No. 12-AA-1639

DISTRICT OF COLUMBIA COURT OF APPEALS

BEHAVIORAL RESEARCH ASSOCIATES, INC.,

Petitioner,

v.

MARK LOVE,

Respondent.

On appeal from the District of Columbia Office of Administrative Hearings
OAH Case No. 2012-DOES 01073

BRIEF OF RESPONDENT

John C. Keeney, Jr. (No. 934307)
Christian P. Huebner (No. 1003815)*
Legal Aid Society of the District of Columbia
1331 H Street, N.W., Suite 350
Washington, D.C. 20005
Telephone: (202) 661-5966
Fax: (202) 727-2132

*Presenting oral argument

STATEMENT PURSUANT TO RULE 28(a)(2)(A)

The parties in this case are Behavioral Research Associates, Inc. (BRA), the Petitioner, and its former employee, Mark Love, the Respondent.

BRA was represented in the Office of Administrative Hearings (OAH) and is represented before this Court by Judith L. Walter, Esq. Mr. Love was represented in the OAH by Tonya Love of the Claimant Advocacy Program, Metropolitan Washington Council, AFL-CIO. Mr. Love is represented before this Court by John C. Keeney, Jr., Esq. and Christian P. Huebner, Esq. of the Legal Aid Society of the District of Columbia.

There currently are no intervenors or *amici curiae* in this matter.

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QUESTIONS PRESENTED

Whether substantial evidence, including claimant's testimony that was found more credible than that of his supervisor, supports the ALJ's factual finding that Mr. Love sought and received approval from his supervisor to leave ninety minutes early with his shift covered by a substitute.

Whether the ALJ's factual finding that Mr. Love had permission to leave work early negates the requisite intent the employer would need to show in order to meet its burden of proof to establish misconduct precluding full unemployment benefits to Mr. Love.

STATEMENT OF THE CASE

The Office of Administrative Hearings (OAH) affirmed that Mark Love was qualified for unemployment benefits after being fired by Behavioral Research Associates, Inc. (BRA). Mr. Love was fired for leaving work ninety minutes early on May 31, 2012, after arranging for another employee to cover the last hour-and-a-half of his shift. Mr. Love testified that he sought and received oral approval from his supervisor. The ALJ found that testimony to be credible and explained why the supervisor's denial was not credible.

BRA appealed.

STATEMENT OF FACTS

Mr. Love served as a Counselor at BRA from December 2009 until June 2012. (Apx. 4, 11-12).[1] As a Counselor, Mr. Love attended to adults diagnosed as profoundly retarded who lived in BRA's facility at 1034 Burns Street in Southeast Washington, D.C. (Apx. 5-7, 24, 103).

[1] References to Employer's Appendix are cited as "Apx. [page]." References to the OAH transcript, which is in the record, are cited as "Tran. [page]." References to Employer's brief are cited as "BRA Br. [page]."

On May 31, 2012, Mr. Love was scheduled to work from 4 p.m. to 12 a.m. (Apx. 104). With his supervisor's approval, Mr. Love arranged to have a co-worker, Angela Cannon, cover the last ninety minutes of his shift. (Apx. 104). Later, under scrutiny from her own boss, Mr. Love's supervisor denied approving the substitution. (Apx. 69-71, 106). As a result, Mr. Love was fired for abandoning his shift. (Apx. 11-12, 71). Before the events of May 31, Mr. Love's supervisor considered him to be a good employee.[2] (Apx. 103).

A. The Events of May 31, 2012

At 4 p.m. on May 31, 2012, BRA staff held a meeting at the Burns Street facility, which included Mr. Love and his supervisor, Linda Graham. (Apx. 104). During that meeting, Mr. Love asked his co-worker Ms. Cannon, who already was scheduled to work a shift beginning at midnight that night, to cover the last ninety minutes of his 4 p.m. – 12 p.m. shift so that he could leave at 10:30 p.m.[3] (Apx. 86, 104). According to Mr. Love, whose testimony Judge Wellner found credible, he informed Ms. Graham of the substitution, and Ms. Graham gave her oral approval. (Apx. 86, 88, 104). Mr. Love testified that he also confirmed Ms. Graham's approval later that afternoon, and that he called Ms. Graham at 10:30 p.m. later that night to inform her that Ms. Cannon had arrived to cover the end of his shift, and that Ms. Graham had again approved the substitution. (Apx. 88-89; Tran. 125-26).

