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SUPREME COURT  
STATE OF WASHINGTON  
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No. 35173-4-III

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**SUPREME COURT  
OF THE STATE OF WASHINGTON**

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KASANDRA GERIMONTE,  
  
and  
  
STATE OF WASHINGTON  
DEPARTMENT OF EMPLOYMENT SECURITY,  
  
Appellants,  
  
vs.  
  
VALLEY PINES RETIREMENT HOME  
  
Respondent.  
  
Court of Appeals

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**ANSWER TO RESPONDENT'S PETITION FOR  
DISCRETIONARY REVIEW**

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Monica Holland WSBA # 42133  
Attorney for Kasandra Gerimonte  
Unemployment Law Project  
509.768.0808  
monica@ulproject.org

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## I. INTRODUCTION

Consistent with Washington law, the Court of Appeals issued an unpublished decision reversing the Spokane County Superior Court and reinstating the Employment Security Department's (ESD) order that Appellant Kasandra Gerimonte was eligible to receive unemployment benefits. Unemployed workers are eligible for benefits absent a statutory disqualification. *Safeco Insurance Companies v. Meyering*, 102 Wn.2d 385, 388-89, 687 P2d 195 (1984). Employees who are terminated for "misconduct" are not eligible to receive benefits. RCW 50.20.060. "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).

The ESD Commissioner granted Ms. Gerimonte benefits, finding no misconduct under RCW 50.04.294(1)(a). The Court of Appeals properly followed Washington law in affirming that there was no misconduct where Ms. Gerimonte responded truthfully on two background checks and where there was no requirement to disclose pending charges or her participation in a diversion program between background checks. *Gerimonte v.*

*Employment Security Department*, (unpublished opinion) No. 35173-4-III (Cons. w/ no. 35224-2-III), attached as Appendix A.

Respondent Valley Pines fails to show that the Court of Appeals decision is in conflict with precedent or that the issue raised is one of substantial public interest that requires further guidance from this Court. Because Valley Pines fails to meet any of the criteria for review under Rules of Appellate Procedure (RAP) 13.4(b) and because it raises new and irrelevant issues, this Court should deny Valley Pines's petition for review.

## **II. COUNTERSTATEMENT OF THE ISSUES**

For the reasons addressed below, the issues raised in Valley Pines' petition for review do not meet any of the standards for this Court's discretionary review under RAP 13.4(b). However, if the Court did accept review, the issues would be:

- (1) Should this Court decline to consider new issues raised for the first time in Valley Pines' petition for review where the issues were never raised in the trial court or the Court of Appeals and this Court is limited by the issues presented before and determined by those Courts?
- (2) Should this Court deny review of a decision of the Court of Appeals where Valley Pines fails to identify an issue of substantial public interest that would merit such review?

### III. RESPONSE TO VALLEY PINES' STATEMENT OF THE CASE

The Court of Appeals decision provides the proper factual context which Gerimonte incorporates by reference. The following facts are offered to clarify Valley Pines' misleading contentions.

Valley Pines continues to assert that Ms. Gerimonte failed to disclose that she had participated in 'disqualifying crimes' when she completed the first background check in April 2014. Pet. at 2-3. These contentions are wholly misleading and they ignore critical facts. The background check inquired only about pending charges or convictions, which Ms. Gerimonte did not have in April 2014. CR 116. There was no 'disqualifying crime' in existence at that time. The background check did not require that Ms. Gerimonte speculate about what possible future charges or convictions could result from her activities in January; it only asked to list pending charges or convictions. CR 114, CR 110.

Valley Pines continues to assert that she had 'knowledge of these impending charges,' and withheld them from her employer, Pet. 3, despite the findings of the Court of Appeals and the Commissioner to the contrary. CR 116, *Gerimonte*, Appendix A at p. 8. These so called 'impending' charges were not brought against Ms. Gerimonte until October 2014, CR

54, ten months after the activity took place, and six months after the first background check. CR 114.

