

FILED
COURT OF APPEALS
DIVISION II

ORIGINAL

2017 JAN 31 AM 11:11

STATE OF WASHINGTON

BY 
DEPUTY

No. 49688-7-II

COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

TINA BEACH, Respondent

v.

STATE OF WASHINGTON, DEPARTMENT OF EMPLOYMENT
SECURITY, Appellant

RESPONDENT'S OPENING BRIEF

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COURT OF APPEALS DIV I
STATE OF WASHINGTON
2017 JAN 30 AM 11:56

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1. INTRODUCTION

This is a judicial review of the Employment Security Department (ESD) Commissioner's Decision affirming the denial of Petitioner Tina Beach's (Ms. Beach) unemployment benefits. After being discharged from Sander Resources (employer) on March 11, 2015, Ms. Beach applied for unemployment benefits. After appearing in two administrative hearings and multiple appeals, Ms. Beach was eventually denied her benefits on a finding of misconduct under RCW 50.20.066. Nevertheless, the Commissioner's findings of fact in this matter are not supported by substantial evidence and should be modified. Furthermore, the Commissioner misinterpreted and misapplied the law in concluding that Ms. Beach's actions constituted misconduct. Accordingly, the Commissioner's Decision should be reversed, allowing Ms. Beach to receive unemployment benefits.

2. ASSIGNMENTS OF ERROR

1. The Commissioner's Decision dated December 4, 2015, is not supported by substantial evidence.
2. The Commissioner's Review Office erred in concluding that Ms. Beach was discharged for misconduct.

ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

1. Whether this Court should modify the Commissioner's Decision dated December 4, 2015, when (1) the employer did not have a clear reimbursement policy, and (2) Ms. Beach effectively refuted each claim that she misused company funds. (Assignment of Error 1).
2. Whether this Court should reverse the Commissioner's Decision dated December 4, 2015, when Ms. Beach did not intentionally violate her employer's policy relating to reimbursements. (Assignment of Error 2).
3. Whether this Court should reverse the Commissioner's Decision dated December 4, 2015, when the employer presented different reasons for its termination of Ms. Beach in each administrative hearing related to the issue of misconduct. (Assignment of Error 2).

3. STATEMENT OF THE CASE

3.1 Statement of the facts

Ms. Beach began working for the employer on July 14, 2014, as a safety compliance and risk manager. AR 700 (Goodwin IO, Finding of Fact (FF) 1).¹ As part of her job duties, Ms. Beach was required to travel frequently around the country to meet clients and attend conferences, which were to be covered by the employer. AR 215. Business expenses included airfare, room and board, transportation, and food. *Id.* On average, Ms. Beach would spend two to three weeks per month traveling. AR 175. This resulted in a large amount of travel expenses. *Id.* Ms. Beach and her supervisor, Ms. Sander, made an agreement that in between business trips,

¹ The Certified Appeal Board Record will be referenced here as "AR" and will use its designated pagination. Also, the two initial orders in this case entered by ALJ Goodwin and ALJ Pierce will be referenced as "Goodwin IO" and "Pierce IO" in order to respectfully distinguish them.

Ms. Beach could fly to Billings, Montana, to be with her daughter, rather than flying home to Pasco, Washington, if doing so would be less expensive. AR 167, 177-178. Often, flying to Billings was the equivalent of flying back home to Pasco for Ms. Beach because she would cover her own personal living expenses. AR 179. On other trips, when Ms. Beach would stay in locations such as Houston or Austin, Texas, she would stay at her supervisor's condo in order to save the employer hotel expenses. AR 168.

The employer's credit card and reimbursement policies were unclear. The employer did not have any written policies regarding the use of company funds. AR 73, 111. All agreements were made verbally. AR 74. From July through October 2014, Ms. Beach used her own personal credit card to front business expenses. AR 173-174. During this time, the employer required that Ms. Beach place these business purchases on her personal credit card with the agreement that it would reimburse her later. AR 208. The employer attempted to get Ms. Beach a company credit card before October 2014 with Southwest Airlines for the purpose of earning air miles. AR 213. However, the banker "screwed up." *Id.* The employer then attempted to obtain a credit card with United Airlines and again the banker "screwed up." AR 213-214. This resulted in Ms. Beach not

receiving a credit card until October 2014 and having to front company expenses until this period of time.

