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NO. 69807-9

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

JEFF KIRBY, an individual, AND PUGET SOUND SECURITY PATROL, INC.,

Appellant-Petitioners,

v.

STATE OF WASHINGTON DEPARTMENT OF EMPLOYMENT SECURITY,

Respondent.

BRIEF OF RESPONDENT

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I. INTRODUCTION

The Employment Security Act is to be liberally construed in favor of granting benefits to unemployed workers. Accordingly, a claimant who has been discharged from employment is entitled to benefits unless the employer proves the claimant was discharged for statutory misconduct.

The Employment Security Department Commissioner correctly concluded that Puget Sound Security Patrol, Inc. ("Employer") failed to prove Dorothy Thomas was discharged for misconduct as that term is defined in the Employment Security Act when Ms. Thomas complied with the Employer's policy and state law by contemporaneously writing and submitting all required incident reports. Ms. Thomas' confusion over the Employer's request that she immediately write an additional incident report resulted from the Employer's miscommunication and did not constitute a willful refusal to follow a reasonable instruction. Rather, based on the break in communication attributable to the Employer, Ms. Thomas' failure to give more of an explanation or attempt to write another report was at most a good faith error in judgment, which the statute explicitly states is not misconduct.

Further, a finding of insubordination requires that the claimant refuse to follow a *reasonable* direction or instruction. Substantial evidence supports the Commissioner's finding that based on the totality of

the circumstances, the Employer's order that she immediately write a report without giving clarification was not objectively reasonable.

Because substantial evidence supports the findings of fact adopted by the Commissioner, and the conclusion that Ms. Thomas was not discharged for misconduct is free of error, the Department respectfully requests this Court affirm the Commissioner's decision allowing Ms. Thomas unemployment benefits.[1]

II. COUNTERSTATEMENT OF ISSUES ON APPEAL

1. Misconduct requires that the claimant act willfully, such that she is aware she is violating or disregarding the rights of the employer. Does substantial evidence support the Commissioner's finding that Ms. Thomas did not act willfully where, based on a miscommunication attributable to the Employer, she was legitimately confused about what the Employer was requesting and was therefore unaware that she might be violating the rights of her employer?

2. Under RCW 50.04.294(2)(a), a claimant is disqualified from receiving unemployment benefits if she willfully refuses "to follow the reasonable directions or instructions of the employer." Does substantial evidence support the Commissioner's finding that the Employer's order that Ms. Thomas immediately write an incident report without allowing her to seek guidance or clarification on an incident she had already contemporaneously documented was unreasonable?

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[1] The superior court transmitted the Agency Board Record in this matter as a stand-alone document. *See* CP Index. The Agency Board Record (a.k.a. Commissioner's Record) is separately paginated from the Clerk's Papers and, therefore, will be cited to in this brief as "CR."

III. COUNTERSTATEMENT OF THE CASE[1]

In December 2009, Puget Sound Security Patrol, Inc. hired Dorothy Thomas as a security officer. Commissioner's Record (CR) 78, 275; Finding of Fact (FF) 5. Ms. Thomas was assigned to a United Parcel Service (UPS) warehouse. CR 78–79, 275; FF 5.

As a security guard, one of Ms. Thomas's work duties was to fill out a daily log of her observations and to complete an incident report for any observed safety hazards, criminal activities, or unprofessional conduct by employees. CR 88, 93, 275–76; FF 7, 8. Throughout her employment, Ms. Thomas made daily log entries, wrote incident reports as required, and talked to her immediate supervisor, Dan Dose, as incidents unfolded at the UPS site. CR 94, 134, 279; FF 19. She also frequently spoke with UPS employee Doug Langston, who was in charge of the UPS contract and was next in line on the Employer's contact list after her immediate supervisor. CR 111, 134–35, 279; FF 19.

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[1] The Employer's statement of the case cites the administrative record regardless of whether the point in the record is reflected in a finding of fact. In fact, several statements directly contradict an explicit finding made by the Commissioner. *See* Br. of App. at 4–16. The question on appeal is not whether there is substantial evidence to support the findings the Employer wishes the trier of fact had made, but rather whether substantial evidence supports the findings the Commissioner actually made. The Employer further points to statements made during the first administrative hearing. *See* Br. of App. at 12–13, 32. However, the Commissioner on remand directed the ALJ to hold a new hearing and issue a decision *de novo*. Thus, it is inappropriate to cite to portions of the record from the first administrative hearing. The Department provides this counterstatement of the case to present the facts as found by the Commissioner based on the second administrative hearing, which are the basis for this Court's review. *See Tapper v. Emp't Sec. Dep't*, 122 Wn.2d 397, 406, 858 P.2d 494 (1993); *Smith v. Emp't Sec. Dep't*, 155 Wn. App. 24, 32, 226 P.2d 263 (2010).

