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COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON

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**COURT OF APPEALS, DIVISION III,  
FOR THE STATE OF WASHINGTON**

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KASANDRA GERIMONTE,

Appellant,

v.

VALLEY PINES RETIREMENT HOME, LLC.

Respondent.

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**BRIEF OF APPELLANT KASANDRA GERIMONTE**

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## I. INTRODUCTION

Kasandra Gerimonte was discharged from her work as a caregiver for her employer, Valley Pines Retirement Home, LLC (Valley Pines), due to a disqualifying background check. To support a denial of benefits under the Employment Security Act, Valley Pines had the burden of establishing misconduct by a preponderance of evidence and failed to do so before the Commissioner. Pursuant to the Administrative Procedure Act, this Court reviews the final agency decision of the Commissioner.

Here, the Commissioner correctly concluded Valley Pines had failed to meet its burden to establish misconduct. Ms. Gerimonte's actions predating employment did not constitute work-related misconduct. Further, Ms. Gerimonte was not dishonest in filling out her background check authorization forms and Valley Pines did not have any policies compelling disclosure between background checks. For these reasons, Ms. Gerimonte asks this Court to reverse the Superior Court's order and affirm the Commissioner's original decision granting Ms. Gerimonte unemployment benefits and award reasonable attorneys' fees.

## II. ASSIGNMENT OF ERROR

Ms. Gerimonte assigns only one error to the decision of the Commissioner of the Employment Security Department for the purpose of clarification.<sup>1</sup> However, the Spokane County Superior Court erred in reversing the Commissioner's decision for the following reasons:<sup>2</sup>

1. The Superior Court erred in rejecting the Commissioner's Conclusion of Law #10 because the Commissioner neither interpreted nor applied the law erroneously and the conclusion was supported by substantial evidence.
2. The Superior Court erred in rejecting the Commissioner's Conclusion of Law #11 because it does not constitute an error of law and includes factual findings that are supported by substantial evidence.
3. The Superior Court erred in its Finding of Fact #9 because no testimony or documentation of a criminal investigation beginning at or before January 16, 2014 was provided at the hearing, and the subsequent RMS incident report is not of record.
4. The Superior Court erred in reversing the Commissioner's decision.

## III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether Valley Pines' additional documents submitted to the Commissioner following the initial order are of record in this case.
2. Whether Ms. Gerimonte had "pending charges" at the time of the April 8, 2014 background check pursuant to WAC 388-113-0010.

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<sup>1</sup> A review of the hearing transcript suggests there was confusion between Ms. Gerimonte and ALJ Thomas as to whether January 2015 or 2016 was being discussed for the date of entry into a diversion program. *See* CR 54. Ms. Gerimonte does not contest Valley Pines' argument that she was charged October 22, 2014. CP 17, 20. Therefore, it is more likely the diversion program was entered in January 2015 instead of January 2016. *See* CrRLJ 3.3.

<sup>2</sup> RCW 34.05 provides for appellate review of final administrative agency decisions. A Court of Appeals reviews the Commissioner's decision from the "same position as the superior court." *Tapper v. Emp't Sec. Dep't*, 122 Wn.2d 397, 402, 858 P.2d 494, 498 (1993).

3. Whether the Commissioner correctly concluded Ms. Gerimonte had not committed misconduct under the Employment Security Act when:
  - a. Ms. Gerimonte truthfully and accurately responded to background check questions;
  - b. Valley Pines did not have a set of written policies or an employee handbook; and
  - c. Ms. Gerimonte was unaware of any rule or policy which required her to report to her employer her involvement with a diversion program.

### **III. STATEMENT OF THE CASE**

Ms. Gerimonte was employed by Valley Pines Retirement Home, LLC (“Valley Pines”), beginning around the end of March 2014. Commissioner’s Record (“CR”) 26, 113 (FF 2). Valley Pines is an adult family home and as such is bound by WAC 388-113-0020 and therefore must not allow persons with certain criminal convictions or pending charges to have unsupervised access to adults or minors. CR 21, 114 (FF3). DSHS reviews the background check results for adult family homes. Once they see a pending charge for a disqualifying crime, the adult family home can lose its license if the employee is given unsupervised access to vulnerable adults.

