No. 05-AA-999

DISTRICT OF COLUMBIA COURT OF APPEALS

CHIMES DISTRICT OF COLUMBIA, INC.,

Petitioner,

v.

JENNIEV JONES,

Respondent.

On Petition for Review from
the Office of Administrative Hearings

BRIEF OF RESPONDENT

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

The parties to this case are Chimes District of Columbia, Inc., the petitioner, and JennieV Jones, the respondent. Chimes was represented in the Office of Administrative Hearings by Karen Holcomb, a benefits coordinator, and Jane Rybka, a project manager. It is represented in this Court by Howard K. Kurman and Laura L. Rubenstein of the firm Offit Kurman, P.A. Ms. Jones represented herself before the Office of Administrative Hearings. She is represented in this Court by Barbara McDowell and Peter G. Wilson of the Legal Aid Society of the District of Columbia. No intervenors or amici have appeared in this case.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

STATUTES AND REGULATIONS:

* Cases principally relied upon

QUESTIONS PRESENTED

1. Whether an employee's absence from work due to a serious medical condition constitutes "misconduct" within the meaning of the unemployment compensation statute, D.C. Code 51-110.

2. Whether substantial evidence supports the undisputed factual findings that Ms. Jones was fired because she did not return to work when her medical leave expired because she had to undergo defibrillator implant surgery.

3. Whether OAH had any basis for concluding that Ms. Jones was not "available for work" at the time relevant under the unemployment compensation statute, which refers to the time at which the claimant applied for unemployment benefits rather than, as Chimes assumes, the time that the claimant was fired.

STATEMENT OF THE CASE

Respondent JennieV Jones applied for unemployment compensation after she was fired from her position as a janitor with petitioner Chimes District of Columbia (Chimes). After a claims examiner of the District of Columbia Department of Employment Services (DOES) determined that Ms. Jones was entitled to benefits, Chimes appealed to OAH. It argued that Ms. Jones was ineligible for benefits because she was fired after she was physically unable to return to work when her prearranged medical leave expired. Ms. Jones, who was representing herself, explained that she had not returned to work because she was about to undergo defibrillator implant surgery. OAH subsequently issued a decision in Ms. Jones's favor, ruling that she did not commit misconduct within the meaning of the unemployment statute.

1. Ms. Jones Is Awarded Unemployment Compensation. Respondent JennieV Jones, a working mother of grown children, was employed as a janitor at the Ronald Reagan Building until February 2, 2005, when she went home from work ill. 8/9/05 Tr. 29; Final Order 2. Ms. Jones received outpatient care at Greater Southeast Hospital the next day, but, remaining sick, was admitted to the Washington Hospital Center the following week. 8/9/05 Tr. 29. Ms. Jones

was diagnosed with a heart condition and with vertigo. Id. ("I wasn't able to walk straight, I was – I had vertigo going, you know, shifting sideways."). Ms. Jones was unable to return to work, and requested medical leave from Chimes, her employer. Final Order 2. Chimes granted Ms. Jones leave under the District of Columbia Family and Medical Leave Act, D.C. Code 32-501, from February 1, 2005 through May 24, 2005. Id.

After Ms. Jones underwent several medical tests, she and her primary care physician decided she was healthy enough to return to work before May 24. 8/9/05 Tr. 29. Ms. Jones went back to work in early May. Id. 30. Learning that she had returned, Ms. Jones's supervisor explained that she and her doctor were required to complete additional paperwork before she could resume working. Id.

Ms. Jones returned to her primary care physician, who explained that he had received negative test results and asked that she see a cardiologist before he signed the additional forms. 8/9/05 Tr. 31. Ms. Jones's cardiologist recommended immediate surgery to place a defibrillator in her chest. Id. 31-32 ("[The cardiologist] told me that I could not go back until I got the defibrillator put in, because my heart wasn't going to be able to stand, you know."). Ms. Jones underwent that operation on May 25, 2005. Id. 32.

Chimes fired Ms. Jones effective May 24, 2005. Final Order 2. Its stated justification was that Ms. Jones had not returned to work when her medical leave expired. Id. Ms. Jones, who "didn't plan to not be employed," applied for unemployment compensation. 8/9/05 Tr. 32. On June 22, 2005, DOES concluded that Ms. Jones was not fired for misconduct, and was

therefore entitled to receive unemployment compensation.[1] See Determination By Claims Examiner; D.C. Code 51-110(b). Chimes appealed that decision to OAH.