Ms. Thomas properly submitted all of her daily logs and incident reports to Mr. Dose. CR 275; FF 9. The logs were the property of UPS and kept on UPS property. CR 94, 275; FF 9. The Employer's policy states that guards who fail to file reports will not get paid. CR 217, 275–76; FF 7. Ms. Thomas always received her pay, indicating that procedures were being followed. CR 276; FF 9.

As the Employer's representative testified, issues documented in incident reports were sometimes handled by Mr. Dose and sometimes handled by Mr. Langston. CR 110–11, 134, 279; FF 19. Any incident reports that could not be resolved by Mr. Dose were supposed to be directed by Mr. Dose to the Employer's operations manager, Steven Squire, who worked at the Employer's main office. CR 92–93, 276; FF 9.

During her time with the Employer, Ms. Thomas wrote incident reports on several UPS incidents. CR 94, 145–46, 276–77; FF 9, 10–12, 19. For example, while working at the UPS site, Ms. Thomas overheard a UPS employee bragging about stealing a brand of expensive headphones. CR 136, 276; FF 10. Ms. Thomas wrote an incident report, which she gave to Mr. Dose, and which was sent to the UPS human resources office. CR 136–38, 276–77; FF 10. Nothing was done in response to Ms. Thomas's report, and the headphones continued to be stolen. CR 137–39; FF 10. Ms. Thomas finally called a UPS 800 number that was

posted at the UPS site to report the continuing theft. CR 138; FF 10. Shortly thereafter, scanners were put into use, and theft of the headphones ceased. CR 138–39; FF 10.

In addition to the headphone thefts, Ms. Thomas also documented and notified her supervisor of other work incidents. CR 140–41, 146; FF 10–12. For example, she reported in writing that a UPS employee brought an AK-47 bayonet to work. CR 140–41; FF 10–11. She also reported a series of drug sales occurring on UPS property. CR 140–41; FF 10–11.

On June 8, 2011, Mr. Langston contacted Mr. Squire to note his displeasure that Ms. Thomas had notified UPS corporate headquarters about the headphones thefts two months prior via the posted on-site 800 number. CR 96–98, 277; FF 13. Mr. Langston alleged that Ms. Thomas's actions were outside the contract negotiated between UPS and the Employer. CR 96–98, 277; FF 13.

Although Ms. Thomas had been properly logging and reporting incidents to her immediate supervisor Mr. Dose, the June 8, 2011, phone call from Mr. Langston was the first time Mr. Squire heard of the alleged headphones theft ring. CR 80, 96–98, 279; FF 19. Mr. Dose had not been properly forwarding the incident reports written by Ms. Thomas to Mr. Squire. CR 186–88, 276; FF 9. Therefore, Mr. Squire was unaware of the contemporaneous incident reports Ms. Thomas had already written.

Based on the call he received from Mr. Langston, Mr. Squire called Ms. Thomas and informed her he was removing her from the UPS premises. CR 98–99, 278; FF 15. Mr. Squire and Ms. Thomas began discussing the issues that were happening at the warehouse, and Mr. Squire requested that Ms. Thomas come in and discuss the headphone theft with himself and the Executive Vice President of Employee Relations, William Cottringer, on June 10. CR 99, 147, 278; FF 15. On June 10, when Ms. Thomas arrived at the office, neither Mr. Squire nor Mr. Cottringer was present. CR 103, 278; FF 16.

In Mr. Squire's absence, the HR manager and CEO each confronted Ms. Thomas and demanded she immediately fill out an incident report on the spot regarding the headphone thefts. CR 278; FF 16. Rather than speaking with Mr. Dose about the incident reports Ms. Thomas had previously written, the Employer simply assumed that Ms. Thomas had not written an incident report on the headphone theft ring and had instead simply called the UPS 800 number. CR 186–88, 279; FF 20. Having already written and submitted a contemporaneous report on the incident, having reported the incident to UPS's corporate 800 number, and having previously scheduled a meeting to discuss the incident with Mr. Squire, Ms. Thomas was confused and scared about why she was being asked to write the report. CR 158; FF 19; Conclusions of Law (CL)

9.[2] This confusion led her to believe she was being asked to incriminate herself. CR 155, 158, 186–88, FF 16.

