NO. 91414-1

SUPREME COURT OF THE STATE OF WASHINGTON

JEFF KIRBY, and PUGET SOUND SECURITY PATROL, INC.,

Appellant-Petitioners,

vs.

STATE OF WASHINGTON DEPARTMENT OF EMPLOYMENT SECURITY,

Respondent.

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

While at home and off duty, Sarah Black, a security guard, made an offensive statement on her private Facebook page that did not reference her work, her employer, or her employer's clients. Her employer, Puget Sound Security, and one of its clients learned about the statement, and Puget Sound Security fired her because of it. The Commissioner of the Employment Security Department allowed Black's application for unemployment benefits, concluding that Puget Sound Security failed to prove Black's conduct was "misconduct connected with . . . her work." RCW 50.20.066(1). The Court of Appeals properly affirmed this decision.

The Court of Appeals correctly applied the plain language of the misconduct disqualification statute and this Court's decision in *Nelson v. Department of Employment Security*, 98 Wn.2d 370, 655 P.2d 242 (1982), in holding that Black's off-duty conduct was not sufficiently "connected with" her work to disqualify her from receiving unemployment benefits under RCW 50.20.066(1). *Nelson* still provides clear guidance on when off-duty conduct is work-connected, and it is consistent with the current definition of misconduct, RCW 50.04.294, and the Department's regulation interpreting work-connectedness, WAC 192-150-200. There is no need to revisit *Nelson*.

The Court of Appeals also correctly decided that Puget Sound Security failed to demonstrate that Black's conduct amounted to "misconduct" as defined in RCW 50.04.294. The decision does not conflict with other appellate decisions, and the Court should decline to address the speculative policy issues the Petition raises that are not based on the record. Review is unwarranted.

II. COUNTERSTATEMENT OF THE ISSUES

For the reasons set forth below, the issues raised in Kirby's Petition for Review are not appropriate for this Court's discretionary review under RAP 13.4(b). If the Court were to accept review, however, the issues before the Court would be:

1. Under RCW 50.20.066(1), an individual is disqualified from receiving unemployment benefits if she has been discharged "for misconduct connected with his or her work[.]" Puget Sound Security fired Sarah Black for a private Facebook post she made while off-site and off-duty from work, and the post did not mention her job, her employer, or her employer's client. Did the Commissioner correctly apply the standard from *Nelson v. Department of Employment Security*, 98 Wn.2d 370, 374, 655 P.2d 242 (1982), to conclude that Black's off-duty conduct was not "connected with" her work?

2. If a claimant's conduct is work-connected, the employer also must show that it met the definition of "misconduct" under RCW 50.04.294. Did Puget Sound Security fail to establish that Black's conduct amounted to "misconduct" as defined by statute?

III. COUNTERSTATEMENT OF THE CASE

Claimant Sarah Black worked as a security officer for Puget Sound Security Patrol, Inc., from December 2010 through February 2012. Certified Administrative Record (AR) at 127, 270, 305 (Finding of Fact (FF) 1). Black was a full-time, permanent employee, paid $10.44 per hour. AR at 49, 305–06 (FF 1). She worked the graveyard shift at a Tacoma Public Utilities (TPU) building. AR at 48–50, 205, 306 (FF 1). Black's duties were to maintain security surveillance of the facility and to perform "customer service of internal and external clients." AR at 49–50, 130.

While at home and off duty, Black posted a statement on Facebook.com in response to a news article about a state trooper who had been shot. AR at 132–33, 206, 270-80 306 (FF 2, 3). The post said: "u kno wat, I do not give a fuck about a police officer that got shot, if they quit fuckin wit ppl, ppl prolly quit shootin em all the goddamn time.....karmas a bitch." AR at 143, 233, 306 (FF 2, 3).

Black had set her Facebook privacy settings so that her postings were accessible only to the approximately 100 people designated as her "friends" on the website. AR at 130–31, 235, 306 (FF 4). Members of the public and others not listed as friends could not view her Facebook page. AR at 131, 306 (FF 4). Black's post was an expression of a personal opinion that did not include any reference to her employer, TPU, or her job as a security

guard. AR at 132, 233, 306 (FF 5). She testified that she did not intend to communicate her opinion to her employer, TPU, or anyone not on her list of friends. AR at 131, 133, 306 (FF 5).

