No. 11-AA-502

DISTRICT OF COLUMBIA COURT OF APPEALS

ROCHELLE V. SAVAGE-BEY,

Petitioner,

v.

LA PETITE ACADEMY,

Respondent.

On Petition for Review from
the Office of Administrative Hearings

BRIEF OF PETITIONER

*John C. Keeney, Jr. (No. 934307)
David A. Young, admitted pro hac vice

Legal Aid Society of the District of Columbia
1331 H Street, N.W., Suite 350
Washington, D.C. 20005
(202) 628-1161

Counsel for Petitioner

* Presenting oral argument

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

The parties to this case are Rochelle V. Savage-Bey, the petitioner, and La Petite Academy, the respondent. Ms. Savage-Bey initially appeared *pro se* before the Office of Administrative Hearings but was subsequently represented by Tonya Love of the Claimant Advocacy Program. Ms. Savage-Bey is represented in this Court by John C. Keeney, Jr. and David A. Young of the Legal Aid Society of the District of Columbia. She was previously represented on her first appeal, No. 09-AA-489 (remanded Aug. 5, 2010), by Bonnie I. Robin-Vergeer, also of the Legal Aid Society of the District of Columbia. Respondent appeared *pro se* before the Office of Administrative Hearings. In this Court, respondent has failed to identify its counsel. No intervenors or amici have appeared in this case.

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QUESTIONS PRESENTED

1. Whether, on remand from this Court to apply the new statutory standards of "good cause" and "excusable neglect" in D.C. Code § 51-111(b) (as amended effective July 23, 2010), the Office of Administrative Hearings ("OAH") erred in failing to evaluate Rochelle V. Savage-Bey's good faith inability to comply with the appeal deadline because she lacked actual knowledge of the Department of Employment Services ("DOES") determination and otherwise satisfied the multi-factor analysis for excusable neglect set forth in *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380 (1993).

2. Whether, as argued in the initial appeal in this case, OAH erred in dismissing Ms. Savage-Bey's unemployment compensation administrative appeal as untimely where (1) DOES failed to present substantial evidence that it in fact served the claims determination to her by mail; (2) OAH credited Ms. Savage-Bey's sworn testimony that she never received it in the mail; and (3) after numerous inquiries to DOES, she filed her administrative appeal the same day that it was faxed to her.

3. Whether the evidence before the ALJ established that the employer failed to meet its burden of proof to establish simple misconduct, much less gross misconduct, for next-day termination following a sick food preparer's one-day attack of diarrhea that prevented her from safely preparing and serving food to pre-school toddlers on that day and where substantial evidence established that purported previous incidents were both minor and excusable.

STATEMENT OF THE CASE

This is Ms. Savage-Bey's second appeal to this Court. In her first appeal, Ms. Savage-Bey sought review of an OAH determination that she failed to timely file her administrative appeal of DOES's denial of unemployment compensation benefits pursuant to D.C. Code § 51-111(b). By order dated August 3, 2010, the Court of Appeals vacated and remanded that initial

determination, together with 32 other related appeals, to OAH for consideration of the petition's timeliness under the new statutory standards contained in the Unemployment Compensation Reform Amendment Act of 2010 (the "Act"), effective on July 23, 2010 for all pending cases and appeals. The Act extended the filing deadline from 10 to 15 calendar days and added statutory "good cause" and "excusable neglect" exceptions for late filers.

On remand, OAH held no additional hearing and again dismissed the appeal as untimely. As in her first decision, Administrative Law Judge ("ALJ") Sharon E. Goodie credited Ms. Savage-Bey's testimony that she never received the claims determination by mail, as well as Ms. Savage-Bey's testimony about her multiple calls and visits to DOES to obtain the determination. Nonetheless, the ALJ found that DOES met its burden to establish the mail service presumption, and that Ms. Savage-Bey failed both to rebut that presumption and to show that she took "prompt action" as required in *Thomas* v. *Nat'l Children's Ctr., Inc.*, 961 A.2d 1063 (D.C. 2008) and *Frausto v. United States Dep't of Commerce*, 926 A.2d 151 (D.C. 2007). In addition, the ALJ considered whether Ms. Savage-Bey demonstrated "excusable neglect" so as to excuse her late filing. Looking to a wide range of cases for guidance in interpreting "excusable neglect," the ALJ concluded that Ms. Savage-Bey's efforts to effectuate her appeal—which included making telephone calls to DOES to inquire about the claims determination, physically going to DOES on two occasions to obtain a copy of it, and then filing her administrative appeal the same day she received the determination—did not "meet the level of excusable-ness" required by law.

Having vacated and remanded this claims determination to OAH to consider in the first instance whether the new "good cause" or "excusable neglect" exceptions for late filers have been met here, this Court now can and should apply those statutory grounds. The ALJ erred not only in its reliance on inapposite cases to limit the applicability of the "excusable neglect"

exception (and undermine the Act's legislative objective), but also in failing to give proper consideration to Ms. Savage-Bey's lack of knowledge of the determination, her repeated attempts in following up on the resolution of her claim, and her good faith efforts once she became aware of its existence.

Alternatively, the Court may avoid having to engage in the "good cause" and "excusable neglect" analyses altogether by considering the argument Ms. Savage-Bey raised in her original appeal: that the ALJ erred in finding that her administrative appeal of the claims determination was untimely in the first place. In dismissing Ms. Savage-Bey's appeal as untimely, the ALJ wrongly found (both times) that DOES established the mailing presumption and that there was "no evidence" to rebut the presumption despite crediting Ms. Savage-Bey's testimony that she did not receive the determination in the mail. The ALJ also erred in imposing the additional evidentiary hurdle of "prompt action" from *Frausto*, and then wrongly concluding that Ms. Savage-Bey failed to clear this unnecessary hurdle.

Finally, based on the full factual record already before it, and given the more than three-year delay in this case caused by the two erroneous OAH determinations, which have prevented Ms. Savage-Bey from receiving important safety-net benefits, this Court should exercise its jurisdiction to reverse on the merits the DOES's denial of benefits as well. In so doing, this Court should find that employer failed to meet its burden of proof to establish the gross misconduct that was implicitly found by the claims examiner and explicitly refuted by the record before the ALJ. The record contains no evidence of intentional disregard of the employer's interests and to the contrary has substantial evidence that Ms. Savage-Bey was not terminated for simple, much less gross misconduct, and she was therefore entitled to the full period of unemployment benefits. On this factual record, remand is futile because this Court reviews *de*

novo the legal questions of gross and simple misconduct, and there is only one legal conclusion that flows rationally from the facts established at the hearing.

STATEMENT OF FACTS

On August 15, 2008, Ms. Savage-Bey applied for unemployment compensation benefits after she was discharged from La Petite Academy ("La Petite"). Transcript of the Feb. 4, 2009 Hearing at 13, ("Tr. I") (App. A42); Transcript of the Feb. 26, 2009 Hearing at 23, ("Tr. II") (App. A105). On September 15, 2008, DOES claims examiner Laverne Tate found Ms. Savage-Bey ineligible for benefits due to "misconduct." Determination by Claims Examiner ("Determination") at 1 (App. A232).[1]

1. The record evidence on timeliness, "good cause" and "excusable neglect."

The final paragraph of the September 15, 2008 claims determination contained a typed, unsworn certificate of service by the claims examiner, stating: "I certify that a copy of this document was mailed to the claimant and to the employer named herein at the above address on 09/15/2008." *Id.* Above this language, however, the claims examiner listed not only DOES's address for its Central Adjudication Branch, but two additional addresses: (1) "ROCHELLE V SAVAGE-BEY, 1517 V STREET SE #1, WASHINGTON, DC – 20020-0000"; and (2) "LA PETITE ACADEMY INC, PO BOX 283, SAINT LOUIS, MO – 63166-0283." *See id.*

Notwithstanding this certificate of service, Ms. Savage-Bey did not receive the claims determination by mail. She made several telephone calls to DOES to inquire about the status of her application for unemployment benefits. Tr. I at 14-16 (App. A43-46), Tr. II at 17, 21 (App. A99, 103). On one of the last of such calls, which she made on December 4, 2008, the DOES

[1] Although the examiner did not use the term "gross misconduct" nor distinguish "gross" and "simple" misconduct, the disqualification for the period "until such time as you have been employed in each of ten (10) weeks" is the standard applicable to "gross misconduct" in D.C. Code § 51- 110 (b)(1)(2008).

representative with whom she spoke encouraged her to come down to DOES's office in person. Ms. Savage-Bey visited DOES's office, on both December 4 and 5, 2008. Tr. II at 19-21 (App. A101-103). Following those visits, Ms. Savage-Bey finally and actually received the DOES determination by fax on December 5, 2008 from her claims examiner. Tr. I at 13-14 (App. A42-43); Tr. II at 14, 18 (App. A96, 100). That same day, Ms. Savage-Bey filed her administrative appeal in person with OAH. *See* Request for Hearing to Appeal a Determination by a Claims Examiner Involving Unemployment Benefits, Dec. 5, 2008 ("Request for Hearing") (App. A227-28); Tr. II at 14 (App. A96).

