No. 12-AA-1441

DISTRICT OF COLUMBIA COURT OF APPEALS

E.C.

Petitioner,

v.

RCM OF WASHINGTON, INC.

Respondent.

On Petition for Review from
the Office of Administrative Hearings

BRIEF OF PETITIONER

*** Jennifer Mezey (No. 462724)**
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******Presenting oral argument***

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

The parties in this case are E. C. the Petitioner, and her former employer, RCM of Washington, Inc., the Respondent. RCM of Washington, Inc. was represented in the Office of Administrative Hearings ("OAH") by Charles A. Ray of the Employer Advocacy Program. In this Court, RCM of Washington, Inc. has not filed an appearance. Ms. C. was represented in the OAH by Drake Hagner and Westra Miller of the Legal Aid Society of the District of Columbia. Ms. C. is represented in this Court by Jennifer Mezey, Drake Hagner, and John C. Keeney, Jr. of the Legal Aid Society of the District of Columbia.

Amici The Domestic Violence Legal Empowerment and Appeals Project (DV LEAP) *et al*. are represented by Joan Meier of DV LEAP and Matthew Eisenstein, Christa Forman and Adele Gilpin of Arnold & Porter, LLC.

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QUESTIONS PRESENTED

1. Whether the D.C. Office of Administrative Hearings (OAH) Administrative Law Judge (ALJ) erred in failing to apply D.C. Code § 51-131, which allows victims of domestic violence to qualify for unemployment compensation if they are fired "due to domestic violence," even if their conduct would otherwise be deemed simple or gross misconduct?

2. Whether the ALJ's factual findings required him to conclude, under a proper application of D.C. Code § 51-131, that Ms. C. was fired "due to domestic violence"?

3. Whether the ALJ erred in determining that Ms. C. committed "simple misconduct" when her abuser's persistent intimidation, not her own volition, caused Ms. C. to violate her employer's rules?

STATEMENT

E. C. suffered persistent abuse and threats from her boyfriend, M. L.[1] That abuse, and her abuser, followed her into her workplace when Mr. L. stalked her at work, threatened to get her fired, complained about her to her supervisors, and ultimately got her fired for his visits to her workplace. Despite finding that Ms. C. was a victim of domestic violence and facts sufficient to show that her job loss was due to domestic violence, the ALJ ruled that she had committed simple misconduct and partially disqualified Ms. C. from receiving benefits.

Statutory Framework. The District's unemployment insurance statute explicitly protects individuals whose separation from employment – including resignation – was "due to domestic violence." The relevant provision – D.C. Code § 51-131– states:

> *Notwithstanding any other provision of this subchapter*, no otherwise eligible individual shall be denied benefits for any week because the individual was separated from employment by discharge or voluntary or involuntary resignation *due to domestic violence* against the individual or any member of the individual's

[1] Because of the extremely personal nature of the evidence in this case, Ms. C. through her undersigned counsel, requests that this Court's opinion use her initials and those of Mr. L. (E.C. and M.L., respectively) in the caption and text in order to help protect their privacy.

immediate family, unless the individual was the perpetrator of the domestic violence.

D.C. Code § 51-131(a) (emphasis added); *see* D.C. Code § 51-131(b) (defining "domestic violence" as an "Intrafamily Offense" under D.C. Code § 16-1001(8)). The Act creates a separate fund for unemployment benefits awarded to victims of domestic violence pursuant to section 51-131, freeing most employers from liability when an employee is separated from work due to domestic violence.[2] D.C. Code § 51-133 (directing benefits awarded pursuant to section 51-131 to not be charged to employer's experience rating accounts).

The Council enacted this provision in 2004 to provide "unemployment compensation to individuals who leave work because of domestic violence." *See* D.C. Council, Comm. on Public Servs., Comm. Report on Bill 15-436 at 1 (Jan. 28, 2004), *available at* http://dcclims1.dccouncil.us/images/00001/20040826135937.pdf ("Committee Report").[3] In doing so, the District followed the example of twenty-four other states. *See id.* at 2.[4] In 2010, the D.C. Council expanded the domestic violence exception to include those who had to leave jobs for "compelling family reasons," including domestic violence, against the individual or any member of his or her family.[5] Unemployment Compensation Reform Amendment Act of 2010, D.C. Laws 18-192, 57 D.C. Reg. 22 (May 28, 2010) (codified as amended at D.C. Code § 51-131).

Administrative Proceedings: Ms. C. applied for unemployment insurance benefits after being terminated by her employer, RCM of Washington, Inc. ("RCM"), an

[2] The only exception is where an employer has previously elected to be liable for payments in lieu of ongoing contributions, for example, the D.C. government or certain nonprofit organizations. D.C. Code § 51-133.
[3] See *infra* I.B for full discussion of the legislative history of D.C. Code § 51-131.
[4] See *infra* notes 26 and 29 for a discussion of the state statutory language.
[5] This modification was made in order for the District to qualify for additional federal unemployment insurance funds. See *infra* I.B for full discussion of the 2010 modification.

organization that provides housing for persons with intellectual and physical disabilities. The D.C. Department of Employment Services (DOES) denied her application on May 29, 2012. Determination by Claims Examiner, Record at Tab 1 (hereinafter "R."), Exhibit 300 (hereinafter "Ex."). Ms. C. timely appealed the denial to the D.C. Office of Administrative Hearings (OAH). Transcript of the July 10, 2012 Hearing at 31-32 (hereinafter "Tr.") (App. A31-32); *see also* Request for Hearing to Appeal a Determination by a Claims Examiner Involving Unemployment Benefits, R. at Tab 2, Ex. 301. ALJ James Harmon conducted a hearing on July 10, 2012. He framed the issue before him as whether the employer will "prove by [a] preponderance of the evidence that Ms. C. engaged in some type of work-related misconduct that would warrant the denial of her receiving unemployment benefits." Tr. at 33 (App. A33). He also noted that "there may be this issue of domestic violence and the applicability of [D.C. Code § 51-131] to this case." Tr. at 30 (App. A30).

The Employer's Case. RCM presented the testimony of three employees—Stacey Whitted (Human Resources Manager), Keesa Robinson[6] (Support Coordinator) and Paulette Robinson (Incident Management Coordinator) – to assert that Ms. C. was fired "as a result of the investigation; [for] permitting unauthorized persons in the RCM location," Tr. at 42 (App. A42), and "fail[ing] to follow protocol regarding unauthorized staff in the work location" Tr. at 43 (App. A43). The employer's witnesses conceded that they had not observed the incidents in question. Tr. at 74-75 (App. A74-75); Tr. at 89 (App. A89); Tr. at 106 (App. A106). Further, the employer's witnesses could not say with any precision when the incidents had

[6] Ms. Robinson's testimony was brief and consisted of the fact that she did not authorize M. L. to enter RCM's facilities. Tr. at 88 (App. A88). However, Ms. Robinson further testified that she was Ms. C. 's supervisor only for six weeks from February to mid-March 2012. Tr. at 89 (App. A89). The three incidents allegedly in question occurred in September 2011,Tr. at 130-33 (App. A130-33); November 2011, Tr. at 142-144 (App. A142-44); and December 2011, Tr. at 146-49 (App. A146-49).

occurred. Tr. at 79 (App. A79) ("I was not able to determine the dates that Mr. L. was in the […] facility, no."); Tr. at 80 (App. A80) ("I don't know the actual dates, no."); Tr. at 95 (App. A95) (testifying that "[t]he last time" Mr. L. was in the facility was "the incident on the 10th of March [2012] … I don't have the dates of the other[] [incidents].").[7]

Ms. Whitted presented a portion of the employer's policy manual, R. at Tab 11, Ex. 202 (allowing dismissal of employees for "[a]llowing unauthorized person(s) in RCM's facilities or riding in company vehicle…") and an acknowledgment receipt signed by Ms. C. R. at Tab 11, Ex. 204. Ms. Whitted testified that in the course of RCM's investigation, Ms. C. admitted in a written statement[8] that she had allowed Mr. L. onto RCM properties or residents' homes "on about 3 occasions." R. at Tab 11, Ex. 205.[9] Ms. Whitted conceded that in five years of working at RCM of Washington as HR Manager of over 170 Direct Support Professionals – the position held by Ms. C. – she knew of only one incident in which an individual was disciplined for allowing access to a residential facility. Tr. at

[7] By stating that the final incident occurred on March 10, 2012, the employer's witness appears to be referencing the events of March 11, 2012, when Mr. L. appeared at Ms. C. 's workplace uninvited. Tr. at 161 (App. A161) (describing incident). Ms. C. repeatedly asked a co-worker to deny him access to the building. Tr. at 162 (App. A162). But Mr. L. gained access to the building by unknown means. Tr. at 164-65 (App. A164-65). However, Ms. C. did not allow him to step into the individual residence. Tr. at 167-68 (App. A167-68). Mr. L. became aggressive and began shouting expletives, including "I don't give a fuck about your workplace," prompting her to close the door and call the police. Tr. at 169-70 (App. A169-70.

[8] Only page 14 of the statement was entered into evidence over the objection of counsel for Ms. Cromartie. Tr. at 55-59 (App. A55-59).

