92255-1

September 2, 2015
Donald Baker's
"Appellate Review of the Court of
Appeals Decision" will be
treated as a petition for
review to the Washington
Supreme Court.
Mary A. Neil
Commissioner

NO. 71991-2-I

SUPREME COURT OF

THE STATE OF WASHINGTON

DONALD BAKER

Petitioner,

v.

STATE OF WASHINGTON DEPARTMENT

OF EMPLOYMENT SECURITY,

Respondent,

APPEALLATE REVIEW OF THE COURT OF APPEALS DECISION

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I. INTRODUCTION

I, the Petitioner, submit this brief in response to the Court of Appeals, Division 1 Opinion. I assert that the Appeals Court made an improper decision due to the whole record not being made to the Court and my failure to site pertinent case law and rules. For this reason a review is necessary due to there being a Conversion of Proceedings that introduced the new evidence and remanded it from Superior Court (Judge Ellis) back to the Office of Administrative Hearings. When I filed again to the Superior Court (Judge Wynne) the two cases did not merge together, therefore making the evidence appear new. The evidence still should have been admitted.

II. ASSIGNMENT OF ERRORS

Assignment of Errors

No. 1.....Failure of Merging the Two Cases Together/Using Full Record

No. 2.....Failure to Allow Evidence that was Admissible per RCW's

No. 3.....Misplaced Judgement between Criminal Activity and Non-Intentional.

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Issues Pertaining to Assignment of Error

No.1..... RCW 34.05.070(3) New evidence was introduced through the remand process and there was no need to repeat the introduction.

No.2.....RCW 34.05.562(2) Even without the merger the Second Superior Court should have remanded the case back to the OAH.

No.3.....The Court of Appeals, Division 1 in the case of Barker v. Employment Security Department ruled that the arrest was non-intentional.

No.4.....Advanced notice of the call-in procedure is impossible due to a non-intentional act that in capacitates a person ability to do so.

No.5.....Relief is allowed under RCW 34.05.574(3)

No.6.....RCW 34.05.470 does not specify ten business days or calendar days.

No.7.....RCW 34.05.476(2)(c)(d)(i) The Booking and Release Info and Disposition of the Case where all offered during the Remand back to the OAH.

N0. 8.....RCW 50.20.066 There was no misconduct due to my arrest due to charges being false and dismissed due to accusers unknown to me at the time, mental health issues.

III. STATEMENT OF THE CASE

I worked for Maintech Acquisitions LLC from November 29, 2011 until discharge on December 23, 2011. The Employer states that I was absent from work beginning on December 20, 2011. The Employer further states that they have a company policy that states three consecutive "No Calls No Shows" would be considered a voluntary resignation by the employee and would result in termination of employment without advanced notification. The attendance policy also state certain issues give extenuating circumstances. The original testimony of the Employer given to the ALJ, was that I was absent on the December 20, 2011. I then was arrested on the morning of December 21, 2011 and released on the morning of December 22, 2011 at 0930. Mr. Wittrock did ask me to come to work the next day and I was dressed and ready for work. He in fact did not state that it was to discuss my future with the company. Nor did he ask the disposition of the alleged assault. This was stated to the ALJ during the Initial Hearing. I did apply for my benefits under the premise that I was laid off and this was stated to the ALJ as well.

IV. ARGUMENT

The Court denied my appeal for the following reasons; **RCW 50-04-294(1) (a) willful and wanton disregard of the rights, title, and interest of the employer or a fellow employee as defined in the above referenced RCW.** This is untrue due to the fact that contact was made to a coworker on the first day of my absence and the following morning after my arrest in which charges were dismissed**. RCW 50-20-066 Disqualification due to misconduct.** I did not commit a felony or gross misdemeanor, nor was I convicted of a misdemeanor**. RCW 50-20-050** voluntary quit without good cause. I did not quit and I did try to preserve my employment by contacting my employer on the first day of my absence due to incarceration 19 December 2011, reflected in my booking and release statement. Therefore I was not in violation of the company policy. I would like to add if the Employer had faith in their testimony, Maintech would have responded to the Wrongful Termination and Denial of Benefits lawsuit filed in King County Superior Court. (BAKER v. Maintech Acquisitons, LLC) I won this case by default after serving defendant twice. I would also argue that the Appeals Court Ruling in the case of **BARKER v. EMPLOYMENT SECURITY DEPARTMENT 2005 COA DIV 1.** Mr. Barker was awarded his benefits and his arrest was deemed non intentional. The arrest was deemed beyond his control. The situation of my arrest was identical except that I did call in.

