Supreme Court of Appeals No.
Court of Appeals No 73024-0-I

SUPREME COURT OF THE STATE OF WASHINGTON

SARAH CHRISTNER,

Petitioner,

v.

STATE OF WASHINGTON DEPARTMENT OF EMPLOYMENT SECURITY,

Respondent.

MEMORANDUM SUPPORTING REVIEW BY AMICUS CURIAE THE UNEMPLOYMENT LAW PROJECT

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I. INTEREST OF THE AMICUS CURIAE

The interests of *Amicus* are set forth in the accompanying Motion.

II. ISSUES TO BE ADDRESSED BY AMICUS

A. Is an unemployment claimant's Fourteenth Amendment due process right to proper notice and a fair hearing violated when the Notice of Hearing fails clearly specify that misconduct is at issue after the employer has failed to allege or provide any documentary evidence of misconduct and after the Employment Security Department has granted benefits?

B. Does a subjective interpretation of the "standards of behavior" language of RCW 50.04.294(1)(b) conflict with the plain meaning of the statute and the Legislature's intent for Title 50 as a whole, when an employer alleges a specific policy exists to govern an employee's behavior?

III. STATEMENT OF THE CASE

The Unemployment Law Project (ULP) supports the Statement of the Case as framed by Petitioner Sarah Christner.

IV. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

Unemployment continues to be a prevalent issue in Washington State. Preliminary reports show 208,000 individuals, roughly 5.7% of the labor

force in Washington State, faced unemployment in August of 2016.[1] Individuals rely on Unemployment Insurance (UI) benefits to help make ends meet as they transition to a new job. In 2015, the Employment Security Department (ESD) paid UI benefits to 221,300 individuals.[2] In the 2014 fiscal year Office of Administrative Hearings (OAH) adjudicated 26,217 UI appeals.[3] The ULP represents roughly 500 - 600 of those claimants annually and has witnessed the negative implications the constitutional and public policy issues addressed in this case have on a unemployed workers in Washington State.

A. This Court should grant review under RAP 13.4(b)(3) because failure to provide adequate notice to an unemployment claimant violates due process under the Fourteenth Amendment and creates a snowball effect that results in arbitrary and capricious decision making.

Unemployment benefits are not to be denied, or taken away without due process. *Bd. Of Regents of State Colleges v. Roth*, 408 U.S. 564, 584, 92 S. Ct. 2701, 2713, 33 L.ED. 2d 548 (1972) (citing *Sherbert v. Verner*, 374 U.S. 398, 83 S.Ct. 1790, 10 L.ED.2d 965 (1963)). All parties in administrative hearings

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[1] Employment Security Department Labor and Performance Analysis, Monthly Employment Report for August 2016, (September 2016), https://fortress.wa.gov/esd/employmentdata/docs/economic-reports/current-monthly-employment-report.

[2] Employment Security Department, *ESD By the Numbers ~ Servering employers and jobseekers*, Strategic focus on JOBS Measurable improvement 2015 in Review, https://esdorchardstorage.blob.core.windows.net/esdwa/Default/ESDWAGOV/newsroom/2015%20year%20in%20review.FINAL.pdf (last visted Oct. 5, 2016).

[3] Washington State Office of Administrative Hearings, *What We Do*, Strategic Plan Fiscal Years 2015-2021, 8 http://oah.wa.gov/OAHPublicWebDocuments/2015_2021_strategic_plan.pdf (last visited Oct. 5, 2016).

must receive a Notice of Hearing (NoH) not less than seven days prior to the hearing. RCW 34.05.434. The Notice of Hearing must include a short and plain statement of the matter before the ALJ, and refer to the particular sections of the statutes involved. RCW 34.05.434. The majority of claimants represent themselves at OAH hearings. [4] Allowing claimants to appear pro se is consistent with the Legislature's intent to keep OAH proceedings easily accessible to the public. RCW 32.12.010. However, this widespread lack of legal representation requires that notice be minimally adequate so as not to jeopardize a claimant's due process rights.

Claimants rely solely on the NoH to inform them about what legal issues will be presented in the administrative hearing. By citing the specific sections of the statute involved in the NoH, the claimant is given the opportunity to, at the very least, read that portion of statute, and use it to prepare for his or her hearing. At times, OAH has issued very clear and concise notices that detail the matter before the ALJ, and the particular sections of the statutes involved. Unfortunately this does not happen consistently, and did not happen in the current case in front of the Court.

