

DISTRICT OF COLUMBIA
OFFICE OF ADMINISTRATIVE HEARINGS
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A.B.

Appellant/Claimant

v.

LOCAL UNIVERSITY

Appellee/Employer

Case No.: 2012-DOES-00806

FINAL ORDER

I. Introduction

Claimant A.B. appealed a Department of Employment Services (DOES) Determination disqualifying him from receiving unemployment benefits. The issue presented is whether Employer Local University discharged Claimant for disqualifying misconduct within the meaning of the District of Columbia Unemployment Compensation Act (the “Act”), D.C. Official Code § 51-110(b), and Title 7, Subchapter 312 of the District of Columbia Municipal Regulations (DCMR).¹

I heard the case on May 31, 2012. Claimant represented himself and testified. Thomas Martin, Esquire, represented Employer, and Operations Manager B.C. testified. I admitted Exhibit 200 into evidence, and I considered Exhibits 300 and 301 to decide jurisdiction. For the reasons set forth below, I find that Claimant was discharged for simple misconduct—not gross misconduct. This means Claimant is entitled to some benefits, but not the full benefits he would receive if he had become unemployed through no fault of his own.

¹ The challenged Determination states that Claimant voluntarily quit his job, but the evidence presented at the hearing revealed that Claimant was, in fact, discharged for the specified reason of job abandonment in the form of three consecutive no-call/no-shows. The outcome of the case thus turns on whether the evidence establishes disqualifying misconduct.

II. Jurisdiction

The appeal was timely, based on its filing date and the mailing date of the Claims Examiner's Determination.² Jurisdiction is established.

III. Findings of Fact

Claimant worked for Employer in a maintenance position from October 17, 2010 until March 14, 2012. He was responsible for keeping parking areas clean, and worked 8-hour shifts Mondays through Fridays. Operations Manager B.C. was his immediate supervisor.

On Thursday, March 8, 2012, Claimant advised B.C. by telephone that he would not be coming to work that day because he and his daughter had been rear-ended in a car accident on the way to work. Without any follow-up notice by telephone or otherwise, Claimant then missed three consecutive work days on Friday, Monday, and Tuesday, March 9, 12, and 13. By termination letter dated March 14, 2012, Employer discharged him for job abandonment based on the three consecutive absences without notice. Exhibit 200.

Although Employer had no reason to know it at the time, Claimant was hospitalized from Thursday, March 8 until Tuesday, March 13, due to injuries sustained in the car accident. His daughter was also injured and required a longer hospitalization. On March 15, two days after his hospitalization ended and one day after he had been discharged from his job, Claimant faxed his hospital release records to Employer.³ Before then, Claimant had provided no information about his whereabouts on the days he missed work.

² D.C. Official Code § 51-111(b); OAH Rules 2812.3 and 2983.1; Exhibits 300 and 301.

³ The discharge was effective March 14, but Claimant did not receive the discharge letter until March 16, when it reached him by mail. The letter was apparently in route when Claimant faxed his hospitalization records on May 15.

IV. Conclusions of Law

District of Columbia law generally presumes claimants are qualified to receive benefits if they satisfy the eligibility criteria listed in D.C. Official Code § 51-109.⁴ The law carves out disqualifying exceptions to this general rule when, for example, employers discharge claimants for “misconduct” as defined in the Act and applicable DOES regulations. D.C. Official Code § 51-110(b); 7 DCMR 312. Employers bear the burden of proving disqualifying misconduct by a preponderance of the evidence. *Morris v. U.S. EPA*, 975 A.2d 176, 181 (D.C. 2009).

The Act recognizes two levels of misconduct: “gross” and “other than gross,” also called “simple misconduct.” Persons discharged for gross misconduct are disqualified from receiving benefits for a longer time than those discharged for simple misconduct. *Compare* D.C. Official Code §§ 51-110(b)(1) and (b)(2). Gross misconduct is defined generally as “an act which deliberately or willfully violates the employer’s rules, deliberately or willfully threatens or violates the employer’s interests, shows a repeated disregard for the employee’s obligation to the employer, or disregards standards of behavior which an employer has a right to expect of its employee.” 7 DCMR 312.3. Simple misconduct is less egregious behavior that still “constitutes a breach of the employee’s duties or obligations to the employer, a breach of the employment agreement or contract, or which adversely affects a material employer interest.” 7 DCMR 312.5. Either level of misconduct requires proof “the employee *intentionally* disregarded the employers’ expectations for performance.” *Bowman-Cook v. WMATA*, 16 A.3d 130, 135 (D.C. 2011).