After Ms. Beach obtained a company credit card, she would incur both business and personal costs. *See* AR 124-227. She did not need to ask her employer's permission to make any of these purchases. AR 207. When Ms. Beach incurred a business cost, she would charge it on the company credit card and sometimes pay with her personal credit card. AR 170. Conversely, when Ms. Beach incurred a personal cost, she would charge those costs on her personal credit card and sometimes on the company credit card. *See* AR 124-227. Whenever Ms. Beach incurred a personal expense on the company credit card, she would reimburse the company by writing a reimbursement check. AR 169.

In one instance, Ms. Beach purchased a Spymaster on the company's credit card and took the necessary steps to reimburse her employer. AR 176-177. This reimbursement took place when her employer deducted the amount of this item from what it owed her. AR 206. A Spymaster is a tracking device used to help people locate others in the case of an emergency. AR 176-177. On another occasion, Ms. Beach was in Portland, Oregon to meet with a potential client. AR 179. While there, she purchased a computer cord on the company's credit card for her

computer as one of her computer devices had malfunctioned. *Id.* This was necessary for her to do her work. *Id.*

On February 13, 2015, Ms. Beach and Ms. Sander sat down and went through Ms. Beach's expense report line by line. AR 181. This covered the expenses for the time leading up to February 13, 2015. *Id.* At no time did Ms. Sander express to Ms. Beach that there were any issues with any of her expenses. *Id.*

Between March 10, 2015, and March 12, 2015, Ms. Beach, along with other members of the company, was scheduled to attend a conference in Orlando, Florida. AR 94. On March 9, 2015, there were pre-conference committee meetings that Ms. Beach did not attend. *Id.* Ms. Beach arrived to Orlando on the morning of March 10, 2015, from Las Vegas, Nevada. AR 93. On Tuesday morning, Ms. Beach attempted to attend the morning conference sessions; however, when she went to receive her badge and registration materials from the registration desk, those materials were not there. AR 97-98. She later discovered that someone else was wearing her badge. AR 98-99. Ms. Beach contacted Ms. Sander and was then able to obtain her badge and attended the afternoon sessions of the conference. AR 118.

The night of March 11, 2015, the employer sponsored a photo booth at Casino Night, which Ms. Beach was also scheduled to attend. AR

203. Ms. Beach intended to attend this event, and so she purchased a ticket for herself on the company card and a ticket for her significant other on her personal card. *Id.* Because there was a three hour gap between the time the conference events ended and the Casino Night began, Ms. Beach made plans to have dinner with the potential clients at Disney Orlando Studios, and then return for Casino Night. AR 100-101. Unbeknownst to Ms. Beach, Ms. Sander hoped that Ms. Beach would join the rest of her co-workers for dinner. AR 201. When Ms. Beach informed Ms. Sanders of her plans to have dinner with potential clients, Ms. Sanders became upset. *Id.*

Before Ms. Beach went to dinner and before she was able to attend Casino Night, Ms. Sander terminated her. AR 101. When Ms. Sander terminated Ms. Beach, Ms. Sander told her that the “team had dinner plans” and that she had “let the team down.” AR 93, 201-202. At no point during this conversation did Ms. Sander tell Ms. Beach that she was terminated for the misuse of company funds. AR 216. Ms. Sander also did not give nor show Ms. Beach credit card statements evidencing the misuse of company funds. *Id.* On March 16, 2015, the employer issued Ms. Beach a termination letter that did not state why she was terminated. AR 244 (Exhibits 16).

3.2 Procedural history

After being discharged, Ms. Beach filed for unemployment benefits. The ESD issued a Determination Notice on April 29, 2015, which denied Ms. Beach her unemployment benefits. AR 400 (Goodwin IO, FF 1). Ms. Beach filed a timely appeal on May 21, 2015. *Id.* An administrative hearing was held with Administrative Law Judge (ALJ) Mary Ellen Goodwin who concluded that Ms. Beach was not terminated for misconduct. AR 703 (Goodwin IO, Conclusion of Law (CL) 8). The ALJ found that the employer terminated Ms. Beach because it claimed that she misused the employer's funds by failing to attend 50% of the safety conference events between March 11, 2015, and March 13, 2015. *Id.* The ALJ issued a decision granting benefits on June 30, 2015. AR 703-704. At no point during this hearing did the employer's witness mention or bring up any "unauthorized expenses" outside of the conference in Orlando, Florida. AR 34-123. The employer appealed this decision to the Commissioner's Review Office. AR 711-728. The Commissioner remanded this case for a new hearing on August 28, 2015, on the grounds that there was insufficient evidence on the record to fairly decide the matter. AR 729-731.