Once charges were filed in October 2014, Valley Pines misleadingly states that Ms. Gerimonte ‘never told Valley about the filed charges,’ or that she had entered a diversion program. Pet. 3. Valley Pines continues to ignore the critical facts that she actually did report the filed charges when requested in the April 2016 background check, CR 114, and that Valley Pines had no policy, rule, or even a communication with Ms. Gerimonte requiring her to report filed charges between background checks, or her participation in a diversion program for that matter. CR 116. Absent any policy mandating that Ms. Gerimonte disclose her pending charges or involvement with a diversion program between background checks, Ms. Gerimonte used her judgment to not disclose this information until it was requested on the next background check. She responded to both background checks completely and truthfully and with the information she had at the time.

The Court of Appeals based its decision in part on RCW 50.04.294(3)(c), which provides that “Misconduct” does not include ... Good faith errors in judgment or discretion.” *See, Gerimonte*, Appendix A. The Court of Appeals also relied on *Hamel v. Employment Security Department*, 93 Wn. App. 140, 146, 966 P.2d 1282 (1988) (“willful



misconduct” means more than negligence); and *Wilson v. Employment Security Department*, 87 Wn. App. 197, 199-200, 940 P.2d 269 (1997) (actions or failures to act that are simply negligent, and not in defiance of a specific policy, do not constitute misconduct in the absence of a history of repetition after warnings).

This Court should rely on the facts as the Court of Appeals and Ms. Gerimonte have objectively presented them, rather than on the misleading summary that Valley Pines’ petition presents.

#### **IV. ARGUMENT WHY REVIEW SHOULD BE DENIED**

Rule of Appellate Procedure 13.4(b) sets forth the criteria governing this Court's acceptance for discretionary review of a Court of Appeals decision:

A petition for review will be accepted by the Supreme Court *only*: (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

RAP 13.4(b) (emphasis added).

Rather than addressing these bases for review, Valley Pines attempts to re-litigate the case with new and irrelevant issues on appeal. *See, e.g.*, Pet. 2 (arguing “the criminal acts itself [sic], should be

considered misconduct”). Valley Pines raises only one of the 13.4(b) bases for review in its petition: substantial public interest. Pet. 2, 5-8. Using its petition as a platform, Valley Pines clamors for this Court to create new law based upon considerations irrelevant to Ms. Gerimonte’s eligibility for benefits. *Cf., e.g.*, Pet. 5-6 (citing WAC 388-76-101631, a regulation published by the Department of Social and Health Services, to support the claim that Ms. Gerimonte’s termination was not a “normal unemployment case” and warrants a new definition of misconduct). Valley Pines’ “public interest” contentions are thus outside of the scope of this Court’s review of Ms. Gerimonte’s unemployment case.

Although citing a variety of cases, Valley Pines fails to articulate that these cases have been cited because the Court of Appeals decision conflicts with them, or how these cases actually do conflict with the present decision as required by 13.4(b)(1) or (2). *See* Pet. 4-7. <sup>1</sup>

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<sup>1</sup> Even if this Court were to construe that Valley Pines was asserting a 13.4(b)(1) or (2) reason basis for review, these cases do not conflict with the present decision because they are clearly distinguishable:

Valley Pines cites *Johnson v. Employment Security*, 64 Wn. App 3111, 825 P.2d 505 (1992), Pet. 4, which is distinguishable because the appellant in *Johnson* was employed and on duty at the time the misconduct occurred.

Valley Pines cites *Nelson v. Employment Security*, 31 Wn. App, 621, 644 P.2d 145 (1982) Pet. 4. This case has been reversed by *Nelson v. Department of Employment Security*, 98 Wash.2d 370, 655 P.2d 242 (1982).

Valley Pines cites *Anderson v. Employment Security*, 135 Wn. App 887, 146 P.3d 475 (2006), Pet. 5, for the holding that an employee’s failure to disclose a ‘conflict of interest’ is misconduct. *Id.* at 895. There the employer had a policy to provide yearly disclosures. *Id.* at 892. The facts are undisputed that Valley Pines had no such policy.

A. **The Court Should Not Consider the New and Irrelevant Issues Valley Pines Raises for the First Time in Its Petition for Discretionary Review.**

Valley Pines has raised three issues in its petition for review that were never presented or addressed by the trial court or the Court of Appeals.

