

ORIGINAL

No. 42023-6-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

JAMES E. WATKINS,

Appellant,

v.

EMPLOYMENT SECURITY DEPARTMENT,
STATE OF WASHINGTON,

Respondent.

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STATE OF WASHINGTON

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BRIEF OF APPELLANT

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A. INTRODUCTION

Mr. Watkins was a 74 year old man who worked for \$9.50 per hour as a security officer for Northwest Protective Services, beginning in August 2007. CP Comm. Rec. 126, Finding of Fact (“FF”) 1.¹ On the job one night in May 2009, he injured his knee, back, shoulders, and wrist when he fell while patrolling the perimeter of a hospital in Yakima. He eventually sought treatment at the ER of the hospital.

In June 2009, though Mr. Watkins said he did not know about it, his medical provider released him back to “light duty” work. But the employer had no “light duty” work for him until August 6, 2009, when it phoned and wrote him about a position. CP Comm. Rec. 126-127, FF 2 & 3. Mr. Watkins told the employer he was not physically able to do the work. The employer’s form letter sent the same day asked him to accept or decline the position, return the letter, and return to work by August 11. Mr. Watkins did not sign the letter and informed the employer again on August 17 that

¹ Thurston County Superior Court has transmitted the Administrative Record, aka Certified Appeals Board Record, in this matter as a single, stand-alone document; that Record is separately paginated so references in this brief to that record will appear as “CP Comm. Rec.,” meaning “Clerk’s Papers Commissioner’s Record.” All other references to the Clerk’s Papers will be in standard citation format, “CP,” with reference to the page number as it appears on the Superior Court Clerk’s Papers Index.

he was physically unable to do the work. CP Comm. Rec. 127, FF 3 & 4.

On August 24, the employer sent him another letter: "This letter is written to serve notice of your termination . . . due to your violation of Company policy . . ." CP Comm. Rec. 122, Exh. 11, p. 37; 127, FF 4. The ESD granted unemployment benefits to Mr. Watkins, finding he had been fired without a showing of misconduct: "Although your employer indicates that you quit your employment, your employer separated you from work on 08/24/09. You did not have the intention to quit, nor did you express you were quitting." CP Comm. Rec. 42. An ALJ affirmed, holding that Mr. Watkins had been fired and had shown no intent to quit: "Nothing in the record establishes that the claimant intended to be absent. . . I am persuaded that the employer discharged the claimant due to absenteeism. I adjudicate this case as a discharge." CP Comm. Rec. 127.

The Commissioner² reversed and denied benefits, holding contrary to the prior decision makers that Mr. Watkins had "voluntarily quit employment" without good cause. CP Comm.

² Though technically a "Review Judge" of the Commissioner's Review Office reviews appeals from OAH decisions, for simplicity the review judge is referred to in this brief as "the Commissioner."

Rec. 140, Conclusions of Law II & III. The Superior Court affirmed. CP 85-87. This appeal timely followed. CP 88-92.

B. ASSIGNMENTS OF ERROR

1. The Commissioner erred in Conclusion of Law II that Mr. Watkins “quit” his job. (Conclusion of Law (“CL”) II) CP CP Comm. Rec. 140.
2. The Commissioner erred in finding as “fact” in Conclusion of Law II that Mr. Watkins was the “moving party” in the job separation.
3. The Commissioner erred in Conclusion of Law III, denying Mr. Watkins unemployment benefits. (CL III) CP CP Comm. Rec. 140.
4. The Commissioner erred in reversing two prior decision makers who had held that Mr. Watkins was fired and was entitled to unemployment benefits because there was no showing of misconduct. CP CP Comm. Rec. 141.
5. Mr. Watkins is entitled to fees and costs when the Commissioner’s Order is reversed.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Were the ESD's initial determination and the ALJ's subsequent conclusion correct that Mr. Watkins was entitled to unemployment benefits because he had been fired by his employer without a showing of misconduct when

- Mr. Watkins failed to return to work as required by the employer after he had fallen while on patrol for his job, injuring his back, knee, shoulders, and wrist so that he was not able to sit or stand for long uninterrupted periods, and
- The employer sent Mr. Watkins a termination notice that stated that the letter was "written to serve **notice of your termination . . . due to your violation of Company policy**" CP Comm. Rec. 122, Exh. 11, p. 37; 127, FF 4, and
- The employer argued at the benefit appeals hearing that it had terminated him for misconduct?

(Issue Pertaining to Appellant's Assignments of Error 1 - 4).

2. Should attorney fees and costs be awarded to the law firm representing Mr. Watkins for its work on judicial review? (Issue Pertaining to Appellant's Assignment of Error 5).

C. STATEMENT OF THE CASE

1. Substantive Facts: Job Separation.

a. Mr. Watkins was injured on the job.

Mr. Watkins worked as a security officer for Northwest Protective Services at the Memorial Hospital in Yakima beginning in August 2007. CP Comm. Rec. 17; 126, Finding of Fact (“FF”) 1. He was paid \$9.50 per hour. CP Comm. Rec. 18.

He was injured on the job one night in May 2009 and eventually sought treatment at the ER of the hospital. He had fallen outside the hospital on his rounds and had injured his knee, wrist, ribs, and back. CP Comm. Rec. 19. He described the accident this way:

I was patrolling the outside by car. And various stations I'd have to get out of the car and walk, check doors and punch in, show that I was there. . . . It was about 10:00 – oh, I'm going to guess now – about 10:00 at night. There was a dimly-lit area that was paved (unintelligible) a walkway. The end of the walkway apparently at one time had been a garden and there was a rock sticking up. I had walked through there many times. And at this particular time I came through my right toe hit this rock and down I went. My hands going out to protect me. I was 74 years old at that time.

CP Comm. Rec. 27.

He went on to describe the course of his injuries:

[I]t jarred my spine and my back, wrists, my shoulders, and it just hurt like a son of a gun. . . So I went on ahead and I finished my shift. That was on a – I think that was on the 26th. Then I went on ahead and I was at work Sunday, I went back to work on Sunday. I was driving the car and getting in and out. And I got to hurting so dog gone bad I couldn't stand it. At about 9:00 in the morning I had to go in and go in to the emergency room and see if I could get some help. Well, then I ended up going to therapy, so they had heat pads and massage, water therapy. . . . All kinds of stuff. I wasn't getting better. It got to the point that the medication they put me on, I was afraid to drive a car. And it just kept getting worse and worse and worse. . . . It got to the point where it just hurt like a son of a gun.

CP Comm. Rec. 27.

After a month of treatment, his medical provider – without Mr. Watkins being aware of it - released him back to “light duty” work in June 2009, but the employer had no “light duty” work until August 6, 2009, when it contacted him to work. CP Comm. Rec. 19; 126-127, FF 2 & 3. Mr. Watkins insisted that he was not aware that his doctor had cleared him for light duty. CP Comm. Rec. 28-29.