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[2] Annette House, Executive Assistant at BRA, testified that Mr. Love had been disciplined one previous time. (Apx. 66). Mr. Love's supervisor, Linda Graham, testified that this previous incident played no part in the decision to fire Mr. Love; his termination was based solely on the events of May 31, 2012. (Tran. 54-55).

[3] Mr. Love testified that he needed to leave early because he had received a phone call from his daughter's mother that his daughter was ill and he needed to attend her. (Apx. 85-86). Judge Wellner held that the reason for Mr. Love's leaving was immaterial, because BRA's allegations of misconduct turned solely on whether Mr. Love had permission to leave work early, regardless of the reason. (Apx. 107).

That afternoon there came an unexpected event. BRA received word from a government agency[4] that the Burns Street facility needed to be evacuated immediately, and the residents moved to a hotel, so that the Burns Street facility could be heat-treated for a bedbug infestation. (Apx. 104). The staff, including Mr. Love, successfully completed the evacuation. Thus, Mr. Love was at the hotel at 10:30 p.m. when Ms. Cannon arrived to cover the end of his shift. (Apx. 89, 104). Ms. Graham was not at the hotel when Mr. Love called to confirm that he was leaving; rather, at about 10 p.m. she had returned temporarily to the Burns Street facility with another employee. (Apx. 55, 57, 104). While there, Ms. Graham received a telephone call from her superior at BRA, Annette House, who informed her that she (Ms. House) was at the hotel and was heading upstairs to check on the residents and staff. (Apx. 45-46). After hanging up with Ms. House, Ms. Graham immediately called another employee at the hotel, Diane Green, to warn that Ms. House was at the hotel to check on them, and to make sure the staff was "on [their] P's and Q's" rather than "not doing their jobs … because I wasn't there to see." (Tran. 72, 73). Ms. Graham claimed that she then made one more phone call, to Mr. Love, and asked him to return to the hotel. (Apx. 46). According to Ms. Graham, Mr. Love, having already left for the evening and having already arranged for an approved substitute, said he would not return. (Apx. 46).

When Ms. House arrived at the hotel, she checked on the staff and then called her own boss, Mr. Gordon, to give him a report. (Apx. 69). Mr. Gordon asked about Mr. Love and told Ms. House that Mr. Love was scheduled for that shift. (Apx. 69). Ms. House also discovered a

[4] There was conflicting testimony about which agency ordered the evacuation. Ms. House testified that the Occupational Safety and Health Administration (OSHA) instigated the move, while Ms. Graham testified that it was the Department on Disability Services (DDS). (Tran. 88; Apx. 43, 53).

BRA employee, Michael Green, asleep in a room housing two evacuated residents.[5] (Apx. 48). Mr. Green was fired. (Apx. 51).

Thereafter, Ms. Graham arrived back at the hotel, and Ms. House asked about Mr. Love. (Apx. 69-70). Although Ms. Graham testified that she had just spoken with Mr. Love on her way back to the hotel, she told Ms. House she "had no idea he was gone." (Apx. 46, 69-70, 71). According to Ms. House, Ms. Graham then went to go talk with the staff "to find out where was" Mr. Love. (Apx. 70). Ms. Cannon then reported to Ms. House that Mr. Love had asked her to substitute for the end of his shift, but that she (Ms. Cannon) did not know who had given authorization for the substitution. (Apx. 70). When Ms. House asked Ms. Graham whether she had given Mr. Love permission to leave early that evening, Ms. Graham denied it. (Apx. 71).[6] Because Ms. Graham denied giving permission for Mr. Love to leave early, Ms. House decided to fire Mr. Love for abandoning his shift.[7] (Apx. 70-71).

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[5] The information about Mr. Green's sleeping came from Ms. Graham's testimony. (Apx. 48-51). It is unclear when Ms. House made this discovery.

