

DISTRICT OF COLUMBIA
OFFICE OF ADMINISTRATIVE HEARINGS
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A.B.

Appellant/Claimant

v.

LOCAL FOOD STORE, INC.

Appellee/Employer

Case No.: 2012-DOES-00789

FINAL ORDER

I. INTRODUCTION

A. Parties: Claimant A.B. and Employer Local Food Store, Inc. Claimant represented herself at the hearing. Attorney Thomas B. Martin of TALX represented Employer.

B. Issue: The District of Columbia Department of Employment Services (“DOES”) issued a Claims Examiner’s Determination (“Determination”) about Claimant’s unemployment benefits. Claimant has appealed the Determination and requested a hearing.¹

C. Date and Time of Hearing: May 29, 2012, at 9:30 a.m.

D. Witnesses: Claimant testified on her own behalf. Loss Prevention Officer B.C. testified for Employer.

E. Exhibits: Employer’s Exhibits 200 to 205.

F. Result: Employer fired Claimant for simple misconduct. I therefore modify the Claims Examiner’s Determination. Claimant remains disqualified from receiving benefits, but only for the first eight weeks otherwise payable.

¹ No eligibility issue has been raised or preserved under the District of Columbia Unemployment Compensation Act, D.C. Official Code §51-109, such as base period eligibility, and availability for or ability to work.

II. JURISDICTION

The request for hearing was timely, based on its filing date and the mailing date of the Determination.² Jurisdiction is established.

III. FINDINGS OF FACT

Employer operates a store in Washington, DC. Claimant worked at the store as a Clerk from February 2011 until March 12, 2012.

Employer has a “zero tolerance policy” concerning workplace violence. The policy prohibits fights and threats among coworkers and provides that employees who violate the policy will be fired. Claimant received and reviewed a copy of Employer’s written Workplace Threats and Violence Policy when she was hired. Exhibit 200. She understood it, and she observed Employer’s consistent enforcement of the policy over time.

One of Claimant’s coworkers was C.D. During early March 2012, C.D. repeatedly accused Claimant and other coworkers of stealing her headphones. She was loud and aggressive in her accusations, and her coworkers found the behavior irritating. On March 8, 2012, Claimant asked her supervisor to move her away from C.D. The supervisor agreed, but the reassignment was just for one day.

C.D. continued her aggressive and accusatory behavior on March 9, 2012. Another coworker, D.E., summarized certain events that day in a Statement he prepared a few days later for Loss Prevention Officer B.C.:

[E]arlier that day I noticed that C.D. was still in a bad mood about the head phones incident and she was still taking it out on the coworkers. One of the co-workers asked me was that my phone on the table and I said no. C.D. overheard and started to spazz out on me saying [“]Oh what you trying to take my phone like you took my headphones[?”], I looked at her and said I didn’t take anything of yours Then said C.D. you need to stop walking around blaming people for your lost head phones if you don’t know who took them. That’s when she told me and the rest of the deli coworkers that we could see her outside at 8. Then shortly after that happen[ed] was when the [Claimant] and C.D. altercation took

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

place. . . . [Claimant] had 5 min[utes] left [in her shift] and she was gathering her things. So that's when C.D. walked up and said to me and [Claimant], ["Y'all get the fuck out the corner.]" So I turned to her and told her that is not the way you ask someone. But I still moved to the side. But [Claimant] was still there gathering her things. So that's when she walked up to [Claimant] and said "Get the fuck out the corner again." That's when Claimant said "You could say it in a nice way." So C.D. tried to move her and [Claimant] said "Don't put your hands on me." Then that's when I stepped in the first time to break it up. And I pulled [Claimant] to the side and said "Just relax don't worry about her and her b.s." [Claimant] told me she was cool so I let her go and she sat back down. Still gathering her things and that's when C.D. came back and said "Didn't I say get the fuck of the corner." And that's when C.D. pulled the stool from under [Claimant] and pushed her in the corner. Then that's when [Claimant] punched her out of self-defen[s]e. So I got in between again to break it up. Trying to pull C.D. off [Claimant] but what I didn't know was C.D. had [Claimant's] hair so I ended up pulling them both to the floor. Then that's when other employees came to help me break it up and once it was broken up they went their separate ways.

Exhibit 204. One of the coworkers who witnessed and broke up the fight, E.F., drafted a statement describing the incident similarly. Exhibit 205.

When Employer learned of the incident, it dispatched B.C. to investigate. B.C. obtained statements from Claimant, C.D., D.E. and E.F. Based on those statements, Employer concluded that Claimant and C.D. had violated the workplace policy against threats and violence. Employer fired them both. In making the decision, Employer relied in part on B.C. determination that Claimant could have removed herself from the situation and avoided striking C.D.

