NO. 92255-1

SUPREME COURT OF THE STATE OF WASHINGTON

DONALD BAKER,

Petitioner,

v.

STATE OF WASHINGTON DEPARTMENT
OF EMPLOYMENT SECURITY,

Respondent.

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

Donald Baker was discharged from his job with Maintech Acquisition, LLC (Maintech), for being absent from his scheduled shifts for three consecutive days without giving advance notice, in violation of Maintech's attendance policy. The Commissioner of the Employment Security Department determined Baker was discharged for statutory misconduct and, therefore, was disqualified from unemployment benefits. Baker failed to meaningfully challenge any of the Commissioner's findings and conclusions in the superior court or Court of Appeals. Additionally, in any event, the Court of Appeals correctly held that substantial evidence in the record supported the Commissioner's findings, which, in turn, supported the conclusion that Baker was discharged for disqualifying misconduct.

Baker asserts no basis for review under RAP 13.4(b). The Court of Appeals' decision does not conflict with case law, and this case raises no significant constitutional questions or issues of substantial public importance. Baker's Petition for Review should be denied.

II. COUNTERSTATEMENT OF THE ISSUES

For the reasons set forth below, the issues raised in Baker'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 likely be:

1. Does the administrative record contain substantial evidence to support the Commissioner's factual findings, where the fact-finder relied on evidence supported by Baker's former employer and determined that Baker's testimony was not credible?

2. The Employment Security Act defines "misconduct" to include "[w]illful or wanton disregard of the rights, title and interests of the employer," "[r]epeated and inexcusable absences," and "[v]iolation of a company rule if the rule is reasonable and if the claimant knew or should have known" of the rule's existence. Did the Commissioner correctly conclude that Baker's conduct amounted to misconduct?

3. Did the superior court properly decline to consider new evidence that Baker offered for the first time on appeal?

4. Even if Baker prevails, should the Court decline to award relief to him outside the scope of the Administrative Procedure Act, RCW 34.05.574?

III. COUNTERSTATEMENT OF THE CASE

Donald Baker worked full-time as a maintenance crew employee for Maintech Acquisition, LLC (Maintech), from November 29-December 23, 2011. Clerk's Papers (CP) at 139, 147, 203, 207, 234 (Finding of Fact (FF) 1). Maintech had a written attendance policy that required employees to show up for work when scheduled and on time. CP at 143, 205-06, 234 (FF 2). Maintech's policy defined absenteeism as "three (3) hours of work missed within a scheduled workday without properly notifying your

Supervisor irrespective of cause." CP at 205. To give proper notice, Baker was to contact—either by email or by telephone—his supervisor or a person of the next reporting relationship, a minimum of one hour prior to the start of his scheduled shift. CP at 205. Under the policy, three consecutive absences without prior notification would result in termination. CP at 143, 205-06, 234 (FF 2). Baker knew of Maintech's attendance policy. CP at 147, 205-06, 234 (FF 2).

Baker was scheduled to work his usual 7:00 a.m. to 3:30 p.m. shift on December 20. CP at 140, 234 (FF 6). Around 7:00 a.m. that day, Baker was arrested at his apartment on suspicion that he had assaulted his roommate. CP at 148-49, 234 (FF 6). Baker did not go to work or call in to work to inform his supervisor that he would be absent that day. CP at 140-41, 234 (FF 7).

Following his arrest, Baker spent one night in jail and was released around 9:30 a.m. on December 21. CP at 135, 150-51, 234 (FF 8). He was again scheduled to work his usual shift that day, but did not go to work. CP at 140-41, 234 (FF 8). Instead, Baker called a co-worker and asked his co-worker to tell his supervisor, Tyson Wittrock, that he had been in jail. CP at 156-57, 159-60, 234-35 (FF 8). Wittrock received a message from the co-worker that Baker was in jail. CP at 159-60, 235 (FF 8).