The dates of my absence were December 19, 20, and 21st of 2011. I was released on December 21, 2011 at 2130. This contradicts the employer's sworn testimony. (**RCW 34.05.558** Disputed issues of fact shall be conducted by the court without a jury and must be confined to the agency record for judicial review as defined by this chapter, supplemented by additional evidence taken pursuant to this chapter.) The evidence of the booking and release information

proves the employer was not truthful and their substantial evidence is in question. The booking and release evidence should be allowed because it was introduced at the first Superior Court hearing with Judge Ellis **(N0.13-2-01950-5)** per **RCW 34.05.562 (1) (2)**. The second Superior Court hearing should have allowed the evidence as well per **RCW 34.05.452**. The arrest on the morning of December 19, 2011, I tried calling my supervisor from the Marysville Jail. This was possible because the jail is a small and they detainees to make your calls during the booking process by use of cell phone or the jail free line. I could not reach the supervisor whom was the Employers only point of contact given to me. Therefore, I called Thomas on the morning of December 19, 2011. (**RCW 34.05.558**- Judicial review of disputed issues of fact shall be conducted by the Court without a jury and must be confined to the agency record for judicial review as defined by this chapter, supplemented by additional evidence taken pursuant to this chapter) He relayed the message and the Supervisor agreed. The date the supervisor gave testimony to of call in was the wrong date. I could not have called when he specified. This should prove that there was not a willful and wanton disregard for my former employer's rights, titles and interest per **RCW 50.04.294 (1) (a)** This also an error in law that the ALJ administered. I should have been removed from the schedule after initial call until the next contact. The supervisor only used his personal phone so could not call him collect from the in custody phone. **Barker v. Emp't Sec. Dep't)** (I do assert with the errors in the dates absent provided with proof and the date of call in which I was able to inform someone of my absence and the nature of my absence. The Court could evaluate the emails dates of creation which are well after the termination date. They are a part of the substantial evidence against me that made this honorable discharged disabled veteran appear self- serving. They were created seven

months later in June when Maintechs unemployment benefit experience rating was in question. **(RCW 34.05.554 (1) (a) (2)** Issues not raised before the agency may not be raised on appeal, except to the extent that: The court shall remand to the agency for determination any issue that is properly raised pursuant to subsection (1) of this section. The Petitioner sites the error in law with the Court not accepting new evidence per **CR 59 (2) (4)** and **RCW 34.05.562 (1)** (b) the unlawfulness of procedure or decision making process. The Department sites the Employers policy for three days absent without advanced notice is considered "No Call No Show" per **RCW 50.04.294 (2) (d).** Due to my non-intentional arrest this is an error in law and a misrepresentation of the policy. (**Barker v. Emp't Sec. Dep't.)** I would also argue that the attendance policy was impossible to adhere to due to the fact that there were no Employer landlines nor were there email contacts provided. Mr. Wittrock only had his personal cellphone and the fact is that a call came in from a jail. Also we were not provided upper level management numbers. The issue of the evidence not being accepted during Judge Wynne's Superior Court case also brings up the failure of the Conversion of Proceeding per **RCW 34.05.70 (1)(3).** The next issue is the agency record which fails to show new evidence was introduced during the Office of Administrative hearing Remand per **RCW 34.05.476 (d).** There is error in law by stating there was misconduct due my arrest, incarceration and that I should have known the actions would led to my arrest. The allegations were false and charges dismissed by prosecutors motion because the truth came out. The Court should reconsider the decision per **CR 59 (a) (8).** Asst. Attorney General Benson argues in footnote on page 5 of the opinion that my argument on appeal contradicts my testimony during Initial hearing. It does a lot of time passed, I suffer from PTSD and Anxiety disorder, and I expected Maintech to be

