70738-8

NO. 70738-8

COURT OF APPEALS FOR DIVISION I

STATE OF WASHINGTON

JEFF KIRBY and PUGET SOUND SECURITY PATROL, INC.
Appellants-Petitioners,

v.

STATE OF WASHINGTON DEPARTMENT OF EMPLOYMENT SECURITY,
Respondent.

REPLY OF APPELLANT

ROCKE | LAW GROUP, PLLC
Aaron V. Rocke, WSBA #31525
101 Yesler Way, Suite 603
Seattle, Washington 98104
(206)652-8670

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Cases

Other Cases

Statutes

Regulations

I. Restatement of Issues

The employer would like to emphasize three issues in reply. First, the regulation that defines work-related misconduct replaces or refines the *Nelson* test in this way: conduct is job-related if it harms or has the potential to harm the employer's interests. The department admits that speech against clients and fellow employees is work-related. In this case, the speech was directed at her client's customers. Because part of the claimant's duty was to provide security for those customers, part of her duty was to be polite and courteous to those customers, and part of her duty was to cooperate with those customers, who were law enforcement, the speech calling for their murder was work-related.

Second, the proper scienter standard is whether she knew or should have known of the rule, standard, or potential harm, and whether she acted on purpose; not whether she had actual knowledge of and intent to cause specific harm. The essence of Black's statement, which was made directly to her client, was: "When the very people you pay me to protect are murdered, they get what they deserve."

The more shocking the statement, the more likely it is to be republished. This rule is exponentially true when you say it on the internet. She should have known better.

Third, while the department concedes the employer's interests were potentially harmed, the undisputed evidence is that the employer was actually harmed as that term is defined in the regulation.

The court should find that (1) the conduct was job-related (sufficient nexus); (2) the claimant knew or should have known that the conduct was prohibited or would harm the employer's interests; and (3) the conduct damaged the employer's interests. This will bring the court's decisions in line with published agency decisions and other states.

II. Argument

A. Nexus Between Work and the Misconduct

1. *Nelson* May Be Updated in Light of the Regulation

While Puget Sound Security's position is that the facts satisfy the *Nelson* test, the department's new regulation casts doubt on its applicability. *Nelson* was decided in 1982. *Nelson v. Department of Employment Security*, 98 Wn. 2d 370, 655 P.2d 242 (1982). The misconduct statute was amended in 1993, *see* (Resp. Brief pg. 13 fn. 13), and again in 2003.

In response to the 2003 legislative changes, the department promulgated a new regulation: WAC 192-150-200. That new regulation memorializes the requirement that misconduct must be work-related (in sub-section one) and defines what conduct is work-related (in sub-section

two). The new definition is as follows: "For purposes of this section, the action or behavior is connected with your work if it results in harm or creates the potential for harm to your employer's interests," and that, "This harm may be tangible, such as damage to equipment or property, or intangible, such as damage to your employer's reputation or a negative impact on staff morale." WAC 192-150-200(2). This regulation updates the law since *Nelson*.

As the department argues, (Resp. Brief pg. 10) (citing *Markam Group, Inc. v. Dep't of Emp't Sec.*, 148 Wn. App. 555, 561 (2009); *William Dickson Co. v. Puget Sound Air Pollution Control Agency*, 81 Wn. App. 403, 407 (1996)), this court extends substantial weight to the Commissioner's interpretation of the Act because of the agency's special expertise. In this case, the agency spoke clearly by promulgating a rule. This court may update the *Nelson* test in light of the regulation by rearticulating the standards for dismissal when the misconduct occurs off duty.

The department implicitly argues that the 2003 regulation applies only to conduct on duty, and that the 1982 *Nelson* case applies exclusively when off duty. Nothing in the text of either the statute or the regulation supports this view. On the contrary, while the 2003 regulation does not specifically distinguish between on and off duty behavior, it is hard to

imagine the need for a definition of work-related misconduct to govern on-duty behavior.

