No. 07-AA-297

DISTRICT OF COLUMBIA COURT OF APPEALS

RUTH E. BERKLEY,

Petitioner,

v.

D.C. TRANSIT, INC.,

Respondent.

On Petition for Review from
the Office of Administrative Hearings

BRIEF OF PETITIONER

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

The parties to this case are Ruth Elaine Berkley, the petitioner, and D.C. Transit, Incorporated, the respondent. Ms. Berkley represented herself in the Office of Administrative Hearings. She is represented in this Court by Barbara McDowell and Eric Angel of the Legal Aid Society of the District of Columbia. D.C. Transit did not appear in the proceedings before the Office of Administrative Hearings and has not complied with this Court's order to identify its counsel. No intervenors or amici have appeared in this case.

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1. Whether the Office of Administrative Hearings (OAH) erred in concluding that Ms. Berkley, a pro se claimant for unemployment compensation, left her job with D.C. Transit voluntarily, where OAH failed adequately to warn her about the consequences of her decision to testify in the employer's absence on a dispositive issue on which the employer bore the burden of proof, and where OAH failed to consider whether a substantial reduction in wages renders an employee's decision to leave her job involuntary.

2. Whether OAH erred in concluding that Ms. Berkley lacked good cause to leave her job with D.C. Transit, without taking into account her undisputed testimony that her wages were substantially reduced prior to her departure.

STATEMENT OF THE CASE

Petitioner Ruth E. Berkley sought unemployment compensation from the Department of Employment Services (DOES) after leaving her job with D.C. Transit, Inc., a private transportation company. Ms. Berkley left D.C. Transit after she was denied work for two weeks and was then assigned substantially fewer hours than she previously had worked. After a DOES claims examiner denied her claim for unemployment compensation, Ms. Berkley sought de novo review in the Office of Administrative Hearings (OAH). When D.C. Transit failed to appear, the administrative law judge (ALJ) conducted an ex parte hearing, asking questions of Ms. Berkley, who appeared without counsel, for approximately one hour. OAH subsequently issued a decision in favor of D.C. Transit, holding that Ms. Berkley left her job voluntarily and without good cause, and that she was therefore ineligible for unemployment compensation.

1. Ms. Berkley's Employment Relationship. Ms. Berkley, a mother of adult children who herself had a significant medical condition, sought assistance in obtaining a job through the

Social Security Administration's "Ticket to Work" program.[1] 3/16/07 Tr. 18 [App. A32] (describing that program and Ms. Berkley's medical condition).

On June 19, 2006, with the help of the Ticket to Work program, Ms. Berkley was hired by D.C. Transit, a private transportation company, as a driver's assistant. 3/16/07 Tr. 11 [App. A25]. She accompanied drivers on their routes and recorded relevant information. Id. She enjoyed her job, which supported her financially and helped keep her mind off the loss of one of her children. Id. at 16, 18 [App. A30, A32]. Although her position offered only a modest salary, she was able to work full time and occasionally overtime. Id. at 11-12 [App. A25-26].

In August 2006, D.C. Transit refused to assign Ms. Berkley any work for approximately two weeks. 3/16/07 Tr. 16 [App. A30]. This denial was prompted in part by a disagreement between Ms. Berkley and a dispatcher arising out of a miscommunication in which a passenger was left without a ride. Id. at 15 [App. A29]. D.C. Transit eventually gave Ms. Berkley substantially reduced work hours in early September, but denied her repeated requests for more work. Id. at 16, 20 [App. A30, A34]. As a consequence of that reduction in hours, Ms. Berkley's earnings were significantly reduced. Id. at 21-23 [App. A35-A37]. She was also denied compensation for overtime hours she had worked. Id. at 11 [App. A25].

In early November 2006, D.C. Transit called a staff meeting to discuss employee concerns over reduced work hours and unpaid wages. 3/16/07 Tr. 23 [App. A37]. On approximately the same date, Ms. Berkley overheard Ben Johnson, the principal of D.C. Transit, discussing a new job opportunity in an assisted living facility in Silver Spring, Maryland. Id. Concerned about her substantially reduced earnings at D.C. Transit, Ms. Berkley asked for a job interview with Ms. Bird, the director of the assisted living facility. Id. at 27 [App. A41]. Mr.

[1] "The Ticket to Work and Self-Sufficiency Program is an employment program for people with disabilities who are interested in going to work." See www.yourtickettowork.com/program_info.