First, Valley Pines asserts that the ‘commission of a criminal act itself<sup>2</sup> should be considered misconduct.’ Pet. 2, effectively asking this Court, for the first time, to expand the statutory scheme of RCW 50.04.294. Second, Valley Pines asks this Court to consider the ‘inadequate statutory and case law definition(s) of misconduct’ as they apply to vulnerable adults, urging that this Court, for the first time, to adopt a more stringent definition. Third, Petitioner seems to assert that the State is at fault for failing to adequately protect vulnerable adults and as such, the State should pay the unemployment tax. These new issues are irrelevant to the Court of

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Valley Pines cites *Macey v. Employment Security*, 110 Wash 2d 308, 752 P.2d 372 (1988), Pet. 6, where the employee lied on his employment application as to whether he had ever been convicted of any violation of the law. *Id.* at 321. Unlike the claimant in *Macey*, Ms. Gerimonte had not been convicted or even charged with anything when she completed her first background check, and she did not lie on the second background check.

*Cuesta v. Employment Security Department*, 200 Wn. App 560, 402 P.3d 898 (2017), Pet. 7, is also distinguishable because the employee was discharged for on-the-job misconduct.

- 2 Valley Pines ignores that the criminal activity occurred prior to Ms. Gerimonte’s employment with them. Valley Pines would appear to be asking that this Court declare that the commission of a crime, no matter when, should bar an individual from the prospect of ever receiving an unemployment check. This is a new policy question outside the scope of what the Court of Appeals decided.

Appeals decision affirming the Commissioner that Ms. Gerimonte engaged in no statutory misconduct under RCW 50.04.294 during her employment with Valley Pines.

Review of these questions is thus not merited because they are not properly before the Court. Valley Pines only asserted them after the Court of Appeals issued its decision. It is well-established in Washington that new issues cannot be raised for the first time in a petition for review. RAP 2.5(a); *Heg v. Alldredge*, 157 Wn.2d 154, 162, 137 P.3d 9 (2006) (noting this Court will not review an issue raised for first time in a petition for review, citing RAP 2.5(a)); *Fisher v. Allstate Ins. Co.*, 136 Wn.2d 240, 252, 961 P.2d 350 (1998). Thus, the Court is limited to the questions and theories presented before and determined by the Court of Appeals, and to claims of error directed to that court's resolution of such issues. *People's Nat'l Bank v. Peterson*, 82 Wn.2d 822, 829, 514 P.2d 159 (1973) (declining to review issues and theories raised for the first time in a petition for review where they were not presented in the trial court or the Court of Appeals). Since Valley Pines did not raise these issues or pose these questions in a timely fashion at the trial court or in the Court of Appeals, it is too late for him to do so in his petition. The Court should decline to address them.

**B. The Court of Appeals opinion does not threaten the public interest.**

Valley Pines asserts that RCW 50.04.294 raises an issue of substantial public interest regarding the protection of vulnerable adults. Pet. 2. It asks this Court to create a more stringent definition of the statute and even asserts that this Court “needs to define a separate category for this protected class.” Pet. 7.

As discussed above, not only does Valley Pines raise this issue for the first time before this Court; it attempts to introduce an issue of statutory construction for a new class of vulnerable adults. These are tangential and convoluted arguments that are irrelevant to the issue of whether or not Ms. Gerimonte was terminated for misconduct under RCW 50.04.294 such that she be denied unemployment benefits. RCW 50.04.294 is clear and the Court of Appeals properly interpreted its provisions to this case in finding that Ms. Gerimonte did not engage in any wilful or deliberate behavior constituting misconduct when she was employed with Valley Pines.

Additionally, Valley Pines asks this Court to essentially step into the legislative realm and adopt a new statutory scheme by defining “a separate category for this protected class [of vulnerable adults].” Valley Pines is not asking the Court to review the Court of Appeals interpretation of RCW

50.04.294, but to instead create a new statute or a new section of the existing statute regarding misconduct. This is the purview of the Legislature, not this Court.

## V. CONCLUSION

Valley Pines failed to raise a definitive basis for review by this Court. The Court of Appeals properly analyzed this issue under the clear plain language of RCW 50.04.294. Valley Pines failed to show that the decision of the Court of Appeals is in conflict with appellate precedent or that there is an issue of substantial public interest. Valley Pines also raises new, irrelevant and convoluted issues that should not be raised for the first time in a petition for review to this Court. For these reasons, the Court should deny review.

Dated this 7 day of September 2018.