Three months earlier, on January 3, 2014, Ms. Gerimonte was involved in acts for which she was not charged at the time. CR 43–44. Ms. Gerimonte was not aware of any criminal charges when she was hired. CR

43 (“I didn’t know about this crime when I was hired. I didn’t get -- they didn’t file on me until awhile -- a year or so after that.”).

On April 8, 2014, Ms. Gerimonte completed a background check authorization form. CR 110. Line 11B asked: “Do you have charges (pending) against you for any crime?” *Id.* Ms. Gerimonte checked the box labeled “No.” *Id.* This statement was accurate, no charges had been filed at this time. CR 43; *see* WAC 388-113-0010. Valley Pines does not have a set of written policies or an Employee Handbook. CR 114 (FF 5); CR 47. At some point during employment, charges were filed against Ms. Gerimonte. CR 115 (FF 14). Ms. Gerimonte then entered a diversion program for the charges. CR 115 (FF 14). In 2016, Ms. Gerimonte completed a second background check authorization form. CR 114 (FF 10); CR 42. On the form, Ms. Gerimonte indicated she had pending charges. CR 49–50, 52. The second background check result was disqualifying and Valley Pines terminated Ms. Gerimonte’s employment on April 26, 2017. CR 50.

The Employment Security Department initially denied Ms. Gerimonte unemployment benefits following termination by Valley Pines. CR 113 (FF 1). Ms. Gerimonte appealed that decision and a hearing was held before Administrative Law Judge Christopher Thomas. *Id.* ALJ Thomas reversed the Employment Security Department’s initial determination and awarded Ms. Gerimonte benefits. CR 117. Valley Pines

then appealed ALJ Thomas' initial order to the Commissioner. CR 134. The Commissioner adopted ALJ Thomas' findings of fact and conclusions of law and issued a final order affirming the award of benefits to Ms. Gerimonte. *Id.*

Pursuant to RCW chapter 34.05, Valley Pines appealed the final agency decision to Spokane County Superior Court. Honorable Judge Linda Tompkins reversed the decision of the Commissioner and denied benefits for Ms. Gerimonte. CP 40-43 (CL 7). Judge Tompkins determined Valley Pines had established misconduct under RCW 50.04.294 by a preponderance of evidence, specifically a "(1)(a) willful or wanton disregard of the rights and interests of the employer by; (2)(e) deliberate acts that are illegal and provoke violation of laws; and (2)(g) violation of law while acting in the scope of employment, substantially harming the employer's ability to do business." CP 40-43 (CL 7). Ms. Gerimonte now appeals that decision.

#### **IV. STANDARD OF REVIEW**

The Administrative Procedure Act (APA) governs the review of final agency decisions by an appellate court. *Campbell v. Emp't Sec. Dep't*, 180 Wn.2d 566, 571, 326 P.3d 713, 716 (2014); *see generally* RCW 34.05. Following review by a superior court acting in its appellate capacity, a court of appeals "sit[s] in the same position as the superior court and appl[ies] the

APA standards directly to the administrative record.” *Campbell*, 180 Wn.2d at 571, 326 P.3d at 716. The decision of the agency itself is reviewed by the court of appeals, “not [the decision] of the ALJ or the superior court.” *Id.* “The party challenging the agency action carries the burden to show the decision was in error.” *Id.* (citing RCW 34.05.570(1)(a)).

Pursuant to the APA, if the statute or agency rule upon which a decision is based is not “constitutionally infirm or otherwise invalid,” *Id.*, an agency decision may only be overturned if “the decision is based on an error of law, the order is not supported by substantial evidence, or the order is arbitrary and capricious.” *Id.*; see RCW 34.05.570(3)(a)–(i).

Whether a factual finding is supported by substantial evidence is determined “in light of the whole record.” *Campbell*, 180 Wn.2d at 571, 326 P.3d at 716. Substantial evidence is “evidence of a sufficient quantity to persuade a fair-minded person of the truth and correctness of the agency action.” *Id.* (quoting *Port of Seattle v. Pollution Control Hr’gs Bd.*, 151 Wn.2d 568, 588, 90 P.3d 659, 669 (2004)); see *Blackburn v. Dep’t of Soc. & Health Servs.*, 186 Wn.2d 250, 256, 375 P.3d 1076, 1079 (2016). A court reviewing an agency record for substantial evidence “views the evidence and the reasonable inferences therefrom in the light most favorable to the party who prevailed in the highest forum that exercised factfinding authority,” *William Dickson Co. v. PSAPCA*, 81 Wn. App. 403, 411, 914

P.2d 750, 755 (Div. 2 1996) (quoting *State ex rel. Lige & William B. Dickson Co. v. County of Pierce*, 65 Wn. App. 614, 618, 829 P.2d 217, 219 (1992)); see *Univ. of Wash. Med. Ctr. v. Dep't of Health*, 164 Wn.2d 95, 104–05, 187 P.3d 243, 247 (2008), in this case, Ms. Gerimonte prevailed before the Commissioner of the Employment Security Department, see RCW 34.05.464(4).