On February 4, 2009, ALJ Sharon E. Goodie held a hearing on Ms. Savage-Bey's administrative appeal; subsequently, on February 26, 2009, after a continuance so that Ms. Savage-Bey could obtain counsel, the ALJ held an additional day's hearing.[2] *See* Tr. I at 35-39; (App. A64-68). Because the appeal was filed on December 5, 2008, and the DOES determination was dated September 15, 2008, the ALJ questioned Ms. Savage-Bey regarding the timeliness of her appeal at both hearings. *See id.* at 10-18 (App. A48-56); Tr. II at 12 (App. A94). In response, Ms. Savage-Bey provided sworn testimony that she never received her claims determination in the mail, and that, immediately after receiving it by fax on December 5, 2008, she filed her administrative appeal in person with OAH. *See* Tr. I at 13-14 (App. A42-43); Tr. II at 14, 18 (App. A96, 100).

During both hearings, Ms. Savage-Bey stated that prior to December 5, 2008, she called and left unreturned messages inquiring about the status of her claim with DOES. *See* Tr. I at 14-16 (App. A43-46), Tr. II at 17, 21 (App. A99, 103). However, the record is unclear exactly when

[2] During the first day of hearings, Ms. Savage-Bey appeared *pro se*; Valinda Farmer, the program assistant director for La Petite, testified on behalf of La Petite and also appeared *pro se*. During the second hearing, Ms. Savage-Bey was represented by Tonya Love of the Claimant Advocacy Program; Ms. Farmer, again, testified on behalf of La Petite and appeared *pro se*.

Ms. Savage-Bey began her inquiries. At the first hearing, Ms. Savage-Bey testified that "[m]aybe four days" after she applied for benefits, she started receiving blue claim forms in the mail—presumably on or about the week of August 18, 2008. *See* Tr. I at 15 (App. A44). Ms. Savage-Bey stated that, upon receiving these claim forms, she "called up there on the phone . . . le[ft] a message for them." *Id.* at 14-15 (App. A43-44). At the second hearing, Ms. Savage-Bey testified that she did not begin attempting to contact DOES until "the end of October, maybe November, about what was going on." Tr. II at 17 (App. A99). She called DOES but "wasn't getting through" and "was leaving messages" that were not returned. *Id.* Ms. Savage-Bey also called her claims examiner, Ms. Tate, and left a message that was also unreturned. *See id.* at 21 (App. A103).

Ms. Savage-Bey also testified that she eventually "talked to [DOES] over the phone, and they kept telling [her] that [she] would get something in the mail." Tr. I at 14 (App. A43). The record is unclear on when exactly the phone call occurred, but Ms. Savage-Bey's testimony suggests that it may have been in "October, maybe," because this appears to have been when her blue claim forms indicated that she had been "denied benefits." *See id.* at 15-16 (App. A44-45).

Despite this assurance from DOES, Ms. Savage-Bey also spoke with friends and her ex-sister-in-law who received unemployment benefits to seek their advice. *See* Tr. I at 16 (App. A45). These people counseled patience, explaining that "it would take some time," and that she should "just wait" for the determination. *See* Tr. II at 17, 19 (App. A99, 101). But by the end of November, Ms. Savage-Bey had still not received the determination and thought "that was just too long." *See* Tr. II at 19 (App. A101).

On December 4, 2008, Ms. Savage-Bey again "called [DOES] and [she] finally got in contact with someone . . . [who] told [her] that it was best to come up there," and "that's what

[Ms. Savage-Bey] did." *See id.* at 19-21 (App. A101-103). When she arrived in person at DOES, an employee informed her that "something had already been mailed out to [her]." Tr. I at 14 (App. A43); Tr. II at 17 (App. A99). Ms. Savage-Bey responded that although "everything else was coming" in the mail, she had not received the determination. *See* Tr. I at 14, 17 (App. A23, 26); Tr. II at 17 (App. A99). The DOES employee then contacted Ms. Savage-Bey's claims examiner and "told Ms. Tate what was going on." Tr. II at 18 (App. A100). And that day, December 4, 2008, Ms. Tate was "supposed to fax [the determination] to [Ms. Savage-Bey]." *Id.*

Ms. Savage-Bey "waited up [at DOES] all day that day," but "never received" the fax. *Id.* Ms. Savage-Bey returned to DOES in person the following day, December 5, 2008, and then received her claims determination and accompanying notice of appeal rights by fax. *See id.* at 18, 21-22 (App. A100, 103-04); Submission with Request for Hearing, Ex. 100 (Facsimile from Laverne Tate to DOES, Dec. 5, 2008) (App. A231). Ms. Savage-Bey filed her administrative appeal the same day at OAH. Tr. II at 14 (App. A96); Request for Hearing (App. A227).

2. The record evidence on "misconduct."

At the hearing, Valinda Farmer, Ms. Savage-Bey's supervisor, testified for La Petite and submitted the following documents into evidence: a Professional Conduct Report for an absence on August 8, 2008; a Professional Conduct Report of July 31, 2008; handwritten notes of another employee; and three 2006 Reports. *See* Ex. 200-206 (App. A235-245). Ms. Savage-Bey testified and presented one witness, Yvonne Owens, a former teacher and assistant manager at La Petite. *See* Tr. I at 21-35 (App. A50-64); Tr. II at 26-133 (App. A108-215).

The record established that Ms. Savage-Bey was notified on Monday, August 11, 2008, that she was terminated from her position as a Food Service Manager effective the previous

Friday, August 8, 2008. The stated reasons for the termination were (1) her medical absence that Friday, August 8; (2) a July 31, 2008 miscellany of purported issues; (3) an employee's handwritten complaint (although that employee did not testify); and (4) some old 2006 incidents. *See* Ex. 200 (Professional Conduct Reports dated Aug. 8, 2008 and Jul. 31, 2008) (App. A235-36); Ex. 201-203 (handwritten notes) (App. A237-242); Ex. 204-206 (Professional Conduct Reports from 2006) (App. A243-245).

The medical incident that led to Ms. Savage-Bey's absence on Friday, August 8, 2008, began on Thursday, August 7, 2008, when she started vomiting at work and was allowed to go home early. Tr. II at 49 (App. A131). On the following morning, Ms. Savage-Bey called Ms. Farmer and told her she was not feeling well and could not come to work; Ms. Farmer responded, however, that she was not excused and had to come in. *Id.* at 50 (App. A132).

Ms. Savage-Bey and Farmer disagreed on what was said next in the conversation. Ms. Savage-Bey testified that she specifically told Farmer that she had diarrhea and would come to work on Monday with a doctor's note. *Id.* at 52 (App. A134). She also testified that as a "licensed food handler" who cooked and served food to toddlers, she knew that it was inappropriate to handle food when ill: "They don't want you in the kitchen at all. . . . It's just hazardous." *Id.* at 51 (App. A133). Ms. Savage-Bey further testified, "In my condition, I wouldn't be able to gotten to work that morning." *Id.* at 52-53 (App. A134-35). Ms. Farmer, on the other hand, initially testified that she could not remember if Ms. Savage-Bey had told her about the diarrhea, but later denied that Ms. Savage-Bey had informed her of any details. *See id.* at 35, 39 (App. A117, 121); *see also* Ex. 200 at 1 (Professional Conduct Report dated Aug. 8, 2008) (App. A235).

On Monday August 11, when Ms. Savage-Bey arrived at work, she was presented with the August 8, 2008 Professional Conduct Report (and others), which she refused to sign, and was terminated.

With regard to the July 31, 2008 Professional Conduct Report, which cited Ms. Savage-Bey for serving cold English muffins with unmelted cheese, disrupting classrooms by "floating in and out," slamming classroom doors, and having belligerent interactions with other staff, Tr. II at 58 (App. A141); Ex. 200 at 2 (Professional Conduct Report dated Jul. 31, 2008) (App. A236), Ms. Savage-Bey testified that she was not at fault. She stated that she prepared the food according to a menu created by La Petite's corporate office, that the menu ordinarily specified if food was to be warmed or melted, and that the July 31 menu contained no such instructions. Tr. II at 53, 55-56 (App. A135, 137-38). Ms. Farmer disagreed, testifying that the food menus were prepared by the cook and typed up by management, but could not recall if the menu actually instructed the cook to warm the cheese or whether Ms. Savage-Bey consulted with her about the menu. *Id.* at 41-42 (App. A123-24). As to the other July 31 items in the Report, Ms. Savage-Bey denied intentionally slamming doors or being disruptive, and noted that until recently, the doors in the building lacked "guards" that prevent them from slamming shut. *Id.* at 57-58 (App. A139-140). Ms. Savage-Bey reiterated that she never discussed the July 31 incident with anyone and first saw the conduct report on August 11, 2008. *Id.* at 62, 58. (App. A140, 144).

Yvonne Owens' testimony corroborated Ms. Savage-Bey's testimony regarding the food menus and the lack of door guards. Ms. Owens worked as an assistant manager and lead teacher at La Petite for fifteen years until she was terminated on August 4, 2008. *Id.* at 66 (App. A148). She testified that corporate headquarters set the food menus, although it had been a cook's responsibility in the past. *Id.* She also noted that Ms. Savage-Bey brought the July 31 menu to

her attention because it lacked nutritional value, and that the menu did not specify that the English muffin was to be warmed. *Id.* at 66-67 (App. A148-49). Owens denied knowledge of any disruptions caused by Ms. Savage-Bey in late-July 2008, and confirmed that the doors often slammed, and only recently were door guards installed. *Id.* at 68 (App. A150).