[9] The employer also presented a termination letter dated April 23, 2012. R. at Tab 11, Ex. 200. While RCM employees maintain that Ms. C. was mailed a letter terminating her employment because she violated the rule against allowing unauthorized visitors onto RCM property, Tr. at 42-45 (App. A42-45), Ms. C. did not receive this letter, Tr. at 203 (App. A203). She learned of her firing from Crime Victims Services in April 2012. Tr. at 200-02 (App. A200-02).

81-82 (App. A81-82).[10] Ms. Whitted also confirmed that RCM's investigation was prompted by Mr. L.'s statements to RCM, Tr. at 72 (App. A72),[11] rather than any concerns or other complaints about Ms. C.'s job performance, Tr. at 66 (App. A66) ("No one ever complained about [Ms. C.]. Everybody liked [redacted] and they still do.").

Paulette Robinson, RCM's Incident Management Coordinator, testified that she investigated and rejected Mr. L.'s allegations that Ms. C. had abused and neglected residents in her care and had sexual relations with him on the property. Tr. at 94 (App. A94). She interviewed Ms. C. on March 14, 2012, when Ms. C. provided her handwritten statement. R. at Tab 11, Ex. 205. Ms. C. admitted to her that she had allowed Mr. L. onto RCM property, Tr. at 95 (App. A95). Ms. C. further stated that she had "quite a few bad altercations" in her relationship with Mr. L., Tr. at 103 (App. A103), and that Mr. L. had a "past violent history." Tr. at 97 (App. A97). Despite this knowledge, RCM invited Mr. L. to RCM property to interview him about his complaints against Ms. C. Tr. at 104-05 (App. A104-05). Ms. Robinson interviewed Mr. L. at RCM's administrative offices about his complaints the next day, March 15, 2012.[12] Tr. at 104-

[10] Ms. C. testified that she had seen co-workers with guests at work on at least two occasions. In February 2012, Ms. C. saw her co-worker's sister inside a residence waiting for her co-worker to get off work. Tr. at 151-52 (App. A151-52).

[11] In addition to describing the occasions when he was on RCM property, Mr. L. told RCM that he and Ms. C. had sex on RCM's property. Tr. at 73 (App. A73); Tr. at 94 (App. A94). Mr. L. also told RCM that Ms. C. put Benadryl in the food of the residents without authorization which prompted an abuse and neglect investigation. Tr. at 92-94 (App. A92-94). Ms. Whitted stated Ms. C. was not fired because of the sexual or medication allegations. Tr. at 73-74 (App. A73-74).

[12] Ms. C. asked the police to serve Mr. L. with her protection order petition and TPO while he was at her employer's offices. Tr. 185 (App. A185). The police did so, see Superior Court of the District of Columbia, Domestic Violence Unit Return of Service, March 15, 2012, Ex. 108 (App. A319), and then removed Mr. L. from RCM's property, Tr. at 106 (App. A106); Tr. at 187-94 (App. A187-94). The next day, on March 16, 2012, Ms. C. returned to Court to file a supplement to her CPO petition, describing how Mr. L. made

05 (App. A104-05); Superior Court of the District of Columbia, Domestic Violence Unit Return of Service, March 15, 2012, Ex. 108 (App. A319) (showing that the Metropolitan Police Department served Mr. L. with a Temporary Protection Order, among other papers from the Domestic Violence Unit, at RCM's administrative headquarters, 900 2nd Street NE, Washington, DC, on March 15, 2012).

The Claimant's Case. To support her claim that she had been terminated due to domestic violence, Ms. C. testified in detail about her abusive relationship with Mr. L. and the nexus between the abuse and the incidents leading to her termination. *See* Tr. at 130 (App. A130) (describing her need to "give into what [Mr. L.] want[ed]" so that he did not create a scene at her workplace, causing her to lose her job); Tr. at 137-140 (App. A137-40) (describing an incident when Mr. L. showed up at her workplace after she ignored his repeated phone calls); Tr. at 168-70 (App. A168-70) (describing an incident in which Mr. L. showed up at her workplace and after she tried to get him to leave, he yelled, "I don't give a fuck about your workplace" and said, "you think you're going to hold your job? You're unfit to work here and I'm going to make sure that I call your employe[er]"). Ms. C. also offered the testimony of Heather Powers, LICSW, an expert witness in the field of domestic violence,[13] Tr. at 232 (App. A232) about how domestic violence played a part in Ms. C. 's actions while employed at RCM.[14]

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contact with RCM supervisors. Supplemental Petition and Affidavit for Civil Protection Order of Mar. 16, 2012, Ex. 109 (App. A320).

[13] Ms. Powers defined domestic violence as a relationship in which "one partner uses a pattern of abusive behaviors in order to gain and maintain control over the other partner." Tr. at 228 (App. A228).

[14] Ms. Powers is a Licensed Independent Clinical Social Worker (LICSW) with more than seven years experience providing social work services to survivors of domestic violence. Tr. at 227 (App. A227). Over the course of her career, she has conducted more than 250 assessments and provided individual and group therapy for more than 100 survivors of domestic violence. Tr. at

Ms. C. testified that she began dating Mr. L. in April 2011. Tr. at 115 (App. A115). One month later, she began working at RCM. Tr. at 112 (App. A112). From early on in their relationship, Mr. L. attempted to control Ms. C. . He accused her of cheating on him and relying on other people in her life. Tr. at 116 (App. A116). He humiliated her by calling her names in public. *Id.* Ms. C. testified, "I didn't feel safe because Mr. L. had a habit of giving me threats of what he would do and later on, as the relationship continued, he made good on some of those threats." *Id.*

According to expert witness Heather Powers, Mr. L.'s behavior was consistent with common patterns of abuse in relationships involving domestic violence. Ms. Powers testified that Ms. C. experienced the following kinds of abuse from Mr. L. :

> [C]oercion and threats, […] using intimidation, making her afraid, destroying property, using emotional abuse, put-downs, calling her names, using isolation, controlling what she does, who she sees, who she speaks to, minimizing, denying and blaming, shifting responsibility for the abusive behavior on to Ms. C. , saying that he was doing certain things because of her […], and using economic abuse, absolutely, preventing her from getting and/or keeping a job.

Tr. at 236 (App. at A236). Ms. Powers further testified that these behaviors made Ms. C. afraid and anxious while forcing her to figure out how to manage his behavior to avoid further violence. Tr. at 239-40 (App. A239-40). Ms. Powers concluded that these behaviors:

> [M]ade her aware that, if he made a threat, that he would follow up on it, that she needed to focus a lot of time and energy on trying to contain his behavior, trying

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227-28 (App. A227-28). Ms. Powers based her expert opinion on an in-person psycho-social assessment of Ms. C. as well as her review of documents associated with this case, including photographs of vandalism, text messages from Mr. L. to Ms. C. , and petitions for protection orders. Tr. at 233-35 (App. A233-35). She evaluated the presence of domestic violence using the Duluth Wheel of Power and Control, Ex. 111 (App. A324) which is produced by the Domestic Abuse Intervention Project. It is a widely-used model that has gained general acceptance in the field of social work for identifying different types of abuse a survivor of domestic violence may experience. Tr. at 228-30 (App. A228-30).

> to give him what he wanted in order to keep things calm in her own life […] because he would follow her and he would create difficult situations where he had loud outbursts that were embarrassing and humiliating to her. […] [T]hat kind of public humiliation is really common, and it's part of how abusers use isolation.

Tr. at 240 (App. A240).

Over eleven months, Ms. C. attempted to end her relationship with Mr. L. four separate times. Tr. at 120-21 (App. A120-21); Tr. at 154-55 (App. A154-55); Tr. at 156-59 (App. A156-59); Tr. at 160 (App. A160). According to Ms. Powers, it is common for abusers to become more extreme and violent when their victims attempt to end the abusive relationship, and Mr. L.'s response to Ms. C. was consistent with this pattern. Tr. at 241-42 (App. A241-42).[15] Each time Ms. C. tried to break up with Mr. L., he engaged in frightening, violent behavior, including grabbing her around the neck, Tr. at 157 (App. A157); vandalizing the front of her apartment building, Tr. at 122-24 (App. A122-24); Tr. at 135-36 (App. A135-36); kicking in her car window, Tr. at 156 (App. A156); slashing her tires, Tr. at 159-60 (App. A159-60); stalking her at work, Tr. at 137-40 (App. 137-40); and threatening to get her fired, Tr. at 169 (App. A169); Tr. at 172-74 (App. A172-74); Ex. 105 (Text Messages sent by M. L. to Ms. C.) (App. A311-12). As part of Mr. L.'s pattern of abuse and harassment, he frequently appeared at her workplace even after she repeatedly told him not to come to her workplace. Tr. at 137 (App. A137) (describing how Mr. L. would show up at her workplace if she did not answer his frequent phone calls); Tr. at 141 (App. A141) (testifying that Mr. L. showed up uninvited at her workplace many times). For example, on August 15, 2011, Ms. C. and Mr. L. "had an argument" and Mr. L. insisted on driving her

[15] Ms. Powers testified, "[A]round the time of leaving is when things become the most dangerous. It's when the most harm is created and the abusers' actions tend to get more desperate in order to maintain that control that he has previously established." Tr. at 242 (App. A242).

to work. Tr. at 188 (App. A188). Ms. C. declined because her shift was scheduled such that she could rely on public transportation to go to work. Tr. at 188 (App. A188). She caught the bus, and when she arrived at her workplace, Mr. L. was sitting in his truck outside the facility. Tr. at 118-19 (App. A118-19). Ms. C. described the incident in her testimony, stating that Mr. L. "exited the truck and wanted to talk" to her. Tr. at 119 (App. A119).