Appellate review of factual findings “necessarily entails acceptances of the fact-finder’s views regarding the credibility of witnesses and the weight to be given reasonable but competing inferences.” *William Dickson Co.*, 81 Wn. App. at 411, 914 P.2d at 755. When findings of fact “are not expressly delineated, or where those findings of fact are buried or hidden within conclusions of law, it is within the prerogative of an appellate court to exercise its own authority in determining what facts have actually been found below.” *Tapper*, 122 Wn.2d 397, 406, 858 P.2d at 500. However, appellate courts “do not reweigh the evidence.” *Univ. of Wash. Med. Ctr.*, 164 Wn.2d at 103, P.3d at 246, and “do not retry factual issues,” *Id.* at 106, 187 P.3d at 248 (refusing to reconsider factual issues despite evidence “which could have reasonably led to a different decision”). Factual findings that are not challenged on appeal are treated as “verities.” *Tapper*, 122 Wn.2d at 407, 858 P.2d at 500.

Conclusions of law are reviewed de novo. *Blackburn*, 186 Wn.2d at 256, 375 P.3d at 1079. Mixed issues of law and fact, such as work-related misconduct under RCW 50.20.060 involve a hybrid standard because they “require[] establishing the relevant facts, determining the applicable law, and then applying the law to the facts.” *Tapper*, 122 Wn.2d at 403, 858 P.2d at 498. Thus, the underlying “factual findings of the agency are entitled to the same level of deference which would be accorded under any circumstance,” whereas the “[t]he process of applying the law to the facts . . . is a question of law and is subject to de novo review.” *Id.*

## V. ARGUMENT

Under the Employment Security Act, the employer bears the burden of proving statutory misconduct to support a denial of benefits. *Nelson v. Dep't of Emp't Sec.*, 98 Wn.2d 370, 373, 655 P.2d 242, 244 (1982); see RCW 50.20.060. The Employment Security Department is the agency tasked by the state legislature with administering unemployment benefits in Washington. RCW 50.08.010; RCW 50.12.010. Valley Pines Retirement has not met its burden to establish misconduct, the Commissioner's essential conclusions of law are supported by substantial evidence, and the Commissioner applied the law correctly. Therefore, the Commissioner's order should be affirmed and Ms. Gerimonte should be granted benefits.

### **A. Valley Pines' Additional Documents Submitted to the Commissioner Following the Initial Order Constitute Argument, Not Evidence**

Administrative law judges have broad discretion to determine what evidence is or is not admissible. *See, e.g., Univ. of Wash. Med. Ctr. v. Dep't of Health*, 164 Wn.2d 95, 104, 187 P.3d 243, 247 (2008) (citing *Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wn.2d 568, 597, 90 P.3d 659, 674 (2004)). Evidentiary rulings are reviewed under the abuse of discretion standard. *Id.* at 104, 187 P.3d at 246; *Kirby v. Emp't Sec. Dep't*, 185 Wn. App. 706, 728, 342 P.3d 1151, 1161 (Div. 1 2014).

At the hearing before ALJ Christopher Thomas, exhibits labeled one through thirty-five were admitted into evidence. CR 3; *see* CR 35. Valley Pines filed a petition for review with the Commissioner of the Employment Security Department and attempted to introduce additional evidence. CR 139-172. The Commissioner rejected the new evidence stating “[t]he newly raised matters, being unsworn and not amenable to inquiry by either the administrative law judge or the other parties, must constitute argument rather than evidence.” *Id.*, (citing *In re Wolstenhome*, Emp’t. Sec. Comm’r Dec.2d 349 (1977)).

