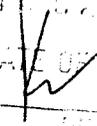


Reverse & refile

COURT OF APPEALS
DIVISION II

FILED
11/23/21 PM 3:44
STATE OF WASHINGTON
BY 
DEPUTY

NO. 42164-0-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

DAVID B. VAIL & ASSOCIATES,

Petitioner/Respondent.

v.

EMPLOYMENT SECURITY DEPARTMENT, and CHALMERS
JOHNSON

Cross-Respondents/Appellants,

REPLY BRIEF OF
PETITIONER/RESPONDENT DAVID B. VAIL & ASSOCIATES

Peter T. Petrich, WSB #8316
Christopher J. Marston, WSB
#30571
DAVIES PEARSON, P.C.
920 Fawcett Ave.
Tacoma, WA 98402
253-620-1500

TABLE OF CONTENTS

TABLE OF AUTHORITIESii

ARGUMENT1

**1. THE SEPTEMBER, 2009 EMAIL
CORRESPONDENCE AND IMPROPER
RELATIONSHIP CONSTITUTED MISCONDUCT 2**

**2. THE WORK-PLACE COMMENTS BY MR.
JOHNSON AND THE DELETION OF THE TAPE
CONSTITUTED MISCONDUCT 8**

**3. THE POST-TERMINATION EVIDENCE WAS
IMPROPERLY EXCLUDED BY THE
COMMISSIONER 10**

CONCLUSION19

TABLE OF AUTHORITIES

CASES:

Nelson v. Employment Security Dept.,
98 Wn.2d 370, 655 P.2d 242 (1982) 3

Smith v. Employment Security Dept.,
155 Wn. App. 24, 226 P.3d 263 (2010) 8

*McKennon v. Nashville Banner
Publishing Co.*, 513 U.S. 352, 115 S. Ct. 879 (1995) (1995) . . . 16

*Goehle v. Fred Hutchinson Cancer
Research Center*, 100 Wn. App. 609, 1
P.3d 579 (2000) 16, 17

Janson v. North Valley Hosp., 93 Wn.
App. 892, 971 P.2d 67 (1999) 17

STATUTES:

RCW 50.04.294 3, 5, 7, 9
RCW 50.20.066(1) 11
RCW 50.01.010 17

REGULATION:

WAC 192-150-200(1) 11
WAC 192-150-200(2) 12

ARGUMENT

The Employment Security Department (the “Department”) and the employee, Chalmers Johnson (“Mr. Johnson”), incorrectly argue that the Commissioner properly upheld the decision of the Department to grant unemployment benefits to Mr. Johnson. However, Mr. Johnson did engage in misconduct when he: (1) sent the September, 2009, email, and engaged in an inappropriate relationship; (2) deleted portions of the tape; (3) made derogatory statements regarding Vail & Associates, and (4) viewed and downloaded pornography and sent explicit, inappropriate emails to third-parties. The pre and post-evidence of misconduct that Mr. Johnson engaged in was sufficient to support a denial of his claim for unemployment benefits.

Moreover, Mr. Johnson’s actions cannot be evaluated in the context of a lay employee. Instead, they must be evaluated in the context of Mr. Johnson’s role as an attorney-employee of Vail & Associates. As an attorney-employee of Vail & Associates, he had to meet higher standards of conduct than the lay employee. Under the Fundamental Principles of Professional Conduct section of the Rules of Professional Conduct, it states that, “. . . But in the last analysis it is the desire for the respect and confidence of the members of the legal profession and the society which the lawyer serves that should provide to a lawyer the

incentive for the highest possible degree of ethical conduct. The possible loss of that respect and confidence is the ultimate sanction.” Within this context, Mr. Johnson’s conduct needs to be evaluated, because it was within this context that Vail & Associates was appropriately evaluating Mr. Johnson.

1. THE SEPTEMBER, 2009, EMAIL CORRESPONDENCE AND IMPROPER RELATIONSHIP CONSTITUTED MISCONDUCT

The Department and Mr. Johnson have attempted to characterize the September, 2009, email correspondence as nothing more than an email between two, consenting adults and unrelated to Mr. Johnson’s work with Vail & Associates. This characterization of the email correspondence fails to take into account the potential, adverse impact it could have had on Vail & Associates.