Respectfully submitted,

  
on behalf of  
Monica Holland, WSBA # 42133  
Attorney for Appellant Gerimonte

# APPENDIX A

**FILED**  
**JUNE 7, 2018**  
In the Office of the Clerk of Court  
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION THREE

In re the Matter of:	)	
	)	
KASANDRA GERIMONTE,	)	No. 35173-4-III (consolidated with No. 35224-2-III)
	)	
Appellant,	)	
	)	
and	)	
	)	
EMPLOYMENT SECURITY	)	UNPUBLISHED OPINION
DEPARTMENT OF THE STATE OF	)	
WASHINGTON,	)	
	)	
Appellant,	)	
	)	
v.	)	
	)	
VALLEY PINES RETIREMENT HOME,	)	
	)	
Respondent.	)	

FEARING, J. — Kasandra Gerimonte and the Washington State Employment Security Department (ESD) appeal a superior court order reversing the ESD Commissioner’s (Commissioner) granting of unemployment compensation benefits to Gerimonte. Because the superior court reviewed new evidence and reweighed the evidence before the ESD, we reverse and reinstate the award of benefits.



## FACTS

The Valley Pines Retirement Home (Valley Pines) employed Kasandra Gerimonte, a certified nursing assistant, as a caregiver from March 2014 until April 26, 2016. The Washington State Administrative Code binds Valley Pines. One provision of the code reads that enumerated criminal convictions or pending criminal charges will disqualify an individual from unsupervised access to adults receiving geriatric services. A state statute mandates all retirement home caregivers undergo a background check before employment and every two years while working with vulnerable senior citizens.

Valley Pines does not have an employee handbook, nor does it maintain a set of written employee policies. The retirement home provides training and certification processes that allow caregivers to maintain licensing and employment.

Valley Pines first initiated a background check on Kasandra Gerimonte on April 8, 2014. Gerimonte indicated on her form authorizing the background investigation that she had no criminal convictions or pending charges against her. Valley Pines' background check did not reveal any disqualifying crimes, pending charges, or reports of theft.

Valley Pines hired Gerimonte shortly thereafter.

In April 2016, Valley Pines conducted a second background check of Kasandra Gerimonte. The check found that the State of Washington filed charges against Gerimonte on January 3, 2014. In completing the employment form authorizing the background check in April 2016, Gerimonte disclosed that she had pending theft charges. Gerimonte

allegedly deposited forged checks at a Numerica Credit Union branch in January 2014, before the first background check. Although the purported crimes occurred on January 3, 2014, according to Gerimonte, the State filed no charges until after the 2014 background check.

Kasandra Gerimonte entered a court authorized diversion program after the State brought theft charges in late 2014. The State would dismiss the charges if Gerimonte successfully completed the diversion program. Gerimonte did not notify Valley Pines of the pending charges until the 2016 background check. She asserts that no Valley Pines' rule or policy required her to voluntarily report her participation in the diversion program. Gerimonte never pled guilty to any charge.

When Valley Pines learned, in April 2016, of the pending theft charges against Kasandra Gerimonte, the retirement home discharged her from employment. Gerimonte applied for unemployment benefits, which the ESD initially denied. Kasandra Gerimonte appealed ESD's initial determination.

#### PROCEDURE

An ESD administrative law judge conducted an evidentiary administrative hearing. James Lowell, Valley Pines manager, testified that the State charged Kasandra Gerimonte, in January 2014, before Gerimonte began employment with the retirement home. Gerimonte clarified that she committed the criminal act on January 3, 2014, but first learned of the criminal investigation or charges after she commenced work.

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Gerimonte averred that the State filed no charges until January 2015. Gerimonte's mother, Kristine Labelle, affirmed that the State did not file charges until seven or eight months after January 2014. Labelle testified law enforcement conducted a lengthy investigation, and Gerimonte did not know the State would file charges until it did so.

James Lowell testified that Valley Pines informs each employee, before employment, of a policy about background authorizations adopted to comply with State of Washington Department of Social and Health Services requirements. Kasandra Gerimonte declared that Valley Pines never reviewed any handbook or policy regarding criminal charges with her. Valley Pines provided no paperwork confirming any mention of policies to Gerimonte. Gerimonte insisted she lacked knowledge of any obligation to disclose possible future criminal charges.