Lastly, to the extent that the *Nelson* opinion required something in a contract or rule in order to make off-duty conduct work-related, such a statement would be *obiter dicta* as it was not essential to the holding of the case. As argued in the superior court, the *Nelson* case may have been decided differently if the off-duty employee shoplifted from a customer or while wearing the employer's uniform. Besides, a rule requiring a writing would be impractical. Under such a rule and the department's argument in this case, an employer would fail to satisfy the *Nelson* test if an off-duty employee murdered a client or its customer, unless the employer has a "no-murdering of clients or their customers" policy in the employee handbook.[1]

B. Off Duty Conduct is Work-Related if it Damages the Employer

The claimant knew of work rules, knew her industry standards, and should have known that common sense means don't hurt your employer.

---

[1] Lest the court think this is hyperbole, in the superior court's words, one of her Facebook friends could have gone to the newspaper with the quote and it could have been printed: "Employee – you know, security guard advocates murder of police officers," that she "not only condones it, she's advocating it," to "Go out and kill cops." VRP 20-21. The department argued that she would still get benefits. VRP 21.

2. The statement violated employer's and state rules.

Ms. Black knew her employer's rules. Findings of Fact 9, 10, and 11 list rules governing security guards' conduct. She knew this applied to law enforcement. An excerpt from her cross-examination at CR 135:

> Q: Being courteous and professional applied not just to the client, but that client's guests?
> A: Yeah.
> Q: Some of TPU's guests included police officers?
> A: Yes.

Next, Ms. Black was a state-licensed security guard. She was required to know and understand state regulations related to security guards. In addition to her specific post including law enforcement, her employer and the industry standard require positive relationships with law enforcement. Security guards are licensed by the state. Part of state licensing requirements, which the claimant had, includes a block of instruction on security guards "building relationship with law enforcement." WAC 308-18-305(e)(iii); CR 302-03.

The department argues privacy settings. This emphasis is a red herring and ignores the obvious fact that Ms. Black communicated directly with a TPU employee. Analogously, this would be akin to the court focusing on the encryption of an email instead of looking at to whom the email was addressed.

3. Precedent Proves the Point

The department cites *In re Jeremy Owens*, Empl. Sec. Comm'r Dec.2d 989 (2012). In that case, an employee made negative comments on Facebook. The Commissioner wrote that the "claimant exhibited disregard of his employer's interests and violated standards of behavior the employer had the right to expect of him," and that, "It defies logic that the claimant would not have realized the damage his comments could cause to the employer's reputation." *Id.* In that case, the conduct was found to be "clearly work-connected." *Id.* Although that employee did not use privacy settings, the claimant in this case made the statements knowing her client was a "friend" who could read the post.

4. Other Jurisdictions have denied benefits in similar circumstances.

Denial of employment benefits based on misconduct related to social media use is a relatively new area of law in Washington. Other jurisdictions have, however, dealt with similar situations and determined that claimants should not obtain benefits.

In *Guevarra*, a nurse employed by a hospital posted an offensive writing on her Facebook wall which was only viewable by her friends. *Guevarra v. Seton Medical Cntr, et al*; 2013 U.S. Dist. LEXIS 169849 (ND CA December 2, 2013). Her friends included a co-worker who then reported the posting to Ms. Guevarra's supervisor. Guevarra was

terminated and subsequently denied benefits. Similarly, Ms. Black should not be allowed to obtain benefits when she posted offensive and harmful statements on social media.

C. The scienter is met because she should have known and acted on purpose.

The department invites the court to the ALJ's confusion about intent. Proving intent to harm is not necessary. Willful or wanton disregard of the employer's interests is one of several non-exclusive ways to commit misconduct. *See* RCW 50.04.294(1)(a). There are other, non-exclusive examples, which do not require intending the harm. *See e.g., Hamel v. Employment Sec. Dep't*, 93 Wn. App. 140, 146-147, 966 P.2d 1282 (Div. II 1998) (intentionally acts when knows or should have known that conduct jeopardizes employer's interests). Misconduct includes these other three: "Deliberate violations or disregard of standards of behavior which the employer has the right to expect of an employee," RCW 50.04.294(1)(b), carelessness of such degree to show substantial disregard of the employer's interests, RCW 50.04.294(1)(d), and violations of a reasonable company rule. RCW 50.04.294(2)(f).

