No. 14-AA-1086

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

Drake Hagner (D.C. Bar No. 1004674)*
Jonathan H. Levy (D.C. Bar No. 449274)
Legal Aid Society of the District of Columbia
1331 H Street, N.W., Suite 350
Washington, DC 20005
Telephone: (202) 628-1161
Facsimile: (202) 727-2132
Cell phone: (301) 461-5914
dhagner@legalaiddc.org
jlevy@legalaiddc.org
Counsel for Petitioner Jacqueline Lynch
**Presenting oral argument*

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ARGUMENT

There is no factual dispute in this case.[1] Ms. Lynch forgot that her gun was on a shelf in the bathroom stall and left without the gun, not through any conscious act, not because she bore Masters Security any ill will, and not because she was indifferent as to the consequences of her actions. Rather, she left the gun in the bathroom because she was distracted by her mother's poor health, and, as a result, she made an honest mistake. That honest mistake cost Ms. Lynch her job, which, in turn, caused her financial hardship – the exact type of financial hardship that the District of Columbia's unemployment compensation statute is designed to ameliorate.

The question for this Court is whether the same honest mistake that led to Ms. Lynch's job loss should also deprive her of the economic safety net that was enacted to protect recently unemployed individuals. *See Badawi v. Hawk One Sec., Inc.*, 21 A.3d 607, 616 (D.C. 2011) (purpose of statutory scheme is "minimizing the economic burden of unemployment"). The answer to that question is no. Ms. Lynch is entitled to unemployment compensation benefits because she was terminated for making an honest mistake, and this Court has repeatedly made clear that, given the remedial, non-punitive purpose of the

[1] Indeed, Masters Security expressly adopted Ms. Lynch's statement of facts. Masters Security Br. 1.

unemployment compensation statutory scheme, an honest mistake does not amount to disqualifying misconduct. *Jones v. D.C. Dep't of Employment Servs.*, 558 A.2d 341, 342 (D.C. 1989); *Colton v. D.C. Dep't of Employment Servs.*, 484 A.2d 550, 553 (D.C. 1984); *Jadallah v. D.C. Dep't of Employment Servs.*, 476 A.2d 671, 675 (D.C. 1984) (quoting *Keep v. D.C. Dep't of Employment Servs.*, 461 A.2d 461,463 (D.C. 1983)); *see also Capitol Entm't Servs., Inc. v. McCormick*, 25 A.3d 19, 27 (D.C. 2011) (employee does not forfeit entitlement to unemployment benefits for "unintentional incompetence").

I. THE ALJ'S FINDINGS DO NOT SUPPORT, AND MASTERS SECURITY'S ADMISSIONS PRECLUDE, THE CONCLUSION THAT MS. LYNCH ENGAGED IN GROSS MISCONDUCT.

A. The "Equivalent of Intentionality" Concept Does not Apply to Gross Misconduct.

As the ALJ correctly noted, an individual is only disqualified from receiving unemployment benefits for misconduct, which can be either simple or gross. App. A18. Gross misconduct is defined by regulation, and is limited to actions that are willful, deliberate, or intentional. 7 DCMR § 312.3; *e.g., Capitol Entm't*, 25 A.3d at 24. The ALJ specifically made findings – supported by substantial evidence – that are incompatible with this regulatory definition. The ALJ found that Ms. Lynch's actions were "not malicious or intentional." App. at A20. And the ALJ noted that "[t]here is nothing in the record to suggest that [Ms. Lynch] placed her loaded gun on the shelf with the intent to leave it behind." *Id.* Masters Security

similarly concedes that Ms. Lynch's conduct did not meet the express terms of the regulatory definition of gross misconduct. *See* Masters Security Br. 7 (referring to Ms. Lynch's "lack of deliberateness or willfulness"); *id.* at 6 (agreeing that the ALJ found that Ms. Lynch acted without intent or similarly culpable mental state); *id.* at 8 (suggesting that Ms. Lynch's actions were "unintentional").[2] Accordingly, the descriptions of Ms Lynch's actions by both the ALJ and Masters Security cannot support a finding of gross misconduct as a matter of law.

