NO. 93429-1

SUPREME COURT OF THE STATE OF WASHINGTON

SARAH CHRISTNER,

Petitioner,

v.

STATE OF WASHINGTON
DEPARTMENT OF EMPLOYMENT
SECURITY,

Respondent.

RESPONDENT'S RESPONSE TO AMICUS CURIAE BRIEF OF THE UNEMPLOYMENT LAW PROJECT

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I. INTRODUCTION

Amicus Curiae, the Unemployment Law Project, does not provide sound reasons for this Court to review the sufficiency of the hearing notice in this case or the application of the definition of misconduct to the facts of this case. First, the record shows that Christner was on notice that whether she was discharged from work for misconduct would be at issue at the administrative hearing, and the law supports that the hearing notice was sufficient. Second, Amicus's argument about the application and interpretation of RCW 50.04.294 is based on a misreading of the statute, the Court of Appeals' decision, and the Employment Security Department's internal, non-binding manual. This case does not present any issues warranting this Court's review.

II. ARGUMENT

A. The Notice of Hearing Was Constitutionally Sufficient

The absence of a citation to the statutory definition of misconduct, RCW 50.04.294, on the Notice of Hearing did not deprive Christner of due process. Amicus wrongly asserts that by citing to the misconduct disqualification statute, RCW 50.20.066,[1] the Notice of Hearing did not put Christner on notice "that she would have to defend her rights to UI

[1] Amicus incorrectly cites to RCW 50.20.060, the misconduct disqualification statute that applies to claims filed before January 4, 2004. Mem. Supporting Rev. at 5. The Notice of Hearing correctly cited to RCW 50.20.066, the misconduct disqualification statute that applies to claims filed on or after January 4, 2004. CP 108.

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." Mem. Supporting Review at 5. Amicus cites to page three of the of the Court of Appeals opinion for that proposition. *Id.* But it does not support them because the opinion merely notes that the employer requested Christner's resignation, not that Christner believed she had to "defend her rights under the voluntary quit statute" as a result. *Christner v. Dep't of Emp't Sec.*, No. 73024-0-I, slip op. at 3 (Wash. Ct. App. June 6, 2016) . In fact, as the opinion notes, and as further described below, Christner reported to the Department she was discharged when she applied for benefits. *Id.*

The Amicus argument is not supported by the record. First, when Christner initially applied for benefits, she completed a Discharge Questionnaire form, not a Voluntary Quit Statement. CP 159-61; slip op. at 3 (Christner "reported that she was discharged because her employer was unable to accommodate short notice time off requests any further."). Then, the Department's initial determination was that she was discharged from work without misconduct, not that she voluntarily quit. CP 139-40. The employer appealed the determination, and, at the hearing, Christner asserted that she was fired. CP 113 ("I was asked to resign. I was fired.").

Christner thus was not only aware that whether she was discharged for misconduct would be an issue at the hearing, she made it the salient issue.

Second, the hearing notice identified the issues to be considered at the administrative hearing:

> **Purpose of the Hearing:** A hearing will be held by telephone conference before the Administrative Law Judge . . . to consider the following matter(s):
>
> - The claimant was discharged from employment for misconduct pursuant to RCW 50.20.066, or voluntarily quit without good cause pursuant to RCW 50.20.050
> - The claimant was able to, available for, and actively seeking work in accordance with the standards of RCW 50.20.010(1)(c)

CP 183. Thus the hearing notice identified that one purpose of the hearing was to determine how the job separation occurred: was Christner discharged from work for misconduct pursuant to RCW 50.20.066, or did she voluntarily quit without good cause pursuant to RCW 50.20.050?

Moreover, reasonable inquiry from this notice would show that RCW 50.20.066 states that a benefits claimant "shall be disqualified from benefits beginning with the first day of the calendar week in which he or she has been discharged or suspended for misconduct connected with his or her work and thereafter for ten calendar weeks . . . ." To claim that citing to this statute in this context did not put this claimant on notice that one of the issues to be determined at the hearing would be whether or not

she was discharged for work-connected misconduct, one must ignore the language of the statute itself. Indeed, Amicus neglects to quote the statute in its brief.

