90287-9

No: 69807-9-I

SUPREME COURT OF THE STATE OF WASHINGTON

JEFF KIRBY and PUGET SOUND SECURITY PATROL, INC.

Petitioners,

v.

STATE OF WASHINGTON DEPARTMENT OF EMPLOYMENT SECURITY,

Respondent.

AMENDED PETITION FOR REVIEW

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I. Identity of Petitioners

Puget Sound Security Patrol, Inc. is the interested employer in this unemployment benefits claim. Mr. Kirby is its sole stockholder.

II. Court of Appeals Decision

The Court of Appeals issued a published decision No. 69807-9-I on March 20, 2014, and it rejected reconsideration on April 7, 2014. Petitioners seek review.

III. Issues Presented for Review

1. Under RCW § 50.04.294(2)(a), does the court of appeals properly find for the first time that a security company's four instructions to its employee to write a report were unreasonable when:
   - the instruction was found to be reasonable from the employer's perspective,
   - the job of a security guard is to observe and report,
   - security guards' state license requires training on report writing,
   - the employer had a business need for the written report and an absent business record of it ever being made, yet
   - there may have been better ways of accomplishing the task?
2. When an employee is fired for insubordination and the employer proves the instruction was reasonable from its perspective, must the employer additionally prove either that the instruction was objectively the best way to pursue its interest or reasonable from the perspective of the employee, or should we follow the common law and require the employee to prove justification for refusing the employer's direction?
3. Given that an employee refuses a reasonable, work-related instruction from her employer and that her subjective intent to harm the employer is irrelevant to proving insubordination, must the employer prove something

extra, such as whether the employee was aware of how rejecting the employer's instruction specifically harms the employer?

4. Because insubordination is in the same sub-section of RCW § 50.04.294 as other statutory examples of willful and wanton behavior, does the published decision change the law of misconduct to require proof that the employee knew how she was hurting the employer's interests on those other grounds?
5. If an employee thinks providing truthful information to her employer would get her fired, does she act in good faith by repeatedly refusing her employer's demands to provide the information?

IV. Statement of the Case

A. By not finding insubordination, the decision changes Washington law.

Security guard Dorothy Thomas alleged serious security concerns and criminal behavior by her client. When she was not satisfied with the results of apparently following company policy, she took matters into her own hands. She violated company policy by using impermissible channels of communication with the client. Next, the client blindsided her employer's upper management about the allegations.

Thomas knew the importance of report writing in the security industry. Security guards cannot get their license without training on its importance. *See* WAC 308-18-300, 305. Thomas's employer asked her to write down what happened and what she orally told the client. Thomas did not ask for clarity or say that it was impossible. *See* CR 103. She shot back that she already wrote what happened. Management repeated the order to write a report and to come to headquarters in two days to discuss it. Slip Opinion at 6 ¶12. That phone call was on June 8th.

On June 9th, Thomas made no attempt to review or copy logs or incident reports, and she made no attempt to get clarity from the employer; instead she signaled an intention to have a migraine headache on the 10th. *See* CR 278 (FF 16).

On June 10th, Thomas came to headquarters (45 minutes late and without a headache) expecting to change the employer's mind about writing a report. She intended to make management reconsider forcing her to write it.

When Thomas came without the report, a human resources assistant told Thomas again to write it. Thomas refused this second time and stated her motivation. The evidence on Thomas's motivation is overwhelming, unmistakable, and a finding of fact: Thomas withheld information because she thought providing it would be used as proof that she should be fired.

Next, the CEO introduced himself to Thomas, explained the situation, and asked her to write a report. Slip Opinion ¶14. The CEO told her that he needed an incident report so the company could investigate. *Id.*; CR 127. She refused a third time. Slip Opinion at ¶14. The CEO repeated his instruction. She refused a fourth time. *Id.* She was sent home with pay and told to return in a few days for her disciplinary hearing. She came to the disciplinary hearing a few days later still without a written report. *Id.* at ¶15; CR 122. She was given an opportunity to explain or justify her refusal to write the report. CR 85. She remained silent. *Id.* The employer finally terminated her for insubordination. *Id.* This was the eighth day since the first time she was asked to write it. *Id.* Thomas refused four orders from three levels of management on two different days to write one report. She was fired for insubordination.