IV. DISCUSSION AND CONCLUSIONS OF LAW

Under the D.C. Unemployment Compensation Act, a claimant who is fired for misconduct may be disqualified from receiving unemployment benefits.³ If an employer believes a claimant should be disqualified for misconduct, the employer must prove it.⁴

There are two levels of disqualifying misconduct: “gross” and “other than gross.”⁵ “Gross” misconduct is the more serious of the two levels and includes any act that “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.”⁶ “Other than gross” misconduct, also known as simple misconduct, includes “acts where the severity, degree, or other mitigating circumstances do not support a finding of gross misconduct.”⁷ The period of disqualification for simple misconduct is shorter than the period of disqualification for gross misconduct.⁸

A claimant will not be disqualified without a finding of misconduct based on Employer’s reasons for the discharge.⁹ Any misconduct disqualification requires proof that a claimant intentionally disregarded an employer’s expectation and proof that the claimant understood the conduct at issue could lead to discharge.¹⁰

The material facts of this case are not in dispute: Claimant was involved in a physical altercation with a coworker, C.D., while at work on March 9, 2012. C.D. had been acting aggressively and threateningly toward Claimant and other coworkers. In fact, Claimant had

³ D.C. Official Code § 51-110(b); 7 D.C. Municipal Regulations (DCMR) 312.

⁴ 7 DCMR 312.2 and 312.8; *Badawi v. Hawk One Sec., Inc.*, 21 A.3d 607, 613 (D.C. 2011).

⁵ D.C. Official Code §§ 51-110(b)(1) and (2).

⁶ 7 DCMR 312.3.

⁷ 7 DCMR 312.5; *Odeniran v. Hanley Wood*, 985 A.2d 421, 425 (D.C. 2009).

⁸ D.C. Official Code § 51-110(b).

⁹ *Chase v. D.C. Dep’t of Emp’t Servs.*, 804 A.2d 1119, 1123 (D.C. 2002) (internal citation omitted).

¹⁰ See *Hamilton v. Hojeij Branded Food, Inc.*, No. 11-AA-332, 2012 D.C. App. LEXIS 143, at *28 (D.C. 2012); *Bowman-Cook v. Wash. Metro. Area Transit Auth.*, 16 A.3d 130, 135 (D.C. 2011) (proof of intentionality); *Capitol Entm’t Servs., Inc. v. McCormick*, 25 A.3d 19, 25 (D.C. 2011) (proof of understanding that conduct could lead to discharge) (citing *Hickenbottom v. District of Columbia Umemp’t Comp. Bd.*, 273 A.2d 475, 478 (D.C. 1971)).

asked to be separated from C.D. the previous day, and a supervisor had granted the request. During the altercation on March 9, 2012, Claimant struck C.D. after C.D. pushed her into a corner.¹¹ Claimant was aware at the time that fighting with a coworker as a violation of Employer's workplace rules and could lead to discharge. She knew Employer enforced this rule consistently.

Employer has proven that it fired Claimant for a disqualifying rule violation, as that term is used in applicable DOES regulations. *See* 7 DCMR 312.7 (test for disqualifying rule violation includes the employee's awareness of the rule, the reasonableness of the rule and consistent enforcement of the rule). Claimant was aware that striking a coworker violated Employer's workplace rules; the rule is a reasonable means of maintaining a safe environment for employees and customers; Employer consistently enforces the policy. And, specifically, Claimant knew that striking a coworker could lead to being fired. *See Hickenbottom v. D.C. Unemployment Comp. Bd.*, 273 A.2d 475, 478 (D.C. 1971) ("The types of conduct . . . for which the misconduct penalty may be imposed[] impute knowledge to the employee that should he proceed he will damage some legitimate interest of the employer for which he could be discharged").

The question remains, however, whether the degree of misconduct in this case was "gross" or "simple." Under DOES regulations, "unprovoked assault or threats" is an example of behavior that may be characterized as gross misconduct. 7 DCMR 312.4b. Claimant's conduct in this case was at least to some extent, "provoked," as described by Claimant and the two witnesses whose statements B.C. collected. Exhibits 204 and 205. I have credited those statements, which are hearsay as to the truth of what they describe but carry certain indications of reliability and are corroborated by Claimant's testimony at the hearing. *See Gropp v. D.C. Bd. of Dentistry*, 606 A.2d 1010, 1014 (D.C. 1992) (among the factors that must be considered in evaluating the reliability of hearsay evidence are "whether the declarant is biased, whether the testimony is corroborated, whether the hearsay statement is contradicted by direct testimony, whether the declarant is available to testify and be cross-examined, and whether the hearsay statements were signed or sworn") (internal quotations omitted). C.D. threw the first punch or

¹¹ C.D. statement varied significantly from the others'. She alleged that Claimant was the aggressor.

became physically violent first, and she backed Claimant into a corner from which Claimant could not escape without moving past C.D.

Claimant did not deny striking C.D., however, and although Claimant and E.F. characterized Claimant's response as an act of "self-defense," there seem to have been some opportunities for Claimant to have left the scene and sought help before she threw a punch. One such opportunity occurred just after D.E. intervened the first time.

Given the apparent provocation by C.D. that led to the physical altercation, the absence of any egregious harm to Employer caused by Claimant's actions, and the isolated nature of the incident (as far as the record reveals), I conclude that a disqualification for only simple misconduct is warranted. The Determination is modified. D.C. Official Code § 51-111(e). Claimant is disqualified from receiving benefits 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 upon the foregoing and the record in this matter, it is:

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

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

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

DATED: May 30, 2012

Steven M. Wellner
Administrative Law Judge