La Petite also introduced various handwritten notes of an employee who did not testify, *see* Ex. 201-203 (App. A237-242), as well as three 2006 Professional Conduct Reports. *See Ex.* 204-206 (App. A243-245). Ms. Savage-Bey's counsel objected, *see* Tr. II at 91-99 (App. A173-181), stating that exhibit 202 was unsigned, that the 2006 Reports were authored by former employees about incidents prior to Farmer's tenure, and that supervisor Samantha Campbell's signatures on exhibits 203, 204, and 205 were inconsistent with each other, including in one Report where her name was misspelled. *Id.* (App. A241-244). The employer's sole witness, Ms. Farmer, who began work at La Petite in June 2008, admitted she had no personal knowledge of any incidents prior to June 2008. Tr. II at 107 (App. A189).

Ms. Savage-Bey testified that she had never seen any Reports until August 11, 2008. *Id.* at 109-112 (App. A191-194). Ms. Owens also testified that she did not recognize the signature of Ms. Campbell on exhibits 204 and 205 and that she had never seen any of the Reports prior to the hearing. *Id.* at 121-122 (App. A203-204). Ms. Owens stated that the records were not kept in a locked filing cabinet at the time they were purportedly created, and that Ms. Savage-Bey's file went missing in 2008. *Id.* at 122-123 (App. A204-205). Moreover, Ms. Owens testified that Dominique Jackson, whose signature on exhibit 205 she recognized, would occasionally become angry with an employee and "arbitrarily" write a disciplinary report, but never show it to them. *Id.* at 125, 128 (App. A207, 210). Ms. Owens also recalled a conversation where Ms. Jackson

stated that "she was going to get rid of all the Savage-Beys" because of a grudge. *Id.* at 127 (App. A209).

Ms. Savage-Bey's counsel argued the numerous irregularities. Tr. II at 99-100 (App. A181-82). During the hearing, the ALJ held the reports "barely" authenticated, but accorded only "limited weight." *Id.* at 96, 102 (App. A178, 184).[3]

3. The initial ALJ dismissal as untimely.

On April 17, 2009, OAH issued its initial final order dismissing Ms. Savage-Bey's appeal as untimely. Final Order dated April 17, 2009 ("Final Order") at 1 (App. A23). Relying on the certificate of service at the bottom of the DOES determination, *see* Determination at 1 (App. A232), the ALJ found that the claims examiner "mailed the . . . Determination . . . to [Ms.] Savage-Bey's correct last-known address" on September 15, 2008. Final Order at 2-3 (App. A24-25). However, the ALJ credited Ms. Savage-Bey's testimony and expressly found that Ms. Savage-Bey "did not receive the Determination in the mail." *See id.* at 3 (App. A25); *id.* at 4-5 (App. A26-27). The ALJ further found that it was not until December 5, 2008 that Ms. Savage-Bey actually received, by fax, a copy of her claims determination and accompanying notice of appeal rights. *See id.* at 3-4 (App. A25-26). And the ALJ recognized that, upon receiving the determination, Ms. Savage-Bey "came to this administrative court in person to file her appeal letter" that same day. *Id.* at 4 (App. A26). Despite the findings of fact stated above, the ALJ concluded that "[t]he record contains no evidence which rebuts the mail date in the certificate of service." *Id.* at 4 (A26).

In addition, the ALJ found additional facts regarding Ms. Savage-Bey's good faith efforts to follow up on her claim. The ALJ found that, while awaiting her determination, Ms. Savage-

[3] Such 'limited weight" was compelled by law as 7 DCMR § 312.9 requires that persons alleging misconduct must be "present and available for questions by the adverse party."

Bey "talked to friends who had received unemployment compensation benefits in the past" and "the[se] friends advised her to wait for DOES to send the Determination." *Id.* at 3 (App. A25). And the ALJ found that "[i]n late October or early November 2008, [Ms.] Savage-Bey called DOES to inquire about the status of her application." *Id.* During this call, "[a] DOES staff person told [Ms.] Savage-Bey that she would receive something in the mail." *Id.* The order does not mention that Ms. Savage-Bey testified that she also called and left unreturned messages for DOES. *See* Tr. I at 14-16 (App. A43-45); Tr. II at 17, 21 (App. A99, 101)

The ALJ further found that by "early December 2008," Ms. Savage-Bey still "had not received the Determination" in the mail. Final Order at 3 (App. A25). Accordingly, on December 4, 2008, Ms. Savage-Bey personally "went to the DOES One-Stop Center . . . to inquire about the status of her application." *Id.* Ms. Savage-Bey was then advised that "DOES had mailed the Determination to her on September 15, 2008." *Id.* The following day, "[a] DOES staff person in another office faxed a copy of the Determination to the . . . One-Stop Center, which gave the faxed copy to [Ms.] Savage-Bey." *Id.* at 3-4 (App. A25-26).

Next, the ALJ discussed what she understood to be the applicable law. She explained that the Court of Appeals, in *Thomas*, "recently changed the analysis this administrative court must use when a Determination is mailed to, but never arrives at, the correct address for the party who wishes to appeal the decision." *Id.* at 4 (App. A26) (citing *Thomas*, 961 A.2d at 1066; *Frausto*, 926 A.2d at 154). According to the ALJ's reading of *Thomas* and *Frausto*: "if the court credits an appellant's assertion that she did not receive an otherwise properly mailed Determination, this administrative court must further consider whether the appellant (a) had actual notice of the proceedings; (b) acted in good faith; (c) took prompt action; and (d)

presented an adequate defense." *Id.* The ALJ concluded that the presumption of mailing could be rebutted only if the *Frausto* factors favored Ms. Savage-Bey. *See id.*

The ALJ briefly analyzed the *Frausto* factors and then concluded that Ms. Savage-Bey failed to satisfy the "prompt action" prong. The ALJ found that Ms. Savage-Bey "candidly and credibly testified that she could not remember most of the specific dates on which she pursued her application for benefits. However, she estimated that the first time she called DOES to check the status of her application for benefits was in late October or early November. . . ." *Id.* at 5 (App. A27). Although the ALJ acknowledged that this "first call did not yield her a copy of the Determination," the ALJ noted that Ms. Savage-Bey "waited another month, until approximately December 4, 2008, to follow up again." *Id.* The ALJ determined that "[t]hese two calls, made more than a month after the appeal period expired, do not constitute prompt action on her application." *Id.* In summing up her analysis of the *Frausto* factors, the ALJ stated that Ms. Savage-Bey "acted in good faith by seeking advice when she did not receive the Determination." *Id.* But Ms. Savage-Bey apparently erred, in the ALJ's view, because "she should have gone to the source, DOES, for her advice, instead of, or in addition to, consulting friends." *See id.*

Having considered and applied the "prompt action" prong of *Frausto*, the ALJ held "that [Ms.] Savage-Bey has not rebutted the presumption that the Determination was mailed on September 15, 2008." *Id.* The ALJ therefore dismissed Ms. Savage-Bey's appeal because it was "untimely, and jurisdiction [was] not established." *Id.* at 5-6 (App. A27-28).

4. Remand from this Court.

While Ms. Savage-Bey's first appeal was pending, the District of Columbia Council passed the Unemployment Compensation Reform Amendment Act of 2010, which extended the deadline to appeal a decision to OAH from 10 to 15 days and added a late filing exception for

"excusable neglect" or "good cause." D.C. Code § 51-111(b). On August 3, 2010, this Court vacated and remanded Ms. Savage-Bey's appeal, together with 32 other pending appeals, to OAH for consideration of the new law. (App. A12-19).

5. Final Order on Remand.

On remand, OAH did not convene a new hearing because it "had already heard evidence on both the timeliness issue and the merits of the new case." Final Order on Remand dated March 31, 2011 ("Final Order on Remand") at 6 (App. A6). The Final Order on Remand is virtually identical to the original Final Order, with an additional section on the "good cause" and "excusable neglect" exceptions for late filings.[4] With regard to this new section, the ALJ acknowledged that in the absence of a definition from this Court of "good cause" or "excusable neglect" in the unemployment benefits statute, the applicable test is set forth in *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 388 (1993). Final Order on Remand at 8 (App. A8). Without analyzing any of *Pioneer* factors, however, the ALJ then compared the length of delays in two of this Court's pre-amendment cases and concluded that "excusable neglect" has no discernable pattern. *Id.* (citing *Berenbaum v. Berenbaum*, 638 A.2d 681 (D.C. 1993); *In re Yates*, 988 A.2d 466 (D.C. 2010)). The ALJ also cited federal criminal decisions from several federal courts of appeals denying excusable neglect for motions and appeals filed by criminal defendants. *Id.* at 9 (App. A9). The Order then concludes that Ms. Savage-Bey does not

> meet the level of excusable-ness of the appellants in the cases cited above—in particular the criminal defendants. . . . If errors of the criminal defendants, who had liberty interests

[4] The Final Order on Remand also added brief paragraph comparing the actions taken in *Thomas* with those by Ms. Savage-Bey, concluding that Ms. Savage-Bey's actions "do not match the prompt and persistent follow-up demonstrated in *Thomas* and *Frausto*." Final Order on Remand at 7 (App. A7).

at stake, do not qualify as excusable neglect, this administrative court cannot find Claimant Savage-Bey's three month delay [qualifies].