Johnson of D.C. Transit arranged the interview and drove Ms. Berkley to Silver Spring. Id. at 27-28 [App. A41-42]. Ms. Berkley was hired for the assisted living position and left D.C. Transit in late November. Id. at 30 [App. A44]. Her final paycheck from D.C. Transit was not honored because the company lacked sufficient funds. Id. at 21 [App. A35].

2. Ms. Berkley Applies for Unemployment Compensation. Shortly after being hired by Ms. Bird, Ms. Berkley, herself recovering from a significant medical condition, was informed that her job requirements would include sole responsibility for three patients at the assisted living facility. 3/16/07 Tr. 30 [App. A44]. In light of this change to the terms of her employment, Ms. Berkley left her new job. Id. She promptly filed an application with DOES for unemployment compensation. A DOES claims examiner concluded that Ms. Berkley's departure from D.C. Transit was "voluntar[y] and without good cause connected with the work," thus disqualifying her from compensation. Determination by Claims Examiner [App. A10]. Ms. Berkley sought de novo review of that decision at OAH. 3/16/07 Tr. 7 [App. A21].

3. The Hearing Before OAH. On March 16, 2007, Ms. Berkley appeared without counsel before OAH Administrative Law Judge John Thomas Rooney. The ALJ noted the absence from the hearing of D.C. Transit, which bore the burdens of production and persuasion on the threshold question of whether Ms. Berkley quit voluntarily. 3/16/07 Tr. 8 [App. A22]. The ALJ advised Ms. Berkley that, "if you do choose to testify, you can meet your burden of explaining if you did, in fact, voluntarily quit work, that you did it for a good reason connected with that work." Id.

Ms. Berkley then answered questions from the ALJ for approximately one hour. During the course of her testimony, Ms. Berkley repeatedly emphasized the significant reduction in her work hours as the reason for her departure from D.C. Transit. For example, in response to the

ALJ's question of why she left D.C. Transit, Ms. Berkley explained that her employer "didn't have no work for me." 3/16/07 Tr. 22 [App. A36]. Ms. Berkley likewise noted that she "didn't get no more work, you know, the way it was going," and that her employer "wasn't trying to give me no hours or nothing." Id. at 26-27 [App. A40-A41]. Concerning the final weeks of her employment with D.C. Transit, Ms. Berkley commented that her employer "didn't have nothing else for me," id. at 28 [App. A42], and "didn't have no work for me," id. at 29 [App. A43].

While attempting to demonstrate the relevance of documentary evidence tending to show that her earnings were reduced in November 2006, Ms. Berkley pointed to "this schedule right here that they gave me with my hours and everything, just when they cut the hours and everything." 3/16/07 Tr. 38 [App. A52]. In addition, Ms. Berkley explained to the ALJ that she had brought "all my pay stubs here for verification and a bounced check," as well as a time sheet showing her assigned hours, offered to prove that she "wasn't making no money." Id. at 23 [App. A37]. The ALJ refused to admit either the pay stubs or the time sheet. Id. at 46 [App. A60]. Ms. Berkley's testimony was not contradicted by anything in the record.

4. OAH's Final Order. On March 23, 2007, one week after the hearing, OAH issued a Final Order denying Ms. Berkley's claim for unemployment compensation. At the outset, the ALJ reasoned that, although D.C. Transit did not participate in the hearing to attempt to satisfy its burden of proving that Ms. Berkley quit voluntarily, testimony from Ms. Berkley, taken alone, was sufficient to satisfy the employer's burden. The ALJ did not expressly explain to Ms. Berkley, an obviously unsophisticated pro se litigant, that she had no obligation to give testimony on the voluntariness issue or that, in the employer's absence, she would prevail on that dispositive issue so long as she did not testify.

The ALJ did not consider at length the possibility that Ms. Berkley's departure from D.C. Transit was involuntary in light of the conditions of her employment. Instead, the ALJ seemed to assume that Ms. Berkley's departure was necessarily voluntary, regardless of how D.C. Transit might have treated her, so long as she "acknowledged" that she had not been terminated. See Final Order 6 [App. A6].

The ALJ then proceeded to hold that Ms. Berkley had not met her own burden of proving that her departure, even if voluntary, was for good cause related to her work. In so holding, the ALJ essentially ignored Ms. Berkley's principal reason for her departure – namely, that D.C. Transit had significantly reduced her work hours and, consequently, her wages during the final months of her employment. See Final Order 6 [App. A6]. The ALJ purported to justify that approach by characterizing Ms. Berkley's testimony as "vague," "confusing," and unsupported by "any relevant documentation relating to * * * whether her income dropped substantially prior to her leaving the job." Id.