truthful. After the decision my brother reminded me the dates of incarceration, were wrong thus retrieved the evidence and supply the new evidence per **RCW 34.05.554** and **CR 59 (2) (4)** The issue of Judge Wynne denying reconsideration was in error per **CR 59 (b)** for the rule does not state business days or calendar days. I am stating the argument that relief can be provided under **RCW 34.05.574 Type of Relief. Section 3** states the court may award damages, compensation, or ancillary relief only to the extent expressly authorized by another provision of law. Substantial justice has not been done due to considering the arrest as misconduct due to the non-intentional act with no conviction, a policy that was made impossible to adhere to by Maintech and its representatives, untrue facts in the record, but adhering to the best of my ability by notifying a co-worker, and the denial of benefits. The issues stated above I provide **CR 59 (a) (9) -** which substantial justice has not been done.

V. CONCLUSION

I respectfully request the court to reconsider ~~its Opinion~~ the Appeal that I violated the Employers company policy, that Misconduct was there, and that I had a willful and wanton disregard to Employers Rights, Titles, and Interest. Also to amend facts held within the record. I have filed a complaint with Human Rights Commission that was deemed too late because the issue was brought up seven months later and the Employer changed its allowance of benefits and provided incorrect testimony. A civil suit has been filed in King county Superior Court for wrongful termination and denial of unemployment benefits. This civil suit has and Order Granting Default against Maintech dated 20 Aug 2015. (Order Attached) This is New Evidence and I am citing Civil Rule 59 (2) (4) Newly discovered evidence, material for the party making

the application, not with reasonable diligence have discovered and produced at trial. I had to file a lawsuit to get to the truth of the termination and the denial of my benefits. If Maintech had faith in their testimony they would have responded.

Respectfully Submitted; this 25TH Day of August 2015.

Donald Baker
Pro SE
2203 172nd Place SE
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71991-2-I

PROOF OF SERVICE

I, Donald Baker, certify that I served a copy of the Supreme Court Appeal on all parties or their counsel of record on the date below as follows:

In Person
Court of Appeals,
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600 University Street
Seattle, WA 98101

In Person
April Bishop
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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 25th day of August 2015 at Everett, WA.

Donald Baker, pro se

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DONALD BAKER, Appellant, v. STATE OF WASHINGTON DEPARTMENT OF EMPLOYMENT SECURITY, Respondent.	DIVISION ONE No. 71991-2-I UNPUBLISHED OPINION FILED: July 13, 2015

PER CURIAM — Donald Baker appeals an order affirming an administrative decision disqualifying him from unemployment benefits. Because Baker committed disqualifying misconduct when he missed three consecutive days of work without properly notifying his employer, we affirm.

FACTS

Donald Baker worked for Maintech Acquisition LLC (Maintech) from November 29, 2011 until his discharge on December 23, 2011. Maintech had a written attendance policy that required employees to show up for work when scheduled and to show up on time. The policy stated that three consecutive "no call, no shows" would be considered a voluntary resignation by the employee and would result in termination of employment. Baker was aware of Maintech's policy.

On December 12 and 13, 2011, Maintech allowed Baker to work half days so that he could attend to pending court matters. When he returned to work, he informed his supervisor, Tyson Wittrock, that the court matters were resolved.

On the morning of December 20, 2011, Baker was arrested at his apartment on suspicion of assault. He did not show up for his 7:00 a.m. shift or notify Wittrock that he would be absent that day. Baker spent that night in jail, and though he was released around 9:30 a.m. the next day, he again failed to show up for work or contact Wittrock. He instead called a co-worker who told Wittrock that Baker had been in jail.

The next day, December 22, 2011, Baker was once again absent from work. He called Wittrock around noon and said he could not come to work because he had legal issues to attend to. Wittrock told Baker to come into work the next day to discuss his future with the company.

On December 23, 2011, Baker met with Wittrock, who told him his employment was terminated due to his absences.

Baker subsequently applied for unemployment benefits for the week he was incarcerated and missed three work days. In his application, Baker told the Employment Security Department (Department) that he had been laid off due to lack of work. The Department initially approved Baker's claims. But the Department later learned that Baker had been discharged, not laid off. The Department then issued a determination notice, notifying the parties that Baker was disqualified from benefits because he had been discharged for misconduct pursuant to RCW 50.20.066.