The Commissioner’s decision not to admit the additional evidence was not an abuse of discretion. The administrative hearing before ALJ Thomas was the best forum for the presentation of evidence. In the context of a hearing, Ms. Gerimonte and ALJ Thomas would have been in a far better position to understand the evidence presented and test its credibility. In the abstract, allowing submission of additional evidence before a final order by the Commissioner increases the risk that untested evidence of questionable quality could be accorded undue weight. Accordingly, the Commissioner’s decision to exclude the additional evidence was appropriate and was not an abuse of discretion.

## **B. Ms. Gerimonte Did Not Commit Work-Related Misconduct**

Valley Pines bears the burden to prove misconduct by a preponderance of evidence. The Commissioner correctly concluded the evidence presented was insufficient for Valley Pines to meet its burden.

1. Ms. Gerimonte Responded to the Background Check Authorization Form of April 8, 2014 Truthfully and Accurately.

Ms. Gerimonte completed her first background check authorization form on April 8, 2014. CR 110. On question 11B, Ms. Gerimonte was asked the following: “Do you have any charges (pending) against you?” CR 114 (FF 8). Ms. Gerimonte checked the box marked “No” next to the question. *Id.* The record does not identify with certainty the date Ms. Gerimonte was charged. *See* CR 53–54.<sup>3</sup> However, Ms. Gerimonte concurs with Valley Pines’ argument at the superior court level that she was charged October 22, 2014 in Spokane County. CP 17, 20.

“Pending charge” is a defined term, meaning “a criminal charge for a disqualifying crime *has been filed* in a court of law for which the department has not received documentation showing the disposition of the

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<sup>3</sup> The testimony at the hearing discusses a range of possible dates between January 2015 and January 2016. *See* CR 53–54. However, none of the testimony indicates charges were filed before April 8, 2014. *See id.*

charge.” WAC 388-113-0010 (emphasis added). One form of misconduct is dishonesty related to employment. RCW 50.04.294(2)(c).

Here, to establish misconduct, Valley Pines must affirmatively demonstrate by a preponderance of evidence that prior to April 8, 2014 Ms. Gerimonte had pending charges and was dishonest. On April 8, 2014 Ms. Gerimonte had not yet been charged<sup>4</sup> and Valley Pines has failed to present evidence demonstrating that Ms. Gerimonte was untruthful when filling out the background check authorization form of April 8, 2014. Further, the facts and all reasonable inferences must be viewed in the light most favorable to Ms. Gerimonte because she is the party who prevailed before the Employment Security Department. In light of the entire record, Ms. Gerimonte was not the subject of a “criminal charge for a disqualifying crime that ha[d] been filed in a court of law” when she completed her first background check authorization form.<sup>5</sup> In fact, it would have been untrue (and perhaps dishonest) for Ms. Gerimonte to indicate she was subject to pending charges before any charges were filed. Therefore, the first

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<sup>4</sup> “Ms. Gerimonte: Do you see it. It says, ‘Violation. Violation. Violation.’ There’s no -- I didn’t know about this crime when I was hired. I didn’t get -- they didn’t file on me until awhile -- a year or so after that.” CR 44.

<sup>5</sup> As Valley Pines argued before the superior court:

She knew at the time she was under investigation for criminal activity as of January 3, 2014, that ultimately resulted in charges being filed against her on October 22, 2014 in Spokane County under cause number 14103793-8.

CP 17, 20. (citations omitted).

background check authorization form contained no false statements and was not dishonest. Valley Pines has not met its burden to establish misconduct through dishonesty relating to the first background check.

2. Ms. Gerimonte Responded to the Background Check Authorization Form of April 2016 Truthfully and Accurately.

Ms. Gerimonte was asked to complete a second background check authorization form in April 2016. CR 114 (FF 10). When completing this authorization form, Ms. Gerimonte was again asked “[d]o you have any charges (pending) against you for any crime?” CR 114 (FF 12). Ms. Gerimonte checked the box “yes” to indicate she had “pending charges,” CR 114 (FF 12), and identified the three charges that had been filed:

MR. LOWELL: Um, yes. Uh, she indicated in 11B that she had a -- a, uh, pending charge against her. There's no indication on the form as to whether or not it's disqualifying. Um, well, wait a minute. She did write on it that, uh, it is identity theft two counts. Uh, one count of theft first degree. Um, and, uh -- uh, it went in.