[6] At the OAH hearing, Ms. Graham testified that she would not have approved Ms. Cannon as a substitute for Mr. Love because Ms. Cannon was not strong enough to lift the resident Mr. Love was assigned to – the resident "need[ed] two men to lift him." (Apx. 49). Ms. Graham acknowledged, however, that Ms. Cannon previously had attended to another male resident by herself. (Apx. 50). Further, according to Ms. Graham's testimony, Mr. Love was the only person attending his assigned resident; while Mr. Green was in the room as well, he was responsible for a different resident. (Apx. 47-48). Thus, the testimony did not establish the employer's contention that Ms. Cannon was an inadequate substitute for ninety minutes. If it was truly essential to have two men attending solely to Mr. Love's assigned resident, then Ms. Graham already had failed to properly schedule the shifts. If, on the other hand, there was available help from other employees to lift the resident if needed (as appears to have been the case), then Ms. Cannon's substitution would not have posed a problem.

[7] While Ms. House testified that she made the decision to fire Mr. Love, Ms. Graham testified that she did the actual firing. (Apx. 51, 70-71). BRA issued Mr. Love his official termination letter on June 5, 2012. (Apx. 11-12).

B. The OAH Finds as a Fact that Mr. Love Received Permission to Leave Early and Upholds His Benefits.

After his firing, Mr. Love filed a claim for unemployment benefits. (Apx. 1). A Department of Employment Services (DOES) Claims Examiner determined Mr. Love had received permission to leave early and BRA had not met its burden of proof to show otherwise. (Apx. 14). BRA appealed and, on July 19, 2012, Administrative Law Judge Steven M. Wellner conducted a full hearing at the Office of Administrative Hearings. (Apx. 15, 16).

The testimony presented at the OAH focused on two key factual questions: (1) whether Ms. Graham had given oral permission for Mr. Love to leave early and arrange for a substitute, and (2) whether Mr. Love, despite receiving oral permission, still needed to submit a written request for the substitution.

On the first question, Mr. Love and Ms. Graham gave conflicting testimony. Mr. Love testified that he had received permission from Ms. Graham on at least three occasions: at the 4 p.m. meeting (Apx. 86), while preparing for the evacuation (Tran. 125-26), and again over the phone after Ms. Cannon arrived later that evening (Apx. 89). Ms. Graham denied giving permission on any occasion. (Apx. 49-50, 55-56, 71). Judge Wellner, as factfinder, made a credibility determination and accepted Mr. Love's testimony that he had received permission. In light of the evidence and record, Judge Wellner concluded it was

> a more plausible scenario that Ms. Graham approved [Mr. Love's] request for a shift substitution – perhaps not thinking the matter through completely because of the hectic situation that day – and then realized, belatedly, when Ms. House was in the hotel lobby, that [Mr. Love's] absence would be problematic from Ms. House's perspective.

(Apx. 106).

Based on his observation of the witnesses, Judge Wellner found it significant that "surprisingly," Ms. Graham's "testimony about her call with [Mr. Love]" on the night in question did not "focus on her concern that [Mr. Love] was absent without leave but, rather, her desire that he return to the hotel. Had she been entirely surprised about his absence, she might have been expected to focus more keenly on the fact that he was absent without leave." (Apx. 106). Judge Wellner noted that the parties also had submitted conflicting witness affidavits on this point, but concluded that Ms. Cannon's affidavit, stating the shift substitution "was not discussed with management," was ambiguous – Judge Wellner could not ascertain whether Ms. Cannon "was asserting that she actually knew [Mr. Love] had not discussed the matter with Ms. Graham." (Apx. 106). On the other hand, Mr. Green's affidavit was "explicit" that Mr. Love "told me [Mr. Green] that he had informed Ms. Linda Graham that Angela [Cannon] would be covering for him" on the night in question and that Mr. Green was "in the room together" with Mr. Love when "he called Ms. Graham on the phone to inform her that Angela was there and that he was leaving her [sic] the night." (Apx. 13, 106). Judge Wellner recognized that Mr. Green's firing for sleeping on the job made it questionable whether he was "the most reliable witness-by-affidavit" in this case, but ultimately concluded on the totality of evidence that BRA had "failed to meet its burden of proof" that Mr. Love left without permission. (Apx. 106).

On the second question, whether Ms. Graham's oral permission would be "enough to authorize a shift change," the very text of the substitution policy signed by Mr. Love upon hiring makes no mention of a written request requirement, as Ms. House admitted under cross-examination. (Apx. 4, 74, 107). The full text of policy No. 27 reads:

> **Leaving while on duty** – At no time are you to leave the facility while you are on duty unless authorized by management. If there is an emergency management must be contacted and proper coverage must be established and in the facility prior to you leaving the

> premises. Failure to do so will result in immediate termination of your employment by means of Job abandonment.

