVICES 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: 1331463

Appellant: Employer

Local Office : 63 / CUMBERLAND
CLAIM CENTER

November 21, 2013

For the Claimant: PRESENT

For the Employer: PRESENT, TOM MCNAMEE, FRANCES HUMPHREY

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, Amy J. Medina, began working for this employer, Broadway Services, Inc., on April 6, 2012, and her last day worked was June 5, 2013. At the time of her discharge, the claimant worked full-time as a Transit Coach Driver, earning an hourly salary of \$12.30.

Employer has a Major Rules policy that prohibits falsifying records. Claimant was aware of the policy and acknowledged its receipt on April 4, 2012. The employer requires prospective employees, as a part of their pre-employment screening, to complete a Health History questionnaire and submit to a pre-employment physical. The Health History questionnaire has the following instructions: "Driver completes this section,

but medical examiner is encouraged to discuss with driver.”

On April 4, 2012, claimant completed the Health History questionnaire however, she left the section that makes an inquiry into driver’s “nervous or psychiatric disorders e.g., severe depression” blank because she did not believe she was under an obligation to disclose her mental health condition. Claimant wanted to consult with the medical examiner prior to responding to the inquiry. Claimant disclosed to the medical examiner that in 2011 she was diagnosed with Anxiety and Mood disorder. The medical examiner instructed claimant to indicate “No” to the inquiry “nervous or psychiatric disorders e.g., severe depression.” The claimant complied.

On June 14, 2013, claimant made a formal request for leave pursuant to the Family Medical Leave Act (hereinafter referred to as “FMLA”). Claimant’s healthcare provider indicated on the form that claimant was diagnosed with Bi-polar disorder in November, 2011. Claimant denies the Bi-polar diagnosis but acknowledges that the Anxiety and Mood disorder diagnosis predated the pre-employment screening of April 4, 2012.

On September 4, 2013, employer made a business decision to discharge claimant for falsifying her Health History questionnaire.

CONCLUSIONS OF LAW

Maryland Code Annotated, Labor and Employment Article, § 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).

Maryland Code Annotated, Labor and Employment Article, § 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 a standard 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).

While falsification of an employment application is misconduct, the degree of misconduct (simple or gross) depends on the materiality of the information falsified. Hill v. First National Bank, 1958-BR-92.

EVALUATION OF EVIDENCE

The employer had the burden to show, by a preponderance of the credible evidence, 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. Based upon the testimony and record, I find that employer has met its burden.

The evidence establishes that the claimant violated employer's policy by failing to properly document her mental health diagnosis on the Health History questionnaire. The issue before the Hearing Examiner is whether the claimant's falsification was material within the meaning of the Maryland Unemployment Insurance Law.

There is insufficient evidence to show claimant's failure to properly document her mental health diagnosis was material, demonstrated a deliberate and willful disregard of standards that an employer has a right to expect or showed a gross indifference to the employer's interests. Likewise, the evidence fails to establish that the claimant's actions demonstrated a regular and wanton disregard of the employee's obligations to the employer. The evidence does establish, however, that the claimant did engage in a course of wrongful conduct within the scope of her employment relationship, which constitutes misconduct connected with the work within the meaning of the Maryland Unemployment Insurance Law. It is questionable whether employer could use disclosed medical information to adversely affect claimant's employment. However, claimant's failure to respond truthfully to the inquiry is a falsification. Accordingly, I hold the employer met its burden in this case and the claimant's discharge was for policy violation, constituting misconduct connected with the work and benefits are, therefore, denied.

DECISION

IT IS HELD THAT the claimant was discharged for misconduct connected with the work within the meaning of Maryland Code Annotated, Labor and Employment Article, § 8-1003 (Supp. 1996). Benefits are denied for the week beginning June 2, 2013 and for the nine weeks immediately following. 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 other eligibility requirements at ui@dllr.state.md.us or telephone (410) 949-0022 from the Baltimore region, or (800) 827-4839 from outside the Baltimore region. Deaf claimants with TTY may contact Client Information Service at (410) 767-2727, or outside the Baltimore region at (800) 827-4400.

The determination of the Claims Specialist is reversed.



D F Camper, 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

This is a final decision of the Lower Appeals Division. Any party who disagrees with this decision 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 December 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: November 12, 2013
DW/Specialist ID: WCU25
Seq No: 001
Copies mailed on November 21, 2013 to:

AMY J. MEDINA
BROADWAY SERVICES INC
LOCAL OFFICE #63
BROADWAY SERVICES INC