The administrative law judge resolved, in favor of Kasandra Gerimonte, the factual disputes as to the timing of the theft charges and the review of Valley Pines' policies with Gerimonte. The judge found:

Here, claimant answered all questions truthfully on both the 2014 and 2016 background check authorizations. Claimant was unaware that she was being investigated about a theft charge and there were no pending charges when she filled out the 2014 background authorization. Following the 2014 background check but before the second background check, claimant learned of the incident and eventually entered a diversion program before the second background check was authorized.

. . . Employer's assertions aside, the claimant was unaware of any employer policy or rule requiring her to divulge her participation in a diversion program. Indeed, the employer provides no oral or written policies . . . to its new employees. It only requires that a W-4 and

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background check authorization be filed [sic] out. Claimant's actions do not equate to a willful or wanton disregard of the rights, title, and interests of the employer.

Commissioner's Record at 116-17. The administrative law judge reversed ESD's initial finding and granted Gerimonte unemployment benefits.

Valley Pines petitioned the ESD Commissioner for reconsideration of the administrative law judge's decision. Valley Pines attached the cover of a police report to the petition, which report read that the State filed felony charges on October 22, 2014. Valley Pines never submitted this police report cover to the administrative law judge or Kasandra Gerimonte during the evidentiary hearing.

The ESD Commissioner declined to consider the police report because Valley Pines failed to submit the document during the administrative hearing. The Commissioner adopted the administrative law judge's findings of fact and conclusions of law and affirmed the administrative law judge's order.

Valley Pines appealed the ESD Commissioner's order to the superior court. The superior court reversed the Commissioner's decision. The superior court determined that substantial evidence did not support the Commissioner's finding that Kasandra Gerimonte lacked knowledge of being investigated for theft in April 2014. The superior court entered findings of fact, one of which reads:

At the time she signed her background check, she knew she had been investigated by Numerica Credit Union for alleged forgery for passing bad checks on January 3, 2014, and was later interviewed by Spokane Police

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Department. She knew at said time that the police were recommending filing charges against her, and charges were ultimately filed against her.

Clerk's Papers at 41. The superior court also found that Gerimonte had documentation of a pending criminal investigation on or before January 16, 2014. In so finding, the superior court relied on the police cover sheet submitted by Valley Pines in its ESD petition for reconsideration.

## LAW AND ANALYSIS

### Merits of Appeal

Kasandra Gerimonte and ESD appeal and assign error to the superior court's findings. The two appealing parties primarily contend that the trial court erred when entering new findings of fact and when reweighing the evidence by concluding that Kasandra Gerimonte committed work-connected misconduct. We agree.

Washington's Administrative Procedure Act (APA), chapter 34.05 RCW, governs judicial review of employment benefits. *Smith v. Employment Security Department*, 155 Wn. App. 24, 32, 226 P.3d 263 (2010). This appeals court sits in the same position as the superior court and applies APA standards to the administrative record. *Smith v. Employment Security Department*, 155 Wn. App. at 32. We deem the ESD Commissioner's decision prima facie correct. *Smith v. Employment Security Department*, 155 Wn. App. at 32. The challenger to the ESD Commissioner's decision holds the burden to demonstrate the decision's invalidity. *Smith v. Employment Security*

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*Department*, 155 Wn. App. at 32; RCW 34.05.570(1)(a). This court reviews the Commissioner's ruling rather than the underlying administrative law judge's decision, but of course, if the Commissioner adopts the administrative law judge's findings of fact, we in essence review the administrative judge's findings. *Tapper v. Employment Security Department*, 122 Wn.2d 397, 405-06, 858 P.2d 494 (1993).

Findings of fact will be upheld when supported by substantial evidence. RCW 34.05.570(3)(e). Substantial evidence persuades a rational, fair-minded person of the truth of the finding. *Miller v. City of Tacoma*, 138 Wn.2d 318, 323, 979 P.2d 429 (1999). The reviewing court may not reweigh evidence or substitute its judgment on the credibility of witnesses. *Tapper v. Employment Security Department*, 122 Wn.2d at 403.