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[2] At the same time, Masters Security asserts that:

> In sum, the ALJ correctly ". . . concluded that the intentionality requirement for gross misconduct was satisfied because Ms. Lynch was aware that worry and distraction could impact her job performance and was thus consciously reckless." Pet'r's Br. at 5. This finding by the ALJ is supported by substantial evidence and is not arbitrary, capricious, or an abuse of discretion.

Masters Security Br. 6. This contention by Masters Security conflicts with this Court's holding in the previous appeal in this case. At that time, the ALJ had determined that Ms. Lynch was terminated for gross misconduct for allegedly "deliberately and willfully reporting to work in a distracted state." *Lynch v. Masters Sec.*, 93 A.3d 668, 677 (D.C. 2014). This Court reversed that determination as "'not in accordance with the law,'" because Ms. Lynch's supposedly distracted state when she arrived at work was not the basis for her termination from employment and therefore could not, as a matter of law, form the basis for the denial of unemployment compensation. *Id.* (quoting *Savage-Bey v. La Petite Acad.*, 50 A.3d 1055, 1060 (D.C. 2012)). That holding remains binding here as the law of the case, *e.g.*, *In re Baby Boy C.*, 630 A.2d 670, 678 (D.C. 1993), meaning that the only relevant intent for a finding of gross (or simple) misconduct is the intent (or lack thereof) with which Ms. Lynch left her gun in the bathroom stall, not the intent with which she arrived at work earlier that morning.

Masters Security correctly points out that it is at least theoretically possible for an unintentional act to constitute some form of misconduct under the District's unemployment compensation law as interpreted by this Court. *See* Masters Security Br. 8. However, an unintentional act cannot constitute *gross* misconduct under this same body of law. This is a result of the way in which the D.C. Council divided misconduct – originally a single construct – into the separate categories of gross and simple (also known as "other than gross"). The original, unitary definition of "misconduct" was:

> "[1] an act of wanton or wilful disregard of the employer's interest, a deliberate violation of the employer's rules, a disregard of standards of behavior which the employer has the right to expect of his employee, or [2] negligence in such degree or recurrence as to manifest culpability, wrongful intent, or evil design, or show an intentional and substantial disregard of the employer's interest or of the employee's duties and obligations to the employer."

Hickenbottom v. D.C. Unemployment Comp. Bd., 273 A.2d 475, 477-78 (D.C. 1971) (quoting with approval 48 Am. Jur. Social Security, Unemployment Insurance, Etc. § 38 (1943)); *accord Capitol Entm't*, 25 A.3d at 25. The first part of this definition includes intentional acts, while the second part includes acts of heightened or aggravated negligence. And, as noted above and on pages 10-12 of Ms. Lynch's opening brief, the regulatory definition of *gross* misconduct follows the first (intentional) part and excludes the second (aggravated negligence) part of

this old general misconduct definition. *See* 7 DCMR § 312.3 ("[T]he term 'gross misconduct' shall mean 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"). Accordingly, this Court has repeatedly held that actions must be intentional to constitute gross misconduct. *See, e.g.*, *Hickey v. Bomers*, 28 A.3d 1119, 1130 n.18 (D.C. 2011) (actions could not be gross misconduct because they did not rise "to the level of deliberateness and willfulness necessary to support a conclusion of gross misconduct"); *Capitol Entm't*, 25 A.3d at 24 (noting that "decisions of this court make it abundantly clear that an employee's actions must be intentional, deliberate, or willful to amount to gross misconduct"); *Badawi v. Hawk One, Sec. Inc.*, 21 A.3d 607, 614 (D.C. 2011) ("In order to conclude that the employee engaged in gross misconduct under our statutory scheme, the ALJ must first find that the employee acted deliberately or willfully"); *Odeniran v. Hanley Wood, LLC*, 985 A.2d 421, 428 (D.C. 2009) (describing "the requirement that the dismissed employee acted intentionally" as a "necessary . . . condition for a finding of gross misconduct"); *Morris v. U.S. EPA*, 975 A.2d 176, 182 (D.C. 2009) ("District of Columbia regulations specify . . . that prior to a finding of gross

misconduct, the employer must prove that the employee's actions were willful and deliberate.").