Id. at 9-10 (App. A9-10).

In closing, the ALJ observed that "the . . . period for appeals of DOES Determinations is jurisdictional" and then dismissed the case. Final Order on Remand at 10 (App. A10).

STATEMENT OF JURISDICTION

On remand, OAH issued its second final order on March 31, 2011. Within thirty days, Ms. Savage-Bey 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

OAH's legal rulings are reviewed *de novo* because this Court is "the final authority on issues of statutory construction." *See Odeniran v. Hanley Wood, LLC*, 985 A.2d 421, 424 (D.C. 2009). Here, the *de novo* standard applies to the Court's review of the meaning of the 2010 statutory exceptions for "excusable neglect" and "good cause," as well as to the applicability of the *Fausto* test to the facts here. The Court of Appeals also reviews a determination of whether an unemployment benefits claimant committed gross or simple misconduct *de novo*. *Id.*

This Court reviews the ALJ's factual findings "to ensure that they are supported by substantial evidence in the record" under an abuse of discretion standard. *Id.* An OAH final order cannot stand unless "'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.'" *Thomas*, 961 A.2d at 1065 (quoting *D.C. Dep't of Employment Servs. v. Vilche*, 934 A.2d 356, 360 (D.C. 2007)). "It is well-settled that substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as

adequate to support a conclusion." *Washington Metro. Area Transit Auth. v. D.C. Dep't of Employment Servs.*, 683 A.2d 470, 476-77 (D.C. 1996) (quotations and citations omitted).

SUMMARY OF ARGUMENT

Having remanded this case for consideration of the new statutory standards for extending the filing period contained in the Unemployment Compensation Reform Amendment Act of 2010, this Court should reverse OAH's erroneous decision on that ground. The circumstances that led to Ms. Savage-Bey's failure to comply with the then-10 (now 15) day filing period are ones that might very well be considered the paradigmatic example of "good cause" and "excusable neglect." Ms. Savage-Bey never received the DOES determination in the mail through no fault of her own; she made multiple, good faith inquiries about her claim by phone and in person; and the same day she did finally receive the determination, she filed her appeal with OAH. Under the multi-factor analysis of *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 388 (1993), cited approvingly by this Court in *Dada v. Children's Nat'l Med. Ctr.*, 715 A.2d 904, 909-10 (D.C. 1998), this Court determines if a late filing is excusable by considering the danger of prejudice to other parties, the length and reason for the delay, whether the reason for the delay was within the control of the filing party, and whether the party acted in good faith. Ms. Savage-Bey easily satisfies this test, and that should be the end of it. The ALJ cited various inapposite precedents, applied the wrong standard, and erred in concluding that Ms. Savage-Bey's filing could not be excused because she was allegedly less timely than a few late filers in other (mainly federal, criminal) cases.

Although remanded for "further action" in light of new "good cause" and "excusable neglect" statutory exceptions, this Court alternatively need not actually consider how the provisions apply here because Ms. Savage-Bey's appeal was timely filed in the first place. Here, the *only* evidence of mailing—an unsworn certificate of service—bears substantial similarity to

the one in this Court found "confusing and . . . inadequate" in *Rhea v. Designmark Serv., Inc.*, 942 A.2d 651, 654 (D.C. 2008) (quotation and citation omitted). Even if some weight were accorded to DOES's certificate, Ms. Savage-Bey's credited testimony rebuts any presumption that the DOES claims determination was mailed. Accordingly, by statute, Ms. Savage-Bey's initial 10-day (later extended to 15 days) appeal period did not begin to run until she received actual notice of the determination by fax on December 5, 2008. *See* D.C. Code § 51-111(b). Because Ms. Savage-Bey filed her administrative appeal that same day, her appeal was timely.

In any event, the ALJ erred by imposing additional evidentiary hurdles, the *Frausto* factors, that she believed prevented her from overturning the accuracy of the certificate of service, even though she had also found as a fact that Ms. Savage-Bey never in fact received the DOES determination in the mail. Under *Chatterjee v. Mid Atl. Reg'l Council of Carpenters*, 946 A.2d 352, 355 (D.C. 2008), *Rhea*, 942 A.2d at 656, and other cases, Ms. Savage-Bey's credited testimony should have rebutted any presumption of mailing raised by the certificate of service. The *Frausto* factors discussed in *Thomas* are inapposite where, as here, OAH has already credited a claimant's testimony of nonreceipt. Regardless, Ms. Savage-Bey's actions (including her phone calls, visits, and same-day filing upon actual receipt) met any such burden for the "prompt action" prong of the *Frausto* test, which the ALJ found fatal to her claim.

Finally, given the substantial delay to date, this Court should decide the merits of this case and find Ms. Savage-Bey is entitled to full unemployment benefits. On a complete factual record where the employer failed to establish misconduct and the record contains substantial evidence of no intentional misconduct, this Court has found as a matter of law that a claimant was entitled to benefits. *Cf. Badawi v. Hawk One Sec., Inc.*, 21 A.3d 607, 617 (D.C. 2011) (finding no substantial evidence of gross misconduct). In this case, the evidence submitted by La

Petite indicated Ms. Savage-Bey was terminated for pretextual reasons—failing to arrive at work when she was sick, and failing to heat English muffins where a food menu contained no instruction to do so. Moreover, any purported prior 2006 history of disciplinary problems was based on hearsay reports of doubtful authenticity that, in any event, are precluded by 7 DCMR § 312.9 for lack of a witness. This Court should therefore find as a matter of law she is entitled to her full eligibility for unemployment benefits.

ARGUMENT

I. EVEN IF MS. SAVAGE-BEY FAILED TO TIMELY FILE HER APPEAL, SHE SATISFIES THE EXCUSABLE NEGLECT EXCEPTION CONTAINED IN THE UNEMPLOYMENT COMPENSATION REFORM AMENDMENT ACT OF 2010.

The Unemployment Compensation Reform Amendment Act of 2010 amended the unemployment appeal period so that "[t]he 15-day appeal period may be extended if the claimant or any party to the proceeding shows excusable neglect or good cause." In *Pioneer Investment Services v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380 (1993), the United States Supreme Court construed "excusable neglect" to permit a court, where appropriate, "to accept late filings caused by inadvertence, mistake, or carelessness, as well as by intervening circumstances beyond the party's control." *Id.* at 388. There, the Court noted that the inquiry is "at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission." *Id.* at 395. Factors to consider include "prejudice [to the opposing party], the length of delay and its potential impact on the judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith." *Id.*[5]

[5] Although *Pioneer* construed a Federal Bankruptcy Rule of Procedure that specifically included an excusable neglect exception, federal courts have subsequently relied on the *Pioneer* to define "excusable neglect" in other contexts. *See generally* Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1165 (3d. ed. 2002) ("Generally, excusable neglect seems to require a demonstration of good faith on the part of the party seeking an enlargement of time and some reasonable basis for noncompliance within the time specified in the rules.").

The Court of Appeals has since adopted the "*Pioneer* factors" in assessing whether a party has demonstrated excusable neglect. *See Dada v. Children's Nat'l Med. Ctr.*, 715 A.2d 904, 909-10 (D.C. 1998).[6]

Here, Ms. Savage-Bey clearly and easily demonstrated excusable neglect.[7] Her appeal was filed on December 5, 2008, 66 days (not three months, as the ALJ found, *see* Final Order on

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[6] Prior to *Pioneer*, this Court construed excusable neglect "flexibly, but strictly, interpreted to apply to unique or extraordinary circumstances,' as opposed to 'run of the mill' situations where counsel has failed to receive a final order from a court clerk or co-counsel have failed to communicate." *See Snow v. Capitol Terrace*, 602 A.2d 121, 125 (D.C. 1992). Excusable neglect included "lack of knowledge of judgment, extraordinary circumstances such as physical disability or unusual delay in transmission of the mail, or 'unique circumstances.'" *Berenbaum v. Berenbaum*, 638 A.2d 681, 683 (D.C. 1994) (citing *Pryor v. Pryor*, 343 A.2d 321, 322 (D.C. 1975)). However, in 1998, the Court cited the more lenient language of the *Pioneer* "excusable neglect" exception to excuse failure to adhere to a discovery scheduling order. *See Dada v. Children's Nat'l Med. Ctr.*, 715 A.2d 904, 909-10 (D.C. 1998) (remanding with instructions to consider whether untimely evidentiary filing should be excused using factors similar to those described in *Pioneer*); *see also In re Yates*, 988 A.2d 466 (D.C. 2010); *Doe v. D.C. Metro Police Dep't*, 948 A.2d 1210, 1218 (D.C. 2008).

[7] The ALJ decided to analyze Ms. Savage-Bey's reasons for failing to comply with the 15-day time period under the "excusable neglect" exception, observing that "good cause" generally refers to forces beyond the control of the party filing an appeal, whereas "excusable neglect" generally refers to carelessness or inadvertence by the appellant in combination with forces beyond the appellant's control. Final Order on Remand at 7 (concluding that "no such outside forces [beyond the control of Ms. Savage-Bey] appear to be at work in this case). Ms. Savage-Bey does not concede that the "good cause" exception does not also apply here. Her alleged failure to timely appeal is directly the result of her not having timely received the determination by mail, even if DOES had indeed mailed it—a fact that was entirely outside of her control.