The appellate court held in a published decision that her refusal was more appropriately characterized as a good faith error in judgment and that the employer's instructions were not reasonable. It denied reconsideration.

If unchanged, the intermediate appellate decision will be cited as holding or supporting four things contrary to Washington law: (1) an employer fails to prove its instruction is reasonable, even if the order was reasonable from its perspective at the time and furthers a legitimate business interest, unless it also proves either there were no better ways of accomplishing the task or it was also reasonable from the employee's perspective; (2) although the statute says that purposeful insubordination is an example of willful or wanton disregard of an employer's interest and intent to harm is not necessary, an employer must nevertheless prove that the employee knew something extra about how her failure to follow the employer's instructions specifically harms the employer; (3) because insubordination is in the same sub-section as other examples of willful and wanton behavior, the published decision also changes the law of misconduct to require this extra knowledge on those grounds; and (4) that an employee acts in good faith when she violates her duty of loyalty by purposefully refusing to provide information that she thinks is proof that she should be fired.

B. The appellate decision accidentally made a new finding that the employer's instruction was unreasonable.

In the beginning, the Employment Security Department denied benefits because the claimant was insubordinate. Slip Opinion at 9 ¶17. The claimant appealed, and an administrative law judge found for the claimant. *Id.* at ¶18. The Employment Security Commissioner remanded the matter for a *de novo* hearing to decide specifically "whether the employer's instruction to claimant to" write an incident report "was reasonable." *Id.* at ¶19. A new hearing was held. *Id.* at ¶20. Following that second hearing, the ALJ found that the instruction was reasonable from the perspective of the employer, unreasonable from the perspective of the employee, and made no express finding on its objective reasonableness. CR 274-283 (Initial Order).

The job of a security guard is to observe and report. Incident reports go to the employer's headquarters. Because headquarters had no incident report and had reason to think one never existed, it reasonably instructed Thomas to produce an incident report. The instruction was to produce one; she was not instructed that she could not copy or rely upon a previously written report or logs and she did not ask for them. In response to this instruction, Thomas did not ask for clarification; she said she would do it, but later refused to follow through.

Thomas denied being asked to write it before coming to the office. CR 155. The tribunal rejected Thomas's testimony and found that she was first asked to write the report by phone on June 8th, then again in person on June 10th. *See* CR 278 (FF 15), 280 (FF 22); Slip Opinion at 6 ¶12.

The department argued, and the Court of Appeals found, "The ALJ found the Employer's request to write an incident report was not reasonable in light of the information known to Ms. Thomas and Ms. Thomas's actions were not a willful disregard of her Employer's interests." Resp. Brief at 8. The department cited four sources: CR 278; FF 16; CL 8, 9." CR 278 is the page of the Initial Order that includes FF 16, so those two are actually the same source. The other two citations were also in the Initial Order. Neither the Initial Order generally, nor the referenced finding and conclusions specifically, explicitly state that the order was unreasonable. The citation was improper and erroneously adopted by the decision.

The department also wrote a section heading called "Substantial Evidence Supports the Commissioner's Finding that the Employer's Request Was Not Reasonable," *id.* at 23, and the published appellate decision echoed that "the commissioner found that the employer's instructions were not reasonable." Slip Opinion at ¶1. The appellate court affirmed because those "findings were supported by substantial evidence[.]" *Id.* However, there was no such finding. The

error was brought to the appellate court's attention on reconsideration, but reconsideration was denied.

