No. 13-AA-517

DISTRICT OF COLUMBIA COURT OF APPEALS

JACQUELINE LYNCH,

Petitioner,

v.

MASTERS SECURITY,

Respondent.

On Petition for Review from the Office of Administrative Hearings
(2013-DOES-00196)

BRIEF OF PETITIONER

Drake Hagner (No. 1004674)*
Jennifer Mezey (No. 462724)
John C. Keeney, Jr. (No. 934307)
Legal Aid Society of the District of Columbia
1331 H Street, N.W., Suite 350
Washington, DC 20005
Telephone: (202) 628-1161
Counsel for Petitioner Jacqueline Lynch
**Presenting oral argument*

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

The parties in this case are Jacqueline Lynch, the unemployment claimant and petitioner, and Masters Security, her former employer and respondent. Ms. Lynch was represented in the Office of Administrative Hearings (OAH) by Tonya D. Love of the AFL-CIO Claimant Advocacy Program. Ms. Lynch is represented in this court by Drake Hagner, Jennifer Mezey, and John C. Keeney, Jr., of the Legal Aid Society of the District of Columbia. Masters Security was represented in the OAH by Vice President of Operations, Bernard Battle. In this court, Masters Security is represented by Edward R. Noonan and Jeffrey P. Brundage of Eckert Seamans Cherin & Mellott, LLC. No intervenors or *amici* have appeared.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

***Authorities principally relied upon**

QUESTION PRESENTED

Whether the Administrative Law Judge (ALJ) applied the wrong legal standard in disqualifying a security guard from unemployment benefits for gross misconduct, when the ALJ found that the guard's conduct (accidentally leaving her service weapon in a bathroom stall for less than fifteen minutes) was unintentional, but nonetheless deemed her "consciously reckless" for going to work on a day when she was distracted by worry about her ailing mother.

STATEMENT OF THE CASE

Petitioner Jacqueline Lynch applied for unemployment compensation after Masters Security terminated her from her security guard job for accidentally leaving her service weapon in a bathroom stall for less than fifteen minutes at the start of her work shift. The District of Columbia Department of Employment Services (DOES) determined that Ms. Lynch was disqualified from receiving any benefits for her failure to follow the company's weapons handling policy. Ms. Lynch appealed to the Office of Administrative Hearings (OAH). After a hearing, the ALJ issued a Final Order finding that Masters Security failed to prove any rule violation. However, after finding that Ms. Lynch left the weapon behind unintentionally, the ALJ found that Ms. Lynch committed gross misconduct because she was "consciously reckless" in coming to work on a day when she was distracted by worry for her ailing mother.

STATEMENT OF FACTS

For five years, Jacqueline Lynch was employed by Masters Security as a supervisory armed security officer. Final Order at 2, Mar. 11, 2013 ("Order") (App. A2); Transcript of the February 25, 2013 Hearing at 45 (hereinafter "Tr."). At the time of her termination, she served at the United States Department of Health and Human Services (HHS) headquarters building. Order at 2 (App. A2); Tr. at 15. Her responsibilities included: checking visitor identification,

sending visitors through a weapons detector, and protecting HHS employees, visitors, and equipment. Order at 2 (App. A2). Ms. Lynch had worked in security services for 28 years and, until the morning of January 14, 2013, had never left a weapon unsecured. Tr. at 61-62 (App. A28-29).

On January 14, 2013, Ms. Lynch arrived at the HHS building shortly before her 8:00 a.m. shift and retrieved her company-issued firearm. Order at 2 (App. A2). Before assuming her post in the front lobby, she went to the restroom located in a corridor behind the lobby. Order at 2 (App. A2). This particular restroom, while accessible to the public, was used by employees and often went unnoticed by building visitors due to its location in a back hallway. Tr. at 48-50. Ms. Lynch entered the restroom, went into a bathroom stall, and, following her normal practice, removed her firearm from its holster and placed it on the bathroom stall shelf. Order at 2 (App. A2); *see* Tr. at 73-74 (App. A34-35).

In order to use the toilet, a female officer must remove her firearm because it is attached to a holster on her belt. *See* Tr. at 58 (App. A25); *see also* Tr. at 70-71 (App. A34-35). Masters Security had no policies or protocol directing a female officer on how or where to place her firearm while using the restroom. Order at 4 (App. A4); Tr. at 71 (App. A32); Tr. at 75 (App. A36). In lieu of any guidance from Masters Security, Ms. Lynch had previously determined that placing the gun on the shelf was the safest and most practical way to secure her weapon while in the stall. *See* Order at 2-4 (App. A2-4); *see also* Tr. at 73-75 (App. A34-36). The other alternatives—such as placing her firearm on the bathroom floor, or hanging her belt from the upper hook of the stall door—were less safe because another person could reach into the stall and take the gun. Order at 2-3 (Order A2-3); Tr. at 73-76 (App. A34-37). Masters Security attempted to prove that alternative methods for gun placement were possible, for example,

attaching the gun to a belt and hanging it around her neck, but the ALJ dismissed the idea as unrealistic and "bizarre." *See* Tr. at 76-78 (App. A37-39). Ms. Lynch testified that placing the gun on the stall shelf was "what every woman [officer] does" in the restroom. Tr. at 73 (App. A34); *see also* Tr. at 71 (App. A32); Tr. at 74 (App. A35); Tr. at 76 (App. A37).