In *Wasgshal v. Rigler*, 711 A.2d 112 (D.C. 1998), this Court observed that:

> "the principal factor to be considered in the good-cause inquiry is the reason for the plaintiff's failure to comply with the rule. We also take into account prejudice to the plaintiff and lack of prejudice to the defendant." . . . . A further factor . . . [to] . . . consider [is] whether the plaintiff had made "some showing of reasonable diligence in attempting to comply with the rules."

Id. at 116 (quoting *Bulin v. Stein*, 668 A.2d 810, 815 (D.C. 1995); *Cameron v. Washington Metro. Area Transit Auth.*, 649 A.2d 291, 294 (D.C. 1994)); *see also Baba v. Goldstein*, 996 A.2d 799, 803 (D.C. 2010) (same). Ms. Savage-Bey prevails under this test. However, because

Remand at 10 (App. A10)) after the 15-day filing period expired on September 30, 2008. There is no evidence whatsoever that La Petite suffered any prejudice from the 66-day delay, and the ALJ did not find any. Nor did the brief delay have any discernable impact on the hearing before the ALJ; although only two of Ms. Savage-Bey's supervisors testified, the delay unlikely impacted others' availability, as they had been terminated before or shortly after Ms. Savage-Bey's dismissal on August 11, 2008. The reason for the delay is that Ms. Savage-Bey did not receive the DOES determination by mail—a finding that the ALJ made. Final Order on Remand at 4 (App. A4). Although she made several, good faith attempts to ascertain the status of her claim, DOES failed to return her phone calls in October and November. Finally, Ms. Savage-Bey's immediate attempt to appeal the DOES Determination when she received a copy of it by fax on December 5, 2008, is evidence that she acted in good faith and was not aware of the DOES Determination. All the *Pioneer* factors weigh in favor of Ms. Savage-Bey.

The ALJ reached the wrong conclusion based on legal and factual errors. As an initial matter, although the ALJ mentioned *Pioneer*, Final Order on Remand at 8 (App. A8), she failed to *apply* the *Pioneer* test to the facts of this case. Instead, the ALJ improperly construed "excusable neglect" according to the "unique circumstances" standard of *Berenbaum*, a decision of this Court that preceded its adoption of the *Pioneer* test. *Id.* at 9 (citing *Berenbaum*, 638 A.2d at 683). The ALJ then contrasted the leniency demonstrated in the post-*Pioneer* case of *In re Yates*, 988 A.2d 466 (D.C. 2010) with the relative harshness in *Berenbaum*, erroneously concluding that "it is hard to find any patterns or common features among appellate court rulings on excusable neglect." Final Order on Remand at 8. In any event, the ALJ failed to note that even under *Berenbaum*'s "unique circumstance" test, "lack of knowledge of judgment" and

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the ALJ's opinion applied an excusable-neglect analysis, and the factors to be considered for both exceptions are relatively similar, this brief focuses on that inquiry.

"unusual delay in transmission of the mail" are both specifically cited as examples of "excusable neglect." *Cf. Snow*, 602 A.2d at 125. Finally, the ALJ also failed to consider that the harsher "unique circumstances" standard applied in *Berenbaum* concerned a judicially-established exception to appellate jurisdiction that was created for equitable reasons,[8] rather than a statutorily authorized exception, intended to be construed broadly to further the statutory purposes of this humanitarian safety net during economic downturns.

Moreover, the ALJ erred by relying on inapposite criminal law precedents to guide its analysis. Rather than consider the *Pioneer* factors, the ALJ cited federal appellate decisions in criminal cases (some unpublished), concluding that the facts here compared unfavorably to those, which the ALJ deemed even more compelling cases to find excusable neglect because the "criminal defendants [have] liberty interests at stake." *See* Final Order on Remand at 8-10 (App. A8-10) (citing *United States v. Sherman Kemp*, 2010 U.S. App. LEXIS 22231 (4th Cir. 2010 unpublished); *United States v. Boesen*, 599 F.3d 874 (8th Cir. 2010); *United States v. Wright*, 370 Fed. Appx. 906; 2010 U.S. App. LEXIS 6410 (10th Cir. 2010)). The ALJ's conclusion—which, in any event, is untrue—is irrelevant; *Pioneer* does not require any comparative analysis of this sort.

The ALJ's legal conclusion also runs counter to the purpose and legislative history of the unemployment statute and its 2010 amendment. This Court, which reviews all questions of statutory interpretation *de novo*, has repeatedly held that the legislative intent of this statute requires that it be construed liberally in favor of claimant. "Unemployment benefits 'are a matter of statutory entitlement for persons qualified to receive them.'" *Hawkins v. Dist. Unemployment*

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[8] The basis for such an exception in *Berenbaum* was seriously undermined by the Supreme Court when it held that the federal appellate time limits were jurisdictional and could not be waived for equitable reasons. *See Bowles v. Russell*, 551 U.S. 205 (2007) (overruling the "unique circumstances" exception to federal appellate deadlines).

Comp. Bd., 381 A.2d 619, 623 (D.C. 1977); *see also* D.C. Code § 51-110(a) (2001). The unemployment statute "should be construed liberally, whenever appropriate to accomplish the legislative objective of minimizing the economic burden of unemployment." *Bublis*, 575 A.2d at 303 (quoting *Green v. D.C. Dep't of Employment Servs.*, 499 A.2d 870, 875 (D.C. 1985)); *Thomas v. D.C. Dep't of Labor*, 409 A.2d 164, 170-71 (D.C. 1979)); *Cruz*, 633 A.2d at 71 ("[T]he sufficiency of a claimant's asserted justifications must be considered in light of the remedial purposes of the statute."); *Williams v. Dist. Unemployment Comp. Bd.*, 383 A.2d 345, 349 (D.C. 1978) (the purpose of the unemployment statute "is to protect employees against economic dependency caused by temporary unemployment and to reduce the necessity of relief or other welfare programs") (citations and quotations omitted).

The same liberal construction applies equally to its 2010 amendments. The Committee Report for the 2010 Act notes that "[u]nemployment insurance is a critical part of the safety net during these economic times and is even more considering that the District's unemployment rate has topped 12%. The Purpose of . . . the "Unemployment Compensation Reform Amendment Act of 2010" is to extend eligibility. . . [and] improve the administration of the unemployment compensation program . . . ." D.C. Council, Comm. on Hous. & Workforce Develop., *Report on Bill 18-455, "Unemployment Compensation Reform Amendment Act of 2010,"* at 1 (April 14, 2010).

Here, the ALJ erred by failing to construe the "excusable neglect" exception consistently with the analysis required in *Pioneer*, *Dada*, and *Yates*. The reason for the delay and the good faith efforts to obtain and then appeal immediately upon obtaining the DOES determination, clearly meet the exception. Accordingly, this Court must reverse the ALJ's decision.

II. THE ALJ ERRED IN FINDING THAT MS. SAVAGE-BEY DID NOT TIMELY FILE HER APPEAL.

Though the Court has affirmed that the OAH filing period is jurisdictional,[9] it has repeatedly held that "[a] prerequisite to invoking the jurisdictional bar imposed by the statutory

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[9] This Court need not reach the issue of whether the 15-day time period set forth in D.C. Code § 51-111(b) is indeed jurisdictional because Ms. Savage-Bey's appeal was timely for numerous reasons. That said, in light of recent statutory changes and doctrinal developments in the U.S. Supreme Court, the time may have come for the Court to re-examine its "consistent holdings that the statutory ten day period within which a petitioner must file his or her notice of appeal is 'jurisdictional.'" *Wright-Taylor v. Howard Univ. Hosp.*, 974 A.2d 210, 212 (2009) (citation omitted). This case is an appropriate vehicle for such a re-examination, as its long procedural course illustrates the waste of judicial and administrative resources consumed by the enforcement of a supposed jurisdictional bar and the frustration of the purpose of unemployment compensation, which is to provide support at a time of need—not years later.

First, the District of Columbia Council's 2010 amendment to the statute provides for enlargement of the filing period based on "good cause" or "excusable neglect." Thus, the law no longer has the rigidity that originally prompted its characterization as "jurisdictional." In *John R. Sand & Gravel v. United States*, 552 U.S.130, 133-34 (2008), the Court recognized that limitations periods fall into two categories: claims-processing rules that are subject to equitable tolling, and "jurisdictional" limits that cannot be extended for equitable reasons. *Accord id.* at 757 (Stevens, J., dissenting). While D.C. Code § 51-111(b) may at one time have fallen into the absolute category, not amenable to equitable extension, that is no longer true. Faced with a plethora of decisions from this Court addressing the timeliness of appeals to OAH and clear evidence that many unemployment decisions do not reach the claimants promptly after they are issued, the Council expressly authorized enlargement of the time for filing for "good cause" or "excusable neglect." Consequently, the current statute—the one that governs Ms. Savage-Bey's appeal—can no longer be properly characterized as a "jurisdictional" limitation.