C. The employer's instruction was reasonable and work-related.

Thomas says she documented incident reports, yet she also admitted to speaking with the client's 800 number. *See* Slip Opinion at 5; CR 277-78 (FF 13-14); CR 98; *cf.* FF 9 (implying, but not finding, specific incident report was written). This number was a hotline for the client's employees, not security guards. CR 109-10, 185. Post orders for guards had six contact points; none were the 800 number. CR 110-11. Thomas was not authorized to make this kind of client contact. CR 277 FF 13); CR 98. She even told the client's 800 number operator that she feared being fired for making the call. FF 10. The employer's rule prohibiting this contact ensures that headquarters knows about incidents and has control over when and how information is passed to the client and to whom that information is conveyed. It also allows the security company to come up with solutions to real problems and screen out unsubstantiated complaints. The client had complained that Thomas kept bringing unsubstantiated complaints. FF 14; CR 124-26.

Thomas testified that she wrote a specific incident report, and saw her supervisor fax it to operations manager Squire at her employer headquarters. CR 152. ("I'm sure of it. Yeah.") However, the ALJ rejected Thomas's testimony and adopted the employer's testimony as credible that Squire did not have these incident reports. CR 278 (FOF 16); *see also* CR 95-96. The absence of a business record was reason to think the report was never written. The employer's instruction to produce an incident report, whether by getting or relying on old ones or by writing a new one, on two days' notice was reasonable.

Regardless of what Thomas put in the logs (which do not go to the employer's headquarters), regardless of what she may or may not have put in the incident

reports, the employer also needed to know what Thomas said to the client through the 800 number. *See* CR 125. Thomas was sharing information orally with someone at the client's 800 number, CR 125, who apparently told her that she could not be fired for calling. CR 142. "Rather than keeping that information confidential," the CEO testified, Thomas shared that information with other security officers and temporary employees who "blindsided" client management. CR 125.

The incident Thomas was asked to write about was her phone call to the client's corporate headquarters. CR 104. Although Thomas admits to making the call, she refused to document what she said. The employer needed to know both what Thomas observed on the jobsite and what she orally told the client. In the absence of the incident report being on file at headquarters, the best way to get that information was to ask Thomas for it. The daily logs kept by the client are saved for what may be as little as thirty days. CR 94. So, there might not be logs to rely on. These facts support the finding of fact that the instruction was reasonable from the employer's perspective.

D. The Information Gap

The ALJ found an information gap between what Thomas knew and what the employer knew, and found "Thomas's failure to give more of an explanation" was an error in judgment. The ALJ wrote these as conclusions of law, not findings of fact. The employer challenged these conclusions. Opening Brief pg. 27. The appellate court adopted these as findings without scrutiny, and found the information gap implicitly material and not Thomas's fault.

The parties' version of the events is irreconcilable. For instance, "Thomas was expecting that she would be meeting first with Squire about the report but never had the opportunity to do so before being asked to write it." Slip Opinion pg. 7 ¶13; CR 280 (FF 22 Thomas "expected and wanted to talk further with

Mr. Squire"). The confusion in the record is because Thomas both admitted to Squire asking her to write the report directly, yet insisted that this was in person at the meeting. CR 147-48. However, elsewhere she testified that Squire would not come out and talk to her before requiring her to write the report. CR 159. Yet, the tribunal found the employer's three witnesses more credible. *See* CR 280 (FF22). Squire was not present on June 10th, so Thomas's testimony could not be accurate. The tribunal found and appellate court correctly wrote that Thomas was first asked to write it on June 8th. She didn't do it.

E. Thomas refused to write the report because she thought it would get her fired.

The tribunal found as fact that Thomas would not write it because it would be used against her. CR 279 (FF 21); *see also* Slip Opinion 7 ¶13; CR 149. She thought admitting what she said would be admitting violating company policy, so she thought refusing the order was safer. *See* CR 278-79; FF 16, 21. This is the same reason she put in her ESD discharge questionnaire. In answer to the question about why she was fired, Thomas handwrote: "I guess not filling out an incident report upon request," and "After all I had been through I was scared it was going to be used against me." CR 223. Because, as she says, she has already written incident reports, "the only thing they could use it for would be something to fire me with." CR 149.

V. Argument Why Review Should Be Accepted

This Court should accept review consistent with RAP 13.4(b) because the opinion is in conflict with a decision of the Supreme Court and another Court of Appeals, and involves an issue of substantial public interest.

