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Court of Appeals No. 73024-0-I

IN THE WASHINGTON COURT OF APPEALS
DIVISION ONE

SARAH CHRISTNER,

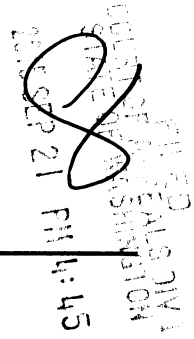
Appellant,

v.

STATE OF WASHINGTON DEPARTMENT OF EMPLOYMENT SECURITY,

Respondent.

APPELLANT'S REPLY BRIEF



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I. INTRODUCTION

Appellant Sarah Christner submitted a two-week resignation letter—at the behest of her former employer, Washington Center for Pain Management (WCPM), after WCPM determined it would no longer consider her requests to take time off from work, regardless of whether they were for medical appointments or for personal reasons. CP 155-56, Finding of Fact (" FF") 10. WCPM permitted Ms. Christner to work the remaining two weeks, processing her termination as a quit.

Prior to adjudicating Ms. Christner's claim, WCPM informed the Employment Security Department (ESD) in writing that Ms. Christner "voluntarily resigned" to pursue a position with another employer. CP 147-48. WCPM did not provide a copy of the relevant policies, a copy of any alleged warning, attendance records, time off request records, or other documentation to prove disqualifying misconduct under RCW 50.20.066 or 50.04.294(1) or (2) prior to the adjudication of the claim.

ESD adjudicated the job separation as a discharge—finding there was no evidence to show that Ms. Christner's actions were a willful or deliberate disregard of the employer's rules, polices or best interests. CP 139-43. The employer appealed, alleging *its intent was not to show misconduct* but to show that Ms. Christner quit so that it could be entitled to relief of benefit charges. At the hearing, WCPM only provided vague

testimonial evidence regarding the dates and details of Ms. Christner's requests for time off and did not produce copies of evidence that are customarily relied upon.

As outlined in Ms. Christner's opening brief and further argued below, the decision to deny benefits by the Commissioner's Review Office (Commissioner) for disqualifying misconduct pursuant to RCW 50.04.294(1)(b) is not supported by the substantial evidence in the whole record, constitutes an error of law, and should be reversed.

II. ARGUMENT IN REPLY

A. Clarification of the Standard of Review in Reply

Contrary to the articulation of the standard of review in the Commissioner's brief ("Resp. Br."), this court reviews the evidence in the light most favorable to the party who prevailed at the final administrative proceeding below—*not* "in the light most favorable to the Commissioner," as framed in the Commissioner's Brief. *See* Resp. Br. at 14; *See City of University Place v. McGuire*, 144 Wn.2d 640, 652, 30 P.3d 453 (2001); *William Dickson Co. v. Puget Sound Air Pollution Control Agency,* 81 Wn. App. 403, 411, 914 P.2d 750 (1996).

In this case, the prevailing party at the hearing was the employer, which has not appeared in this appeal. The Commissioner's final decision

is initially considered prima facie correct, the party challenging the decision—here, Ms. Christner—bears the burden of showing it is invalid. RCW 34.05.570(1)(a); *Smith v. Employment Sec. Dep't,* 155 Wn.App. 24, 32, 226 P.3d 263 (2010). However, the *burden of proof* in a misconduct case remains on the party alleging misconduct, and thus, contrary to the Commissioner's brief, the burden of proof to establish misconduct is not an "initial" one. *See* Resp. Br. at 9; WAC 192-100-065; *Yamamoto v. Puget Sound Lbr. Co.,* 84 Wash. 411, 146 P. 861 (1915).

To successfully overturn an agency's finding of fact, the appellant must establish that factual findings are not supported by substantial evidence in the agency record. RCW 34.05.570(3)(e). "Substantial evidence is 'evidence in sufficient quantum to persuade a fair-minded person of the truth of the declared premises.'" *Heinmiller v. State Dep't of Health*, 127 Wn.2d 595, 609-10, 903 P.2d 433, 909 P.2d 1294 (1995), *cert. denied*, 518 U.S. 1006 (1996). This court must search the entire record for evidence that is both supportive and contrary to the Commissioner's findings. *Franklin Cnty v Sellers,* 97 Wn.2d at 324 (citing to *Universal Camera Corp. v. NLRB*, 340 U.S. 474, (1951).

B. The Court Should Reject Respondent's New and Unsupported Allegation that Ms. Christner's Actions Constituted "False Pretenses"—A Conclusion Not Reached by the Commissioner.

The Commissioner's brief attempts to transform Ms. Christner's actions during her employment at WCPM as acting under "false pretenses." *See* Resp. Br. at 14-15, 17, and 24. However, this new issue lacks factual support and thus is disingenuous.

Neither the Commissioner nor the ALJ concluded that Ms. Christner acted under "false pretenses" during her employment. CP 178-80, and 161-66. The record shows Ms. Christner's honesty was not at issue. The Commissioner did not analyze misconduct under RCW 50.04.294(2)(c). Neither the Commissioner nor the ALJ set forth a credibility determination in the record or made a determination on the weight to evidence. *Id.* Furthermore, WCPM did not allege false pretenses. To the contrary, Ms. Christner was honest when WCPM asked her the nature of her personal request for time off—to her detriment.