2. The Hearing Before OAH. On August 9, 2005, Administrative Law Judge (ALJ) Ann C. Yahner held a hearing concerning Chimes's appeal of Ms. Jones's receipt of unemployment compensation. Chimes was represented by Karen Holcomb, a benefits coordinator, and Jane Rybka, a project manager. 8/9/05 Tr. 3. Ms. Jones appeared pro se and explained to the ALJ that she had tried unsuccessfully to find a lawyer and to obtain advice from OAH staff. Id. 8 ("I wish I had a lawyer. I couldn't get any information from the people here, you know, that sent me the mail, and I called and called and called, wouldn't nobody give me any information."); id. 33 ("I don't know anything about, you know, what I'm supposed to do for this and, you know, I'm just a plain person.").

The ALJ identified the two legal issues in the case as whether Chimes filed a timely administrative appeal (a matter not disputed here) and whether Ms. Jones was fired for a reason that would disqualify her from receiving unemployment compensation. 8/9/05 Tr. 4; id. 6-7. Chimes proceeded to argue that it fired Ms. Jones on May 24 because she was "physically not able to return to work" on that date. Id. 19; id. 20; id. 34-35. That argument was consistent with the letter Chimes mailed Ms. Jones to inform her that she was fired. See Letter of May 24, 2005 (Pet. App. Tab 6). Ms. Jones explained that she had not intended to remain out of work beyond May 24, but that she had to have surgery because her "heart was in the shape where it wouldn't beat." 8/9/05 Tr. 32.

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[1] Chimes did not include the determination of the DOES claims examiner in its appendix filed with this Court. A copy of that determination is appended to this brief.

3. OAH's Final Order. On August 15, 2005, OAH issued a Final Order affirming Ms. Jones's entitlement to unemployment compensation. At the outset, the ALJ noted that the Final Order "addresse[d] only disqualification based on reasons for separation," and not whether Ms. Jones was otherwise disqualified under D.C. Code 51-109. Final Order 2; id. n.2. The ALJ observed that the burden of proof on the question of misconduct lies with the employer. Id. 3 (citing McCaskill v. D.C. Dep't. of Employment Servs., 572 A.2d 443, 446 (D.C. 1990)).

The ALJ then reasoned that Chimes had not established that Ms. Jones was disqualified either for "gross" or "simple misconduct" within the settled meaning of the unemployment compensation statute. As for the question of gross misconduct, the ALJ noted that such a holding required Chimes to demonstrate that Ms. Jones violated its rules or interests with a culpable mental state, and concluded that Chimes had not met that burden. Final Order 5. As for the question of simple misconduct, the ALJ held that Ms. Jones's failure to return to work due to her surgery was "no more misconduct than is unsatisfactory work performance." Id. 6.

SUMMARY OF THE ARGUMENT

An employee does not commit misconduct within the meaning of the unemployment compensation statute, D.C. Code 51-101 et seq., if she leaves work to receive critical medical care. To prove that an employee was fired for misconduct, an employer must show that the employee violated its rules or interests with a culpable mental state. Ms. Jones, who did not return to work when her prearranged medical leave expired because she was about to undergo surgery, did not violate Chimes's rules with a culpable mental state. The unemployment compensation statute does not force employees to choose between receiving critical medical care and receiving unemployment benefits.

While Chimes argues in part that this case turns on the substantiality of the evidence on which the ALJ relied, there is no factual dispute between the parties. The ALJ found, as the parties agreed, that Ms. Jones was fired because she did not return to work on the date her medical leave expired. That was so because she was preparing to undergo surgery for a serious medical condition. Ms. Jones also took steps to inform Chimes that she would not be returning on the date originally anticipated. These facts are not contested by either party, and are supported by all of the evidence on the record.

Chimes's argument that Ms. Jones should be disqualified from receiving unemployment benefits because she was not "available for work" is meritless. The unemployment benefits statute tests a claimant's availability for work at the time she files her claim, and not at the earlier time when she is fired. The statute also measures a claimant's availability for any suitable work in light of their experience and health, rather than, as Chimes implicitly argues, their availability for the precise job they previously held. The only evidence in the record on point indicates that Ms. Jones was available for suitable work within a reasonable time of the date she filed her claim for benefits.

There is no valid reason why the unemployment statute should be interpreted to prevent recently disabled workers from receiving transitional unemployment assistance while searching for new work suitable to their condition merely because they are no longer able to perform their old job. Nor should the statute be read to force an employee to choose between receiving critical medical care and receiving unemployment benefits. This Court should not embrace Chimes's interpretation of the statute, which is contrary to its plain language, the federal regulations governing all state unemployment compensation regimes, and the decisions of this Court.