A. Employees fired for insubordination do not get unemployment benefits.

If an employee is fired for insubordination, the employee does not get unemployment benefits. *See* RCW 50.20.066 (1) (disqualified from benefits if discharged for misconduct); RCW 50.04.294(2)(a) (insubordination is misconduct). This Court reviews *de novo* any errors of law and applications of the wrong legal standard. *Henson v. Employment Sec. Dep't*, 113 Wn.2d 374, 377, 779 P.2d 715 (1989).

B. This Court should articulate the test for when an employer's instruction at work reasonable.

The appellate court unknowingly made a new finding or conclusion that the employer's instruction was not reasonable. It erroneously stated that the lower tribunal found the instruction was unreasonable, and it affirmed because there was substantial evidence to support the finding. Unfortunately, this error was not corrected on reconsideration.

The decision will be cited in the future as creating a new standard for when the record supports a finding that the employer's instruction was unreasonable. Not only will that standard be impractical for employers to ever prove insubordination, it is also in in tension with the department's own view on when an employer's instruction is reasonable.

The department has held in a significant decision, "It is common knowledge that an employer has a broad prerogative to assign its workers as it sees fit, excepting of course assignments which may be unlawful, or injurious to the health, safety or morals of the employees." *In re Leroy v. Harvey,* Empl. Sec. Comm'r Dec.2d 601, 1980 WL 344279 (WA) (1980) (discussing insubordination).

The department's view makes common sense and is supported by common law. The common law requires an agent to comply with all lawful instructions. Restatement (Third) of Agency, § 8.09. An agent also has the duty to refrain from conduct likely to damage the principal's enterprise. Restatement (Third) of Agency, § 8.10. One specific duty is to provide information, especially when asked for it. *See* Restatement (Third) of Agency, § 8.11.

The appellate court's published decision, however, creates a new test. All of the reasons the court provides are from the employee's perspective of why the task was hard, not from the employer's perspective about why it needed to ask her to perform a task that was hard. Slip Opinion at 17 ¶¶27, 30. The appellate court wrote that Thomas was being asked to write an incident report a second time and without access to her prior writings. Slip Opinion at ¶30. However, the employer had a business reason to ask it of her. The employer did not have her prior incident reports, CR 278 (FOF 16); *see also* CR 95-96, and believed the reports did not exist. The only way the employer assumed it could get the information was to ask her for it. The court wrote that she was being asked to write it before meeting with Squire. Slip Opinion at ¶30. This finding should not make a difference. If the employer wants her report in writing instead of orally and has a legitimate business interest to ask for it in that form, then the employee is reasonably required to provide it in that form. The implicit test as will be gleaned from the published decision is employee-centric and invites litigation. Prospectively, employees may use the opinion as a playbook that discourages employee productivity and requires an employer to prove they have designed an unimpeachable business plan if they want to fire an employee for insubordination.

This Court should articulate a test that reflects an employer's prerogative. The test cannot and should not be failed if an employee simply feels there is a better way to accomplish the task and an ALJ feels the employer didn't prove it

instructed the employee in the best way. The test must reflect that managers are accountable to the organization for their direction and control of employees, and that employers are accountable to shareholders, regulators, and the courts when they lack control.

In the context of termination for violating a workplace rule, a department regulation provides that a "company rule is reasonable if it is related to your job duties, is a normal business requirement or practice for your occupation or industry ...." WAC 192-150-210(4). In the context of a specific instruction to a particular employee, the law should be similarly framed: an employer's instruction to an employee is reasonable if it is related to a legitimate business need and is not in violation of a collective bargaining agreement or other law. This Court should articulate a legal standard for the parties to understand and the department to apply.

C. The decision derogates the agent's burden of proving justification.

The employer argued that the tribunal applied the wrong legal burdens of proof. The Restatement (Second) of Agency § 381 (1958) imposes the general duty to use "reasonable efforts to give his principal information which is relevant to affairs entrusted to him", which "the principal would desire to have." *See Cogan v. Kidder*, 97 Wn.2d 658, 663 (1982). In this case, the employer specifically asked for the information, so the duty is more specific.