(Apx. 4). Ms. House, who oversaw and wrote the human resources policies for BRA, also admitted that she had never seen any formal company policy requiring written requests. (Tran. 96-97).

Judge Wellner further found as a fact that there was "evidence that [BRA's] procedure for granting permission in these cases was not always as formal" as BRA contended. (Apx. 107). Indeed, while BRA introduced into evidence an example of such a written request (Apx. 9), testimony showed that written approvals were not required in every case. Ms. Graham acknowledged that the practice of submitting written substitution requests was an evolving one. (Apx. 41). Perhaps most tellingly, Ms. Graham testified that she approved another emergency shift change the very night of the Burns Street evacuation without a written request. (Apx. 59-60). That was consistent with Judge Wellner's finding that "May 31, 2012, was a particularly unusual and confusing day for employees and managers at the Burns facility, and it seems plausible that certain procedures would be relaxed, or at least that employees would perceive [BRA's] expectations that day to have been relaxed." (Apx. 107).

In light of his factual determinations, Judge Wellner concluded that BRA had not shown that Mr. Love "intentionally disregarded [BRA's] expectation" by arranging a substitute for the end of his shift. (Apx. 106). Without such a showing of intent, BRA could not show disqualifying misconduct, and so Judge Wellner affirmed full unemployment benefits. (Apx. 107). BRA now appeals Judge Wellner's order.

STANDARD OF REVIEW

The Court "review[s] OAH decisions to determine whether (1) OAH made findings of fact on each materially contested issue of fact, (2) substantial evidence supports each finding, and (3) OAH's conclusions flow rationally from its findings of fact." *Hamilton v. Hojeij Branded Food, Inc.*, 41 A.3d 464, 472 (D.C. 2012) (quotations omitted).

The Court affirms the ALJ's factual determinations "as long as they are supported by 'substantial evidence' notwithstanding that there may be contrary evidence in the record (as there usually is)." *Ferreira v. District of Columbia Dep't of Employment Servs.*, 667 A.2d 310, 312 (D.C. 1995) (citation omitted). Substantial evidence "means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Hamilton*, 41 A.3d at 472 (quotation omitted). "Moreover," in making factual determinations, "an agency need not explain why it credited one witness over another." *Ferreira*, 667 A.2d at 312.

Whether an employee's "actions constituted misconduct, gross or simple, is one of law, and [the Court's] review of the ALJ's resolution of this issue is therefore *de novo*." *Hamilton*, 41 A.3d at 472 (quoting *Odeniran v. Hanley Wood*, 985 A.2d 421, 424 (D.C. 2009)).

SUMMARY OF ARGUMENT

The ALJ correctly found that the employer had not met its burden to show that Mr. Love's actions constituted disqualifying "misconduct" under the unemployment benefits statute. The ALJ found as a fact supported by substantial evidence, including his credibility judgments of witnesses who testified before him, that Mr. Love received oral approval for the ninety minute substitution at the end of his shift. Because Mr. Love received permission to leave early, he necessarily did not act with the intent to harm the employer, and therefore did not commit "misconduct" disqualifying him from his full unemployment benefits.

ARGUMENT

I. Substantial Evidence, Including Explicit Credibility Determinations of Claimant and His Supervisor, Supported the Factual Determinations that Mr. Love Received Permission to Leave Work Early and Did Not Need to Submit His Request In Writing.

Substantial evidence supports Judge Wellner's factual determinations that (1) Mr. Love received oral approval from his supervisor, Ms. Graham, to have another employee cover the last ninety minutes of his shift on May 31, 2012, and (2) Mr. Love could reasonably expect that oral permission allowed him to leave early, even without an accompanying written request. These facts led Judge Wellner to conclude that Mr. Love had not intended to disregard his employer's expectations, and therefore could not have committed disqualifying misconduct. (Apx. 105-06). Both of these determinations were supported by substantial evidence and therefore under this Court's precedents must be upheld.

Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Hamilton*, 41 A.3d at 472 (quotation omitted). As this Court has recognized, substantial evidence does not mean the absence of other, countervailing evidence. Rather, the Court must uphold an ALJ determination "if it is supported by substantial evidence even if there is substantial evidence to support a contrary conclusion." *Combs v. District of Columbia Dep't of Employment Servs.*, 983 A.2d 1004, 1009 (D.C. 2009).