On August 6, Mr. Watkins told the employer he could not return to work. The employer testified as follows: “I asked why, and he said, ‘I just hurt too bad.’” CP Comm. Rec. 22. That same day the employer sent him a form letter asking him to accept or

decline the position, return the form letter, and return to work by

August 11. CP Comm. Rec. 70

Mr. Watkins explained:

Well, to make a very long story short, when they sent me this letter they went on ahead and called. And I could not do the job. I couldn't sit very long, I couldn't walk, I couldn't stand very long. I'd get in a car and go to drive and I just hurt like a – it hurt bad.

CP Comm. Rec. 27.

Mr. Watkins did not sign the letter and informed the employer again on August 17 that he was physically unable to do the work. CP Comm. Rec. 127, FF 3 & 4. In that August 17th conversation, Mr. Watkins called Mr. Curry, the Branch Manager and told him, according to Mr. Curry “that he was just not able to do that work. . . . Yes, he called me just to tell me that there was no way that he could do the work because it hurt that he couldn't sit very long or stand.” CP Comm. Rec. 23. Mr. Curry replied to Mr. Watkins that “the doctor says you can do this. And he said there's just no way.” CP Comm. Rec. 23-24.

b. The employer sent Mr. Watkins a “notice of your termination ... for violation of company policy.”

On August 24 the employer sent Mr. Watkins a termination notice: “This letter is written to serve **notice of your termination** .

. . . due to your violation of Company policy” CP Comm.

Rec. 122, Exh. 11, p. 37; 127, FF 4. In documents submitted to the ESD the employer stated that he had been discharged for “violation of a company rule.” CP Comm. Rec. 55.

About his receipt of the termination letter, Mr. Watkins explained as follows:

I guess my age I just wasn't bouncing back like I did when I was 21 or 22. And then they said that I wouldn't work. Well, I said, "I can't. I hurt too damn bad." And I did, and they put me on various medications which did not help. Well, they helped, but it was very, very slow. And then I received the termination notice and it said that, according to the employee's handbook – well, I never did receive an employee's handbook. I don't ever remember seeing one. And contrary to things that I've heard on the telephone today. So, yes, it was 16 hours a week. I mean, it was a job that sounds like you could do it. But I couldn't. You know, when your back, the small of your back, your shoulders, up your neck - . . . and your knee, well, my right knee right now has a tear in the knee. I have paperwork on that. I've been told that if I have surgery on it the chances are that I'll just be walking with a cane from now on.

CP Comm. Rec. 28.

In October 2009, subsequent to Mr. Watkins being terminated, his doctor signed another “Activity Prescription Form” indicating Mr. Watkins could “perform modified duty” from October 23, 2009, to November 30, 2009. CP Comm. Rec. 77, Exh. 6, p.

2. Mr. Watkins agreed:

And, yes, you know, I have got to work. I have got to. My wife and I – well, I've got to support us. . . . It's not that I'm trying to get out of work, or anything, because I want to and I'm searching for work –

CP Comm. Rec. 31. Physically able once again to work, he began searching for work and applied for unemployment benefits.

CP Comm. Rec. 14.

2. Procedural Facts

- a. The ESD granted unemployment benefits to Mr. Wakins, finding he had been fired and was entitled to benefits because there was no misconduct.**

The ESD granted benefits, finding Mr. Watkins had been fired without a showing of misconduct:

Although your employer indicates that you quit your employment, your employer separated you from work on 08/24/09. You did not have the intention to quit, nor did you expressed [sic] you were quitting.

You were separated from work while presenting a medical condition, which was beyond your control. Misconduct has not been established because it has not been shown that your actions were deliberate or that you violated your employer's rules.

CP Comm. Rec. 42.

- b. **After a full and fair hearing at which the employer argued it had fired Mr. Watkins, an ALJ affirmed that Mr. Watkins had been fired without misconduct and was entitled to benefits.**

When the employer appealed the grant of benefits, Mr. Watkins represented himself at the appeals hearing. The employer was represented by Shanda Means, Human Resource Manager, Bonnie Roberts, Administrative Assistant, Tom Curry, Branch Manager, and Cathleen Rhoades. CP Comm. Rec. 6.

At that hearing the employer argued it had fired Mr. Watkins, specifically citing the “misconduct” statute and using its language as justification for the firing:

Ms. Means: According to RCW 04.294 [RCW 50.04.294, the “misconduct” provision of the Employment Security Act] there are some examples of willful and wanton disregard of the interest of (unintelligible) repeated and inexcusable absences, deliberate acts, violation of reasonable rules. The Claimant made no attempts to contact the Employer for three weeks during which time the Claimant was considered to be absent for inexcusable reasons. . . . By the Claimant willfully showing a wanton disregard or violating policy by deliberately not expecting and performing the modified duty assignment, as well as not making contact with the Employer, we are currently (unintelligible) no effort to preserve his job. Just by the Claimant’s own doing that **he was terminated for job abandonment**. This claimant clearly **shows a willful and deliberate act** of (unintelligible) reasonable company policy we respectfully ask that

the determination be set aside and benefits be denied.

CP Comm. Rec. 36 (emphasis added).

In response to this argument, Mr. Watkins, representing himself, replied as to his willfulness:

Mr. Watkins: Captain Delemont here in Yakima is – as I had stated earlier – I told him, and I reported to him two or three times a week of my condition. ***I did not willfully abandon my position.*** When I received that letter I figured that was a way they wanted to get rid of me. Captain Delemont was notified, oh, at least two or three times a week as to what my conditions was. ***So I did not willfully abandon my position.***

CP Comm. Rec. 36 (emphasis added). This was consistent with what he had said all along; for example, when he was asked by the ESD prior to its granting him benefits if he had “the intention to quit” his job, he said “No, I wanted to get better and return to work.” CP Comm. Rec. 82. And in a later interview with ESD about refusing the August 6 job he said “I was not quitting my job, I just wanted to feel better to be able to work. Then they sent me the termination letter.” CP Comm. Rec. 84.

After a full hearing, the ALJ affirmed the grant of benefits, holding that Mr. Watkins had been fired and had shown no intent to quit: “Nothing in the record establishes that the claimant intended to be absent. . . I am persuaded that the employer discharged the

claimant due to absenteeism. I adjudicate this case as a discharge." CP Comm. Rec. 127.