> As always, I told Mr. L. , you're not supposed to be here and he kept forcing his way, saying, I just want to talk to you. And because I've had past experiences with him, it's safer for me to allow him to say what he needs to say so that I can remain safe.

Tr. at 119 (App. A119). On that occasion, she stood outside her workplace and allowed him to talk to her for approximately ten minutes. Tr. at 120 (App. A120). She did not invite him into the workplace, nor did he come onto the employer's property on that day. Tr. at 119 (App. A119).

Mr. L. also frequently called Ms. C. while she was at work, despite her repeatedly telling him not to. Tr. at 140 (App. A140). In December 2011, after repeatedly ignoring Mr. L.'s calls to her cell phone while she was at work, Ms. C. testified that she heard a tapping sound on the glass patio door of her workplace. Tr. at 137-40 (App. A137-40). She looked up and saw that Mr. L. was standing on the patio of her workplace, watching her "ignore" his calls. Tr. at 139-40 (App. A139-40).

Neither of these incidents was cited as the grounds for Ms. C. 's termination. Instead, RCM's claim of misconduct appears to have been based on Ms. C. 's confession regarding three incidents that occurred between September 2011 and December 2011, although none of the company's witnesses knew the dates of these incidents. Tr. at 79 (App. A79); Tr. at 80 (App. A80); Tr. at 95 (App. A95). During these three incidents, which are described below, Mr. L. came onto RCM property for anywhere between two minutes and one hour. In the

expert opinion of Heather Powers, all three incidents were related to the pervasive domestic violence to which Ms. C. was subject. Tr. at 243-47 (App. A243-47). Specifically, Ms. Powers opined:

> It's my opinion that she knew that doing things that were in compliance with his desires, and his desire was to have her solely dependent upon him, that she would reduce the possibility of abuse, that she would keep herself safe, she would be more likely to keep any incidents that could involve others who were near her when these incidents happened, she would keep that under control, she would keep that minimized, by inviting him to support her, or to be there for her in ways that he did not want anyone else to be there for her.

Tr. at 243-44 (App. A243-44).

At the hearing, Ms. C. testified in detail about the circumstances surrounding these incidents; Ms. Powers opined about the role played by domestic violence in these incidents.

- **September 1, 2011 (Incident #1).** Less than two weeks prior to the September 1, 2011 incident, on August 22, 2011, Ms. C. tried to break up with Mr. L. for the first time. Tr. at 120 (App. A120) ("I was tired of the harassment. I was tired of being threatened. I was tired of being stalked and I attempted to end the relationship with Mr. L. ."). Ms. C. testified that she awoke the next morning (August 23, 2011) to find the words "[y]ou owe me $600, bitch, I know where you live now, I want my money" spray-painted prominently on the front entry door, sidewalk, and wall of her apartment building.[16] Tr. at 122 (App. A122); Ex. 101 (Photographs of Property Damage) (App. A302-04). Upon discovering the property damage, Ms. C. "felt threatened" and the Metropolitan Police Department were called. Tr. at 123 (App. A123). She sought and was granted a Temporary Protection Order (TPO) and filed a Civil Protection Order (CPO) petition against

[16] The building where she lived banned Mr. L. . Tr. at 135 (App. A135). Later, she would lose her housing when Mr. L. came to the property after a fight and stood outside her apartment window screaming expletives at her. Tr. at 135-36 (App. A135-36).

Mr. L. . Tr. at 125-26 (App. A125-26); Temporary Protection Order, Aug. 23, 2011, Ex. 102 (App. A305); Petition and Affidavit for Civil Protection Order, Aug. 23, 2011, Ex. 103 (App. A306-10). Mr. L. also filed his own retaliatory CPO petition against Ms. C. , Tr. at 128 (App. A128), again, another common practice of abusers, Tr. at 241 (App. A241).[17]

On September 1, 2011, Ms. C. went to court for her CPO hearing. Tr. at 121-27 (App. A121-27). Ms. C. testified that the Judge discouraged her from "wast[ing] the Court's time when both you and Mr. L. are in [agreement] that you want to stay away from each other." Tr. at 128 (App. A128). Ms. C. told the Judge, "I need protection because I have proof that I feel that my life is in jeopardy … I am unsafe" and that she posed no harm to Mr. L. , but the Judge would not hear it. Tr. at 128 (App. A128). Ms. C. left the courthouse without obtaining a CPO, which resulted in the lapsing of the stay away protections in place from the TPO.[18] Tr. at 128-29 (App. A128-29).

Immediately after leaving the courthouse, Ms. C. caught a bus to her workplace, and Mr. L. followed her. Tr. at 129-30 (App. A129-30). Mr. L. walked behind Ms. C. , "harassing" her and demanding to speak with her. Tr. at 130 (App. A130) ("He was trying to apologize. Mr. L. was stating to me that he just wanted me to talk to him."). In describing how she decided what to do next, Ms. C. explained:

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[17] As Ms. Powers explained in her testimony:

> A number of abusers will file responsive [temporary or civil] protection orders in order to try to cover their actions so they're not the only ones being accused […] of engaging in violent and abusive behavior. […] [I]t's a way that abusers have a way of using the court system against their victims.

Tr. at 241 (App. A241).

[18] *See* note 23 *infra* for discrepancy between Ms. C. 's testimony and the ALJ's findings in the Final Order.

> I know what happens when I don't give in to what he wants. My work is very important. I have children I have to provide for. I have to keep a roof over my head and the last thing I needed was to lose my job, so, therefore, I did not want to make a scene at my workplace.

Tr. at 130 (App. A130). Even though Ms. C. told Mr. L. that he needed to stay away from her, she knew that "Mr. L. is not the type to take no for an answer; he will make a scene." Tr. at 131 (App. A131). Therefore, Ms. C. testified that, in order to pacify him, she allowed him into the resident's home – while the resident was not there – for "about 20 minutes" while she prepared the resident's meal. Tr. at 131-32 (App. A131-32). Mr. L. was calm during the visit. Tr. at 132 (App. A132).

Ms. Powers characterized Ms. C. 's experience of failing to get the CPO as an unsuccessful "effort to escape" the relationship. Tr. at 247 (App. A247). In order to avoid the "likelihood of negative repercussions" that tend to result from such failed efforts, a domestic violence victim like Ms. C. would tend to revert to "behavior patterns" previously adopted to "keep[] things more peaceful." *Id.* Therefore, by allowing Mr. L. onto the property, Ms. C. was complying with Mr. L.'s desires in order to "reduce the possibility of abuse, [and] … keep herself safe." Tr. at 243 (App. A243).

- **November 2011 (Incident #2)**. On this occasion, Ms. C. testified that she asked Mr. L. to pick her up from work when she no longer had access to a car. Tr. at 142 (App. A142). She also testified that it was her co-worker, rather than Ms. C. herself, who allowed Mr. L. on the property,[19] he was on the property for approximately two minutes, and he did not interact with any residents. Tr. at 143-44 (App. A143-44). When asked about this incident, Ms. Powers noted that previously when Ms. C. had declined an offered ride from Mr. L. , he got angry and showed up at her workplace anyway. Tr. at 244 (App.

[19] This fact was undisputed by the employer.

A244); *see also* Tr. at 118-20 (App. A118-20) (Ms. C. 's testimony about the prior incident). Ms. Powers opined that asking Mr. L. to drive her to work – rather than getting a ride from another person – would give Ms. C. "a greater likelihood of creating greater peace in their relationship and in her life in general." Tr. at 244 (App. A244).

- **December 2011 (Incident #3)**. Ms. C. asked Mr. L. to bring her breakfast at work, because she had been called into work unexpectedly and did not have time to purchase food for herself. Tr. at 146 (App. A146). Ms. Powers opined that this type of request is typical in abusive relationships because "it gives the abuser evidence that the survivor is reliant upon them and needs them for their own survival. . . . It reinforces the dependence." Tr. at 245-46 (App. A245-46). When Mr. L. arrived with breakfast, Ms. C. was the only employee working the shift and could not leave the residents alone to retrieve the food from Mr. L. . Tr. at 147 (App. A147). She "buzzed" Mr. L. into the building and opened the front door of the residents' apartment. Tr. at 148 (App. A148). At that time, one of the residents – who had met Mr. L. at the employer's Christmas party – spotted Mr. L. and invited him into his apartment to talk with him, which Ms. C. allowed. Tr. at 147-48 (App. A147-48). Ms. C. testified that the resident was "excited" because "[h]e liked [Mr. L.]," who was, in turn, "pleasant" and "calm," and stayed for about 10 minutes. Tr. at 148-49 (App. A148-49).

After August 2011, Ms. C. attempted to end her relationship with Mr. L. on three more occasions, each of which, Ms. C. testified, resulted in more hostility and violence. In December 2011, she and Mr. L. were in a McDonald's in Northeast Washington, DC, when Mr. L. became "very hostile, meaning he was yelling at this point, he

was humiliating me, calling me names, so I decided I was going to leave [the restaurant]." Tr. at 155 (App. A155). As Ms. C. walked toward her car, she stated, "Mr. L. followed me out and still kept calling me names in the parking lot." Tr. at 155-56 (App. A155-56). As Ms. C. attempted to drive away, Mr. L. kicked in her car window on the passenger side. Tr. at 156 (App. A156); *see also* Petition and Affidavit for Civil Protection Order of Mar. 12, 2012 (hereinafter "CPO Petition March 2012"), Ex. 107 at 2-3 (App. A315-16) (describing incident on Dec. 9, 2011).