Washington courts recognize that employers have an interest in maintaining a congenial and productive work environment. The courts have also held that it is common sense that an employee should have

awareness of this interest. *Haney v. Employment Sec. Dep't*, 96 Wn. App. 129, 141, 978 P.2d 543 (1999). Ms. Black's actions constitute misconduct violating the common sense requirement from *Haney* and RCW 50.04.294.

D. Undisputed Evidence Shows the Employer Was Harmed

When the court properly considers "harm" to include intangible harm, "such as damage to your employer's reputation or a negative impact on staff morale," WAC 192-150-200(2), and to include both "harm" and the potential for harm, WAC 192-150-200(1), it is undisputed that the employer was harmed, and the department does not say otherwise.[2] It was, therefore, an error of law to require or discuss "specific harm" and this court should overturn or remand based on that error of law.

Black's Facebook friend forwarded the post to his own employer's Customer Service Department. Finding of Fact 4. In the e-mail to his own Customer Service, the anonymous employee stated his reason. The TPU employee said the fact that the outrageous statement came from someone who works security at TPU was "extremely concerning."

---

[2] Puget Sound challenged Finding of Fact 13, which found no evidence that the relationship between the employer and its client was "specifically harmed," because Black was fired. (Opening Brief pgs. 8-9, 17-19). It also challenged Conclusion of Law 10, which required proof of "specific harm." *Id.* The department does not defend the ALJ's extra requirement of "specific harm."

CR 233, 245. TPU, the client, was also "very concerned that someone with such disregard for" life, or "respect for law enforcement officers would be employed here," CR 61, and "was horrified that [the employer] had an employee that would say things like that about police officers." CR 59-60.

The TPU Customer Service Department notified the claimant's supervisor at Puget Sound Security. Finding of Fact 4. The supervisor was "shocked, embarrassed and – and disgusted." CR 158.

The damage to the employer's interests was already done, and possibly more set in motion, when Black published her statement. The court should find that the employer's intangible interest was harmed or potentially harmed.[3]

E. New Findings Based on the Record

The department urges that the employer's citation to facts contained in the record but not explicitly identified by the Administrative Law Judge as "findings of fact" should not be considered by this court. It claims that this court's only job is to determine whether the findings the

[3] Additionally, it is intolerable to say to employers that the only way to show damage is to keep an employee, and to fire an employee purges any damage. Finding of Fact 13 reveals that the ALJ misunderstood the legal test for harm. If properly understood, the record undisputedly proves harm. The court should find these statements in error.

commissioner **did** make are supported by substantial evidence. This is a misreading of the statute.[4]

Read together, the statutes indicate that a court may make additional findings of fact if there is no disputed issue in that regard, or it may remand for further proceedings if essential findings of fact have not been made by the commissioner and cannot be made with the given record. *Cf.* RCW 34.05.574(1)(b) (a reviewing court may, *inter alia*, take action required by law, set aside agency action, or remand for further proceedings).

F. Unsupported Findings and Conclusions

The employer challenged additional aspects of Finding of Fact 13, which found that the claimant did not tell her statement to anyone, so any harm was caused by the employer. (Opening Brief, pgs. 18-19).[5] The

---

[4] RCW 34.05.570 states that, on judicial review, the court should reverse an order if "the agency has ... failed to follow a prescribed procedure;" "the agency has erroneously interpreted or applied the law;" "the order is not supported by evidence that is substantial while viewed in light of the whole record ..." or "**the agency has not decided all issues requiring resolution by the agency.**" RCW 34.05.570(3)(c)-(f) (emphasis added). Moreover, the court is confined to the agency record only to review "**disputed** issues of fact." RCW 34.05.558 (emphasis added).

