

**STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS**

**Keithann Widner,
Petitioner Below, Petitioner**

vs.) **No. 12-0964** (Kanawha County 11-AA-53)

**Mike Jones, Chair of the West Virginia
Bureau of Employment Programs Board
of Review; James G. Dillon, member of the
Board of Review, Carole A. L. Bloom, member
of the Board of Review; Russell Frye, Acting
Director for Work Force West Virginia; and
Charleston Area Medical Center, Employer,
Respondents Below, Respondents**

FILED

June 28, 2013
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Keithann Widner, by counsel Bruce Perrone, appeals the “Order of Respondent Charleston Area Medical Center, Inc. Denying Petitioner’s Appeal of Respondent Board’s Disqualification of Unemployment Benefits” entered by the Circuit Court of Kanawha County on June 25, 2012, denying petitioner unemployment compensation benefits. The employer Charleston Area Medical Center, Inc. (“CAMC”), by counsel L. Kevin Levine, has filed a summary response, to which petitioner filed a reply.

The Court has considered the parties’ briefs and the record on appeal. The facts and legal arguments are adequately presented, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision is appropriate under Rule 21 of the Rules of Appellate Procedure.

Petitioner was employed by CAMC as a coder from July 2, 2007, until she was terminated on October 28, 2010. Petitioner received a written warning for falling asleep on the job in July of 2010. Subsequently, petitioner was caught sleeping on the job. In September of the same year, petitioner received another written warning for failing to follow CAMC core values. As a result of petitioner’s performance she received a performance improvement plan. In October of 2010, petitioner received a written warning for a billing mistake and was caught sleeping on the job again. Petitioner was discharged on October 28, 2010, for sleeping at work, which constituted gross misconduct.

Petitioner filed a claim for unemployment compensation benefits with WorkForce West Virginia. On November 15, 2010, a deputy issued an initial decision disqualifying petitioner

from benefits beginning October 24, 2010, through December 11, 2010, for simple misconduct pursuant to West Virginia Code § 21A-6-3(2). Petitioner timely appealed the deputy's decision to the administrative law judge ("ALJ"). The ALJ reversed the deputy's decision and held that petitioner was discharged for an act of gross misconduct because she continued to sleep at work after receiving prior written warnings in violation of CAMC policy. Petitioner then timely appealed to the Board of Review ("Board"), which issued its opinion on March 10, 2011, that affirmed and adopted the ALJ's decision in its entirety. Petitioner appealed to the Circuit Court of Kanawha County, claiming the Board's decision was erroneous.

On appeal, petitioner first argues that the circuit court erred in affirming the ALJ's decision because before the gross misconduct penalty is triggered, the employer must first show that the specific acts are misconduct, and that the employee was discharged for the same type of act. Petitioner also argues that involuntary acts, such as those caused by illness, cannot be considered an act of misconduct when determining whether an applicant should be denied unemployment compensation. Petitioner also argues that the rules of liberality require reversal because CAMC failed to prove that her conduct fell within the appropriate disqualification provision.

This Court has held:

The findings of fact of the Board of Review of the West Virginia [Bureau of Employment Programs] are entitled to substantial deference unless a reviewing court believes the findings are clearly wrong. If the question on review is one purely of law, no deference is given and the standard of judicial review by the court is *de novo*.

Syl. Pt. 3, *Adkins v. Gatson*, 192 W.Va. 561, 453 S.E.2d 395 (1994). This Court has also held:

Findings of fact by the Board of Review of the West Virginia Department of Employment Security, in an unemployment compensation case, should not be set aside unless such findings are plainly wrong; however, the plainly wrong doctrine does not apply to conclusions of law by the Board of Review.

Syl. Pt. 1, *Kisamore v. Rutledge*, 166 W.Va. 675, 276 S.E.2d 821 (1981).¹ Upon our review, the Court concludes that the circuit court did not improperly review the Board's decision nor did it err in affirming it. Having reviewed the circuit court's "Order of Respondent Charleston Area Medical Center, Inc. Denying Petitioner's Appeal of Respondent Board's Disqualification of Unemployment Benefits" entered on June 25, 2012, we hereby adopt and incorporate the circuit court's well-reasoned findings and conclusions as to the assignments of error raised in this appeal. The Clerk is directed to attach a copy of the circuit court's order to this memorandum decision.

For the foregoing reasons, we find no error in the decision of the circuit court and its June 25, 2012 order affirming the board's decision.

¹ Prior to 2007, Workforce West Virginia was known as the Bureau of Employment Programs. See W.Va. Code § 21A-1-4 (2009).

Affirmed.

ISSUED: June 28, 2013

CONCURRED IN BY:

Chief Justice Brent D. Benjamin

Justice Robin Jean Davis

Justice Margaret L. Workman

Justice Menis E. Ketchum

Justice Allen H. Loughry II

CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

KEITHANN WIDNER,

Petitioner,

v.

Civil Action No. 11-AA-53
Hon. Charles E. King, Jr.