- c. **The Commissioner, reversing two prior decision makers, concluded to the contrary that Mr. Watkins had quit without good cause and was not entitled to benefits.**

On the employer's further appeal, the Commissioner reversed and denied benefits, holding contrary to the prior decision makers that Mr. Watkins had not been fired but had "voluntarily quit employment" without good cause. Specifically, the Commissioner concluded as follows:

I

We must first determine whether the separation resulted from a quit or a discharge. In deciding whether a separation is quit or a discharge, it must be determined what actually caused the separation. *Safeco Ins. Cos. [sic] v. Meyering*, 102 Wn.2d 385, 687 P.2d 195 (1984). This issue is decided by identifying the "moving party" initiating the separation. *In re Hensley*, Empl. Sec. Comm'r Dec.2d 636 91984).

II

We conclude that claimant was the moving party: he was offered a job assignment which fell within the restrictions his doctor had ordered, but **failed to respond or show up for work**. Rather, he abandoned his job. Consequently, we conclude that he voluntarily quit employment.

CP Comm. Rec. 140 (Conclusions of Law I & II).

On judicial review, the Thurston County Superior Court denied Mr. Watkins' appeal and this appeal timely followed. CP 85-87; 88-92.

D. ARGUMENT

1. MR. WATKINS WAS ELIGIBLE FOR BENEFITS BECAUSE THE EMPLOYER SENT HIM A LETTER TERMINATING HIS EMPLOYMENT AND WAS THUS THE MOVING PARTY IN THE JOB SEPARATION; IT ALSO FAILED TO PROVE MISCONDUCT AS TWO PRIOR DECISION MAKERS HAD HELD.

The employer sent Mr. Watkins a "notice of termination," stating his "termination is due to your violation of Company policy" CP Comm. Rec. 122. At the benefits hearing, the employer specifically argued that it had fired Mr. Watkins and cited the misconduct statute and used its language to justify the firing. Mr. Watkins in turn argued that he "did not willfully abandon my position." CP Comm. Rec. 36. At the end of the hearing, the ALJ agreed with the ESD's original conclusion: Mr. Watkins was fired, and not for misconduct. The Commissioner's decision to the contrary was a sleight of hand, constructing a quit from a discharge, making it easier to deny Mr. Watkins benefits, and burdening him with an "overpayment." Such a sleight of hand, however, was an

error law Mr. Watkins asks that the Commissioner's Decision be reversed.

- a. **Mr. Watkins did not quit because to be a quit the law requires proof of a "knowing" or "intentional" act intended to terminate one's employment.**

Mr. Watkins was fired because he missed work that the employer thought he could perform. People get fired all the time for missing work – but they do not "get quitted" for it. He missed work because he was physically in pain and could not work. Missing work because one is ill or injured is "excusable" and is not misconduct and it is not "quitting" one's job, just as the ESD had originally held. The Commissioner's Conclusion of Law I in this case, quoted above, relies upon *Safeco Ins. Co. v. Meyering*, 102 Wn.2d 385, 687 P.2d 195 (1984). In doing so, the Commissioner failed to fully quote the passage relied upon:

The act requires the Department analyze the facts of each case to determine what actually caused the employee's separation. *A voluntary termination requires a showing that an employee **intentionally terminated** her own employment.* *Vergeyle v. Department of Empl. Sec.*, 28 Wn. App. 399, 402, 623 P.2d 736 (1981).

Safeco, 102 Wn. 2d at 393 (emphasis added). The Commissioner quoted only the first sentence; the error of law was ignoring the second sentence.

As both the ESD's initial determination and the ALJ's conclusion stated, there was absolutely no evidence that Mr. Watkins "intentionally terminated" his employment. Ample evidence shows, however, that he was fired.

In the *Safeco Ins. Co.* case, Ms. Meyering "unilaterally and voluntarily submitted her resignation to her supervisors," a pretty good sign she intended to quit.

But the *Vergeyle* decision cited in *Safeco* is even more instructive for Mr. Watkins' case. Ms. Vergeyle had asked the employer months in advance for approval of certain vacation dates for which she needed to make elaborate and involved arrangements due to her husband's health condition. When the date of the vacation approached, the employer refused to allow her to take the vacation at the time she had arranged and it offered her other alternatives. She refused and signed a document that said, "Alternative not acceptable. I will not report for work beginning 9-2-77 thru 10-2-77. I understand termination of employment will result." *Vergeyle v. ESD*, 28 Wn. App. 399, 401, 623 P.2d 736 (1981).

When she later argued that she had been discharged and had not quit, this Court – though ultimately allowing benefits –

concluded she had quit because when she signed the document that said “termination will result,” “she knew her unauthorized absence would result in her discharge.” 28 Wn. App. at 402. In reaching this conclusion, this Court relied upon an out-of-state case that had held a person may be deemed to have quit through “the commission of an act ***which the employee knowingly intended to result in his discharge***” *Id.*

When these two cases are compared to Mr. Watkins’ case, it is apparent Mr. Watkins did not quit. First, unlike *Safeco*, he did not “unilaterally and voluntarily” hand in a resignation letter to his supervisors. Second, unlike *Vergeyle*, he committed no act which he “knowingly intended to result in his discharge.” The August 6 letter the employer sent to him (CP Comm. Rec. 70) about a “light duty” assignment of 30 hours per week says absolutely nothing to suggest that if he refused the assignment he would be terminated. Had it done so, *perhaps* it would be analogous to *Vergeyle* and perhaps the Commissioner would have been right here: but it said nothing of the kind.

Moreover, the employer’s “call record” of phone conversations between August 6 and August 21 does not indicate he was told he would be fired or be deemed to have quit if he did

not take the position. CP Comm. Rec. 72. Then on August 24 the employer sent him a letter giving him “notice of your termination.” CP Comm. Rec. 71. Therefore, Mr. Watkins was right when he argued at his hearing that he “did not willfully abandon my position.” CP Comm. Rec. 36.

b. It was an error of law for the Commissioner to “construct” an intent to quit from Mr. Watkins’ failures to take action.

To conclude as the Commissioner did here that Mr. Watkins “quit” is merely a version of the “constructive quit” doctrine that has been repudiated by Washington courts. *Bauer v. Employment Security Department*, 126 Wn. App. 468, 108 P.3d 1240 (2005) The “constructive quit” doctrine, though it can still be found in older ESD Commissioner’s Decisions, has been firmly rejected by Washington courts:

The voluntary constructive quit doctrine has not been adopted by Washington courts or the legislature. The doctrine does not fit within the current statutory scheme or interpretive cases. To adopt the doctrine would usurp the legislative function.

Bauer, 126 Wn. App. at 481.

In *Bauer*, the Commissioner, similar to the instant case, had held the claimant had “effectively quit his employment” by “**failing** **to** maintain his license, which was a requirement of his

employment.” 126 Wn. App. at 474. Mr. Bauer lost his Commercial Driver’s License because he had two serious traffic offenses within three years. On appeal, the State argued that the legislature’s phrase regarding good cause quits, that one “left work voluntarily,” could be reasonably interpreted to include a work separation due to “termination-triggering conduct,” which the State argued in *Bauer* was his serious traffic offenses leading to the loss of his license.