Ms. Thomas had anticipated speaking with Mr. Squire as previously scheduled prior to writing the report so she could get clarification and guidance about what the incident report should contain. CR 158; FF 21, 22; CL 9. Nevertheless, the Employer informed Ms. Thomas that Mr. Squire was out and she needed to write the report prior to his return. CR 150, 155–56; FF 16. Unaware that the Employer did not know that she had already documented the incident, and legitimately confused about what she was being asked to do, she refused to write an additional report. CR 155, 158, 186–88; FF 16. As a result, the HR manager and CEO believed Ms. Thomas was altogether refusing to write an incident report on the theft ring. CR 186–88, 279; FF 20.[3]

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[2] While labeled a conclusion of law, some statements in Conclusion of Law 8 and 9 are correctly considered findings of fact and should be reviewed as such. As a general matter, if a statement is that the evidence shows the occurrence of existence of something, then it is a finding of fact, but if the statement derives from a process of legal reasoning about the facts in evidence, it is a conclusion of law. *See State v. Niedergang*, 43 Wn. App. 656, 658–59, 719 P.2d 576 (1986). In any event, a court will review a mislabeled finding or conclusion for what it is, in accordance with the proper standard of review. *See Willener v. Sweeting*, 107 Wn.2d 388, 394, 730 P.2d 45 (1986) (appellate court reviews erroneously designated findings and conclusion for what they are).

[3] As further evidence of the CEO's and HR's lack of knowledge regarding Ms. Thomas's prior reports, the Commissioner pointed out that the employer's Employment Security questionnaire alleged that Ms. Thomas "had verbally reported accusations of an internal theft ring and then when directed by [the HR manager] to write a required incident report, she refused, and then when CEO Schaeffer gave her the same order she refused again." The Commissioner also pointed to CEO Schaeffer's testimony that he had assured UPS he would get an incident report so that they would not have to rely on just "verbal hearsay." CR 279; FF 20.

When Ms. Thomas later realized at a follow-up disciplinary meeting that there had been a miscommunication, Ms. Thomas offered to write an additional report. CR 165, 282; CL 9. The Employer refused and discharged her for "insubordination" for failing to write an incident report. CR 165, 282; CL 9.

After Ms. Thomas was discharged, she applied for unemployment benefits. The Department originally denied Ms. Thomas benefits, and she requested a hearing to contest the denial. Following a hearing, an Administrative Law Judge (ALJ) Drew Henke issued an Initial Order which set aside the Department's Determination Notice and concluded the Employer failed to prove Ms. Thomas was discharged for misconduct. CR 250–55. The Employer appealed the ALJ's decision to the Commissioner of the Department. CR 257–61. Believing that the hearing was too narrowly focused, the Commissioner remanded for a complete rehearing and decision de novo. CR 269–72. After a complete rehearing, ALJ Valerie Carlson issued a new Initial Order also finding that the Employer failed to prove Ms. Thomas was discharged for misconduct. CR 274–84. The ALJ found the Employer's request to write an incident report was not reasonable in light of the information known to Ms. Thomas and Ms. Thomas's actions were not a willful disregard of her Employer's interests. CR 278; FF 16; CL 8, 9. Rather, Ms. Thomas's

actions were at worst the kind of error in judgment the statute deems not to be misconduct. CR 278; FF 16; CL 8, 9.

The Employer appealed the ALJ's decision to the Commissioner. CR 286–93. In affirming the ALJ and adopting the ALJ's findings and conclusions, the Commissioner specifically noted the Employer failed to carry its burden of showing that Ms. Thomas was discharged for statutory misconduct, as that term is defined in RCW 50.04.294. CR 296–97. The Employer appealed to King County Superior Court, which affirmed the Commissioner's decision.

IV. STANDARD OF REVIEW

The standard of review is of particular importance in this case because the Employer relies on statements that are not findings made by the Commissioner. In addition, the Employer relies on statements made in the first administrative hearing, which do not form the basis of the order that is before this Court on appeal.

Judicial review of the Commissioner's decision is governed by the Administrative Procedure Act (APA) pursuant to RCW 34.05.510 and RCW 50.32.120. *W. Ports Transp., Inc. v. Emp't Sec. Dep't*, 110 Wn. App. 440, 449, 41 P.3d 510, 515 (2002). The court of appeals sits in the same position as the superior court and applies the APA standards directly to the administrative record. *Smith v. Emp't Sec. Dep't*, 155 Wn. App. 24,

32, 226 P.2d 263 (2010). The court reviews the decision of the Commissioner, not the superior court order or the underlying decision of the ALJ except to the extent the Commissioner's decision adopted any findings and conclusions of the ALJ's order. *Tapper v. Emp't Sec. Dep't*, 122 Wn.2d 397, 406, 858 P.2d 494 (1993). As noted above, in this case the Commissioner explicitly adopted the ALJ's findings of fact and conclusions of law.

The Commissioner's decision is considered prima facie correct and the burden of proving otherwise rests on the party challenging the decision. RCW 34.05.570(1)(a); *Smith*, 155 Wn. App. at 32. In this case, that burden falls on the Employer.