Under the common law, an agent bears the burden of proving that his or her refusal to follow the instructions of the principal is justified. One authority states the black-letter law:

> Insofar as the agent is invested with discretionary powers the agent is required to act only according to the best of his or her judgment for the interest of the principal, and in the absence of negligence or bad faith the agent will not be liable. **However, if the instructions are direct and positive, the agent has no discretion, and the agent's motives in departing therefrom are not material.** It will

> not affect the agent's liability that the agent departed from instructions in good faith for what the agent's [sic] believed to be the advantage of the principal.

(3 C.J.S. Agency 551, § 272 (emphasis added) (footnotes omitted)). "Generally, an agent is required to adhere faithfully to the instructions of the principal, regardless of the agent's own opinion as to the propriety or expediency thereof." (3 C.J.S. Agency 550-51§ 272) (citing, *inter alia*, *Cultum v. Heritage House Realtors, Inc.*, 103 Wn.2d 623, 632 (1985)). The tribunal and appellate court erred by creating an employee-centric test and by not requiring Thomas to prove her refusal was justified.

D. Insubordination is an example of misconduct that does not require proof of extra awareness of harming the employer's interest.

The published decision holds that the employer must prove, not only purposeful insubordination, but also proof that the employee was aware that she was disregarding the employer's rights. Slip Opinion at 18 ¶27 (official reporter headnote 7). Implicitly, telling the employee to do an act is insufficient to put the employee on notice that the action is in the employer's interest. It is illogical for the law to require proof that the employee knew how the employer was being harmed when proof of an employee's intent to harm the employer is not required. This extra requirement of proof that the employee knew how the employer was being harmed (in addition to refusing a reasonable order) is new law, and contrary to the statute and public policy.

Conduct that disqualifies one from unemployment benefits is "misconduct" defined by RCW 50.04.294 (copy of which is at Appendix C). Sub-section one defines it to include, "Wilful or wanton disregard of the rights, title, and interests of the employer or fellow employees." RCW 50.04.294(1)(a). Sub-section two lists examples of conduct that meets the "willful or wanton" definition. "Insubordination showing a deliberate, willful, or purposeful refusal to follow the

reasonable directions or instructions of the employer" is one example. RCW 50.04.294(2)(a). Even the department agrees that insubordination constitutes a statutory example of behavior that constitutes willful or wanton disregard of the rights and interests of the employer. Resp. Brief at 14.

It should also be noted, "Deliberate violations or disregard of standards of behavior which the employer has the right to expect of an employee" and, "Carelessness or negligence of such degree or recurrence to show an intentional or substantial disregard of the employer's interests" are two other definitions of misconduct under sub-section one that do not require proof of "wilful or wanton disregard," and should therefore be easier to prove.

Employers have an interest in their reasonable instructions being followed, and the employer's clear instruction to the employee is proof in itself of the employer's interest. An employee's purposeful refusal to seasonably follow the employer's reasonable instruction is misconduct.

The appellate court's decision moves insubordination from sub-section two of the statute, which lists examples of willful and wanton disregard, into sub-section one of the statute by requiring inherent proof that the employee knew how the employer would be harmed. By allowing so-called confusion to disprove insubordination, the decision holds that an employer must prove both insubordination and that the employee meant to damage the employer. This is a change in the law that is against public policy. Because the statutory framework is so clearly abandoned, the legislature would be challenged to amend the statute in a way that clearly overrules the lower court's holding.

Moreover, in light of the appellate decision, employees would be well-advised to resist cooperation with an employer's workplace investigation or quality assurance: every time a sergeant asks a police officer for an explanation of the use of force; every time a truck driver who has struck a pedestrian and is asked to

explain his driving or provide a sample for urinalysis; every time a manager accused of sexual harassment is asked to answer questions about an accusation. None of the employees in these situations should cooperate if the employee can at a later hearing offer credible evidence of an explanation for refusing the order or confusion. *See* Slip Opinion at 22 ¶31. The employer will have to explain the purpose of the task or question and the business need for the result or information in order to let the employee know how the employer will be harmed by the employee's failure to cooperate. In the meantime, the employer's prerogative to direct the employee is weakened and productivity lowered. This Court should clarify the law and present a workable legal standard.