On that day, when Ms. Lynch finished using the toilet, she exited the stall, failing to re-holster her firearm. Order at 3 (App. A3). This was the first time that she had left her firearm in the restroom, Tr. at 61-62 (App. 28-29), as she normally double-checked to make sure she had possession of her firearm before leaving. Order at 3 (App. A3); Tr. at 47 (App. A23). However, this was not the first time a gun had been left in the restroom by a female officer. Ms. Lynch had previously found a weapon left in the restroom by Officer Irene Burton, who was not disciplined or terminated as a result. Order at 2 (App. A2); *see* Tr. at 23-24 (App. A15-16).

Ms. Lynch attributed her failure to check to see whether she had her weapon when she left the restroom to the fact that she was preoccupied with worry for her mother. Order at 3 (App. A3); Tr. at 46 (App. A22) ("I had a lot of things on my mind . . . My mother has been very ill."). The day of the incident was Ms. Lynch's first day back at work after taking time off to care for her mother, who had been in the hospital for over a week and had just been discharged from a rehabilitation program. Tr. at 59-60 (App. A26-27). As Ms. Lynch testified, "I went into the restroom, used it and as I head out, I usually, I always touch my weapon before I come out of the restroom . . . [my mother's illness] was on my mind, you know, and I didn't even think about that. I didn't do it." Tr. at 47 (App. A23).

No more than fifteen minutes after Ms. Lynch exited the restroom, Ms. Lynch's co-worker Officer Burton entered the same bathroom stall and found the weapon.[1] Order at 3 (App. A3); Tr. at 16. She brought the firearm to Ms. Lynch's supervisor, Captain Timothy Nelson, who in turn identified the weapon as Ms. Lynch's by consulting the employer's weapons inventory sheet. Tr. at 26-27. Then, Captain Nelson "called Ms. Lynch up to the arms room. [He] gave her the weapon back, and [he] told her go back to her post." Tr. at 27. Captain Nelson was in the process of writing a personnel action form for the incident when he learned that another security officer, Officer Ancespel, had contacted Major Battle, Captain Nelson's supervisor, to report the incident. Order at 3 (App. A3); Tr. at 27-28.

Major Battle instructed Captain Nelson to send Ms. Lynch home and to write up a personnel action form on the incident. Order at 3 (App. A3); Tr. at 29. Captain Nelson complied and recommended "suspension, pending termination." Tr. at 31-32. Vice President Kristine Nichols determined that Ms. Lynch should be terminated for "the offense of leaving her weapon in the bathroom." Tr. at 33 (App. A18); *see* Order at 3 (App. A3). No other employee had previously been discharged for leaving a weapon in the restroom. Tr. at 33 (App. A18) (when asked to explain why Officer Burton was not fired for the same offense, Captain Nelson stated that he "can't explain the difference."); *but see* Order at 2 (App. A2) (finding that Office Burton's offense of leaving her gun in the bathroom was not reported to management).

[1] The ALJ found that the gun was left unattended for approximately fifteen minutes. Order at 3 (App. A3); Order Denying Motion for Reconsideration at 2-3 (App. A10-11). Ms. Lynch, in her Motion for Reconsideration, calculated six to ten minutes. Motion for Reconsideration at 1-2, R. at Tab 10. Ms. Lynch testified that after leaving the restroom she returned to her desk at approximately 7:55 a.m.. Tr. at 52. She then received a call from Captain Nelson at around 8:06 or 8:10 a.m., informing her that he had possession of her weapon. Tr. at 51. Officer Burton found the weapon sometime after she started her break at 8:06 a.m.. Statement by Irene Burton, Exhibit 214 (App. A54).

Administrative Proceedings

Ms. Lynch subsequently applied for unemployment benefits. The District of Columbia Department of Employment Services (DOES) disqualified her from benefits. Determination by Claims Examiner, Record at Tab 1 (hereinafter "R."), Exhibit 300 (hereinafter "Ex."). The basis of the denial was discharge for gross misconduct because "[Ms. Lynch] violated the company's weapons handling policy by leaving her loaded gun in the ladies room unsecured." *Id.* Ms. Lynch timely appealed the denial to the District of Columbia Office of Administrative Hearings (OAH). Order at 2 (App. A2).

Administrative Law Judge (ALJ) Arabella W. Teal conducted a hearing on February 25, 2013. Masters Security Vice President of Operations Bernard Battle called Masters Security employees Officer Irene Burton and Captain Timothy Nelson to testify. Captain Nelson testified that Ms. Lynch was no longer employed with Masters Security because, "[s]he left a weapon in the bathroom stall, which is a termination offense, according to the employee handbook of Masters Security." Tr. at 26 (App. A17); *see also* Tr. at 36 (App. A19). The ALJ also admitted a handwritten statement by Officer Burton describing how she found the firearm. *See* Statement by Irene Burton, Ex. 214 (App. A54); Tr. at 19-22.

When the ALJ asked Captain Nelson if he knew why Ms. Lynch "left the gun in the bathroom," he responded:

Captain Nelson:	[S]he had told me she had been going through some things. I believe that she has a sick person in her family, and her mental state wasn't right, at the time. That is what she told me.
Judge Teal:	So, she was distracted?
Captain Nelson:	Yes, Ma'am.