The next day, December 22, Baker was again scheduled to work his usual shift, but did not go to work. CP at 140-41, 152, 235 (FF 9). He called Wittrock at 11:42 a.m. and told Wittrock that he had been jailed, had some legal issues to take care of, and could not come in to work that day. CP at 141-42, 153, 160-61, 235 (FF 9). Wittrock told Baker to come to work the next day to discuss his future with the company. CP at 142, 153, 235 (FF 9).

Baker went to work on December 23, and Wittrock told Baker that because of his failure to show up to work over multiple days, Baker was not reliable, and Maintech would have to let him go. CP at 142-43, 155, 162, 203, 235 (FF 10).

Baker applied for unemployment benefits the same week. CP at 202, 235 (FF 11). In his application, Baker told the Department that he had been laid off due to lack of work. CP at 128, 196, 209, 235 (FF 12). The Department initially approved Baker's claim. CP at 195-202, 235 (FF 12).

The Department later received information that Baker had not been laid off for lack of work, but instead that Maintech had discharged Baker because he had violated Maintech's attendance policy. CP at 195-204. The Department then denied Baker's claim because he had been discharged from work for disqualifying misconduct. CP at 195-202. Baker was therefore responsible for paying back all of the benefits he had received relating to his employment with Maintech. CP at 195-202.

Baker appealed the Department's decision. CP at 192-94. An administrative law judge (ALJ) conducted a hearing, at which Baker and Wittrock testified. CP at 115-65. The ALJ found that the parties' testimony "conflicted on material points." CP at 234 (FF 3). After considering and weighing all of the evidence, including the witnesses' demeanors and motivations, the reasonableness and consistency of testimony, and the totality of circumstances, the ALJ found Baker's testimony not credible and made findings based on the employer's version of events. CP at 234 (FF 3). The ALJ issued an Initial Order affirming the Department's decision. CP at 233-40.

Baker petitioned the Department's Commissioner for review of the Initial Order. CP at 242-46. After a series of procedural steps not relevant to the merits of this appeal,[1] the Commissioner adopted the ALJ's findings of fact and conclusions of law and affirmed the Initial Order. CP at 278-81.

Baker appealed the Commissioner's decision to the superior court. CP at 320-27. Baker argued that a different timeline of events had taken place with respect to his arrest and that the allegation for which he was

[1] Baker's petition for review appeared to be untimely. CP at 249. The Commissioner remanded the matter for a hearing on whether Baker had good cause for his untimely appeal. CP at 167-88, 249. After the remand hearing, the Commissioner determined that Baker had not established good cause and dismissed Baker's petition. CP at 249-51. Baker appealed to Snohomish County Superior Court. The Department eventually agreed to remand the matter to the Commissioner for a decision on the merits of the appeal. CP at 262-63 (Findings of Fact, Conclusions of Law and Order in Snohomish County Superior Court No. 13-2-01950-5). The resulting Commissioner's decision is the order on appeal in this case. CP at 278-81.

arrested was dismissed. CP at 16-17, 37. Baker submitted new evidence—documents that he believes support his version of events, but that he had not presented to the ALJ or Commissioner—to the superior court. The superior court declined to consider evidence outside the agency record and affirmed the Commissioner's decision. CP at 8-10. Baker sought reconsideration, but the superior court denied his request as untimely. CP at 1-7.

Baker next appealed to the Court of Appeals, which affirmed the Commissioner's decision in an unpublished decision. *Baker v. Dep't of Emp't Sec.*, No. 71991-2-I, slip op. (Wash. Ct. App. July 13, 2015). The Court of Appeals held that Baker's failure "to assign error to any factual finding or conclusions of law, cite to the administrative record, or provide more than scant citation to legal authority" precluded review. *Baker*, slip op. at 4-5. Nonetheless, the Court of Appeals went on to conclude that "even ignoring these deficiencies," substantial evidence in the record supported the Commissioner's findings. *Id.* at 5-7. The Court of Appeals decided that the factual findings, in turn, supported the Commissioner's conclusion that Baker committed disqualifying misconduct on three independent grounds: RCW 50.04.294(2)(d) (repeated and inexcusable absences), RCW 50.04.294(2)(f) (violation of a known, reasonable company rule), and RCW 50.04.294(1)(a) (willful or wanton disregard of the employer's rights, title, and interests). Baker now seeks this Court's review.

