

**- DECISION -**

Claimant:  
LIZZY B DOUGLAS

Decision No.: 2823-BR-13

Date: September 18, 2013

Appeal No.: 1308972

S.S. No.:

Employer:  
SSC BETHESDA OPERATING  
COMPANY LLC

L.O. No.: 63

Appellant: Claimant

Issue: 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).

---

**- 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 18, 2013

---

**REVIEW OF THE RECORD**

After a review of the record, the Board adopts the following findings of fact and conclusions of law. The hearing examiner's decision is reversed.

The claimant, Lizzy Douglas worked as a geriatric nursing assistant for the employer, SSC Bethesda Operating Co., d/b/a Bethesda Health & Rehabilitation, from July 4, 2004 until January 2, 2013. The claimant worked full time earning \$15.77 per hour. The claimant was discharged for a one time incident of allegedly sleeping on the job.

On the claimant's last day of work, she was working the late night shift. She came to work feeling slightly ill, but took medication. At 3:00 a.m. the claimant was found at the nurse's desk with her head in her folded arms. The claimant notified her charge nurse upon starting her shift that she was not feeling well, but had taken medication to alleviate her symptoms. The claimant informed her charge nurse that she took the medication that may make her sleepy. Her charge nurse told her to do her best and she would be fine.

Owen Gardner, the supervisor on duty, discharged the claimant after he observed her at the nurses' station with her head in her hands. Mr. Gardner discharged the claimant for this incident.

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 the instant case, 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 light most favorable to the employer, the claimant failed to use good judgment by not notifying the employer of his physical condition and requesting a replacement. Failing to use good judgment, or an isolated case of ordinary negligence, in the absence of a showing of culpable negligence or deliberate action in disregard of the employer's interests is insufficient to prove misconduct. *Hider v. DLLR*, 115 Md. App. 258, 281 (1997); *Greenwood v. Royal Crown Bottling Company*, 793-BR-88.

The Board finds that this single isolated incident of does not rise to the level of misconduct.

There is always a question about exactly how deliberate the act of falling asleep on the job. *Hawkins v. Charles County Commissioners*, 1053-BR-93. Falling asleep on the job is generally regarded as gross

misconduct. However, mitigating factors do arise in exceptional circumstances. *Ingram v. Union Memorial Hospital, 1680-BR-93*.

In the instant case, the claimant informed her supervisor, the charge nurse immediately upon arriving at work that she was not feeling well and that she took some medication that may make her drowsy. The claimant does not dispute that she rested her head when Mr. Gardner found her at the nurse's station. However, she disputes that she had been previously warned and verbally admonished for sleeping on the job. Mr. Gardner offered no evidence other than, "she had been previously warned three years prior" for sleeping on the job". The claimant vehemently denied ever sleeping on the job.

The hearing examiner bases his credibility determination on what he perceives as conflicting statements. The hearing examiner's credibility determinations are not demeanor-based.

Because the hearing examiner's credibility determinations were not demeanor-based, the Board does not owe the hearing examiner "special deference" as to his findings in this regard. *See Dept. of Health and Mental Hygiene v. Shrieves, 100 Md. App. 283, 299 (1994)*. The Court of Appeals distinguishes between: (1) testimonial inferences, "credibility determinations based on demeanor," and (2) derivative inferences, "inferences drawn from the evidence itself." *Shrieves, 100 Md. App. at 299* (citations omitted). The Court explained:

Weight is given the administrative law judge's determinations of credibility for the obvious reason that he or she "sees the witnesses and hears them testify, while the Board and the reviewing court look only at the cold records."....But it should be noted that the administrative law judge's opportunity to observe the witnesses' demeanor does not, by itself, require deference with regard to his or her derivative inferences. Observation makes weighty only the observers testimonial inferences.

*Shrieves, 100 Md. App. at 299-300.*

The hearing examiner derived his credibility determinations in this regard from what he perceived as conflicting evidence in the record but offered no explanation as to why the Mr. Gardner's testimony was more credible than the claimant's testimony.