Tr. at 37-38 (App. A20-21).

Ms. Lynch testified that she left her firearm because she was distracted and worried about her ailing mother's health. As Ms. Lynch explained:

> I've done [security work] now for approximately . . . 28 years . . . I take pride in what I do. I have never, ever left a weapon anywhere, anywhere, at any time. This is a mistake, yes, it was of my own, but it was a mistake that I truly regret and I wish I could take that back, but I had . . . my mother was on my mind and my focus, and I was trying to think, should I take off to be home with her? I didn't think this was something I would have done, but it happened. It happened to me.

Tr. at 61-62 (App. A28-29).

During the hearing, the ALJ acknowledged that Ms. Lynch did not intend to leave her service weapon behind: "[Ms. Lynch] said she did it with – as a mistake. She wasn't aware that she left it. She didn't leave [the weapon] purposefully there." Tr. at 69 (App. A30).

Final Order

In a Final Order issued March 11, 2013, the ALJ affirmed the Claims Examiner's determination and concluded that Ms. Lynch was terminated for gross misconduct. Order at 5 (App. A5). The ALJ determined that Ms. Lynch was fired for "leaving a loaded gun in a publicly-accessible restroom for 15 minutes because she was preoccupied." *Id.* at 4 (App. A4). The ALJ dismissed the employer's argument that Ms. Lynch was terminated for violation of a company rule because she found no credible evidence of any policy requiring Ms. Lynch to place her gun elsewhere in the stall, as required to establish a rule violation under 7 DCMR § 312.7. *Id.*

Despite finding no rule violation, the ALJ concluded that Ms. Lynch's "mistake" constituted gross misconduct. Order at 5 (App. A5). The ALJ found that "[g]iven the essential nature of her job," Ms. Lynch's failure for "15 minutes to notice that she did not have possession of her gun" was "reckless" and "constitute[d] misconduct." *Id.* at 4-5 (App. A4-5). After finding misconduct, the ALJ determined that Ms. Lynch's conduct rose to the level of gross

misconduct because her "abandon[ment] [of] a loaded weapon in a publicly-accessible place . . . presented huge risks to the persons she was supposed to be protecting." *Id*. at 5 (App. A5). In coming to this conclusion, the ALJ focused on Ms. Lynch's role as a security guard, stating "her job . . . was to use all her senses to monitor security in the area," and "[s]imply put, those who are armed security personnel must also monitor themselves to ensure they are not too impaired . . . to safeguard their weapons." *Id*. at 4-5 (App. A4-5). The ALJ also focused on Ms. Lynch's act of coming to work while distracted. *Id*. at 5 (App. A5) ("Instead of notifying Employer she needed a break to check on her mother, or that she needed to be absent from work, Claimant abandoned a loaded weapon in an [sic] publicly-accessible place.").

The ALJ also compared Ms. Lynch's conduct to that of the claimant in *Badawi v. Hawk One Sec., Inc.,* 21 A.3d 607 (D.C. 2011), a security officer who was found to have committed simple misconduct after he intentionally removed his firearm and placed it in a drawer while he prayed nearby. *Id.* at 5 (App. A5). The ALJ distinguished *Badawi*, because here the gun was loaded, Ms. Lynch could not see the door to the restroom, and the gun was unattended for a longer period of time. *Id.* The ALJ determined that these factors outweighed the "mitigating factor that this incident was the only one of its kind involving [Ms. Lynch]," and found that Ms. Lynch committed gross misconduct. *Id.*

Motion for Reconsideration and Order Denying Motion

On March 15, 2013, Ms. Lynch filed a Motion for Reconsideration on the grounds that "her state of mind should have negated any intent to disregard the expectations of the employer." Motion for Reconsideration at 3, R. at Tab 10. Ms. Lynch challenged the ALJ's legal conclusion that Ms. Lynch had the requisite mental state to have left her firearm in the bathroom intentionally, willfully, or deliberately, as is required for a finding of gross misconduct. *Id.*

The ALJ denied the Motion for Reconsideration on May 1, 2013. In the denial order, the ALJ stated that whether Ms. Lynch *unintentionally* left her gun unattended was "not the point." Order Denying Motion for Reconsideration at 1 ("Recons. Order") (App. A9).[2] Instead, according to the ALJ:

> Claimant knew that she was distracted by worry, and knew that being on duty required her to at least safeguard, and be ready to use, her loaded weapon. Nevertheless, instead of admitting that she lacked the concentration necessary to perform her duties that day, [Ms. Lynch] began her shift. I concluded that, given the nature of her job . . . Claimant's actions were consciously reckless in much the same way they would have been had she been distracted or unable to properly pay attention to core job duties because she was sleepy, had taken medication, or was engaged in a personal conversation.

Id. at 1-2 (App. A9-10). The ALJ concluded that the intentionality requirement for gross misconduct was satisfied because Ms. Lynch was aware that worry and distraction could impair her job performance and was thus "consciously reckless." *Id.* at 2 (citing *Capitol Entm't Servs., Inc. v. McCormick*, 25 A.3d 19, 26 (D.C. 2011) (App. A10).

Ms. Lynch timely filed her petition for review with this court on May 16, 2013.

