

**- DECISION -**

Claimant:  
DEBORAH L WIRTH

Decision No.: 4318-BR-12

Date: September 12, 2012

Appeal No.: 1216033

S.S. No.:

Employer:  
DOVE POINTE RESIDNTL SRVCS 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: October 12, 2012

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**REVIEW OF THE RECORD**

After a review of the record, after deleting the fifth, sixth and seventh sentences of the second paragraph, and after replacing the word "believed" with the word "concluded" in the first sentence of the third paragraph, the Board adopts the hearing examiner's modified findings of fact. The Board makes the following additional findings of fact:

The claimant participated in a four-day training session at the time she was hired on the proper administration and documentation of medication. The employer also conducts biennial training on dispensing and charting medication. On February 26, 2012, and again

on March 2, 2012, the claimant failed to properly dispense medication to patients. However, the claimant charted that she had given the medication as directed. The employer discovered the claimant's errors and elected to discharge her on March 27, 2012.

The employer operates a care facility for individuals with varied disabilities. The employer operates under a license with the state and medication errors jeopardize that license. Improper dispensation or charting of medication places the employer at risk for other liability.

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).

Both the claimant and the employer, through its authorized representative, have appealed the hearing examiner's decision.

In the claimant's appeal, she contends another employee was harassing her, called this incident to the employer's attention, and deliberately caused the claimant's termination from employment. The claimant contends there was no misconduct and she should be allowed benefits.

In the employer's appeal, the representative contends: "The preponderance of evidence clearly showed that the claimant recorded administering medication when in fact the medicine was still in the container." The employer representative argues the claimant's conduct was gross misconduct and the benefit determination should have been affirmed.

The Board has conducted a thorough review of evidence of record from the Lower Appeals Division hearing. The greater weight of the competent and credible evidence of record supports the employer representative's contentions. The evidence showed that the claimant was properly trained on the administration and documentation of medications. The evidence showed that, on two occasions in late-

February and early-March or 2012, the claimant documented that she had administered medication, but had not actually done so. Clearly the claimant acted in a manner contrary to the employer's expectations and its best interests. The Board finds her discharge was for gross misconduct under Maryland law.

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 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 25, 2012 and until the claimant becomes re-employed, earns at least twenty 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



Clayton A. Mitchell, Sr., Associate Member

RD

Copies mailed to:

DEBORAH L. WIRTH

DOVE POINTE RESIDENTIAL SERVICES INC

JAMES A. STULLER

DOVE POINTE RESIDENTIAL SERVICES INC

Susan Bass, Office of the Assistant Secretary

## **UNEMPLOYMENT INSURANCE APPEALS DECISION**

DEBORAH L WIRTH

SSN #

**Claimant**

vs.

DOVE POINTE RESIDNTL SRVCS 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: 1216033  
Appellant: Claimant  
Local Office : 65 / SALISBURY  
CLAIM CENTER

June 04, 2012

**For the Claimant:** PRESENT

**For the Employer:** PRESENT, JAMES A. STULLER, CHARLOTTE PITTMAN, TONY OLESKA

**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, Deborah L. Wirth, began working for this employer, Dove Pointe Residntl Srvcs, Inc., on January 5, 2009, and her last day worked was March 27, 2012. At the time of her discharge, the claimant worked full-time as an Aide, earning an hourly salary of \$9.45.

Employer provides residential services to individuals with intellectual and/or physical disabilities. Employer requires its employees to observe safety precautions as it relates to the administration of medication to ensure the safety of the individuals in their custody. As such, employer has a written policy that details the medication administration policy. Claimant was aware of the policy and acknowledged its receipt. On February 26, 2012, it is unknown whether a specific individual received his/her prescription

medications. Claimant indicated, in writing that the prescription medications were administered but does not remember if the prescription medications were, in fact, administered. A third party indicated to employer that the medications were not administered.

Employer believed that claimant failed to administer the prescription medications and falsified the written documentation. On March 27, 2012, employer made a business decision to discharge claimant for medication administration errors.

### CONCLUSIONS OF LAW

Maryland Code Annotated, Labor and Employment Article, § 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).

Maryland Code Annotated, Labor and Employment Article, § 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).

Where an employer discharges a claimant for a variety of actions alleged to constitute misconduct, but where some of these actions were not proven or cannot be considered as misconduct, the remaining actions should be considered, and if they amount to misconduct, the claimant was discharged for misconduct. Edmonds v. Anne Arundel County Government, 1476-BH-92.

Violations of reasonable work rules have been held to be willful and intentional misconduct. Painter v. Department of Employment and Training, 68 Md. App. 356, 511 A.2d 585 (1986).

### EVALUATION OF THE 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. Hartman v. Polystyrene Products Company, Inc., 164-BH-83. In this case, the employer met this burden.

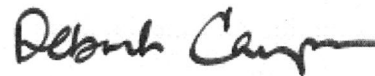
Violations of reasonable work rules have been held to be willful and intentional misconduct. Painter, supra. The evidence establishes that the claimant failed to adhere to the medication administration policy. Had claimant adhered to the medication administration policy, she would have known, with reasonable certainty, whether or not the prescription medications were administered. The issue before the Hearing Examiner is whether the claimant's misconduct was willful and intentional within the meaning of the Maryland Unemployment Insurance Law.

It is unknown whether the relevant individual received his/her prescription medications on February 26, 2012. As such, the evidence fails to establish that the claimant engaged in conduct that demonstrated a deliberate and willful disregard of standards that an employer has a right to expect or that it showed a gross indifference to the employer's interests. The evidence fails to establish that the claimant's actions demonstrated a regular and wanton disregard of the employee's obligations to the employer. Claimant's lack of attentiveness resulted in potential harm to the individual served. As such, the evidence does establish that the claimant did engage in wrongful conduct within the scope of her employment relationship, which constitutes misconduct connected with the work within the meaning of the Maryland Unemployment Insurance Law. Accordingly, I hold the employer met its burden in this case and the claimant's discharge was for failing to observe safety precautions, constituting misconduct connected with the work and benefits are, therefore, denied.

### DECISION

IT IS HELD THAT the claimant was discharged for misconduct connected with the work within the meaning of Maryland Code Annotated, Labor and Employment Article, § 8-1003 (Supp. 1996). Benefits are denied for the week beginning March 25, 2012 and for the twelve 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 other eligibility requirements at [ui@dllr.state.md.us](mailto:ui@dllr.state.md.us) or telephone (410) 949-0022 from the Baltimore region, or (800) 827-4839 from outside the Baltimore region. Deaf claimants with TTY may contact Client Information Service at (410) 767-2727, or outside the Baltimore region at (800) 827-4400.

The determination of the Claims Specialist is reversed.



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D F Camper, 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 June 19, 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 : May 18,2012  
CH/Specialist ID: USB32  
Seq No: 001  
Copies mailed on June 04, 2012 to:  
DEBORAH L. WIRTH  
DOVE POINTE RESIDNTL SRVCS INC  
LOCAL OFFICE #65  
JAMES A. STULLER  
DOVE POINTE RESIDNTL SRVCS INC