⁴ Nothing in the record suggests any issue has been raised or preserved concerning the benefits eligibility criteria enumerated in D.C. Official Code § 51-109, such as base period wages, ability to work, or availability for work.

Regardless of the level of misconduct, denying benefits in a misconduct case requires a finding of misconduct “based fundamentally on the reasons specified by the employer for the discharge.” *See Chase v. D.C. Dep’t of Emp’t Servs.*, 804 A.2d 1119, 1123 (D.C. 2002). Here, the specified reason for the discharge was three consecutive absences without notice, behavior commonly referred to as “no-call/no-show.”

Based on the record presented, Claimant’s absences, standing alone, lack the requisite intentionality to support a finding of disqualifying misconduct. He did not intend for himself and his daughter to be injured in a rear-end collision on March 8, and his absences while hospitalized on March 9, 12, and 13 are sufficiently excusable to rule out disqualifying misconduct solely because he missed work. *Larry v. Nat’l Rehab. Hosp.*, 973 A.2d 180, 183 (D.C. 2009).

But Employer did not discharge Claimant solely because he was absent from work. The discharge occurred because Claimant missed three consecutive work days without providing any notice about his whereabouts. His March 8 telephone call to his supervisor conveyed notice that he was rear-ended on his way to work and would be absent that day. But Claimant did nothing to notify his supervisor (or anyone else) that he would be missing additional work because he was hospitalized. In that regard, I note that despite his injuries, nothing in the record suggests he was too incapacitated to call his employer during his entire 5-day hospitalization. This easily avoidable omission displayed an intentional disregard for a reasonable, commonsense workplace expectation: namely, that employees will at least try to provide timely notice about anticipated absences, especially prolonged ones. Here, Claimant’s absences may have been excusable, but his failure to call to explain them was not excusable. A finding of disqualifying misconduct is warranted under the circumstances.

As for the level of misconduct, I find that Claimant's behavior amounts to simple misconduct—not gross misconduct warranting a complete disqualification from benefits. In light of the more severe economic consequences, the District of Columbia Court of Appeals instructs (i) that “to constitute gross misconduct, an employee's misdeeds must be serious indeed” and (ii) that in deciding whether a misdeed is serious, the regulatory definition of gross misconduct “should not be read to ‘extend to the outer limits of its definitional possibilities,’” given the remedial nature of the unemployment statute. *Odeniran v. Hanley Wood*, 985 A.2d 421, 426-27 (D.C. 2009). The Court of Appeals also cautions against finding gross misconduct without evidence of serious adverse business consequences, stressing that “an employer seeking to prove that its business interests were jeopardized by an employee's action enough to warrant a finding of gross misconduct must make a heightened showing of seriousness or aggravation, lest the statutory distinction between gross and “simple” misconduct, in our law since 1993, be erased.” *Doyle v. NAI Pers., Inc.*, 991 A.2d 1181, 1183 (D.C. 2010).

Here, Claimant inexcusably failed to call to explain his absences, but the record reveals no resulting serious adverse consequences to Employer's operations. Moreover, although the stress of the accident and injuries to himself and his daughter do not fully excuse the failure to call, these mitigating factors diminish Claimant's culpability and counsel against the severe sanction of gross misconduct. I will therefore modify the Clams Examiner Determination, which imposes a complete disqualification from benefits predicated on gross misconduct. D.C. Official § 51-111(e). Because the record establishes simple misconduct, Claimant remains disqualified from receiving benefits, but only for the first eight weeks otherwise payable, and subject to the other provisions of D.C. Official Code § 51-110(b)(2).

V. Order

Based on the above findings of fact, conclusions of law, and the entire record in this case, it is, this 8th day of June 2012

ORDERED, that the Claims Examiner Determination is **MODIFIED**; and it is further

ORDERED, that Claimant A.B. is **DISQUALIFIED** from receiving unemployment compensation benefits but only **for the first eight weeks otherwise payable and subject to the other provisions of D.C. Official Code § 51-110(b)(2)**; and it is further

ORDERED, that the appeal rights of any party aggrieved by this Order are stated below.

Scott A. Harvey
Administrative Law Judge