CR 49. Under WAC 388-76-101631, the result of this background check triggered a duty to terminate Ms. Gerimonte. *See also* CR 94 (identifying the “Applicant,” Ms. Gerimonte, as the source of the disqualifying information). Valley Pines then properly terminated Ms. Gerimonte on April 26, 2016. CR 50.

Ms. Gerimonte truthfully disclosed the existence of pending charges when she was subject to her second background check in April 2016. By then she had become aware that charges had been filed. Nothing about the second background check was dishonest. Valley Pines again cannot meet its burden to establish misconduct because Ms. Gerimonte's statements were truthful.

3. Valley Pines Did Not Have a Policy Requiring Disclosure of Pending Charges Between Background Checks.

Another basis for statutory misconduct is violation of an employer's reasonable policy that was known or should have been known to the employee. RCW 50.04.294(2)(f). Then, the three-pronged *Macey* test must be met to establish misconduct:

(1) The rule must be reasonable under the circumstances of the employment; (2) the conduct of the employee must be connected with the work . . . ; and (3) the conduct of the employee must in fact violate the rule.

*Macey v. Dep't of Emp't Sec.*, 110 Wn.2d 308, 319, 752 P.2d 372, 378 (1988).<sup>6</sup> ALJ Thomas asked Mr. Lowell whether employees were provided with "any sort of . . . employee handbook, which contained the rules or the policies of Valley Pines." CR 47. Mr. Lowell replied, "Um, no, I don't, actually." CR 47-48. He also explained that employees were expected to

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<sup>6</sup> A policy requiring disclosure of disqualifying offenses is undoubtedly reasonable.

understand how background checks and disqualifying crimes worked due to the training they received when they became certified caregivers. *See* CR 46–48. When ALJ Thomas asked Ms. Gerimonte about the substance of her Nursing Assistant Registered (NAR) training and whether she had been “made aware of disqualifying factors,” she stated “No, I was not.” CR 59.

After reviewing the evidence and testimony presented, ALJ Thomas found the following:<sup>7</sup>

The employer does not have a set of written policies or an Employee Handbook. It relies on the various trainings and/or certification processes that are required to maintain certifications. The claimant is a certified nursing assistant. That certification is current.

CR 114 (FF 5) (citation omitted); *see* CR 46–49. ALJ Thomas then reached the following conclusion of law:

Employer’s assertions aside, the claimant was unaware of any employer policy or rule requiring her to divulge her participation in a diversion program. Indeed, the employer provides no oral or written policies and [sic] to its new employees. It only requires that a W-4 and background check authorization be filed. Claimant’s actions do not equate to a willful or wanton disregard of the rights, title, and interests of the employer.

CR 116–17 (CL 11). It is important to note that this conclusion of law includes an implied factual finding—namely that the employer “provides no oral or written policies . . . to its new employees.” *See* CR 116–17 (CL

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<sup>7</sup> Recall, the Commissioner adopted ALJ Thomas’ factual findings and conclusions of law in their entirety. CR 134.

11). This Court has discretion to treat this incorporated factual finding as a fact that was found below. *Tapper*, 122 Wn.2d 397, 406, 858 P.2d at 500.

Here, Ms. Gerimonte is entitled to receive benefits unless Valley Pines established by a preponderance of evidence that it had a reasonable policy, Ms. Gerimonte knew or should have known about the policy, Ms. Gerimonte acted in a way that violated the policy, and the acts that violated the policy were connected with her work. First, the Commissioner's finding that Valley Pines has no written policies or an Employee Handbook is supported by substantial evidence because Mr. Lowell testified to those facts. CR 46–48. At the hearing, Valley Pines produced no evidence to support the existence of a policy requiring disclosure of pending charges between background checks.

Second, because Valley Pines did not have a policy requiring disclosure, Ms. Gerimonte could not have knowledge of such a policy. This is further supported by the Commissioner's finding that Ms. Gerimonte was unaware of any employer policy or rule requiring her to divulge her involvement in a diversion program. CR 115 (FF 14).

Third, because no policy existed, Ms. Gerimonte could not in-fact violate such a policy. Fourth, had such a reasonable policy existed, then a violation might be connected with the work; however, it was Valley Pines' burden to establish the existence of such a connection.

