

**- DECISION -**

Claimant:	Decision No.:	2781-BR-12
AYANA M WASSON	Date:	July 6, 2012
	Appeal No.:	1145053
	S.S. No.:	
Employer:	L.O. No.:	63
HELIX HEALTH SYSTEM INC	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.

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**- 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 6, 2012

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**REVIEW OF THE RECORD**

After a review of the record, and after deleting "or about" from the first and third sentences of the second 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)*; also see *Johns Hopkins University v. Board of Labor, Licensing and Regulation, 134 Md. App. 653, 662-63 (2000)*(psychiatric condition which prevented claimant from conforming his/her conduct to accepted norms did not except that conduct from the category of misconduct under §8-1003). 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).

Aggravated misconduct is an amplification of gross misconduct where the claimant engages in "behavior committed with actual malice and deliberate disregard for the property, safety or life of others that...affects the employer, fellow employees, subcontractors, invitees of the employer, members of the public, or the ultimate consumer of the employer's products or services...and consists of either a physical assault or property loss so serious that the penalties of misconduct or gross misconduct are not sufficient."

In this case, the hearing examiner found the claimant's discharge to have been for simple misconduct and assessed a ten-week penalty. The employer has appealed this decision and argues the claimant should be disqualified from the receipt of benefits upon a finding that his discharge was for gross misconduct.

In the employer's appeal, its representative contends the hearing examiner's decision is in error. The representative further contends the evidence supports a finding of gross misconduct. The representative also contends: "The evidence and testimony presented shows that the claimant engaged in unprofessional and objectionable behavior..." That was the employer's contention throughout the hearing, however, the employer witnesses did not provide any more specifics than offered by the representative as to the nature of the "unprofessional and objectionable" words or actions by the claimant.

The employer's witnesses testified in broad generalities about the claimant's actions. The employer's witnesses offered very little in terms of specific words or deeds which led to these conclusory statements. The employer may find many types of conduct to be objectionable and may elect to terminate an employee for that reason. However, for there to be a finding of disqualifying misconduct, the employer must present credible and competent evidence of what, specifically, was done or said, or what was omitted, by the claimant. A decision as to whether a claimant is disqualified is based upon the acts or omissions by the claimant; such a decision is not based upon the employer's own conclusions about the claimant's behavior. In other words, one or more persons testifying that a claimant's behavior was "unprofessional", "rude" or "flippant", is not sufficient to show that the claimant's behavior was disqualifying. These terms are conclusions and, more importantly, are vague and open to interpretation.

The Board is of the opinion that the employer's evidence was insufficient to meet its burden of proof in establishing either gross misconduct or simple misconduct. The Board finds the claimant's discharge to have been for non-disqualifying reasons.

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 Board further 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 simple 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 HELIX HEALTH SYSTEM INC.

The Hearing Examiner's decision is reversed.



Donna Watts-Lamont, Chairperson



Clayton A. Mitchell, Sr., Associate Member

VD

Copies mailed to:

AYANA M. WASSON  
HELIX HEALTH SYSTEM INC  
DONNA D. HENRY  
HELIX HEALTH SYSTEM INC  
Susan Bass, Office of the Assistant Secretary

**UNEMPLOYMENT INSURANCE APPEALS DECISION**

AYANA M WASSON

SSN #

**Claimant**

vs.

HELIX HEALTH SYSTEM 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: 1145053

Appellant: Employer

Local Office : 63 / CUMBERLAND  
CLAIM CENTER

January 26, 2012

**For the Claimant:** PRESENT

**For the Employer:** PRESENT, DONNA D. HENRY, CECILIA PUKACZ, AMY KEEGAN, NIKKI MCKOY, JUDY HALLEY

**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, Ayana Wasson, filed a claim for benefits establishing a benefit year beginning November 13, 2011.

The claimant began working for the employer, Helix Health System (Good Samaritan Hospital) on or about July 20, 2009. At the time of separation, the claimant was employed as a multi-functional technician. The claimant last worked for the employer on or about November 10, 2011. The claimant was terminated for failing to meet the employer's behavioral expectations (Empl. Exh. 1), following an investigation into several staff complaints concerning her attitude. The final incident occurred on or about November 9, 2011, when a nurse reported that the claimant was "flip" and unprofessional during a discussion regarding patient

care. A few weeks earlier, another nurse complained of the claimant's attitude/sarcasm. The claimant was asked to take a blood pressure reading; she complied, but questioned its necessity. (See, Empl. Exh. 2) Following this incident, the claimant was "coached" on proper communication/behavior. The claimant had received a final warning in January 2011 (Empl. Exh. 3-4), after which, and prior to the recently-reported incidents, the employer had noticed some improvement in her attitude.

### 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).

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 8-1002 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.

In the case of a discharge, the employer has 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 this case, the burden has been sustained as to simple misconduct. The claimant offered compelling testimony in defense of the allegations of rudeness and/or poor attitude, yet her assertions that the employer always took the "patients' word" and that the nurses were just as "flippant" toward the techs, was not entirely persuasive. The weight of the credible and reliable evidence suggested that there were, in fact, periodic manifestations of disrespectful or otherwise inappropriate behavior towards patients or staff. The employer failed to demonstrate a necessary level of regularity or egregiousness in the claimant's actions to warrant a determination of gross misconduct. The transgressions more appropriately fall within the meaning of Section 8-1003. The statute imposes a mandatory penalty.

## 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 November 6, 2011, 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](mailto: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.



E B Steinberg, 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 10, 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 13, 2012

BLP/Specialist ID: WCU51

Seq No: 001

Copies mailed on January 26, 2012 to:

AYANA M. WASSON  
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DONNA D. HENRY