The *Bauer* court rejected this reasoning and the logic of “constructive quits” generally because, under the Washington law discussed above, “quitting” requires some sort of affirmative act that demonstrates an intent to quit. Further, *Bauer* rejected the ESD’s interpretation of the statute when ESD argued that “termination-triggering conduct” that itself does not show an intention to quit a job can be “construed” or “constructed” to constitute a quit: “The department’s interpretation is a narrow construction of the statute that would disqualify a greater number of employees. This is contrary to the statute’s history of liberal construction.” *Bauer*, 126 Wn. App. at 477.

The *Bauer* court instead adopted with obvious approval a decision from Maine on the issue of whether a “voluntary” quit can be constructed from a claimant’s actions or inactions:

The Supreme Court of Maine addressed an almost identical statute and held:

[A]n individual leaves work “voluntarily” only when freely making an affirmative choice to do so. The clear import of the statute is that it is the intentional act of leaving employment rather than the deliberate commission of an antecedent act which disqualifies an individual from eligibility for benefits. To read the doctrine of constructive voluntary quit or constructive resignation into [the statute] is to overstep the bounds of administrative construction and usurp the legislative function.

Brousseau v. Me. Employment Sec. Comm’n, 470 A.2d 327, 330 (Me. 1984) (footnote omitted). **That view is consistent with the jurisprudence of Washington.** We cannot substitute our judgment or usurp the prerogative of the legislature. *State v. Bunting*, 115 Wn. App. 135, 139, 61 P.3d 375 (2003).

Bauer, 146-147 (emphasis added to language from *Bauer*).

As noted in the first argument section, our courts have addressed the plain meaning of “leaving voluntarily”:

[T]he phrase “due to leaving work voluntarily” has a plain, definite and sensible meaning, free of ambiguity; it expresses a clear legislative intent that to disqualify a claimant from benefits **the evidence must establish that the claimant, by his or her own choice, intentionally, of his or her own free will, terminated the employment.**

Vergeyle v. Dep't of Employment Sec., 28 Wn. App. 399, 402, 623 P.2d 736 (1981) (emphasis added) (quoting *Allen v. CORE Target City Youth Program*, 275 Md. 69, 79, 338 A.2d 237 (1975)), *overruled on other grounds by Davis v. Employment Sec. Dep't*, 108 Wn.2d 272, 737 P.2d 1262 (1987).

In other words, decision makers cannot construct by sleight of hand a quit when there is no evidence of an intentional, knowing act to quit: "[a] voluntary termination requires a showing that an employee intentionally terminated her own employment." *Safeco Ins. Cos. v. Meyering*, 102 Wn.2d 385, 393, 687 P.2d 195 (1984).

The Commissioner's decision here, that "we conclude that he voluntarily quit employment," premised on Mr. Watkins' alleged inaction, things he is faulted for not doing, is merely another application of the "constructive quit" doctrine. Constructing out of a series of actions – or in this case alleged inactions – that those inactions "prove" an intent to quit, is exactly what *Bauer* says is rejected in Washington. In Washington, there must be an intentional act and one cannot "construct" such an act by the **failure** to act. The failure of the claimant in *Bauer* was failing to maintain a commercial driver's license, but that failure was not

grounds in that case for “constructing” a quit; similarly, Mr. Watkins’ alleged failure to call his employer cannot be grounds here for “constructing” a quit either. (Mr. Watkins consistently maintained, however, that he was in contact with the local supervisor in Yakima “two or three times a week”)

The Commissioner in Mr. Watkins’ case concluded he quit because he “failed to respond or show up for work. Rather, he abandoned his job.” CP Comm. Rec. 140. This is precisely the logic rejected in *Bauer*, that Mr. Bauer’s two serious traffic offenses “set in motion” the events that led to his loss of his license, a requirement for his job. Thus, the Commissioner’s decision here misinterprets, misapplies, or completely ignores the holdings of *Safeco*, *Vergeyle*, and *Bauer* and should therefore be reversed.

In unemployment compensation appeals, the Court of Appeals reviews the findings and conclusions *of the Commissioner* of the Employment Security Department. *Okamoto v. Employment Security Department*, 107 Wn. App. 490, 496, 27 P.3d 1203, *rev. denied*, 145 Wn.2d 1022 (2001). Accordingly, the Court of Appeals reviews the Superior Court’s decision *de novo*. *National Electrical Contractors Assoc. v. Employment Security Department*, 109 Wn. App. 213, 219, 34 P.2d 860 (2001).

The Commissioner's decision here is reviewed under the Administrative Procedure Act and will be reversed on judicial review if any one of several grounds is satisfied. RCW 34.05.570. Specifically, in the instant case, "the agency has erroneously interpreted or applied the law." RCW 34.05.570(3)(d).

Issues of law are the responsibility of the judicial branch. *Tapper v. Employment Security*, 66 Wn. App. 448, 451, 832 P.2d 449 (1992), *rev'd on other grounds*, 122 Wn.2d 397, 858 P.2d 494 (1993). Therefore, when reviewing legal questions the court is allowed to substitute its judgment for that of the administrative agency. *Franklin County Sheriff's Office v. Sellers*, 97 Wn.2d 317,324-325, 646 P.2d 113 (1982) *cert. denied*, 459 U.S. 1106 (1983). Pure questions of law are reviewed *de novo*. *Id.*

While deference is granted to the agency's factual findings, the agency's application of the law is reviewed *de novo*. *Dermond v. Employment Security Department*, 89 Wn. App. 128, 132, 947 P.2d 1271 (1997).

2. ATTORNEY FEES AND COSTS IN THIS CASE ARE MANDATED BY STATUTE WHEN A COMMISSIONER'S ORDER IS REVERSED ON JUDICIAL REVIEW.

A claimant who succeeds in convincing a court to reverse a Commissioner's Order is allowed reasonable attorney fees and costs as mandated by statute:

It shall be unlawful for any attorney engaged in any appeal to the courts on behalf of an individual involving the individual's application for initial determination, or claim for waiting period credit, or claim for benefits to charge or receive any fee therein in excess of ***a reasonable fee to be fixed by the superior court in respect to the services performed in connection with the appeal taken thereto and to be fixed by the supreme court or the court of appeals in the event of appellate review, and if the decision of the commissioner shall be reversed*** or modified, such fee and the costs shall be payable out of the unemployment compensation administration fund. ***In the allowance of fees the court shall give consideration to the provisions of this title in respect to fees pertaining to proceedings involving an individual's application for initial determination, claim for waiting period credit, or claim for benefits.*** In other respects the practice in civil cases shall apply.