Valley Pines failed to meet its affirmative burden of proof. Valley Pines did not have a reasonable policy, Ms. Gerimonte was not aware of such a policy, and Ms. Gerimonte could not in-fact violate a policy that did not exist. Whether a violation would be connected with the work is immaterial because the policy did not exist and was not knowingly violated. Therefore, Valley Pines failed to meet its burden to establish misconduct pursuant to RCW 50.04.294(2)(f).

4. Ms. Gerimonte's Actions Before Employment Are Not Work-Related Misconduct Because They Do Not Satisfy The *Nelson* Test

Actions by an employee that occur away from the place of employment can constitute work-related misconduct. The *Nelson* test was adopted because the Washington State Supreme Court determined limiting misconduct to only acts that occur at work would be too narrow:

We adopt the rule that in order to establish misconduct connected with an employee's work as required by the employer must show 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.

*Nelson v. Dep't of Emp't Sec.*, 98 Wash. 2d 370, 374–75, 655 P.2d 242, 245 (1982). *Kirby v. Emp't Sec. Dep't* provides an informative analysis of these factors. 185 Wn. App. 706, 720, 342 P.3d 1151, 1157 (2014).

In *Kirby*, an employee, who routinely interacted with police officers at work, posted on Facebook about not caring that a police officer had been shot. *Id.* at 710–11, 342 P.3d at 1152–53. The post was made while the employee was at home and not on duty. *Id.* at 711, 342 P.3d at 1153. The Commissioner determined the Facebook post was not connected with the employment and therefore could not constitute misconduct. *See id.* at , 342 P.3d at 1154. On appeal, the Division One Court of Appeals affirmed this conclusion because “there was ‘no evidence of a nexus between [the employee’s] [post] and her work.’” *Id.* at 718–19, 342 P.3d at 1156 (second alteration in original). The employer ultimately failed to establish a nexus because—

the post was made while [the employee] was at home and not on duty, and the post made no reference to [the employer], to [the municipal body that paid the employer], or to [the employee]’s job or her position as a security officer. Further, [the employee] made the post on her private Facebook page, which was accessible only to her “friends.” Consequently, [the employer] fails to establish that the first *Nelson* element is met—that the conduct had some nexus with Black’s work.

*Id.* This result makes sense because the actions occurred away from work, did not directly discuss work, and were tied to personal views that were largely disconnected from the employee's work.

Here, the connection to Ms. Gerimonte's work is even more attenuated. The alleged acts for which Ms. Gerimonte was charged, predated her employment with Valley Pines. CR 113–14 (FF 13). Thus, the first prong of the *Nelson* test is not met because there is no nexus between Ms. Gerimonte's employment and her actions of January 3, 2014.

The second prong of the *Nelson* test considers whether the employee's conduct resulted in some harm to the employer's interests. This harm may be actual, or "create[] the potential for harm" *Kirby*, 185 Wn. App. at 721, 342 P.3d at 1157. Although the social media post at issue in *Kirby* was sufficient to create the potential for harm, *id.*, the three month delay between Ms. Gerimonte's alleged acts and her later employment decreases the likelihood that her actions created a potential for harm.

Under the first half of the third *Nelson* prong, the conduct must violate some code of behavior contracted for between the employer and employee. *Nelson* informs us that the policy violated "must be the subject of a contractual agreement between employer and employee," but "[t]his agreement need not be a formal written contract between employer and employee and may be reasonable rules and regulations of the employer of

which the employee has knowledge and is expected to follow.” *Nelson*, 98 Wn.2d at 374, 655 P.2d at 244 (1982). Significantly, *Nelson* rejected the notion that an “implied” standard of behavior could meet this test, because it “makes [the test] far too broad.” *Id.*

Here, Ms. Gerimonte could not have violated a code of behavior before she had formed an employment relationship with Valley Pines. While a rule forbidding disqualifying conduct would certainly be reasonable, there is no indication Ms. Gerimonte was subject to any such rule when her alleged acts occurred in January 2014.

Finally, under the second half of the third *Nelson* prong, the actions must have been done with intent or knowledge that the employer's interest would suffer. Ms. Gerimonte could not have intended or known that her actions would impact Valley Pines when she was not yet an employee.

In summary, the *Nelson* test cannot be met under the facts of this case. Ms. Gerimonte’s actions before employment have no nexus with her work, she did not violate any policies because she was not subject to any agreed-upon codes of behavior, and could not have known or intended her actions would harm her employer. Therefore, Valley Pines cannot meet its burden to establish statutory misconduct arising out of Ms. Gerimonte’s actions before her employment.