Having refused to consider the reason that Ms. Berkley actually gave for leaving D.C. Transit – the reduction in her hours and earnings – the ALJ recharacterized her reason as having been based on "general dissatisfaction" with her work. The ALJ noted that "general dissatisfaction" is excluded as good cause under the applicable regulations and would not justify a "reasonable and prudent person in the job market" to leave a job. Final Order 6 [App. A6].

SUMMARY OF THE ARGUMENT

This case arises out of a pro se claimant's denial of unemployment benefits after she left her job as an unskilled driver's assistant when her employer substantially reduced her wages. OAH's decision in this case turns on several procedural and substantive errors, each of which is independently sufficient to require reversal and remand for further proceedings.

The ALJ identified this case as presenting two related issues regarding Ms. Berkley's entitlement to unemployment benefits: first, whether she left her job involuntarily, as the Unemployment Compensation Act presumes; and second, if she was found to have left her job voluntarily, whether she established that she did so for good cause connected with the work. The ALJ erred in his treatment of both issues.

With respect to the threshold issue whether Ms. Berkley left her job involuntarily – an issue on which the absent employer bore the burden of proof – the ALJ erred in not clearly explaining to Ms. Berkley her rights and options. Because the employer did not appear at the hearing to attempt to meet its burden of proof on the voluntariness issue, Ms. Berkley was entitled to prevail without offering any evidence on that issue. But the ALJ did not explain this vital point in terms that an unsophisticated pro se litigant could be expected to understand. Instead, the ALJ expressly offered Ms. Berkley the option of testifying on the voluntariness issue, an offer an unsophisticated litigant might reasonably understand as a preference by the ALJ that she testify rather than remain silent. Yet, by testifying, Ms. Berkley unknowingly ran the risk of undermining her own case. The ALJ thus denied Ms. Berkley the opportunity to make an informed decision about how to litigate her case.

The ALJ then ruled against Ms. Berkley on the involuntariness question based essentially on her admission that she had not been discharged by her employer. That analysis was substantively incomplete. As this Court has made clear, in cases in which an employer has rendered a claimant's continued employment intolerable, the claimant's choice to depart may appropriately be deemed involuntary. See, e.g., Washington Chapter of American Institute of Architects v. D.C. Department of Employment Services, 594 A.2d 83 (D.C. 1991). It is not

essential, as the ALJ believed, for the claimant to have been fired in order for her departure to be involuntary.

With respect to the question whether, even if Ms. Berkley left her job voluntarily, she did so for good cause, the ALJ disregarded evidence that Ms. Berkley left her job because her employer substantially reduced her wages. This Court has determined that an employer's reduction in an employee's compensation may give the employee good cause to leave. See Cruz v. D.C. Department of Employment Services, 633 A.2d 66 (D.C. 1996). Ms. Berkley's repeated, uncontradicted testimony explained that her departure from D.C. Transit was motivated by a substantial reduction in her total wages. This testimony was more than adequate to require the ALJ to consider the substance of Ms. Berkley's testimony, for this Court has clarified that a claimant for unemployment compensation need merely articulate material issues of fact. Having not offered Ms. Berkley any instruction on what additional evidence it required from her, the ALJ was not entitled to ignore the substance of Ms. Berkley's testimony and to conclude that her departure was motivated by general dissatisfaction. The ALJ's conclusion is therefore unsupported by substantial evidence, and should be reversed.

ARGUMENT

I. OAH ERRED PROCEDURALLY AND SUBSTANTIVELY IN RULING THAT MS. BERKLEY RESIGNED FROM D.C. TRANSIT VOLUNTARILY.

As OAH acknowledged, Ms. Berkley, a claimant for unemployment compensation, was entitled to a presumption that her departure from D.C. Transit was involuntary. See Final Order 4 [App. A4]. The burden of proof on the question lies with the employer, see Green v. D.C. Department of Employment Services, 499 A.2d 870 (D.C. 1985), although in some instances a claimant may satisfy the employer's burden by "acknowledging" that her departure was voluntary. See 7 D.C.M.R § 311.3. Because D.C. Transit failed to appear before OAH, the

burden of proof alone was sufficient to decide this case in Ms. Berkley's favor. Yet, the ALJ failed adequately to caution Ms. Berkley about the allocation of that burden, and then erroneously concluded that her testimony satisfied the employer's burden merely by testifying that she had not been fired by D.C. Transit. See, e.g., Washington Chapter of American Institute of Architects v. D.C. Department of Employment Services, 594 A.2d 83 (D.C. 1991) (quitting in light of "miserable" employment conditions may be deemed involuntary).