We review the ESD Commissioner's legal conclusions for errors of law. *Griffith v. Department of Employment Security*, 163 Wn. App. 1, 6, 259 P.3d 1111 (2011). The reviewing court may substitute its view of the law for the Commissioner's ruling, but we must give "substantial weight" to the Commissioner's interpretation due to the agency's special expertise. *Verizon Northwest, Inc. v. Employment Security Department*, 164 Wn.2d 909, 915, 194 P.3d 255 (2008).

The existence of misconduct is a mixed issue of fact and law. *Markam Group, Inc. v. Department of Employment Security*, 148 Wn. App. 555, 561, 200 P.3d 748 (2009). Whereas, we accord the factual findings of the agency deference, we subject the

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process of applying the law to the facts to de novo review. *Tapper v. Employment Security Department*, 122 Wn.2d at 403.

Unemployed workers are eligible for benefits absent a statutory disqualification. *Safeco Insurance Companies v. Meyering*, 102 Wn.2d 385, 388-89, 687 P.2d 195 (1984). Employees who are terminated for “misconduct” are not eligible to receive unemployment benefits. RCW 50.20.060. Based on facts supported by substantial evidence, the ESD Commissioner properly concluded that Kasandra Gerimonte did not engage in misconduct.

Substantial evidence supports the Commissioner’s finding that Kasandra Gerimonte lacked knowledge of any criminal investigation until 2015. Gerimonte testified the State charged her a year after the incident, or in 2015. Gerimonte’s mother, Kristine Labelle, testified Gerimonte did not know of the charges until seven or eight months after January 2014, and, in the interim, questioned whether the State would ever charge her. The 2016 background check shows Gerimonte committed violations on January 3, 2014, but does not indicate when the State filed charges.

Kasandra Gerimonte responded honestly to both background check authorization questions. On April 8, 2014, Gerimonte answered that she had no pending criminal charges. Gerimonte and her mother both testified the State charged Gerimonte in late in 2014. In April 2016, after the State filed theft charges, Gerimonte responded honestly on her background authorization forms that she had a pending charge.

The ESD Commissioner, through the administrative law judge, did not abuse discretion when resolving factual questions in favor of Kassandra Gerimonte. Gerimonte lacked knowledge of any Valley Pines policy requiring her to report her participation in a diversion program to her employer. James Lowell did not provide Valley Pines employees with any employee handbook. Gerimonte testified repeatedly that Lowell never represented, orally or in writing, a requirement to report all pending charges. Lowell admitted Valley Pines does not maintain any written policy regarding reporting pending charges.

Valley Pines manager James Lowell asserted during the hearing that the retirement home's policy regarding pending charges was covered in the required trainings to become a certified nursing assistant. Lowell was unable to provide any evidence that Kassandra's Gerimonte's training covered that policy, however.

Kassandra Gerimonte reasonably decided to not share her participation in a diversion program with Valley Pines. Gerimonte did not know how a diversion program might affect pending charges in relation to her occupation, and Gerimonte could not discover such information because James Lowell never provided her with a copy or summary of corporate rules. Substantial evidence supported the ESD Commissioner's conclusion that Gerimonte lacked notice of any policy that required her to report to her employer involvement in a diversion program.



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In turn, the ESD Commissioner correctly determined that Kasandra Gerimonte did not commit misconduct. “Misconduct” includes, in relevant part, “[w]illful or wanton disregard of the rights, title, and interests of the employer or a fellow employee.” RCW 50.04.294(1)(a). “‘Misconduct’ does not include: . . . Good faith errors in judgment or discretion.” RCW 50.04.294(3)(c).

Courts have concluded that “‘willful misconduct’” means more than negligence. *Hamel v. Employment Security Department*, 93 Wn. App. 140, 146, 966 P.2d 1282 (1998). Willful misconduct contemplates an intentional act with knowledge that the act will likely result in serious injuries, or with reckless disregard of its probable consequences. *Hamel v. Employment Security Department*, 93 Wn. App. at 146. Actions or failures to act that are simply negligent, and not in defiance of a specific policy, do not constitute misconduct in the absence of a history of repetition after warnings. *Wilson v. Employment Security Department*, 87 Wn. App. 197, 199-200, 940 P.2d 269 (1997).

Kasandra Gerimonte’s actions do not amount to misconduct. James Lowell failed to communicate to Gerimonte the required reporting of pending charges or participation in a diversion program. While Gerimonte’s pending charge potentially endangered Valley Pines’ business license, she cannot be faulted for failing to adhere to an unknown policy. At most, Gerimonte acted negligently in failing to report any pending charges.