**C. Ms. Gerimonte is Entitled to Attorneys' Fees Upon Successful Reversal of the Superior Court's Order for the Commissioner to Deny Benefits Pursuant to RCW 50.32.160.**

An attorney representing an Employment Security Act claimant may be awarded a reasonable fee “if the decision of the commissioner shall be reversed or modified.” RCW 50.32.160. A claimant who initially prevailed before the Commissioner, but was unsuccessful at the superior court level, is not seeking a reversal or modification of the Commissioner’s original decision. Instead, the procedural posture compels a claimant to seek a reversal or modification of the Commissioner’s subsequent denial following an order by the superior court.<sup>8</sup> This Court should view this as a distinction without a difference— the ultimate effect on claimants is the same and the policy goals driving RCW 50.32.160 apply with equal force.

In every respect, Ms. Gerimonte has been subjected to the same costs as a claimant who was unsuccessful before the Commissioner and pursued a subsequent appeal. The Equal Access to Justice Act explains the rationale for awarding attorneys’ fees to parties seeking review of agency actions:

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<sup>8</sup> The Administrative Procedure Act provides a limited number of forms of relief when a court reviews an agency decision, including the power to “order an agency to take action required by law” or “set aside agency action.” RCW 34.05.574. Superior Court Judge Tompkins ordered that “[t]he decision of the Commissioner is reversed and Ms. Gerimonte is not entitled to receive unemployment benefits.” CP 66. The Commissioner was thus ordered to take the action of denying benefits, which has the same effect as if the Commissioner had originally denied benefits to Ms. Gerimonte.

The legislature finds that certain individuals . . . may be deterred from seeking review of or defending against an unreasonable agency action because of the expense involved in securing the vindication of their rights in administrative proceedings. The legislature further finds that because of the greater resources and expertise of the state of Washington, individuals . . . are often deterred from seeking review of or defending against state agency actions because of the costs for attorneys, expert witnesses, and other costs. The legislature therefore adopts this equal access to justice act to ensure that these parties have a greater opportunity to defend themselves from inappropriate state agency actions and to protect their rights.

H.B. 1010, 54th Leg., Reg. Sess. (Wash. 1995). Awarding attorneys' fees to Ms. Gerimonte and other claimants who are subjected to a reversal at the superior court level promotes access to justice, is consistent with legislative intent, and is logically consistent with awarding fees for a claimant's vindication of their rights pursuant to RCW 50.32.160. Consequently, Ms. Gerimonte should be awarded her reasonable attorneys' fees if she prevails.

### **CONCLUSION**

Administrative Law Judge Thomas and the Commissioner correctly determined that Ms. Gerimonte had not committed misconduct and was therefore entitled to unemployment benefits. The Employment Security Department's factual findings that were necessary to support its legal conclusions were supported by substantial evidence. Further, the Administrative Law Judge and Commissioner applied the law correctly to

the facts. Thus, the Superior Court erroneously reversed the decision of the Commissioner.

The record does not support the Superior Court's conclusion that Ms. Gerimonte committed statutory misconduct. Ms. Gerimonte responded to both background checks truthfully, she did not violate any known and reasonable policies of Valley Pines, and her actions before employment were not work-related misconduct because they do not satisfy the *Nelson* test. Valley Pines failed to meet its burden to establish statutory misconduct.

For the foregoing reasons, Ms. Gerimonte respectfully requests that this Court reverse the superior court's order and award her unemployment benefits and reasonable attorneys' fees for successfully vindicating her rights.

Dated this 20<sup>th</sup> day of July 2017.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

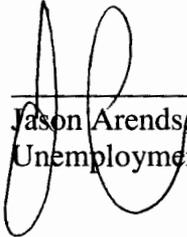
I hereby certify that I caused the foregoing **Brief of Appellant**  
**Kassandra Gerimonte** be filed with the Clerk of the Court, and I certify  
that I served all parties, or their counsel of record, a copy of this document  
by United States Mail, proper postage attached, to the following addresses:

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I certify under penalty of perjury under the laws of the State of  
Washington that the foregoing is true and correct.

DATED this 20 day of July 2017 in Seattle, WA.

  
\_\_\_\_\_  
Jason Arends, Office Manager  
Unemployment Law Project