A. The ALJ Failed Adequately To Explain To Ms. Berkley The Consequences Of Her Decision To Testify On A Matter On Which The Employer Bore The Burden Of Persuasion.

A claimant seeking unemployment compensation is presumed by law to have left her last job involuntarily and therefore to be eligible to collect compensation. See 7 D.C.M.R § 311.3. As this Court has made clear, the employer in such cases bears both the burden of producing relevant evidence and the burden of persuading the adjudicating agency that the employee's departure was voluntary. Green, 499 A.2d at 873. The placement of these burdens on the employer reflects "substantial policy considerations." Id. at 875. Those include the recognition that the employer is more likely to have access to the evidence relevant to whether a departure is voluntary or involuntary and that the benefits provisions of the Unemployment Compensation Act "should be construed liberally * * * to accomplish the legislative objective of minimizing the economic burden of unemployment." Id. (quoting Thomas v. D.C. Department of Labor, 409 A.2d 164, 170 (D.C. 1979)).

Despite these weighty considerations, OAH has concluded that the testimony of an employee, taken alone, may satisfy the employer's burden of proof on the question of voluntariness, even if the employer is altogether absent from the proceedings before the agency. See, e.g., Final Order 4 [App. A4] ("[T]estimony or documentary evidence offered by the

employee may prove the employer's case"). The regulations, while not addressing the precise situation of the absent employer, similarly provide that the presumption of involuntariness may be rebutted either if "the claimant acknowledges that the leaving was voluntary" or if "the employer presents evidence sufficient to support [such] a finding." 7 D.C.M.R § 311.3.

Whatever the merits of this position, the ALJ in this case failed to ensure that Ms. Berkley, a pro se claimant unschooled in the law, understood the significance of the burden of proof and the potential adverse consequences of her decision to testify. Although the ALJ apparently perceived that he was under no obligation to do so, that perception was erroneous. See McLean v. D.C. Department of Employment Services, 506 A.2d 1135, 1138 n.2 (D.C. 1986) (per curiam) (clarifying agencies' duty to explain to litigants the allocation of the burden of proof); see also Selk v. D.C. Department of Employment Services, 497 A.2d 1056, 1059 (D.C. 1985) (explaining agencies' obligation to inform pro se litigants of their basic procedural rights); Babazadeh v. D.C. Hackers' License Appeal Board, 390 A.2d 1004, 1009 (D.C. 1978) (same).

To be sure, this is not a case in which the ALJ made no effort to explain the law. Cf. Selk, 497 A.2d 1056 (reversing a DOES order because the hearing examiner failed entirely to advise the claimant of her right to cross-examine witnesses). But the explanation offered in this case was inadequate and confusing. The ALJ suggested to Ms. Berkley that it was "initially the Employer's burden to establish that [Ms. Berkley] voluntarily left work," but that if she did choose to testify, she could "meet [her] burden of explaining if [she] did, in fact, voluntarily quit work, that [she] did it for a good reason connected with the work." Final Order 8 [App. A8] (emphasis added). This statement is erroneous. It is the employer's burden always – not merely "initially" – to prove that an employee left her job voluntarily. See Green, 499 A.2d at 874-877. Although evidence proffered by an employee in some cases might help prove that she left her job

voluntarily, that point is quite different from the suggestion that an employee must affirmatively prove that she left her job involuntarily. If the presumption of involuntariness is to have any force, it must mean that an employee need not introduce any evidence in support of her claim that she left her job involuntarily, although she might choose to do so if the employer has already introduced evidence to rebut the presumption. And Ms. Berkley was entitled to clear instructions to that effect, for without such instructions her entitlement to the presumption would be meaningless. Cf. Babazadeh, 390 A.2d at 1008 ("The opportunity to inspect one's file * * * provides an empty right if the charged party is unaware of his right to access.").

Ms. Berkley's pro se status before OAH lends additional weight to these concerns. See McLean, 506 A.2d at 1138 n.2; see also Goodman v. D.C. Rental Housing Commission, 573 A.2d 1293, 1299 (D.C. 1990) (procedural hurdles are disfavored in suits routinely filed by pro se litigants). Indeed, Ms. Berkley could plausibly have understood the ALJ's statement as signaling that she must or should testify on the voluntariness question in order to prevail, or at least that the ALJ, the individual who would rule on her claim for benefits, was expecting her to testify. For example, immediately upon hearing the ALJ's statement, Ms. Berkley stated that "I guess I'm going to go ahead and state my case." 3/16/07 Tr. 17 [App. A31].