STANDARD OF REVIEW

"Whether a fired employee's actions constituted misconduct, gross or simple, is a legal question, and our review of an agency's legal rulings is *de novo* . . . ." *Odeniran v. Hanley Wood, LLC*, 985 A.2d 421, 424 (D.C. 2009) (internal quotation marks and citation omitted). This court will reverse an OAH ruling that is "[a]rbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." D.C. Code § 2-510(a)(3)(A) (2001). As to factual findings, the Court determines 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

[2] The Order Denying Motion for Reconsideration given to petitioner by OAH has incorrect pagination (reading "4, 2, 3, 4, 4, 6"), though the order appears to be a complete and accurate copy. For purposes of this brief, petitioner has cited the page numbers as if they were paginated correctly ("1, 2, 3"). Further, all cites to the Order include a parallel citation to the Petitioner's Appendix.

from its findings of fact." *See Rodriguez v. Filene's Basement, Inc.*, 905 A.2d 177, 180 (D.C. 2006). The court reviews "mixed questions of law and fact under [its] usual deferential standard of review for factual findings" while "*de novo* review [applies] to the ultimate legal conclusions based on those facts." *Hickey v. Bomers*, 28 A.3d 1119, 1123 (D.C. 2011) (internal quotation marks omitted) (citations omitted).

SUMMARY OF THE ARGUMENT

It is undisputed that Ms. Lynch was terminated for accidentally leaving her service weapon in a bathroom stall for less than fifteen minutes on a day when she was distracted by worry about her ailing mother. In her 28 years as a security guard, Ms. Lynch had never before left a service weapon unattended. The ALJ erred in treating her one-time unintentional conduct as gross misconduct. As this court's precedent makes abundantly clear, disqualifying misconduct, gross or simple, must be supported by a finding that the claimant acted with the requisite state of mind. For gross misconduct, a claimant's actions must have been intentional, deliberate, or willful; simple misconduct requires an intentional act or its equivalent. *See Scott v. Behavioral Research Assoc., Inc.*, 43 A.3d 925, 931 (D.C. 2012).

Here, the ALJ erroneously concluded that Ms. Lynch committed gross misconduct because she was "consciously reckless" for "fail[ing]. . . to notice that she did not have possession of her gun," and for coming to work on a day when she was distracted by worry. Order at 4 (App. A4). This was legal error for multiple reasons. First, the mental state the ALJ found with respect to the actual grounds for Ms. Lynch's termination – "failure to notice" – is not a conscious disregard. According to the ALJ's own findings, the act of leaving the gun in the restroom was unintentional, not "conscious," and therefore not "consciously reckless." The proper legal standard for recklessness requires a "conscious choice of a course of action." *See In*

re Romansky, 825 A.2d 311, 316 (D.C. 2003). Second, the ALJ erred when she based her finding of misconduct, not on the employer's reason for discharge (leaving her firearm in the bathroom), but for coming to work while distracted. This was legal error, as a misconduct finding must be based on the *employer's* reason for discharge. *Chase v. District of Columbia Dep't of Employment Servs.*, 804 A.2d 1119, 1122-23 (D.C. 2002). Third, treating coming to work while distracted, even while working in a safety-sensitive position, as gross misconduct as a matter of law is the same as extending "gross misconduct" to ordinary negligence. That is not the law and would be inconsistent with the purpose of the unemployment compensation statute, which is to protect workers from hardship even when they have been justly discharged from employment for making mistakes at work. *See Badawi v. Hawk One Sec., Inc.*, 21 A.3d 607, 616 (D.C. 2011) (requiring that the definition of misconduct be construed to further the statutory purpose of "minimizing the economic burden of unemployment").

No reasonable ALJ could find that Ms. Lynch made a conscious choice to leave her service weapon in the restroom. The employer's own witness, a female officer, had left her gun in the bathroom unattended on a prior occasion, illustrating that accidents happen. Ms. Lynch's one-time mistake was at most ordinary negligence, which cannot be either gross or simple misconduct. *See Capitol Entm't Servs., Inc. v. McCormick*, 25 A.3d 19, 27 (D.C. 2011).

The ALJ's conclusion that Ms. Lynch committed gross misconduct is legally erroneous and must be reversed. No remand is necessary because no reasonable ALJ could find that Ms. Lynch had the requisite intent to commit gross or simple misconduct on this record.

ARGUMENT

I. As a matter of law, there was no disqualifying misconduct, either gross or simple, in Ms. Lynch's one-time mistake.

a. The ALJ found that Ms. Lynch acted unintentionally when she left her firearm in the restroom.

The ALJ explicitly and repeatedly found that Ms. Lynch left her firearm in the restroom unintentionally. *See* Order at 4 (App. A4) ("Claimant left the bathroom, completely forgetting about the gun for 15 minutes."); *see also id.* ("Claimant . . . failed for 15 minutes to notice that she did not have possession of her gun."); *id.* at 5 (App. A5) ("[Ms. Lynch] admitted that she remained so distracted that she never noticed that she did not have her weapon until she reported to the arms room at Captain Nelson's request."); *id.* at 3 (App. A3) ("Claimant was also in the habit if [*sic*] checking to see that she had re-holstered her weapon before she left the rest room stall, but she was so pre-occupied with worry about her mother that she failed to do so on this occasion."). These findings were amply supported by the record and are entitled to deference on appellate review. *See Rodriguez v. Filene's Basement, Inc.*, 905 A.2d 177, 180 (D.C. 2006).

b. The ALJ erred in treating unintentional conduct as gross misconduct.