[5] This finding was probably intended to diffuse the employer's argument that morale suffered, because there was evidence that Black's coworkers were demoralized when the supervisor used this circumstance

record proves Black knew her client was in the audience of her statement, that the statement was circulated within the client and forwarded to the claimant's supervisor.

The employer challenged Finding of Fact 5, which found that Black did not intend to communicate the statement to the client. (Opening Brief pgs. 8, 16-17). The department repeats the claimant's testimony and ALJ's finding without explaining the contradiction. *See* (Resp. Brief. pg. 22).[6] The court should find that the claimant acted intentionally, which she admitted. CR 135.

The employer challenged Finding of Fact 3, which found the motive for the posting was really about the lack of media attention to a little girl. *See* (Opening Brief pgs. 9-12). The employer also challenged the refusal to cross examine the claimant on that issue. *See id.* at 19, 38; CR 148. The department echoes the claimant's self-serving testimony, argues the ALJ's

---

as an object lesson. However, the finding was written erroneously over-broad.

[6] The department cites AR 130-31, 133, and 156. Those citations include the claimant's self-serving testimony that she intended to tell no one other than the 100 friends, but it does not explain away that she knew one of those friends was her client. "Q: And the person that reported you to your employer got you fired. He was a friend, right? A: Yes." AR 131. It "was possible for friends to convey to others what had been said in the claimant's" post, and that "occurred here, when a Tacoma Public Utilities employee, who was one of her Facebook friends, sent a copy of the message to TPU's Customer Service Department." Finding of Fact 4.

finding is unreviewable, (Resp. Brief pgs. 22-23), and argues the lack of prejudice. The finding need not be set aside if the court holds that the claimant's motive is irrelevant. In the alternative, the prejudice would be in that the ALJ misunderstood the legal requirement and held the employer to a standard higher than required by law.

This court should set aside a finding if fair-minded person would not be persuaded of the truth or correctness of the matter. *See e.g.,* (Resp. Brief pg. 9) (citing *In re Estate of Jones*, 152 Wn.2d 1, 8 (2004) (fair-minded person standard)). Because no fair-minded person would find that the original post was about a little girl, because motive or intent is irrelevant, or because cross examination was unfairly restricted, the court should find reversible error.

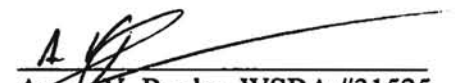
The employer challenged Conclusion of Law 10, which stated that the fact that the employer trained other employees not to do what Black had done proves it was not a rule when Black did it. (Opening Brief pgs. 22-23). This finding is arbitrary and capricious. Affirming this finding would seriously jeopardize the training and supervision of employees statewide. The department does not argue in support of it, and this court should find it was in error.

III. Conclusion

Claimant Black intentionally made an outrageous and harmful statement to her client about that client's business guests. The client decided it was offensive and harmful to the employer, and this court should also so find. This court should reverse the department's decision. In the alternative, because the department relied on facts on which it prevented cross-examination, the court could remand for additional proceedings.

Respectfully submitted this 17th day of March, 2014.

ROCKE | LAW GROUP, PLLC



Aaron V. Rocke, WSBA #31525
Attorney for Appellants

Declaration of Service

I caused a copy of the foregoing Appellant's Reply Brief to be served on the following in the manner indicated below:

Via Email to

Nigel S. Malden
Nigel S. Malden Law, PLLC
711 Court A, Suite 114
Tacoma, WA 98402
NM@NIGELMALDENLAW.COM

Via hand delivery to

April Benson Bishop
Attorney General's Office
800 5th Avenue, Suite 2000
Seattle, WA 98104

on today's date.

I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct to the best of my belief.

SIGNED this 17th day of March, 2014, at Seattle, Washington.

Sarah Borsic, Legal Assistant