Far from cautioning Ms. Berkley about the consequences of that decision, the ALJ went on to suggest that her testimony was necessary to decide the case. 3/16/07 Tr. 18 [App. A32] ("I can't use anything other than what you say today and the documents you admit into the record to form my opinion."). The ALJ explained this assertion by noting that "the Office of Administrative Hearings is an independent agency, and we do not have the record from the DOES in front of us today, okay." Id. Yet, the suggestion that Ms. Berkley was required to supplement evidence introduced before DOES was confusing at best, for the role of OAH in

unemployment compensation cases is to conduct a de novo hearing, rendering the proceedings before DOES irrelevant. See Rodriguez v. Filene's Basement, Inc., 905 A.2d 177, 180 (D.C. 2006). And in any event, in the absence of any evidence presented by the employer, the presumption of involuntariness alone provided adequate grounds to decide this case in Ms. Berkley's favor. See Green, 499 A.2d at 876-877. The ALJ's indication to the contrary denied Ms. Berkley the opportunity to make an informed tactical decision of paramount importance to her claim.

B. The ALJ Mistakenly Assumed That Ms. Berkley's Departure Was Necessarily Voluntary So Long As She Was Not Formally Terminated.

In concluding that Ms. Berkley had herself rebutted the legal presumption that her departure from D.C. Transit was involuntary, the ALJ seized on what he characterized as Ms. Berkley's "acknowledge[ment] that she left her job voluntarily in mid-November, 2006, for a new job." Final Order 4 [App. A4]. The ALJ's analysis was incomplete, for "involuntary" departures are not limited to situations in which the employer terminated the employee. See American Institute of Architects, 594 A.2d at 85 (quitting in light of "miserable" employment conditions may be deemed involuntary); accord, e.g., Thomas, 409 A.2d at 170 (quitting under threat of termination may be deemed involuntary). Indeed, this Court has rebuffed precisely the analytical shorthand applied in this case, making clear that the agency may not "shortcut its obligation to apply the appropriate regulations and find reliable, probative, and substantial evidence of voluntariness before turning to the good cause issue." Thomas, 409 A.2d at 174. Termination is not a prerequisite to a finding that a departure was involuntary, and the application of such a rule in this case was incorrect.

This Court's previous discussions of the question of voluntariness illuminate the ALJ's error in this case. In Green, for example, the claimant and the employer presented competing

narratives describing the claimant's final days of employment. The claimant insisted that he quit his job because he was about to be fired, so that his departure was appropriately deemed involuntary. See Thomas, 409 A.2d at 170. The employer, however, maintained that Green was cautioned against quitting and advised that he would not necessarily be fired. See Green, 499 A.2d at 872. The Court concluded, as it had in Thomas, that the question of whether an employee's departure is voluntary is subtler than the question of whether an employee was terminated from the job. Moreover, because the burden of proof on the question rests with the employer, an agency confronted with the equally plausible claims of an employer and a claimant is not entitled to hold for the employer. See Green, 499 A.2d at 877 (employer must prove its case by a "fair preponderance of the evidence").

In fact, the Court has gone still farther. In American Institute of Architects, the Court extended the holdings of Green and Thomas to a case involving an employee who was told not to "quit or be fired," but, in effect, to "quit or stay and be miserable." 594 A.2d at 87. The employee was encouraged to sign a letter of resignation drafted by her employer, and was presented with a letter of reference and an offer to help her find other employment. Id. at 84-85. Building on its decisions in Green and Thomas, the Court acknowledged that an employee's allegations of intolerable employment conditions, such as an assertion that the employee was told she was not welcome and was encouraged to find other work, could be sufficient in some circumstances to support a claim that her departure was involuntary.

These cases preclude the ALJ's assumption that, because D.C. Transit did not explicitly fire Ms. Berkley, she necessarily left D.C. Transit voluntarily. The record contained evidence that D.C. Transit gave Ms. Berkley the sort of option to "quit or stay and be miserable" that would call into question the voluntariness of her departure. Among other things, D.C. Transit

denied Ms. Berkley any work for some two weeks, and subsequently cut back substantially on her previous work hours, thereby reducing her wages. She, together with other employees, was given cause for concern that her hours and wages would remain significantly reduced. And, in Ms. Berkley's case, D.C. Transit's principal went so far as to encourage her to apply for an outside job and even drove her to her interview. These allegations were more than sufficient to require OAH, at a minimum, to engage in a more careful analysis of the voluntariness question. This is particularly so given that the employer failed to present any evidence to OAH. Accordingly, the case should be remanded so that OAH can make adequate findings of fact, properly allocate the burden of proof, and reach a sound conclusion on the question of voluntariness.