While the email was sent using Mr. Johnson’s private, email account, he was on his work computer. Vail & Associates discovered it on his work computer while Mr. Johnson was at work. Comm. Rec., Pg. 29, Lines 1-15.¹ It was also an email exchange between Mr. Johnson and another employee of Vail & Associates. Even without the reference to Mr. Johnson’s escapades with his client’s ex-wife, it was an inappropriate

¹ Unless otherwise noted, the citations to the record are to the Commissioner’s Record (“Comm. Rec.”) that was filed in the Superior Court and designated in the Designation of Clerk’s Papers.

email correspondence to be sending to another co-worker while Mr. Johnson was working for Vail & Associates. Mr. Johnson is not a layperson, he is an attorney, and the Department and Mr. Johnson should not be allowed to successfully argue this email correspondence, at the most, was only poor judgment.

In addition, the ongoing relationship with his former client's ex-wife while he was employed with Vail & Associates was inappropriate and put Vail & Associates at risk of harm from such a relationship. Comm. Rec. Pg. 24, Lines 9-24. Vail & Associates was justified in considering this misconduct because its reputation was clearly at stake. Mr. Johnson admitted he had an ongoing relationship with his former client's ex-wife. *Id.* at Pg. 51, Lines 9-25. As an attorney working for Vail & Associates, Vail & Associates had every right to expect that Mr. Johnson would not engage in an inappropriate relationship much less publish his dalliance to a co-worker. While the relationship mentioned in the email correspondence involved a client's ex-wife, who was not a client of Vail & Associates, it was ongoing and had the potential to harm Vail & Associate's interests.

Under RCW 50.04.294(b) and (c) respectively, misconduct is defined as, "Deliberate violations or disregard of standards of behavior which the employer has the right to expect of an employee," and

“Carelessness or negligence of such degree or recurrence to show an intentional or substantial disregard of the employer's interest.” Under either of these definitions, the email correspondence, and the ongoing relationship he had with his former client’s ex-wife all constituted misconduct. Any law firm concerned with its reputation, and its ability to practice effectively would expect its attorneys not to engage in the conduct Mr. Johnson engaged in.

In *Nelson v. Employment Security Dept.*, 98 Wn.2d 370, 655 P.2d 242 (1982), the court articulated how an employer may establish that misconduct was connected with an employee’s work as required by RCW 50.20.060 for claims arising before January 4, 2004. To do so, an employer must demonstrate by a preponderance of the evidence that a reasonable person would find the employee’s conduct: (1) had some nexus with the employee’s work; (2) resulted in some harm to the employer’s interest; and (3) was in fact conduct which was (a) violative of some code of behavior contracted for between employer and employee, and (b) done with intent or knowledge that the employer’s interest would suffer. *Id.* at 374-375. As to the agreement between the employer and employee, the agreement did not have to be a formal written contract and could have been reasonable rules and regulations of the employer of which the employee had knowledge and was expected to follow. *Id.* at 374. In

addition, RCW 50.04.294(2)(f), which pertains to claims arising after January 4, 2004, provides that it is “misconduct” for an employee to violate a rule if the rule is reasonable and if the claimant knew or should have known of the existence of the rule. *See*, RCW 50.04.294(2)(f).

Once Vail & Associates discovered the email correspondence, and Mr. Johnson’s relationship with his client’s ex-wife, Vail & Associates could not continue to employ Mr. Johnson. The email and the relationship destroyed any trust Vail & Associates had in Mr. Johnson’s integrity and honesty, and his ability to practice law effectively at Vail & Associates thereby creating a nexus between the conduct and his employment. The discovery of the email and the relationship Mr. Johnson had engaged in and was engaging in directly impacted his ability to perform his job for Vail & Associates. Even without a formal written, agreement, Vail & Associates expected Mr. Johnson to conduct himself professionally. By sending the email and continuing to engage in the relationship, Mr. Johnson should have known that this conduct would be against Vail & Associates’ interests and violative of the agreement he had with Vail & Associates to conduct himself professionally.

In fact, there was an employee handbook that contained several provisions that Mr. Johnson violated when he sent the email and continued the relationship. The handbook had the following applicable provisions:

David B. Vail & Associates operates on the basis that every individual deserves to be treated with respect, courtesy, tact and consideration. Therefore we expect you to treat our customers and fellow employees accordingly and with the highest standards of integrity. You should be aware of and sensitive to any behavior that is offensive to others.

See, Comm. Rec., Pg. 588.