The ALJ's order on reconsideration explicitly stated that whether Ms. Lynch's conduct was "unintentional" was "not the point." Recons. Order at 4 (App. A9). That was legal error. However justified an employee's termination (an issue not before this court), this court's cases do not cut the emergency lifeline of unemployment benefits without substantial evidence of bad intent or its equivalent. *See Wash. Times v. District of Columbia Dep't of Employment Servs.*, 724 A.2d 1212, 1218 (D.C. 1999) ("The fact that an employee's discharge appears reasonable from the employer's perspective does not necessarily mean that the employee engaged in misconduct." (internal citations omitted)).

An unintentional act cannot be the basis for either gross or simple misconduct. *See Bowman-Cook v. Wash. Metro. Area Transit Auth*., 16 A.3d 130, 135 (D.C. 2011) (finding that "'implicit in [the] definition of 'misconduct' is that the employee intentionally disregarded the employer's expectations for performance'"); *see also Hickenbottom v. District of Columbia 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.") (emphasis added).[3] For gross misconduct, it is "abundantly clear that an employee's actions must be intentional, deliberate, or willful . . . ." *Capitol Entm't Servs., Inc. v. McCormick*, 25 A.3d 19, 23-24 (D.C. 2011) (hereinafter "*Capitol Entertainment*"). The requisite mental state for gross misconduct is codified in the regulations:

> [A]n 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.

7 DCMR § 312.3 (emphasis added). This court has cautioned that "context makes clear that [the definition of gross misconduct in 7 DCMR § 312.3] should not be read to extend to the outer limits of its definitional possibilities." *Odeniran v. Hanley Wood, LLC*, 985 A.2d 421, 426 (D.C. 2009) (internal quotations omitted).

While the mental state required to find simple misconduct is not codified in the regulations, as it is for gross misconduct, this court has held that intent or its equivalent is

---

[3] In 1993, the unemployment compensation act was amended to create two levels of misconduct: "gross misconduct" and "misconduct other than gross misconduct" (commonly called simple misconduct). *See* D.C. Code § 51-110(b)(1)-(2). The current statute and regulations for gross and simple misconduct do not mention negligence of any kind. *See id.*; 7 DCMR § 312. Although statute and regulations now refer to a bifurcated definition of misconduct, this Court has held that precedents under *Hickenbottom* "retain their relevance." *Capitol Entertainment*, 25 A.3d at 26.

required for a finding of simple misconduct. *See Scott v. Behavioral Research Assocs., Inc.*, 43 A.3d 925, 931 (D.C. 2012) (requiring "intentionality or its equivalent (*e.g.*, conscious indifference to, or reckless disregard of, the employee's obligations or the employer's interest)") (citing *Hamilton v. Hojeij Branded Food, Inc.*, 41 A.3d 464, 475 (D.C. 2012)). Thus, any misconduct "requires a showing of more than ordinary negligence." *Capitol Entertainment*, 25 A.3d at 27; *see also Keep v. District of Columbia Dep't of Employment Servs.*, 461 A.2d 461, 463 (D.C. 1983). Ordinary negligence is defined as "any 'failure to exercise ordinary care,' *i.e.*, 'the same caution, attention, or skill that a reasonable person would use under similar circumstances.'" *Capitol Entertainment*, 25 A.3d at 23 (citations omitted).[4] Thus, without, at minimum, substantial evidence of bad intent or its equivalent, no misconduct can be found.

c. <u>There was no evidence that Ms. Lynch was aware or "conscious" of leaving the gun in the bathroom, so she was not "reckless" within the meaning of the unemployment compensation statute.</u>

This court's precedent acknowledges the possibility, never yet so found, that reckless conduct (from which intent can be inferred) may support a finding of misconduct, but only if "conscious" disregard is proven. *See Capitol Entertainment*, 25 A.3d at 26 (finding that "conscious disregard amounting to recklessness" can be gross misconduct); *see also Scott*, 43 A.3d at 931 (finding that "*conscious* indifference to, or *reckless* disregard of, the employee's obligations or the employer's interest" can be simple misconduct) (internal citation omitted) (emphasis added). Omitting this critical legal element of "conscious disregard," the ALJ erroneously concluded as a matter of law, "[g]iven the essential nature of her job," Ms. Lynch's failure for "15 minutes to notice that she did not have possession of her gun" was "reckless" and

[4] For persons with special training or experience, "the duty to exercise ordinary care requires adherence to the standard of conduct expected of others in the same field." *Capitol Entertainment*, 25 A.3d at 24 n.10 (citing *O'Neil v. Bergan*, 452 A.2d 337, 341 (D.C. 1982)).

"constitute[d] misconduct." Order at 4-5 (App. A4-5). That was a legal error, reviewable by this court *de novo*. *See Odeniran v. Hanley Wood, LLC*, 985 A.2d 421, 424 (D.C. 2009) ("Whether a fired employee's actions constituted misconduct, gross or simple, is a legal question, and our review of an agency's legal rulings is *de novo* . . . .") (internal quotation marks and citation omitted). The mental state the ALJ found with respect to the actual grounds for Ms. Lynch's termination – "failure to notice" – is not a conscious disregard. Nor is it a conscious indifference to or reckless disregard of the employer's interests, as is required to find simple misconduct.