Second, the Supreme Court's recent decision in *Henderson v. Shinseki*, 131 S. Ct. 1197 (2011), clarified the line between claims-processing rules and jurisdictional limits. In *Wright-Taylor*, this Court construed the U.S. Supreme Court's decision in *Bowles v. Russell*, 551 U.S. 205 (2007), as drawing a line between *statutory* time limits (which the Court understood to be "truly jurisdictional") and rule-based time limits (which were "subject to equitable exceptions"). 974 A.2d at 212. In *Henderson*, the Supreme Court unanimously held that a statutory 120-day time limit for filing appeals from the denial of veterans' benefits was *not* jurisdictional and was subject to equitable enlargement. In so doing, the Court noted that the veterans' benefit process was supposed to be informal and concerned with the well-being of the claimant. 131 S. Ct. at 1200-01. The Court rejected the government's argument that the decision in *Bowles* was controlling. *Id.* at 1203. Especially pertinent here, the Court distinguished the review of an administrative decision by the Veterans Court—an Article I tribunal with a special jurisdiction—from *Bowles*, which involved review of a district court order by a federal appellate court. *Id.* at 1203-04 (noting the Court's prior ruling that deadlines for federal district court review of the

ten-day filing period is [DOES's] obligation of giving notice which was reasonably calculated to apprise petitioner of the decision . . . and an opportunity to contest that decision through an administrative appeal." *Wright-Taylor*, 974 A.2d at 217 (internal quotations and citation omitted); *see Thomas*, 961 A.2d at 1065; *Chatterjee*, 946 A.2d at 354-55. Here, DOES failed to establish by substantial evidence that it served the claims determination to Ms. Savage-Bey on September 15, 2008, and thus the operative date of receipt under D.C. Code § 51-111(b) is December 5, 2008—the date on which she actually received the determination by fax. Because she filed her administrative appeal that same day, her appeal is timely.

A. The ALJ Erred in Finding that DOES Established the Mail Presumption and that Ms. Savage-Bey Failed to Rebut It.

Substantial evidence does not support the ALJ's findings that DOES properly established the presumption that it mailed the determination on September 15, 2008 and that Ms. Savage-Bey failed to rebut that presumption. Here, the *only* evidence of mailing—a bare, unsworn certificate of service—does not properly establish that DOES in fact mailed a determination to Ms. Savage-Bey. The claims examiner's certificate reads in its entirety: "I certify that a copy of this document was mailed to the claimant and to the employer named herein at the above *address*

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denial of social security benefits are subject to equitable enlargement). OAH review of DOES unemployment claims decisions much more closely resembles the review of veterans' benefits in *Henderson* than it does the federal court appellate review in *Bowles*.

Third, this Court's original decisions characterizing the time limit in D.C. Code § 51-111(b) as "jurisdictional" were based on an indiscriminate use of the term that the U.S. Supreme Court has repudiated in a series of decisions. *See Henderson*, 131 S. Ct. at 1203 (citing cases). The result of that outmoded terminology has been a legion of opinions from this Court overturning grudging decisions by OAH that have delayed the award of vital safety-net benefits. The statutory changes and the Supreme Court's clarification in *Henderson* that statutory time limits are not necessarily jurisdictional are a sufficient basis for a division of this Court to hold that *amended* D.C. Code § 51-111(b) is not "jurisdictional" in the modern sense. (Because of the delay that *en banc* review would likely entail and the multiple other grounds for reversal, Ms. Savage-Bey does not seek consideration by the full Court at this time).

on 09/15/2008." Determination at 1 (emphasis added) (App. A232). But confusingly, the claims examiner listed *two addresses* at the top of the determination: Ms. Savage-Bey's *and* La Petite's. *See id.* Accordingly, on its face, the certificate of service does not necessarily establish that DOES in fact mailed a determination to Ms. Savage Bey; at best, it may support only a weak presumption of mailing service, which Ms. Savage-Bey clearly rebutted through her credited testimony of nonreceipt.

In *Rhea*, where the certificate of service stated that the determination "was mailed to the claimant/employer at the above address," this Court reasoned that "[r]ead literally, the certificate of service means that a single copy of the examiner's decision was sent only to a single address. That address in the present case could have been either the claimant's or the employer's, and no differentiation is made in the certificate between the two parties." *Rhea*, 942 A.2d at 654. "If that copy was sent to the employer, this would explain, and would be consistent with, [the claimant's] claim that she did not receive the . . . mailing . . . ." *Id.* at 654 n.9. The same thing can be said in this case. As in *Rhea*, the certificate here failed to establish that DOES *in fact* mailed the claims determination to Ms. Savage-Bey. *See id.*

Even assuming that this confusing certificate some does create a rebuttable presumption of "the date and fact of mailing," *see Chatterjee*, 946 A.2d at 355, this Court has held repeatedly that a certificate of service is insufficient proof when a party credibly testifies that she did not receive the determination. *See, e.g.*, *Thomas*, 961 A.2d at 1065-66; *Burton*, 957 A.2d at 929 n.3; *Chatterjee*, 946 A.2d at 355; *Rhea*, 942 A.2d at 654-55; *see also Wright-Taylor*, 974 A.2d at 215-16 (discussing and summarizing holdings in *Thomas*, *Chatterjee*, and *Rhea*). Here, the ALJ's conclusions completely disregarded Ms. Savage-Bey's credited testimony that she did not receive the determination. This Court has long recognized the "general rule that on credibility

questions, the fact finding of hearing examiners is entitled to great weight." *Gunty v. D.C. Dep't of Employment Servs.*, 524 A.2d 1192, 1197 (D.C. 1987) (internal citations omitted). Despite having found that Ms. "Savage-Bey did not receive the Determination in the mail," Final Order on Remand at 4 (App. A4), the ALJ somehow concluded a page later that "[t]he record contains no evidence which rebuts the mail date on the certificate of service." *Id.* at 5 (App. A5). Not only is the ALJ's conclusion inconsistent with the factual findings (and therefore clear error), the kind of credited testimony Ms. Savage-Bey provided here is precisely what this Court, in prior cases, has said should sway a fact-finder that the mail presumption has been rebutted.

In *Chatterjee*, the Court made clear that "even a properly executed certificate of service is not conclusive." 946 A.2d at 355. There, OAH credited the claimant's testimony that he had not received a claims determination until two weeks after it was allegedly mailed. *Id.* In reversing and remanding OAH's dismissal on untimeliness grounds, the Court held that the claimant's testimony "raised two possibilities": (1) that the U.S. Postal Service failed to deliver the mail for two weeks; or (2) that DOES failed to mail the claims determination on the date certified. *See id.* ("Perhaps, as Mr. Chatterjee suggested, 'whatever they indicate that they're posting, they don't really post them on that particular date.'"). Because the claimant's testimony "fairly called into question the accuracy of the certificate of service," the Court ruled that more fact-finding was required and that a dismissal "'may stand only if additional proof, beyond the certificate itself, establishes that the appeal was in fact untimely.'" *Id.* at 356 (quoting *Rhea*, 924 A.2d at 656).[10]

[10] The rebuttable presumption of a certificate of service is at best a "bursting bubble" type of presumption, where, once the opponent of the presumption "offers evidence against the fact presumed, the presumption vanishes." *Cf. Green v. D.C. Dep't of Employment Servs.*, 499 A.2d 870, 874 (D.C. 1985) (describing the "bursting bubble" theory of presumptions as the "prevailing view") (quotations and citation omitted). Under this Court's cases, credited testimony by a claimant that casts doubt on the accuracy of a certificate of service is sufficient to make this presumption "vanish[]".

Similarly, in *Rhea*, the Court vacated and remanded OAH's dismissal of an appeal as untimely, observing that the claimant's appeal to OAH was a single day late, and that the "record also contain[ed] no description of agency procedures from which we could be confident that no such one-day error was made." *Rhea*, 942 A.2d at 654-55. In particular, the Court noted that "[t]he record does not disclose whether, on [the date noted in the certificate of service], the claims examiner's determination was placed in a DOES outbox from which mail is collected, or whether it was physically placed in the United States Mail." *Id.* at 655. And, as discussed above, *Rhea* also involved a "confusing and . . . inadequate" certificate of service that failed to certify whether the determination was mailed to both the claimant and the employer, or just one of the parties. *Id.* at 654 (quotations and citation omitted).

Here, the ALJ has not only credited Ms. Savage-Bey's testimony that she never received DOES's determination by mail, she went further to describe the good faith steps that Ms. Savage-Bey took to try to obtain it—placing multiple calls to DOES to inquire, talking to friends knowledgeable about the process, and twice going to DOES's office in person. Final Order on Remand at 4 (App. A4). All of these efforts provide further evidence that Ms. Savage-Bey indeed never received the determination by mail. The ALJ's finding that DOES met its burden of proving Ms. Savage-Bey received the determination that it allegedly mailed on September 15, 2008, therefore, is not supported by substantial evidence.

B. OAH Erred in Imposing an Additional Requirement That Ms. Savage-Bey Satisfy the *Frausto* Factors After Crediting Her Testimony Of Nonreceipt.