Ms. C. attempted to end her relationship with Mr. L. for the third time on February 14, 2012. As Ms. C. describes, Mr. L. responded with even greater aggression:

> Mr. L. , as always, humiliated me in public, but this time, Mr. L. attempted to try to grab my purse to keep me from leaving. He blocked my path. He was grabbing me … around the neck area … and my main purpose was to just get away from him… .

Tr. at 157 (App. A157). She hurried back to her car and found him standing next to it with both tires on the right side flattened. Tr. at 158-59 (App. A158-59); *see also* CPO Petition March 2012, Ex. 107 at 2 (App. A315) (describing incident on Feb. 14, 2012).

Ultimately, on March 10, 2012, Ms. C. ended the relationship for the final time. Tr. at 160 (App. A160). That evening, Mr. L. stood outside her apartment building, yelling her name. *Id.* The next day, March 11, 2012, Mr. L. came to RCM and attempted to enter the building three times. Tr. at 160-64 (App. A160-64). Ms. C. asked a male co-worker to go to the main door and refuse entry to any individual looking for her who was not an RCM employee. Tr. at 162 (App. A162). Her co-worker returned and confirmed that a man matching Mr. L.'s description was attempting to enter the building. Tr. at 163 (App. A163). On Mr. L.'s third try, he gained entry to the building by unknown means, because Ms. C. did

not let him in. Tr. at 164 (App. A164). When Mr. L. knocked on the front door of the apartment, Ms. C. took steps to ensure that the residents of the apartment would not interact with Mr. L. . She asked "J.T.", the resident who was fond of Mr. L. , to step into his bedroom.[20] Tr. at 166-67 (App. A166-67). She noted that the other resident was not visible to Mr. L. from the front door. Tr. at 167 (App. A167). Ms. C. testified that she opened the door and spoke to Mr. L. but did not invite him into the residence; nor did he enter the residence that day. Tr. at 167-68 (App. A167-68). When she asked him to leave, Mr. Lewis became verbally abusive, saying:

> I don't give a fuck about your workplace … You think you're going to hold a job? You're unfit to work here and I'm going to make sure that I call your employe[r].

Tr. at 169-70 (App. A169-70). Ms. C. shut the door and called the police. Tr. at 170 (App. A170). The police advised her to get a protection order. Tr. at 176 (App. A176). After the incident, Ms. C. spoke with both of the residents whom she took steps to protect. Neither was agitated or upset. Tr. at 170 (App. A170). *See also* CPO Petition March 2012, Ex. 107 at 1 (App. A314) (describing incident on March 11, 2012).

That same day, Mr. L. sent Ms. C. threatening text messages stating that he would contact her supervisor with allegations against her, including the false allegation that they had sex on the employer's property. Tr. at 171-74 (App. A171-74). In his text message, Mr. L. wrote:

> Your job will be bringing u [sic] up on us having sex while ur [sic] individuals are placed in there [sic] rooms by u total neglect amongst other things… u are not fit with that kind of behavior to work for that company… . My complaint will be carried out today if kesha[21] [sic] call me back … .

[20] See *supra* at p. 13 for incident involving resident.
[21] Keesa Robinson was Ms. C. 's direct supervisor on March 11, 2012. Tr. at 89 (App. A89).

Ex. 105 (Text Messages sent by M. L. to Ms. C.) (App. A311-12).

The next day, on March 12, 2012, Ms. C. went to court again to file for a TPO and CPO. Tr. at 176-79 (App. A176-79). She was granted a Temporary Protection Order requiring Mr. L. to stay at least 100 feet away from her workplace, among other protections. Temporary Protection Order of Mar. 12, 2012, Ex. 106 (App. A313). She notified her supervisor, Keesa Robinson, and her co-workers about the previous day's incident and the threats that Mr. L. had made against her, including that he would contact her employer and have her fired. Tr. at 175 (App. A175).

Shortly thereafter, Mr. L. carried out his threat to get her fired when he contacted RCM. Tr. at 93-94 (App. A93-94). Following Mr. L.'s accusations, Ms. C. was placed on unpaid leave for six weeks, pending an abuse and neglect investigation, and was subsequently terminated. Tr. at 92 (App. A92); Tr. at 94 (App. A94); Tr. at 184 (App. A184); Tr. at 200-02 (App. A200-02).

Ultimately, Ms. C. and Mr. L. returned to court on March 26, 2012, and Ms. C. was granted a Civil Protection Order based on Mr. L. having committed the intrafamily offenses of "Harassment and Assault." Tr. at 197-200 (App. A197-200); Civil Protection Order of Mar. 26, 2012, Ex. 110 (App. A321-23).

ALJ Decision. In an order issued on August 2, 2012, the ALJ concluded that Ms. C. had engaged in simple misconduct because RCM "has demonstrated that [Ms. C.] intentionally breached her duties and obligations to [RCM] by allowing an unauthorized person, Mr. L. , to enter the facility on multiple occasions." Final Order at 9 (App. A333).

Findings of Fact. The ALJ noted multiple incidents of abusive behavior by Mr. L. towards Ms. C. . *See id.* at 3-6 (App. A327-30). Although he did not reference all incidents to which Ms. C. testified,[22] he found the following facts:

- On August 23, 2011, Ms. C. found her name, along with threatening words, spray-painted on the entry door to her apartment building and along the sidewalk entrance. The spray-painting read: "[redacted][.] Bitch pay me my money $600. [redacted]. Now I know where you live." *Id.* at 4 (App. A328) (referencing Ex. 101). Ms. C. believed that Mr. L. was responsible for the spray-painting. *Id.* As a result, she immediately sought, and was granted, a Temporary Protection Order ("TPO") against him. *Id.* (referencing Ex. 102).
- On September 1, 2011, Ms. C. returned to court for a "second TPO" hearing and the TPO was not granted.[23] Ms. C. took the bus to work after her hearing, only to find that Mr. L. had also taken the bus and was intent on following her to her work site. After discovering that she had been followed, Ms. C. allowed Mr. L. to enter her client's home with her and speak with her as she prepared a meal. No clients were present at the home at the time. *Id.*
- After finding that Ms. C. and Mr. L. had gotten back together in November 2011, the ALJ stated that Ms. C. had asked Mr. L. to pick her up in his vehicle at the end of her work shift at that time. Ms. C. 's co-worker let Mr. L. into the RCM residential facility. Mr. L. remained in the premises only briefly before leaving with Ms. C. . *Id.*

[22] Notably, the ALJ did not reference: (1) the August 15 incident when Mr. L. showed up at Ms. C. 's workplace after she refused an offer of a ride, Tr. at 118-19 (App. A118-19); (2) Mr. L.'s ongoing harassment of Ms. C. via phone calls at work, Tr. at 136-37 (App. A136-37); (3) events that occurred outside of work such as her getting her kicked out of her housing or damaging her car, Tr. at 135-36, 156 (App. A135-36, 156).

[23] The ALJ appears to be referencing Ms. C. 's CPO hearing on that date.

- He further noted that, in December 2011, Ms. C. asked Mr. L. to bring her breakfast while she was at work. When he arrived with her food, Ms. C. let him in. Mr. L. and a resident whom Mr. L. had met on an earlier occasion engaged in conversation. *Id.* at 5 (App. A329).
- In February 2012, Ms. C. attempted to end the relationship. Mr. L. , reacting to this, grew angry and grabbed Ms. C. 's neck. After the altercation, Mr. L. also followed Ms. C. 's car and threatened to have her incarcerated by police. *Id.*
- On March 10, 2012, Ms. C. ended the relationship. The following day, she reported to work at an RCM client's apartment. Mr. L. arrived at her work uninvited and was able to gain entry into the apartment building. He sought Ms. C. out at her client's apartment. However, she refused to allow Mr. L. inside the unit. *Id.* She spoke with him briefly from the doorway. He began to yell and she attempted to end the conversation. Mr. L. resisted, telling her that "I don't give a fuck about your workplace." Ms. C. called the Metropolitan Police Department and filed a complaint against Mr. L. . *Id.*
- Later in the day on March 11, 2012, Mr. L. sent several text messages to Ms. C. telling her that he planned to have her terminated from RCM. He made several allegations, including that Ms. C. and Mr. L. had had sex at a work site while residents were present in the same site and that Ms. C. had washed Mr. L.'s clothes while at a work site. After receiving these threatening texts, Ms. C. notified her supervisor. *Id.* She also filed a CPO (Civil Protection Order) petition and was granted a TPO. *Id.* (referencing Ex. 108). On March 26, 2012, a Superior Court judge granted a more permanent CPO, finding that Mr. L. had harassed and assaulted Ms. C. . *Id.* at 6 (App. A330) (referencing Ex. 110).

Discussion/Legal Conclusions. The ALJ found Ms. C. was terminated for "not following protocol," *id.,* but that these actions did not constitute gross misconduct because RCM did not "demonstrate[] that [Ms. C. 's] actions were either sufficiently egregious or had a serious adverse impact on its business operations." *Id.* at 9 (App. A333). He further noted that "at no time was the safety and security of the residents where [Ms. C.] worked in jeopardy." *Id.* He also found that Ms. C. could not be disqualified from getting benefits for a rules violation because RCM did not prove that its policy against unauthorized visitors was consistently enforced, as required by 7 DCMR § 312.7. *Id.* at 8 (App. A332).