The Amicus argument is also contradicted by the next section of the Notice of Hearing, which directs parties to the Office of Administrative Hearings' website, http://www.oah.wa.gov, for "General information about the hearing process." CP 183. On the website, there is a link to "What is … An unemployment hearing?"[2] Following that link leads to specific information about how to prepare for an unemployment benefits hearing,[3] including information about how to research the law and a link to the Employment Security Act, Title 50 RCW.[4] There was thus ample direction about how to research the issues to be litigated at the hearing.

It is true that the Notice of Hearing did not include a citation to the statutory definition of misconduct, RCW 50.04.294. But, as in Christner's petition and briefs to the Court of Appeals, Amicus cites no authority for the proposition that in the civil administrative context, hearing notices must include every relevant statutory definition. *See* Mem. Supporting

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[2] OFFICE OF ADMINISTRATIVE HEARINGS, http://oah.wa.gov/Home/Index/3228 (last visited November 7, 2016).

[3] http://oah.wa.gov/Home/Index/3230 (last visited November 7, 2016).

[4] "HOW DO I RESEARCH THE LAW?", http://oah.wa.gov/Home/Index/3208#How do I research the law (last visited November 7, 2016).

Review at 3-5. Indeed, this Court has held that even in the criminal context, an information charging a defendant need not include definitions of the essential elements of the crime charged. *State v. Johnson*, 180 Wn.2d 295, 302, 325 P.3d 135 (2014). This is despite the fact that the accused have the constitutional right to know the charges against them. *Id.* at 300 (citing U.S. Const. amend. VI; Wash. Const. art. I, §22).

There is no serious due process notice issue presented by these facts. In the civil administrative hearing context, the "APA requires that parties be put on notice of the issues to be litigated." *McDaniel v. Dep't of Soc. & Health Servs.*, 51 Wn. App. 893, 898, 756 P.2d 143 (1988). Here, the Notice of Hearing put Christner on notice that whether she was discharged for misconduct was an issue to be litigated at the hearing. *Id.*; CP 183. Where a criminal charging document is not required to include definitions of essential elements, the Notice of Hearing was not required to include the definition of misconduct. The Court of Appeals correctly ruled that the notice was sufficient. Slip op. at 10-11. There is no constitutional issue warranting this Court's review. RAP 13.4(b)(3).

B. The Court of Appeals Decision Is Consistent with the Plain Language of the Misconduct Statute

Like Christner, Amicus argues that the Court of Appeals employed a "subjective" standard in finding misconduct under RCW 50.04.294(1)(b)

and that only "universally understood" standards of behavior may support a misconduct finding under subsection (1)(b). Mem. Supporting Review at 7-9. Amicus then points to the specific examples of misconduct under RCW 50.04.294(2) and those identified in the Department's Unemployment Insurance Resource Manual (UIRM) as the "universal" standards of behavior they believe the Department should be limited to considering. *Id.* at 7 ("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 on any subjective hardship that an employer asserts rather than holding the employer to meeting its burden under subsection (2)(f)."). This misreads and mischaracterizes the Commissioner's and Court of Appeals' decisions, the statute, and the UIRM. The Court of Appeals properly applied the law to the specific facts of this case. *See* Answer to Pet. for Review at 12.

First, the Amicus argument is misdirected because neither the Commissioner nor the court applied a "subjective hardship" standard. Rather, the Commissioner found as fact, based on the particular facts and evidence in the record, that Christner's conduct created a hardship for the employer. CP 162 (Finding of Fact 6). That finding was based on the circumstances of the employer's business as a pain management center and Christner's job as a full-time front desk receptionist having to greet

and schedule patients. CP 96, 162 (FF 6). It was also based on Christner's own email to her employer in which she acknowledged the hardship her conduct created: "I understand that it has been increasingly difficult to accommodate as many time off requests as I have requested in such short notice." CP 158. Thus, the particular facts included Christner's awareness that her conduct was harmful to her employer.

It was because she continued to engage in that conduct despite the warnings from her employer that led to her dismissal and the finding of misconduct. CP 164 (Conclusion of Law (CL) 11). It was not simply because of the hardship finding itself. The basis for finding misconduct in this case was that the employer warned Christner of the hardship her conduct created and asked for two weeks' notice for leave requests, thereby putting her on notice of a standard of behavior it expected of her. Slip op. at 8-9, 12. And yet, after this final warning, Christner made five short-notice leave requests for personal reasons within a five week period *and* stated that she would continue to do so until she found alternate employment. *Id.*; CP 164 (CL 11). Under these facts, the Commissioner could fairly find misconduct because the employer "had the right to expect that Christner would not repeatedly request time off on short notice while she was on notice that such requests created a hardship for her employer." Slip op. at 8. Thus, the facts showed that she violated or disregarded the

"standards of behavior which the employer has the right to expect of an employee." *Id.*; RCW 50.04.294(1)(b); *see* Resp't's Br. at 16-18.