One of Black's Facebook friends, however, was a TPU employee who saw the post. AR at 131–32, 155, 233, 306 (FF 4). Without telling Black, the friend sent a copy to TPU's customer service department. AR at 131, 233, 306 (FF 4, 5). TPU's customer service supervisor notified Black's supervisor, Vickie Brown, who in turn notified Puget Sound Security's chief executive officer and executive vice president for employee relations. AR at 59–60, 82–83, 233, 306 (FF 4).

Brown met with Black to discuss the Facebook posting and told her that the post had been made known to TPU. AR at 157–58, 168–69, 235, 306 (FF 6). Black said that she had the right to express an opinion when she was not at work and that the settings on her Facebook page were private. AR at 148–49, 157–58, 235, 306 (FF 6).

The same day, Puget Sound Security's discipline committee met and discharged Black. AR at 195, 247, 307 (FF 7). Shortly thereafter, Black applied for, and was granted, unemployment benefits. AR at 187–91. The Department allowed her benefits because it determined that Puget Sound Security failed to establish that it had discharged Black for disqualifying

misconduct because the post on her Facebook page was not "connected with her work" as a security guard. AR at 187–88; RCW 50.20.066(1).

Puget Sound Security had general workplace rules requiring professionalism and courteousness, but it did not have any specific rules governing off-duty conduct or any social media policies or guidelines. AR at 89–90, 103–05, 130, 216, 307–08 (FF 8–11). After discharging Black, Puget Sound Security told the 10 other security officers at TPU that Black had been discharged, showed them her Facebook posting, and cautioned them that anything they posted on Facebook would not be considered private, no matter what the privacy settings were. AR at 83, 85–86, 89, 162–63, 170, 307 (FF 8).

Puget Sound Security appealed the Department's decision, and an administrative law judge (ALJ) conducted a hearing. AR at 3–183, 192–204. In an initial order, the ALJ affirmed the Department's decision to allow benefits, concluding that Puget Sound Security did not meet its burden of proving that Black's conduct was connected with her work, as required by RCW 50.20.066(1). AR at 310 (Conclusion of Law (CL) 10), 311. Specifically, the ALJ concluded that the circumstances did not meet the test for off-duty conduct stated by the Washington Supreme Court in *Nelson*, 98 Wn.2d at 374. AR at 309–10 (CL 7, 10).

Puget Sound Security petitioned the Department's Commissioner for review. AR at 316–21. The Commissioner[1] adopted the ALJ's findings and conclusions and affirmed the initial order. AR at 324–26. Puget Sound Security appealed to King County Superior Court, which affirmed the Commissioner's decision. Clerk's Papers (CP) at 1–15, 68–70, 107–08.

Puget Sound Security appealed the superior court's decision to the Court of Appeals. In a published decision, the Court of Appeals affirmed the Commissioner's decision allowing benefits to Black. *Kirby v. Dep't of Emp't Sec.*, No. 70738-8-I (Wash. Ct. App. Dec. 22, 2014).[2] Applying the three-part standard from *Nelson* for when off-duty conduct is work-connected, the Court of Appeals concluded that Puget Sound Security failed to establish that Black's post was "connected with" her work. Slip op. at 5–17. Specifically, Puget Sound Security failed to show that Black's post had some nexus with her work, that the post violated a code of behavior contracted for between employer and employee, or that Black had made the post with intent or knowledge that Puget Sound Security's interest would suffer. *Id.* at 8–12. Thus, even though Black's post had the potential to harm Puget Sound Security's interests, Puget Sound Security did not prove

[1] Decisions on petitions for Commissioner review are made by review judges in the Commissioner's review office but are treated as decisions of the Commissioner by statutory delegation. *See* RCW 50.32.070; WAC 192-04-020(5).

[2] The Court of Appeals initially filed its decision as unpublished, but the Department moved for publication, and the court granted the motion.

all of the elements to establish that Black's off-duty conduct was work-connected under *Nelson*. *Id.* at 12–13. The Court of Appeals also concluded that even if Black's conduct were work-connected, Puget Sound Security failed to prove her conduct fell within the statutory definition of misconduct in RCW 50.04.294. *Id.* at 17–22. Puget Sound Security's Petition for Review by this Court followed.

IV. REASONS WHY REVIEW SHOULD BE DENIED

Rule of Appellate Procedure (RAP) 13.4(b) governs this Court's acceptance of review of a Court of Appeals decision. Puget Sound Security is incorrect that the decision of the Court of Appeals involves issues of substantial public interest and conflicts with another appellate decision. The decision correctly applies *Nelson*, which the Court does not need to revisit because the post-2003 statutory definition of "misconduct" and the Department's regulation explaining work-connectedness are consistent with *Nelson*. The decision also does not conflict with other appellate decisions. In raising several policy issues, Puget Sound Security asks the Court to reweigh evidence or consider facts that are not in the record. But the employer's failure to meet its burden of proof to establish work-connected misconduct does not raise an issue of substantial public interest that needs to be determined by this Court. The Court should deny review.