ARGUMENT

I. CHIMES DID NOT MEET ITS BURDEN OF PROVING THAT MS. JONES COMMITTED MISCONDUCT THAT WOULD DENY HER UNEMPLOYMENT BENEFITS.

The ALJ held that Ms. Jones was entitled to receive unemployment compensation because she was fired from her last job for reasons other than misconduct. That holding was based on the uncontested factual finding that Ms. Jones was fired because she suffered "a serious health condition" that temporarily prevented her from working. Final Order 3; id. 6; see also Pet. Br. 2; id. 4. The Final Order must be affirmed if "(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." Butler-Truesdale v. Aimco Properties, L.L.C., 2008 D.C. App. LEXIS 104, *4 (D.C. Mar. 20, 2008). The Final Order satisfies this standard.

A. A Claimant's Absence From Work Due To A Serious Physical Illness Does Not Constitute Misconduct Within The Meaning Of The Unemployment Statute.

A claimant who is absent from work because she has to undergo surgery to treat a serious physical illness does not commit misconduct within the meaning of the unemployment compensation statute. That is so because "implicit in this court's definition of 'misconduct' is that the employee intentionally disregarded the employer's expectations for performance." Washington Times v. D.C. Dep't. of Employment Servs., 724 A.2d 1212, 1217-1218 (D.C. 1999) (quoting Keep v. D.C. Dep't. of Employment Servs., 461 A.2d 461, 463 (D.C. 1983) (per curiam)). Where an employee is faced with a choice between receiving critical medical care and attending work, she does not intentionally disregard her employer's interests by tending to her health, even if the employer believes it has reasonable grounds to fire her.

This Court's previous cases involving unemployment claimants who miss work due to illness teach that a finding of misconduct requires the employer to show that the claimant intentionally violated its attendance policies. For example, where an employee missed a week of work due to illness and relied on a friend to inform his employer of the reason for his absence, the Court concluded that the employer could not rely on an ambiguous company policy that purportedly required the claimant personally to call his supervisor. Hawkins v. District Unemployment Compensation Board, 381 A.2d 619 (D.C. 1977). By contrast, the Court sustained a finding of misconduct where the claimant attempted to justify his absence from work on medical grounds but the employer "established a pattern of absenteeism and tardiness over a period of several months, both before and after [the claimant] was injured." Shepherd v. D.C. Dep't. of Employment Servs., 514 A.2d 1184, 1185 (D.C. 1985).

Chimes did not demonstrate before OAH that Ms. Jones intentionally violated its attendance requirements, nor has it done so here. Chimes has acknowledged Ms. Jones's efforts to comply with its medical leave policy. Ms. Jones attempted to return to work before her medical leave was exhausted. Pet. Br. 6. She also agreed to provide Chimes with the additional paperwork it required of her. Id. Once it became clear that she would have to undergo an operation, she explained her situation to her supervisor. Pet. Br. 7.

In light of these facts, Ms. Jones's temporary absence from work due to her surgery cannot be construed as an intentional violation of Chimes's policies. In contrast to Shepherd, where the employer identified a pattern of unplanned, unexcused absences, Chimes asserts merely that Ms. Jones did not return to work the day her agreed-upon medical leave expired. But the unemployment statute does not force a claimant to choose between receiving critical medical care and receiving unemployment benefits. That is particularly so where, as here, the claimant

takes reasonable steps to ensure that her employer is promptly notified of her situation. Regardless of whether Chimes believed it made sound business sense to fire Ms. Jones, she did not commit misconduct by placing her physical well-being before compliance with the letter of her medical leave.

B. Substantial Evidence Supports The ALJ's Findings Of Fact.

The ALJ found (and Chimes has not disputed) that Ms. Jones suffered a serious medical condition; that her condition required defibrillator implant surgery; and that she could not immediately return to work at Chimes as a result of the surgery. Final Order 2; see also Pet. Br. 2; id. 4. The ALJ also found that Chimes "submitted no evidence of either gross or simple misconduct." Id. 6. These findings of fact are "entitled to respect" on review by this Court, and may only be set aside when the record "clearly precludes [OAH's] decision from being justified by a fair estimate of the worth of the testimony of witnesses." Universal Camera Corp. v. NLRB, 340 U.S. 474, 490 (1951).

