

**- DECISION -**

Claimant:  
DAWN M WISZ

Decision No.: 4751-BR-12

Date: September 28, 2012

Appeal No.: 1115420

Employer:  
WELLS FARGO BANK N A

S.S. No.:

L.O. No.: 60

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: October 29, 2012

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**PRELIMINARY STATEMENT**

The Board of Appeals (Board) issued its original decision in this case on April 4, 2012. Subsequent to the mailing of that decision, but apparently before the claimant received it, the claimant faxed the Board an additional eleven (11) pages of material, on April 12, 2012. Given the amount of material and the impending close of the time in which the Board could re-open the case, the Board re-opened this case on April 13, 2012.

Now having had any opportunity to review the additional material the Board concludes that its original decision was correct and re-issues it below.

## REVIEW OF THE RECORD

After a review of 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*. 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, *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); 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).

In its supplement to the employer's appeal, its representative contends the claimant was clearly warned of the performance problems and of the consequences for her failure to correct these issues. The employer's representative also contends the testimony of its three witnesses, concerning the counseling and coaching given to the claimant, should have been sufficient to establish that the claimant knew or should have known how to properly handle calls and preserve her employment. The employer also raises questions about the hearing examiner's receipt of documentary evidence.

On appeal, the Board reviews the evidence of record from the Lower Appeals hearing. That review reveals the hearing examiner erred in his analysis of the evidence. The employer clearly and specifically warned the claimant about its concerns with the way she handled certain calls from customers. The warning set forth the employer's expectations and requirements and advised the claimant that failure to improve could result in her termination from employment. The employer is a bank. The claimant's job was to assist loan customers. The employer relies upon the good will of its customers for its continued success. Rude and unprofessional behavior by its employees in their interaction with customers has a serious detrimental effect upon the employer's business.

The evidence did not show that the claimant improved her performance in any meaningful way following her receipt of the written warning. The final incident was not handled properly by the claimant. She clearly realized this when she asked someone to review the recording of the call. However, the claimant



should have better controlled the manner in which she dealt with that customer, or have passed the call to someone else, when she realized it was going to be difficult to assist the customer. The employer reviewed that call, at the claimant's request, and concluded the claimant's performance had not improved. From this, the employer decided to terminate the claimant's employment rather than continue to jeopardize its relationships with its customers.

The Board understands that dealing with members of the public can be difficult at times. The Board also understands that the claimant handled many calls every day, but only received a few complaints. However, the claimant's job was to properly handle these calls, professionally and courteously. She repeatedly failed to do so, even after she was warned. While the Board will not find her actions to have been deliberate or willful, the Board does find her failure to improve her performance and these recurring problems to be indicative of gross negligence or repeated carelessness. That is sufficient to support a finding that her discharge was for gross misconduct under Maryland law.

The hearing examiner found it relevant that the employer did not provide copies of the actual recordings which were at issue here. The Board does not agree. Three witnesses appeared from the employer and testified to their personal review of the recordings. Whether the hearing examiner would have found them to be as serious as the employer is not material. The employer has its own standards and expectations. The employer is entitled to create such performance requirements, and to discharge a worker who fails to comply. The claimant, here, was warned about the employer's concerns. She was advised what needed to be improved immediately. She had another instance of improper handling of a customer call within two months of this written warning. Unless there is a significant discrepancy, or no competent evidence, the employer was the proper entity to determine whether the claimant's performance was within its requirements and expectations. Here, the claimant admitted the call was problematic.

The employer's concern about receipt of exhibits is unfounded. The hearing examiner received the following documents into the record:

- Employer's Exhibit #1 (the written warning),
- Employer's Exhibit #2 (Performance counseling and Corrective Action pages from the employer's handbook)
- Employer's Exhibit #3 (Professionalism pages from the employer's handbook)
- Employer's Exhibit #4 (email about October 2010 complaint)
- Claimant's Exhibit #1 (Employer's dress code guidelines)

The Board notes that the employer's policies are not determinative of this matter. The Board looks to the underlying act or omission for which a worker is discharged to determine whether the worker should be subjected to a disqualification from benefits. Only if a claimant is found to have been discharged for misconduct or gross misconduct, notwithstanding any employer policy or rule, will the claimant be disqualified from benefits.

In this case, the Board finds the claimant was disqualified from this employment for reasons which constitute gross misconduct.