A. Mr. Love Received Oral Permission to Leave Work Early and Arrange a Substitute.

Mr. Love's testimony that he received permission from Ms. Graham to leave work early and arrange a substitute on May 31, 2012 constituted substantial evidence for the ALJ's factual finding of the same. *See Gunty v. Dep't of Employment Servs.*, 524 A.2d 1192, 1198-1199 (D.C. 1987) (Where witnesses "presented essentially contradictory versions of the events" surrounding

employee's departure, "[a]lmost any factual finding by the [ALJ] necessarily turned on whether he believed" one witness or the other ... [E]ither, if believed, would have supplied substantial evidence in support of a decision for [the employee] or for the employer, respectively."); *Dillon v. Dep't of Employment Servs.*, 912 A.2d 556, 560 (D.C. 2006) (testimony credited over conflicting testimony constituted substantial evidence). Judge Wellner found that testimony credible, and found Ms. Graham's contrary testimony not credible. Having made a credibility determination, favoring Mr. Love's testimony over that of Ms. Graham, "it is well settled that where credibility questions are involved, the factfinding of the [ALJ] is entitled to great weight, since the [ALJ] is in the best position to observe the demeanor of witnesses." *Combs*, 983 A.2d at 1009 n.3 (quotation omitted). The reviewing court, "on the other hand, is limited to a paper record which may capture the words of a case but not its heart and soul." *In re S.G.*, 581 A.2d 771, 774 (D.C. 1990). Thus, "'[a]n appellate court will not redetermine the credibility of witnesses where, as here, the trial court had the opportunity to observe their demeanor and form a conclusion.'" *Id.* at 775 (quoting *WSM, Inc. v. Hilton*, 724 F.2d 1320, 1328 (8th Cir. 1984)).[8]

Although in making credibility determinations, the ALJ "is not legally required to explain ... why [he] favored one witness ... over another," *Citizens Assoc. of Georgetown, Inc. v.*

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[8] This Court has declined to defer to the ALJ's credibility determinations only in "extraordinary" cases where the credited testimony is "so profoundly flawed that it did not constitute probative, reliable and substantial evidence." *Eilers v. District of Columbia Bureau of Motor Vehicles Servs.*, 583 A.2d 677, 684 (D.C. 1990). In those instances, "to avoid a remand," the ALJ must go on to explain its credibility decision and "give persuasive reasons for its reliance on particular testimony." *Citizens Assoc. of Georgetown, Inc. v. District of Columbia Zoning Com.*, 402 A.2d 36, 47 n.19 (D.C. 1979). A paradigm example arises when the factfinder credits the testimony of a medical expert retained for litigation over the testimony of a treating physician. *See, e.g., Pro-Football, Inc. v. District of Columbia Dep't of Employment Servs.*, 782 A.2d 735, 744 (D.C. 2001); *Sandula v. District of Columbia Police & Firefighters' Ret. & Relief Bd.*, 979 A.2d 32, 41 (D.C. 2009). Although this appeal is far from an "extraordinary" case, Judge Wellner provided detailed reasons for his credibility determination.

District of Columbia Zoning Com., 402 A.2d 36, 47 (D.C. 1979); *see also Ferreira*, 667 A.2d at 312, Judge Wellner gave precise reasons for crediting Mr. Love's testimony over Ms. Graham's. For instance, having observed Ms. Graham testify, Judge Wellner found it "surprising[]" that she emphasized her concern that Mr. Love return to work once she learned that Ms. House was making a surprise visit to the hotel, rather than concern that Mr. Love was absent in the first place. (Apx. 106). Ms. Graham's testimony about when she claimed to first learn of Mr. Love's absence – when she called another employee at the hotel to warn of Ms. House's visit – also conflicts with the account given by Ms. House. (Apx. 45-46). According to Ms. House, when Ms. Graham returned to the hotel and Ms. House asked "Ms. Graham, where is Mr. Love? She said he's not here? I said no … So she went in to ask the staff to find out where was he." (Apx. 69-70). Ms. Graham, of course, had testified that in addition to her warning call about Ms. House's visit, she also spoke with Mr. Love to ask him to return to work before she arrived back at the hotel, so his absence should have been no surprise. (Apx. 46).