Judicial review is limited to the agency record. RCW 34.05.558. The court must uphold the Commissioner's findings of fact it they are supported by substantial evidence. *William Dickson Co. v. Puget Sound Air Pollution Control Agency*, 81 Wn. App. 403, 411, 914 P.2d 750, 755 (1996). Substantial evidence is evidence that is "sufficient to persuade a rational, fair-minded person of the truth of the finding." *In re Estate of Jones*, 152 Wn.2d 1, 8, 93 P.3d 147 (2004). If there are sufficient facts in the record from which a reasonable person could make the same finding as the Commissioner, the court must uphold the finding, even if the court would make a different finding based on its reading of the record.

Callecod v. Wash. State Patrol, 84 Wn. App. 663, 676 n.9, 929 P.2d 510 (1997); *see also Fred Hutchinson Cancer Research Ctr. v. Holman*, 107 Wn.2d 693, 713, 732 P.2d 974 (1987) (evidence may be substantial enough to support a factual finding even if the evidence is conflicting and could lead to other reasonable interpretations).

The reviewing court is to "view the evidence and the reasonable inferences therefrom in the light most favorable to the party that prevailed" at the administrative proceeding below. *Tapper*, 122 Wn.2d at 407. The court may not substitute its judgment for that of the agency on the credibility of witnesses or the weight to be given to conflicting evidence. *Smith*, 155 Wn. App. at 35; *see also City of Univ. Place v. McGuire*, 144 Wn.2d 640, 652, 30 P.3d 453 (2001) (reviewing court accepted fact-finders determinations of witness credibility and weight to be given to reasonable but competing inferences).

Questions of law are subject to de novo review. *Tapper*, 122 Wn.2d at 403. Although interpretation of the misconduct statute is subject to de novo review, the court must interpret the statutory provisions liberally to achieve the goals of the Act. RCW 50.01.010; *Tapper*, 122 Wn.2d at 407–08. Further, courts grant substantial weight to an agency's interpretation of statutory language and legislative intent of a statute the agency administers. *Pub. Util. Dist. No. 1 v. Dep't of Ecology*, 146 Wn.2d

778, 790, 51 P.3d 744 (2002); *Macey v. Emp't Sec. Dep't*, 110 Wn.2d 308, 313, 752 P.2d 372 (1988). This is especially true where, as here, the agency has expertise in a particular area. *Markam Group, Inc. v. Dep't of Emp't Sec.*, 148 Wn. App. 555, 561, 200 P.2d 748 (2009) (giving substantial weight to Commissioner's interpretation of "misconduct" as defined in RCW 50.04.294 because of agency's special expertise).

V. ARGUMENT

The Commissioner properly concluded that the Employer did not prove Ms. Thomas was discharged for disqualifying misconduct. RCW 50.20.066(1). Misconduct requires that an action be willful; that is, the claimant must act intentionally and be aware that they are violating or disregarding the rights of the employer. WAC 192-150-205(1). Ms. Thomas complied with company policy and all applicable laws. And given the totality of circumstances, it was reasonable for Ms. Thomas to be confused about what she was being asked to do. Ms. Thomas's conduct, which was the result of her legitimate confusion and attributable to the Employer's lack of communication amongst management, was not misconduct; it was at most a good faith error in judgment.

Further, an employee engages in disqualifying misconduct when they refuse to follow the reasonable directions of the employer. Here, substantial evidence supports the Commissioner's finding that the

Employer's order that she immediately write an additional incident report, in light of the miscommunication and without allowing Ms. Thomas to seek clarification from Mr. Squire in their previously scheduled meeting, was not reasonable and may not be the basis for finding misconduct. Thus, the Commissioner properly determined that Ms. Thomas was eligible for benefits. The decision of the Commissioner should be affirmed.

A. The Commissioner Properly Concluded That Ms. Thomas Made a Good Faith Error in Judgment

The Employment Security Act ("Act") was enacted to provide compensation to individuals unemployed through no fault of their own. *Tapper*, 122 Wn.2d at 407–08. Accordingly, the Act must be liberally construed in favor of granting benefits to unemployed claimants. RCW 50.01.010; *Tapper*, 122 Wn.2d at 407–08.

A discharged claimant is entitled to unemployment benefits unless the employer proves the claimant was fired for work-connected misconduct. RCW 50.20.066(1); WAC 192-150-200(1).

Misconduct includes the following:

> (a) Willful or wanton disregard of the rights, title, and interests of the employer or a fellow employee;
> (b) Deliberate violations or disregard of standards of behavior which the employer has the right to expect of an employee;

> (c) Carelessness or negligence that causes or would likely cause serious bodily harm to the employer or a fellow employee; or
> (d) Carelessness or negligence of such degree or recurrence to show an intentional or substantial disregard of the employer's interest.