This strong line of caselaw is supported by the regulatory examples of gross misconduct, each of which is an intentional act. *See* 7 DCMR § 312.4 (including, as examples of gross misconduct, sabotage, unprovoked assault or threats, arson, theft or attempted theft, dishonesty, insubordination, repeated disregard of reasonable orders, intoxication, use or possession of a controlled substance, willful destruction of property, and repeated absence or tardiness following warning); *see also Hickey*, 28 A.3d at 1130 n.18 (refusing to find gross misconduct because actions at issue were "far from the types of conduct listed in 7 DCMR § 312.4 as examples of gross misconduct (conduct including sabotage, assault or threats, arson, and theft)").

Masters Security misconstrues a sentence in this Court's prior decision in this case as having decided that gross misconduct can be extended beyond the explicit limits (in both regulation and precedent) of willful, deliberate, or intentional conduct to unintentional conduct that constitutes some form of aggravated negligence. *See* Masters Security Br. 7 (quoting *Lynch v. Masters Sec.*, 93 A.3d at 675, quoting in turn *Scott v. Behavioral Research Assocs., Inc.*, 43 A.3d 925, 931 (D.C. 2012)). It appears unlikely, however, that this Court intended to reverse its clear previous course of requiring willfulness, deliberateness, or intent

for gross misconduct. "'[D]ecisions of this court [have made] it abundantly clear that an employee's actions must be intentional, deliberate, or willful to amount to gross misconduct.'" *Scott*, 43 A.3d at 931 (quoting *Capitol Entm't*, 25 A.3d at 24). The point of the sentence upon which Masters Security relies was to acknowledge that the Court's opinions generally require intentionality for even simple misconduct, not to expand the definition of gross misconduct or to reverse, *sub silentio*, the significant line of caselaw demonstrating a narrower definition of gross misconduct.

B. Mitigating Circumstances Here Preclude a Finding of Gross Misconduct.

Even intentional, deliberate, or willful actions may amount only to simple (rather than gross) misconduct if mitigating circumstances exist. *See* 7 DCMR § 312.5; *see also Odeniran*, 985 A.2d at 428 ("[T]he requirement that the dismissed employee acted intentionally is only a necessary, not a sufficient, condition for a finding of gross misconduct."). In *Badawi*, for example, this Court concluded that gross misconduct could not be found when a security guard *intentionally* left his gun at his desk while he prayed because the employer "did not demonstrate that Badawi's actions were 'other than an isolated incident, nor did it contend that its business had suffered serious consequences as a result,' which we have held to be sufficient to support a finding of gross misconduct." 21 A.3d at 617 (quoting *Odeniran*, 985 A.2d at 429). This Court specifically noted Badawi's

"unblemished record of employment" and that "nothing happened" as a result of Badawi's intentional failure to keep his gun with him. Here, Ms. Lynch has a similarly unblemished record of employment, and it is unquestioned that this was an isolated incident. *See*, *e.g.*, Lynch Br. 1 (noting that "Ms. Lynch had worked in security services for 28 years and, until the [incident at issue], had never left a weapon unsecured"); *see also* Masters Security Br. 1 (expressly adopting Ms. Lynch's statement of the facts). It is also undisputed that Ms. Lynch's actions had no adverse effect on Masters Security's operations. *See* Lynch Br. 3 (describing how Ms. Lynch's gun was found by a coworker, who gave it to Ms. Lynch's supervisor, who, in turn, returned the gun to Ms. Lynch and told her to go back to her post); *see also* Masters Security Br. 1 (adopting Ms. Lynch's statement of the facts).

Two additional mitigating factors further preclude a finding of gross misconduct here. First, Ms. Lynch was distracted with legitimate concern for her mother's health. *See* App. A2-3, A22-23. Second, Masters Security had no rules and provided no training regarding what female employees should do with their firearms while using the bathroom. App. A4, A32, A36. This complete lack of guidance by the employer made it far more likely that an employee would accidentally leave a gun in a bathroom stall, and indeed, it is uncontested that Ms. Lynch was not the only Masters Security guard to do so at the very same location.