IV. REASONS WHY REVIEW SHOULD BE DENIED

The Court should decline review of this case as Baker's petition fails to demonstrate any of the criteria in RAP 13.4(b). The Court of Appeals properly reviewed the Commissioner's findings of fact for substantial evidence and concluded, correctly, that Baker was discharged from work for misconduct that disqualified him from receiving unemployment benefits. Additionally, the Court should decline to consider Baker's argument regarding the contents of the certified administrative record because Baker did not raise the alleged error below.

A. Baker Does Not Address Any of the Criteria Under RAP 13.4(b) Justifying Review of a Court of Appeals Decision

RAP 13.4(b) governs this Court's acceptance of review of a Court of Appeals decision. The Court should deny review because Baker's petition does not cite RAP 13.4 or offer argument to demonstrate that any the criteria for granting review apply. He makes no attempt to show that the Court of Appeals' decision conflicts with a decision of this Court, that there is a significant question of law under the constitution, or that there is an issue of substantial public interest that this Court should determine. The one case he cites does not conflict with the Court of Appeals' decision

in this case. Pet. for Review at 4-6 (citing *Barker v. Emp't Sec. Dep't*, 127 Wn. App. 588, 112 P.3d 536 (2005)).[2]

Instead, Baker merely repeats his assertions, made below, that the Commissioner's findings of fact were incorrect and that the Commissioner incorrectly decided that Baker was ineligible for benefits. Pet. for Review at 1, 3-8. His Petition amounts to unsworn testimony, attempting to refute the findings of fact, which the Court should not consider. *See* RCW 34.05.558 (judicial review of disputed facts must be confined to the agency record); *Cummings v. Dep't of Licensing*, __ Wn. App. __, 355 P.3d 1155, 1159 (2015) (court will not disturb findings of fact supported by substantial evidence even if there is conflicting evidence).

The Court of Appeals and superior court have already properly decided Baker's case in accordance with the Employment Security Act, title 50 RCW, and the standards for judicial review set forth in the Administrative Procedure Act, chapter 34.05 RCW (APA). This Court sits in the same position as the superior court and applies the APA standards of review directly to the Commissioner's administrative record. *Tapper v. Emp't Sec. Dep't*, 122 Wn.2d 397, 402, 858 P.2d 494 (1993);

[2] Baker did not paginate his Petition for Review. For purposes of this Answer, the Department will cite to specific pages in his Petition under the assumption that the Introduction is on page 1.

RCW 34.05.510; RCW 50.32.120. Baker provides no reason why this Court should conduct, for a third time, the same type of judicial review.

B. Baker Has Not Shown Error in the Commissioner's Factual Findings, Which are Verities

Baker's disagreement with the Commissioner's Factual Findings is not a basis for review under RAP 13.4(b). Moreover, despite the Court of Appeals' clear indication in its decision that unchallenged factual findings are verities, Baker still has failed to assign error or otherwise expressly challenge any of the Commissioner's findings of fact. *Baker*, slip op. at 4-5; Pet. for Review at 1-3. Thus, this Court should treat the findings as verities on appeal. *Tapper*, 122 Wn.2d at 407; RAP 10.3(g), RAP 10.3(h). Even if the Court were inclined to consider the Commissioner's factual findings, review of the Court of Appeals' decision is unwarranted because the Court of Appeals conducted an appropriate review for substantial evidence. *Baker*, slip op. at 6-7.

Baker asserts, as he did at the Court of Appeals, a different version of events than found by the Commissioner. Pet. for Review at 3-6. But as the Court of Appeals recognized, the weight, persuasiveness, and credibility of the evidence are beyond the scope of appellate review. *Baker*, slip op. at 6 (citing *William Dickson Co. v. Puget Sound Air Pollution Control Agency*, 81 Wn. App. 403, 411, 914 P.2d 750 (1996)).

