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)

REPLY BRIEF OF PETITIONER

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SUMMARY OF ARGUMENT

At the evidentiary hearing, Masters Security failed to prove that Ms. Lynch intended to leave her firearm in the bathroom. Order at 4 (App. A4). Its brief does not dispute this. Masters Security Br. 4-6. Proof of intent, however, is required to support a finding of gross misconduct. *See, e.g., Scott v. Behavioral Research Assocs., Inc.*, 43 A.3d 925, 931 (D.C. 2012); Lynch Opening Br. 12.

Instead, Masters Security argues that Ms. Lynch can be denied unemployment benefits for coming to work "while distracted." Masters Security Br. 4-6. But that was not what Ms. Lynch was fired for, and it is settled law that the denial of unemployment compensation cannot be based on conduct that was not the actual basis of the employee's termination. *See, e.g., Chase v. District of Columbia Dep't of Employment Servs.*, 804 A.2d 1119, 1122-23 (D.C. 2002) (internal citation omitted). Further, Masters Security identifies no legal authority for deeming even *intentionally* coming to work "while distracted" to be misconduct of any kind.

On Ms. Lynch's Motion for Reconsideration, the ALJ created a new rule that being "distracted" at work or "lack[ing] the concentration necessary to perform [one's] duties" is the equivalent of intent or "conscious" disregard amounting to recklessness, satisfying the intentionality requirement. Recons. Order at 1-2 (App. A9-10). "Distraction" is simply another term for negligent forgetfulness and is not the same as intent or "conscious" disregard. *See* Lynch Opening Br. 13-15 (discussing recklessness, which requires a "conscious choice of action"); *id.* at 18-21 (discussing gross negligence, which requires conduct "in such a degree or recurrence as to manifest culpability, wrongful intent, or evil design"). Masters Security cannot bootstrap Ms. Lynch's awareness that she was distracted by her mother's illness into an awareness that she was leaving her sidearm in the bathroom, particularly where the ALJ found

that Ms. Lynch's failure to retrieve her weapon was unintentional. To deny unemployment benefits, it is not enough to say that intentional acts that are not misconduct indirectly *caused* the employee to commit the act resulting in termination. That would replace the Court's repeatedly articulated intent standard with a simple causation test. Masters Security's brief cites nothing in support of its newfangled standard, and Ms. Lynch is not aware of any such decision.

Alternatively, Masters Security argues that Ms. Lynch committed gross misconduct by violating her employer's handgun safety rules. However, the ALJ found that Ms. Lynch did not violate the employer's rules and that finding is supported by substantial record evidence in the record.

ARGUMENT

I. Reporting to work while distracted is not disqualifying misconduct in this case because it was not the act for which Ms. Lynch was fired, and because "distraction" is not equivalent to an intent to do wrong.

a. Ms. Lynch was not discharged for coming to work while distracted.

Masters Security does not dispute that it fired Ms. Lynch for leaving her gun in the restroom – *not* for coming to work while distracted. However, on appeal, Masters argues that Ms. Lynch's lack of intent in forgetting the firearm in the bathroom is "a red herring" because "Ms. Lynch intentionally went to work distracted... [which] was the direct result of her gross misconduct in coming to work while distracted." Masters Security Br. at 5. This overbroad argument sweeps away decades of well-developed District of Columbia law that strictly sets the bounds of disqualifying misconduct. This Court is clear that a finding of misconduct must be based on the act that was the cause of termination. *See, e.g., Chase v. District of Columbia Dep't of Employment Servs.*, 804 A.2d 1119, 1122-23 (D.C. 2002) (internal citation omitted). As such,

an employer cannot point to prior events that were not the reason given for termination in order to deny benefits.

b. Treating conduct "caused" by distraction as disqualifying misconduct would substitute distraction for the mental state required by this Court's precedents.

The employer also cannot justify the denial of unemployment compensation on the theory that coming to work "while distracted" caused Ms. Lynch to commit the act for which she was discharged. That would substitute ordinary negligence (distraction) – clearly non-disqualifying conduct under the law, *see Capitol Entm't Servs., Inc. v. McCormick*, 25 A.3d 19, 27 (D.C. 2011) – for disqualifying misconduct. *See* Lynch Opening Br. 11-13 (discussing intent requirement); *see id.* at 18-21 (discussing gross negligence). This would in turn impermissibly enlarge the statutory misconduct exception contrary to the remedial purpose of the Unemployment Compensation Act as a safety net. *See, e.g., 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)).