MIKE JONES, CHAIR of the West Virginia
Bureau of Employment Programs Board of
Review; JAMES G. DILLON, Member of
the Board of Review; CAROLE A. L. BLOOM,
Member of the Board of Review; RUSSELL FRY,
Acting Director of Work Force West Virginia;
and CHARLESTON AREA MEDICAL CENTER,
Employer,

 Respondents.

**PROPOSED ORDER OF RESPONDENT CHARLESTON AREA MEDICAL CENTER,
INC. DENYING PETITIONER'S APPEAL OF RESPONDENT BOARD'S
DISQUALIFICATION OF UNEMPLOYMENT BENEFITS**

Pending before the Court is a petition for appeal filed by Petitioner Keithann Widner (the "Petitioner" or "Ms. Widner"), pursuant to section 21A-7-17 et seq. of the West Virginia Code, on or about April 14, 2011. Through her petition, the Petitioner has requested that this Court review and reverse the final decision of the Board of Review of the West Virginia Department of Employment Security (the "Board of Review") entered on March 10, 2011, which memorialized the Board's holding that the Petitioner was disqualified from receiving unemployment compensation pursuant to section 21A-6-3(2) of the West Virginia Code.

Having examined and carefully considered the parties' filings and the record in this matter, as well as the pertinent legal authorities, the Court is of the opinion that the Petitioner's actions constituted gross misconduct under section 21A-6-3(2) of the West Virginia Code, and that both the ALJ and the Board of Review properly concluded that the Petitioner was therefore

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KANAWHA COUNTY CLERK
CIRCUIT COURT

disqualified from receiving unemployment benefits. Accordingly, the Court hereby DENIES the Petitioner's appeal and AFFIRMS the Respondent Board of Review's decision disqualifying the Petitioner from receiving unemployment compensation benefits. The Court bases its opinion on the following factual and legal findings:

FINDINGS OF FACT

1. At the time of her termination, the Petitioner, Keithann Widner (the "Petitioner") was employed at CAMC as a Coder II in the hospital's Coding and Data Registries Department.

2. The Petitioner has acknowledged both in her application for unemployment benefits and in filings with this Court during the course of this appeal that she was discharged for "sleeping on the job." (*See* 1/21/11 Hr'g Tr. ALJ Ex. 2; Petr.'s Br. 1-2.) In her Petitioner's Brief, the Petitioner admitted to "dozing off at work on three occasions." (Petr.'s Br. 1.)

3. The Petitioner acknowledged in her Petitioner's Brief that she had received prior written warning that further sleeping while at work would result in the termination of her employment. (*Id.* 3 n.2.)

4. The Petitioner applied for unemployment compensation benefits on or about October 31, 2010. The Deputy denied the Petitioner's application for benefits, finding that the Petitioner was disqualified for simple misconduct, pursuant to section 21A-6-3(2) of the West Virginia Code. (11/15/10 Deputy Decision; 1/24/11 ALJ Decision 1; 1/21/11 Hr'g Tr. ALJ Ex. 1.) The Petitioner appealed the Deputy's decision.

5. At the administrative hearing before Administrative Law Judge Truman L. Sayre, Jr. (the "ALJ") on January 21, 2011, the Petitioner did not dispute that she fell asleep at work on October 27, 2010, which ultimately led to the termination of her employment. (1/21/11 Hr'g Tr. 16-17.)

6. During her employment in the CAMC coding department, in addition to being warned about falling asleep at work, the Petitioner also received several warnings, both verbal and written, for performance issues beginning in October 2007 through to her termination. (1/24/11 ALJ Decision 1-2. *See also* 1/21/11 Hr'g Tr. Employer's Ex. 1.)

7. On January 24, 2011, the ALJ rendered his decision, finding that the Petitioner was disqualified from benefits for gross misconduct, pursuant to section 21A-6-3(2) of the West Virginia Code. (1/24/11 ALJ Decision 2.) Subsequently, the Petitioner appealed the decision of the ALJ to the Employment Compensation Board of Review (the "Board of Review").

8. By final decision dated March 10, 2011, the Board of Review affirmed the ALJ's disqualification of the Petitioner on the grounds that the Petitioner's actions constituted gross misconduct. (3/10/11 Bd. Review Decision.)

CONCLUSIONS OF LAW

1. "In a judicial proceeding to review a decision of the board, the findings of fact of the board shall have like weight to that accorded to the findings of fact of a trial chancellor or judge in equity procedure." W. Va. Code Ann. § 21A-7-21 (West, WestlawNext through 2011 Reg. Sess.).

2. "The findings of fact of the Board of Review of the West Virginia Department of Employment Security are entitled to substantial deference unless a reviewing court believes the findings are clearly wrong. If the question on review is one purely of law, no deference is given and the standard of judicial review by the court is *de novo*." Syllabus Point 3, *Adkins v. Gatson*, 453 S.E.2d 395 (W. Va. 1994). *See, also, Patton v. Gatson*, 530 S.E.2d 167, 169 (W. Va. 1999).