RCW 50.32.160 (emphasis added). The fees and costs contemplated in this statute are stated in mandatory terms: "such fee and the costs *shall* be payable out of the unemployment compensation administration fund." *Id.*

Therefore, pursuant to this statute and RAP 18.1, appellant requests attorney fees and costs be awarded upon reversal of the Commissioner's Order in this case.

E. CONCLUSION

For the reasons stated above, James E. Watkins respectfully requests that this court reverse the Commissioner's Decision in this case because he did not quit his job, but was fired without proof of misconduct.

Petitioner also requests that reasonable attorney fees be awarded in an amount to be determined upon filing of a cost bill subsequent to a decision in this matter and under authority of RCW 50.32.160 that mandates attorney fees and costs be awarded upon reversal or modification of a Commissioner's Order.

Dated this 12th Day of July 2011.

Respectfully submitted,



Marc Lampson
Attorney for Appellant
WSBA # 14998
1904 Fourth Ave., Suite 604
Seattle, WA 98101
206.441.9178

BY *ca*

IN THE COURT OF APPEALS, DIVISION II
FOR THE STATE OF WASHINGTON

JAMES E. WATKINS,

Respondent,

and

STATE OF WASHINGTON,
EMPLOYMENT SECURITY
DEPARTMENT,
Appellant.

No. 42023-6-II

CERTIFICATE OF SERVICE BY MAIL

CERTIFICATE

I certify that I emailed an electronic copy and mailed a paper copy of the Appellant's Opening Brief in this matter postage prepaid, on July 12, 2011, to the Respondent ESD's attorney, Dionne Padilla-Huddleston, WSBA# 38356, Office of the Attorney General, PO Box 40110, Olympia, WA 98504-0110.

Dated this July 12, 2011.



Marc Lampson
WSBA # 14998
Attorney for Respondent

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

JAMES E. WATKINS,

Appellant,

v.

EMPLOYMENT SECURITY DEPARTMENT,
STATE OF WASHINGTON,

Respondent.

APPENDICES

APPENDIX A: RCW 50.04.294

APPENDIX B: ESD'S ORIGINAL ORDER GRANTING BENEFITS

APPENDIX C: ALJ'S ORDER GRANTING BENEFITS

APPENDIX D: COMMISSIONER'S DECISION REVERSING

APPENDIX E: AUGUST 6 LETTER ABOUT NEW POSITION

APPENDIX F: AUGUST 24 NOTICE OF TERMINATION

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2011 JUL 12 PM 1:21

11:11:53 AM 07/12/11
SYDNEY

APPENDIX A: RCW 50.04.294

Misconduct — Gross misconduct.

With respect to claims that have an effective date on or after January 4, 2004:

(1) "Misconduct" includes, but is not limited to, the following conduct by a claimant:

(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.

(2) 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:

(a) Insubordination showing a deliberate, willful, or purposeful refusal to follow the reasonable directions or instructions of the employer;

(b) Repeated inexcusable tardiness following warnings by the employer;

(c) Dishonesty related to employment, including but not limited to deliberate falsification of company records, theft, deliberate deception, or lying;

(d) Repeated and inexcusable absences, including absences for which the employee was able to give advance notice and failed to do so;

(e) Deliberate acts that are illegal, provoke violence or violation of laws, or violate the collective bargaining agreement. However, an employee who engages in lawful union activity may not be disqualified due to misconduct;

(f) 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; or

(g) Violations of law by the claimant while acting within the scope of employment that substantially affect the claimant's job performance or that substantially harm the employer's ability to do business.

(3) "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.

(4) "Gross misconduct" means a criminal act in connection with an individual's work for which the individual has been convicted in a criminal court, or has admitted committing, or conduct connected with the individual's work that demonstrates a flagrant and wanton disregard of and for the rights, title, or interest of the employer or a fellow employee.

[2006 c 13 § 9. Prior: 2003 2nd sp.s. c 4 § 6.]

Notes:

Retroactive application – 2006 c 13 §§ 8-22: See note following RCW 50.04.293.

Conflict with federal requirements – Part headings not law – Severability – 2006 c 13: See notes following RCW 50.20.120.

Conflict with federal requirements – Severability – Effective date – 2003 2nd sp.s. c 4: See notes following

APPENDIX B: ESD'S ORIGINAL ORDER GRANTING BENEFITS

000000000000NMDT

STATE OF WASHINGTON
EMPLOYMENT SECURITY DEPARTMENT
Determination Notice
12/19/2009

790
NORTHWEST PROTECTIVE SVC
IMPRIMIS INC
2700 Elliott Ave
Seattle WA 98121-1109

Return address:
EMPLOYMENT SECURITY DEPT
TELECENTER APPEALS
FAX : (800) 301-1795
PO BOX 19018
OLYMPIA WA 985070018

BYE: 10/16/2010 ID: -0839

A copy of this determination was mailed to the interested parties at their address on 12/19/2009.

YOUR RIGHTS/SUS DERECHOS: If you disagree with this decision, you have the right to appeal. Your appeal must be received or postmarked by 01/19/2010. See "YOUR RIGHT TO APPEAL" at the end of this decision. Si no está de acuerdo con esta decisión, tiene el derecho de registrar un apelación. Vea "SU DERECHO DE APELACION" al final de esta decisión.

NOTICE/AVISO: The language below is intended to be general context of the cited law. You may ask for a copy of the complete law by calling your Telecenter at 1-800-318-6022 or by logging on to www.rcw.go2ui.com. La intención del lenguaje de abajo es para dar un contexto general de la ley que se cita. Puede pedir una copia de esa ley al TeleCentro 1-800-318-6022 ó al entrar en www.rcw.go2ui.com.

State law says you may be denied unemployment benefits if you are fired or suspended for misconduct connected with your work. See RCW 50.20.066.

"Misconduct" includes acts that show a willful or wanton disregard for your employer or co-workers, deliberate violations of customary standards of behavior, and carelessness or negligence

12/19/2009

1 of 5

-0839

Archived Copy

that is repeated or could result in serious bodily harm. See RCW 50.04.294 and WAC 192-150-200.

FACTS:

When you filed your initial application for unemployment benefits effective 10/18/09, you reported that your employment with Northwest Protective Services Imprimis INC. had been terminated.

Your employer stated that you quit your employment by refusing to work an assignment that met the restrictions set by your physician. Your employer called you on 08/06/09 and you told them that you would not work. On 08/24/09, the employer terminated your employment for job abandonment. They provided complete information concerning an accident you suffered on 05/26/09.

You stated that you suffered an accident on 05/26/09, which you immediately reported to your employer. You worked on 05/29/09 and on 05/30/09, after one hour of work you were authorized to leave. You were under severe pain. Although that since June you were released to work with modifications, you were still physically unable to work. In August, you received a letter from your employer with an offer of work; you told them that you would not work. Later, you received a termination letter. You did not give notice, as it was not your intention to quit. You just needed time to recover. By 10/23/09, you became able to work full time.