RCW 50.04.294(1). The Act goes on to provide examples of behavior that constitute willful or wanton disregard of the rights, title, and interests of the employer, including "[i]nsubordination showing a *deliberate*, *willful*, or *purposeful* refusal to follow the *reasonable* directions or instructions of the employer." RCW 50.04.294(2)(a) (emphasis added).

Notably, misconduct does not include "(a) Inefficiency, unsatisfactory conduct, or failure to perform well as the result of inability or incapacity; (b) Inadvertence or ordinary negligence in isolated instances; or (c) Good faith errors in judgment or discretion." RCW 50.04.294(3); *see also Macey v. Empl. Sec. Dep't*, 110 Wn.2d 308, 318, 752 P.2d 372 (1988) (recognizing that "[g]iven the mandate of liberal construction [in RCW 50.01.010], we conclude that unsatisfactory job performance, whether stemming from inability to perform, errors of judgment, or ordinary negligence, does not constitute misconduct."). Inability, ordinary negligence, and good faith errors in judgment are excluded from the definition of misconduct because they are generally

behaviors society does not consider to be the "fault" of the employee. *Tapper*, 122 Wn.2d at 411.

The employer has the initial burden to show, by a preponderance of the evidence, that the discharge was the result of misconduct on the part of the employee. RCW 50.20.066; *Nelson v. Dep't of Emp't Sec.*, 98 Wn.2d 370, 374–75, 655 P.2d 242 (1982). A preponderance of the evidence is that which produces the strongest impression, has the greater weight, and is more convincing than the evidence against which it is offered. WAC 192-100-065, *Yamamoto v. Puget Sound Lumber Co.*, 84 Wn. 411, 417, 146 P. 861 (1915). On appeal, it is the appellant's burden to establish that the Commissioner's decision was in error. RCW 34.05.570(1)(a); *Smith* 155 Wn. App. at 32.

The Department does not question the Employer's decision to discharge an employee. *See Tapper*, 122 Wn. 2d at 412 (noting that an employer's decision to discharge an employee is distinct from the Department's decision to grant or deny unemployment benefits). But the question here is not whether Ms. Thomas should have been discharged, but whether the reason for discharging her falls within the statutory definition of "misconduct" so that she is disqualified from receiving unemployment benefits. *See Johnson v. Emp't Sec. Dep't*, 64 Wn. App. 311, 314–15, 824 P.2d 505 (1992) (holding that conduct that justified an

employee's discharge does not necessarily disqualify that employee from unemployment benefits under the Act); *Wilson v. Emp't Sec. Dep't*, 87 Wn. App 197, 203–04, 940 P,2d 269 (1997) ("The fact that Wilson's acts might have been sufficient grounds to justify his discharge from employment does not mean that they were sufficient grounds to constitute statutory misconduct and disqualify him from unemployment benefits.").

Applying the statutory language and interpretive cases above, the Commissioner's decision that Ms. Thomas's conduct did not amount to misconduct is supported by substantial evidence and is free from any errors of law.

1. Substantial evidence supports the finding that Ms. Thomas was confused by the Employer's request, and her confusion resulted from the Employer's miscommunication among management

A finding of misconduct requires that a claimant's action be willful or wanton. WAC 192-150-205(1). Substantial evidence supports the finding that Ms. Thomas was confused by the Employer's order that she immediately write an incident report and that her confusion resulted from the Employer's miscommunication among its management. This did not amount to a willful refusal. Rather, Ms. Thomas's actions were at most a good faith error in judgment, which the statute explicitly states is not misconduct.

RCW 50.04.294(1)(a) specifically provides that an employee's "willful or wanton disregard of the rights, title, and interests of the employer or a fellow employee" disqualifies the employee from unemployment benefits. The Department has defined the terms "willful" and "wanton" in its regulations. "'Willful' means *intentional* behavior done *deliberately* or *knowingly*, where you are *aware that you are violating or disregarding the rights of your employer* or a co-worker." WAC 192-150-205(1) (emphasis added). "'Wanton' means *malicious behavior* showing extreme indifference to a risk, injury, or harm to another that is known or should have been known to you. . . ." WAC 192-150-205(2) (emphasis added). While the misconduct statute reflects amendments made effective in 2004, "willful or wanton disregard" remains central to the definition of "misconduct" as it was when misconduct was first defined by statute in 1993. The words "deliberate" and "intentional" also remain prominent throughout the statute.