Second, Amicus does not argue that this expectation was unreasonable or that Christner was not aware of it. Instead, it relies on a misreading of RCW 50.04.294 to argue that the "standards of behavior" must be universal to all employers. Amicus claims 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," and that the Court of Appeals' failure to recognize this created a "misconduct loophole." Mem. Supporting Review at 8. This is not right.

Rather, subsection (1) of RCW 50.04.294 "includes, but is not limited to," four broad categories of misconduct. RCW 50.04.294(1)(a)–(d). The first category is "Willful or wanton disregard of the rights, title, and interests of the employer or a fellow employee." RCW 50.04.294(1)(a). Subsection (2) then provides a non-exhaustive list of specific "acts that are considered misconduct because they signify a willful or wanton disregard of the rights, title and interests of the employer or fellow employee." RCW 50.04.294(2) ("These acts include, but are not limited to" seven listed examples.). Subsection (2) uses the same language as, and thus further explains the type of behavior considered misconduct

under, subsection (1)(a). If courts were required to apply subsection (2) to every set of facts, the remaining three categories of misconduct under subsection (1) would become superfluous. Accordingly, the Court of Appeals did not create a misconduct "loophole" by applying subsection (1)(b) to the facts of this case. *See* Mem. Supporting Review at 8. Nor did it "subjectively apply" the misconduct provisions "interchangeably." *Id.* at 9. It simply applied the statute to this specific set of facts.

Finally, like Christner, Amicus argues that only violations of "universally" known or accepted standards of appropriate work behavior may be disqualifying under RCW 50.04.294(1)(b), citing only the Department's Unemployment Insurance Resource Manual (UIRM) (in addition to RCW 50.04.294(2)) for this proposition. Mem. Supporting Review at 6-7. Christner submitted these excerpts from the UIRM to the Court of Appeals as a "supplemental authority," and the Department objected because the manual pages are evidence, not binding legal authority. *See* Dep't's Supp. Response Br.; Slip op. at 11 n.24. Regardless, as the Court of Appeals found, the "examples of misconduct in the manual are illustrative, not exhaustive," and Christner's conduct was not inconsistent with the manual's examples. Slip op. at 12.

Amicus also suggests that if the standards are not universal, then they are "subjective" and cannot support a misconduct finding. But

violations of standards of behavior under RCW 50.04.294(1)(b) are statutorily limited by behavior that an employer can reasonably expect from an employee. And here, as the court explained, the employer had the right to and reasonably could expect that Christner would not repeatedly request time off on short notice after she had been warned that such requests created a hardship for the employer. Slip op. at 8, 12.

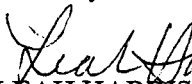
The Court's unpublished opinion does not create an unpredictable, subjective standard—it simply applies the statutory standards to the particular facts of this case. The Court should reject Amicus's claim that this case presents a broader issue, when in fact Christner is simply asking this Court to review a fact-bound application of the statute. That does not satisfy the criteria for review in RAP 13.4(b).

III. CONCLUSION

This case does not present any issues that meet the criteria for review under RAP 13.4(b). For the reasons outlined in its Answer and above, the Department respectfully asks the Court to deny the Petition for Review.

RESPECTFULLY SUBMITTED this 7th day of November, 2016.

ROBERT W. FERGUSON
Attorney General



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PROOF OF SERVICE

I, Jennifer Bancroft, hereby state and declare as follows:

1. That I am a citizen of the United States of America, a resident of the State of Washington, over the age of eighteen (18) years, and not a party to the above-entitled action.

2. That on the 7th day of November 2016, I caused to be served a true and correct copy of **Respondent's Response to Amicus Curiae Brief of the Unemployment Law Project** as follows to:

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I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON that the foregoing is true and correct.

DATED this 7th day of November 2016, in Seattle, Washington.

Jennifer Bancroft

Jennifer Bancroft, Legal Assistant