A. The Petition Does Not Raise any Issues of Public Interest Requiring Review by the Court

Under RAP 13.4(b)(4), the Court will accept a petition for review if the petition "involves an issue of substantial public interest that should be determined by the Supreme Court." The Petition does not involve an issue of substantial public interest because: 1) the 2003 amendment to the statutory definition of misconduct and the Department's regulation explaining work-connectedness are consistent with *Nelson*; 2) the Court of Appeals properly applied the *Nelson* test to the facts, and the employer's failure to establish otherwise is not a matter of public interest; 3) the scope of judicial review is limited to the record, which precludes engaging in the speculation Puget Sound Security invites, and; 4) generic licensing standards cannot and do not replace the statutory requirement that work-connected misconduct be proved.

1. *Nelson v. Department of Employment Security* is still good law.

A discharged worker is eligible for unemployment benefits under the Employment Security Act unless she was discharged for "misconduct connected with his or her work." RCW 50.20.066(1); *Tapper v. Emp't Sec. Dep't*, 122 Wn.2d 397, 399, 858 P.2d 494 (1993). The burden is on the employer to establish the claimant was discharged for misconduct. *Nelson*, 98 Wn.2d at 374–75.

To establish disqualifying misconduct, an employer must first prove that the employee's conduct was connected with his or her work. *See* RCW 50.20.066(1); WAC 192-150-200(1). Conduct that occurs while an employee is on the job is clearly connected with his or her work; when the conduct in question occurs off the job, however, the connection is less clear. Accordingly, this Court adopted a three-part rule for determining when an employee's *off-duty* conduct is work-connected. *Nelson*, 98 Wn.2d at 375. For off-duty conduct to be work-connected, an employer must show that a reasonable person would find the employee's conduct: (1) had some nexus with the employee's work; (2) resulted in some harm to the employer's interest; and (3) was in fact conduct which was (a) violative of some code of behavior contracted for between employer and employee, and (b) done with intent or knowledge that the employer's interest would suffer. *Id.* at 375. The Court should decline the Petition's invitation to revisit the *Nelson* test for misconduct when the conduct occurs off-duty because the test is still good law.

In 2003, the legislature amended the definition of misconduct by adding a new section, RCW 50.04.294, that more specifically explains when a claimant's discharge-precipitating conduct amounts to misconduct. However, the amended definition did not change the requirement that misconduct be connected with the claimant's work. The misconduct

disqualification statute that existed at the time of *Nelson*, RCW 50.20.060, and the one that exists now, RCW 50.20.066(1), both impose that requirement. RCW 50.04.294 simply provides a non-exclusive list of when an employee's work-connected conduct amounts to misconduct. Therefore, *Nelson* is still good law because it addresses when conduct is work-connected, which the statute required both before and after the amendment that Puget Sound Security alleges calls into question the test's validity.

Nelson also does not need to be revisited in light of modern technology, Pet. at 1, because it applies generally to the entire range of off-duty conduct. A separate rule for the technology context is unwarranted and would create confusion for employers and employees as to how to assess whether conduct is work-connected, in part because there could be disagreement about which test to apply. Besides, Puget Sound Security does not identify or propose any particular test in place of *Nelson*.

The Department's rule explaining when misconduct is work-connected is also consistent with *Nelson*. *See* WAC 192-150-200(1), (2). The rule states that to constitute misconduct, the discharge precipitating conduct "must be connected with your work," WAC 192-150-200(1), and clarifies that conduct is work-connected "if it results in harm or creates the potential for harm to your employer's interests. This harm may be

tangible . . . or intangible . . . ." WAC 192-150-200(2). The Court of Appeals properly rejected Puget Sound Security's argument that the Department's regulation "updates the law since *Nelson,*" Pet. at 12, or does away with the first and third *Nelson* elements. Slip. op. at 16. As the court explained, the mere establishment of harm only satisfies the second *Nelson* element; it is insufficient to establish the other two elements. *Id.* at 17. The regulation merely explains that the employer may show either actual or potential, tangible or intangible harm to establish the second element. WAC 192-150-200(2). "Any other reading conflicts with *Nelson*, which remains the law of this state." Slip op. at 17.

2. The Court of Appeals properly applied the *Nelson* test to the facts of this case, and the employer's failure to satisfy its burden of proof does not raise an issue of public interest.