All employees who are authorized to use the company's e-mail system are required to comply with the following:

- 1) Ownership: All information that is created, sent, received or stored on the firm's e-mail system is the sole property of David B. Vail & Associates.
- 2) Security: The e-mail system is for business purposes only. E-mail should not be presumed to be private.

Id. at Pg. 592.

As an employee of David B. Vail & Associates, your primary responsibility is to this business. Additionally, employees' personal relationships should in no way compete with or compromise the business' interests.

Id. at Pg. 593.

Mr. Johnson was aware of the handbook and its contents. He submitted it as an exhibit during the hearing and also questioned David Vail about it. *See*, Comm. Rec., Pgs. 45-49: 576-577. He also violated the aforementioned terms of the handbook. He had a personal email on his work computer and was engaging in inappropriate behavior, i.e., a relationship with his client's ex-wife, which was offensive to Vail &

Associates and would be offensive to others, and compromised Vail & Associates' interests.

Upon discovering the email, a reasonable person in Vail & Associates' position would have concluded that the email had a nexus with Mr. Johnson's work, resulted in and had the potential to harm Vail & Associates' interests, was violative of behavior that was contracted for between the parties, and was done with knowledge that Vail & Associates' interests would suffer. At the very least, Mr. Johnson should have known Vail & Associates' interests would or have the potential to suffer as a result. More importantly, it was done in violation of RCW 50.04.294(2)(f).

Finally, the Department and Mr. Johnson argue that but for the email correspondence Mr. Johnson would not have been terminated on September 25, 2009. Vail & Associates was clear during the hearing that the email correspondence prompted it to terminate Mr. Johnson immediately. Comm. Rec., Pg. 29. Vail & Associates also made it clear that there were other reasons that justified terminating Mr. Johnson for misconduct. Comm. Rec., Pgs. 31-35. In and of themselves, these additional reasons for terminating Mr. Johnson were sufficient to preclude him from receiving unemployment benefits.

2. THE WORK-PLACE COMMENTS BY MR. JOHNSON AND THE DELETION OF THE TAPE CONSTITUTED MISCONDUCT

In reviewing the Commissioner's decision, this Court reviews the factual findings to determine whether there was substantial evidence to support the findings. *Smith v. Employment Security Dept.*, 155 Wn. App. 24, 32-33, 226 P.3d 263 (2010). Substantial evidence is evidence that would persuade a fair-minded person of the truth or correctness of the matter. *Id.* This Court reviews the findings of fact for substantial evidence in light of the whole record. *Id.*

When he was terminated, Vail & Associates informed Mr. Johnson that he was being terminated, among other reasons, because he had deleted pertinent portions of his taped, performance review, and as a result of his derogatory comments to his co-workers. Not only was there sufficient evidence to find that Mr. Johnson had engaged in this conduct, but the conduct constituted statutory misconduct.

As previously stated, there was an employee handbook that Mr. Johnson was aware of. The employee handbook stated that employees should not, ". . . disparage the firm, its employees and/or services to any one. If there are issues, bring them to the attention of the management." Comm. Rec., Pg. 515. Mr. Johnson violated this policy when he told his co-workers that he was going to sue Vail & Associates or words to that

effect and that its employee handbook would not stand up in court. *See*, Comm. Rec., Pg.34, Lines 16-19. While Mr. Johnson denied that he had made these derogatory and disparaging statements, there is no plausible reason that Vail & Associates would claim this happened other than that its employees reported that such statements were made by Mr. Johnson.

Mr. Johnson's self-serving denial that he never made the statements is not persuasive. Mr. Johnson violated the employee handbook when he made the statements, and he disregarded standards of behavior which Vail & Associates had the right to expect that Mr. Johnson would comply with. *See*, RCW 50.04.294(b) (misconduct is defined as deliberate violations or disregard of standards of behavior which the employer has the right to expect of an employee). The trial court was correct in determining that Mr. Johnson made the statements and the statements constituted misconduct.

In addition, there was sufficient evidence presented that Mr. Johnson had deleted portions of the tape. Mr. Vail had testified as to what was on the tape, and he provided the tape to Mr. Johnson to be placed in his personnel file. During the hearing, Bridgette Lind, the employee of Vail & Associates who Mr. Johnson was to deliver the tape to, testified that she did not receive the tape until a month after the meeting. Comm. Rec., Pg. 66, Lines 4-24. Other than Mr. Johnson deleting a portion of the

tape while it was in his possession, again, there is no other plausible explanation for why the tape would have the most damaging portions of it deleted.