The appellate court wrote, "The ALJ concluded that Thomas's conduct did not amount to willful or wanton disregard of PSS's interests because Thomas acted out of confusion and apprehension, rather than an intent to harm the employer." Slip Opinion at 17¶27. The court held that the employer failed to show these findings were clearly erroneous. *Id.* One problem with this holding is that insubordination is a statutory example of willful or wanton misconduct, and insubordination is established if the refusal was either deliberate or purposeful. Her refusal was on purpose, so it was insubordination and misconduct.

The department is expected to argue that the parties had different understandings of what Thomas was being asked to do. This is a red herring. Thomas refused to do anything. She would qualify for unemployment benefits if she negligently misunderstood the task or negligently wrote a bad report. However, she should not receive benefits for a purposeful refusal to labor.

E. Other examples of misconduct are now made impractical to prove.

The published decision held as follows: although an employee's subjective motivations and intent to harm an employer are irrelevant, "a showing of misconduct must be established by evidence that the employee was aware that he

or she was disregarding the employee's rights." Slip Opinion at ¶27 (official reporter headnote 7). Extending this principal to other examples of misconduct casts doubt on existing legal tests and will have disastrous consequences.

Terminating an employee for violating a workplace rule will now have an extra element. As argued above, the decision will be argued as holding that telling the employee to do an act is insufficient to put the employee on notice that the action is in the employer's interests. It follows that posting a rule prohibiting or requiring behavior is likewise insufficient to put an employee on notice of the employer's interest. It will be insufficient to prove misconduct that the employee knew or should have known of a reasonable, work-related rule, and violated it. Now, employers will bear the burden of proving that the employee also knew something specific about how the employer would be harmed by violating the rule.

Similarly, employers who fire employees will have to also prove that the employees knew something extra and specific how the employer would be injured by the employee's dishonesty related to employment, inexcusable absences following warnings, and deliberate acts that are illegal or provoke violence. Because the principle applies to misconduct generally, this published decision adds an unnecessary element to the employer's burden of proof in every misconduct case. Because a terminated employee seeking benefits has an incentive not to admit appreciating how their conduct might hurt their former employer, the employer will bear a practical obstacle to proving its case.

F. Withholding evidence for your own benefit is not acting in good faith.

The tribunal found that Thomas refused to provide the information because she thought the employer would use it against her, and the appellate court held this to be a good faith error. "Misconduct" does not include "Good faith errors in judgment or discretion." RCW 50.04.294 (3)(c).

An employee owes a fiduciary duty of loyalty to her employer. *Restatement Third of Agency*, § 8.01.[1] This duty is defined as "the duty to act loyally for the principal's benefit in all matters connected with the relationship." *Id.* at § 8.04. It has been codified in the misconduct statute, which states that "misconduct" includes the "willful and wanton disregard of the rights, title, and interests of the employer." RCW 50.04.294(1)(a). The duty of loyalty requires the employee to act only in the interests of her employer. If an employee's personal interests conflict with those of her employer, and she protects her personal interests to the detriment of her employer, she has breached her duty of loyalty as agent. *Raymond v. McFadden*, 21 Wn.2d 328, 332 (1944) (agent or employee is "duty bound not to act adversely to the interest of his employer by serving...any private interest of his own in antagonism or opposition thereto."); *see also* Restatement (Third) of Agency, § 8.03.