There is ample evidence on the record to support the ALJ's findings of fact. Indeed, both the testimony offered by Ms. Jones and the evidence offered by Chimes support those findings. Ms. Jones explained her medical history, including that she suffered vertigo and a serious heart condition, and stated that as a result of that condition she was advised to undergo defibrillator implant surgery. 8/9/05 Tr. 29; id. 31-32

The evidence presented by Chimes confirmed these facts. Karen Holcomb, Chimes's first witness, testified that Ms. Jones was fired on May 24, 2005 because she "was physically not able to return to work" on that date. Id. 19; id. 20. Jane Rybka, Chimes's other witness, similarly testified to her "know[ledge] that JennieV was quite ill." Id. 25. The documents submitted by Chimes likewise acknowledge Ms. Jones's "serious health condition." Letter of

February 18, 2005 (Pet. App. Tab 3); see also E-mail of May 24, 2005 (Pet. App. Tab 5) (explaining that Ms. Jones would undergo defibrillator implant surgery the following day); Letter of May 24, 2005 (Pet. App. Tab 6) (explaining that Ms. Jones was fired on May 24, 2005, because she was "unable to return to work" on that date).

Because the evidence presented by both parties was consistent, Chimes errs in asserting that the Final Order "was not supported by substantial evidence." Pet. Br. 4 (emphasis in original). There is no factual dispute between the parties, and no merit to the claim that the Final Order lacked a sufficient basis in the record.

II. CHIMES'S CLAIM CONCERNING MS. JONES'S "AVAILABILITY FOR WORK" IS WITHOUT MERIT.

Chimes argues that Ms. Jones was not eligible to receive unemployment compensation because she was not available to work as a janitor when it fired her on May 24, 2005. See, e.g., Pet. Br. 7 ("Respondent was separated from employment with Chimes because she was unavailable and unable to work to fulfill her job duties."). Chimes's interpretation of the unemployment compensation statute is erroneous in two respects. First, the statute requires that an employee be "available for work" within a reasonable period of time after she files a claim for unemployment benefits, and not, as Chimes would have it, at the earlier time when she was fired from her job. Second, the statute tests a claimant's availability for any work that is "suitable," and not necessarily for the same job the claimant previously held. The only evidence in the record suggests that Ms. Jones was available for suitable work within a reasonable time after the date she filed her claim for benefits. [2]

[2] A similar claim has been raised in a number of cases currently pending before this Court. See Chimes District of Columbia, Inc. v. Hernandez, No. 06-AA-625; Chimes District of Columbia, Inc. v. King, No. 06-AA-1003; Chimes District of Columbia, Inc. v. Arvaiza, No. 06-AA-1065.

1. An employee who was fired from her most recent job for reasons other than misconduct is ordinarily eligible to receive unemployment compensation, provided that she satisfies certain statutory criteria every week for which she claims benefits. The weekly criteria an unemployment benefits claimant must satisfy are provided by D.C. Code 51-109, and include, among other things, that the claimant "is physically able to work," "is available for work and has registered and inquired for work at the employment office," and "has made a minimum of 2 contacts for new work." D.C. Code 51-109.

The decisions of this Court uniformly support the understanding that an unemployment claimant's eligibility for benefits is tested as of the date her claim for compensation is filed, and not as of the earlier date when she was fired. The requirement that a claimant be available for work "ordinarily requires an active search for work each week for which benefits is claimed together with an ability to accept offers of suitable work within a reasonable time." Woodward & Lothrop, Inc. v. District Unemployment Compensation Board, 392 F.2d 479, 483 (D.C. Cir. 1968); accord, e.g., Downey v. D.C. Dep't. of Employment Servs., 467 A.2d 456, 457 (D.C. 1983) (per curiam) ("[D]uring each week benefits are claimed, a claimant must be available for work."); National Geographic Society v. District Unemployment Compensation Board, 438 F.2d 154, 162 (D.C. Cir. 1970).

The federal regulations governing all state unemployment compensation regimes confirm that the "availability for work" requirement applies "only to the week of unemployment for which [unemployment compensation] is claimed," and not "to the reasons for the individual's separation from employment." 20 C.F.R. 604.3(c). That an employee is fired because she is absent from work, or is physically incapable of working at the time she is fired, does not mean that she is necessarily unavailable for work on the later date when she files her claim for

unemployment compensation. It is the claimant's availability on the latter date, when the claim for benefits is filed, that is tested by the unemployment compensation statute.

2. The law does not require that an unemployment compensation claimant seek the same type of job she previously held in order to be considered available for work. Instead, a claimant must apply for work that is "suitable" in light of such factors as her "prior training, experience, and earnings," the distance of the workplace from the claimant's home, and the health and safety risks of the new job. D.C. Code 51-110(c).

