

**- DECISION -**

Claimant:  
TAMMY LOWERY

Decision No.: 20-BR-15

Date: January 21, 2015

Appeal No.: 1417974

S.S. No.:

Employer:  
RAY OF HOPE INC

L.O. No.: 65

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: February 20, 2015

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**REVIEW OF THE RECORD**

The claimant has filed a timely appeal to the Board from an Unemployment Insurance Lower Appeals Division Decision issued on August 19, 2014. That Decision held the claimant was discharged for misconduct within the meaning of *Md. Code Ann., Lab. & Empl. Art., §8-1003*. Benefits were denied for the week beginning June 22, 2014, and for the following eleven weeks.

On appeal, the Board reviews the evidence of record from the Lower Appeals hearing. The Board reviews the record *de novo* and may affirm, modify, or reverse the hearing examiner's 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. *Md. Code Ann., Lab. & Empl. Art., §8-510(d)*. The Board fully inquires into the facts of each particular case. *COMAR 09.32.06.03(E)(1)*. Only if there has been clear error, a defect in the record, or a failure of due process will the Board remand the matter for a new hearing or the taking of additional evidence. Under some limited circumstances, the Board may conduct its own hearing, take additional evidence or allow legal argument.

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)*.

In this case, the Board has thoroughly reviewed the record from the Lower Appeals hearing. The record is complete. Only the claimant appeared and testified. The necessary elements of due process were observed throughout the hearing. The Board finds no reason to order a new hearing, to take additional evidence, to conduct its own hearing, or allow additional argument. Sufficient evidence exists in the record from which the Board may make its decision.

The Board finds the hearing examiner's Findings of Fact are supported by substantial evidence in the record. Those facts, however, are insufficient to support the hearing examiner's Decision. The Board adopts the hearing examiner's findings of fact. The Board concludes that these facts warrant a reversal of the hearing examiner's decision.

*Md. Code Ann., Lab. and Empl. Art., Title 8, Section 1002* provides:

- (a) Gross misconduct...
  - (1) Means conduct of an employee that is:
    - i. 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
    - ii. repeated violations of employment rules that prove a regular and wanton disregard of the employee's obligations...

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)*.

*Md. Code Ann., Lab. and Empl. Art., Title 8, Section 1003* provides:

- (a) Grounds for disqualification – an individual who otherwise is eligible to receive benefits is disqualified from receiving benefits if the Secretary finds that unemployment results from discharge or suspension as a disciplinary measure for behavior that the Secretary finds is misconduct in connection with employment but that is not:
- (1) Aggravated misconduct...or
  - (2) Gross misconduct...

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 the employment relationship, during hours of employment or on the employer's premises, within the meaning of *Md. Code Ann., Lab. and Empl. Art., Title 8, Section 1003*. (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 her appeal, the claimant 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 attributes her weariness to pain medication in addition to having worked two consecutive shifts for the employer.

Under the facts as found by the hearing examiner, the Board cannot conclude the claimant's inadvertent sleeping to be misconduct. The claimant was at the end of what was a double-shift. She intended to rest for a moment before completing her paperwork and leaving. Other staff members were already on duty. The claimant inadvertently fell asleep while resting. This was an isolated incident and in no way placed any person under the employer's care in jeopardy. The Board concludes that the claimant was discharged for reasons which are not disqualifying.

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 upon a preponderance of the credible evidence, that the employer did not meet its burden of proof and show that the claimant was discharged for gross misconduct within the meaning of *Md. Code Ann., Lab. and Empl. Art., §8-1002*, or for misconduct within the meaning of *Md. Code Ann., Lab. and Empl. Art., §8-1003*. The decision shall be reversed, for the reasons stated herein.

### DECISION

The Board holds that the claimant was discharged, but not for gross misconduct or misconduct connected with the work, within the meaning of *Md. Code Ann., Lab. and Empl. Art., Title 8, Section 1002 or 1003*. No disqualification is imposed based upon the claimant's separation from employment with this employer.

The Hearing Examiner's decision is Reversed.



Donna Watts-Lamont, Chairperson



Clayton A. Mitchell, Sr., Associate Member

VD

Copies mailed to:

TAMMY LOWERY

RAY OF HOPE INC

Susan Bass, Office of the Assistant Secretary

**UNEMPLOYMENT INSURANCE APPEALS DECISION**

TAMMY LOWERY

SSN #

**Claimant**

vs.

RAY OF HOPE 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: 1417974

Appellant: Claimant

Local Office : 65 / SALISBURY

CLAIM CENTER

August 19, 2014

**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, Tammy Lowery, worked for this employer, Ray of Hope Inc, for approximately three years, and her last day worked was June 27, 2014. At the time of her discharge, the claimant worked full-time a CMT and a one on one caregiver for a disabled individual.

The employer terminated the claimant from her position for sleeping on the job. On June 27, 2014, the claimant was scheduled to work from 8:30 a.m. until 4:30 p.m. The claimant had worked the day before this same shift, and in addition, had stayed on to work during the overnight shift and therefore, was particularly tired on June 27, 2014. At approximately 3:50 p.m. the claimant went to the back of the home to rest her eyes for a while before completing her notes and leaving for the day. She told the other staff in the home that she would be resting and then completing her notes before she left for the day. The claimant

lay down and placed a blanket on herself since the air conditioner was on and she felt cold. The claimant lay down to rest her eyes but fell asleep. A residential manager found the claimant asleep and instructed her to leave. At that point the claimant had been asleep for about 30 minutes. The claimant called out on June 30, 2014 due to car problems. On July 1, 2014, the claimant was terminated. She was advised that she was being terminated for sleeping while on duty. At the time of hire, the claimant was issued an employee handbook but she did not read it. Prior to her termination, the claimant had no warnings of any kind.

## 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).

"There is always a question about exactly how deliberate the act of falling asleep on the job is," noted the Board of Appeals in Hawkins v. Charles County Commissioners, 1053-BR-93. Although sleeping on the job without any mitigating circumstances can amount to a finding of gross misconduct, (see Taylor v. Fort Howard Cup Corporation, 1215-BR-91), the cases wherein the Board of Appeals supported a finding of gross misconduct generally require multiple incidents, with prior warnings, (see Bradley v. Liberty Medical Center, Inc., 706-BR-89), evidence of concealment, reflecting a conscience decision to sleep on the job (see Taylor v. Fort Howard Cup Corporation, 1215-BR-91) or positions of responsibility and/or trust (see Ingram v. Union Memorial Hospital, 1680-BR-93 involving an emergency telephone operator, and Harris v. BPS Guard Services, Inc., 563-BR-92, involving a security guard).

## EVALUATION OF EVIDENCE

The employer had the burden to show, by a preponderance of the credible evidence, the claimant's termination 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, this burden has been met.

In the case at bar, the claimant credibly testified that she had worked a great deal of hours the day before and the day of the final incident and was tired. The claimant did not intend to fall asleep but did so. Although the claimant was found to be sleeping while on duty, given the amount of hours the claimant had been allowed to work, and the fact that there were other staff in the home at the time, a finding of gross

misconduct is not warranted. However, the claimant admitted that she slept on the job on one occasion warranting a finding of 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 sleeping on the job, constituting simple misconduct, warranting 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 June 22, 2014 and for the eleven (11) 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

This is a final decision of the Lower Appeals Division. Any party who disagrees with this decision 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 September 03, 2014. 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: August 13, 2014  
BLP/Specialist ID: USB7P  
Seq No: 001  
Copies mailed on August 19, 2014 to:

TAMMY LOWERY  
RAY OF HOPE INC  
LOCAL OFFICE #65