A new hearing was held before ALJ Debra Pierce on October 9, 2015. AR 733. While the employer was represented by counsel at this

hearing, Ms. Beach was not. *Id.* On October 9, 2015, the ALJ issued an Initial Order which held as follows:

A preponderance of the evidence establishes that the claimant misused her employer's credit card and incurred unauthorized expenses. She did not follow established procedures in requesting reimbursement of expenses, or in accounting for personal expenses incurred on the employer's account.

AR 736 (Pierce IO, CL 9).

The ALJ held that Ms. Beach's actions were not the result of negligence or inadvertence, but were intentional and therefore misconduct as defined in RCW 50.04.294(1)(b). *Id.* Ms. Beach appealed this decision to the Commissioner's Review Office, which affirmed the ALJ's decision on December 4, 2015. AR 745-759. The Commissioner's Review Office adopted all of the Office of Administrative Hearings' (OAH) findings of fact and conclusions of law. AR 761. The Commissioner added that Ms. Beach's conduct was "in violation of a reasonable employer policy, which policy was known or should have been known to the claimant" and that her conduct was a "deliberate violation and disregard of standards of behavior which an employer has the right to expect of an employee." AR 761.

Ms. Beach filed a Petition for Review on December 29, 2015, with the Thurston County Superior Court to appeal the Commissioner's Decision. Petition for Judicial Review. Subsequently, the Honorable Judge

Anne Hirsch reversed the Commissioner's Decision dated December 4, 2015. Petitioner's Order on Administrative Appeal 3. Judge Hirsch concluded that the Commissioner's Decision had misapplied and misinterpreted the law relating to Ms. Beach's job separation. *Id.* at 2. Specifically, she concluded that Ms. Beach's conduct was not misconduct. *Id.* The State of Washington ESD appealed this decision. Notice of Appeal to Court of Appeals, Division II.

4. **ARGUMENT**

The Court of Appeals reviews an ESD decision in accordance with the Administrative Procedure Act (APA). RCW 34.05.570; RCW 50.32.120. Although the Court of Appeals reviews the ESD Commissioner's Decision and not the decision of the administrative appeal tribunal, the court reviews the administrative agency record in determining whether the decision should be reversed, modified, or sustained. Kenna v. Emp't Sec. Dep't, 14 Wn. App. 898, 905, 545 P.2d 1248 (1976).

The APA and Washington law provide nine standards for judicial review of an agency order in an adjudicative proceeding. RCW 34.05.570(3); RCW 50.32.120. An agency's findings of fact are reviewed under the substantial evidence standard. RCW 34.05.570(3)(e). To overturn an agency's finding of fact, the claimant must establish that the

finding is not supported by substantial evidence received by the court under the APA. *Id.* Substantial evidence is “evidence in sufficient quantum to persuade a fair-minded person of the truth of the declared premises.” Heinmiller v. State Dep’t of Health, 127 Wn.2d 595, 609-610, 903 P.2d 433 (1995), *cert. denied*, 518 U.S. 1006 (1996) (citations omitted). The court views the evidence in the light most favorable to the party who “prevailed in the highest forum that exercised fact-finding authority.” Miotke v. Spokane Cnty, 181 Wn. App. 369, 376, 325 P.3d 434 (2014). Furthermore, an agency’s conclusions of law can be reversed or modified if “[t]he agency has erroneously interpreted or applied the law.” RCW 34.05.570(3)(d). An agency’s conclusions of law are reviewed de novo. Premera v. Kreidler, 133 Wn. App. 23, 31, 131 P.3d 930 (2006). Whether an employee has engaged in misconduct is a mixed question of law and fact. Tapper v. Emp’t Sec. Dep’t, 122 Wn.2d 397, 402-403, 858 P.2d 494 (1993); Dermond v. Emp’t Sec. Dep’t, 89 Wn. App. 128, 132, 947 P.2d 1271 (1997). To resolve a mixed question of law and fact, the court first establishes the relevant facts, determines the applicable law, and then applies the law to the facts. Tapper, 122 Wn.2d at 403.

4.1 THE COURT SHOULD MODIFY THE COMMISSIONER'S DECISION DATED DECEMBER 4, 2015, WHEN (1) THE EMPLOYER DID NOT HAVE A CLEAR REIMBURSEMENT POLICY, AND (2) MS. BEACH EFFECTIVELY REFUTED EACH CLAIM THAT SHE MISUSED COMPANY FUNDS.

