

What Rises to the Level of Gross Misconduct Under COBRA?

By: Alex Mattingly on July 26, 2019 on graydon.law

Most employers that sponsor a group health plan subject to COBRA are aware that employees and any covered dependents must be offered COBRA continuation coverage when an employee or dependent loses coverage under the plan. What many employers do not expect is that employees terminated for gross misconduct do not have a right to COBRA coverage. While both of these statements are true, administering these rules can be difficult in practice, and a recent case illustrates how difficult it can be for an employer to prove gross misconduct.

A [Maryland district court](#) recently ruled that the behavior resulting in an employee's termination did not rise to the level of gross misconduct, and therefore the employer was responsible for offering COBRA coverage after the employee's termination. The case involved a medical assistant that administered an injection to a patient and told the patient to remain in the clinic for 30 minutes to insure the patient did not have any adverse reactions. The assistant left the patient's room, and then proceeded to forget about the patient and left for the day, leaving the patient alone in the empty clinic. The assistant was fired, but was not offered COBRA continuation coverage because the employer found her conduct to be gross misconduct. The court analyzed the facts, and although the conduct was obviously substandard, the court concluded that one isolated incident of negligence that did not cause harm to the patient did not rise to the level of gross misconduct.

Employers are faced with a difficult challenge when deciding whether conduct that has led to the termination of an employee has reached the level of gross misconduct. The facts in such a situation are often disputed, and the legal standard is muddled at best. Gross misconduct is not defined by COBRA, and courts have diverged widely on the standard to use in determining whether conduct rises to the level of gross misconduct (e.g., the Maryland district court in the above case cited three different standards used by courts within the Fourth Circuit). A decision to not offer COBRA coverage due to the gross misconduct exception can lead to costly results. Not only is the risk of litigation increased by the contentious nature of terminating an employee, but if a court finds that employee conduct was not gross misconduct, the court can award retroactive coverage to the employee and dependents, as well as penalize the employer up to \$110 per day. This recent case should serve as a reminder to all employers to think twice (and consult legal counsel)

before using the gross misconduct exception to COBRA continuation coverage.