The ALJ disagreed that Ms. C. had lost her job because of domestic violence, although he "acknowledge[d], and [found that] the evidence demonstrates that [Ms. C.] was involved in a turbulent relationship with Mr. L. , and was a victim of domestic violence." *Id.* at 10 (App. A334). Nevertheless, the ALJ ruled:

> [T]he evidence does not show that, during those specific times in September 2011, November 2011, and December 2011, when Claimant permitted Mr. L. to enter Employer's residential facilities, her actions were so adversely and severely affected by her being a victim of domestic violence, that she lacked the required intent to commit an act or acts that constituted misconduct under the Act. Indeed, on each occasion that Claimant directly or indirectly permitted Claimant to enter the worksite, she did so willingly and voluntarily, as there were no threats or coercive behavior on these occasions. Claimant permitted Mr. L. to enter the facilities being fully cognizant that unauthorized persons, including Mr. L. , were not allowed in the facilities.

Id. The ALJ stated that he made this decision noting the "expert opinion" of Ms. Powers that Ms. C. had allowed Mr. L. onto the RCM property in September, November and December 2011 "to reduce the possibility of abuse from Mr. L. , to keep herself safe and to reduce the problems for others that were in the facilities where she worked, and that such behavior by Claimant was demonstrative of a compliance with Mr. L.'s desire to have Claimant depend on him." *Id.* at 9-10 (App. A333-34).

STATEMENT OF JURISDICTION

The ALJ issued his Final Order on August 2, 2012. Final Order at 12 (App. A336). Within thirty days, Ms. C. filed her petition for review with this Court. This Court therefore has jurisdiction. *See* D.C. Code § 2-1831.16; *id.* § 2-510; D.C. App. R. 15(a)(2).

STANDARD OF REVIEW

This Court will reverse an OAH ruling if the Court concludes that the ruling is "[a]rbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." D.C. Code § 2-510(a)(3)(A) (2001). The Court must determine 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 from its findings of fact." *See Rodriguez v. Filene's Basement, Inc.*, 905 A.2d 177, 180 (D.C. 2006). In the administrative setting, the Court reviews "mixed questions of law and fact under [its] 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

[redacted] suffered persistent abuse and threats from her boyfriend, That abuse, and her abuser, followed her into her workplace when Mr. L. stalked her at work, threatened to get her fired, contacted her supervisors to complain about her, and ultimately got her fired for his visits to her workplace. In addition to stalking Ms. C. at work, Mr. L. reacted extremely and violently each of the four times between August 2011 and March 2012 when she tried to end their relationship. He defaced her property, which ultimately lead to her eviction; kicked in her car window; slashed her tires; and assaulted her.

Mr. L.'s violence and threats of violence made Ms. C. fear for her safety, her job and, indeed, her life.

Ms. C., through her counsel, argued to the ALJ in this case that she was fired "due to domestic violence" and testified at length about all of the incidents of domestic violence leading up to her termination. Additionally, she presented undisputed expert testimony from Heather Powers, a licensed independent clinical social worker specializing in providing services to victims of domestic violence. Ms. Powers testified that Mr. L.'s behavior was consistent with that of other abusers – particularly in his attempts to control Ms. C. and his violent reactions to her attempts to end their relationship. She further opined that Ms. C. had to spend a great deal of time containing Mr. L. in order to reduce the possibility of harm to herself and others, including the need to convince him that she was dependent upon him. In their testimony, both Ms. C. and Ms. Powers linked the domestic violence experienced by Ms. C. to Ms. C.'s job loss.

Despite correctly finding that Ms. C. was a victim of domestic violence, the ALJ ruled that Ms. C. had committed simple misconduct and partially disqualified Ms. C. from receiving benefits. In so doing, he erred by failing to apply D.C. Code § 51-131, a provision of the unemployment insurance statute enacted to provide benefits to domestic violence victims who are separated from their jobs – including those who are fired – due to domestic violence. Section 51-131 requires a fact-finder to determine whether an individual was a victim of domestic violence at the time of the termination and whether there was a causal nexus between the violence and the job loss; if these criteria are satisfied, the claimant prevails without having to also prove that his or her underlying conduct was not misconduct.

The question of the degree of causality between domestic violence and the job loss as required under section 51-131 is one of first impression for this Court as well as the courts of other states whose unemployment insurance statutes contain this exact or similar language. The language, purpose and legislative history of section 51-131 along with the underlying purpose of the unemployment insurance statute and the IntraFamily Offense Act, D.C. Code § 16-1001 et seq. (referenced in section 51-131) require the use of a contributing (or but for) causal standard to satisfy the requirements of section 51-131. Had the ALJ applied this standard – or even a stricter proximate cause standard – to his extensive findings of fact, he could have come to only one legal conclusion – that Ms. C. was terminated "due to domestic violence," thus entitling her to full benefits.

Additionally, in analyzing the impact of domestic violence on Ms. C. 's state of mind and actions during the three incidents for which she was terminated, the ALJ erred as well. The ALJ found that Ms. C. 's actions were not "so adversely and severely affected by her being a victim of domestic violence, that she lacked the required intent to commit an act or acts that constituted misconduct under the [Unemployment] Act." Final Order at 10 (App. A334). He further found that she had "willingly and voluntarily" allowed Mr. L. on the property because "there were no threats or coercive behavior on these occasions." *Id.* In reaching these conclusions, the ALJ failed to analyze meaningfully the full impact of domestic violence on Ms. C. 's actions, which weighed against a finding of simple misconduct.

Because "substantial evidence in the record dictate[s] a different result as a matter of law," *Badawi v. Hawk One Sec. Inc.*, 21 A.3d 607, 614 (D.C. 2011), Ms. C. respectfully requests that this Court reverse the ALJ's legal conclusion of simple misconduct and remand with instructions to find that she is qualified for benefits. Alternatively, she requests a remand

for proper legal conclusions – based on the existing record – as to whether she was terminated due to domestic violence and/or committed simple misconduct.

ARGUMENT

I. The Administrative Law Judge committed legal error in his analysis of whether Ms. C. 's termination was due to domestic violence.

The ALJ erred in not explicitly applying D.C. Code § 51-131's exception for conduct that is "due to" domestic violence but might otherwise result in disqualification from benefits.[24] Instead of recognizing that in enacting section 51-131, the Council intended to allow benefits for victims of domestic violence whether or not they *otherwise* would have been guilty of misconduct, he required Ms. C. to show that her exposure to domestic violence negated a finding of misconduct. *See* Final Order at 10 (App. A334). In so doing, the ALJ made the Council's special protection for domestic violence victims superfluous. Had he applied section 51-131, its language, purpose and legislative history, along with its relation to the underlying unemployment insurance statute, would have dictated that, in order to prevail, a claimant must prove that domestic violence was a contributing – and not the sole – cause of job loss.

A. The plain language of D.C. Code § 51-131 states that victims who can establish a nexus between their separation and domestic violence do not also have to prove they did not commit misconduct.

1. D.C. Code § 51-131 applies in situations when the claimant might otherwise be found disqualified from receiving benefits.

D.C. Code § 51-131 bars the denial of benefits when separation was due to domestic violence, "notwithstanding any other provisions of this subchapter." The Supreme Court has stated that the "notwithstanding any other provisions" language "clearly signals the drafter's intention that the provisions of the 'notwithstanding' section override conflicting provisions of

[24] He stated that he "disagree[d]" that Ms. C. was fired because of domestic violence but did not cite to or analyze section 51-131 in his decision. Final Order at 10 (App. A334).

any other section" of the statute in which the phrase appears. *Cisneros v. Alpine Ridge Grp.*, 508 U.S. 10, 18 (1993) (quoting appellate courts declaring, "a clearer statement [of intent] is difficult to imagine"); *see also Winters v. Ridley*, 596 A.2d 569, 582 (D.C. 1991) (Ferren, J., concurring) (citations omitted) (clarifying that the notwithstanding language overrides any conflicting provision of law in existence at the time the bill containing the amended language was enacted). In this case, the conflicting provisions are the sections of the unemployment insurance statute and regulations defining gross and simple misconduct to the extent that these provisions do not take into account the impact of domestic violence on job loss. *See* D.C. Code § 51-110; 7 DCMR §§ 312.3 & 312.5. Therefore, the plain language of section 51-131 allows a claimant to prove that she was terminated due to domestic violence, and, if she succeeds, there is simply no need to determine whether her actions constituted misconduct.[25]

2. The plain language of D.C. Code § 51-131 – interpreted with the remedial purpose of the unemployment insurance statute and a liberal construction of the phrase "domestic violence" – dictates the use of a broad standard of causation.

Defining the appropriate causation standard is a question of first impression in this Court and others.[26] Given both the remedial purpose of the unemployment compensation statute, and

[25] Failing that test, the claimant should also be allowed to prove that the impact of domestic violence precludes a finding of gross or simple misconduct as in any other case involving misconduct. See *infra* at III.