ALJ Pierce found that Ms. Beach made unauthorized charges on the employer's credit card, AR 734 (Pierce IO, FF 7)², and that she failed to "adequately account for personal expenses." AR 734 (Pierce IO, FF 5). However, substantial evidence does not support these findings. The Court should modify the Commissioner's Decision dated December 4, 2015, and find that Ms. Beach made authorized charges on her employer's credit card, and that she adequately accounted for her personal expenses to the best of her knowledge.

4.1.1 The Court should consider all hearing transcripts and initial orders included in the Certified Appeal Board Record in its review of the Commissioner's Decision dated December 4, 2015.

Courts must grant relief from agency orders in adjudicative proceedings where it is determined that "the order is not supported by evidence that is substantial when viewed in light of the whole record before the court, which includes the agency record for judicial review, supplemented by any additional evidence received by the court under this

² The Commissioner adopted ALJ Pierce's findings of fact and conclusions on law in his Commissioner's Decision dated December 4, 2015. AR 761.

chapter” pursuant to the APA. RCW 34.05.570(3)(e)(emphasis added). As such, agencies are required to maintain an official record of each adjudicative proceeding. RCW 34.05.467(1). The agency record must include:

- (a) Notices of all proceedings;
- (b) Any prehearing order;
- (c) Any motions, pleadings, briefs, petitions, requests, and intermediate rulings;
- (d) Evidence received or considered;
- (e) A statement of matters officially noticed;
- (f) Proffers of proof and objections and rulings thereon;
- (g) Proposed findings, requested orders and exceptions;
- (h) The recording prepared for the presiding officer at the hearing, together with any transcript of all or part of the hearing considered before final disposition of the proceeding;
- (i) Any final order, initial order, or order on reconsideration;
- (j) Staff memoranda or data submitted to the presiding officer, unless prepared and submitted by personal assistants and not inconsistent with RCW 34.05.455; and
- (k) Matters placed on the record after an ex parte communication.

RCW 34.05.476(2)(emphasis added).

The agency record “constitutes the exclusive basis for agency action in adjudicative proceedings under this chapter and for judicial review of adjudicative proceedings.” RCW 34.05.476(3). On issues of fact, “[j]udicial review of disputed issues of fact shall be conducted by the court without a jury and must be confined to the agency record for judicial review as defined by this chapter...” RCW 34.05.558.

In this case, the Certified Appeal Board Record was filed on August 25, 2016, and reproduced for the Court of Appeals, Division II. Designation of Clerk's Papers 1. The record included transcripts of the hearings held before the OAH on the following dates: (1) June 15, 2015, (2) June 26, 2015, and (3) October 9, 2015. AR 3-227. It also included ALJ Goodwin's Initial Order dated June 30, 2015, and ALJ Pierce's Initial Order dated October 9, 2015. AR 700-710, 733-743. By the plain language of the APA, all transcripts included in the Certified Appeal Board Record are 'agency records' as these documents are transcripts of the hearings considered before the final disposition of the proceedings. *See* RCW 34.05.476(2)(h). Similarly, all initial orders in the Certified Appeal Board Record are considered part of the 'agency record.' *See* RCW 34.05.476. Because these transcripts and initial orders are agency records, these documents should be considered in this Court's judicial review of the Commissioner's Decision. As previously mentioned, "[j]udicial review of disputed issues of fact shall be conducted by the court without a jury and must be confined to the agency record for judicial review as defined by this chapter." RCW 34.05.558. Accordingly, the Court's judicial review should not be limited to the transcript of the hearing before OAH on October 9, 2015, and ALJ Pierce's Initial Order dated October 9, 2015, which led to the final Commissioner's Decision dated December 4, 2015.

4.1.2 The employer did not have a clear policy that Ms. Beach could have violated.

The employer did not have any written policies regarding the use of company funds and did not provide any copies of any written policies at either administrative hearing. AR 73. At the June 26, 2015, hearing, when the ALJ asked the employer's witness whether it had any written policies or rules regarding company funds, the employer responded, "the short answer's no." *Id.* All agreements regarding business and personal expenses were made verbally. AR 74. When Ms. Beach was first hired, another employee advised her that if she put anything on her personal credit card, then she should claim it in an expense report and the employer would reimburse her. AR 208. Ms. Beach needed to be reimbursed because the employer did not provide Ms. Beach with a company credit card from July 2014 through October 2014. According to the employer, the reason for the delay was because the employer had trouble obtaining a credit card that would allow Ms. Beach to collect air miles. AR 213-214. As a result, Ms. Beach paid many of her employer's business expenses on her personal credit card beginning in July 2014 when she was hired.