See App. A16 (noting that Ms. Lynch had "once found an unattended gun in the rest room and returned it to the officer who had left it there"); App. A25. Accordingly, the ALJ's conclusion that Ms. Lynch engaged in gross misconduct is erroneous as a matter of law and must be reversed.

II. MS. LYNCH'S ACTIONS DO NOT FALL WITHIN THE NARROW CATEGORY OF UNINTENTIONAL ACTIONS THAT COULD CONSTITUTE SIMPLE MISCONDUCT.

The key question in this case is whether Ms. Lynch's mistake, which the parties and the ALJ all agree was committed without willfulness, deliberateness, or intent, can still constitute simple misconduct on the basis that it was the type of aggravated negligence that this Court has "equated with intentionality." *Lynch*, 93 A.3d at 677. For the reasons provided in Ms. Lynch's opening brief and explained more fully below, it cannot.[3]

Although not in total agreement regarding the situations in which it is at least theoretically possible for unintentional actions to constitute simple

[3] Masters Security's assertion that this Court previously found that Ms. Lynch committed at least simple misconduct, *see* Masters Security Br. 8-10, is wrong. This Court remanded to the ALJ and asked the ALJ to determine whether Ms. Lynch's conduct here "is the kind of gross negligence that we have equated with intentionality due to the serious harm that could ensue, that is, whether the stated act constitutes highly unreasonable conduct, involving an extreme departure from ordinary care, in a situation where a high degree of danger is apparent." *Lynch*, 93 A.3d at 677. This remand instruction asked a question; it did not answer that question. *See also* App. A21 (ALJ answering the question of whether Ms. Lynch engaged in simple misconduct, rather than concluding that this Court had already ruled on that question).

misconduct, the parties here agree that, at a minimum, an employer attempting to demonstrate unintentional misconduct must prove: (1) "highly unreasonable conduct; (2) an extreme departure from ordinary care; and (3) a situation where a high degree of danger is apparent." Masters Security Br. 5; *compare with* Lynch Br. 16. Here, Masters Security's brief emphasizes the third of these three factors, namely the potential danger. *See, e.g.*, Masters Security Br. 5-6, 9. But the existence of danger is not enough, by itself, to support a finding of misconduct (simple or gross), and Masters Security identifies no evidence in the record of "highly unreasonable conduct" or an "extreme departure from ordinary care." *Cf.* Masters Security Br. 5 (asserting, without elaboration, explanation, or citation to record evidence, that Ms. Lynch's actions were "[u]ndeniably" highly unreasonable and an extreme departure from ordinary care).

In fact, Ms. Lynch's mistake is hardly unique among law enforcement officers. Here in the District of Columbia, a Capitol Police Officer recently left a gun and ammunition in a public bathroom stall at the U.S. Capitol Visitor Center, a location frequented by families with children. *See, e.g.*, *Lawmakers Look Into Capitol Police Leaving Guns in Bathroom*, Associated Press (May 1, 2015, 11:59 AM), http://www.nytimes.com/aponline/2015/05/01/us/ politics/ap-us-capitol-police-guns.html. Reports on the incident noted that it was the third similar incident and that in one of the two prior incidents, the gun was found by a 7- or 8-

year-old child. Hannah Hess, *Capitol Police Left Guns in Bathroom*, Roll Call: Hill Blotter (May 1, 2015, 3:20 PM), http://blogs.rollcall.com/hill-blotter/capitol-police-guns-found-in-problematic-places/.