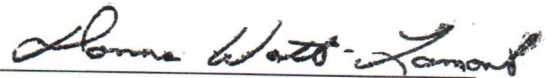
The Board also notes that the hearing examiner did not offer or admit the Agency Fact Finding Report into evidence. The Board did not consider this document when rendering its decision.

The Board finds based on a preponderance of the credible evidence that the employer has 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.

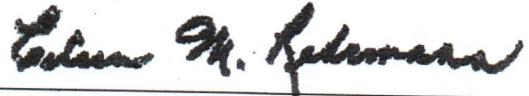
### DECISION

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 March 6, 2011 and until the claimant becomes re-employed, earns at least twenty five 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

RD

Copies mailed to:

DAWN M. WISZ

WELLS FARGO BANK N A

HOPE SUMMERS HEARINGS MGR.

Susan Bass, Office of the Assistant Secretary



**UNEMPLOYMENT INSURANCE APPEALS DECISION**

DAWN M WISZ

SSN #

**Claimant**

vs.

WELLS FARGO BANK N A

**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: 1115420

Appellant: Claimant

Local Office : 60 / LARGO

August 04, 2011

**For the Claimant:** PRESENT

**For the Employer:** PRESENT, RENEE BENDER, ROB BELLIOCT, JUSTINE GUILLE

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

**PREAMBLE**

A decision in this matter was originally issued on May 19, 2011. That decision was appealed to the Board of Appeals, and the matter was remanded to Lower Appeals for a *de novo* hearing. This decision is the result of that *de novo* hearing.

**FINDINGS OF FACT**

The claimant, Dawn Wisz, worked for Wells Fargo Bank from September 8, 2009, through March 14, 2011. The claimant earned \$14.18 per hour while working full time as a loan servicing specialist II.

On October 22, 2010, the employer received a customer complaint regarding a phone conversation involving the claimant. Upon review of the conversation, the employer determined that the claimant acted

in an unprofessional manner with the client. On the same day, the claimant forwarded a call to her supervisor to handle after a client became irate at the claimant. Upon review of the claimant's call it was again determined that the claimant made inappropriate comments to the customer. As a result of these calls, the claimant was given a written warning. The warning was prepared on November 10, 2010. However, the claimant was not issued the warning until some time after she returned from a leave of absence in January of 2011. The claimant processed an average of 20 to 40 calls per day.

On March 10, 2011, the claimant was on a call with an irate customer who was making racial slurs. The claimant attempted to help the customer, to no avail. At the conclusion of the call, the claimant contacted her loan servicing specialist. She wished to obtain insight in an effort improve her handling of such situations in the future. The claimant asked that the call be reviewed and she be provided constructive criticism. The call was reviewed and the employer determined that the claimant acted wholly inappropriate. The claimant was then discharged.

### CONCLUSIONS OF LAW

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.

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).

An employer's dissatisfaction with an employee's work, or an employee's mere inefficiency, incapacity or ordinary negligence in isolated instances does not constitute misconduct within the meaning of the MD. Code Ann., Labor & Employment Art., Section 8-1003. Cumor v. Computers Communications Group, 920-BH-87; Greenwood v. Royal Crown Bottling Company, 793-BR-88.

### EVALUATION OF EVIDENCE

In a discharge case the employer has the burden of proving, by a preponderance of the credible evidence presented at the hearing that the discharge was for some form of misconduct, as that term is defined above. Ivey v. Catterton Printing Company, 441-BH-89.

The evidence clearly shows that the claimant was discharged because of her handling of three calls. The calls were not presented in the hearing so it is impossible to determine if the employer's assessment of the claimant's demeanor was accurate. Even were the claimant to have acted inappropriately in these calls, they are only three calls out of the 20 to 40 handled each day for approximately 1.5 years. This is therefore forum to be, at best, mere negligence in isolated instances on the part of the claimant. The claimant received only one warning for inappropriate activity. When the claimant attempted to solicit assistance in



March of 2011, she was discharged. All of these factors serve to mitigate any potential wrongdoing of the claimant subsequent to the October 22, 2010, calls. For this reason, no misconduct is found in this case.

### DECISION

IT IS HELD THAT the claimant was discharged, but not for misconduct connected with the work within the meaning of Md. Code Ann., Labor & Emp. Article, Section 8-1003. No disqualification is imposed based upon the claimant's separation from employment. The claimant is 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 Examiner is reversed.



M. Franceschini, 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 August 19, 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: July 25, 2011

BLP/Specialist ID: UTW2T

Seq No: 001

Copies mailed on August 04, 2011 to:

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