The Commissioner found Baker's testimony at the administrative hearing to be "self-serving" and "not credible." CP at 234 (FF 3), 278. In any event, as both the superior court and Court of Appeals concluded, substantial evidence in the administrative record supports the Commissioner's factual findings.[3] This Court need not conduct a third review.

C. The Court of Appeals Properly Concluded That Baker Was Discharged From Work for Disqualifying Misconduct

Relying on the Commissioner's factual findings, the Court of Appeals concluded, correctly, that Baker was discharged from work for disqualifying misconduct under the Employment Security Act. *Baker*, slip op. at 7-8.

The legislature enacted the Employment Security Act, Title 50 RCW, to provide compensation to individuals who are "involuntarily" unemployed "through no fault of their own." RCW 50.01.010; *Tapper*, 122 Wn.2d at 408. As such, a claimant is disqualified from receiving unemployment benefits if he or she has been discharged from work for "misconduct." RCW 50.20.066(1).

The statute defining misconduct, RCW 50.04.294, identifies four general circumstances that constitute misconduct as well as several acts

[3] The Counterstatement of the Case section in this Answer includes citations to the evidence in the administrative record that supports each factual finding.

that are misconduct *per se* "because the acts signify a willful or wanton disregard of the rights, title, and interests of the employer or a fellow employee." RCW 50.04.294(2); *Daniels v. Dep't of Emp't Sec.*, 168 Wn. App. 721, 728, 281 P.3d 310 (2012) ("Certain types of conduct are misconduct per se.").

Three provisions within the definition of misconduct are relevant to Baker's case. First, RCW 50.04.294(1)(a) provides that misconduct includes "[w]illful or wanton disregard of the rights, title, and interests of the employer or a fellow employee." RCW 50.04.294(1)(a). Second, under RCW 50.04.294(2)(d) and RCW 50.04.294(2)(f), "[r]epeated and inexcusable absences, including absences for which the employee was able to give advance notice and failed to do so," or a "[v]iolation of a company rule if the rule is reasonable and if the claimant knew or should have known of the existence of the rule," are misconduct *per se*. As the Court of Appeals concluded, the factual findings support the conclusion that Baker's conduct amounted to misconduct under each of these provisions. *Baker*, slip op. at 7-8.

Baker argues that the Court of Appeals' decision is inconsistent with *Barker v. Employment Security Department*, 127 Wn. App. 588, 112 P.3d 536 (2005). In that case, Barker's employer had a policy that failure to attend work, without first informing the employer, constituted a

voluntary quit. *Barker*, 127 Wn. App. at 591. Barker was arrested for violating a no-contact order—of which he was unaware. *Id.* He attempted to call his employer from jail to inform them of his absence, but the employer's phone line did not accept collect phone calls. *Id.* Barker spent 14 days in jail, had no visitors, and could not reach anyone who could call the employer on his behalf because all of his friends used cell phones, which did not accept collect calls. *Id.* He asked to use a different phone, but was not permitted to do so. *Id.* Barker contacted his employer immediately upon his release from jail, but was fired for failing to attend work or notify the employer in advance of his absence. *Id.* The Court concluded that Barker did not commit disqualifying misconduct under the Employment Security Act because "[c]ircumstances beyond an employee's control cannot form the basis for the conclusion that the employee acted in willful disregard of the employer's interests." *Id.* at 595-96.

Unlike the claimant in *Barker*, Baker did not prove that his arrest was erroneous or due to unwitting conduct. *Barker*, 127 Wn. App. at 591, 595. Though Baker now asserts that to be the case, at the time of his administrative hearing—seven full months after his arrest and discharge from work—Baker did not present evidence that the ALJ or Commissioner found persuasive. CP at 234-35, 278-79. In fact, the ALJ found Baker's