The Board does not adopt the hearing examiner's credibility determinations regarding the employer's witnesses.

The Board finds that this was a one-time isolated incident and the employer failed to prove misconduct. The claimant was a nine-year employee. The employer failed to prove that the claimant had fallen asleep on previous occasions. The claimant informed her charge nurse of her illness and that she had taken medication to alleviate some of her symptoms. The decision of the hearing examiner is reversed.

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 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 SSC BETHESDA OPERATING.

The Hearing Examiner's decision is reversed.



Clayton A. Mitchell, Sr., Associate Member



Donna Watts-Lamont, Chairperson

VD/mr

Copies mailed to:

LIZZY B. DOUGLAS

SSC BETHESDA OPERATING

SSC BETHESDA OPERATING

Susan Bass, Office of the Assistant Secretary

**UNEMPLOYMENT INSURANCE APPEALS DECISION**

LIZZY B DOUGLAS

SSN #

**Claimant**

vs.

SSC BETHESDA OPERATING  
COMPANY LLC

**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: 1308972

Appellant: Employer

Local Office : 63 / CUMBERLAND  
CLAIM CENTER

May 10, 2013

**For the Claimant:** PRESENT , YANIA STEWART

**For the Employer:** PRESENT , JULIE ROBERTS, OWEN GARDNER

**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, Lizzy Douglas, worked for the above captioned employer, SSC Bethesda Operating Co., d/b/a Bethesda Health & Rehabilitation, from July 4, 2004 until January 29, 2013 as a geriatric nursing assistant (GNA) earning \$15.77 per hour in a full time capacity. The claimant was terminated after the administrator of the employer's geriatric care facility discovered the claimant sleeping on the job.

The claimant does not dispute that Owen Gardner found her asleep at the nurse's station on her last evening of work. Mr. Gardner often made unannounced visits throughout the facility and he previously found the claimant sleeping on duty approximately 3 years prior. On this last occasion Mr. Gardner found the claimant sleeping at the nurse's desk with her head on her folded arms on the counter around 3:00 AM. He asked another employee to come stand with him when they woke the claimant up.

The claimant contends that she was not feeling well and that she had taken some medicine that made her drowsy. This did not excuse the claimant's behavior which was a violation of rules and grounds for immediate dismissal. (See Emp. Ex. #1)

### 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).

### EVALUATION OF EVIDENCE

The evidence presented shows that the employer discharged the claimant. In a termination case the employer has the burden of proving, by a preponderance of the credible evidence, that the discharge was for some degree of misconduct connected with the work within the meaning of Maryland Unemployment Insurance Law. Ivey v. Catterton Printing Company, 441-BH-89. In the case at bar, that burden has been met.

The claimant denied that she had ever been caught sleeping in the past but this was overcome by Mr. Gardner's credible testimony. Also, the claimant did not deny that she was sleeping but attempted to justify the action due to medication she took for an undisclosed illness.


This type of behavior demonstrates an overall indifference to the employer's interests and was a deliberate and willful disregard of the standards of behavior that the employer had a right to expect.

I hold that the claimant's actions show a regular and wanton disregard of her obligations to the employer and constitute gross misconduct in connection with the work. An unemployment disqualification shall be imposed based on Md. Code, Ann., Labor & Employment Article, Section 8-1002 pursuant to this separation from employment.

## DECISION

IT IS HELD THAT the claimant was discharged for gross misconduct connected with the work within the meaning of Md. Code Ann., Labor & Emp. Article, Section 8-1002(a)(1)(i). The claimant is disqualified from receiving benefits from the week beginning January 27, 2013 and until the claimant becomes reemployed and earns wages in covered employment that equal at least 25 times the claimant's weekly benefit amount.

The determination of the Claims Examiner is reversed.



---

P G Randazzo, 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. 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 May 28, 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: May 07, 2013  
CH/Specialist ID: WCU4X  
Seq No: 001  
Copies mailed on May 10, 2013 to:  
LIZZY B. DOUGLAS  
SSC BETHESDA OPERATING  
LOCAL OFFICE #63  
SSC BETHESDA OPERATING