Baker appealed the Department's decision to the Office of Administrative Hearings. The administrative law judge (ALJ) issued an initial order affirming the Department's decision. The ALJ noted that the parties' testimony "conflicted on material points," but found Baker's testimony not credible.

Baker petitioned the Department's commissioner for review of the Initial Order. The commissioner adopted the ALJ's findings of fact and conclusions of law and affirmed the initial order.

Baker appealed the commissioner's decision to Snohomish County Superior Court and submitted new evidence. The court declined to consider the new evidence and affirmed the commissioner's decision. The court also denied Baker's untimely motion for reconsideration. He appeals.

DECISION

Standard of Review

The Washington Administrative Procedure Act (WAPA), chapter 34.05 RCW, governs judicial review of a decision of the commissioner of the Employment Security Department. Tapper v. Emp't Sec. Dep't, 122 Wn.2d 397, 402, 858 P.2d 494 (1993). We sit in the same position as the superior court and apply the WAPA standards directly to the agency record. Tapper, 122 Wn.2d at 402. We review the decision of the commissioner, rather than the underlying decision of the ALJ, except to the extent that the commissioner adopts the ALJ's findings of fact. RCW 34.05.558; Verizon Nw., Inc. v. Emp't Sec. Dep't, 164 Wn.2d 909, 915, 194 P.3d 255 (2008). The commissioner's decision is considered prima facie correct, and the burden of demonstrating its invalidity is

on the challenging party. RCW 50.32.150; RCW 34.05.570(1)(a); Griffith v. Emp't Sec. Dep't, 163 Wn. App. 1, 6, 259 P.3d 1111 (2011). We review the comissioner's findings of fact for substantial evidence. King County Pub. Hosp. Dist. No. 2 v. Dep't of Health, 178 Wn.2d 363, 372, 309 P.3d 416 (2013); RCW 34.05.570(3)(e). In doing so, we consider the evidence in the light most favorable to the prevailing party and defer to the commissioner's credibility determinations and resolution of conflicting testimony. William Dickson Co. v. Puget Sound Air Pollution Control Agency, 81 Wn. App. 403, 411, 914 P.2d 750 (1996). Unchallenged findings of fact are verities. Fuller v. Emp't Sec. Dep't, 52 Wn. App. 603, 605, 762 P.2d 367 (1988). We review conclusions of law de novo. William Dickson Co., 81 Wn. App. at 407.

Findings of Fact / Sufficiency of Evidence

As an initial matter, we note that Baker fails to comply with our rules on appeal. Pro se litigants are held to the same standard as attorneys and must comply with all procedural rules on appeal. In re Marriage of Olson, 69 Wn. App. 621, 626, 850 P.2d 527 (1993). An appellant must provide "argument in support of the issues presented for review, together with citations to legal authority and references to relevant parts of the record." RAP 10.3(a)(6). Arguments not supported by references to the record, meaningful analysis, or citation to pertinent authority need not be considered. Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992). Baker does not assign error to any factual finding or conclusion of law, cite to the administrative record, or provide more than scant citation to legal authority. RAP 10.3(a)(4), (5), (6); RAP

10.3(g), (h). These omissions preclude review. Olson, 69 Wn. App. at 626. But even ignoring these deficiencies, his arguments are not persuasive.

The Employment Security Act (Act) provides compensation to individuals who are "involuntarily" unemployed "through no fault of their own." RCW 50.01.010; Tapper, 122 Wn.2d at 407-408. Employees discharged for "misconduct" cannot receive unemployment benefits. RCW 50.20.066(1); WAC 192-150-200(1). Under the Act, "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). Certain types of conduct constitute misconduct per se. RCW 50.04.294(2); Daniels v. Dep't of Emp't Sec., 168 Wn. App. 721, 728, 281 P.3d 310 (2012). Among these are "[r]epeated and inexcusable absences, including absences for which the employee was able to give advance notice and failed to do so"; and "[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." RCW 50.04.294(2)(d), (f).