testimony "self serving," "not reasonable," and "not credible." CP at 234 (FF 3). Here, even if Baker's failure to call his employer on the date of his arrest was excusable, unlike the claimant in *Barker*, Baker did not call his employer immediately after his release from jail. In fact, even though Baker was released from jail around 9:30 a.m., he did not call his employer at all that day. He called a co-worker, but Maintech's policy required that Baker notify his supervisor. CP at 156-57, 159-60, 205, 234-35 (FF 2, 8). And the following day, he did not call until 11:42 a.m., though his usual shift began at 7:00 a.m. CP at 139-42, 153, 160-61, 234-35 (FF 8, 9). He failed to go to work on any of the three days at issue, though he was scheduled to work each day. CP at 140-41, 152-53, 234-35 (FF 6-9). Baker's conduct demonstrated a willful disregard of his employer's rights, title and interests; is properly characterized as repeated and inexcusable absences; and was in violation of his employer's known and reasonable rule. *See* RCW 50.04.294(1)(a), RCW 50.04.294(2)(d), and RCW 50.04.294(2)(f). Because the facts in Baker's case are distinguishable from those in *Barker*, the Court of Appeals' decision does not conflict with *Barker*; there is no basis for this Court to accept review.

D. The Court Should Decline to Accept Review on the Basis of an Alleged Error in the Agency Record That Baker Raises for the First Time

For the first time in his Petition, Baker appears to allege that the administrative record is incomplete because of a "Conversion of Proceedings" and "the two cases did not merge together, therefore making the evidence appear new." Pet. for Review at 1. The precise error alleged by Baker is unclear. Regardless, the Court should refuse to review such a claim of error, as Baker did not raise it before the superior court or Court of Appeals. RAP 2.5(a); *see also Darkenwald v. Emp't Sec. Dep't*, 183 Wn.2d 237, 245 n.3, 350 P.3d 647 (2015) (citing RCW 34.05.554(1) and RAP 2.5(a), the Court declined to consider an appellant's arguments raised for the first time on appeal). Additionally, this alleged error does not meet any of the criteria for acceptance of review under RAP 13.4(b).

In any event, the APA defines the necessary contents of an agency record for judicial review, which includes "any agency document expressing the agency action" and "other documents identified by the agency as having been considered by it before its action and used as a basis for its action." RCW 34.05.566(1). Here, in certifying the agency record to the superior court, an assistant records officer for the Department certified that the record "contains all the matters considered" in Baker's

case. CP at 114. Baker shows no error in the content of the agency record.

V. CONCLUSION

Baker has not shown that the Court of Appeals' decision meets the criteria for this Court's review under RAP 13.4(b). The Court should deny the Petition.

RESPECTFULLY SUBMITTED this 22nd day of October, 2015.

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PROOF OF SERVICE

I, Katie Moceri, hereby state and declare as follows:

1. That I am a citizen of the United States of America, a resident of the State of Washington, over the age of eighteen (18) years, and not a party to the above-entitled action.

2. That on the 22nd day of October 2015, I caused to be served by mailing and emailing a true and correct copy of Answer to Petition for Review, with proper postage affixed thereto to:

By US mail and Email:

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I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON that the foregoing is true and correct.

DATED this 22nd day of October 2015, in Seattle, Washington.

Katie Moceri, Legal Assistant

OFFICE RECEPTIONIST, CLERK

From: OFFICE RECEPTIONIST, CLERK
Sent: Thursday, October 22, 2015 2:01 PM
To: 'Moceri, Katie (ATG)'
Cc: Benson, April (ATG); donaldwaynebaker38@yahoo.com
Subject: RE: Donald Baker v Employment Security Dept., No. 92255-1

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Sent: Thursday, October 22, 2015 1:59 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Cc: Benson, April (ATG) <AprilB1@ATG.WA.GOV>; donaldwaynebaker38@yahoo.com
Subject: Donald Baker v Employment Security Dept., No. 92255-1

Dear Clerk,

Attached for filing is the Answer to Petition for Review in *Donald Baker v Employment Security Dept., No. 92255-1*

The Petitioner is receiving this email as a courtesy copy. A hard copy will also be delivered via US mail.

Sincerely,
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