This court has found, in other contexts, that a finding of recklessness requires a "conscious choice of a course of action." *E.g.*, *In re Romansky*, 825 A.2d 311, 316 (D.C. 2003) (employing *Black's Law Dictionary* and Am. Jur. definitions of "recklessness" as a "state of mind in which a person does not care about the consequences of his or her action" and "requir[ing] a *conscious choice of a course of action*, either with knowledge of the serious danger to others involved in it or with knowledge of facts that would disclose this danger to any reasonable person") (emphasis added). The Restatement (Second) of Torts § 500 contrasts recklessness and negligence, stating that recklessness:

> differs from that form of negligence which consists of mere inadvertence, incompetence, unskillfulness, or a failure to take precautions to enable the actor adequately to cope with a possible or probable future emergency, in that reckless misconduct requires *a conscious choice of a course of action*, either with knowledge of the serious danger to others involved in it or with knowledge of facts which would disclose this danger to any reasonable man.

Restatement (Second) of Torts § 500 (emphasis added). The District of Columbia has employed the Restatement's definition of recklessness. *See Copeland v. Baltimore & O. R. Co.*, 416 A.2d 1, 3 (D.C. 1980) (citing Restatement (Second) of Torts § 500). A similar distinction is made in the criminal context as well. *E.g. United States v. Dixon*, 135 U.S. App. D.C. 401, 406 n.6, 419 F.2d 288, 293 n.6 (1969) ("Negligence is distinguished from acting purposefully, knowingly, or

recklessly in that it does not involve a state of awareness."). Thus, Ms. Lynch's failure to notice that she did not have her gun, without more, cannot be the basis for any finding of recklessness, and thus of a finding of misconduct.

d. The ALJ erred in tying gross misconduct to Ms. Lynch's awareness that she was distracted when she came to work, which was not the basis for her termination.

In the absence of any evidence of intent in forgetting her gun that resulted in Ms. Lynch's termination, the ALJ looked instead to Ms. Lynch's awareness that she was distracted that day by her mother's illness. The ALJ treated Ms. Lynch's decision to go to work while knowing she was distracted as if it were disqualifying misconduct. Order at 5 (App. A5) ("Claimant knew that she was distracted, but went to work anyway . . . Instead of notifying Employer she needed a break to check on her mother, or that she needed to be absent from work, Claimant abandoned a loaded weapon in an [*sic*] publicly-accessible place."); Recons. Order at 2 (App. A10) ("[I]nstead of admitting she lacked the concentration necessary to perform her duties that day, she began her shift."). In her Order Denying Motion for Reconsideration, the ALJ explains her analysis further:

> Claimant argues that her action of leaving her loaded gun unattended in a restroom was unintentional . . . That is not the point . . . Claimant's actions were consciously reckless in much the same way they would have been had she been distracted or unable to properly pay attention to core job duties because she was sleepy, had taken medication, or was engaged in a personal conversation.

Recons. Order at 1-2 (App. A9-10).

The ALJ committed legal error. Masters Security did not fire Ms. Lynch for coming to work while distracted. *See* Order at 3 (App. A3) (finding that Lynch was terminated for leaving her weapon in the bathroom); *see also* Tr. at 26 (App. A17); 33 (App. A18); 36 (App. A19). A critical "prerequisite to the denial of benefits in a misconduct case is that a finding of misconduct must be based fundamentally on the reasons specified by the employer for the discharge." *See*

Chase v. District of Columbia Dep't of Employment Servs., 804 A.2d 1119, 1122-23 (D.C. 2002) (quoting *Smithsonian Institution v. District of Columbia Dep't of Employment Servs.*, 514 A.2d 1191, 1194 (D.C. 1986)); *Jones v. District of Columbia Unemployment Comp. Bd.*, 395 A.2d 392, 395 (D.C. 1978); *see also Green v. Dist. Unemployment Comp. Bd.*, 346 A.2d 252, 256-57 (D.C. 1975) (finding reversible error where the Board found disqualifying misconduct by fashioning a new rationale for the claimant's misconduct when the employer's reason for termination—that the employee had falsified her overtime records—was disproven). Because Ms. Lynch was terminated for leaving her service weapon in the restroom, her decision to come to work while distracted cannot form the basis of a finding of disqualifying misconduct.

Equating a general awareness that worry, illness, or other factors might diminish an employee's job performance with the specific mental state regarding the specific conduct that prompted an employee's termination would weaken the unemployment compensation scheme provided by the Council. Workers, especially those with little economic leverage and limited medical or personal leave must often work when they are not at their best. A theory that would deny unemployment compensation for unintentional acts committed while distracted by worry (as Ms. Lynch was), exhausted, sick, or otherwise not at their best would undermine the statutory purpose of "protect[ing] employees against economic dependency caused by temporary unemployment and . . . reduc[ing] the need for other welfare programs." *Wash. Times v. District of Columbia Dep't of Employment Servs.*, 724 A.2d, 1212 at 1216 (D.C. 1999). If reporting to work under such circumstances was a form of gross misconduct it would impermissibly expand disqualifying gross misconduct to include ordinary negligence, which is not the law. *See Capitol Entertainment*, 25 A.3d at 27. Such an expansion would make wholly illusory the statutory safety net of emergency assistance between jobs. *See Larry v. Nat'l Rehab. Hosp.*, 973 A.2d

180, 184 (D.C. 2009) ("We have repeatedly noted that '[u]nemployment compensation benefits are a statutory right for those genuinely eligible . . . and the statute is to be construed broadly to accomplish the legislative and statutory intent of minimizing the economic burden of unemployment.") (internal citation omitted)).

e. The gravity of the potential harm does not convert unintentional conduct into disqualifying gross misconduct.