II. MS. BERKLEY HAD GOOD CAUSE TO LEAVE HER JOB WITH D.C. TRANSIT.

In an ordinary "voluntary quit" case, a claimant is eligible for unemployment compensation if her departure was "for good cause connected with the work." D.C. Code § 51-110(a). This Court has recognized that one good cause for leaving a job is the employer's reduction in the claimant's compensation. See Cruz v. D.C. Department of Employment Services, 633 A.2d 66, 69 (D.C. 1996); see also Selk, 497 A.2d at 1059; Kramer v. D.C. Department of Employment Services, 447 A.2d 28 (D.C. 1982). Although Ms. Berkley articulated that reason for her departure from D.C. Transit, the ALJ essentially ignored it.

A. A Substantial Reduction In Wages Gives An Employee Good Cause To Leave Her Employment.

This Court, like a number of other courts, has recognized that a claimant has good cause to leave a job if the employer has significantly reduced the claimant's wages or hours, or put the

claimant on reasonable fear of such a reduction. Such situations may arise when the employer has suffered economic reverses to its business.

1. In Cruz, for example, the claimant maintained that he had left his job because the employer was "experiencing severe financial difficulties," some employees (although not the claimant himself) had already been "furloughed," and the claimant believed in light of the employer's economic situation that "his own continued employment was in jeopardy." 633 A.2d at 68. This Court remanded the case for further proceedings because the hearing officer had failed to address the claimant's position that he left the job principally because of concerns about his employer's economic stability and the continued viability of his job. Id. at 71. The Court indicated that, if the claimant had, in fact, left his job "at least in part because [the employer's] financial instability seriously threatened his job security," the claimant might well be able to demonstrate that his departure was for good cause related to his work. The issue would turn on whether the claimant's concerns were objectively reasonable -- "real, not imaginary, substantial, not trivial, and reasonable, not whimsical." Id. at 72.

Somewhat similarly, in Kramer, the claimant alleged that he quit his job after the employer required him to work overtime, but refused to pay him for it. 447 A.2d at 30. This Court held that, in such circumstances, the claimant's voluntary quit was the action of a reasonable and prudent person, and thus was for good cause related to the work. Id. As Kramer confirms, a claimant is not without a remedy under the Unemployment Compensation Act when an employer, while not discharging the employee, significantly reduces the compensation that had been promised him.

2. The regulations implementing the Unemployment Compensation Act reinforce the conclusion that a claimant may have good cause to resign if the employer has significantly

reduced his wages. The regulation offers seven circumstances that do not amount to such good cause, one of which is a "[m]inor reduction in wages." 7 D.C.M.R § 311.6(b). Because this regulation excludes solely and specifically those claimants who resign their job because of a minor reduction in wages, well accepted canons of interpretation compel the inference that claimants who resign their jobs because of a substantial reduction in wages remain eligible for compensation. This Court has often recognized that "[w]hen a legislature makes express mention of one thing, the exclusion of others is implied." McCray v. McGee, 504 A.2d 1128, 1130 (D.C. 1986); accord, e.g., Ethyl Corp. v. Environmental Protection Agency, 51 F.3d 1053, 1061 (D.C. Cir. 1995).

If the District of Columbia had intended to disqualify employees who left their jobs because their wages had been substantially reduced, it was perfectly capable of doing so in clear and specific fashion. It did not. The precise language of § 311.6(b) is powerful evidence of the government's intent to include workers who experience substantial wage reductions within the ranks of those eligible to draw unemployment compensation.

3. It has long been recognized outside the District of Columbia that "a substantial reduction in earnings is generally regarded as good cause for leaving employment." Bunny's Waffle Shop, Inc. v. California Employment Commission, 24 Cal. 2d. 735, 743 (Cal. 1944) (Traynor, J.); see, e.g., Johns-Manville Products Corp. v. Board of Review, Division of Labor and Industry, 300 A.2d 572, 574 (N.J. Super. Ct. App. Div. 1973) (noting that the California Supreme Court's decision in Bunny's Waffle Shop is "in accord with the weight of reasoned authority"); Armco Steel Corp. v. Labor & Industrial Relations Commission, 553 S.W.2d 506, 508 (Mo. App. App. 1977) (the California Supreme Court's decision in Bunny's Waffle Shop is "the accepted rule"); Robertson v. Brown, 139 So.2d 226, 229 (La. Ct. App. 1962) (describing a

reduction in salary as good cause for quitting as the "general rule prevailing in most jurisdictions").