Judge Wellner also analyzed the weight of two conflicting affidavits of Mr. Green and Ms. Cannon. Mr. Green's affidavit in support of Mr. Love's receipt of permission was clear about what information Mr. Green had and how he knew it.[9] According to Mr. Green's statement, Mr. Love "told me that he had informed Ms. Linda Graham that Angela would be covering for him" and further, Mr. Green was "in the room together" with Mr. Love when "he

[9] Employer's brief, without citation, objects that Mr. Green's affidavit was hearsay. BRA Br. 3, 11. As Judge Wellner explained to BRA's counsel in the OAH, hearsay and affidavit evidence is admissible in an administrative hearing. (Apx. 94); *cf. James v. District of Columbia Dep't of Employment Servs.*, 632 A.2d 395, 396 (D.C. 1993) (hearsay evidence may constitute substantial evidence); *Coalition for the Homeless v. District of Columbia Dep't of Employment Servs.*, 653 A.2d 374, 377-378 (D.C. 1995) (credibility determination plus hearsay evidence "provided more than sufficient support" for substantial evidence); D.C. Code § 2-509 (b) (2012). BRA tellingly ignores the same hearsay issues in Ms. Cannon's affidavit upon which it relies. *E.g.*, BRA Br. 13.

called Ms. Graham on the phone to inform her that Angela was there and that he was leaving her the night [sic]." (Apx. 13). But Judge Wellner also recognized that Mr. Green had been fired for sleeping on the job that very evening, which made it questionable whether he was "the most reliable witness-by-affidavit." (Apx. 106). Angela Cannon's statement that her substitution for Mr. Love "was not discussed with management," on the other hand, was found to be ambiguous. (Apx. 10, 106). It is unclear whether Ms. Cannon meant that *she* was not involved in any conversations with Ms. Graham and Mr. Love, or whether she also was certain that Mr. Love had never discussed the matter with Ms. Graham at any point. If the latter, Ms. Cannon's statement gives no indication how she knew of conversations Mr. Love had out of her presence. The timing of Ms. Cannon's statement also is significant. According to Ms. House, Ms. Cannon made her statement directly after Ms. House confronted Ms. Graham, who then "went in to ask the staff" about Mr. Love. (Apx. 69-70). "Then," according to Ms. House, "Ms. Cannon came in," reported that she and Mr. Love had arranged for the substitution, and made a written statement, which she happened to conclude with the sentence: "This was not discussed with management." (Apx. 10, 70).

After observing the witnesses and the other evidence in the record, Judge Wellner determined that Mr. Love's testimony was more credible than Ms. Graham's. Judge Wellner found it "a more plausible scenario that Ms. Graham approved [Mr. Love's] request for a shift substitution – perhaps not thinking the matter through completely because of the hectic situation that day – and then realized, belatedly, when Ms. House was in the hotel lobby, that [Mr. Love's] absence would be problematic from Ms. House's perspective." (Apx. 106). In making this credibility determination, Judge Wellner went above and beyond what was required of him in explaining his reasoning, *see Citizens Assoc. of Georgetown*, 402 A.2d at 47, and his

determination certainly satisfies the substantial evidence standard of what "a reasonable mind might accept as adequate to support a conclusion." *Hamilton*, 41 A.3d at 472 (quotation omitted).

BRA argues that the evidence before Judge Wellner also could have led to other "equally plausible" interpretations. BRA Br. 14-15. Of course, that argument presumes contrary credibility findings that this Court is not in a position to make. In any event, that argument is legally irrelevant because that is not this Court's substantial evidence test. The Court must uphold Judge Wellner's determination "if it is supported by substantial evidence even if there is substantial evidence to support a contrary conclusion." *Combs*, 983 A.2d at 1009.

B. Mr. Love Reasonably Relied on His Supervisor's Oral Approval to Leave Early.

Judge Wellner's finding that it was reasonable for Mr. Love to believe Ms. Graham's oral approval of his substitution request did in fact give him permission to leave early also was supported by substantial evidence. (Apx. 107). At the hearing, BRA argued that not just oral approval, but a written request was necessary for Mr. Love to arrange the substitution. Both Ms. Graham and Ms. House contended that BRA had such a policy, and BRA submitted an example of a previous written request submitted by Mr. Love. (Apx. 9, 36-41, 72-75).