In *Williams v. Queen Fisheries, Inc.*, 2 Wn. App. 691 (1970), Williams was employed by the defendant as president for three years. *Id.* at 693. He had agreed with another company to start a personal business using Queen Fisheries' equipment. *Id.* at 693-94. On his last day in office, he wrote checks from the Queen checking account for the benefit of a separate business he owned. *Id.* at 694. After suit was filed, the court found that Williams was an agent of the defendant, and therefore owed the fiduciary duty of loyalty to Queen. *Id.* It also found that the use of Queen's equipment, credit and monies to establish a personal business constituted a breach of that duty because the agent was placing his private interests and disregarding that of his principal. *Id.* This breach constituted

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[1] Washington has adopted the laws of the Restatements of Agency as a restatement of its common law. *See Kieburtz & Associates, Inc. v. Rehn*, 68 Wn. App. 260, 265-66 (1992).

a breach of employment contract and established good cause for the early termination of Williams as president. *Id.* at 695.

In this case, Thomas was assigned to write logs and incident reports while on duty at the client location, and to submit them to her superiors so the corporate principals could use the information in servicing the client contract. She was directed by her supervisors to write an incident report. She refused. The chief executive officer of the company explained to her the importance of the incident report and the principles of institutional knowledge and ordered her to write the report. She refused, claiming that she did not want to imperil herself. In fact, after the first hearing, the ALJ found that "the claimant told the employer that **it was not in her best interest to complete a written incident report at that time.**" CR 252 (FOF 9) (emphasis added). The consideration of the agent's interest above or in contravention of the principal's interest, violates the agent's duties to the principal. Acting in good faith is the opposite of violating the duty of loyalty.

The centerpiece of the appeal was the argument that violating the duty of loyalty equates to acting in bad faith, yet that argument was not analyzed in the published decision. However, because the findings of fact were published in a decision explicitly affirming that she acted in good faith, the decision will be cited in the future as redefining good faith to include the ability to violate the duty of loyalty.

G. Information Gap

The court adopted the ALJ's finding that there was an information gap, and that the employer was responsible for it. As challenged in the opening brief, these findings were both legally needless and factually incorrect. According to Thomas, she told the employer of her prior incident reports, and the employer asked her to provide a report in writing. A disinterested reader may find her refusal to write the

incident reports upon repeated command and the absence of a business record as evidence tending to impeach the claimant on her testimony that she wrote them the first time. Neither the ALJ nor the appellate court analyzed this inference as a possibility.

Thomas consistently and repeatedly testified as to why she wouldn't write the reports: it was not in her interest.

Employers are not required by law to explain the business reasons for each aspect of the employee's task. In some cases, the employer is best served by not telling an employee the purpose of a task. For example, an employer may legitimately require an employee to answer questions in writing before revealing the purpose of the questioning. An employee who purposefully refuses to answer those questions in writing is insubordinate. The information gap is not necessarily the employer's burden to fill. The employer needed to know both what Thomas observed and what she orally stated to the client. Thomas withheld that information and admitted why: because her repeated oral communication to the client was against company policy, and her writing it down could be used against her! A fair-minded reader, fully informed of the testimony, would not hold the information gap, if any, was material.

The department is expected to argue that Thomas was confused. While the regulations do not define "good faith errors," WAC 192-150-200(3)(b) states, "'Inadvertence or ordinary negligence in isolated instances' means that your action is an accident or mistake." Allowing benefits where an employee has shown a deliberate and considered refusal to obey the reasonable instructions of her employer because the refusal was based on an information gap that she does not bring to the employer's attention at the time would render the text of RCW 50.04.294 (2)(a) meaningless. The exception would swallow the rule. This

error was challenged on appeal, yet it not analyzed in the decision affirming benefits.

VI. Conclusion

The very essence of agency is control. Employers, who pay unemployment benefits through taxes adjusted to their experience, must be supported when they give work-related instructions to employees. The published decision of the appellate court drastically changes the balance of power in a way that renders insubordination practically impossible to prove and redefines acting in good faith to include violating the duty of loyalty.

This Court should accept review in order to clarify the law.

Respectfully submitted this 27th day of May, 2014.

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VII. Appendices

Appendix A: Court of Appeals published decision (as rendered by Lexis)

Appendix B: Order Denying Motion for Reconsideration

Appendix C: RCW § 50.04.294