At bottom, the ALJ bases her misconduct analysis on the magnitude of the potential harm to the employer and the public despite the lack of any evidence that Ms. Lynch intended to do harm, as is required for a finding of either gross or simple misconduct. Only after the requisite element of intent is first proven does the magnitude of potential harm become one factor to determine whether the offending conduct is gross or simple misconduct. *See* 7 DCMR § 312.5 (defining "other than gross" misconduct as "acts where the severity, degree, or other mitigating circumstances do not support a finding of gross misconduct"); *see, e.g., Odeniran v. Hanley Wood, LLC*, 985 A.2d 421, 428-429 (D.C. 2009) (finding simple misconduct for the claimant's repeated refusal to work over the course of a single day because the Employer did not prove it was more than an isolated incident or that their business "suffered serious consequences"). As this Court's cases illustrate, when the claimant's offending conduct is unintentional – even if the risk of harm is high – no disqualifying misconduct can be found. *See Capitol Entertainment*, 25 A.3d at 27 (finding no misconduct where bus driver was terminated for two unintentional vehicular accidents); *Keep v. District of Columbia Dep't of Employment Servs.*, 461 A.2d 461, 463 (D.C. 1983) (finding no misconduct where babysitter was terminated for allowing child to chew on wire garbage ties and neglecting to strap child into a stroller, among other incidents, because the conduct was unintentional and not "sufficiently willful to meet the statutory definition of misconduct").

The ALJ compared this case to *Badawi v. Hawk One Security* and determined that Ms. Lynch's conduct was *more* egregious than the handgun safety issue by security guard Badawi, justifying a finding of gross, instead of simple, misconduct in this case. Order at 5 (App. A5). In *Badawi*, a security guard was terminated for removing his service weapon, unloading it, and placing the weapon and ammunition into a drawer while he knelt in prayer for several minutes while on-duty. *See Badawi v. Hawk One Sec., Inc.,* 21 A.3d 607, 611 (D.C. 2011). This court held that Badawi's actions constituted at most simple misconduct. *See id.* at 616-17.

However, the ALJ's use of *Badawi* further emphasizes her disregard for the element of intent required for any misconduct finding. The court in *Badawi* only reached the analysis on mitigating factors that separate gross and simple misconduct because all the elements of misconduct had been established. Badawi *intentionally* removed his firearm, unloaded it and stored it in a drawer before he knelt to pray. *See Badawi*, 21 A.3d at 614-615 ("[T]he ALJ was required to determine at a minimum whether Badawi acted deliberately or willfully in order to conclude that Badawi engaged in gross misconduct."). This case comparison simply underscores the fact that Ms. Lynch's offending actions were unintentional.

f. Ms. Lynch's unintentional act was ordinarily negligent and cannot be the basis for disqualifying her from unemployment benefits.

The ALJ did not rely on another possible theory of misconduct—gross negligence—but that theory also does not apply to Ms. Lynch's conduct. Ordinary negligence is never enough to disqualify a claimant from unemployment benefits. For negligence to be the basis of a misconduct determination, the negligence must be "in such a degree or recurrence as to manifest culpability, wrongful intent, or evil design." *Capitol Entertainment*, 25 A.3d at 27-28; *Hickenbottom v. District of Columbia Unemployment Comp. Bd*., 273 A.2d 475, 477-78 (D.C. 1971). A finding of gross negligence, like recklessness, requires proof of extreme conduct that

implies bad faith on the part of the actor, and thus imputes an intent to do wrong. The standard for gross negligence:

> connote[s] that *the actor has engaged in conduct so extreme as to imply some sort of bad faith*. Where . . . there is no evidence of subjective bad faith on the part of the actor, the extreme nature of the conduct may be shown by demonstrating that the actor *acted in disregard of a risk so obvious that [the actor] must be taken to be aware of it* and so great as to make it highly probable that harm would follow.

Dickson v. District of Columbia, 938 A.2d 688, 690 (D.C. 2007) (emphasis added) (quoting *District of Columbia v. Walker*, 689 A.2d 40, 44-45 (D.C. 1997)). In the context of unemployment benefits, this court held that gross negligence "requires such an extreme deviation from the ordinary standard of care needed to support a finding of wanton, willful and reckless disregard or conscious indifference for the rights and safety of others." *Capitol Entertainment*, 25 A.3d at 27-28 & n.36 (quoting *District of Columbia v. Walker*, 689 A.2d 40, 44-45 (D.C. 1997)).