Here, Ms. Thomas wrote and submitted all required incident reports to Mr. Dose. CR 94, 145–46, 276–77; FF 9, 10–12, 19. The Commissioner found that the parties did not have the same understanding of what the claimant was being asked to do on the day she was called into the Employer's office. CR 281; FF 16, 20; CL 8. Ms. Thomas's immediate supervisor, Mr. Dose, had not been properly forwarding

incident reports to the Employer's main office as required by company policy. FF 9, 16, 19, 20; CL 8, 9. As a result, the CEO and HR manager were unaware Ms. Thomas had properly filed all incident reports with her supervisor. Instead, they erroneously believed they were ordering Ms. Thomas to write her first incident report regarding the headphone thefts. FF 20; CL 8, 9.

Conversely, Ms. Thomas knew she had properly submitted all required incident reports to her immediate supervisor, but she was unaware that these reports had not been forwarded to the main office. FF 9, 16; CL 8, 9. The Commissioner specifically found:

> This information gap was not the claimant's fault. Rather, her immediate supervisor did not convey what she had written in her logs and incident reports to his supervisor, Mr. Squire. This break in communication occurred above the claimant in the chain of command.

CR 281, CL 8. In other words, there was an information gap directly attributable to the Employer's miscommunication.

The miscommunication was further complicated by the fact that Ms. Thomas had a scheduled meeting to talk with Mr. Squire about the headphone thefts and anticipated speaking with him as previously scheduled so she could seek clarification and guidance about what she was being asked to write down. CR 150–59; FF 16, 21, 22; CL 9. Instead, Ms. Thomas was confronted by the HR manager and CEO who she had

never met ordering her to write an incident report on the spot and prior to Mr. Squire's return. CR 119; FF 16; CL 9. Finding herself in an intimidating situation based on the employer's miscommunication and unexpected confrontation, Ms. Thomas was legitimately confused and scared about what she was being asked to do. CR 282; CL 9.

Given these circumstances, which are supported by substantial evidence in the record, the Commissioner properly concluded that Ms. Thomas's conduct was the result of her confusion attributable to the Employer, not a willful refusal to follow the Employer's instructions. She thus should not be disqualified from receiving unemployment benefits.

2. Ms. Thomas made a good faith error in judgment

The Commissioner properly characterized Ms. Thomas's response when she was asked to write another incident report as a good faith error in judgment rather than a willful refusal. As noted above, the Act explicitly excludes "good faith errors in judgment or discretion" from the definition of misconduct RCW 50.04.294(3)(c).

For example, the employer in *Ciskie v. Emp't Sec. Dep't*, 35 Wn. App. 72, 76, 664 P.2d 1318 (1983), had a rule requiring employees to notify a specific supervisor prior to leaving the work site. While at work, Mr. Ciskie received an emergency phone call requiring him to leave the work site. *Ciskie* 35 Wn. App. at 73–74. He attempted to contact his

supervisor and, when he was unsuccessful, asked a co-worker to relay the emergency to the supervisor once he was located. *Id.* at 74.

The court found Mr. Ciskie did not engage in disqualifying misconduct. Although he violated the technical terms of the company rule, he "did . . . attempt to comply with his employer's rule." *Id.* at 76. The court found the employee's deviation from the proper notification procedure reflected "poor judgment or negligence;" however, the fact that he attempted to comply with the rule "was sufficient to dispel any inference that the [employee's conduct] was motivated by bad faith or that he simply did not care about the consequences of his actions." *Id.* Thus, his actions did not constitute a willful or wanton disregard of the employer's interests.

Like the claimant in *Ciskie*, Ms. Thomas attempted to comply with the employer's incident report procedures and in fact complied with the Employer's log and incident report policies. Ms. Thomas diligently reported all incidents she observed on the job, and it was because of her diligence that the headphone thefts ultimately ceased. In light of the information gap caused by the Employer and Ms. Thomas's subsequent confusion, Ms. Thomas's failure to give more of an explanation or attempt to write anything down on the spot without any guidance was at most a good faith error in judgment.

The conclusion that Ms. Thomas's actions were a good faith error in judgment is also supported by the underlying purpose of the Act. The Act is "fault based" and was enacted not to punish those who are unemployed, but to "be liberally construed for the purpose of reducing involuntary unemployment and the suffering caused thereby to the minimum." RCW 50.01.010. The statute explicitly excludes inability, ordinary negligence, and good faith errors in judgment from the definition of misconduct because these are behaviors society does not consider to be the "fault" of the employee. *Tapper*, 122 Wn.2d at 411. Consistent with this underlying purpose, an employer's miscommunication that leads to a claimant's legitimate confusion and misunderstanding cannot be considered the "fault" of the employee and should not form the basis of denying benefits. Finding otherwise would run contrary to the primary purpose of the Act.