The response to these events does not indicate that the U.S. Capitol Police viewed them as "highly unreasonable" or "extreme." To the contrary, the Capitol Police Chief recently testified before Congress that: (1) each case of leaving a gun in a publicly accessible area was "a mistake," (2) Capitol Police are now "providing additional training on what to do when you have to go to the bathroom,"[4] and (3) the penalty for leaving a gun in a public bathroom was typically a suspension of at least 5 days (although he was considering increasing that to 30 days). Stephen Ohlemacher, *Capitol Cops Get Bathroom Training After Gun Left in Toilet*, Associated Press (May 20, 2015, 5:58 PM), http://abcnews.go.com/Politics/wireStory/capitol-police-chief-excuse-leaving-guns-bathroom-31183999; *Washington Capitol Police Weigh Fix After Guns Left in Bathrooms*, Reuters (May 21, 2015, 6:09 PM),

[4] *See also* Holly Yan, Deirdre Walsh, and Ted Barrett, *Capitol Police Get More Training After Leaving Guns in Bathroom Stalls*, CNN (May 21, 2015, 12:55 AM), http://www.cnn.com/2015/05/21/politics/capitol-police-leave-guns-in-bathroom-stalls/ ("In light of the recent reports of gun mishandling, Dine also said the agency is creating online training 'that everyone will go through once a year.'"). Ms. Lynch did not have the benefit of any similar training. To the contrary, as the ALJ found, Masters Security "did not consistently enforce any policy regarding leaving a handgun in a restroom." App. A19.

http://www.nytimes.com/reuters/2015/05/21/us/21reuters-usa-capitolhill-police.html. Both the frequency with which these acts have occurred and the official reaction to these acts indicate that they are neither "highly unreasonable" nor an "extreme departure from the standard of care" as would be required for a finding of simple misconduct in this case.

This type of mistake, and this type of reaction to it, occur elsewhere as well. In 2013, a Massachusetts police captain "inadvertently left his gun" in a courthouse bathroom. He was disciplined with a thirty-day (partially paid) suspension and given additional training. *See, e.g.*, Todd Feathers, *Plymouth Police Searching for Captain's Gun Left Behind in Wareham Courthouse*, The Boston Globe: Metro (Jan. 30, 2013), http://www.bostonglobe.com/metro/2013/01/30/plymouth-police-searching-for-captain-private-gun-left-behind-wareham-courthouse; *Plymouth Officer Suspended 20 Days After Leaving Gun in Wareham*, Wareham Week (Feb. 15, 2015), http://wareham-ma.villagesoup.com/p/plymouth-officer-suspended-20-days-after-leaving-gun-in-wareham-court/954657. That same year, a Tampa police officer left a gun loaded with hollow point bullets in a movie theater bathroom stall, where it was found by a nine-year-old child. That officer was suspended for ten days and demoted for his "negligent" actions. *See* Shelley Rossetter, *Hillsborough Sheriff's Detective Who Left Gun in Movie Bathroom Demoted*, Tampa Bay Times (Aug. 15, 2013, 6:00 PM), http://www.tampabay.com/news/

publicsafety/hillsborough-sheriffs-detective-who-left-gun-in-movie-bathroom-demoted/2136686. Also in 2013, a Michigan State Trooper left a gun in a supermarket bathroom. The trooper "did not face disciplinary action, because it was determined to be human error." *Man Charged After Leaving Gun in Bathroom,* Associated Press: Wire (Oct. 6, 2013), http://www.grandhaventribune.com/article/policefire/641931.

Some examples involve high ranking officials. In 2012 the Craig Police Chief left his gun in the bathroom of a public building where it was accessible to, and recovered by, a jail inmate. The punishment was a letter of reprimand based on a "careless act." *See* Jerry Martin, *Police Chief Reprimanded for Misplacing Firearm*, Craig Daily Press (Feb. 6, 2012), http://www.craigdailypress.com/news/2012/feb/06/police-chief-reprimanded-misplacing-firearm/. And in 2011, a fire chief left his loaded gun in a bathroom at work where it was found by a four-year-old child. He was suspended for three days and ordered to undergo remedial training. *See* Kate Belz, *East Ridge Deputy Fire Chief Suspended After Loaded Gun Found By Four-Year Old*, Chattanooga Times Free Press (Nov. 28, 2011), http://www.timesfreepress.com/news/local/story/2011/nov/28/east-ridge-deputy-fire-chief-suspended/64938/.

