

**- DECISION -**

Claimant:  
SANDRA L GARVIN

Decision No.: 5560-BR-12

Date: February 22, 2013

Appeal No.: 1230867

S.S. No.:

Employer:  
HOME SALES COMPANY

L.O. No.: 60

Appellant: Claimant

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: March 24, 2013

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**REVIEW OF THE RECORD**

After a review of the record, and after correcting the claimant's starting date of employment to December 10, 2010, 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, *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).*

In her appeal, the claimant contends there are errors in the decision, but offers no specific contentions of error as to the findings of fact or the conclusions of law in the hearing examiner's decision. The claimant does not cite to the evidence of record and makes no other contentions of error. The claimant contends the reason she was given for her termination was different than the reason the employer gave the hearing examiner. The claimant requests an opportunity to subpoena witnesses and present documents.

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 record is complete. Both parties appeared and testified. Both parties were given the opportunity to cross-examine opposing witnesses and to offer and object to documentary evidence. Both parties were offered closing statements. The necessary elements of due process were observed throughout the hearing. The Board finds no reason to order a new hearing or take additional evidence in this matter. The claimant's implied request for a new hearing is denied. Because the Board is reversing this matter, the Board will not address the claimant's request for subpoenas or documents.

The Board has thoroughly reviewed the record from the hearing. The Board finds the hearing examiner erred in assessing a penalty based on the claimant's separation. The evidence showed the claimant was discharged for excessive use of the internet in violation of the employer's policy. The policy, however, was not clear. Similarly, the claimant's required duties were unclear. The claimant's credible testimony established that she believed she was completing her duties and only accessing non-work web-sites during down time. The employer believed the claimant was neglecting some of her work. This belief was, in part, based upon an investigation following complaints from other workers. The investigation revealed that there was work which the claimant should have done, but did not. The evidence did not establish that the claimant had a clear delineation of the employer's expectations concerning her work duties.

The employer's evidence demonstrated that this was the first incident about which the employer was aware. The employer had not counseled or warned the claimant about excessive internet use. The evidence did not establish that the claimant should have known she was violating the employer's policy or neglecting her work. The claimant did not have a reasonable opportunity to understand and conform her behavior to the employer's expectations.

Although the employer testified that the claimant's work search was not the motivating factor for the claimant's termination, the evidence tends to show it was that specific use, rather than the claimant's time spent, generally, on the internet. The employer witness was displeased that the claimant was seeking what apparently was a full-time position with another employer using this employer's computer and internet access. The employer, however, repeatedly stated that the claimant was discharged for excessive internet use when her work was not completed. The evidence was not sufficient to support a finding that the claimant violated a work-place rule about which she had actual knowledge. The evidence did not demonstrate that the claimant's discharge occurred under any disqualifying circumstances.

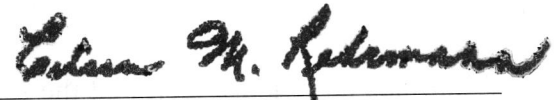
The Board notes that the hearing examiner did not offer or admit the *Agency Fact Finding Report* into evidence. The Board did not consider this document when rendering its decision.

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 Home Sales Company.

The Hearing Examiner's decision is reversed.



Eileen M. Rehrmann, Associate Member



Donna Watts-Lamont, Chairperson

RD/jm

Copies mailed to:

SANDRA L. GARVIN

HOME SALES COMPANY

HOME SALES COMPANY

Susan Bass, Office of the Assistant Secretary

**UNEMPLOYMENT INSURANCE APPEALS DECISION**

SANDRA L GARVIN

SSN #

**Claimant**

vs.

HOME SALES COMPANY

**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: 1230867

Appellant: Employer

Local Office : 60 / LARGO

October 05, 2012

**For the Claimant:** PRESENT , JOEL GARVIN

**For the Employer:** PRESENT , MARK STEURER, ELIZABETH KURRLE

**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, Sandra Garvin, began working for this employer, Home Sales Company, on December 6, 2012. At the time of separation, the claimant was working full-time as a welcome center advisor. The claimant last worked for the employer on August 10, 2012, before being terminated for misuse of company computer system and internet and failing to do her job.