Here, the Court of Appeals correctly applied the *Nelson* standard to Black's off-duty conduct and concluded that Puget Sound Security failed to establish elements (1) and (3). Slip op. at 5–12. The Commissioner made factual findings, supported by the record,that Black made the Facebook post while at home and not while on duty, and the post made no reference to her job, her position as a security officer, Puget Sound Security, or Puget Sound Security's client. AR 133, 233, 235, 306 (FF 3, 5), 308 (CL 10); slip op. at 8–9, 11. Black made the statement on her

private Facebook page, to which only approximately 100 people designated as "friends" had access. AR at 130–31, 235, 306 (FF 4); slip op. at 9, 11. Contrary to the Petition's suggestion, the employer failed to even show that Black's profile listed her employer or profession. Pet. at 14. The content of the post, while certainly offensive, was an expression of Black's personal opinion about a matter that was outside the scope of her work. AR at 306 (FF 5); slip op. at 9–10. Puget Sound Security suggests that Black intended her client to receive the post, Pet. at 9, but that suggestion is really an invitation to reweigh the evidence. The Commissioner found otherwise, and that finding is supported by substantial evidence. AR at 306 (FF 5); slip op. at 16. Puget Sound Security failed to show that the first *Nelson* element was met—that the conduct had some nexus with Black's work.

Next, Puget Sound Security failed to establish that Black's conduct was "violative of some code of behavior contracted for between employer and employee." *Nelson*, 98 Wn.2d at 375; slip. op. at 11. To prove this element, an employer must show the conduct was the subject of a contractual agreement or of "reasonable rules and regulations of the employer of which the employee has knowledge and is expected to follow." *Nelson*, 98 Wn.2d at 375. While Puget Sound Security had general workplace rules requiring professionalism, courtesy, and respect,

it did not have any company policies dealing with posts on Facebook or other social media sites or attempting to specifically regulate off-duty speech. AR at 65–66, 89–90, 105, 130, 307–08 (FF 8-11); slip op. at 14. Puget Sound Security did not show that it met the requirement of *Nelson* that Black violated a reasonable code of behavior explicitly contracted for. *Nelson*, 98 Wn.2d at 374.

Puget Sound Security also failed to show that Black's conduct "was in fact . . . done with intent or knowledge that the employer's interest would suffer." *Nelson*, 98 Wn.2d at 375; slip op. at 9–12. Although the Petition repeatedly states that Black "intended [for] her client to receive the post," Pet. at 9, 16, the Commissioner found that Black "did not intend to communicate her opinion to her employer, to [TPU], or to anyone not on her list of friends." AR at 306 (FF 5). Black's own testimony supports this finding. AR at 130–31, 133, 156; slip op. at 9–10. Puget Sound Security cannot reargue the facts on appeal. In sum, Puget Sound Security failed to establish the first and third required *Nelson* elements. Slip op. at 12. Its failure to prove its case does not raise an issue of substantial public interest requiring review by this Court.

3. The Court should not speculate as to when rules governing off-duty conduct or social media posts are reasonable because this employer did not have such rules.

Puget Sound Security asks the Court to address hypothetical scenarios that, if review were granted, the Court could not reach because the record does not support such inquiry. It asks, "When can employers regulate Facebook posts?" Pet. at 16. It also asks, "When, if ever, can an employer demonstrate that its work rules or expectations as to off-duty misconduct are reasonable and work-related . . . ?" Pet. at 1. But, as discussed above, Puget Sound Security did not have a social media policy or *any* policy that could reasonably be understood to apply to its employees' private, off-duty conduct. Slip op. at 14. Rather, Puget Sound Security had broad and general policies requiring employees to be courteous, professional, helpful, and to act ethically. *See* AR at 208–18, 307–08 (FF 9–11); slip. op. at 3, 11, 14. And it failed to explain how this "extend[ed] to off-duty, off-site, social medial posts." Slip op. at 14.