Judge Wellner, however, determined that BRA's rules were "evolving" and "not always as formal" as Ms. Graham and Ms. House contended.[10] (Apx. 107). By leaving early on the

[10] Judge Wellner's conclusion also is consistent with 7 DCMR § 312.7 (2013), which requires that "if violation of an employer's rules is the basis for a disqualification from benefits," it must be shown "(a) That the existence of the employer's rule was known to the employee; (b) That the employer's rule is reasonable; and (c) That the employer's rule is consistently enforced by the employer." Here, BRA fails under at least prongs (a) and (c).

basis of oral approval alone, therefore, Mr. Love did not "intentionally disregard[] [his] employer's expectation" and thus did not commit misconduct. (Apx. 106).

That determination was supported by overwhelming substantial evidence. First and foremost, BRA could not show any evidence that the practice of written substitution requests actually existed anywhere as a formal policy. A writing is not mentioned in the "Leaving while on duty" formal policy No. 27, signed and initialed by Mr. Love upon his hiring, and entered into evidence as the purported basis of Mr. Love's firing. (Apx. 4, No. 27; Apx. 32-34; Tran 57-58). On cross-examination, Ms. House admitted that nothing in policy No. 27 requires a written request for substitutions. (Apx. 74). Even more, Ms. House, who is responsible for writing human resources policies, admitted she had never "seen the policy that states" that substitution requests must be in writing. (Tran. 96-97).

Similarly, Ms. Graham's testimony revealed that the practice of submitting written requests for substitutions was far from a settled, defined policy. When asked about the procedures for submitting written requests, Ms. Graham was unable to give a clear answer about how far in advance the requests needed to be submitted. (Apx. 36-37). She also testified that the practice has been a developing one. (Apx. 41). Finally, and perhaps most tellingly, Ms. Graham acknowledged that she authorized another shift substitution "right then and there," without any written documentation, on the night of Mr. Love's absence. (Apx. 60).

A third testifying BRA employee, Adrian Jackson, likewise could not give a definitive account of the proper timing for submitting written substitution requests. (Apx. 79-80). Like Ms. Graham, Ms. Jackson testified that the substitution request procedures had evolved during Mr. Love's tenure (Tran. 113-15) and further suggested that in cases of emergency it would be

sufficient to "inform management what's going on" and ensure "proper staffing coverage [is] in place prior to them leaving." (Apx. 82).

This lack of clarity about BRA's substitution policy is similar to *Scott v. Behavioral Research Associates, Inc.*, 43 A.3d 925 (D.C. 2012), another unemployment benefits case involving BRA. In *Scott*, BRA fired an employee for purportedly failing to cooperate with an internal investigation into a fight between two residents. BRA claimed that under company policy the employee, Ms. Scott, was required to make an oral report to BRA's investigator within five days of the investigation's commencement, even though Ms. Scott already had made such a report immediately after the fight. BRA produced no evidence that the five-day-window requirement existed anywhere as a formal written policy, however, and this Court held that "[w]ithout a clear finding as to the relevant workplace standard or duty against which [employee's] conduct properly was measured" no finding of intentional misconduct was possible. *Id.* at 927 & n.1, 928 & n.2, 929, 932.

Here, in light of the evidence, and based on his assessment of the witnesses and record as a whole, Judge Wellner's determination that Mr. Love could reasonably rely on Ms. Graham's oral consent as permission to substitute for the end of his shift was well within the bounds of substantial evidence, i.e., what "a reasonable mind might accept as adequate to support a conclusion." *Hamilton*, 41 A.3d at 472 (quotation omitted). And as in *Scott*, Judge Wellner's legal conclusions – that BRA did not meet its burden of proof to show that Mr. Love acted with intent to violate standards of employment, and therefore did not engage in misconduct – follow directly from that factual determination.

II. The ALJ's Finding that Mr. Love Had Permission to Leave Early Flows Rationally and Inevitably to the Legal Conclusion that Employer Failed to Prove the Harmful Intent Necessary to Show Disqualifying Misconduct.