These examples, and others like them, demonstrate that, although it is unquestionably dangerous to inadvertently leave a gun in a publicly accessible

bathroom, it is relatively common for police and other law enforcement officers to do so. Police forces generally treat this type of mistake as ordinary negligence: they impose discipline on the negligent officer and provide additional training to reduce or prevent recurrences. Ms. Lynch agrees that her conduct – like these police officers' conduct – was negligent. But, as a matter of law, ordinary negligence does not justify depriving an individual of the safety net provided by unemployment compensation benefits. *See Capitol Entm't*, 25 A.2d at 27 ("[A]n employee's ordinary negligence in failing to perform work in accordance with the employer's standards, rules, or expectations is not misconduct, gross or otherwise."). Accordingly, Ms. Lynch's honest mistake, which resulted in the loss of her job, is not a valid ground for the denial of unemployment compensation benefits.

Lacking sufficient evidence that Ms. Lynch's conduct was something other than ordinary negligence, Masters Security suggests that Ms. Lynch's actions were analogous to three different scenarios, none of which suggests that Ms. Lynch committed any sort of misconduct. First, Masters Security suggests that Ms. Lynch's mistake was similar to a truck driver failing to set the parking brake. Masters Security Br. 7. This comparison is correct and supports Ms. Lynch's position because forgetting to set a parking brake is a classic example of ordinary negligence, which cannot constitute even simple – let alone gross – misconduct.

Indeed, it is similar to what happened in *Capitol Entm't* itself, where an employee's repeated failure to adhere to a safe turning radius resulted in two bus accidents, 25 A.3d at 21, and this Court concluded that the employee was, nonetheless, "eligible to receive unemployment compensation benefits," *id.* at 29; *see also id.* at 29 n.42 (collecting cases finding no misconduct even after repeated at-fault truck accidents).

Second, Masters Security likens Ms. Lynch's mistake here to an actor in a film loading his handgun with real bullets and shooting actors on a set. Masters Security Br. 7. The legal ramifications of this hypothetical turn – as in many unemployment compensation cases – on intent. If the actor used real bullets intentionally – that is, knowing that the bullets were real and that the gun was a prop about to be used in a play – he committed gross misconduct. But if the actor's use of real bullets was an honest mistake – if, for example, the actor reasonably but mistakenly believed that the bullets were fake or that the gun was used for target practice rather than as a prop – this situation, like dangerously negligent driving, would not appear to constitute misconduct of any kind.

Finally, Masters Security relies on a Maine case that this Court characterized as "holding that tractor-trailer driver's aggravated negligence in ramming a vehicle she was attempting to pass on the highway, causing personal injury to the vehicle's driver and extensive property damage, was 'tantamount to an intentional disregard

of the employer's interests' that disqualified her from receiving unemployment benefits." *Capitol Entm't*, 25 A.3d at 28 n.37 (describing *Forbes-Lilley v. Maine. Unemployment Ins. Comm'n*, 643 A.2d 377, 379 (Me. 1994)) (quoted in Masters Security Br. 7-8). *Forbes-Lilley* is not only from a foreign jurisdiction, it is also readily distinguishable on numerous grounds, including that it involved the intentional, conscious, or reckless act of "ramming," and that it resulted in both personal injury and property damage. 643 A.2d at 379. Ms. Lynch's mistake is not analogous, as it was unintentional, was neither conscious, nor reckless, and resulted in no personal injury or property damage. More importantly, no purported analogy can make up for Master Security's inability to demonstrate that Ms. Lynch's mistake was highly unreasonable or an extreme departure from ordinary care, both of which are required for a finding of even simple misconduct in these circumstances.

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 (D.C. Bar No. 1004674)*
Jonathan H. Levy (D.C. Bar No. 449274)
Legal Aid Society of the District of Columbia
1331 H Street, N.W., Suite 350
Washington, DC 20005
Telephone: (202) 628-1161
Facsimile: (202) 727-2132
Cell phone: (301) 461-5914
dhagner@legalaiddc.org
jlevy@legalaiddc.org
Counsel for Petitioner Jacqueline Lynch

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 10th day of June, 2015, 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

_____
Jonathan H. Levy