REASONING:

Although your employer indicates that you quit your employment, your employer separated you from work on 08/24/09. You did not have the intention to quit, nor did you expressed you were quitting.

You were separated from work while presenting a medical condition, which was beyond your control. Misconduct has not been established because it has not been shown that your actions were deliberated or that you violated your employer's rules.

DECISION: Based on the information provided, misconduct has not been established.

RESULT: Benefits are allowed beginning 10/18/2009 if you are otherwise eligible.

12/19/2009

2 of 5

██████-0839

Archived Copy

STATE OF WASHINGTON
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE EMPLOYMENT SECURITY DEPARTMENT

IN THE MATTER OF:

James E. Watkins

Claimant

DOCKET NO: 01-2010-00459

INITIAL ORDER

ID: [REDACTED]

BYE: 10/16/2010

UIO: 790

Hearing: This matter came before Administrative Law Judge Larry V. Rogers on April 23, 2010, at Olympia, Washington after due and proper notice to all interested parties.

Persons Present: the claimant, James E. Watkins; and the employer-appellant, Northwest Protective Svc. Imprimis Inc., represented by Shanda Means, Bonnie Roberts, Cathleen Rhoades and Tom Curry.

STATEMENT OF THE CASE:

The employer filed an appeal on January 19, 2010 from a Decision of the Employment Security Department dated December 19, 2009. At issue in the appeal is whether 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. Also at issue is whether the claimant was able to, available for, and actively seeking work during the weeks at issue.

Having fully considered the entire record, the undersigned Administrative Law Judge enters the following Findings of Fact, Conclusions of Law and Initial Order:

FINDINGS OF FACT:

1. The claimant was employed by Northwest Protective Svc. Imprimis Inc., as a security officer from August 10, 2007, until August 24, 2009. The claimant was employed to work at Memorial Hospital in Yakima, Washington.
2. While working for the employer, the claimant was injured on May 26, 2009. The claimant attempted to work a couple of additional days and then went to the ER for treatment. The claimant was not released for work again until June 02, 2009, at which time he was released for light duty.

INITIAL ORDER - 1

3. The employer had no light duty work for the claimant until August 06, 2009, at which time he was called by Bonnie Roberts, an administrative assistant with the employer. During the course of the conversation, the claimant advised Ms. Roberts that he was unable to return to work in spite of the release from the claimant's physician. A letter was also directed to the claimant indicating the availability of the position and that the claimant was expected to return to work on August 11, 2009. The claimant was asked to sign the letter and return it to the employer. He did not.

4. The employer had no further contact from the claimant until a phone call received by Tom Curry, the employer's branch manager for Eastern Washington on August 17, 2009. On August 17, 2009, the claimant's physician had again issued Activity Prescription Form authorizing light duty. The claimant again advised that he was unable to come to work. Following this conversation, it was decided by the employer that the claimant did not intend to return to work, and, effective August 24, 2009, the claimant was considered to have abandoned his job and was terminated.

5. During the weeks at issue the claimant was willing and able to accept any offer of suitable work and sought work as directed by the Department.

CONCLUSIONS OF LAW:

1. An issue that must be decided in this case is whether claimant quit or was discharged. With respect to this issue, the following principles apply. Benefits are intended only for those who become unemployed through no fault of their own. *Macey v. Employment Security Dep't.*, 110 Wn.2d 308, 752 P.2d 372 (1988). In furtherance of this objective, it is the Department's duty to analyze the facts of each case to determine what actually caused the termination. *Safeco Insurance Co. v. Meyering*, 102 Wn.2d 385, 687 P.2d 195 (1984). The employee is disqualified if it is determined that he or she committed an act knowing and intending that it would result in his or her termination. *Vergeyle v. Employment Security Dep't.*, 28 Wn. App. 399, 623 P.2d 736 (1981), cited with approval in *Safeco, supra*. See also *Korte v. Employment Security Dep't.*, 47 Wn. App. 296, 734 P.2d 939 (1987). In this case, the claimant failed to show for work for three weeks and was terminated pursuant to an employer rule. Nothing in the record establishes that the claimant intended to be absent. The employer terminated employment for absenteeism pursuant to the rule. I am persuaded that the employer discharged the claimant due to absenteeism. I adjudicate this case as a discharge.

2. The record in this case establishes that the employer discharged the employee ("the claimant"). The provisions of RCW 50.04.294, RCW 50.20.066, WAC 192-150-085, WAC 192-150-200, WAC 192-150-205, and WAC 192-150-210 are therefore applicable. Copies of these laws are attached to this order.

3. A claimant who has been discharged from employment will be disqualified from

receiving unemployment benefits if the employer proves by the preponderance of the evidence that the employer discharged the claimant for statutory "misconduct." RCW 50.20.066. A claimant disqualified due to misconduct is disqualified for at least ten weeks and until the claimant goes back to work and works for at least ten weeks and earns at least ten times his or her weekly benefit amount in employment covered by unemployment insurance.

4. The definition of misconduct is found in RCW 50.04.294(1), which provides that:

"Misconduct includes, but is not limited to, the following conduct by a claimant:

- (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."

5. Subsections (a)-(g) of RCW 50.04.294(2) provide examples of a "willful or wanton disregard of the interests of the employer or a fellow employee":

- (a) Insubordination;
- (b) Repeated inexcusable tardiness following warnings;
- (c) Dishonesty related to employment;
- (d) Repeated and inexcusable absences;
- (e) Deliberate illegal acts;
- (f) Violations of reasonable company rule if the claimant knew or should have known of the existence of the rule; or
- (g) Illegal acts within the scope of employment that substantially affect the claimant's job performance or that substantially harm the employer's ability to do business.

6. The Department has clarified through rulemaking that to constitute misconduct the claimant's action must also be work connected and must harm or create the potential to harm the employer's interests. WAC 192-150-200. The harm required by the regulation can be either tangible or intangible, and the employer does not have to prove the claimant had an intent to harm the employer's interests. *Hamel v. Employment Sec. Dept.*, 93 Wn. App. 140, 146, 966 P.2d 1282 (1998).

7. The statute itself clarifies that misconduct does not include: (a) inefficiency, unsatisfactory conduct, or failure to perform well as the result of inability or incapacity; (b) ordinary negligence in isolated instances; or (c) good faith errors in judgment or discretion. RCW 50.04.294(3).

8. The provision of RCW 50.04.294 that might apply to the facts of this case is RCW 50.04.294(2)(d), which provides that misconduct exists when an employee's actions amount to repeated and inexcusable absences, including absences for which the employee was able to give advance notice and failed to do so. The employer in this case discharged the claimant because of failure to accept new work.