[26] Four states currently allow claimants to receive unemployment insurance benefits if they are separated from employment – including through termination – "due to domestic violence." See Massachusetts, MASS. GEN. LAWS ANN. ch. 151a, § 25(e) (West); Nevada, Letter from C. Jones to C. Atkinson, at 12, 17 (May 22, 2009) *available at* http://www.doleta.gov/recovery/pdf/NV2-3.pdf; Oklahoma, OKLA. STAT. ANN. tit. 40 § 2-210 (West); N.Y. LAB. LAW § 593(b) (McKinney) (as amended in 2009) (including domestic violence as a compelling family reason). Four other states use a variation of the "due to domestic violence" standard. *See* New Jersey, N.J. STAT. ANN. 43:21-5 (separation due to circumstances resulting from domestic violence); Colorado, COLO. REV. STAT. ANN. § 8-73-108(4)(R)(I) (West) (because of domestic violence); Montana, MONT. CODE ANN. § 39-51-2111(1)(a) (because of circumstances resulting from domestic violence); Minnesota, MINN. STAT. ANN. § 268-095(1)(9) (West) (No misconduct where conduct was a consequence of abuse).

the requirement that courts liberally construe "domestic violence" to further the goal of protecting victims, the plain language of "due to" in section 51-131 is better read to require that domestic violence be the contributing cause of a job loss rather than the sole cause standard implied by the ALJ's analysis in support of his finding of simple misconduct. *See* Final Order at 10 (App. A334) (finding that Ms. C. had acted willingly and voluntarily because there was no immediate, imminent threat at the time of the events in question).

Different courts have varied in the degree of causality necessary to support a finding that a consequence is "due to" a specific action. *See Adams v. Director, OWCP*, 886 F.2d 818, 821 (6th Cir. 1989) ("The causal nexus of 'due to' has been given a broad variety of meanings in the law ranging from sole and proximate cause at one end of the spectrum to contributing cause at the other."). Recent decisions in federal courts of appeals acknowledge the elasticity of the phrase "due to," whose meaning turns on the context of the statute, rule or policy in which it appears. *See U.S. Postal Serv. v. Postal Regulatory Comm'n*, 640 F.3d 1263, 1268 (D.C. Cir. 2011) (observing that "due to" has "a plain meaning regarding causal connection *vel non*," but "it has no similar plain meaning regarding the closeness of the causal connection"); *id.* ("In other words, the phrase can mean 'due in part to' as well as 'due only to.'"); *Kimber v. Thiokol Corp.*, 196 F.3d 1092, 1100 (10th Cir. 1999) (determining that it was rational to interpret "due to," as used in a disability benefits plan, to mean "'due, at least in significant part, to'").

This Court found a narrow causation standard in *A.H.*, a case unlike this one, involving a "due to" provision whose purpose conflicted with that of the underlying remedial statute. This Court found that the District could remove a child whose low-income parent was found to have committed neglect despite a statutory prohibition against removal if the neglect was due to the parent's lack of financial means. *In re A.H.*, 842 A.2d 674, 686 (D.C. 2004). The *A.H.* Court

analyzed this provision in the context of the District's abuse and neglect statute, "a remedial enactment. . .[that] must be liberally construed." *Id.* at 684 (citations omitted). *See also In re J.R.*, 33 A.3d 397, 402. (D.C. 2011) (stating that the abuse and neglect statute is "a remedial enactment, which is to be construed liberally to protect the interests of children . . . ."). In *A.H.*, this Court found that a "palpable tension exists between the proviso and the remedial purpose of the statute." *A.H.*, 482 A.2d at 687. This Court resolved this tension by finding that "[w]hen a case… presents multiple deprivations, some due to lack of financial means and some due to other factors, the statute requires that the neglect determination be based on the factors not attributable to the lack of financial means." *Id.* at 686. In other words, defining the "due to" provision at issue in *A.H.* broadly would have frustrated the remedial purpose of the abuse and neglect statute.

However, in the instant case, there is no such tension between section 51-131 and the underlying unemployment insurance statute. The purpose of this provision is to expand access to unemployment insurance benefits for domestic violence victims who might not otherwise have qualified for these benefits and who need resources to flee abuse.[27] Indeed, the application of a broad causation standard in section 51-131 furthers the remedial purpose of the entire unemployment insurance statute by expanding eligibility for benefits. *See Hickey v. Bomers*, 28 A.3d 1119, 1126 (D.C. 2011) ("[To] protect against economic dependency caused by temporary unemployment and to reduce the need for other welfare programs") (quoting *Bowman-Cook v. Wash. Metro Transit Auth.*, 16 A.3d 130, 134 (D.C. 2011) (internal quotation marks omitted); *Riggs Nat'l Bank v. District of Columbia*, 581 A.2d 1229, 1234 (D.C. 1990) (quoting 3 N. SINGER, SUTHERLAND, STATUTORY CONSTRUCTION § 60.01, at 55 (4th ed. 1986) ("Remedial

[27] See *infra* Section I.B for a discussion of the legislative history of the provision.

statutes are liberally construed to suppress the evil and advance the remedy.")). The expansive nature of section 51-131 is also reflected in the fact that most unemployment benefits paid to prevailing victims of domestic violence are paid from a separate unemployment fund—not through the experience ratings accounts of employers. *See* D.C. Code § 51-133.[28]

Furthermore, this Court has previously held that the remedial purpose of the IntraFamily Offense Act, referenced in section 51-131, requires a liberal construction of the phrase "due to domestic violence" in order to protect victims. *See Cruz-Foster v. Foster*, 597 A.2d 927, 929 (D.C. 1991) ("[T]he paramount consideration concerning this legislation is that it is remedial, and the Act must be liberally construed in furtherance of its remedial purpose.") (citations omitted); *id.* at 931 (noting that even though the Intrafamily Offense Act is not a civil rights statute, a broad reading is required because the law "was designed to counteract the abuse and exploitation of women"); *see e.g.*, *Richardson v. Easterling*, 878 A.2d 1212, 1217 n.6 (D.C. 2005) (finding that stalking constituted emotional violence and was thus one of the harms the IntraFamily Offense Act was designed to address).

B. The legislative history of D.C. Code § 51-131 also supports the plain language reading of a broad definition of causation to establish that a job separation was "due to domestic violence."

The Committee Report accompanying the 2004 bill enacting section 51-131 states:

> The purpose of the legislation is to provide unemployment compensation to individuals who leave work because of domestic violence. *Domestic violence victims are often stalked by their batterers at work*, miss work due to injuries inflicted on them, and need time to obtain legal relief to keep themselves and their children safe. A lost job and income makes it even more difficult to leave the violent relationship. This bill will minimize how money factors into the decision to leave an abusive situation.

D.C. Council, Comm. on Public Servs., Comm. Report on Bill 15-436 at 1 (Jan. 28, 2004), *available at* http://dcclims1.dccouncil.us/images/00001/20040826135937.pdf (hereinafter "Committee Report") (emphasis added).

[28] See *supra* note 2 for explanation of provision.

In considering the wording of section 51-131, the Council explicitly considered and rejected the language of other states' similar domestic violence protections that could have mandated a narrow causation requirement. *Compare* IND. CODE ANN. § 22-4-15-1(c)(8) (requiring that the separation be "directly" caused by domestic violence) *and* N.C. GEN. STAT. ANN. § 96-14(f) (West) (requiring evidence of domestic violence) *and* MASS. GEN. LAWS ANN. ch. 151a § 25(e) (containing provisions referring to disqualification "due to circumstances resulting from domestic violence" and "due to domestic violence"). The bill's Committee Report stated:

> During the last seven years, state legislatures around the country have been responding to the needs of the domestic violence victims. Twenty four states have enacted statutes enabling victims to be eligible for unemployment insurance benefits if they separate from their jobs. Ten more states have pending legislation to offer these benefits. With this bill, the District will join these other jurisdictions in providing unemployment compensation to victims of domestic violence when they lose their jobs.

Committee Report, at 2. *See* Memorandum from N. Gandhi to L. Cropp re: Fiscal Impact Statement: Unemployment Compensation and Domestic Violence Amendment Act of 2004 (Feb. 10, 2004), *available at* http://dcclims1.dccouncil.us/images/00001/20040826135937.pdf (noting that "[s]uch benefit . . . is practiced in 24 states including Massachusetts, North Carolina, California, New York, Indiana, Texas, Wyoming, Maine, Oregon and Washington State"). [29]

[29] The statutes of the states named here used several different causation standards. The most common was that leaving employment was necessary "to protect from" domestic violence, a standard then used by California, *see* CAL. UNEMP. INS. CODE § 1256 (West); Maine, *see* ME. REV. STAT. ANN. tit. 26 § 1193(1)(4); Oregon, *see* OR. REV. STAT. ANN. § 657.176(12) (West); Texas, *see* TEX. LAB. CODE ANN. § 207.046(a)(2) (West); and Washington, *see* WASH. REV. CODE ANN. § 50.20.050(1)(b)(iv) (West). Two of the states, Indiana and New York, used the term "directly" at the time of the District's 2004 amendment. (New York has since broadened its definition.) *See* IND. CODE ANN. § 22-4-15-1(c)(8) (West) ("due to circumstances directly caused by" domestic violence); N.Y. LAB. LAW § 593(b) (McKinney) ("as a consequence of circumstances directly resulting from" domestic violence). North Carolina was the only state to use the "there is evidence of" domestic violence standard. *See* N.C. GEN. STAT. ANN. § 96-14(f) (West). The District's standard—"due to domestic violence"—appeared first in Massachusetts'

The Council's consideration of these states' statutes and subsequent rejection of limiting words such as "direct" (as in "directly due to domestic violence," IND. CODE ANN. § 22-4-15-1(c)(8)) demonstrates the Council's intent to create a broad causation standard in 2004. *See Odeniran v. Hanley-Wood*, 985 A.2d 421, 427 (D.C. 2009) (finding instructive "the canon of *expressio unius est exclusio alterius*, which embodies the common-sense principle that 'when a legislature makes express mention of one thing, the exclusion of others is implied'") (citations omitted).