Instead of recognizing Ms. Savage-Bey's credited testimony as sufficient evidence to burst any mailing presumption that could have arisen from a faulty certificate of service and ending the inquiry there, OAH incorrectly interpreted *Thomas* as imposing additional evidentiary hurdles—the *Frausto* factors—that Ms. Savage-Bey had to satisfy in order to overcome the

mailing presumption. Final Order on Remand at 5-7 (App. A5-7). As an initial matter, *Thomas* does not displace or change *Chatterjee's* holding that OAH should not rely exclusively on a properly executed certificate of service. Indeed, *Thomas* cited *Chatterjee* with approval. *See Thomas*, 961 A.2d at 1065-66. Nor does *Thomas* change the clear trend in this Court's case law addressing the appropriate amount of reliance on certificates of service—less, not more. Since *Thomas*, this Court has cited both cases for the same proposition: that OAH must exercise "caution[] against over-reliance on the so-called presumption of mailing arising from the execution of a certificate of mailing." *Wright-Taylor*, 974 A.2d at 215-16 (citing *Thomas*, 961 A.2d at 1066; *Chatterjee*, 946 A.2d at 356).

After pointing out that the unemployment statute is "remedial in character . . . and . . . must be construed accordingly," this Court in *Thomas* suggested that OAH "explor[e]" the *Frausto* factors—actual notice, good faith, prompt action, adequate defense, and prejudice to the non-moving party—in making a credibility determination. *See Thomas*, 961 A.2d at 1066 (quotations and citation omitted). For example, a claimant's prompt action may show that she is being diligent about her appeal and would not have let the appeal period lapse without filing an appeal. Similarly, a claimant's strong claim on the merits also bolsters the claimant's credibility by tending to show that she would not pass up the opportunity to appeal an adverse claims determination. *Thomas* thus provides OAH with guidance, specifically a set of factors, for purposes of "inform[ing] *whether* . . . a petitioner's *testimony* is sufficient to rebut the presumption that DOES mailed a determination letter on the date certified." *See id.* (emphasis added). But *Thomas*'s applicability ends where, as here, OAH credits a claimant's testimony, fairly calling into question the accuracy of the certificate.

In short, the *Thomas* inquiry duplicates a determination OAH made in a different way; it is not an independent basis for denying relief. OAH erred as a matter of law when it required Ms. Savage-Bey to satisfy those factors when it already credited her testimony that was more than sufficient to overcome a faulty certification of service.

C. Even if Ms. Savage-Bey Were Required to Satisfy the "Prompt Action" Prong of *Frausto*, Ms. Savage-Bey's Unreturned Phone Calls and Prompt Filing of the Appeal After She Received Actual Notice Satisfy Any Such Requirement.

Even assuming that Ms. Savage-Bey were required to satisfy the *Frausto* factor of "prompt action," she did so. OAH used the appeal period as determined by the date on the certificate of service to evaluate whether Ms. Savage-Bey's actions were sufficiently "prompt." OAH determined that Ms. Savage-Bey's "two calls, made more than a month after the appeal period expired, do not constitute prompt action on her application." Final Order on Remand at 7 (App. A7). This was error.

When examining whether actions are sufficiently prompt, the Court has looked at when a party learned of the matter at issue. *See Frausto*, 926 A.2d at 155 (reviewing OAH's order and noting that "[t]he order does not suggest that Frausto failed to act promptly to reopen her case *after she learned of the OAH's order*") (emphasis added); *Brown v. Kone, Inc.*, 841 A.2d 331, 334 (D.C. 2004) (considering whether a party acted promptly from the date the party "discovered . . . that her complaint had been dismissed"); *Venison v. Robinson*, 756 A.2d 906, 911 (D.C. 2000) ("We recognize that the focus of this [prompt action] factor is on the promptness with which the party against whom the default judgment was entered took action to challenge it after learning about it."). And this makes sense: A party cannot take appropriately "prompt" action until that party knows action is necessary.

Here, the date of actual notice was December 5, 2008. Submission with Request for Hearing, Ex. 100 (Facsimile from Laverne Tate to DOES, Dec. 5, 2008) (App. A232). That same day, Ms. Savage-Bey filed her administrative appeal in person with OAH. Request for Hearing at 1 (App. A227). The ALJ credited Ms. Savage-Bey's testimony of nonreceipt of the original determination and her testimony that she received erroneous advice from DOES personnel in the ensuing months. *See* Final Order on Remand at 6 (App. A6).

Prior to her actual notice, the record shows: (1) that Ms. Savage-Bey called and left unreturned messages for both DOES generally and her claims examiner specifically, inquiring about the status of her claim, *see* Tr. I at 14-15 (App. A43-44), Tr. II at 17, 21 (App. A99, 101); (2) that a DOES employee informed her that she *would* receive her determination in the mail after her appeal period had already expired, *see* Final Order on Remand at 4 (App. A4); Tr. I at 14 (App. A23); (3) that, upon reaching a DOES employee who advised her to come to DOES, she immediately did so, spending two days in the DOES office awaiting her determination by fax, *see* Tr. II at 17-19, 21-22 (App. A47-49, 51-52); and (4) that, when the fax finally arrived, she filed her administrative appeal in person with OAH that same day. *See* Tr. II at 14, 18, 21-22 (App. A96, 100, 103-04); Submission with Request for Hearing, Ex. 100 (Facsimile from Laverne Tate to DOES, Dec. 5, 2008) (App. A232); Request for Hearing (App. A227). In short, Ms. Savage-Bey's actions were sufficiently prompt to satisfy OAH's imposition of the additional, and unnecessary, evidentiary burden of the *Frausto* factors.

Moreover, Ms. Savage-Bey's actions should satisfy the "prompt action" prong where DOES provided her with erroneous advice. After Ms. Savage-Bey's appeal period had expired, a DOES staff person told Ms. Savage-Bey over the phone "that she *would* receive something in the mail." Final Order on Remand at 4 (emphasis added) (App. A4); *see* Tr. I at 14 (App. A43).

This Court has repeatedly recognized that a claimant for unemployment benefits is entitled to relief when she has relied on ambiguous or erroneous advice from DOES employees. *See, e.g.*, *Coto v. Citibank FSB*, 912 A.2d 562, 565 (D.C. 2006); *Calhoun v. Wackenhut Servs.*, 904 A.2d 343, 345-47 (D.C. 2006); *McDowell*, 899 A.2d at 768-70 (collecting cases); *Ploufe v. D.C. Dep't of Employment Servs.*, 497 A.2d 464, 465-66 (D.C. 1985). Here, this erroneous advice provided reassurance to Ms. Savage-Bey that she would receive her claims determination in the mail—despite the fact that her appeal period, if determined by the date on the certificate of service, had already expired. *See McDowell*, 899 A.2d at 770 (because DOES's misleading advice had in part caused a claimant to file his appeal more than ten days after the date certified in the certificate of service, OAH was not entitled to invoke untimeliness as a basis for dismissing the claim).

For these reasons, even if Ms. Savage-Bey was required to satisfy the prompt action factor of *Frausto*, her actions to investigate her claim and immediately file an appeal when she learned of the decision satisfied any requirement necessary to rebut the mailing presumption.

III. ON THIS FULL FACTUAL RECORD, EMPLOYER FAILED TO PROVE, AS A MATTER OF LAW, INTENTIONAL "MISCONDUCT," MUCH LESS THE "GROSS MISCONDUCT" USED BY THE CLAIMS EXAMINER TO DENY UNEMPLOYMENT BENEFITS.

The two OAH erroneous decisions on timeliness have resulted in an extreme delay for Ms. Savage-Bey, who has been denied the critical unemployment benefits to which she is entitled for almost three years. Accordingly, if this Court concludes that Ms. Savage-Bey did indeed timely file her administrative appeal, or that she demonstrated excusable neglect even if her filing was untimely, it should also decide this case on the merits now rather than remand the case back to OAH—for a third bite at the apple. This Court is the ultimate authority on the law; it reviews *de novo* the lack of intentionality in misconduct, an issue of law as to which the record

below is complete. *See* Final Order on Remand at 2 (App. A2) ("This administrative court has already heard evidence on both the timeliness issue and the merits of the case."). As such, even if this case were remanded, OAH is extremely unlikely to hold any additional hearings, and would likely decide the legal issue on the existing record, just as this Court could do. In light of the significant prejudice to Ms. Savage-Bey of yet another remand, the full record before this Court, and the substantial evidence as discussed more fully below, that La Petite failed to meet its burden of proof as a matter of law, this Court should reverse the decision of the DOES claim examiner and find that Ms. Savage-Bey is entitled to unemployment compensation.

A. The Employer Failed to Prove, By a Preponderance of the Evidence, That Termination Was for Gross or Simple Misconduct.

A terminated employee is entitled to unemployment compensation benefits unless the termination was for "gross misconduct." D.C. Code § 51-110(b)(1) (2010). An employee terminated for something "other than gross misconduct" is eligible for benefits, but only after eight weeks of eligibility. *Id.* The employer bears the burden of proving, by a preponderance of the evidence, that an employee engaged in simple or gross misconduct. *Hickey v. Bomers*, 2011 D.C. App. LEXIS 558 (D.C. Sept. 29, 2011),* 23; D.C. Code § 51-110 (2011). The regulations define "gross misconduct" as:

> 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 the standards of behavior which an employer has a right to expect of its employee.

7 DCMR § 312.3 (2010). By contrast, "other than gross misconduct," often termed "simple misconduct," is defined as:

> 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. [Simple misconduct] shall include those acts where the severity, degree, or other mitigating circumstances do not support a finding of gross misconduct.