Puget Sound Security argues that the Court of Appeals' opinion "holds that the employer may regulate off-duty conduct on Facebook only if it has a policy referring specifically to 'Facebook,' or 'social media.'" Pet. at 16. It further suggests the opinion "effectively holds that an employer is unable in this circumstance to prohibit damage done by an

employee through social media, even if it issues a social media policy." *Id.* at 17. Puget Sound Security is mistaken in both arguments. The Court of Appeals' opinion addresses only the application of the misconduct disqualification in the Employment Security Act, not a blanket principle for the reasonability of an employer's rules or other employment decisions. And the opinion merely holds that under the facts of this case—where the employer did not have a social media policy, and the Facebook post did not refer to the claimant's employer, coworkers, job duties, or clients—the comments had no nexus with Black's work, there was no code of behavior specifically contracted for, and there was no intent or knowledge that the employer's interest would suffer. Slip op. at 11–12. Nothing in the opinion precludes an employer from discharging an employee under these circumstances. It merely confirms that the Department may not subsequently deny a claimant unemployment benefits for her off-duty speech that bears no nexus to her employment. ("[T]he question before this court is not whether Black should have been terminated from her job. Rather, the question is whether the Commissioner properly concluded that Black was eligible to receive unemployment compensation benefits under the Employment Security Act." Slip op. at 8.) Given these facts, this case does not offer the Court the opportunity to make broad pronouncements on when an employer's

rules governing off-duty conduct in general, or social media postings in particular, are reasonable. The Court should decline to entertain Puget Sound Security's hypothetical assertions.

Finally, Puget Sound Security erroneously suggests that the Court of Appeals' decision will be cited to "compel" the award of benefits in various scenarios that are not analogous to the facts of this case. Pet. at 19–20. In all of the scenarios listed, the employees specifically made either derogatory comments about his or her coworker or manager or, in two situations, made threats to a supervisor or patient. *Id.* These facts are not present in this case, and Puget Sound Security's fears are unfounded. The Court should deny review.

4. General security guard licensing standards do not establish work-connectedness.

Below and in its Petition, Puget Sound Security made vague arguments about the relationship that professional licensing standards have with the misconduct inquiry. *See* slip. op. at 19; Pet. at 1, 19. Specifically, the employer cited RCW 18.170.170 and RCW 18.235.130(4), which provide examples of unprofessional conduct. Slip op. at 19. The particular subsection it cited, RCW 18.235.130(4), states that "[i]ncompetence, negligence, or malpractice that results in harm or

damage to another or that creates an unreasonable risk of harm or damage to another" constitutes unprofessional conduct.[3] Slip op. at 19.

The Court of Appeals correctly stated that these standards are not helpful. Unless the licensing agency has actually found the conduct in question to have violated those professional standards, such general standards themselves provide no guidance as to whether the conduct in question was connected with the employee's work. Here, if the record showed that Black was actually licensed as a security guard and, if licensed, that the licensing agency found her to have violated its licensing statutes, then the conclusion that her conduct was not work-connected might have been different. But those facts are not in this record. Even then, misconduct for carelessness or negligence under RCW 50.04.294(1)(c) and (d) requires showing actual or a likelihood of causing "serious bodily harm to the employer or a fellow employee" or conduct "of such degree or recurrence to show an intentional or substantial disregard of the employer's interest." Professional licensing standards for negligence may not necessarily bear on these elements. The Court should decline to entertain Puget Sound Security's strained argument regarding general professional licensing standards.

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[3] Puget Sound Security also cites WAC 308-18-305(1)(e)(iii), which requires training for licensed security guards to include certain "principles of communications" topics, including building relationships with law enforcement. Pet. at 2.

B. The Court of Appeals' Decision is Consistent with a Washington Appellate Decision

Puget Sound Security incorrectly argues that the Court of Appeals' decision is in conflict with *Hamel v. Employment Security Department*, 93 Wn. App. 140, 966 P.2d 1282 (1998); a precedential Commissioner's decision, *In re Jeremy Owens*, No. 04-2012-19366, Wash. Dep't of Emp't Sec. Dec.2d 989 (Dec. 28, 2012)[4]; and an unreported federal district court decision, *Guevarra v. Seton Medical Center*, No. C 13-2267 CW, 2013 WL 6235352 (N.D. Cal. Dec. 2, 2013).

First, the Court of Appeals' decision does not conflict with *Hamel* because that case involved a waiter's inappropriate comments made to his coworkers and customers while at work. *Hamel*, 93 Wn. App. at 142–43, 147–48. The comments in this case, unlike in *Hamel*, occurred off-duty and did not involve the speaker's employer, coworkers, or clients. The *Hamel* court appropriately did not apply the *Nelson* off-duty test, so there is no conflict. Second, conflict with a precedential Commissioner's decision or an unreported federal case is not grounds for review under RAP 13.4(b)(1) or (2), as these decisions are not decisions of Washington

[4] Under RCW 50.32.095, the Commissioner may designate certain Commissioner's decisions as precedent, which serve as persuasive authority for courts. *Martini v. Emp't Sec. Dep't*, 98 Wn. App. 791, 795, 990 P.2d 981 (2000). A copy of the cited Commissioner's decision is attached for the Court's convenience.

appellate courts. In any event, the Court of Appeals' decision is not inconsistent with either *In re Owens* or *Guevarra*.