3. "[I]n the unemployment compensation context, a finding of fact is clearly erroneous when, although there is evidence to support the finding, the reviewing court, on the

entire evidence, is left with the definite and firm conviction that a mistake has been committed.”
Tabor v. Gatson, 533 S.E.2d 356, 358 (W. Va. 2000) (citing *Hanlon v. Logan County Board of Education*, 496 S.E.2d 447 (W. Va. 1997)).

4. “[U]nemployment compensation statutes, being remedial in nature, should be liberally construed to achieve the benign purposes intended to the full extent thereof.’ To this end our decisions have been constant that ‘unemployment compensation statutes should be liberally construed in favor of the claimant[.]’ However, ‘[t]his “liberality” rule is not to be utilized when its application would require us to ignore the plain language of the statute.’”
Private Indus. Council of Kanawha County v. Gatson, 483 S.E.2d 550, 552-53 (W. Va. 1997) (citations omitted).

5. Section 21A-6-3(2) of the West Virginia Code states, in pertinent part, as follows:

Upon the determination of the facts by the commissioner, an individual shall be disqualified for benefits: . . .

If he or she were discharged from his or her most recent work for one of the following reasons, or if he or she were discharged from his or her last thirty days employing unit for one of the following reasons: . . . *any other gross misconduct*, he or she shall be and remain disqualified for benefits until he or she has thereafter worked for at least thirty days in covered employment: *Provided, That for the purpose of this subdivision, the words “any other gross misconduct” shall include, but not be limited to, any act or acts of misconduct where the individual has received prior written warning that termination of employment may result from such act or acts.*

W. Va. Code Ann. § 21A-6-3(2) (West, WestlawNext through 2011 Reg. Sess.) (first and third emphasis added).

6. Section 21A-6-3(2) of the West Virginia Code specifically provides that the words “any other gross misconduct” shall include, but not be limited to, any act or acts of misconduct where the individual has received prior written warning that termination of employment may result from such act or acts. W. Va. Code Ann. § 21A-6-3(2) (West,

WestlawNext through 2011 Reg. Sess.).

7. The plain language of section 21A-6-3 of the West Virginia Code requires that all of the behaviors constituting “gross misconduct” identified in section 21A-6-3(2) be viewed equally and have the same effect on an individual’s eligibility to receive unemployment benefits. *See Private Indus. Council of Kanawha County v. Gatson*, 483 S.E.2d 550, 552-53 (W. Va. 1997).

8. “Where an employer has reasonable rules and regulations governing notice and verification of illness, these rules must be followed, or failure to follow such rules can constitute ‘misconduct.’” *Kirk v. Cole*, 288 S.E.2d 547, 550 (W. Va. 1982).

9. The only legal issue relevant for purposes of this appeal is whether the ALJ, and subsequently, the Board of Review, erroneously found that the Plaintiff (1) had received prior written warning that termination of her employment may result from her continued sleeping on the job, as provided in section 21A-6-3(2) of the West Virginia Code, and (2) was subsequently terminated for the same behavior.

10. The record and the Petitioner’s admissions and acknowledgement establish that the Petitioner’s repeated falling asleep after having received prior warning of potential termination constituted gross misconduct as a matter of law, pursuant to section 21A-6-3(2) of the West Virginia Code. (*See Petr.’s Br. 1, 2, 3 n.2.*)

11. Because the Petitioner’s actions constituted gross misconduct under section 21A-6-3(2) of the West Virginia Code, both the ALJ and the Board of Review properly concluded that the Petitioner was disqualified from receiving unemployment benefits.

12. None of the facts or legal authority that the Petitioner has proffered to this Court suggests that the findings of fact by either the ALJ or the Board of Review were clearly wrong.

WHEREFORE, based upon the above-stated findings of fact and conclusions of law, the Court hereby ORDERS, ADJUDGES, and DECREES that the Petitioner's appeal be, and it is hereby, DENIED, over the Petitioner's objection, and that the decisions of the ALJ and Board of Review be affirmed. The Court directs the Clerk of the Circuit Court to send certified copies of this order to all counsel of record and to the following parties:

Mike Jones, Chair
West Virginia Bureau of Employment Programs
112 California Ave.
Charleston WV 25305

James Dillon, Member of the Board of Review
West Virginia Bureau of Employment Programs
112 California Ave.
Charleston WV 25305

Carole Bloom, Member of the Board of Review
West Virginia Bureau of Employment Programs
112 California Ave.
Charleston, WV 25305

Russell Fry, Director
Workforce West Virginia
112 California Ave.
Charleston, WV 25305

Entered this 25TH day of June 2012

Charles E. King, Jr.
Charles E. King, Jr., Judge
Circuit Court of Kanawha County, West Virginia

PREPARED BY:

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6-27-12
Date: _____
Certified copies sent to:
 counsel of record
 parties
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The direct has been accomplished:
H. Weber

M. Jones
J. Dillon
C. Bloom
R. Fry
C. Weber
K. Wickner
E. Wehner

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, CATHY S. GATSON, CLERK OF THE CIRCUIT COURT OF SAID COUNTY AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE COPY FROM THE RECORDS OF SAID COURT GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS
June 2012
DAY OF
Cathy S. Gatson CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA
WT

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