The court should decline to review the newly raised allegation of false pretenses as this was not alleged or proven at the hearing is prejudicial to Ms. Christner.

C. The Substantial Evidence in the Record Does Not Support a Finding of Disqualifying Misconduct.

As argued in her opening brief, the substantial evidence in the record, when looking at the whole, does not support a finding of

misconduct. Ms. Christner's resignation was requested for reasons that do not constitute misconduct. It is insufficient as supporting evidence to uphold a misconduct finding for two primary reasons.

First, the discharge "discharge precipitating conduct" cannot be held as the causal nexus for the termination where the employer did not terminate Ms. Christner for two weeks. It does not follow that Ms. Christner's resignation would be requested for violating reasonable standards of behavior that the employer has the right to expect, yet be permitted to remain employed for two weeks. RCW 50.04.294(1)(b). This does not make sense.

Second, the employer has not shown any "deliberate" violation of any rule or policy after a warning based on past conduct. Looking at sequence of events, and assuming that the email dated September 26, 2013 constitutes a "final" warning, it is simply not possible that there could have been 5-6 instances of absences in a five week period. There are not five weeks between September 26, 2013 and October 18, 2013—the date WCPM requested Ms. Christner's two-week resignation. CP 162 (FF 7); CP 188. This finding fails. *Id.* The employer failed to isolate the specific dates of these alleged instances or articulate the amount of time off when it could have.

The employer discharged Ms. Christner because it could no longer accommodate her requests for time off. CP 98; 146. As argued in her opening brief, Ms. Christner's future conduct is not and should not be a basis for a showing of misconduct under the Employment Security Act. The misconduct statute plainly addresses past conduct, not future conduct. See RCW 50.20.066 and RCW 50.04.294.

In this case, the employer simply acted preemptively to forestall the possible administrative burden of processing Ms. Christner's possible future requests for time off. CP 146. While Ms. Christner reminded her employer that she had a long-term goal of seeking a job in law enforcement, and could not guarantee she could offer two weeks' notice in all circumstances, including for reasons related to medical or military reasons.

D. The Commissioner Should Not Interpret the Statutes it Administers in a Manner that Narrows the Reach of Unemployment Benefits to Claimants who are Otherwise Unemployed Through No Fault of Their Own when the Statute is Ambiguous.

Contrary to the Respondent's brief, if the misconduct the court should not simply defer to the Commissioner's interpretation. Resp. Br. at 18. The Employment Security Act mandates the statutes and regulations the Employment Security Department administers are to be liberally construed in favor of reducing *involuntary unemployment*. RCW

50.01.010. The liberal construction mandate means that courts should be cautioned of sanctioning a construction that would narrow unemployment coverage to claimants who are unemployed through no fault of their own. *See Western Ports Transp. v. Employment Sec. Dep't,* 110 Wn. App. 441, 450 (2002).

Ms. Christner argues that there is no ambiguity in the plain reading of RCW 50.04.294(1)(b), and the employer failed to establish that Ms. Christner disregarded any standards of behavior that WCPM had the right to expect of her.

E. This Commissioner's decision in this case should be reversed and not remanded for additional fact-finding.

As the evidence in the record establishes, the employer did not meet its burden of proof by a preponderance of evidence. Ms. Christner simply did not violate or disregard a standard that WCPM had the right to expect. This case should be reversed and not remanded because the employer had ample opportunity to put on its case in chief at the hearing. WCPM attended the hearing unprepared and failed to produce any documentary evidence or refer to reliable employment records to establish data grounded in fact. Because WCPM failed to meet its burden of misconduct the first time around means it should not be given a second bite at the apple. Particularly here—where the evidence in the record

amply supports a finding that Ms. Christner's resignation was requested for reasons that do not constitute misconduct.

III. CONCLUSION

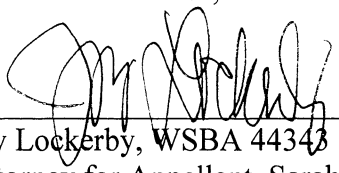
For the reasons stated above and as outlined in her opening brief, Ms. Christner respectfully requests this court reverse the Commissioner's decision to deny benefits. The Commissioner erred in concluding the employer met its burden of proof for misconduct without sufficient evidence in the record.

The employer failed to meet its burden of proof in establishing disqualifying misconduct under RCW 50.04.294(1)(b) by providing anything more than vague, evolving, and approximate testimony about the alleged conduct and the "warning." Instead, the evidence in the record overwhelmingly supports a finding that Ms. Christner became *involuntarily* unemployed through no fault of her own.

Ms. Christner requests an award of reasonable attorneys' fees for vindicating her rights for unemployment eligibility on appeal pursuant to RCW 50.32.160 and in accordance with RAP 18.1.

RESPECTFULLY SUBMITTED this 21st day of September, 2015.

LOCKERBY LAW, PLLC



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PROOF OF SERVICE

The undersigned attorney, Joy Lockerby, declares under penalty of perjury under the laws of the State of Washington that on this day, September 21, 2015, a true and correct copy of the foregoing *Reply of Appellant* was filed with the court and served to counsel of record and interested parties as indicated below:

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DATED this 21st day of September, 2015.

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