The District of Columbia's unemployment compensation statute, D.C. Code §§ 51-101 et seq., creates a presumptive right to unemployment benefits. *Hamilton*, 41 A.3d at 473. An employee may be disqualified from receiving these benefits, however, if he or she is discharged for "misconduct." *Id.* (citing D.C. Code § 51-110 (b)). Misconduct is categorized by the statute as either "gross," or "other than gross" – commonly known as "simple misconduct" – with more severe consequences attaching to the former than the latter. *Id.* "The employer has the burden of proving misconduct, and misconduct shall not be presumed." *Id.*

Both gross and simple misconduct require that the employee have "'*intentionally* disregarded the employer's expectations of performance.'" *Id.* at 475 (quoting *Bowman-Cook v. Wash. Metro. Area Transit Auth.*, 16 A.3d 130, 135 (D.C. 2011)) (emphasis in *Bowman-Cook*). That intent requirement is found expressly in the regulatory definition of gross misconduct, *see* 7 DCMR § 312.3 (2013),[11] and it is "implicit in the definition" of simple misconduct. *Hamilton*, 41 A.3d at 475 (quotation omitted); *see also Scott*, 43 A.3d at 931. Expounding upon the intent requirement, this Court has held that "'ordinary negligence does not rise to the level of misconduct, gross or otherwise.'" *Hamilton*, 41 A.3d at 475 (quoting *Capitol Entm't Servs. v. McCormick*, 25 A.3d 19, 21 (D.C. 2011)).

This Court recently applied the intent requirement in a far more extreme case of absenteeism than ninety minutes with permission. In *Hamilton*, a restaurant manager was fired

[11] The regulation defines gross misconduct 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."

for missing or arriving late for several days of work over a 5-month period. This Court held that the employee had committed neither gross nor simple misconduct. 41 A.3d at 467. "[T]he fact that an employee's discharge" for missing work "appears reasonable from the employer's perspective" the Court noted, "does not necessarily mean that the employee engaged in misconduct." *Id.* at 474 (quotation omitted). Rather, because "intentionality … is an element of misconduct of any kind," what matters is "the underlying reasons for the absences." *Id.* at 476 (quotation omitted). "Even repeated absences or tardiness," the Court held, "do not constitute gross misconduct or, in our view, simple misconduct, unless the employee acted intentionally or in disregard of his or her obligation or expected standards of behavior." *Id.* at 477.

In *Hamilton* the Court found that, in each instance, the circumstances surrounding the employee's absence – a flat tire, the hospitalization of family members, and personal illness during which she arranged for another employee to take her shift – showed that the employee had no intent of breaching her employer's standards, and thus no finding of misconduct was warranted. *Id.* at 477-80.

Even more so here in a case of leaving ninety minutes early with permission. Judge Wellner, after weighing the evidence and making credibility determinations, found as a fact, supported by substantial evidence, that Mr. Love had received permission to arrange a substitute for the end of his shift on May 31, 2012. (Apx. 106-07). Because Mr. Love left work with the understanding he was permitted to do so, he necessarily could not have "intentionally disregarded the employer's expectations of performance." *Hamilton*, 41 A.3d at 475 (quotation omitted). BRA's own HR manager, Ms. House, recognized that permission would negate intent in the employer's eyes: "It wouldn't have been a problem," she testified, "if [Mr. Love] had already spoken to his manager to get permission to have somebody else take his place while he

leaves early." (Apx. 72). And even if the employer had presented evidence that Mr. Love had been negligent in the way he handled the substitution (Judge Wellner made no such finding), that still would not suffice to prove the intent necessary for disqualifying misconduct. *Hamilton*, 41 A.3d at 475. Without having proved intent, it is settled law that BRA failed to show Mr. Love was disqualified for "misconduct" within the meaning of the statute and its regulations. *Scott*, 43 A.3d at 931 (Intentionality is a "necessary" though "not a sufficient condition for a finding" of misconduct.).

CONCLUSION

The Court should affirm the decision of the Office of Administrative Hearings.

Date: May 10, 2013

Respectfully submitted,

John C. Keeney, Jr. (No. 934307)
Christian P. Huebner (No. 1003815)
Legal Aid Society of the District of Columbia
1331 H Street, N.W., Suite 350
Washington, D.C. 20005
Telephone: (202) 661-5966
Fax: (202) 727-2132

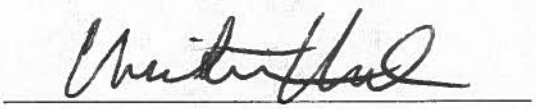
Counsel for Respondent

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing Brief to be delivered by first-class mail, postage prepaid, the 10th day of May, 2013, to

Judith L. Walter, Esq.
6030 Carroll Avenue, Suite 400
Takoma Park, MD 20912

Counsel for Petitioner



Christian Huebner