In *Capitol Entertainment*, a bus driver was terminated after two accidents resulting from her ordinary negligence. *See id.* at 21-22. The bus driver qualified for full unemployment benefits. *See id.* at 29. This court acknowledged that safety is a "paramount concern" in the workplace, *id.* at 28, but neither simple nor gross misconduct was proven because the employer presented "no evidence that [claimant] was indifferent to safety or that she violated the rules of safe bus operation *deliberately or consciously*," *id.* at 28 (emphasis added). The court made clear that, in theory, negligence may rise to the level of misconduct, but "only that more than 'ordinary' carelessness must be shown for it to do so." *Id.* at 27-28. In other words, engaging in a negligent act that creates an unsafe situation in the workplace – by itself – is not enough to prove misconduct. An employer must prove that the claimant acted, or failed to act, out of a state of mind that is willful, deliberate, or intentional.

Like the vehicular accidents in *Capitol Entertainment*, leaving a firearm in a publicly accessible restroom creates an unsafe workplace. However, also like Ms. McCormick, Ms. Lynch's negligence was ordinary, and not extreme. As Ms. Lynch testified, removing her firearm from its holster was a necessary step before using the toilet. Tr. at 71 (App. A32). In the absence of any guidelines or instructions from her employer on how to safely store the firearm during these moments, *see* Order at 4 (App. A4); Tr. at 71 (App. A32), Ms. Lynch routinely placed her firearm in the safest location she could: a shelf located in the bathroom stall, Order at 2-3 (App. A2-3); Tr. at 73-74 (App. A34-35).[5] In fact, another female officer, the employer's own witness, had previously left her gun in the bathroom, illustrating that accidents happen. At most, Ms. Lynch failed to "exercise ordinary care," *Capitol Entertainment*, 25 A.3d at 23, when she placed her firearm in its usual location but accidently left it behind in the stall that day.

Ms. Lynch did not have the "malice and evil intention" typical of gross negligence. *See District of Columbia v. Walker*, 689 A.2d 40, 44 (D.C. 1997) (describing gross negligence in the driving context as "a wanton or reckless disregard for human life or for the rights of others, and indifference to the consequences . . . [which] *implies malice and evil intention*") (internal quotations omitted) (emphasis added); *cf. Powers v. Wilson*, 110 F.2d 960, 961 (2d Cir. 1940) (finding a driver grossly negligent after he drove at a high rate of speed at night, having an accident that killed two female passengers, because his conduct was "not the consequence of momentary inattention, but of a deliberate purpose to enjoy the exhilaration of the peril"). In

[5] The ALJ found no evidence of a policy mandating Ms. Lynch to place her gun elsewhere in the stall, as required for the employer to establish a rule violation under 7 DCMR § 312.7. Order at 4 (App. A4). If an employer asserts that the former employee was terminated for violation of an employer rule or policy, the ALJ must determine: (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. 7 DCMR § 312.7.

fact, the ALJ found that Ms. Lynch left the firearm behind only because she was distracted with worry about her mother. Order at 2-3 (App. A2-3); *see* Tr. at 46-47 (App. A22-23).

Further, Ms. Lynch's one-time negligent act is not recurring carelessness sufficient to "manifest culpability, wrongful intent, or evil design," as is required to support a conclusion of gross negligence, and thus misconduct. *See Hickenbottom*, 273 A.2d at 477-78; *see also* 7 DCMR § 312.3 (gross misconduct may be proven with "*repeated* disregard for the employee's obligation to the employer") (emphasis added). *Cf. Henry v. Iowa Dep't of Job Servs.*, 391 N.W.2d 731, 735-36 (Iowa Ct. App. 1986) (finding claimant qualified for unemployment benefits after one-time failure to secure $1,300 in cash receipts because "an employee's carelessness or negligence rises to the level of misconduct evincing wanton and willful disregard of the employer's interest only if there are recurring incidents of carelessness to a sufficient degree"); *Ulysses v. Commonwealth of Pa. Unemployment Comp. Bd. of Review*, 524 A.2d 552, 554 (Pa. 1987) (holding that claimant's negligence did not demonstrate the culpability required to deny unemployment benefits because the "[vehicular] accident was a single and isolated incident; there was no ongoing pattern demonstrating a lack of care on the claimant's part"). In 28 years as a security guard, Ms. Lynch had never before left a firearm unattended. Tr. at 61-62 (App. A28-29). Ms. Lynch's single lapse in attention is insufficient to be gross negligence. In any event, her ordinary negligence does not amount to intentional misconduct, gross or simple, as a matter of law.

CONCLUSION

Based on the foregoing, Ms. Lynch, through her undersigned counsel, respectfully requests that this Court reverse the ALJ's legal conclusion of gross misconduct and remand with instructions to find that she is qualified for full benefits.

Respectfully submitted,

Drake Hagner (No. 1004674)*
Jennifer Mezey (No. 462724)
John C. Keeney, Jr. (No. 934307)
Legal Aid Society of the District of Columbia
1331 H Street, N.W., Suite 350
Washington, DC 20005
Telephone: 202 628-1161
Fax: 202 727-2132
Counsel for Petitioner Jacqueline Lynch
**Presenting oral argument*

CERTIFICATE OF SERVICE

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

Edward R. Noonan, Esq.
Jeffrey P. Brundage, Esq.
Eckert Seamans Cherin
1717 Pennsylvania Ave, NW - #1200
Washington, DC 20006
Counsel for Respondent Masters Security

_____
Drake Hagner