The Employer's attempt to implant employment law into the analysis of the Employment Security Act and argue that Ms. Thomas committed misconduct because she breached her duty of loyalty is misguided. Br. of App. at 29–32. The issue before the Court is not the validity or invalidity of Ms. Thomas's termination; it is unemployment benefit eligibility under Title 50 RCW. *Johnson*, 64 Wn. App. at 314–15; *Tapper*, 122 Wn. 2d at 412 (noting that an employer's decision to

discharge an employee is distinct from the Department's decision to grant or deny unemployment benefits). As discussed above, a claimant is entitled to benefits unless the employer proves misconduct, which requires a showing of willfulness. Here, the Commissioner correctly concluded that there was no willfulness based on Ms. Thomas's legitimate confusion arising from the Employer's miscommunication. CR 281–82; CL 8, 9. Contrary to the Employer's assertion, the Commissioner did not find that Ms. Thomas had "disloyal motives" or put her self-interest above the Employer's. Br. of App. at 29–32. In fact, it was Ms. Thomas's persistence and diligent reporting of the headphone theft ring that led to its resolution. However, even assuming Ms. Thomas's actions "breached her duty of loyalty" under common law, it would only mean her actions were possible grounds for termination.

The Employer also cites to *Hamel v. Emp't Sec. Dep't*, 93 Wn. App. 140, 966 P.2d 1282 (1998), to emphasize that Ms. Thomas's subjective motivations or intent to harm her Employer is irrelevant in the misconduct analysis. Br. of App. at 19. While the claimant's specific motivations for refusing an order are not relevant, the Act and Hamel nevertheless both acknowledge that the claimant must be aware they are potentially violating or disregarding the rights of their employer and then voluntarily disregard those interests. WAC 192-150-205(1); *Hamel*, 93

Wn. App. at 146–47. Here, Ms. Thomas did not believe she was disregarding her Employer's interest in not writing an incident report because she had already written the report and the headphone thefts had already been resolved. Unlike the employee in *Hamel*, because of her confusion, Ms. Thomas was also not aware that the likely consequence of her action was harm to her employer.

Thus, substantial evidence supports the Commissioner's finding that in light of the information gap and break in communication directly attributable to the Employer, Ms. Thomas was legitimately confused and not aware that she was potentially violating or disregarding the rights of her employer. Her confusion does not constitute willful misconduct. Rather, in light of the information gap, Ms. Thomas's failure to give more of an explanation or attempt to write anything down on the spot was at most a good faith error in judgment.

B. Substantial Evidence Supports the Commissioner's Finding that the Employer's Request Was Not Reasonable

The Employer's demand that Ms. Thomas immediately write an incident report on the spot without allowing her to seek clarification and guidance on what was being ordered was unreasonable and may not form the basis for a finding of insubordination. Under the plain language of the Act, a claimant commits insubordination only if an employer proves the

claimant deliberately, willfully, or purposefully refused to follow the reasonable directions of the employer. RCW 50.04.294(2)(a) (emphasis added). Reasonableness is generally a question of fact to be determined by the fact finder. *See e.g., Forsman v. Emp't Sec. Dep't*, 59 Wn. App. 76, 83, 795 P.2d 1184 (1990) (finding whether claimant exhausted all reasonable alternatives is a question of fact); *Hamel*, 93 Wn. App. at 147 (deferring to Commissioner's finding about whether a reasonable person would understand that claimant's actions would harm employer). Substantial evidence supports the Commissioner's finding that the order given to Ms. Thomas was not objectively reasonable based on the totality of the circumstances.

The Department acknowledges that report writing is required by statute and is an aspect of the security industry. Br. of App. at 7. However, throughout her employment, Ms. Thomas complied with these requirements by completing her daily logs and contemporaneously writing all relevant incident reports. CR 94, 145–46, 276–77; FF 9, 10–12, 19. In particular, immediately after observing the headphone thefts, Ms. Thomas wrote a detailed incident report and, per protocol, gave this incident report to her immediate supervisor, Dan Dose. CR 136–38, 276–77; FF 10. Thereafter, the headphone theft issues were resolved on-site. CR 138–39; FF 10.

The Employer's request for Ms. Thomas to write an additional incident report should not be viewed in a vacuum. When considering the totality of the circumstances, the Employer's order that Ms. Thomas immediately write an additional incident report on the spot, without any context or guidance about what the incident report should contain, and then refusing to allow her to write the report at a subsequent meeting, was unreasonable. Prior to coming into the Employer's office, Ms. Thomas had discussed the headphone thefts with Mr. Squire and was expecting to talk with him further upon her arrival in their previously scheduled meeting. CR 99, 147, 278; FF 15. Instead of meeting with Mr. Squire, Ms. Thomas was confronted by the HR manager and a CEO she had never met, demanding her to immediately write an incident report on the spot prior to Mr. Squire's return. CR 116–19, 278; FF 16; CL 9.