With regard to the employer's actual reimbursement policy, the employer stated that it instructed employees to fill out certain forms when

they paid for business expenses in cash. AR 211. According to the employer, the easiest way for employees to pay for business expenses was with their company credit cards. *Id.* However, Ms. Beach could not possibly adhere to this policy until after October 2014. For the months of November and December 2014, Ms. Beach tried submit her expense report via Dropbox. AR 219. However, she found that submitting her expense report in this method did not always work because Dropbox would frequently stop working. *Id.* When this happened, Ms. Beach would email her employer her expense reports. *Id.* It is clear based on these facts that any policy for reimbursement either by Ms. Beach or by the employer was unclear. Had Ms. Beach received better guidance on how to approach issues of reimbursement, she likely would not have had these disputes.

4.1.3 Ms. Beach effectively refuted each claim that she misused company funds.

Spymaster

On December 7, 2014, Ms. Beach purchased as Spymaster for \$134.90 on the company credit card for her fiancé. AR 162. She emailed both her supervisor, Ms. Sander, and Mr. Harshbarger stating, “I purchased this app, this Spyware as a Christmas gift for Tom [Ms. Beach’s fiancé]” and asked in that email if Ms. Sander wanted her to reimburse her

or if she wanted to take it out of what Ms. Sander owed Ms. Beach. *Id.*³ Ms. Sander expressed that she wished to deduct the amount of the Spymaster from what she owed Ms. Beach. AR 177. Thus, Ms. Beach properly reimbursed the employer for this expense. Additionally, the purchase was made back in December 2014. Ms. Beach was not terminated until March 2015, three months after this purchase was made. Moreover, the employer also did not bring this purchase up as a concern to Ms. Beach prior to the time when it terminated her. It is doubtful, based on these facts, that this contributed to the employer's decision to terminate Ms. Beach.

Plane ticket to Billings, Montana

The employer listed as one of the items in dispute a plane ticket to Billings, Montana at \$462.70 and claimed in its testimony that there was no reason to go to Billings. AR 160. In fact, Ms. Beach attended a Joint Safety conference in Billings, Montana, on behalf of the company from September 15 through September 18, 2014. AR 177. At no point prior to Ms. Beach's termination did the employer question her about this expense, which would have been made over six months before the time she was terminated. AR 163. This six-month time difference shows that it is

³ Mr. Harshbarger was also the attorney representative for the employer throughout this appeal process.

unlikely that this expense contributed to the employer's decision to terminate Ms. Beach.

Additionally, when Ms. Beach was hired, she and Ms. Sander verbally agreed that, because Ms. Beach had children in Montana, it was acceptable for Ms. Beach to fly there in between business trips, if doing so was less expensive than flying to her residence in Pasco, Washington. AR 167. Again, this agreement was never placed in writing and was made verbally. Regardless, the employer agreed to pay for Ms. Beach's travel costs for business, including the trip back home. Ms. Beach treated her trips to Montana as trips to her home because she had family in Montana and covered her own living expenses. AR 179. Ms. Beach only used the company credit card for this expense because the company would have to pay for her flight back home to Washington anyway. If flying to Montana was cheaper, then Ms. Beach was actually saving the company money. Any trips that Ms. Beach took to Montana do not constitute misconduct as this was part of Ms. Beach's employment agreement.

CGA Conference

The employer disputes a purchase the company made for Ms. Beach to attend a conference known as the CGA conference. AR 164. During the week of December 7 through December 12, 2014, Ms. Beach met with Ms. Sander, along with other employees at Ms. Sander's home in

Houston, Texas, and finalized who would be attending the conference. AR 165. Ms. Beach purchased a ticket on the company's credit card and received a receipt through an email on December 19, 2014. AR 269. At the time, the employer apparently did not see this and incorrectly accused Ms. Beach of using company funds to attend this conference. Ms. Sander also admitted that she did not know who the company paid to attend this conference. AR 166. It is unlikely that Ms. Beach was terminated for this particular transaction that she correctly made.

Arch Telecom Purchase

The employer contests a purchase known as "Arch Telecom" for \$29.99. Ms. Beach made this purchase one weekend when she met with a client in Portland, Oregon. AR 179. This purchase was for work-related purposes and allowed for Ms. Beach to connect her Apple computer and her phone. *Id.* She made this purchase because her chord had broken and she needed to ensure that she had a stable connection. *Id.* This was an authorized business-related expense and, therefore, was not a misuse of company funds.