9. Here, the employer has not proved by the preponderance of the evidence that the claimant's conduct showed a willful or wanton disregard of the employer's interests, a deliberate disregard of expected standards of behavior, or a degree of carelessness or negligence beyond ordinary negligence. Following the claimant's release for light duty, the employer was unable to find such duty until two months following the claimant's release. During the time that work was offered, the employer had only two conversations with the claimant—one of August 06, when the claimant was advised of the position and one on August 17, when the claimant phoned the employer. No other efforts were made to contact or talk to the claimant except for a letter confirming the offer of the position. I conclude that the claimant's actions do not rise to a level of willful and wanton behavior, but more in the nature of inefficiency, unsatisfactory conduct, or failure to perform well as the result of inability or incapacity. That being the case, the employer has not proved misconduct as defined in RCW 50.04.294. The claimant is therefore not subject to disqualification pursuant to RCW 50.20.066 as a result of the job separation in this case.

10. RCW 50.20.010(1)(c) requires each claimant to be able to, available for, and actively seeking work. The claimant was able to, available for, and actively seeking work during the weeks at issue and is therefore not subject to denial under the above-cited statute and related laws and regulations.

Now therefore it is ORDERED:

The Decision of the Employment Security Department under appeal is **AFFIRMED**.

The claimant was not discharged due to misconduct and is therefore not subject to disqualification pursuant to RCW 50.20.066(1).

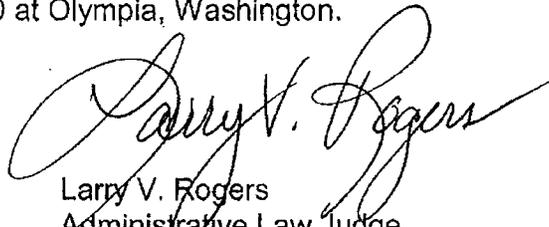
The claimant was able to, available for and actively seeking work during the weeks at issue as required by RCW 50.20.010(1)(c).

Employer: If you are a base year employer for this claimant, or become one in the future, your experience rating account will be charged for any benefits paid on this claim or future claims based on past wages you paid to this individual. If you are a local government or reimbursable employer, you will be directly liable for any benefits paid. Benefit charges or liability will accrue unless this decision is set aside on appeal. See RCW 50.29.021. If you pay taxes on your payroll, any charges for this claim could be used to calculate your future tax

rates.

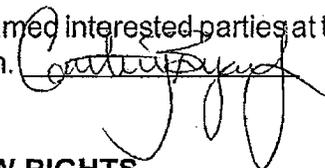
Notice to Claimant: Your former employer has the right to appeal this decision. If this decision is reversed because it is found you committed misconduct connected with your work, all benefits paid as a result of this decision will be an overpayment. State law says you will not be eligible for waiver of the overpayment, nor can the department accept an offer of compromise (repayment of less than the total amount paid to you). The benefits must be repaid even if the overpayment was not your fault. See RCW 50.20.066(5).

Dated and Mailed on April 30, 2010 at Olympia, Washington.



Larry V. Rogers
Administrative Law Judge
Office of Administrative Hearings
2420 Bristol Court SW
PO Box 9046
Olympia, WA 98507-9046

Certificate of Service

I certify that I mailed a copy of this order to the within-named interested parties at their respective addresses postage prepaid on the date stated herein. 

PETITION FOR REVIEW RIGHTS

This Order is final unless a written Petition for Review is addressed and mailed to:

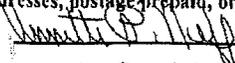
**Agency Records Center
Employment Security Department
PO Box 9046
Olympia, Washington 98507-9046**

and postmarked on or before **June 1, 2010**. All argument in support of the Petition for Review must be attached to and submitted with the Petition for Review. The Petition for Review, including attachments, may not exceed five (5) pages. Any pages in excess of five (5) pages will not be considered and will be returned to the petitioner. *The docket number from the Initial Order of the Office of Administrative Hearings must be included on the Petition for Review.* Do not file your

APPENDIX D: COMMISSIONER'S DECISION REVERSING

CERTIFICATE OF SERVICE

I certify that I mailed a copy of this decision to the within named interested parties at their respective addresses, postage prepaid, on July 9, 2010.


representative, Commissioner's Review Office,
Employment Security Department

UIO: 790
BYE: 10/16/2010

BEFORE THE COMMISSIONER OF
THE EMPLOYMENT SECURITY DEPARTMENT
OF THE STATE OF WASHINGTON

Review No. 2010-2806

In re:

JAMES E. WATKINS
SSA No. [REDACTED] 0839

Docket No. 01-2010-00459

DECISION OF COMMISSIONER

On June 1, 2010, NORTHWEST PROTECTIVE SERVICES, d/b/a IMPRIMIS, Inc., by and through Shanda Means, Human Resources Manager, petitioned the Commissioner for review of a decision issued by the Office of Administrative Hearings on April 30, 2010. Pursuant to chapter 192-04 WAC this matter has been delegated by the Commissioner to the Commissioner's Review Office. Having reviewed the entire record and having given due regard to the findings of the administrative law judge pursuant to RCW 34.05.464(4), the undersigned adopts the Office of Administrative Hearings' findings of fact and conclusions of law, except conclusions Nos. 1 through 9, and enters the following:

CONCLUSIONS OF LAW

I

We must first determine whether the separation resulted from a quit or a discharge. In deciding whether a separation is a quit or a discharge, it must be determined what actually caused the separation. Safeco Ins. Cos. V. Meyering, 102 Wn.2d 385, 687 P.2d 195 (1984). This issue is decided by identifying which was the "moving party" initiating the separation. In re Hensley, Empl. Sec. Comm'r Dec.2d 636 (1984).

II

We conclude that claimant was the moving party: he was offered a job assignment which fell within the restrictions his doctor had ordered, but failed to respond or show up for work. Rather, he abandoned his job. Consequently, we conclude that he voluntarily quit employment.

III

We cannot conclude that claimant had statutory good cause for quitting. His doctor concluded that he could do the work, and claimant did not contact the doctor to explain his concerns. He simply refused to take the job. Benefits must accordingly be denied.

Now, therefore,

IT IS HEREBY ORDERED that the decision of the Office of Administrative Hearings issued on April 30, 2010, is MODIFIED. Claimant is disqualified pursuant to RCW 50.20.050(2)(a) beginning August 23, 2009, and thereafter for seven calendar weeks and until he or she has obtained bona fide work in employment covered by this title and earned wages in that employment equal to seven times his or her weekly benefit amount. The claimant was able to, available for and actively seeking work during the weeks at issue as required by RCW 50.20.010(1)(c). *Employer:* If you pay taxes on your payroll and are a base year employer for this claimant, or become one in the future, your experience rating account will not be charged for any benefits paid on this claim or future claims based on wages you paid to this individual, unless this decision is set aside on appeal. See RCW 50.29.021.