As discussed above, substantial evidence supports the Commissioner's finding that there was miscommunication between the Employer's managers which led to Ms. Thomas's legitimate confusion about what she was being asked to do. As a result, Ms. Thomas anticipated talking with Mr. Squire as previously scheduled to seek clarification and determine what she was supposed to address in the incident report. CR 150–59; FF 15, 21; CL 9.

> Well, I didn't want to fill out the incident report before – I wanted to talk to [Mr. Squire] before I filled it out because I wanted to find out what I was filling out the report on.

CR 158. However, the Employer informed Ms. Thomas that Mr. Squire was out of the office and she needed to write the report prior to his return. CR 116–19, 278; FF 16; CL 9. Allowing Ms. Thomas the opportunity to speak with Mr. Squire would not have hindered the Employer's investigation. In light of the fact that Ms. Thomas had already written a report and complied with all of the Employer's polices, the Employer's demand that Ms. Thomas immediately write an incident report on the spot without allowing Ms. Thomas the opportunity to talk to Mr. Squire about the incident and request clarification in their prescheduled meeting was unreasonable. CR 281–82; CL 8, 9.

The unreasonableness of the request is further supported by the fact that Ms. Thomas had been removed from the job site and the reports were the property of UPS. CR 94, 276, 279; FF 9, 15. As a result, Ms. Thomas did not have access to the logs or reports she had contemporaneously written more than two months earlier when the headphone thefts were originally resolved. She thus would have been unable to refresh her memory about what she had observed and reported. Rather, the Employer was in the best position to access the logs and incident reports that Ms. Thomas had previously written.

As the Commissioner expressly concluded, the reports that Ms. Thomas had contemporaneously written months earlier "would have provided much more accurate information on shifts, times, and details on what was happening and where it was happening than a report written in the office from memory about numerous events after the fact." CR 281; CL 8. Nevertheless, the Employer did not talk with or even request the contemporaneous documentation Ms. Thomas made at the time of the thefts from her immediate supervisor. CR 186–88; FF 9.

The Employer's reliance on *Harvey v. Dep't of Emp't Sec.*, 53 Wn. App. 333, 766 P.2d 460 (1988) and *Peterson v. Empl. Sec. Dep't*, 42 Wn. App. 364, 711 P.2d 1071 (1988) for the proposition that Ms. Thomas committed misconduct is misplaced. In both cases, the Commissioner found the claimant refused a clear and direct order. *Harvey*, 53 Wn. App. at 337; *Peterson*, 42 Wn. App. at 365. Unlike in the present case, however, there was no miscommunication or misunderstanding on the employers' parts. Perhaps most importantly, the Commissioner in those cases also either explicitly or implicitly found the employers' requests were reasonable. *Harvey*, 53 Wn. App. at 337; *Peterson*, 42 Wn. App. at 370. In the present case, however, the Commissioner correctly found the Employer's request was not reasonable under the circumstances.

Ms. Thomas's conduct, therefore, did not amount to misconduct under the Act.

The Employer's demand that Ms. Thomas immediately write an incident report in spite of the Employer's miscommunication and Ms. Thomas's preplanned meeting to discuss the incident with Mr. Squire was unreasonable. The order was additionally unreasonable in light of the fact that the incident was properly documented, submitted, and resolved two months prior and because Ms. Thomas no longer had access to her original documentation. Accordingly, the order was unreasonable and cannot be grounds for a finding of insubordination.

VI. CONCLUSION

The burden was on the employer to demonstrate Ms. Thomas engaged in misconduct that disqualified her from unemployment benefits under RCW 50.04.294. Ms. Thomas diligently documented all suspicious activity at her worksite and submitted those reports to her supervisor. Because her supervisor did not transmit those reports up the chain of command, senior managers were unaware of Ms. Thomas's commendable job performance. This lack of communication led to an unreasonable request, the refusal of which was a good faith error in judgment, which should not disqualify Ms. Thomas from unemployment compensation. For the foregoing reasons, the Commissioner properly concluded the

employer did not meet its burden. The Department respectfully asks the Court to affirm the Commissioner's decision.

RESPECTFULLY SUBMITTED this 28th day of May, 2013.

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PROOF OF SERVICE

I, Dianne S. Erwin, certify that I caused a copy of this document, **Brief of Respondent**, on all parties or their counsel of record on the date below via ABC/Legal Messenger and 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 28 day of May, 2013, at Olympia, Washington.

DIANNE S. ERWIN, Legal Assistant