As other jurisdictions have explained, a regime in which employers could substantially reduce employees' wages instead of having to terminate them would produce intolerable incentives. The employer could abdicate all financial obligations to an employee simply by substantially reducing his earnings, "thereby at one and the same time compelling his resignation and rendering him ineligible for the benefits provided for in the act." Manias v. Director of the Division of Employment Security, 445 N.E.2d 1068, 1069 (Mass. 1983) (citing Robertson, 139 So. 2d at 229); accord, e.g., Brewster v. Rutledge, 342 S.E. 2d 232 (W. Va. 1986) (employee has good cause to quit after employer simultaneously reduces his wages and increases his job responsibilities); Tate v. Mississippi Employment Security Commission, 407 So. 2d 109, 111 (Miss. 1981) (claimant "was required to quit her employment under those circumstances as surely as if she had been terminated by her employer because of economic conditions"); Couch v. N.C. Employment Security Commission., 366 S.E.2d 554 (N.C. Ct. App. 1988), aff'd, 323 N.C. 472 (N.C. 1988) (per curiam) (employee has good cause to quit after employer reduces her wages below an "economically feasible" threshold).

B. The ALJ Erred In Not Focusing On Ms. Berkley's Testimony That She Left Her Job Because Of A Substantial Reduction In Wages.

The ALJ in this case concluded that Ms. Berkley lacked good cause to leave her job, relying on the assumption that her departure was motivated by "general dissatisfaction." See Final Order 6 [App. A6]. That conclusion misses the import of Ms. Berkley's testimony – that she departed D.C. Transit due to the substantial reduction in her work hours, and thus her wages, as well as D.C. Transit's failure to pay overtime that she had accrued. See, e.g., 3/16/07 Tr. 22 [App. A36] (Mr. Johnson "won't giving me no work, and then these bounced checks and stuff, I

couldn't keep on"); id. at 23 [App. A37] ("[P]eople weren't getting paid when they're supposed to be getting paid, and then, you know, like I said, I have all my pay stubs here for verification and a bounced check I have with me"); id. at 26-29 [App. A40-A41] ("I didn't get no more work, you know, the way it was going"); see id. at 11 [App. A25] ("[O]ne of my claims in here is for – I didn't get paid for my over hours").

To affirm the Final Order in this case, this Court must conclude that "(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." Rodriguez, 905 A.2d at 181. An agency's findings are not supported by substantial evidence if the agency ignored testimony bearing on a critical fact in the case. See, e.g., Morall v. Drug Enforcement Agency, 412 F.3d 165 (D.C. Cir. 2005) (vacating an order because it did not indicate that the agency considered the petitioner's testimony); Robinson v. National Transportation Safety Board, 28 F.3d 210, 216 (D.C. Cir. 1994) (remanding an order because it failed to mention a witness's testimony, "much less explain how the [agency] evaluated it"). Nor may an agency lawfully issue an order without considering evidence that is contradictory or "from which conflicting inferences could be drawn." Universal Camera Corp. v. National Labor Relations Board, 340 U.S. 474, 487 (1951); accord, e.g., Lakeland Bus Lines, Inc. v. National Labor Relations Board, 347 F.3d 955 (D.C. Cir. 2003). Indeed, an order must be set aside when the record before this Court "clearly precludes the [agency's] decision from being justified by a fair estimate of the worth of the testimony of witnesses." Universal Camera, 340 U.S. at 490; Detroit Newspaper Agency v. National Labor Relations Board, 435 F.3d 302 (D.C. Cir. 2006). The Final Order in this case falls far short of this standard.

OAH erred in disregarding Ms. Berkley's uncontroverted and consistent testimony that she left her job because her employer was not providing her with enough hours of work. Throughout the course of her testimony, Ms. Berkley repeatedly explained that her departure from D.C. Transit was motivated by the substantial reduction in her hours and wages. For example, in response to the ALJ's question of why she left D.C. Transit, Ms. Berkley explained that her employer "didn't have no work for me," 3/16/07 Tr. 22 [App. A36]; that she "didn't get no more work, you know, the way it was going," id. at 26 [App. A40]; and that D.C. Transit "wasn't trying to give [her] no hours or nothing," id. at 27 [App. A41]. Later in the proceeding, Ms. Berkley reiterated that D.C. Transit "didn't have nothing else for me," id. at 28 [App. A42], "didn't have no work for me," id. at 29 [App. A43], and "didn't have no money to give us," id. To substantiate that testimony, Ms. Berkley attempted to introduce an employment schedule indicating "just when they cut the hours and everything," id. at 38 [App. A52], as well as pay stubs and a bounced paycheck offered to prove that she "wasn't making [any] money," id. at 23 [App. A37].