Casino Night Tickets

The employer also claims that Ms. Beach misused company funds when she allegedly purchased Casino Night tickets for four people. The employer hosted Casino night, and Ms. Beach planned to attend as an

employee. AR 203. She purchased a ticket for herself on the company credit card. *Id.* She also purchased a ticket for her partner, but since he was not an employee at the time, she purchased his ticket on her personal credit card. *Id.* The employer claims Ms. Beach purchased two additional tickets on the company credit card, which she never did. The employer also claims that Ms. Beach wasted these tickets by making plans not to attend Casino Night. However, this would refute its own claim that she purchased four Casino Night tickets on the company's credit card. *See AR 222.* It does not logically follow for her to purchase Casino Night tickets on the company's credit card, and then not attend. The employer's inconsistency here refutes its credibility. Additionally, Ms. Beach was terminated before she even had an opportunity to attend this event.

Employer's reimbursements

While the employer accused Ms. Beach of misusing company funds, the employer itself did not adequately reimburse Ms. Beach for company purchases she made on her personal credit card. For example, in January 2015, she still had not been reimbursed for business purchases she made in November and December 2014. AR 180. Both Ms. Beach and Ms. Sander examined these expenses, and Ms. Sander eventually sent Ms. Beach a check for \$561.18 and was short nearly \$2,000. AR 181. In February 2015, both Ms. Beach and Ms. Sanders again looked through all

of the expenses, and Ms. Beach received another reimbursement check for \$1,406.93. *Id.* At no point during this February meeting did Ms. Sander tell Ms. Beach that there was a problem with any of the purchases she made, whether business or personal. *Id.* The fact that Ms. Beach was terminated less than a month after this meeting took place regarding expenses makes it unlikely that any purchases made earlier played any role in its decision to terminate Ms. Beach.

4.2 THE COURT SHOULD REVERSE THE
COMMISSIONER’S DECISION DATED DECEMBER 4,
2015, WHEN MS. BEACH DID NOT INTENTIONALLY
VIOLATE HER EMPLOYER’S POLICY RELATING TO
REIMBURSEMENTS

Title 50, otherwise known as the Employment Security Act (ESA), RCW 50.01.005, was enacted to use the state’s unemployment reserves “for the benefits of persons unemployed through no fault of their own.” RCW 50.01.010; Safeco Ins. Co. v. Meyering, 102 Wn.2d 385, 392, 687 P.2d 195 (1984); Matson v. Hutt, 85 Wn.2d 836, 539 P.2d 852 (1975). Blameworthiness or its absence, therefore, is central to a determination of an employee’s entitlement to benefits: “The disqualification provisions of the act are based upon the fault principle and are predicated on the individual worker’s action, *in a sense his or her blameworthiness.*” Safeco Ins. Co., 102 Wn.2d at 392 (emphasis added). With the ESA’s purpose in mind, this title must be “liberally construed for the purpose of reducing

involuntary unemployment and the suffering caused thereby to a minimum.” RCW 50.01.010; Delagrave v. Emp’t Sec. Dep’t of State of Wash., 127 Wn. App. 596, 608-609, 111 P.3d 879 (2005). Meaning that, courts should not “narrowly interpret provisions to the worker’s disadvantage when the statutory language does not suggest that such a narrow interpretation was intended.” Delagrave, 127 Wn. App. at 609. “[T]he paramount concern...is to ensure that the statute is interpreted consistently with the underlying policy of this statute.” Safeco, 102 Wn.2d at 392.

Nonetheless, claimants will be ineligible or disqualified from receiving unemployment benefits in certain situations. Chapter 50.20 RCW. One such situation occurs when a claimant is disqualified from receiving benefits because he has been discharged from his employer for misconduct. RCW 50.20.066. The ESA’s definition of misconduct includes, but is not limited to, the following types of conduct:

(a) [w]illful or wanton disregard of the rights, title, and interests of the employer or a fellow employee; (b) [d]eliberate violations or disregard of standards of behavior which the employer has the right to expect of an employee; (c) [c]arelessness or negligence that causes or would likely cause serious bodily harm to the employer or a fellow employee; or (d) [c]arelessness or negligence of such degree or recurrence to show an intentional or substantial disregard of the employer’s interest.”

RCW 50.04.294(1)(a-d).

On the other hand, misconduct does not include:

(a) [i]nefficiency, unsatisfactory conduct, or failure to perform well as the result of inability or incapacity; (b) [i]nadvertence or ordinary negligence in isolated instances; or (c) [g]ood faith errors in judgment or discretion.

