

DISTRICT OF COLUMBIA
OFFICE OF ADMINISTRATIVE HEARINGS
One Judiciary Square
441 Fourth Street, NW
Washington, DC 20001-2714
TEL: (202) 442-9094 · FAX: (202) 442-4789

TKY

Appellant/Claimant

v.

A NURSING CENTER

Appellee/Employer

Case No.: 2012-DOES-00855

FINAL ORDER

I. INTRODUCTION

A. Parties: Claimant TKY and Employer A Nursing Center. Claimant represented herself. Director of Human Resources DK represented Employer.

B. Issues: Whether Claimant filed her appeal timely? If so, whether the reasons for Claimant's separation from employment disqualify her from unemployment benefits?¹

C. Date and Time of Hearing: June 6, 2012, at 2:00 p.m.

D. Witnesses: Claimant and Ms. K.

E. Exhibits: Employer's exhibits 201-204.

F. Result: The Determination is reversed. Claimant is qualified for benefits.

II. FINDINGS OF FACT

1. The Department of Employment Services (DOES) mailed the Determination to Claimant at her home address on April 30, 2012. Exhibit 300. After being fired, Claimant was

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.

working with her union representatives to determine her best course of action. Within that context, she spoke to her representatives about the Determination. Claimant and the union were busy trying to establish that sexual harassment by a supervisor was the genesis for Claimant's getting fired and they had not focused on the deadline for filing her appeal. On May 21, 2012, Claimant realized that she only had 15 calendar days to appeal the Determination. Her union representatives told her to file her appeal anyway. On May 22, 2012, Claimant filed her appeal. Exhibit 301.

2. Claimant worked for Employer, a nursing home and rehabilitation center, from June 13, 2011, until March 15, 2012. Claimant was a housekeeper.

3. In February 2012, Claimant's supervisor Mr. Y started sexually harassing Claimant. He repeatedly asked Claimant for sexual favors, made sexually suggestive remarks, and called her on her days off. All of Mr. Y's advances were unwelcome by Claimant, who asked Mr. Y to stop. Claimant told Security Officer M of Mr. Y's unwelcome sexual advances.

4. On Saturday, March 10, 2012, Claimant reported to work as scheduled. Employer had a full complement of housekeepers. Normally when it is fully staffed, Employer has housekeepers do "spot cleaning." But this day, Mr. Y told Claimant she had two choices: stay in the basement with him (which she understood meant to have sex with him), or go home. If she stayed, Claimant got paid, if she went home, Claimant did not get paid. Claimant went home. On Sunday, March 11, 2012, Claimant reported to work as scheduled. Again Employer had a full complement of housekeepers. And, again, Mr. Y told Claimant she had two choices: stay in the basement with him (which she understood meant to have sex with him), or go home. Claimant went home.

5. On March 14, 2012, Claimant reported to work as scheduled. Claimant was called to a meeting with Mr. Y and Environmental Supervisor CC. Mr. Y said that on March 10 and 11, 2012, he had instructed Claimant to do spot cleaning and she refused, so he was reprimanding her for "refusal to do assigned work." Claimant became angry, knowing that Mr. Y was retaliating against her for not having sex with him and she lashed out and threatened to expose him for sexually harassing her. Exhibit 204. As she grew more and more frustrated, Claimant said she would "Fuck Mr. Y up." *Id.*

6. Rather than take steps to investigate Claimant's allegations and protect her from retaliation, Employer moved to fire Claimant for threatening Mr. Y, in violation of its workplace rules. Exhibits 201, 202, and 203.

7. On March 15, 2012, Claimant told Director of Human Resources DK the context for her behavior on March 14, 2012. Ms. K incorrectly explained that since Claimant had never reported Mr. Y's actions before, there was nothing Ms. K could do. On March 15, 2012, Employer fired Claimant. Exhibit 201.

8. After firing Claimant, another employee came forward to report that Mr. Y had been sexually harassing her. After investigating the situation, Employer fired Mr. Y and rehired Claimant on June 1, 2012.

III. DISCUSSION AND CONCLUSIONS OF LAW

A. Timeliness

In accordance with D.C. Code, 2001 Ed. § 51-111(b), any party may file an appeal from a Claims Examiner's Determination within 15 calendar days after the mailing of the Determination to the party's last-known address or, in the absence of such mailing, within 15 calendar days of actual delivery of the Determination. DOES mailed the Determination on April 30, 2012. Based on the date of this administrative court's file stamp, I conclude that Claimant filed her appeal with this administrative court on May 22, 2012. Exhibit 301.

In this jurisdiction, the law presumes that a certificate of service constitutes proof of the correct mailing date and address, unless the certification is rebutted by reliable evidence. *D.C. Pub. Employee Relations Bd. v. D.C. Metro. Police Dep't*, 593 A.2d 641, 643 (D.C. 1991), citing *Thomas v. D.C. Dep't of Emp't Servs.*, 490 A.2d 1162, 1164 (D.C. 1985). See also *Chatterjee v. Mid Atlantic Reg'l Council of Carpenters*, 946 A.2d 352, 355 (D.C. 2008). The certificate of service here has none of the technical defects identified by the District of Columbia Court of Appeals that might make the certificate of service ambiguous or rebuttable. See *Chatterjee*, 946 A.2d at 355, and *Rhea v. Designmark Servs.*, 942 A.2d 651 (D.C. 2008).

