

**- DECISION -**

Claimant:  
MARIA D SCOTT

Decision No.: 2331-BR-12

Date: June 29, 2012

Appeal No.: 1145200

S.S. No.:

Employer:  
HOLY CROSS HOSPITAL OF S S INC  
ACCOUNTING DEPT

L.O. No.: 63

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: July 30, 2012

---

**REVIEW OF THE RECORD**

After a review of the record, and after deleting "or about" from the first and third sentences of the first paragraph, the Board adopts the hearing examiner's modified 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, 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 reiterates her testimony from the hearing. She contends she was not sleeping, but had "...sat down to gather myself..." She contends she is entitled to benefits and she seems to expect that another hearing will be scheduled. On appeal, the Board reviews the evidence of record from the Lower Appeals 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 Board has thoroughly reviewed the record from the hearing and concurs with the hearing examiner's findings of fact, but reaches different conclusions of law.

Contrary to the claimant's contention, the evidence clearly establishes that the claimant was sleeping when she was found by her supervisor. If she were merely gathering herself, she most likely would have responded immediately or reacted to her supervisor's entry into the area. She did neither, but was only awakened when her name was called.

The hearing examiner found that the combination of sleeping and dishonesty when asked warranted a finding of gross misconduct despite this being an isolated incident. The Board disagrees with this conclusion. The Board finds it more appropriate, under these circumstances, to penalize the claimant for a period of weeks than to completely disqualify her from receiving benefits.

The Board is of the opinion that the evidence supports a finding of simple misconduct, but not gross misconduct. This was an isolated incident, precipitated by somewhat mitigating circumstances. The claimant clearly did not intend to fall asleep. However, the claimant deliberately made a false statement to employer when asked about the incident. The claimant knew or should have known that the employer expected her to be honest in her words and her deeds. The claimant's false statement was a violation of the employer's work-place rules and is sufficient to support the Board's conclusions in this matter.

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.

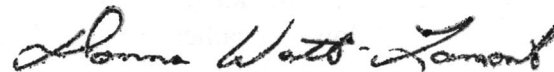
The Board finds based on a preponderance of the credible evidence that the employer has not met its burden of demonstrating that the claimant's actions rose to the level of gross misconduct within the

meaning of §8-1002. However, the Board finds 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 §8-1003. The decision shall be reversed for the reasons stated herein.

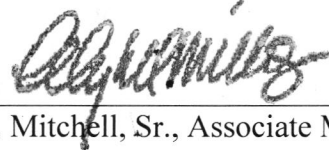
### DECISION

It is held that the claimant was discharged for misconduct connected with the work, within the meaning of Section 8-1003 of the Labor and Employment Article Maryland Code Annotated, Title 8, Section 1003. The claimant is disqualified from receiving benefits from the week beginning October 30, 2011 and the fourteen weeks immediately following.

The Hearing Examiner's decision is reversed.



Donna Watts-Lamont, Chairperson



Clayton A. Mitchell, Sr., Associate Member

VD

Copies mailed to:

MARIA D. SCOTT  
HOLY CROSS HOSPITAL OF S S INC  
HOLY CROSS HOSPITAL OF S S INC  
Susan Bass, Office of the Assistant Secretary

**UNEMPLOYMENT INSURANCE APPEALS DECISION**

MARIA D SCOTT

Before the:

**Maryland Department of Labor,  
Licensing and Regulation  
Division of Appeals**

1100 North Eutaw Street

Room 511

Baltimore, MD 21201

(410) 767-2421

SSN #

**Claimant**

vs.

HOLY CROSS HOSPITAL OF S S INC

**Employer/Agency**

Appeal Number: 1145200

Appellant: Employer

Local Office : 63 / CUMBERLAND  
CLAIM CENTER

January 23, 2012

**For the Claimant:** PRESENT

**For the Employer:** PRESENT, ALEXANDER FREEMIRE, LAUREN HIRD

**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, Maria Scott, began working for this employer, Holy Cross Hospital of Silver Spring, Inc., on or about July 23, 1988. At the time of separation, the claimant was working as a physical therapy aid. The claimant last worked for the employer on November 4, 2011, before being terminated for multiple policy violations.

The employer issued its company policies to the claimant and made them available to its employees at all times. Pursuant to the policies, employees were not permitted to sleep on the job or be dishonest with the employer.

On November 3, 2011, the claimant had just assisted a co-worker in helping a patient who weighed

approximately four hundred pounds. The claimant was tired and her back hurt. The claimant made her way to the 8<sup>th</sup> floor satellite gym, where she laid on an exercise mat and fell asleep. After receiving a report of the claimant's behavior, the claimant's supervisor went to check on the claimant. The claimant's supervisor found the claimant laying on the floor with her eyes closed at approximately 3:30 p.m. The supervisor tapped her foot loudly to get the claimant's attention. However, the claimant did not respond. The supervisor determined, at that time, that the claimant was sleeping. The supervisor then called the claimant's name loudly to get her attention. The claimant jumped and woke up. The claimant was not authorized to take a break at this time.

When asked for her account as to what happened, the claimant first explained that she helped the large patient, her back hurt and that she closed her eyes, but was not sleeping. When asked for her account again, the claimant told the employer that she was stretching and saw her supervisor enter the room.

It was determined, after an investigation that the claimant was sleeping when her supervisor entered the room. The claimant had not received a formal warning regarding this behavior prior to this incident.

### **CONCLUSIONS OF LAW**

Md. Code Ann., Labor & Emp. Article, Section 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 standards 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).

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).

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 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 witness offered credible, first-hand testimony that she witnessed the claimant sleeping on the floor on November 3, 2011, tapped her foot to get the claimant's attention and when she was unable to get the claimant's attention, called the claimant's name loudly. It was only at that point that the claimant responded to the witness, her supervisor. The employer credibly established that the claimant was asleep for at least a five to seven minute period of time. The claimant was not authorized to take this break.

Additionally, when asked for her account as to what happened, the claimant first told the employer that she was resting her eyes only to change her story later, telling the employer that she was stretching and saw her supervisor enter the room.

Although an isolated incident of nodding off on the job after physically exerting one's self to the extent that the claimant did, may not in and of itself be seen as an act of misconduct, the claimant's secondary violation of being dishonest with the employer in combination with her nodding off on the job is sufficient to warrant a finding of gross misconduct.

I hold that the claimant's actions showed a deliberate and willful disregard of the standards the employer had a right to expect, showed a gross indifference to the employer's interests 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)(i). The claimant is disqualified from receiving benefits from the week beginning October 30, 2011, 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.

*H Abromson*

---

H Abromson, 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 February 07, 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: January 10, 2012

BLP/Specialist ID: WCU51

Seq No: 001

Copies mailed on January 23, 2012 to:

MARIA D. SCOTT  
HOLY CROSS HOSPITAL OF S S INC  
LOCAL OFFICE #63