-DECISION-

Claimant:
BRITNEY M GRINER

Employer:
JOHNS HOPKINS BAYVIEW MED CTR

Decision No.: 3894-BR-11

Date: July 01, 2011

Appeal No.: 1107650

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: August 01, 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).*

The employer has appealed the hearing examiner's decision, asserting that the claimant's failure to comply with the FASAP requirement that she attend a particular program was willful and, therefore, gross misconduct. The employer further contends that the claimant failed to make reasonable attempts to maintain contact with the employer and to otherwise comply with the employer's requirements. The employer also contends that the claimant never informed the employer of her financial difficulties and that the claimant failed, without any good reason, to submit the requested FMLA paperwork.

The evidence showed that the claimant did inform the FASAP program of the financial hardship of paying $60 per week for three to six months when she was not working and not earning anything. The claimant could not apply for short-term disability because she had no earnings with which to pay the physician for an examination and report. The employer was or should have been aware of the claimant's financial situation and that its requirements were not possible for the claimant to meet because of this. The claimant should not have been expected to tell every person at the employer that she could not afford the cost of the recovery program. She told the person who needed that information and who had the best opportunity to assist the claimant. That the program was unwilling to waive all or part of the fee was outside the claimant's control.

The claimant testified that she was confused by the different programs, requirements, letters, expectations and deadlines. That is certainly understandable. The claimant had suffered an injury for which she was prescribed pain medication. The claimant became addicted to this medication and was referred to the employer's Employee Assistance Program (EAP or FASAP). The claimant went through a "de-tox" program and met with the psychiatrist to whom FASAP referred her. That doctor released the claimant to return to work without restriction. The employer, through FASAP, required the claimant to attend a three- to six-month program which would cost the claimant $60 per week. The employer did not explain why the claimant was not allowed to return to work upon release by the FASAP doctor or why the employer required the claimant to attend this additional program at her own expense.

As to the FMLA paperwork, the claimant believed the employer had everything it needed. At the time the employer mailed this information to the claimant, the claimant was in the midst of her de-tox program and was in an unstable living environment. The claimant did not specifically recall receiving the FMLA letter from the employer, although the employer testified that it was mailed.

The employer contends that the claimant demonstrated a lack of reasonable attentiveness to the requests for contact and for further information. The employer, however, demonstrated a similar lack of diligence in at least the last two letters it sent to the claimant. The letter dated January 13, 2011, requiring the claimant contact the employer by January 19, 2011, was mailed on January 19, 2011. The employer made it impossible for the claimant to comply with this demand. Similarly, the letter dated January 25, 2011, discharging the claimant from her position, was not mailed until January 31, 2011.

The greater weight of the competent and credible evidence of record shows that the claimant did not act with any disregard for the employer's interests or its expectations. The claimant was understandably confused by those expectations and could not have been reasonably expected to comply. The employer elected to discharge the claimant based upon its presumption that she was abandoning her position. The claimant never intended to leave her employment; the claimant wanted to return, but the employer precluded that. When the employer discharged the claimant it was not for any disqualifying reason 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 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 JOHNS HOPKINS BAYVIEW MEDICAL CENTER.

The Hearing Examiner's decision is reversed.

Donna Watts-Lamont, Chairperson

Clayton A. Mitchell, Sr., Associate Member

RD
Copies mailed to:
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JOHNS HOPKINS BAYVIEW MED CTR
Susan Bass, Office of the Assistant Secretary

UNEMPLOYMENT INSURANCE APPEALS DECISION

BRITNEY M GRINER

SSN #

Claimant

vs.

JOHNS HOPKINS BAYVIEW MED CTR

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: 1107650
Appellant: Claimant
Local Office : 63 / CUMBERLAND CLAIM CENTER

April 1, 2011

For the Claimant: PRESENT, ALISA KAPIK

For the Employer: PRESENT, PIXIE ALLEN, DONNA GROVER, SUNDAE JONES

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 1001 (Voluntary Quit for good cause), 1002 - 1002.1 (Gross/Aggravated Misconduct connected with the work), or 1003 (Misconduct connected with the work).