In *In re Owens*, the Department found an employee's public Facebook post was connected with his work when the employee expressly disparaged his employer, boss, and coworkers in the post. *In re Owens*, Wash. Dep't of Emp't Sec. Dec.2d 989. Here, in contrast, Black's post was not public and did not reference her employer. AR at 130–32, 233, 306 (FF 5). And while the underlying facts in *Guevarra* involved an employee who was denied unemployment benefits in California after she was fired for making an internet post about her employer, the federal district court did not address the merits of the benefits decision. *Guevarra*, No. C 13-2267, 2013 WL 6235352 (N. D. Cal. Dec. 2, 2013). Rather, in an unreported decision, the federal district court dismissed Guevarra's claims against the California Unemployment Insurance Appeals Board and its chairperson for lack of subject matter jurisdiction and failure to state a claim for which relief could be granted. *Id.* The case has no application to the present case.

Because the Court of Appeals' decision is a fact-based and correct application of *Nelson*, and because *Hamel*—the only Washington appellate case that Puget Sound Security argues is in conflict—is distinguishable, Puget Sound Security cannot show that the decision of the

Court of Appeals is in conflict with another appellate decision. The Court should therefore deny review under RAP 13.4(b)(1) or (2).

V. CONCLUSION

The decision of the Court of Appeals, the plain language of the Employment Security Act, and consistent prior case law provide sufficient public guidance on the issues raised by the Petition. The Court of Appeals' decision does not alter the analysis for construing the Employment Security Act. To the contrary, the court expressly relied on the standard and reasoning of *Nelson* to conclude that substantial evidence supported the Commissioner's findings and that Puget Sound Security did not prove work-connected misconduct in this case. Puget Sound Security's Petition shows its disagreement with the decision, but it may not reargue the facts on appeal or ask the Court to speculate about facts that are not supported by the record. Puget Sound Security has not shown that the Court of Appeals' decision meets the criteria for this Court's review under RAP 13.4(b)(1), (2), or (4). The Court should deny the Petition.

RESPECTFULLY SUBMITTED this 1st day of May, 2015.

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PROOF OF SERVICE

I, Katie Moceri, certify that I caused a copy of this document, **Answer to Petition for Review**, to be served on all parties or their counsel of record by ABC Legal Messenger, and via email on the date below as follows to:

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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 4th day of May, 2015, at Olympia, Washington.

Katie Moceri

KATIE MOCERI, Legal Assistant

Empl. Sec. Comm'r Dec.2d 989 (WA), 2012 WL 8441419

Commissioner of the Employment Security Department.

State of Washington.

IN RE: JEREMY OWENS

Case No. 989
Review No. 2012-4627
Docket No. 04-2012-19366
December 28, 2012

DECISION OF COMMISSIONER

***1** On November 23, 2012, CAMERATECHS, by and through William Jones, petitioned the Commissioner for review of an Initial Order issued by the Office of Administrative Hearings on October 26, 2012. Pursuant to chapter 192-04 WAC this matter has been delegated by the Commissioner to the Commissioner's Review Office. Having reviewed the entire record and having given due regard to the findings of the administrative law judge pursuant to RCW 34.05.464(4), we do not adopt the Office of Administrative Hearings' findings of fact or conclusions of law, but instead enter the following.

FINDINGS OF FACT

I

The claimant worked at the interested employer's camera repair shop (Cameratechs) as a sales assistant from December 2005 to July 7, 2012. On July 6, 2012, the claimant reported to the employer that his camera had been damaged at the workplace and that he (the claimant) believed a coworker had caused the damage. The employer examined the claimant's camera, as well as the claimant's camera case, and also questioned the claimant's coworkers but could not verify that the claimant's accusations had merit.

II

The claimant's accusations notwithstanding, nobody - including the claimant - had witnessed the coworker (or anyone else) damaging the claimant's camera. The claimant asked whether the damage would be covered by the employer's insurance. Given the employer's deductible, insurance would not cover the damage, and the claimant was so informed. Moreover, the employer could find no verification that the camera had been damaged at the employer's shop.