Claimant filed her appeal after the 15-day deadline had expired, but the Act includes a provision that says the "15-day appeal period may be extended if the claimant or any party to the

proceeding shows excusable neglect or good cause.” D.C. Code, 2001 Ed. § 51-111(b). I conclude that Claimant met the “excusable neglect” standard in this case.

The statute does not define “good cause” or “excusable neglect,” and there is no case law in the District of Columbia concerning how the good cause or excusable neglect standards apply to unemployment compensation appeals to this administrative court. In practice, the difference between “good cause” and “excusable neglect,” is negligible. Excusable neglect permits a court “where appropriate, to accept late filings caused by inadvertence, mistake, or carelessness” *Pioneer Inv. Servs. Co. v. Brunswick Assoc. Ltd. P’ship*, 507 U.S. 380, 388, (interpreting “excusable neglect” as used in similar bankruptcy rule.). Determining whether a party’s neglect is excusable “is at bottom an equitable one, taking [into] account . . . all relevant circumstances surrounding the party’s omission.” *Id.* at 395. The factors a court considers include “the danger of prejudice [to other parties], the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the party filing the appeal, and whether the party filing the appeal acted in good faith.” *Id.* (emphasis added); *see also In re Estate of Yates*, 988 A.2d 466 D.C. 2010); *Frausto v. U.S. Dep’t of Commerce*, 926 A.2d 151, 154 (D.C. 2007).

The “good cause” standard too must be determined in light of the circumstances of each case. *See Rest. Equip. & Supply Depot, Inc. v. Gutierrez*, 852 A.2d 951 (D.C. 2004). Jurisdictions that have a similar good cause provision in their unemployment compensation statutes (Utah, Iowa, Washington, and California) have generally held that good cause can be established if the delay in filing was due to circumstances beyond the party’s control. *See Utah Admin. Code r. 994-404-102* (2010) (defining good cause as circumstances beyond the claimant’s control or circumstances which were compelling and reasonable); Cal. Unemp. Ins. Code § 1328 (West 2009) (“good cause[] shall include, but is not limited to mistake, inadvertence, surprise, or excusable neglect); *Houlihan v. Emp’t Appeal Bd.*, 545 N.W.2d 863, 866 (Iowa 1996) (holding that good cause in unemployment cases is akin to the “good cause” that must be shown in setting aside a default judgment).

Here Claimant made a compelling case that she was busy working with her union representatives trying to establish the factual underpinning of her case; namely that sexual harassment and retaliation were ultimately the basis for her termination. Employer presented no

evidence that it was prejudiced by the seven-day delay. Further, Employer finally realized Claimant was correct, so there is no doubt Claimant acted in good faith. Under the circumstances of this case, I conclude Claimant had good cause for filing late.² Jurisdiction is established.

B. Separation from Employment

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 reason 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 Here Employer fired Claimant for threatening Mr. Y

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

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.

in violation of its workplace rules. Exhibits 201, 202, and 203. As Employer rehired Claimant, the question is whether under the facts of this case, Claimant is disqualified from receiving unemployment benefits for the weeks that she was unemployed.

After listening to both witnesses and reviewing the documentary evidence, the record clearly establishes that Mr. Y started sexually harassing Claimant in February 2012, by asking for sexual favors, making sexually suggestive remarks, and calling her on her days off. All of Mr. Y's advances were unwelcome by Claimant, who asked Mr. Y to stop. Claimant told Security Officer M of Mr. Y's unwelcome sexual advances. On March 10 and 11, 2012, Claimant reported to work as scheduled. Both days, Employer had a full complement of housekeepers. Normally, when it is fully staffed, Employer has housekeepers do "spot cleaning." But these days, Mr. Y told Claimant she had two choices: stay in the basement with him (which she understood meant to have sex with him), or go home. If she stayed, Claimant got paid, if she went home, Claimant did not get paid. Claimant went home.

Because Claimant refused to have sex with Mr. Y, when Claimant reported to work on March 14, 2012, Mr. Y, having concocted a ruse that on March 10 and 11, 2012, he had instructed Claimant to do spot cleaning and she refused, moved to reprimand her for "refusal to do assigned work." Claimant became angry, knowing that Mr. Y was retaliating against her for not having sex with him, and she lashed out and threatened to expose him for sexually harassing her. Exhibit 204. As she grew more and more frustrated, Claimant said she would "Fuck Mr. Y up." *Id.*

Even though Claimant had told Officer M along about the harassment, and on March 15, 2012, Claimant told Director of Human Resources DK the context for her behavior on March 14, 2012, Ms. K told Claimant that since had never reported Mr. Y's actions before, there was nothing Ms. K could do. On March 15, 2012, Employer fired Claimant. Exhibit 201. Later Employer learned that Claimant's allegations were correct, it fired Mr. Y, and it rehired Claimant.

2011) (proof of understanding that conduct could lead to discharge) (citing *Hickenbottom v. D.C. Unemp't Comp. Bd.*, 273 A.2d 475, 478 (D.C. 1971)).