FINDINGS OF FACT

The Claimant, Britney Griner, was employed as a full-time patient register in the Imaging Department with Johns Hopkins Bayview Medical Center, Employer, from November 2009 to October 20, 2010. The Claimant's rate of pay at the time of separation from this employment was $11.73 per hour. The Claimant was discharged from her position with this Employer for job abandonment.

In late 2009, the Claimant was in a car accident that resulted in injuries. The Claimant was prescribed prescription medication as a result of those injuries. The Claimant became addicted to the prescription medication. On October 20, 2010, the Claimant arrived at work and exhibited signs that she was under the influence of an intoxicating drug. The Claimant was sent to submit to drug test. The Claimant was then placed on a leave of absence.

On November 11, 2010, the Claimant was admitted into a detox program and was released on November 14, 2010. The Claimant's supervisor, Donna Grover, spoke with the Claimant's mother around this time. The Claimant's mother also contacted the Employer's Occupational Health department and provided the Employer with her cell phone number so the Employer would be able to contact the Claimant.

The Claimant also saw a psychiatrist, Dr. Varsa, who released the Claimant to return to work on November 14, 2010. On December 8, 2010, the Claimant signed an agreement with the Employer, that if she enrolled in the Employer's FASAP/EAP program and follow the recommendations, the Claimant could return to work. See Employer's Exhibit #1. The Claimant was in contact with the FASAP/EAP program. The FASAP program referred the Claimant to a 3-6 month recovery program, Partners in Recovery. The Claimant explained to the FASAP representative that she was not working and did not have any money. The Employer told the Claimant that they were going to see if the fee for the program could be waived. On December 20, 02010, the Claimant went to the Partners in Recovery program. The Partners in Recovery program fee was not waived and the Claimant was required to pay $60 per week for 3-6 months. Because the Claimant was not working, she did not have the money for the program. The Claimant attempted to apply for short term disability insurance, however, the doctor wanted to charge her to fill out the required forms and the Claimant could not complete the application.

The Claimant received a letter from the Employer, postmarked for January 19, 2011, stating that if the Employer did not hear from the Claimant by January 19, 2011, the Claimant would be considered to have resigned from her position and her employment terminated. See Claimant's Exhibit #1. When the Claimant received the letter, she called the Employer four times and left three messages, which were never returned. On January 25, 2011, the Claimant was issued a letter from the Employer informing her that she was discharged.

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 been met.

The Employer testified that the Claimant was discharged for job abandonment. The Employer also testified that the Claimant failed to fulfill the recommendations of the FASAP program. The Claimant testified that she notified the FASAP employee that she did not have the money to participate in the Partners in Recovery program. The Claimant's documentary evidence establishes that the Employer sent the Claimant a letter on January 19th stating that if the Employer did not hear from the Claimant by January 19th, she would be terminated. See Claimant's Exhibit #1. The Claimant testified that she attempted to contact the Employer numerous times after receiving this letter to no avail. The Employer failed to provide any witness from the FASAP department to confirm or deny that the Employer was not made aware of the Claimant's financial situation or that the Claimant failed to contact the FASAP deparment when instructed. As a result, the Hearing Examiner finds that the Claimant attempted to comply with the Employer's requirements and was unable to do so. However, the Hearing Examiner does find that the Claimant should have followed up with the Employer after learning that the recovery program fee would not be waived therefore, a mitigated penalty is warranted. The penalty will run from the date the Claimant earned, she could not pay for the recovery program December 20, 2010.

Accordingly, I hold that the Claimant committed a transgression of some established rule or policy of the employer, a forbidden act, a dereliction of duty, or engaged 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. An 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 for misconduct connected with the work within the meaning of Md. Code Ann., Labor & Emp. Article, Section 8-1003. Benefits are denied for the week beginning December 19, 2010, 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 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
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 April 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: March 25, 2011
BLP/Specialist ID: WCU2N
Seq No: 001
Copies mailed on April 1, 2011 to:

BRITNEY M. GRINER
JOHNS HOPKINS BAYVIEW MED CTR
LOCAL OFFICE #63