The superior court may only review the findings of fact entered by the Commissioner and determine whether substantial evidence supports the findings. RCW

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34.05.570(3)(e). RCW 34.05.562 allows the superior court to entertain new evidence in limited circumstances, but no such circumstances existed here.

The superior court erroneously relied on evidence not admitted into the Commissioner's record. The superior court found that Kasandra Gerimonte knew she had been investigated by Numerica Credit Union for alleged forgery for passing bad checks on January 3, 2014, that the police recommend the filing of charges against her, and that the State ultimately filed charges. This finding arises from the police report attached to Valley Pines' petition for reconsideration, not from evidence submitted during the administrative law judge hearing.

In addition to the police report cover arriving late, the cover was unsworn and not amenable to examination by the administrative law judge or Kasandra Gerimonte. The Commissioner properly refused to consider the police report cover for this additional reason.

#### Attorney Fees

Kasandra Gerimonte seeks recovery of reasonable attorney fees pursuant to RCW 50.32.160. Under this statute, an attorney representing an Employment Security Act claimant may be awarded a reasonable fee "if the decision of the commissioner shall be reversed or modified." RCW 50.32.160. Gerimonte seeks to have the Commissioner's decision affirmed, not modified or reversed. Unfortunately, the statute does not afford Gerimonte an award of fees. *Markam Group, Inc. v. Department of Employment*

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*Security*, 148 Wn. App. 555 (2009).

#### CONCLUSION

We reverse the superior court's ruling and reinstate the ESD Commissioner's ruling granting Kasandra Gerimonte unemployment benefits. We deny Gerimonte an award of reasonable attorney fees on appeal.

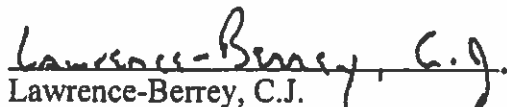
A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.



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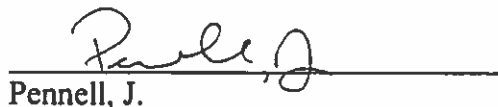
Fearing, J.

WE CONCUR:

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Lawrence-Berrey, C.J.

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Pennell, J.

**CERTIFICATE OF SERVICE**

I hereby certify that I caused the foregoing **ANSWER TO RESPONDENT'S PETITION FOR DISCRETIONARY REVIEW** of Appellant Kassandra Gerimonte be filed with the Clerk of the Court using e-service, and I certify that I served all parties, or their counsel of record, a copy of this document by United States Mail, proper postage attached, to the following addresses:

Timothy Harkins  
Attorney at Law  
1304 W College Ave  
Spokane, WA 99201-2006

Catherine Kardong  
Assistant Attorney General  
1116 W Riverside Ave, Suite 100  
Spokane WA 99201-1106

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

DATED September 7, 2018, in Seattle, WA.



Jason Arends, Office Manager  
Unemployment Law Project

# UNEMPLOYMENT LAW PROJECT

September 07, 2018 - 4:37 PM

## Filing Motion for Discretionary Review of Court of Appeals

### Transmittal Information

**Filed with Court:** Supreme Court  
**Appellate Court Case Number:** Case Initiation  
**Appellate Court Case Title:** Kasandra Gerimonte v. Employment Security Department (351734)

#### The following documents have been uploaded:

- DCA\_Motion\_Discretionary\_Rvw\_of\_COA\_20180907163454SC802124\_1298.pdf  
This File Contains:  
Motion for Discretionary Review of Court of Appeals  
*The Original File Name was Gerimonte Answer to Respondents Petition for Discretionary Review.pdf*

#### A copy of the uploaded files will be sent to:

- CatherineK1@atg.wa.gov
- SpoCoA@atg.wa.gov
- jtirpak@ulproject.org
- tharkins@prh.comcastbiz.net

#### Comments:

ULP's Anser to Respondent's Petition for Discretionary Review

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Sender Name: Jason Arends - Email: jason@ulproject.org

**Filing on Behalf of:** Monica A Holland - Email: monica@ulproject.org (Alternate Email: )

Address:  
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Seattle, WA, 98101  
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