Per the employer's policy regarding computer usage, the company computer and internet is generally to be used for work related purposes. (Employer Ex. 1) Notwithstanding, the claimant and other employees in her department were allowed to use the computer and internet for personal business provided that they were finished with their work.

The claimant worked overnight for this employer. The claimant generally worked alone overnight with the exception of one employee whose shift ran two hours over into the claimant's shift. The claimant's job required her to (1) perform scanning duties; (2) address any emergency requests that came through, and (3) work on requests sent by the client that needed to be addressed. All the employees were responsible for checking the in-box for requests and satisfying those requests. The requests were sent to an email in-box. New requests were populated nightly at 12:00 am for each day. During the claimant's shift, among her other work-related tasks, she was charged with cleaning up all or as many of those requests as possible. Only if the claimant got all of her work completed was she then allowed to do personal stuff.

On or around August 7, 2012, Elizabeth Kurrle, Director of Communications, received a complaint from staff that employees were not pulling their weight with answering the in-box requests. This issue raised had been a continuing issue that had been on-going for a year. Ms. Kurrle was unable to address the matter for a few days. At that time, she investigated the matter. The claimant was scheduled to work overnight from August 6, 2012 to August 7, 2012. Upon review, Ms. Kurrle ascertained that 89 entries were sitting in the in-box from the night shift. Mr. Kurrle then pulled screen shots from claimant's computer usage throughout the evening. Mr. Kurrle discovered that the claimant had been engaging in a number of personal matters throughout the evening which included using Facebook, shopping, and even applying for other jobs. Ms. Kurrle then investigated the claimant's work for August 8<sup>th</sup> and 9<sup>th</sup>. Ms. Kurrle discovered a similar pattern of the claimant engaging in significant personal matters instead of fully addressing the work at hand. In fact, some of the requests from August 7, 2012, continued to remain in the in-box over the next two days. (Employer Ex. 3) Prior to these events, the claimant had not been warned about such actions. Notwithstanding, the employer determined that the claimant had violated policy and that her violation was such that termination was warranted. On August 10, 2012, Ms. Kurrle met with the claimant and terminated her for her actions.

## 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).

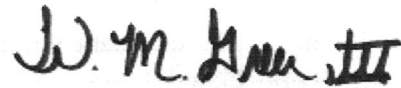
Md. Code Ann., Labor & Emp. Article, Section 8-1003 provides for a disqualification from benefits where the claimant is discharged or suspended as a disciplinary measure for misconduct connected with the work. The term "misconduct" is undefined in the statute but has been defined as "...a transgression 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).



**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 August 5, 2012, and for the nine (9) 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 Claim Specialist is reversed.



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W M Greer, 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.**

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).

## EVALUATION OF THE 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 facts establish that the claimant violated the employer's policy by working on personal work prior to completing her work-related tasks. The claimant was given permission to do personal work on the computer and the internet provided that she finished her work first. The claimant did not do so under these circumstances. While the claimant testified that she indeed had been doing work the whole time, that is not completely the issue. The claimant was only allowed to do personal work after she completed her work. The employer established that the claimant had plenty of work that needed to be completed based on the number of requests that sat in the in-box after the completion of her shift on August 7, 2012. In fact, some of those requests sat in the in-box over the next two days, which evidences a problem that is not just isolated to the claimant. Notwithstanding, the claimant should not have been engaging in any personal work at that time. The claimant clearly committed a transgression of the established rule which constitutes simple misconduct. Despite this issue being an on-going problem in the workplace as indicated by the employer, the claimant had never been warned about this issue previously. No evidence was presented that the claimant had committed such violation previously. The employer has not proven that the claimant's actions rise to the level of gross misconduct.

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.



**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 October 22, 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 : September 27,2012  
CH/Specialist ID: UTW45  
Seq No: 002  
Copies mailed on October 05, 2012 to:  
SANDRA L. GARVIN  
HOME SALES COMPANY  
LOCAL OFFICE #60  
HOME SALES COMPANY