III

Convinced the coworker had damaged his camera, the claimant was not satisfied with the employer's response. On his Facebook page, the claimant posted frustration that his employer had not held the coworker accountable: "My boss is making an excuse for another employee damaging my equipment and that guy gets to get away with it scott free. I am fucking furious about this." Exhibit 20. The claimant made disparaging comments about the work ethic of employees at the employer's shop, which he attributed to the employer: "All the new guys at Cameratechs are slouches - don't want to work, and avoid responsibility. It's also the nurtured culture there." *Id.* The claimant also raised questions regarding the employer's insurance coverage (or lack thereof). Exhibit 20. The claimant's statements generated numerous responses, including the following: "You should be fucking furious"; "Punch him in the f'n neck"; "If the damage to your property happened at work then their insurance should pay for it." *Id.*

IV

Another employee saw the claimant's negative Facebook posts and informed the employer. The employer correctly understood the claimant's posts/interactions were not restricted to a private audience of Facebook "friends" and thus were available for anyone to read. The employer (though not the claimant's Facebook friend) was able to access and read the claimant's Facebook comments and responses. Having done so, the employer was concerned there could be a significant negative impact on the employer's reputation and, in turn, the employer's business. Consequently, the claimant was discharged.

V

*2 During the weeks at issue, the claimant was able to work, was available for work, and actively sought work as directed by the Department.

ISSUES PRESENTED

I

Is claimant disqualified from benefits pursuant to RCW 50.20.066(1) for misconduct as more particularly defined in RCW 50.04.294?

II

Is claimant eligible for benefits during the weeks at issue under RCW 50.20.010(1)(c)?

CONCLUSIONS OF LAW

I

Under the Employment Security Act, an indefinite period of disqualification is imposed during which unemployment benefits are denied when a claimant was discharged for work-connected misconduct. RCW 50.20.066. Misconduct is established by willful or wanton disregard of an employer's interest or the interest of a coworker. RCW 50.04.294(1)(a). Likewise, misconduct is established by violation or disregard for standards of behavior the employer has the right to expect of employees. RCW 50.04.294(2)(b).

II

Certainly, the employer has a vested interest in maintaining a productive business, which is premised in significant part on maintaining a positive reputation in the community. To that end, the employer relies on employees to speak well of the employer and fellow employees. At the least, the employer has the right to expect that employees will not make public disparaging comments regarding the employer or the employer's business, whether on or off duty.

III

The claimant exhibited disregard for his employer's interest and violated standards of behavior the employer had the right to expect of him, when he made negative Facebook statements about his employer, which sparked interest and likewise negative responses. Indeed, to characterize the claimant's statements as negative would be an understatement: The employer is in the business of repairing cameras; yet, the claimant stated his camera had been damaged at the employer's shop by a fellow employee, who refused to accept responsibility for the damage. The claimant explicitly faulted the employer (which he referenced by name) for failing to hold the fellow employee accountable and raised questions regarding the employer's

insurance coverage. (Given the responses, there is no doubt that questions were raised.) Adding insult to injury, the claimant asserted employees at the employer's shop were slouches, who avoided responsibility, an attitude he stated was nurtured there. It defies logic that the claimant would not have realized the damage his comments could cause to the employer's reputation.

IV

There are no mitigating circumstances. The claimant's off-duty barrage of angry accusations was clearly work-connected and was not voiced in private conversation. The use of Facebook did not render the claimant's posts private. Use of a social networking site cannot be equated with private conversation, particularly when the claimant evidently had selected and/or maintained minimal, if any, privacy settings. Excuses notwithstanding, it was the claimant's responsibility to choose/restrict his audience and to ensure his privacy settings remained current. By failing to adequately do so, the claimant effectively allowed anyone to read and share his posts about his employer. Moreover, evidence does not establish the claimant's accusations had merit. Although the claimant believed his coworker had damaged his camera, there is not substantiating evidence. More significantly, although the claimant was not satisfied with the employer's response, evidence does not establish the employer failed to conduct a reasonable and unbiased investigation, much less condoned poor work ethic or encouraged employees to shirk responsibility. In sum, the claimant used a public forum to discredit his employer and the employer's staff. Misconduct has been established.

V

*3 The claimant met the availability requirements of RCW 50.20.010(1)(c) for the weeks at issue.

Now, therefore,

IT IS HEREBY ORDERED that the October 26, 2012, Initial Order of the Office of Administrative Hearings is SET ASIDE on the issue of job separation. Claimant is disqualified pursuant to RCW 50.20.066(1) beginning July 1, 2012 and thereafter for ten calendar weeks and until he has obtained bona fide work in employment covered by this title and earned wages in that employment equal to ten times his weekly benefit amount. The Initial Order is AFFIRMED on the issue of availability. Claimant is not ineligible during the weeks at issue pursuant to RCW 50.20.010(1)(c). *Employer:* If you pay taxes on your payroll and are a base year employer for this claimant, or become one in the future, your experience rating account will not be charged for any benefits paid on this claim or future claims based on wages you paid to this individual, unless this decision is set aside on appeal. *See* RCW 50.29.021.