In 2010, an Efficiency Review on OAH was conducted by Framework LLC SMG / Columbia Consulting. When analyzing challenges

[4] Washington State Office of Administrative Hearings, *History*, Strategic Plan Fiscal Years 2015-2021, 5 http://oah.wa.gov/OAHPublicWebDocuments/2015_2021_strategic_plan.pdf (last visited Oct. 5, 2016).

OAH faced in performance, service, and decision quality, the review found that discrepancies in the form, content, and timeliness of notices made interactions with OAH more difficult.[5] Furthermore, when analyzing the challenges OAH faced in providing access to justice of appellants, the same review expressed concern that, "...pro se appellants do not have the ability to adequately represent themselves. Many do not understand what type of evidence they should produce to support their appeal or know how to obtain the information they need".[6]

A claimant who does not receive proper notice is unable to adequately represent themselves, prepare a defense, and present all relevant evidence. An agency's decision is arbitrary and capricious if the decision is the result of a willful disregard of the facts and circumstances. *Overlake Hosp. Ass'n v. Dep't of Health of State of Wash.*, 170 Wn.2d 43, 50, 239 P.3d 1095, 1098 (2010). If a claimant is not given the opportunity to be heard, the ALJ cannot base his or her ruling on all of the attending facts, and in consideration of the circumstances.

This Court's review is crucial because the NoH failed to give proper

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[5] Washington State Office of Administrative Hearings, *Appendix A*, Strategic Plan Fiscal Years 2015-2021, 18 http://oah.wa.gov/OAHPublicWebDocuments/2015_2021_strategic_plan.pdf (last visited Oct. 5, 2016) (citing Framework LLC SMG/Columbia Consulting, *Challenges to Performance, Service, and Decision Quality*, Washington State Office of Administrative Hearings Efficiency Review Executive Summary of Findings & Recommendations, 4 (May 12, 2010)).

[6] Washington State Office of Administrative Hearings, *Id.* (citing Framework LLC SMG/Columbia Consulting, *Challenges to Providing Access to Justice for Appellants*, Washington State Office of Administrative Hearings Efficiency Review Executive Summary of Findings & Recommendations, 5 (May 12, 2010)).

notice, which resulted in an unfair hearing and violated an individual's constitutional right to due process. The NoH improperly cited RCW 50.20.060[7] as the issue to be addressed in the hearing instead of RCW 50.20.050, which provides a detailed explanation of what a claimant needs to prove in order to show good cause to quit, and RCW 50.04.294, which provides a clear definition for misconduct as well as the exceptions to misconduct.[8]

To consider this notice as adequate under the 14th Amendment would be detrimental to the claimant in the case at hand, as well as the thousands of claimants going through OAH hearings every year. Here the claimant was not put on notice that she would have to defend her rights to UI benefits under the misconduct statute; instead she thought she had to defend her rights under the voluntary quit statute since she was asked to submit her resignation. *Christner v. Emp't Sec. Dep't.* No. 730424-0-I, Wn. Ct. App. (June 6, 2016, at p.3. The claimant's lack of notice and confusion allowed the ALJ to come to a decision that the claimant was discharged due to misconduct, when the employer alleged a quit in their response paperwork to the ESD and in their subsequent appeal to ESD after Ms. Christner was initially granted benefits. *Id.* at p. 5-6. These circumstances, combined with

[7] RCW 50.20.060 is titled "Disqualification from benefits due to misconduct" however it only provides the disqualification *period* and does provide the elements of misconduct, nor does it refer to RCW 50.04.294.

[8] Here the employee's forced resignation notice created a question of law as to whether the claimant quit or was discharged.

the lack of proper notice in Ms. Christner's NoH as to the exact issues being addressed, created confusion for Ms. Christner and failed to satisfy due process requirements, which resulted in an arbitrary and capricious decision.

B. This Court should grant review under RAP 13.4(b)(4) because the Opinion of the Court of Appeals (Opinion) conflicts with the plain meaning of 50.04.294 and the Legislature's intent for the Employment Security Act (ESA) as a whole.

The Preamble to the ESA provides in part,

> *Whereas, economic insecurity due to unemployment is a serious menace to the health, morals, and welfare of the people of this state; involuntary unemployment is, therefore, a subject of general interest and concern which requires appropriate action by the legislature to prevent its spread and to lighten its burden which now so often falls with crushing force upon the unemployed worker and his or her family. ... The legislature, therefore, declares that in its considered judgment the public good, and the general welfare of the citizens of this state require the enactment of this measure, under the police powers of the state, for the compulsory setting aside of unemployment reserves to be used for the benefit of persons unemployed through no fault of their own,* ***and that this title shall be liberally construed for the purpose of reducing involuntary unemployment and the suffering caused thereby to the minimum."***

1. The Opinion of the Court Appeals' should be reviewed because 50.04.294(1)(b) should be interpreted objectively, not subjectively.