In 2010, the Council amended several provisions of the District's unemployment insurance statute, including section 51-131, so that the District could qualify for federal incentive payments through the 2009 Assistance for Unemployed Workers and Struggling Families Act, part of The American Recovery and Reinvestment Act ("ARRA"), Pub. L. No. 111-5, 123 Stat. 115 (as codified at 42 U.S.C. 1103). States could choose among several ways to comply with the ARRA provisions, including amending their state statutes to provide that "[a]n individual shall not be disqualified from regular unemployment compensation for separating from employment *if that separation is for any compelling family reason*." 42 U.S.C. § 1103(f)(3)(B) (emphasis added); *id.* § 1103(f)(3)(B)(I) (defining "compelling family reasons" to include domestic violence against the individual or any member of the individual's immediate family).

A House Committee Report explains the purpose for the ARRA incentive payments:

> [T]he Unemployment Insurance (UI) system provides critical support that helps unemployed workers and their families avoid dire economic circumstances. . . [ARRA] would reward and encourage States for implementing specific policies designed to remove barriers to jobless workers accessing needed benefits . . . . The Committee notes that many of the reforms supported by the new incentive payments would *particularly help women*, who are more likely to be employed in part-time and/or low-wage jobs, as well as *more likely to need to leave work for compelling family reasons, such as domestic violence*, taking care of a sick or disabled child, and following a spouse whose job has moved. Increasing the share

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statute, which also uses the standard "due to circumstances resulting from" domestic violence. *See* MASS. GEN. LAWS ANN. ch. 151a § 25(e).

> of the unemployed receiving UI would simultaneously increase UI's effectiveness in helping workers and families involuntarily and temporarily unemployed and enhance UI's macroeconomic counter cyclical stabilizing role.

H.R. Report, No. 111-8 (Jan. 28, 2009), *available at* http://thomas.loc.gov/cgi-bin/cpquery/T?&report=hr008p2&dbname=111& (hereinafter House Report) (emphasis added).[30]

In 2009 and 2010, the District liberalized its program by, among other changes, amending the 2004 language of section 51-131 to also cover individuals whose separation from work was due to domestic violence against a member of the individual's family, while excluding coverage under this provision for the perpetrator of the domestic violence leading to the job loss.[31] Because the District attested that its domestic violence exception comported with ARRA, *see* Letter from J. Walsh to G. Gilbert (September 3, 2010), *available at* http://www.doleta.gov/recovery/pdf/DC2-3.pdf (hereinafter Walsh Letter), section 51-131 should also be interpreted in light of the goals of the federal legislation. Therefore, just as the unemployment insurance statute is read broadly to expand eligibility and the IntraFamily Offense Act is broadly interpreted to "counteract the abuse and exploitation of women," *Cruz-Foster v. Foster*, 597 A.2d 927, 931 (D.C. 1991), section 51-131 should be read broadly so as to "help women" who are victims of domestic violence by "remov[ing] barriers to jobless workers accessing needed benefits." House Report, No. 111-8 (citing as an additional purpose, "[i]ncreasing the share of the unemployed receiving UI [which] would simultaneously increase UI's effectiveness in helping workers and families involuntarily and temporarily unemployed and enhance UI's macroeconomic counter cyclical stabilizing role.").

[30] The House Report is also available in PDF format at http://www.gpo.gov/fdsys/pkg/CRPT-111hrpt8/pdf/CRPT-111hrpt8-pt1.pdf (quotation at 179).
[31] The amendment of section 51-131 was enacted in July 2010. *See* Walsh Letter, at 1.

C. The language, legislative history and purpose of D.C. Code § 51-131 and the underlying unemployment insurance statute require adoption of a broad causation standard in cases involving section 51-131.

Requiring that a claimant prove that domestic violence was the sole cause of termination – the implied standard used by the ALJ in this case to find simple misconduct – is inconsistent with the language and legislative history of the provision as well as the purpose of the unemployment statute. It is clear that at most, the Council intended a standard of proximate cause. *Cf. Levy v. Minn. Life Ins. Co*., 517 F.3d 519, 524 (7th Cir. 2008) (observing – without deciding – that (in the context of an insurance policy), the phrase "due to" could "creat[e] a proximate cause standard," but that interpretation may not be reasonable when interpreting the phrase in the context of the policy as a whole).

However, the Council's rejection of other states' requirements that domestic violence be a "direct" cause of the job loss, *see, e.g.,* IND. CODE ANN. § 22-4-15-1(c)(8) (West), combined with the Council's affirmation of this standard when amending the law in 2010 to comply with ARRA, indicates that even a proximate cause standard is too strict. Instead, it is more consistent with the language, legislative history and purpose of the statute and exception, to require only that a claimant show that she was the victim of domestic violence, and, this violence contributed to her job loss. *Cf. Majeska v. District of Columbia*, 812 A.2d 948, 951 (D.C. 2002) ("The actor's negligent conduct is a legal cause of harm to another if . . . his conduct is a substantial factor in bringing about the harm.") (alteration in original) (quoting RESTATEMENT (SECOND) OF TORTS § 431 (1965)).

II. Had the ALJ correctly applied D.C. Code § 51-131, his factual findings would have compelled a conclusion that Ms. C. 's separation was due to domestic violence.

Throughout his final order, the ALJ erred in failing to analyze properly the role of domestic violence in this case. This Court's precedents mandate that when fact-finders consider domestic violence (as defined by the IntraFamily Offense Act, *see* D.C. Code **§** 16-1001(8) (referenced in D.C. Code § 51-131)), they must examine the entire mosaic of an abusive relationship and its impact on the case at issue. *See, e.g.*, *P.F. v. N.C.*, 953 A.2d 1107, 1116 (D.C. 2008) (characterizing the "'the absence of any meaningful analysis' of the . . . evidence of domestic violence" in the trial court's custody determination as "troubling" because the Court lacked "the requisite assurance that the purposes of this important legislation were duly carried out by the trial judge") (citing *Ford v. Ford*, 700 So. 2d 191, 196 (Fla. Dist. Ct. App. 1997) (alterations in original)); *Cruz-Foster v. Foster*, 597 A.2d 927, 930 (D.C. 1991) (finding that it is insufficient to "simply examin[e] the most recent episode [of violence]. Rather the judge must be apprised of the *entire mosaic*.... [A] defendant's past conduct is important evidence – perhaps the most important – in predicting his probable future conduct. . . . This is especially true in the context of a marital or similar relationship.") (citations omitted) (emphasis added).

The ALJ erred in failing to analyze meaningfully the entire mosaic of the "turbulent relationship" between Ms. C. and Mr. L. when considering the circumstances surrounding her job loss. Final Order at 3 (App. A327). However, his findings of fact (combined with the testimony of Ms. C. and the undisputed expert testimony of Ms. Powers[32]) are sufficient to allow this Court to conduct such an analysis of Mr. L.'s abuse and its impact on Ms. C. 's separation from RCM.

[32] The ALJ does not appear to consider Ms. Powers' opinion in his legal conclusion that Ms. C. was not fired because of domestic violence. *See* Final Order at 9-10 (App. A333-34).

Ms. C. put forward substantial (and largely undisputed) evidence that the pattern of abuse she suffered at the hands of Mr. L. contributed to her job loss. The record is clear that each of the three incidents cited by the ALJ as simple misconduct were inextricably linked with the increasingly violent relationship between Ms. C. and Mr. L. . The ALJ notes in his decision that in September 2011, Mr. L. followed Ms. C. to work, and she allowed him in. This conclusion, however, fails to account for his finding that nine days before this incident, Mr. L. had spray painted profanity and threats on Ms. C. 's building.[33] It also difficult to see how Ms. C. would not have felt threatened by Mr. L.'s following her on the bus to work from court after the expiration of her stay away order. In fact, Ms. C. testified – without contradiction and with support from Ms. Powers – that she had allowed Mr. L. on the property because he wanted to talk to her, and she knew "what happens when [she didn't] give in to what he wants." Tr. at 130 (App. A130).

The ALJ also concludes that in November and December 2011, Ms. C. "herself initiated contact with Mr. L. ," to drive her home from work and bring her breakfast, respectively. Final Order at 10 (App. A334). However, this conclusion fails to note the previous incident when Mr. L. came to Ms. C. 's workplace and demanded to talk with her after she refused a ride from him much less analyze the impact of this incident on her decision

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However, once the ALJ qualified Ms. Powers as an expert in the field of domestic violence, he cannot "arbitrarily disregard, disbelieve or reject [her] uncontradicted testimony." *Prost v. Greene*, 652 A.2d 621, 629 (D.C. 1985) (citations omitted). In order to reject Ms. Powers' testimony about the nexus between domestic violence and Ms. C. 's actions, the ALJ must point to something in the record to show that Ms. Powers' testimony was "unworthy of belief." *In re L.L.*, 653 A.2d 873, 883 (D.C. 1995) (citations omitted). And in this case, in which the employer did not put on its own expert nor any evidence contradicting Ms. Powers' testimony, this Court will only give "limited deference" to the ALJ's rejection. *See id.* (citations omitted).