Indeed, treating being "distracted" at work as disqualifying misconduct would disproportionately weaken the protections of the unemployment laws for the most vulnerable workers, who must often report to work despite health, family, or financial problems that may produce distraction. Although it is true that employees can be fired if they are too distracted to do their jobs well, *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)), distraction should not be a ground for denying unemployment compensation.

II. The ALJ found no credible evidence of an employer policy that would require Ms. Lynch to place her gun elsewhere than the shelf stall in the restroom.

The ALJ found that Masters Security presented "no credible evidence" of an employer policy that Ms. Lynch violated. Order at 4 (App. A4) ("Employer presented no credible evidence of any policy that would have required Claimant to place her gun elsewhere than the stall shelf while she used the toilet."). This finding is supported by substantial evidence and should not be disturbed. *See Hamilton v. Hojeij Branded Foods, Inc.*, 41 A.3d 464, 472 (D.C. 2012) (Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."); *Combs v. District of Columbia Dep't of Employment Servs.*, 983 A.2d 1004, 1009 (DC 2009) ("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.'").

Masters Security concedes that the ALJ found that it failed to prove a rule violation. Masters Security Br. at 7. Nevertheless, Masters Security cites *Hegwood v. Chinatown CVS, Inc.*, 954 A.2d 410 (D.C. 2008), to argue that the ALJ's gross misconduct determination should be upheld because it has policies about guns and because Ms. Lynch disregarded standards of behavior that an employer has a right to expect of an employee. *Id.* at 6-7. This argument relies on evidence not admitted at the hearing and therefore outside the scope of this Court's review, and further ignores the three elements an employer must prove to establish any employer rule violation.

First, in arguing that Ms. Lynch committed a rule violation, Masters Security relies on documents that were submitted in advance of the hearing as potential exhibits but not actually

entered into evidence. *See* Masters Security Br. at 7 (citing App. A44; App. A46; App. A48-50); Record, Tab 7 (District of Columbia Office of Administrative Hearings, Exhibit List (showing only one exhibit, Ex. 214, entered into evidence)). This Court may only consider material not presented below under "exceptional circumstances" and in order to avoid "manifest unjustice." *See Williams v. District of Columbia Dept. of Public Works*, No. 10-AA-45, Mem. Op. & J. at 20 (D.C. May 2, 2013) (citing *Goodman v. District of Columbia Rental Hous. Comm'n*, 573 A .2d 1293, 1301 & n. 21 (D.C.1990)); *accord, District of Columbia Office of Tax & Revenue v. BAE Sys. Enter. Sys., Inc.*, 56 A.3d 477, 486 (D.C. 2012). Masters Security has not identified any exceptional circumstances which would allow this Court to consider these non-record documents.[1] Nor has Masters Security identified substantial evidence of any employer rule that would contradict the ALJ's finding.

Second, Master Security's reliance on *Hegwood v. Chinatown CVS, Inc.*, 954 A.2d 410 (D.C. 2008), is misplaced. That case holds that the mere fact that an employee violated an employer rule is not enough to deny unemployment compensation. An employer must also meet the three-part test of DCMR § 7-312.7. *See Hegwood*, 954 A.2d at 412 ("[I]n order to find a rule violation, the OAH must find: "(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, the ALJ did not reach the second and third

[1] To the contrary, the ALJ explained clearly at the outset of the hearing that "both sides have filed documents. Simply because the documents have been filed and exchanged does not mean that they are in evidence, and until they are in evidence, I cannot use them to make my decision." Tr. at 8. It is the ALJ – not the submission of possible exhibits prior to the hearing – that determines what evidence becomes a part of the record. *See* DCMR § 1-2821.6 (OAH Rule 2821.6) ("At a hearing, all parties may present evidence. … The Administrative Law Judge shall decide what evidence shall become part of the record.").

prong of the three-part test because Masters Security failed to present such evidence.[2] Substantial evidence supports that portion of the ALJ's conclusion that the employer did not prove a disqualifying rule violation.

[2] While the presence of such a rule was raised in the testimony of Masters Security's witness, Tr. 41-45; Tr. at 69-79 (App. A30-A40), Masters did not present any evidence to establish that the any such rule was reasonable or consistently enforced.

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,

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CERTIFICATE OF SERVICE

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

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