Based on the evidence presented, there was insufficient evidence for the Commissioner to find that Mr. Johnson had not made the derogatory statements or deleted portions of the tape. Instead, there was substantial evidence that Mr. Johnson did make the derogatory and disparaging statements to his co-workers and that he had deleted portions of the tape in violation of the employee handbook and in violation of reasonable standards Vail & Associates expected him to comply with. In fact, the ALJ had concluded that Mr. Johnson was not the most credible witness. Comm. Rec., Pg. 111, Conclusion of Law No. 6.

Under these circumstances, the Commissioner's findings were erroneous.

3. THE POST-TERMINATION EVIDENCE WAS IMPROPERLY EXCLUDED BY THE COMMISSIONER

Finally, the Department and Mr. Johnson argue that the Commissioner properly excluded the evidence discovered post-termination.² The Commissioner did not consider this evidence because it determined that the evidence was not considered by Vail &

² The Pierce County Superior Court did not reach the issue of whether or not the post-termination evidence was improperly excluded. Instead, it held that there

Associates in making the initial decision to terminate Mr. Johnson. This decision misapplies the law to the termination of Mr. Johnson.

Under the law, Mr. Johnson was not entitled to unemployment benefits because he was terminated for misconduct, and he had engaged in misconduct. RCW 50.20.066(1) provides that, “An individual 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 and until he or she has obtained bona fide work in employment covered by this title and earned wages in that employment equal to ten times his or her weekly benefit amount. Alcoholism shall not constitute a defense to disqualification from benefits due to misconduct.”

WAC 192-150-200(1) provides that, “(1) The action or behavior that resulted in your discharge or suspension from employment must be connected with your work to constitute misconduct or gross misconduct. . .” The Department and Mr. Johnson argue that these statutory and regulatory provisions do not allow post-termination evidence to support the decision to terminate Mr. Johnson, but their arguments miss the point. Mr. Johnson was terminated for misconduct related to his employment with Vail & Associates. He was not terminated for a good faith error in

was sufficient evidence of pre-termination misconduct to deny benefits to Mr. Johnson.

judgment or ordinary negligence, and he was not laid off. He was engaged in misconduct that had the potential to harm and did harm Vail & Associates, and he was terminated for the misconduct.

WAC 192-150-200(2) then provides that “For purposes of this section, the action or behavior is connected with your work if it results in harm or creates the potential for harm to your employer's interests. This harm may be tangible, such as damage to equipment or property, or intangible, such as damage to your employer's reputation or a negative impact on staff morale.” Even without considering the post-termination evidence, the Pierce County Superior Court was correct in determining that the pre-termination evidence was sufficient. The September, 2009, email correspondence and the ongoing relationship had the potential to harm Vail & Associates’ reputation. Mr. Johnson’s comments to his co-workers had the potential to harm and did harm staff morale, and the deletion of the tape was dishonest behavior on the part of Mr. Johnson.

The post-termination evidence, therefore, does not provide a basis for the termination of Mr. Johnson nor is Vail & Associates arguing that it was the basis for the termination. Instead, it supports Vail & Associates’ initial decision to terminate Mr. Johnson. During the hearing, David Vail testified that he had an ongoing investigation into Mr. Johnson’s conduct and that he believed Mr. Johnson had been dishonest. Comm. Rec., Pgs.

29-30. He explained to Mr. Johnson the reasons Vail & Associates was terminating him and also explained that they were continuing their investigation into his conduct. *Id.* Mr. Johnson then took the flash drive from Vail & Associates, so he could delete evidence of his misconduct, and this is additional evidence of his misconduct.

Under these circumstances, it would not make sense to preclude an employer from supporting the initial termination for misconduct with post-termination evidence of misconduct nor does the law disallow such evidence to be presented. The Department and Mr. Johnson have not cited to any RCW, WAC, administrative decision or case that would support their position that post-termination evidence is inadmissible. If an employer believes misconduct has occurred, it should be allowed to terminate an employee immediately in order to protect its interests. It should not have to wait until it completes an investigation into the employee's conduct to do so. If the employer terminates an employee without completing the investigation, it runs the risk that the employee may not have engaged in misconduct, and the employee, therefore, would be entitled to benefits. However, if the investigation supports the employer's initial decision to terminate the employee for misconduct, the employer should be allowed to use the investigation's findings to support its initial decision.