Here, Baker does not dispute that he was aware of Maintech's attendance policy. Nor does he contend that the policy is unreasonable. Rather, he argues, as he did below, that he was discharged due to his arrest rather than his absences, he was in jail for a different period than that found by the commissioner,[1] he attempted to contact Wittrock from jail, at least a portion of his

[1] Baker's argument on appeal contradicts his testimony before the ALJ. At the administrative hearing, Baker provided the dates of his incarceration: "I went in on 12/20, and I was released 12/21." He reaffirmed this information several times throughout the hearing. To confirm Baker's answer, the ALJ repeated the question: "Were you incarcerated for any amount of time in the month of December 2011?" Baker responded, "Yes, ma'am. One day." The ALJ then said, "Okay. And that one day was 12/20 to 12/21; is that right?" to which Baker answered, "Yes, ma'am."

absence was excused, and generally, that Maintech proffered false evidence. These arguments fail for several reasons.

First, the weight, persuasiveness, and credibility of the evidence are beyond the scope of our review. William Dickson Co., 81 Wn. App. at 411. As noted above, the commissioner found Baker's testimony to be "self-serving" and "not credible."

Second, Baker has not assigned error to, or otherwise expressly challenged, any of the commissioner's findings of fact. RAP 10.3(g), (h). The unchallenged findings establish that Maintech's attendance policy authorized an employee's discharge after three consecutive "no call, no shows," and that Baker was aware of this policy. They further establish that Maintech discharged Baker because he missed three consecutive work days without giving advance notice of his absences. These unchallenged findings are verities.

Third, the findings are, in any event, supported by substantial evidence. The finding that Maintech's policies authorized discharge after three consecutive "no call, no shows" is supported by ample evidence. Maintech submitted a copy of the written policy as an exhibit. The policy defined absenteeism as "three (3) hours of work missed within a scheduled workday without properly notifying your Supervisor *irrespective of cause*." (Emphasis added.) To give proper notice, an employee was responsible for contacting his or her supervisor a minimum of one hour prior to the start of the scheduled workday, either by e-mail or telephone. In the absence of a supervisor, "notification must be made to the next reporting relationship (i.e., Operations Manager, etc.)." The policy further provided,

"Failure to properly follow the notification process as stated will be classified as a 'no call, no show' as defined below." "No call, no show" meant "not reporting to work and not calling to report the absence." Maintech's policy specifically stated that three consecutive "no call, no shows" would be considered a voluntary resignation by the employee and would result in discharge. Wittrock gave testimony to the same effect.

The record also supports the finding that Maintech discharged Baker for violating the "no call, no show" policy. On a written form submitted to the Department in June 2012, Maintech indicated that the incident that caused Baker's discharge was "no show no call 3 days." Similarly, an e-mail Wittrock sent to a Maintech administrator explained that "[o]n December 20th, 21st, and 22nd Donald failed to call or show up for work and his employment was terminated on the 23rd due to his attendance." Wittrock testified that Baker neither called in nor came to work on December 20 or December 21. Though Wittrock received a message from Baker on December 21, the message came from one of Baker's co-workers—not Baker. And while Baker called the office on December 22, it was not until 11:42 a.m., nearly five hours after the start of his scheduled workday. Thus, substantial evidence supports the finding that Baker was discharged due to his absence from work on three consecutive days without notifying his employer.

Conclusions of Law

The above-mentioned findings, in turn, support the commissioner's conclusion that Baker committed disqualifying misconduct on three independent

grounds: (1) failing to appear for work as scheduled without reasonable excuse, (2) violating Maintech's attendance policy, and (3) acting with willful and wanton disregard of his employer's interests. RCW 50.04.294(2)(d), (2)(f), and (1)(a).

Baker appears to argue that circumstances beyond his control—i.e., his arrest—preclude a conclusion that he committed any disqualifying misconduct. But the commissioner, citing In re Sanchez, Empl. Sec. Commr Dec.2d 801 (1988), ruled that "absence due to incarceration is misconduct under the Act if the claimant should have reasonably expected his actions would lead to incarceration." Baker does not challenge this authority or assign error to the commissioner's conclusion that he "engaged in criminal activity on his own time which he knew or should have known would lead to his being unable to appear for work as scheduled." Baker's conclusory argument to the contrary is insufficient to carry his burden on appeal. See State v. Marintorres, 93 Wn. App. 442, 452, 969 P.2d 501 (1999). The commissioner properly concluded that Baker's actions constituted disqualifying misconduct.

Affirmed.

FOR THE COURT:

Spearman, C.J.

Trickey, J