DATED at Olympia, Washington, July 9, 2010.*

Susan I. Buckles

Review Judge
Commissioner's Review Office

*Copies of this decision were mailed to all interested parties on this date.

RECONSIDERATION

Pursuant to RCW 34.05.470 and WAC 192-04-190 you have ten (10) days from the mailing and/or delivery date of this decision/order, whichever is earlier, to file a petition for reconsideration. No matter will be reconsidered unless it clearly appears from the face of the petition for reconsideration and the arguments in support thereof that (a) there is obvious material, clerical error in the decision/order or (b) the petitioner, through no fault of his or her own, has been denied a reasonable opportunity to present argument or respond to argument pursuant WAC 192-04-170. Any request for reconsideration shall be deemed to be denied if the Commissioner's Review Office takes no action within twenty days from the date the petition for reconsideration is filed. A petition for reconsideration together with any argument in support thereof should be filed by mailing or delivering it directly to the Commissioner's Review Office, Employment Security Department, 212 Maple Park Drive, Post Office Box 9046, Olympia, Washington 98507-9046, and to all other parties of record and their representatives. The filing of a petition for reconsideration is not a prerequisite for filing a judicial appeal.

JUDICIAL APPEAL

If you are a party aggrieved by the attached Commissioner's decision/order, your attention is directed to RCW 34.05.510 through RCW 34.05.598, which provide that further appeal may be taken to the superior court within thirty (30) days from the date of mailing as shown on the attached decision/order. If no such judicial appeal is filed, the attached decision/order will become final.

If you choose to file a judicial appeal, you must both:

APPENDIX E: AUGUST 6 LETTER ABOUT NEW POSITION



PEGGY MUNCERY CAMERON
OWNER
P.R. NEELY, III
President and Chief Executive Officer

SECURITY SERVICES
Security Officers
(Permanent & Temporary)
Special Response Officers
Special Events & Conventions
Site Security
Vehicle & Bicycle Patrols
Alarm Response
Security Assessments

August 6, 2009

Via Priority Mail

Mr. James Watkins
P.O. Box 761
Noches, WA 98937

Dear Mr. Watkins,

NORTHWEST
PROTECTIVE
SERVICE, INC.

We have a shift available that will meet the restrictions required for you to return to work as noted on Activity Prescription Form, dated July 1, 2009.

CORPORATE and
SEATTLE OFFICE
2700 Elliott Avenue
Seattle, WA 98121
(206) 448-4040
FAX (206) 448-2961

This is a long-term temporary site, which requires the officer to post on a chair to provide access control to patient rooms or hospital daycare. There is no climbing, bending, or stooping, twisting, squatting or kneeling, crawling or reaching above shoulders required at this site (which are the documented restrictions we have on file for you). The schedule is as follows:

YACOMA
514 McKinley Avenue
Tacoma, WA 98403
(252) 733-4040
FAX (252) 393-4099

Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday	Notes
15:30 - 21:30			15:30 - 21:30	15:30 - 21:30	15:30 - 21:30	15:30 - 21:30	Regional Hospital

The pay rate for this site is \$ 9.50 per hour for 30 hours per week. In some cases you may be asked to work additional hours due to unforeseen circumstances.

SPOKANE
1522 N Washington #101
Spokane, WA 99201
(509) 328-4040
FAX (509) 328-2922

We would like you to begin this shift effective 8/11/09. Please sign below if you agree to this or if you are declining this position. This letter is to be returned to me no later than 8/10/09.

YAKIMA
1100 D West Lincoln
Yakima, WA 99202
(509) 452-0445
FAX (509) 452-0445

Feel free to contact me if you have any questions.

Sincerely,

WASHINGTON
230-05-0320130

Tom Currie
Branch Manager

{EXHIBIT M}

PORTLAND
9700 SW Capitol Hwy #105
Portland, OR 97219
(503) 284-5050
FAX (503) 284-2229

Cc: Royalee Watson, Eberle Vivian
Dr. Bruce Kite

WEB SITE

www.nwprotective.com

- I agree to take this position and work the hours required, beginning _____/09.
- I decline to accept this assignment based on _____

E-MAIL

copy@nwprotective.com

Signed: _____ Date: _____

APPENDIX F: AUGUST 24 NOTICE OF TERMINATION



PEGGY KANDERY CAMERON
Director
ET NEELY, II
President and Chief Executive Officer

SECURITY SERVICES
Security Officers
(Permanent & Temporary)
Special Response Officers
Special Events & Conventions
Site Security
Vehicle & Bicycle Patrols
Alarm Responses
Security Assessments

August 24, 2009

James Watkins
P.O. Box 761
Naches, WA. 98937

Dear Mr. Watkins:

NORTHWEST
PROTECTIVE
SERVICE, INC.

This letter is written to serve notice of your termination with NW Protective Service, Inc., effective immediately. Your termination is due to your violation of Company policy, Section V, Subsection B, which states:

SPOKANE

22 N. Washington #101
Spokane, WA 99201
(509) 326-4040
FAX (509) 326-6862

SECTION V: TERMINATION OF EMPLOYMENT (Page 39)

B. Abandonment of Job

It will be assumed that you have abandoned your job and quit voluntarily if:
• For 3 consecutive weeks, you do not contact Operations and obtain and work a minimum of 16 hours per week.

SEATTLE and
CORPORATE OFFICE
2700 Elliott Avenue
Seattle, WA 98131
(206) 446-0000
FAX (206) 446-2461

Northwest Protective Service sent you a job offer dated 8/6/09, that fit within the limitations that your doctor placed you on. The letter stated that you must contact the office no later than 8/21/09. To date we have not received a response.

TACOMA
3515 N. 20th / A1200
Tacoma, WA 98404
(253) 283-4500
FAX (253) 383-0200

By your actions, you have directly violated Company policy and have made no attempt to preserve your job with Northwest Protective.

YAKIMA
1100 E. West Lincoln
Yakima, WA 98902
(509) 452-8400
FAX (509) 452-8440

NW Protective has reasonable expectation that you will perform your duties in accordance with the standards of the employee handbook, which was provided to you at the time of employment, clearly stating your duties and responsibilities.

WASHINGT. COUNTY
236240000000

It is requested that you immediately return all uniforms and equipment belonging to Northwest Protective Service. Failure to do so may cause a delay in processing your final payment, if applicable.

PORTLAND
2823 Lloyd Center
Portland, OR 97232
(503) 284-0700
FAX (503) 284-0223

Sincerely,

Tom Currie
Branch Manager
Northwest Protective Service
(509) 326-4040

WEB SITE
www.nwprotective.com

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{EXHIBIT N}
Exhibit # 421