

**- DECISION -**

Claimant:  
JOHN M RAAB

Decision No.: 4331-BR-12

Date: December 21, 2012

Appeal No.: 1223352

S.S. No.:

Employer:  
BOARD OF EDUCATION OF BALTO CO

L.O. No.: 65

Appellant: Employer

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: January 21, 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. 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)*.

The findings of fact of the hearing examiner are herein incorporated by reference.

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."

Harassment in the workplace is a serious matter. This was not the claimant's first offense. The claimant was disciplined for a pattern of inappropriate behavior. The claimant was suspended, reassigned and required to attend mandatory harassment/professional boundaries training.

The claimant only attended two sessions of the mandatory training and dropped out of the program. The claimant proffered that he was unable to complete the course because he was providing home health care for his fiancée for about twelve weeks. Based on the credible evidence, the claimant made no effort to complete the mandated course and made no effort to contact his employer, including the human resource's department, or to advise his employer that he had difficulties in completing the program or needed an extension. The claimant's conduct demonstrated a willful and wanton disregard of the claimant's obligations to his employer and a gross indifference to the employer's interests.

Unless an employer's request is illegal, unethical or ambiguous, *Hatfield v. Tri-State Oil*, 390-BR-82, *Leon v. Southern States Cooperative*, 885-BR-83, *Walker v. Domino's Pizza of Maryland, Inc.*, 200-BH-87, refusing to perform an assignment within the scope of one's job duties is insubordination and can constitute misconduct, *Gray v. Valley Animal Hospital, Inc.* 224-BR-90, or gross misconduct, *Romesberg v. Shaffer Ford, Inc.*, 48-SE-90; *Solomon v. Cantwell Cleary Company, Inc.*, 1027-BR-91; *Ishola v. AMI Doctors of Prince Georges County*, 487-BR-89, depending on the importance of the policy or instruction and the number of times the claimant violated the policy.


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 met its burden of demonstrating that the claimant's actions rose to the level of gross misconduct within the meaning of *Maryland Annotated, Labor & Employment Article, § 8-1002*. The decision shall be reversed for the reasons stated herein and in the hearing examiner's decision.

### 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 May 27, 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.



Eileen M. Rehrmann, Associate Member



Donna Watts-Lamont, Chairperson

RD

Copies mailed to:

JOHN M. RAAB

BOARD OF EDUCATION OF BALTO CO

JAMES A. STULLER

BOARD OF EDUCATION OF BALTO CO

Susan Bass, Office of the Assistant Secretary

**UNEMPLOYMENT INSURANCE APPEALS DECISION**

JOHN M RAAB

SSN #

**Claimant**

vs.

BOARD OF EDUCATION OF BALTO CO

**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: 1223352

Appellant: Claimant

Local Office : 65 / SALISBURY

CLAIM CENTER

July 26, 2012

**For the Claimant:** PRESENT

**For the Employer:** PRESENT, JAMES A. STULLER, ALFRED BILLS, MARY RONEY

**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, John M Raab, began working for this employer, Board of Education of Balto Co, on October 28, 2009, and his last day worked was May 30, 2012. At the time of his discharge, the claimant worked full-time as a building service worker.

The claimant was discharged for a single event of insubordination toward his supervisor. As a result of a complaint of sexual harassment against the claimant, he was required by this employer to complete a mandatory training on sexual harassment and professional boundaries. The claimant was made aware at a disciplinary meeting in August 2011 that he would be required to complete a sexual harassment training at

CompPsych. By letter dated November 14, 2011, the claimant was instructed by his supervisor to contact CompPsych to schedule the training which he did. The claimant attended two sessions but failed to complete the entire course which consisted of a total of 10 sessions; after attending two sessions, the claimant failed to schedule any further sessions. The claimant was under the false impression that he had one year to complete the program when in fact, he had six months to do so. After November 1, 2011, the claimant failed to attend any additional sessions. By March 29, 2012, the claimant had failed to complete the program. The claimant did not contact the employer, including the department of human resources, to advise that he had difficulties in completing the program or needed an extension to do so.

On April 17, 2012, a hearing was held with the claimant to allow him an opportunity to explain why he had not completed the program. The claimant presented testimony and documents to explain his failure to complete the program. Based on the evidence presented at the hearing, the claimant was terminated for his failure to complete a mandatory training program on sexual harassment and professional boundaries despite directives to do so by his superiors.

### 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).

In Schoo v. Davis, Garth, et al., 603-BR-90, the Board of Appeals held "The claimant was cooperative and courteous on most occasions. However, on one occasion, she walked out of a counseling session called by her supervisor, even though she had been told the session was not finished. The claimant was discharged for misconduct."

### 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. (See Hartman v. Polystyrene Products Company, Inc., 164-BH-83). In the case at bar, the employer met this burden.

In the case at bar, the claimant admitted that he did not complete the mandatory training program and was

aware he could be terminated for such failure. Although the claimant testified that his fiancé's medical condition allegedly prevented him from completing the program<sup>1</sup>, he admitted that he failed to advise the employer of his difficulties in completing the program and failed to request an extension to complete the program. The claimant admitted that after November 1, 2011, he did not contact CompPsych to schedule further sessions; it was not until over 4 months later in March 2012 that the employer made a recommendation for termination. Ultimately, it was the claimant's responsibility to ensure compliance with his superiors' directives, and his failure to complete the program, or to attempt to pursue alternatives that would have enabled him to complete the program, amounts to dischargeable insubordination. Traditionally a finding of insubordination warrants a finding of gross misconduct; however, in the case at bar the claimant's behavior history calls for a reduced penalty. The claimant's behavior history does not excuse his failure to comply with his superiors' directive; however, it does constitute a mitigating factor, warranting a finding of misconduct, rather than gross misconduct.

Accordingly, the employer met its burden in this case and the claimant's discharge was for a single event of insubordination towards his supervisor, with mitigating factors warranting a finding of simple misconduct and 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 27, 2012 and for the fourteen (14) 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.

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<sup>1</sup> The claimant was unable to provide a timeline for the time period, in which he allegedly was unable to attend sessions due to his need to care for his fiancé, nor was any medical documentation presented to support this assertion; his fiancé's statement, introduced in evidence, was equally vague.

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 August 10, 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: July 24, 2012  
DAH/Specialist ID: USB26  
Seq No: 001  
Copies mailed on July 26, 2012 to:  
JOHN M. RAAB  
BOARD OF EDUCATION OF BALTO CO  
LOCAL OFFICE #65  
JAMES A. STULLER