[33] The ALJ found that the building had been spray painted and stated that Ms. C. believed that Mr. L. had done the spray painting. Final Order at 4 (App. A328). There was no evidence introduced to imply or establish that anyone else had spray painted the building.

about how to get to work. Nor does it account for Ms. Powers' undisputed testimony that Ms. C. 's requests of Mr. L. for help in meeting her needs were designed to appeal to Mr. L.'s desire to keep her dependent on him in order to protect herself from future abuse. Tr. at 243-44 (App. A243-44). The ALJ's conclusions that Ms. C. was not threatened or coerced on the specific occasions of the three incidents also fail to note the escalating violence in the events of August 2011, December 2011, February 2012, and March 2012 as examples of what happened when Ms. C. tried to flee the abusive relationship and assert her independence from Mr. L. . The ALJ further failed to consider the threat and coercion implicit in the events of March 2012 when Mr. L. instigated the chain of events that led to Ms. C. 's termination, itself a form of economic abuse.[34]

Ms. C. herself made clear how the cumulative effect of domestic violence impacted her state of mind and actions. In response to a question on cross examination, Ms. C. stated:

> Mr. L. had already displayed disruptive behavior towards me when I don't oblige with what he would like, so given the circumstances and the situations, and to keep things at peace and at bay, I allowed him to come in, knowing that he's not supported to be there. But I have been through so much and know what happens when I don't do what he wants me to do, *so I made the best decision that I could*.

Tr. at 211-12 (App. A211-12) (emphasis added).

When the ALJ's findings of fact are reviewed with the entire record, it is clear that domestic violence was a contributing factor in Ms. C. 's separation, and that it was

[34] One study discussed in the brief of amicus DV LEAP notes that frequent calls to coworkers and supervisors are a form of financial abuse in which the abuser attempts to have the victim fired in order to increase her financial dependence on him. *See generally* Jennifer E. Swanberg and T.K. Logan, *Domestic Violence and Employment: A Qualitative Study*, 10 J. OCCUPATIONAL HEALTH PSYCHOL. 3, 6 (2005); Jennifer E. Swanberg et al., *Intimate Partner Violence, Employment, and The Workplace: Consequences and Future Directions*, 6 TRAUMA, VIOLENCE & ABUSE 286, 292 (2005).

situations like hers that motivated the Council to enact section 51-131 into law.[35] Just as Mr. L. followed Ms. C. to her workplace after their CPO hearing, *see* Final Order at 4 (App. A328), the Council's Committee on Public Services heard reports of "[d]omestic violence victims [who] are often stalked by their batterers at work…." Committee Report, at 1. Just as the ALJ found that Ms. C. had committed simple misconduct because Mr. L.'s violent nature threatened her employer's interests, *see* Final Order at 9 (App. A333), and the employer's representative stated that Ms. C. had brought "the personal issues" between her and Mr. L. into the workplace, *see* Tr. at 67-68 (App. A67-68), the Committee Report references the testimony of advocates that domestic violence victims may be fired "because the victim brought violence to the workplace," Committee Report, at 5. Just as Mr. L. showed up at Ms. C. 's workplace unannounced, verbally abused her, threatened to get her fired after she broke up with him and made false allegations to her supervisors, *see* Final Order at 5 (App. A329), the Council Committee Report notes the testimony of advocates who gave "accounts of how domestic violence spills into the workplace." Committee Report, at 4.

Therefore, it is clear that under a proper application of facts to law in this case, no reasonable fact-finder could find that Ms. C. was not terminated due to domestic violence. As such, under a reading of the facts and law that is "deferential," but "by no means 'toothless,'" *Odeniran*, 985 A.2d, at 424 (quoting *Georgetown Univ. Hosp. v. District of Columbia Dep't of Employment Serv*s., 916 A.2d 149, 151 (D.C. 2007)), the finding of even simple misconduct must be reversed.

[35] The facts of Ms. C. 's case could also meet a substantial or proximate causation standard. However, the language, legislative history and purpose of section 51-131 support a broad, flexible standard requiring only that domestic violence contribute to the job loss. See *supra* at I.A.2.

III. The ALJ erred in finding that Ms. C. committed simple misconduct because Ms. C. 's "actions were not so adversely and severely affected by her being a victim of domestic violence;" rather, she lacked the required intent to commit an act or acts that constituted misconduct under the Act.

The ALJ's narrow construction of domestic violence and its impact on Ms. C. also taints his legal conclusion that Ms. C. committed simple misconduct. The ALJ states that she acted "willingly and voluntarily" when she let Mr. L. on the RCM property because "there were no threats or coercive behavior from Mr. L. on those occasions [Incidents 1-3]." Final Order at 10 (App. A334). In reaching this conclusion, the ALJ failed to give a "full and reasoned consideration to all the material facts and issues in this case," *Hamilton v. Hojeij Branded Food, Inc.*, 41 A.3d 464, 477 (D.C. 2012) (quoting *Washington Times v. District of Columbia Dep't of Employment Servs*., 724 A.2d 1212, 1221 (D.C. 1999)), because he did not meaningfully analyze the pattern of domestic violence suffered by Ms. C. , see *supra* at II, as an "underlying reason" for her actions. *Larry v. Nat'l Rehab. Hosp.*, 973 A.2d 180, 183-84 (D.C. 2009).

Simple misconduct encompasses acts "where the severity, degree, or other mitigating circumstances do not support a finding of gross misconduct." 7 DCMR § 312.5. This includes:

> an act or omission by an employee which constitutes a breach of the employee's duties or obligations to the employer, a breach of the employment agreement or contract, or which adversely affects a material employer interest.

Id. As with gross misconduct, an analysis of simple misconduct must take into account the remedial purpose of the unemployment insurance statute, as well as the nature of the action in question, the employee's state of mind and the reasons for the employee actions. *See Hamilton*, 41 A.3d at 473-74; *Badawi v. Hawk One Sec. Inc.*, 21 A.3d 607, 614 (D.C. 2011).

The ALJ erred by not considering the "entire mosaic" of domestic violence as an underlying reason for Ms. C. 's actions to negate his finding of simple misconduct. Such

an analysis is analogous to the requirement that fact-finders determine the underlying reason for an employee's absence, such as a bona fide illness or other emergency, to determine whether the reason is sufficient to negate a finding of misconduct. *See Hamilton,* 41 A.3d at 477 (stating that fact-finders must analyze the underlying reasons for absenteeism in simple misconduct cases and concluding that illness is "an unfortunate, involuntary event, which is ordinarily unavoidable and standing alone, unintentional absences from work on account of illness is not misconduct"); *cf. Larry*, A.2d at 184 ("To be sure, [the claimant] acted 'deliberately' in the sense that she deliberately did not go to work that day, but it stretches any reasonable definition of that word as used in the regulation to think that a seriously ill person would be expected to show up for hospital duty.").

In *Hamilton*, for example, this Court examined, in detail, the record of Ms. Hamilton's multiple absences for a variety of personal reasons. After doing so, this Court concluded that Ms. Hamilton did not commit misconduct of any kind because she "did substantially all that she could do under the circumstances of each incident of absence or tardiness." *Hamilton,* 41 A.3d at 480. Along with the broad effects of domestic violence, a proper analysis of misconduct would have considered Ms. Cromeratie's previously unblemished record, *see* Tr. at 66 (App. A66) (employer's witness testifying that prior to Mr. L.'s accusations, RCM never received complaints about Ms. C. , and adding, "Everybody liked [redacted] and they still do"), and the efforts she took to protect her employer's interests while keeping herself safe, *see, e.g.*, Tr. at 130-31 (App. A130-31) (trying to prevent Mr. L. from making a scene at her workplace); Tr. at 166-71 (App. A166-71) (describing the steps she took to ensure that Mr. L. would not interact with the residents in her care and the fact that neither resident was disturbed or agitated as a result of the exchange between her and Mr. L.) in determining whether or not she, like

Ms. Hamilton, had "[done] the best [she] could," *see* Tr. at 211 (App. A211), under the circumstances, thus negating a finding of misconduct.

The impact of Mr. L.'s abuse on Ms. C. 's state of mind and her actions was a critical, material fact in determining whether or not she had committed misconduct of any kind. By requiring Ms. C. to prove that she was deprived of all intent to commit misconduct because of an immediate threat at the time of each action, the ALJ failed to engage in the reasoned analysis this Court requires in misconduct cases. Therefore, his finding of simple misconduct constitutes legal error requiring remand.

CONCLUSION

Based on the foregoing, Ms. C. , through her undersigned counsel, respectfully requests that this Court reverse the ALJ's legal conclusion of simple misconduct and remand with instructions to find that she is eligible for benefits. Alternatively, she requests a remand for proper legal conclusions – based on the existing record – as to whether she was terminated due to domestic violence and/or committed simple misconduct.

Respectfully submitted,

____/s/_____
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CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of this brief of Petitioner to be delivered by first-class mail, postage prepaid, this ___25th____ day of February 2013 to:

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/s/
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