Dated at Olympia, Washington, December 28, 2012. [a1]

Annette Womac
Review Judge Commissioner's Review Office

RECONSIDERATION

Pursuant to RCW 34.05.470 and WAC 192-04-190 you have ten (10) days from the mailing and/or delivery date of this decision/order, whichever is earlier, to file a petition for reconsideration. No matter will be reconsidered unless it clearly appears from the face of the petition for reconsideration and the arguments in support thereof that (a) there is obvious material, clerical error in the decision/order or (b) the petitioner, through no fault of his or her own, has been denied a reasonable opportunity to present argument or respond to argument pursuant WAC 192-04-170. Any request for reconsideration shall be deemed to be denied if the Commissioner's Review Office takes no action within twenty days from the date the petition for reconsideration is filed. A petition for reconsideration together with any argument in support thereof should be filed by mailing or delivering it directly to the Commissioner's Review Office, Employment Security Department, 212 Maple Park Drive, Post Office Box 9555, Olympia, Washington 98507-9555, and to all other parties of record and their representatives. The filing of a petition for reconsideration is not a prerequisite for filing a judicial appeal.

JUDICIAL APPEAL

If you are a party aggrieved by the attached Commissioner's decision/order, your attention is directed to RCW 34.05.510 through RCW 34.05.598, which provide that further appeal may be taken to the superior court within thirty (30) days from the date of mailing as shown on the attached decision/order. If no such judicial appeal is filed, the attached decision/order will become final.

If you choose to file a judicial appeal, you must both:

***4** a. Timely file your judicial appeal directly with the superior court of the county of your residence or Thurston County. If you are not a Washington state resident, you must file your judicial appeal with the superior court of Thurston County. *See* RCW 34.05.514. (The Department does not furnish judicial appeal forms.) AND

b. Serve a copy of your judicial appeal by mail or personal service within the 30-day judicial appeal period on the Commissioner of the Employment Security Department, the Office of the Attorney General and all parties of record.

The copy of your judicial appeal you serve on the Commissioner of the Employment Security Department should be served on or mailed to: Commissioner, Employment Security Department, Attention: Agency Records Center Manager, 212 Maple Park, Post Office Box 9555, Olympia, WA 98507-9555. To properly serve by mail, the copy of your judicial appeal must be received by the Employment Security Department on or before the 30th day of the appeal period. *See* RCW 34.05.542(4) and WAC 192-04-210. The copy of your judicial appeal you serve on the Office of the Attorney General should be served on or mailed to the Office of the Attorney General, Licensing and Administrative Law Division, 1125 Washington Street SE, Post Office Box 40110, Olympia, WA 98504-0110.

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Footnotes

a1 Copies of this decision were mailed to all interested parties on this date.

Empl. Sec. Comm'r Dec.2d 989 (WA), 2012 WL 8441419

End of Document

OFFICE RECEPTIONIST, CLERK

To: Moceri, Katie (ATG)
Cc: rmckenna@orrick.com; brian.moran@orrick.com; aaron@rockelaw.com; Benson, April (ATG)
Subject: RE: Jeff Kirby vs. Employment Security Dept.--No. 91414-1-Answer to Petition for Review

Received 5-4-2015

Supreme Court Clerk's Office

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Moceri, Katie (ATG) [mailto:KatieB2@ATG.WA.GOV]
Sent: Monday, May 04, 2015 8:56 AM
To: OFFICE RECEPTIONIST, CLERK
Cc: rmckenna@orrick.com; brian.moran@orrick.com; aaron@rockelaw.com; Benson, April (ATG)
Subject: Jeff Kirby vs. Employment Security Dept.--No. 91414-1-Answer to Petition for Review

Dear Clerk,

Attached for filing are Answer to Petition for Review and Attachment in *Jeff Kirby, and Puget Sound Security Patrol, Inc. v. Employment Security Dept.; No. 91414-1.*

The attorneys for the Petitioner are receiving this email as a curtesy copy. A hard copy will also be mailed.

Sincerely,
Katie Moceri
Legal Assistant to April Benson, Leah Harris, and Dionne Padilla-Huddleston
Attorney General's Office
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