RCW 50.04.294(3)(a-c).

Moreover, an employer's "[g]ood cause for discharge is not to be equated with misconduct disentitling the worker to benefits." Ciskie v. State, Emp't Sec. Dep't, 35 Wn. App. 72, 76, 664 P.2d 1318 (1983). The burden of proving misconduct rests on the party alleging misconduct, and the appropriate standard is preponderance of the evidence. In Re Okazaki, Emp't Sec. Comm'r Dec.2d 113 (1975).

ALJ Pierce concluded that Ms. Beach's actions were "not the result of negligence or inadvertence, but were intentional," constituting misconduct pursuant to RCW 50.04.294(1)(b).⁴ The Commissioner reasoned that Ms. Beach's conduct was also misconduct pursuant to RCW 50.04.294(1)(a). AR 761. The Commissioner misinterpreted and misapplied the law in concluding that Ms. Beach was terminated for misconduct in accordance with RCW 50.20.066(1). Ms. Beach's actions

⁴ The Commissioner adopted ALJ Pierce's findings of fact and conclusions on law in his Commissioner's Decision dated December 4, 2015. AR 761.

were good faith errors in judgment or discretion pursuant to RCW 50.04.294(3)(c), which is per se not misconduct.

RCW 50.04.294(3)(c) states that misconduct does not include good faith errors in judgment or discretion. Ms. Beach made it clear at both the June 26, 2015, hearing and the October 9, 2015, hearing that she did not act in any way that intentionally violated any company policy and believed that she was always acting in the best interest of the company. The disputes that arose surrounding Ms. Beach's purchases can be explained by the employer's lack of a clear reimbursement policy. Given the nature of Ms. Beach's work, which required extensive travel and discretion to incur business expenses while meeting with potential customers, the employer should have had a clear written policy as to business and personal expenses, as well as reimbursement. The employer's lack of a clear policy is also reflected in the fact that it too failed to adequately reimburse Ms. Beach for business purchases she made. At most, any actions Ms. Beach made regarding personal and business expenses and reimbursement were good faith errors of judgment and not misconduct.

4.3 THE COURT SHOULD REVERSE THE COMMISSIONER'S DECISION DATED DECEMBER 4, 2015, WHEN THE EMPLOYER PRESENTED DIFFERENT REASONS FOR ITS TERMINATION OF MS. BEACH IN EACH ADMINISTRATIVE HEARING RELATED TO THE ISSUE OF MISCONDUCT.

4.3.1 Prior written statements

The employer's written reasons for terminating Ms. Beach do not align with the reasons it provided at the hearings. Pre-hearing statements, because they have been made at a time closer to the period of time in issue and before a party is aware of the effect they may have on the claim's adjudication, are entitled to great weight. Huguenin v. Emp't Sec. Dep't, 32 Wn. App. 658, 648 P.2d 980 (1982). In a questionnaire that the employer filled out explaining to the ESD why it terminated Ms. Beach, the first reason it gave was that "Ms. Beach failed to perform work and/or failed to record work performed in violation of company policy." AR 264. The employer went on to explain how Ms. Beach began working less hours than what was required beginning in January 2015, which allegedly made it difficult for the employer to continue paying her salary. AR 264-265. The employer then listed several instances in which it claims that Ms. Beach did not meet performance expectations. *See id.* While the employer did list "unauthorized, unreimbursed charges on company credit card" as its second reason for termination, AR 266-267, it did not once bring up

Ms. Beach's lack of performance at either administrative hearing. *See* AR 34-227. The fact that the employer listed lack of performance as the primary reason for termination in its paperwork, but failed to bring it up at either hearing impairs its credibility in claiming that the misuse of company funds was the actual reason for Ms. Beach's termination.

The employer also listed "insubordination" as another reason why Ms. Beach was terminated. AR 267. The employer then listed several instances in which it believed Ms. Beach acted in an insubordinate manner. *See id.* Again, the employer did not bring this up at either hearing. Yet it listed this as one of the reasons why it terminated Ms. Beach.