The Opinion was based on RCW 50.04.294(1)(b), which applies to employee misconduct due to *"deliberate violations or disregard of standards of behavior which the employer has the right to expect of an employee." Id.*

The ESD defines "standards of behavior" as:

> Standards of behavior are standards an employee is expected to follow ***without any prior notice*** or warning by the employer. There is no

> requirement that the employer have a written rule prohibiting the behavior...There is no circumstance that excuses the misconduct...may be considered a violation of ***universally accepted standards*** of behavior. For example, if an employee comes to work under the influence of illegal drugs or alcohol or steals from the employer, he or she has violated the standards. ***There is no circumstance that excuses the misconduct***...Impudence, insolence, disrespectfulness or rudeness to one's supervisor may be considered a violation of universally accepted standards of behavior.

Employment Security Department's *Unemployment Insurance Resource Manual,* 5440 - Discharge, July 9 2014. (Emphasis added) ("UIRM")

The plain meaning of this statute creates an objective standard. Therefore, any holding based on RCW 50.04.294(1)(b) should rest on whether an employer has the right to hold employees to a specific standard of behavior that would be understood universally by all employers.

Here, the Court of Appeals and all lower courts failed to address how the employer's policy requesting a minimum of two weeks notice for time off met a universal standard. Rather, the Opinion erroneously invoked a subjective "hardship" consideration to support its application of subsection (1)(b) because an employee took time off on short notice, which the employer claimed created a hardship. *Christner*, at 6. If the courts are allowed to substitute a subjective standard under RCW 50.04.294(1)(b), then an employee could be terminated for misconduct based upon any subjective hardship that an employer asserts rather than holding the employer to meeting its burden under subsection (2)(f).

RCW 50.04.294(2)(f) provides: "The following acts are considered misconduct because the acts signify a willful or wanton disregard of the rights, title, and interests of the employer or a fellow employee. These acts include, but are not limited to: *Violation of a company rule if the rule is reasonable and if the claimant knew or should have known of the existence of the rule.*" (Emphasis added) The plain meaning of this provision means that a misconduct analysis under 50.04.2942(f) is implicated when an employer policy existed to govern the employee's behavior. It is undisputed that the employer in this case had a policy requiring a "minimum of two week's notice" for time off requests, "no exceptions." *Christner v. Emp't Sec. Dep't.* No. 730424-0-I, Wn. Ct. App. (June 6, 2016) at p. 6. The coexistence of these two provisions within the scheme of the misconduct statute means that the Legislature intended to make a distinction between misconduct that arises under an employer policy as the language in subsection (2)(f) provides and "standards of behavior" as subsection (1)(b) provides. The Legislature would not have explicitly created separate provisions if it intended for courts to use these provisions interchangeably.

This Court's review of this case is imperative because when the Court of Appeals found misconduct based on subsection (1)(b) it created a "misconduct loophole" that allows employers with any company policy, no matter how unreasonable, to fall back on subsection (1)(b) to prove

misconduct under a "standard of behavior" analysis rather than a violation of a company policy analysis under subsection (2)(f).

This conflated analysis creates a windfall to employers, who can escape the test of reasonableness required by subsection (2)(f) as applied to their policies by falling back on subsection (1)(b). This interpretation conflicts with the express intent of the the Legislature in drafting 50.04.294, shrinks the pool of those who will qualify for benefits, and is contrary the Legislature's express intent for the Employment Security Act (ESA) as a whole.

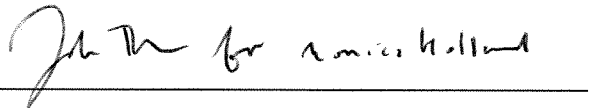
The legislature drafted RCW 50.04.294 and made a clear distinction between subsection (2)(f) and subsection (1)(b) and courts should not be allowed to subjectively apply these distinct provisions interchangeably.

Moreover, as an important matter of public policy, claimants need to be able to rely on the ESD to apply its own objective policies as a guide throughout the appeals process to avoid arbitrary and capricious decision making when courts invoke a subjective standard.

V. CONCLUSION

This case presents issues of substantial public interest and violations of Constitutionally protected rights. Review is authorized under under RAP 13.4(b)(3)-(4) and should be granted.

Respectfully submitted this 6th day of October 2016



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CERTIFICATE OF SERVICE

I certify that I sent a copy of the MEMORANDUM SUPPORTING REVIEW to all parties or their counsel of record via email, on the date below as follows:

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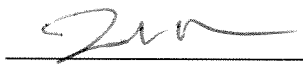

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