

**- DECISION -**

Claimant:	Decision No.:	1124-BR-13
GRACE NGUGI MAINA	Date:	March 20, 2013
	Appeal No.:	1221896
	S.S. No.:	
Employer:	L.O. No.:	63
BALTIMORE HEART ASSOCIATES PA	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: April 19, 2013

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**REVIEW OF THE RECORD**

After a review of the record, the Board adopts the hearing examiner's findings of fact but reaches a different conclusion of law.

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).

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."

Where the employer is not present and the claimant credibly denies each of the employer's allegations made to the claims specialist a finding of misconduct is not supported. *Lipman v. Graphics Factory, Inc.*, 697-BR-90. A claimant does not have to prove why the employer fired him. *Ivey v. Catterton Printing Company*, 441-BH-89.

In the instant case, the employer was not present to present any evidence or to rebut the claimant's testimony. The employer was duly notified of the date, time and place of the hearing. The Board finds the claimant credible.

The Board finds that the claimant was discharged for using her cell phone on one isolated occasion in the employer's building when it rained on May 14, 2012. The claimant used poor judgment when she used her cell phone inside the employer's building in violation of the workplace rule. The Board finds the exceptional circumstance under which the claimant used the cell phone mitigating.

The employer did not sufficiently demonstrate that the claimant's actions were more than a mere isolated incident. See *Proctor v. Atlas Pontiac*, 144-BR-87 (An instantaneous lapse in the performance of job duties does not constitute misconduct); also see *Gilbert v. Polo Grill*, 192-BH-91 (One slight lapse in the claimant's performance is insufficient to support a finding of misconduct).

In the instant case, the Board finds insufficient evidence that the claimant's actions rose to the level of misconduct.

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 did not meet its burden of demonstrating that the claimant's actions rose to the level of misconduct within the meaning of § 8-1003. The hearing examiner's 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 BALTIMORE HEART ASSOCIATES PA.

The Hearing Examiner's decision is reversed.



Clayton A. Mitchell, Sr., Associate Member



Donna Watts-Lamont, Chairperson

KJK

Copies mailed to:

GRACE NGUGI MAINA

BALTIMORE HEART ASSOCIATES PA

Susan Bass, Office of the Assistant Secretary

**UNEMPLOYMENT INSURANCE APPEALS DECISION**

GRACE NGUGI MAINA

SSN #

**Claimant**

Vs.

BALTIMORE HEART ASSOCIATES PA

**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: 1221896

Appellant: Claimant

Local Office : 63 / CUMBERLAND  
CLAIM CENTER

December 31, 2012

**For the Claimant:** PRESENT

**For the Employer:**

**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).

**FINDINGS OF FACT**

The claimant, Grace Ngugi Maina, worked for this employer, Baltimore Heart Associates PA, for approximately six and half years, and her last day worked was May 16, 2012. At the time of her discharge, the claimant worked full-time as a billing coordinator

The claimant was discharged for her failure to follow an employer's reasonable instructions and/or rules. On or about April 29, 2012, the employer implemented a cell phone policy prohibiting the use of personal cell phones in the building. Employees were not allowed to use the office phones for personal business. On May 14, 2012, the claimant was observed by a manager concluding a personal cell phone call. The claimant would have gone outside to use the phone but it was pouring rain on that day, and the waiting room was filled with patients. The claimant went upstairs to use her cell phone for a brief moment to speak

with her daughter to authorize repairs to her vehicle which had broken down. The claimant did not request permission from a manager/supervisor to make this call. The claimant was aware of the employer's cell phone policy. Prior to this incident, the claimant had no prior warnings for cell phone usage.

## 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)].

The Board of Appeals has consistently held, unless a request is illegal, unethical or ambiguous, (See Hatfield v. Tri-State Oil, 390-BR-82, Leon v. Southern States Cooperative, 885-BR-83, and Walker v. Domino's Pizza of Maryland, Inc., 200-BH-87, respectively) a claimant's failure to follow an employer's reasonable instruction(s) constitutes misconduct. [See Gray v. Valley Animal Hospital, Inc., 224-BR-90, "A violation of the (employer's reasonable) procedures requires an explicit authorization. The claimant's failure to get such authorization amounts to misconduct."]. Depending on the importance of the policy or instruction involved and the number of times the claimant violated the subject policy, failure to act in accordance with the employer's instruction(s) can constitute gross misconduct. (See Dunavent v. Federal Armored Express, Inc., 949-BR-85).

In Griffith v. State Employees' Credit Union, 374-SE-92, the Board of Appeals held "A claimant's misconduct is not mitigated by the alleged fact others also committed misconduct." Therefore, the claimant's argument others committed similar misconduct does not excuse the claimant's misconduct.

## EVALUATION OF THE EVIDENCE

The employer had the burden to show, by a preponderance of the credible evidence; the claimant's separation from employment was for conduct which rose to the level of misconduct or gross misconduct, pursuant to the Maryland Unemployment Insurance Law. (See Hartman v. Polystyrene Products Company, Inc., 164-BH-83). In the case at bar, that burden has been met.

In the case at bar, the claimant failed to follow the employer's reasonable instruction(s) regarding no cell phone usage in the building. The claimant argued other employees similarly violated the employer's policy in this regard and were not discharged. The claimant's argument that others committed similar misconduct does not excuse the claimant's misconduct. See Griffith, supra. The claimant admitted that she violated the employer's policy on this single occasion, and failed to request permission prior to doing so, for which the employer discharged her. Neither the nature of the violation nor the number of violations warrant a finding of gross misconduct; however, the claimant still violated a reasonable employer policy, supporting a finding of simple misconduct. The employer did not appear for the hearing on this matter.

Accordingly, the burden in this case has been met and the claimant's discharge was for failure to follow an employer's reasonable instruction(s), constituting simple misconduct, warranting only the imposition of a

weekly 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 May 13, 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 Claims Specialist is reversed.

*V. Nunez*

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V. Nunez, 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 January 15, 2013. 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: December 17, 2012

AEH/Specialist ID: WCU6H

Seq No: 001

Copies mailed on December 31, 2012 to:

GRACE NGUGI MAINA  
BALTIMORE HEART ASSOCIATES PA  
LOCAL OFFICE #63