When asked by the department "[W]hat effects did the employee's action(s) have on your business," the employer did not mention Ms. Beach's supposed misuse of company funds. AR 268. Instead, the employer explained that her "failure to perform her work in a competent manner" resulted in loss of revenue to the company. *Id.* The employer also stated that, in one instance, Ms. Beach did not meet a particular deadline, which resulted in the client taking back work assigned to the employer. *Id.* Based on the answers provided by the employer in this questionnaire, it seems that Ms. Beach was terminated for poor performance. RCW 50.04.294(2)(a) states that "inefficiency, unsatisfactory conduct, or failure to perform well as the result of inability or incapacity" is per se not

misconduct. Thus, based on the reasons listed by the employer on this questionnaire and based on the employer's change in reason as to why Ms. Beach was terminated show that she was not terminated for misconduct.

4.3.2 Administrative hearings

In the hearing before ALJ Pierce on October 9, 2015, the employer focused on several instances in which Ms. Beach supposedly misused company funds. *See* AR 124-227. Specifically, the employer brought up the Spymaster purchase, the plane ticket to Billings, Montana, the CGA conference ticket, the Casino Night tickets, and how Ms. Beach supposedly did not follow its reimbursement policy. *Id.* The ALJ then based its decision on what was presented at this hearing. *See* AR 733-743. The employer had a much different tone at the previous hearing before ALJ Goodwin on June 26, 2015.

At this first hearing, when the ALJ asked how Ms. Beach misused company funds, the employer jumped straight into the events that took place on the day she was terminated on March 11, 2015. *See* AR 74. The employer explained how Ms. Beach planned to take the potential clients out to dinner rather than attend an event that she supposedly purchased tickets for. *See* AR 74-81. At one point, ALJ Goodwin stated "I'm trying to get to the extent of why you believe that she [Ms. Beach] used and misused the employer's money." ALJ Goodwin then asked, "[H]ow did

that happen?” The employer again went back to the events of March 11, 2015. AR 82. Throughout the hearing, the employer continuously emphasized the tickets that Ms. Beach had purchased for Casino Night and how Ms. Beach wasted these tickets because she didn’t attend. *See* AR 34-123. However, this is illogical as Ms. Beach could not attend this event because she was terminated before it occurred. As explained above, Ms. Beach only purchased two tickets for the Casino Night. One was for herself on the company credit card, which was proper, and a second for her partner on her personal credit card. She did not purchase any other tickets to Casino Night.

Based on the evidence presented, ALJ Goodwin at the June 26, 2015, hearing found that Ms. Beach was not discharged for misconduct. At no point during the first hearing did the employer bring up expenses for the Spymaster, the plane ticket to Billings, Montana, or the CGA conference. This is in contrast with the second hearing which focused heavily on those supposed expenses and relatively little time discussing the event on March 11, 2015. *See* AR 124-227. In applying the Hugeunin reasoning, the employer’s testimony as to why Ms. Beach was discharged in the first hearing was more accurate as it was made at a time closer to the time of the actual discharge. Additionally, the statements made by the employer in the discharge questionnaire discuss reasons for terminating

Ms. Beach that are not even mentioned in either hearing. The employer's reasons for terminating Ms. Beach have evolved since the actual discharge. This evolution questions the credibility of the employer's claims. Ms. Beach was not terminated for misuse of company funds, but for poor performance, which is per se not misconduct pursuant to RCW 50.04.294(2)(a) .

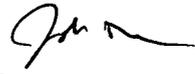
5. CONCLUSION

For the reasons stated above, Ms. Beach respectfully requests that this Court modify the Commissioner's Decision and find that Ms. Beach made authorized charges on her employer's credit card, and that she adequately accounted for her personal expenses to the best of her knowledge. Furthermore, Ms. Beach requests that this Court reverse the Commissioner's Decision and conclude that Ms. Beach was not discharged for misconduct pursuant to RCW 50.20.066(1), allowing Ms. Beach to collect unemployment benefits.

Ms. Beach further requests that reasonable attorney fees be awarded in an amount to be determined upon filing of a cost bill subsequent to this order. RCW 50.32.160 (mandating that attorney fees and costs shall be awarded upon reversal or modification of a Commissioner's order.)

Dated this 30th day of January 2017.

Respectfully submitted,



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STATE OF WASHINGTON

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COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

TINA BEACH,)	
)	
Respondent,)	
)	
v.)	
)	No. 49688-7-II
STATE OF WASHINGTON,)	
DEPARTMENT OF EMPLOYMENT)	
SECURITY,)	
Appellant.)	
_____)	

CERTIFICATE OF SERVICE BY MAIL

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 January 30, 2017, to the Appellant ESD's attorney, Kara Tebeau, Office of the Attorney General, PO Box 40110, Olympia, WA 98504-0110.

Dated this 30th day of January 2017, in Seattle, WA.



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