Despite this consistent, uncontroverted testimony, the ALJ disregarded Ms. Berkley's testimony about the reduction in her hours and earnings as "vague" and "confusing." Final Order 6 [App. A6]. This is hardly a "fair estimate of the worth" of Ms. Berkley's testimony. Universal Camera, 340 U.S. at 490. To be sure, Ms. Berkley, appearing without assistance of counsel, did not precisely quantify her reduced hours and wages. But this should not have been treated as fatal by an agency designed in large measure to adjudicate claims brought under remedial statutes (such as the Unemployment Compensation Act) that rely "largely on lay persons, operating without legal assistance, to initiate and litigate administrative and judicial proceedings." Goodman v. D.C. Rental Housing Commission, 573 A.2d 1293, 1299 (D.C.

1990). The ALJ was not entitled to compel a pro se litigant to guess at her peril at what additional evidence she may have needed to provide. If the ALJ was concerned that Ms. Berkley had omitted some critical information, the appropriate remedy was not to reject her claim, but to "lend prudent assistance in the ascertainment of the facts." Kartsonis v. District Unemployment Compensation Board, 289 A.2d 370, 371 n.2 (D.C. 1972).

In any event, there was nothing intolerably vague about Ms. Berkley's explanation of the reduction in her work hours. This Court has recognized that claimants of unemployment compensation need merely to "articulate material issues of fact," because it would be "unreasonable, under such a statutory scheme, to set too high a threshold." Cruz, 633 A.2d at 72 n.9. Ms. Berkley satisfied this standard. At minimum, Ms. Berkley testified that D.C. Transit had so reduced her working hours that she could no longer afford to work there. See, e.g., 3/16/07 Tr. at 22-23 [App. A36-A37]; id. at 26-27 [App. A40-A41]; id. at 29 [App. A43].

The ALJ was not entitled to conclude on this record that Ms. Berkley's concerns about her reduction in earnings were "imaginary," "trivial," and "whimsical," as distinguished from "real," "substantial," and "reasonable." Cruz, 633 A.2d at 71. Indeed, in contrast to the claimant in Cruz, Ms. Berkley testified not merely that she feared that her wages would soon be reduced because of her employer's economic situation, but that her wages had already been reduced. 3/16/07 Tr. 16 [App. A30] ("I got my pay stubs that can verify the situation"); id. at 23 [App. A37] ("I have all my pay stubs here for verification and a bounced check I have with me, and this time sheet, which you can see the hours and things that was given to me, and I wasn't making no money"). Ms. Berkley made clear that the amount of the reduction was substantial. She testified, for example, that the employer had begun paying her for only four hours a day, rather than the eight hours (and occasional overtime) that she had received earlier. Id. at 29

[App. A43]. She attributed the reduction in her hours and wages – and those of other employees as well – to her perception that D.C. Transit's "business was going down" and that the company had "no more work for us." Id. at 20 [App. A34]. In fact, Ms. Berkley's testimony that the principal of D.C. Transit himself helped her find other employment suggests that D.C. Transit did not expect that it would soon be able to restore Ms. Berkley to her previous level of employment.

D.C. Transit, having not participated in the hearing, did not provide any evidence to contradict Ms. Berkley's testimony. At a minimum, Ms. Berkley's uncontested allegations raise material issues of fact that the ALJ was not entitled to ignore. Having done so, its Final Order is not supported by substantial evidence, and must be reversed.

CONCLUSION

The Office of Administrative Hearings' Final Order should be reversed and this case remanded for additional proceedings.

Respectfully submitted.

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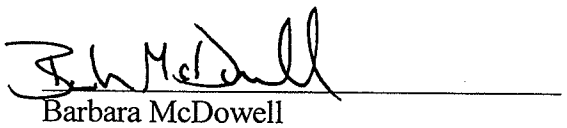
CERTIFICATE OF SERVICE

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 21st day of November 2007, to:

D.C. Transit, Inc.
Attention: Human Resources
1405 Kearney Street NE
Washington, DC 20017



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