7 DCMR § 312.5 (2010).

Gross misconduct requires the employer to prove that the employee's action was deliberate or willful. *See Doyle v. NAI Personnel, Inc.* 991 A.2d 1181, 1183-84 (D.C. 2010). "Whether an employee was rightly discharged" for misconduct is "an issue 'distinct' from whether the employer has 'a reason to discharge [the employee].'" *Id.* at 1183 *quoted in Bowman-Cook v. Washington Metro. Area Transit Auth.*, 16 A.3d 130, 134 n. 5 (D.C. 2011). As this Court has emphasized earlier this year, "[n]ot every act for which an employee may be dismissed from work will provide a basis for disqualification from unemployment benefits because of 'misconduct'" *Bowman-Cook,* 16 A.3d at 134 n. 5 (citations omitted). The Court examines the "underlying reasons" for the employee's acts, considering the entire record. "When an employee proffers evidence suggesting that such actions were sufficiently excusable to negate willfulness or deliberateness . . . , the burden shifts back to the employer to disprove such evidence." *See Badawi v. Hawk One Sec., Inc.*, 21 A.3d 607, 617 (D.C. 2011). Excluded as a matter of law from the definition of "gross misconduct" are, *inter alia,* "minor violations of employer rules. . . . Absence or tardiness where the number of instances or their proximity in time does not rise to the level of gross misconduct; [and] [i]nappropriate use of profane or abusive language." These simply do not rise to the level of gross misconduct. *See* 7 DCMR § 3.12.6(a),(c),(d) (2010).

With regard to one-day absences in particular, this Court has emphasized that "[t]he fact of absences or tardiness alone cannot suffice as proof of gross misconduct, without consideration of the bases for such absences or tardiness." *Hickey* at *24 (internal quotation and citations omitted). Indeed, "[g]enuine illness that prevents an employee coming to work negates the willfulness and deliberateness of her absenteeism, thereby preventing a finding of gross misconduct." *Id.* Here, there is a single day medical absence of a licensed food handler serving

food to toddlers, compared to the multiple absences of the legal secretary in *Hickey*. But even the multiple absences in *Hickey* were held by this Court to be "simple", not "gross" misconduct. Thus in this case, too, a conclusion of "gross misconduct" (as apparently found by the claims examiner) must be clearly erroneous.

La Petite failed to satisfy its burden of showing that Ms. Savage-Bey was fired for gross misconduct, and the record contains overwhelming evidence that she was not fired for even simple misconduct. The weight of the employer's case appears to ride on the August 8 or July 31, 2008 Professional Conduct Reports. *See* Ex. 200 (App. A235-36). Yet, none of the employer's reasons stated therein establishes the "willfulness" and "deliberateness" required for a showing of "gross misconduct." *Cf. Doyle*, 991 A.2d at 1181 ("to constitute gross misconduct, an employee's misdeeds must be serious indeed, far more egregious than every act that literally might be viewed as, for example, jeopardizing an employer's interests.") (internal citations omitted). Even assuming this Court fully credits Farmer's testimony about the August 8, 2008 absence and the Professional Conduct Report memorializing that incident, Ms. Savage-Bey's refusal to serve food to preschool toddlers when she was significantly ill, Ex. 200 at 1 (App. A235), is commendable and not misconduct in any sense. As to the July 31 2008 Professional Conduct Report about English muffins, loud doors without door guards, and the other items therein (that were not considered serious enough to warrant termination at that time), *id.* at 2 (App. A236), none of those allegations—even if true—constitutes intentional misconduct of any sort either.

The remaining "evidence" that might at all be considered here is even weaker. To the extent that La Petite may have relied in any way on the various 2006 incident reports (that were not even shown to or discussed with the employee at the time they were created), *see* Ex. 204,

205, and 206 (App. A243-245), such reliance is a futile search for proof of intentional misconduct for a termination two years later. In any event, the 2006 Professional Conduct Reports are historical hearsay of dubious authenticity that the ALJ correctly stated could be given "little weight." Tr. II at 96, 102 (App. A178, 184). Such "little weight" was compelled by 7 DCMR § 312.9 (2011) ("In an appeal hearing, the persons who supplied the answers to questionnaires or issued other statements alleging misconduct shall be present and available for questioning by the adverse party."). Perhaps of even more dubious evidentiary value are the various handwritten notes of an employee who did not testify, *see* Ex. 201-203 (App. A237-242), which rightly prompted Ms. Savage-Bey's counsel to object at the hearing. *See* Tr. II at 91-99 (App. A173-181).

Moreover, because this Court reviews in detail the "underlying reasons" for alleged actions that preceded termination, the testimony of Ms. Savage-Bey and Ms. Owens establish that her actions were "sufficiently excusable" and not any kind of misconduct. *Cf. Badawi*, 21 A.3d at 617 (holding that where an employee's actions are "sufficiently excusable" because of the reasons underlying the conduct, a showing of those reasons negates the willfulness and deliberateness required for gross misconduct.). Ms. Savage-Bey's failure to appear at work on August 8, 2008, resulted from her illness, including symptoms of diarrhea which would make it unsafe for her to prepare and serve food to toddlers. Tr. II at 52-53 (App. A134-135). Her alleged "slamming of doors" was the result of the doors not having "door guards." Tr. II at 57 (App. A139) (Savage-Bey's testimony); *id.* at 68 (App. A150) (Owens' testimony). Finally, Ms. Savage-Bey's alleged failure to heat the English muffins occurred because the menu prepared by La Petite's headquarters did not contain any instruction to heat the muffins. *Id.* at 53, 55-56 (App. A135, 137-38) (Savage-Bey's testimony); *id.* at 66-67 (App. A148-49) (Owens'

testimony). None of the testimony offered by Farmer or details in the Professional Conduct Reports rebuts these explanations for Ms. Savage-Bey's actions, and therefore her conduct does not constitute "gross misconduct." *Cf. Badawi*, 21 A.3d at 617 ("when an employee proffers evidence suggesting that such actions were sufficiently excusable to negate willfulness or deliberateness . . . , the burden shifts back to the employer to disprove such evidence.").

Nor was misconduct proven. On this factual record, the ALJ simply has no basis for concluding that petitioner committed misconduct, because "implicit in [the] definition of 'misconduct' is that the employee *intentionally* disregarded the employer's expectations for performance." *Washington Times v. D.C. Dep't of Employment Servs.*, 724 A.2d 1212, 1217-18 (D.C. 1999) (emphasis added) (explaining that "[o]rdinary negligence in disregarding the employer's standards or rules will not suffice as a basis of disqualification for misconduct" (citing *Keep v. District of Columbia Dep't of Emp't Servs.*, 461 A.2d 461, 463 (D.C. 1983))); *see also Chase v. District of Columbia Dep't of Emp't Servs.*, 804 A.2d 1119, 1124 n.12 (D.C. 2002) (fact that the employee's misconduct was intentional "may be required even for a finding of simple misconduct").

B. Because the Record Contains Overwhelming Evidence Dictating a Result as a Matter of Law, This Court May Reverse OAH Without a Second Remand.

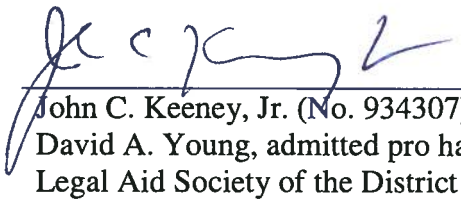
Although this Court will typically remand for missing findings of fact by the ALJ, where, as here, the evidence in the record dictates the result as a matter of law, it has reversed OAH decisions without remanding for its findings on the legal question of misconduct. *See Hickey, *32; Badawi v. Hawk One Sec., Inc.*, 21 A.3d at 617 ("Although we would normally remand on these issues, in this case we reverse because even if the ALJ resolved these issues in Hawk One's favor upon remand, the record would still demonstrate that Hawk One fired Badawi for only simple misconduct") (citing *Odeniran*, 985 A.2d at 425) (finding as a matter of law that claimant

had not committed gross misconduct but remanding to OAH for determination of simple misconduct). As noted, in this case the record contains no evidence that Savage-Bey's actions were willful or deliberate, but instead substantial evidence that her actions were sufficiently excusable so as to not to be misconduct at all. Therefore, this Court could hold as a matter of law that the record establishes that employer failed to prove misconduct and that Ms. Savage-Bey was therefore entitled to the full period of unemployment benefits.

CONCLUSION

For the foregoing reasons, this Court should reverse OAH's final order dismissing Ms. Savage-Bey's administrative appeal, hold as a matter of law that no intentional misconduct was proven on this full and closed factual record, and declare Ms Savage-Bey's full entitlement to her long-delayed 2008-2011 unemployment benefits.

Respectfully submitted,



John C. Keeney, Jr. (No. 934307)
David A. Young, admitted pro hac vice
Legal Aid Society of the District of Columbia
1331 H Street, N.W., Suite 350
Washington, D.C. 20005
(202) 628-1161
Fax (202) 727-2132

Counsel for Petitioner

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, this 17th day of October 2011, to each of the following:

La Petite Academy
c/o TALX
P.O. Box 283
St. Louis, MO 63166

Todd S. Kim, Solicitor General
Office of the Solicitor General
441 4th Street, N.W.
Suite 600 South
Washington, D.C. 20001

John C. Keeney, Jr.