In this case, based on the email correspondence and the other actions Mr. Johnson engaged in, Vail & Associates determined that Mr. Johnson had engaged in misconduct and posed a threat to Vail & Associates' legitimate business interests. It, therefore, immediately terminated him for misconduct but informed him that its investigation of his conduct was ongoing. In questioning from the ALJ, Mr. Vail testified with respect to the termination of Mr. Johnson as follows:

A. . . . we have an attorney/client relationship which requires integrity; it requires working in the best interest of the client, and not subverting the client to having abuse of their own private relationship. Now, I don't know at that point in time who it was being referred to. What I do know is that I could not allow him to continue in the office because of that allegation. The Bar Association will probably, if I had knowledge of this and allowed him to stay in the truth of that be found, I could lose my license, let alone Chalmers losing his license. So I needed to get further information on that to find out where this led. But I had no choice that that allegation in and of itself was reason to get him out of the office. Apart from the other issues related to his dishonesty and ethics problems that I was having with him. Now, I got this email that morning at 10:24 a.m. You notice that I fired him that afternoon.

See, Comm. Rec., Pg. 28, Lines 15-25, Pg. 29, Lines 1-2..

Q. So did you discuss that e-mail with Mr. Johnson at the time of termination?

A. Not specifically. I told him we had information that we were further investigating. The investigation they had to do was bar issues. It may have to do with potential harm to clients. We needed to know how that went. So we needed him out of the office so that we could be able to do our investigation.

See, Id., at Pg. 29, Lines 10-15.

Vail & Associates then discovered that not only was it correct about Mr. Johnson but that Mr. Johnson had been engaged in a pattern of misconduct. He was downloading, storing, and viewing pornography through his work computer, including the flash drive, but he was also using his work email address to email inappropriate and, often times, sexually explicit correspondences to third-parties, as well as graphic pictures of sex acts. Again, this misconduct put Vail & Associates' legitimate, business interests at risk.

Even if there was no connection between the initial termination of Mr. Johnson, and the subsequently discovered evidence, an exception should be adopted where the after-acquired evidence would have resulted in the employee's termination for misconduct. Much like in employment discrimination cases where after-acquired evidence of misconduct is allowed to limit or avoid awards of front pay and reinstatement, the same principals should apply to unemployment cases in order to limit the amount of unemployment compensation that an employee would be entitled to receive. In other words, once the post-termination evidence of statutory misconduct is discovered, this Court should recognize that at that point the employee is no longer entitled to unemployment benefits because he would have been terminated for misconduct by his employer.

In *McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352, 115 S. Ct. 879 (1995), the United State Supreme Court held that an employer that discovers additional grounds for discharging an already terminated employee may rely on that newly found evidence to limit the employee's right to back wages and front pay. The 62 year-old plaintiff employee in *McKennon* alleged that she was discharged based on her age in violation of the ADEA. During the lawsuit, the defendant employer learned through discovery that the plaintiff had violated the employer's policies by coping financial documentation related to the defendant's financial condition. Given that the employer did not know of the misconduct prior to the initial termination, the employee's misconduct could not be a complete bar to relief.

However, it was recognized that the employee's misconduct had to be taken into account and that it was appropriate to limit any back pay award to be calculated from the date of the discharge to the date new information was discovered. As to front pay or reinstatement, it was held that these were inappropriate remedies. "It would be both inequitable and pointless to order the reinstatement of someone the employer would have terminated, and will terminate, in any event upon lawful grounds." *Id.* at 362. The courts of this State have adopted the rule set forth in *McKennon*. See, *Goehle v. Fred Hutchinson Cancer Research Center*, 100 Wn. App.

609, 1 P.3d 579 (2000), *citing*, *Janson v. North Valley Hosp.*, 93 Wn. App. 892, 900, 971 P.2d 67 (1999) (holding that the rule set forth in *McKennon* applies to RCW 49.60).

In unemployment cases, the same principals should apply. With respect to the intent of the legislature in enacting the Employment Security Act (the “Act”), RCW 50.01.010 states the following:

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 state of Washington, therefore, exercising herein its police and sovereign power endeavors by this title to remedy any widespread unemployment situation which may occur and to set up safeguards to prevent its recurrence in the years to come. 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.

(Emphasis Added). The legislature did not intend for the unemployment reserves to be used for the benefit of those persons that are unemployed through their own fault.