For this reason, even if a claimant cannot continue to perform her previous job for medical or other reasons, the claimant still may be able to perform a number of other jobs. A man diagnosed with epilepsy may be ill-suited to continue working as a butcher, yet able to perform less dangerous work. Kentucky Unemployment Ins. Comm'n. v. Henry Fischer Packing Co., 259 S.W.2d 436 (Ky. 1953). A millworker who turns 65 may struggle with the physical demands of his job, but remain capable of performing lighter work. Dubois v. Maine Employment Security Comm'n., 114 A.2d 359 (Me. 1955). A truck driver with late-onset diabetes may become unfit to drive long distances, yet remain an asset to a moving company with shorter routes. Matter of George, 256 S.E.2d 826 (N.C. App. 1979). A meat packer who develops respiratory ailments may be unable to work in a tannery, but able to work in an environment with better air quality. FDL Foods, Inc. v. Employment Appeal Board, Dep't. of Inspections and Appeals, 460 N.W.2d 885 (Iowa Ct. App. 1990). In all of these cases, evidence of the grounds for the claimants' discharge from their previous job shed no light on their eligibility for different jobs better suited to their medical condition.

Chimes has not identified any evidence to suggest that Ms. Jones was unable to accept a new job on or about the time she filed her claim for benefits, nor does the record contain any

such evidence. Ms. Jones testified that as a result of the operation, one of her arms was placed in a sling for six weeks. 8/9/05 Tr. 32. Even assuming Ms. Jones could not continue to work as a janitor, there is no reason to suppose that she could not perform other, less physically taxing work. Ms. Jones's surgery no more disqualified her from beginning a different job than epilepsy would disqualify a former butcher, age a former millworker, emphysema a former meat packer, or diabetes a former truck driver from seeking new work more suitable to their condition.

3. Although Chimes relies on two decisions from other jurisdictions that denied claims for unemployment compensation, neither of those decisions is on point.

Chimes cites Merante v. Director of Job & Family Servs., 2005 Ohio App. LEXIS 5607 (Ohio App. Nov. 23, 2005) in the section of its brief devoted to the issue of Ms. Jones's availability for work, but that case does not address the question of a claimant's availability. Merante presented the question whether an employee who misrepresented the severity of his wife's illness was fired "for just cause," which would disqualify him from receiving unemployment benefits under the Ohio statute. 2005 Ohio App. LEXIS at **9. That issue has nothing to do with a claimant's availability for work within the meaning of the District unemployment statute.

The other decision Chimes relies on recognizes that even an employee who voluntarily quits his job for medical reasons may be eligible for unemployment benefits. Genetin v. Unemployment Comp. Board of Review, 451 A.2d 1353, 1354-1355 (Pa. 1982). In Genetin, the court observed that "[w]here an employee because of a physical condition, can no longer perform his regular duties, he must be available for suitable work, consistent with the medical condition, to remain eligible for benefits." Id. at 1356. That holding provides no support for Chimes's position, which is that an unemployment claimant's availability for work should

measured by his ability to "perform his regular duties" at the time he was fired, rather than his availability for "suitable work, consistent with [his] medical condition," at the time he files his claim.

* * *

Chimes's novel interpretation of the unemployment statute, which would test an unemployment claimant's eligibility for compensation based on her ability to perform her old job as of the date she was fired, would undermine the ability of individuals recently disabled or diagnosed with illness to receive vital safety-net benefits while transitioning to new work suitable to their medical condition. That position is contrary to the text of the statute, the decisions of this Court and other courts, the federal regulations governing all unemployment regimes, and important considerations of public policy.

CONCLUSION

For the foregoing reasons, the Final Order should be affirmed.

Respectfully submitted.

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CLAIM DETERMINATION OF THE DEPARTMENT OF EMPLOYMENT SERVICES

DISTRICT OF COLUMBIA GOVERNMENT

DEPARTMENT OF EMPLOYMENT SERVICES
OFFICE OF UNEMPLOYMENT COMPENSATION
609 H STREET, N.E. SUITE 334
WASHINGTON, D.C. 20002

Date: 06-23-2005
Social Security Number: 226-82-3866

Chimes District of Columbia
4815 Seton Drive
Baltimore, M.D. 21215

Jennie V. Jones
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Washington, D.C. 20020

DISCHARGE NOT FOR MISCONDUCT:

DETERMINATION BY CLAIMS EXAMINER

The claimant was discharged from the most recent work by the employer for not being able to hold claimant's position due to being out on medical leave. There was no other reason given for the discharge other than discharge was not for cause.

DECISION:

The claimant listed herein has been determined eligible for unemployment benefits; no disqualification has been imposed based on separation from your employment.

Claims Examiner

I certify that a copy of this document was mailed to the employer/claimant named herein at the above address on 06-22-2005

Signature

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CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing Brief of Respondent to be delivered by first-class mail, postage prepaid, and by facsimile, this 14th day of April, 2008, to:

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