In this case, even if it could be successfully argued that Mr. Johnson was not terminated for statutory misconduct, once Vail &

Associates discovered the post-termination evidence that would have resulted in his termination for misconduct, Mr. Johnson became ineligible for unemployment benefits. As such, he should only be entitled for benefits between the date he was terminated, and the date the post-termination evidence was discovered. Such a result would serve a threefold purpose. First, it would comply with the legislature's intent in having the Act only benefit those that become unemployed through no fault of their own. Second, it would preserve the unemployment reserves for those individuals that become unemployed through no fault of their own. Third, it would protect employers from having to pay more to the fund because it would limit the ability of unscrupulous employees from receiving unemployment benefits.

Employees should not be able to benefit from their ability to conceal their misconduct from their employers until after they are terminated. Where an employer learns of statutory misconduct after the termination of the employee, the employer should be able to present the evidence of such misconduct to the Department. The employer should be allowed to show that the employee would have been terminated for such misconduct had the employer been aware of it, which was shown in this case. Thereafter, the benefits that the employee would otherwise be entitled to would have to be denied. Here, the case for such a result is

even stronger because the initial decision to terminate Mr. Johnson was for misconduct. Mr. Johnson is not an individual that should benefit from the unemployment reserve fund. His termination from Vail & Associates was his own fault and was a result of his own misconduct.

CONCLUSION

The initial email correspondence and other acts of misconduct that Mr. Johnson engaged in that Vail & Associates was aware of prior to his termination should have resulted in a denial of unemployment benefits. The email and the inappropriate relationship by themselves were sufficient evidence of misconduct. Even if the pre-termination evidence was not sufficient to establish statutory misconduct, the post-termination evidence was sufficient and should have been admissible. It should have been admissible because it did relate to the initial decision to terminate Mr. Johnson for misconduct, and it should have been admissible for the same reasons that after-acquired evidence is admissible in discrimination cases. Setting aside all other arguments, it should be admissible because it fulfills the intent of the Act and serves the public interest by disallowing benefits to those individuals that are not and should not be entitled to them.

Vail & Associates would respectfully request that the Commissioner's decision be set aside and that Mr. Johnson's claim for unemployment benefits be denied.

DATED this 21st day of December, 2011.

DAVIES PEARSON, P.C.



PETER T. PETRICH, WSB #8316

CHRISTOPHER J. MARSTON, WSB #30571

Attorneys for Petitioner/Respondent David B. Vail
& Associates

COURT OF APPEALS
DIVISION II

11 DEC 21 PM 3:45

NO. 42164-0-II

STATE OF WASHINGTON
BY _____
DEPUTY

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

DAVID B. VAIL & ASSOCIATES,

Petitioner/Respondent.

v.

EMPLOYMENT SECURITY DEPARTMENT, and CHALMERS
JOHNSON

Cross-Respondents/Appellants,

DECLARATION OF SERVICE OF REPLY BRIEF OF
PETITIONER/RESPONDENT DAVID B. VAIL & ASSOCIATES

Peter T. Petrich, WSB #8316
Christopher J. Marston, WSB
#30571
DAVIES PEARSON, P.C.
920 Fawcett Ave.
Tacoma, WA 98402
253-620-1500

STATE OF WASHINGTON)
) ss.
County of Pierce)

Kathy Kardash, being first duly sworn on oath, deposes and says:

That on the 21st day of December, 2011, I delivered a true and correct copy of the Reply Brief of Petitioner/Respondent David B. Vail & Associates to Legal Messengers, Inc. for delivery to the following attorneys of record as well as by e-mail also listed below:

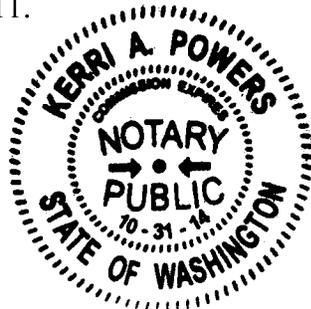
Robert McKenna
Dionne Padilla-Huddleston
Assistant Attorney General
1125 Washington St.
Olympia, WA 98504-0110
dionnep@atg.wa.gov

and by First Class Mail, postage prepaid and hand delivery by Christopher Marston to:

Chalmers C. Johnson
523 South G Street, Apt. 402
Tacoma, WA 98405


KATHY KARDASH

Subscribed and sworn to before me this 21st day of December, 2011.




Name: Kerri A. Powers
Notary Public in and for the State of Washington, residing at Puyallup.
My Commission expires: 10-31-14.