

NO. 35173-4-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON DEPARTMENT OF EMPLOYMENT
SECURITY,

and

KASANDRA GERIMONTE,

Appellants,

v.

VALLEY PINES RETIREMENT HOME,

Respondent.

REPLY BRIEF OF APPELLANT EMPLOYMENT SECURITY
DEPARTMENT

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I. ARGUMENT IN REPLY

Valley Pines fails to assign any error to specific findings or conclusions of the Commissioner, in violation of RAP 10.3(h). Instead, it asks the Court to reweigh evidence and credibility determinations, view certain evidence in the light most favorable to Valley Pines, and make new factual findings. That is not this Court's role on appeal.

Even if the Court searches the record for evidence to support the unchallenged findings, it will find substantial evidence supports them and that those findings, in turn, support the Commissioner's conclusions of law. Kasandra Gerimonte completed her employment application and background check forms truthfully. She did not have any duty to disclose her pre-employment conduct that had not yet resulted in a criminal charge. Her failure to disclose this speculative information was not disqualifying misconduct under the Employment Security Act, as she did not violate any known policy requiring her to report a criminal investigation or immediately report charges once they were filed, and she did not intentionally disregard Valley Pines's interests. RCW 50.04.294(2)(f), (1)(a).

The issue for the Court is not whether Ms. Gerimonte was rightfully discharged, but whether she was discharged for statutory misconduct. There is no legal justification for a remand under

RCW 34.05.562, and there is no basis for an award of attorney fees to Ms. Gerimonte under RCW 50.32.160. The Court should affirm the Commissioner's decision and deny Ms. Gerimonte's request for attorney fees.

A. Valley Pines Fails to Assign Error to Specific Findings and Conclusions

This is a judicial review under Washington's Administrative Procedure Act, Chapter 34.05 RCW. Here, the Commissioner found Ms. Gerimonte did not engage in work-connected misconduct under the Employment Security Act and was, therefore, eligible for unemployment benefits. Commissioner's Record (CR)¹ 117 (Conclusion of Law (CL) 12). This decision is prima facie correct, and although the Department and Ms. Gerimonte appeal from the superior court's order reversing the Commissioner's decision, this Court sits in the same position as the superior court and reviews the Commissioner's decision. *Tapper v. Emp't Sec. Dep't*, 122 Wn.2d 397, 402, 858 P.2d 494 (1993). Therefore, it is Valley Pines's burden to demonstrate its invalidity. RCW 34.05.570(1); RCW 50.32.150; *Smith v. Emp't Sec. Dep't*, 155 Wn. App. 24, 32, 226 P.3d 263 (2010). Accordingly, Valley Pines must assign error to the

¹ The superior court transmitted the Commissioner's Record (CR) as a stand-alone document. See Index to Clerk's Papers (CP). Because the administrative record is separately paginated from the Clerk's Papers, this brief cites to the Commissioner's Record as "CR."

Commissioner's findings of fact and conclusions of law that it challenges.
See RAP 10.3(h).

Valley Pines has not specifically assigned error to any of the Commissioner's findings and conclusions. It has not "set forth a separate concise statement of each error which a party contends was made by the agency issuing the order," as required by RAP 10.3(h). Additionally, Valley Pines has not identified the specific findings or conclusions it is challenging within the briefing to make up for the absence of the concise statement, placing the burden on the Appellants to interpret Valley Pines's broad argument and presume where it is alleging error. *See Ferry Cnty. v. Growth Mgmt. Hearings Bd.*, 184 Wn. App. 685, 725, 339 P.3d 478 (2014) (lack of technical compliance with RAP 10.3(h) not fatal when the party nonetheless makes the nature of the challenge clear and the challenged findings are set forth within the briefing).

Rather, Valley Pines asks this Court to reweigh evidence, view it in the light most favorable to Valley Pines, and find that Ms. Gerimonte's failure to disclose an investigation that had not yet resulted in charges when she was hired was disqualifying misconduct. But, this Court may not reweigh the evidence or make new findings, and it must view the evidence in the light most favorable to Ms. Gerimonte and the Department. *William Dickson Co. v. Puget Sound Air Pollution Control Agency*, 81 Wn. App.

403, 411, 914 P.2d 750 (1996); *Smith*, 155 Wn. App. at 35-36; *see* RCW 34.05.554, .570. Because the factual findings should be considered verities on appeal, and any assignments of error should be considered abandoned by Valley Pines, this Court should affirm the Commissioner's decision. *Kittitas Cnty. v. Kittitas Cnty. Conservation*, 176 Wn. App. 38, 55, 308 P.3d 745 (2013).

B. Ms. Gerimonte Did Not Violate a Company Rule of Which She Should Have Known

Under the Employment Security Act, it is misconduct per se if a claimant violates a reasonable company rule which the claimant knew or should have known the existence of. RCW 50.04.294(2)(f). Valley Pines argues that Ms. Gerimonte should have learned through her license certification training that the employer required disclosure of her theft charges as soon as they were filed and, thus, her violation of that rule constitutes disqualifying misconduct. Br. Resp't 17. But the Commissioner found both that there were no written policies and that Ms. Gerimonte was unaware of any unwritten policies requiring disclosure. CR 114 (Finding of Fact (FF) 5, 14). Valley Pines now has the burden to prove that those findings were not supported by the record and that the Commissioner made an error of law. RCW 34.05.570(1); RCW 50.32.150; *Smith*, 155 Wn. App. at 32.

Substantial evidence supports both of the relevant factual findings. First, the Commissioner found that the employer did not have a set of written policies or a handbook outlining the requirements for disclosure of criminal conduct. CR 114 (Finding of Fact (FF) 5). In his testimony, Mr. Lowell, the Valley Pines manager, did not dispute that there was no written policy or handbook, so this finding is supported by uncontested testimony. CR 47-48. Second, the Commissioner found that Ms. Gerimonte was unaware of any rule or policy that required her to disclose her participation in the diversion program. CR 115 (FF 14). The testimony on this point was conflicting. Mr. Lowell testified that he was sure they reviewed the regulatory requirements when she was hired because it was standard practice to explain why an applicant is filling out the background check authorization. CR 46-49. And, he testified that the training to become a nurse certified or registered nurse's assistant includes information on the need to disclose. CR 46-49. But Ms. Gerimonte testified that she was never informed, verbally or in writing, about these requirements upon hire. CR 52, 61. The Commissioner weighed the conflicting testimony and found in favor of Ms. Gerimonte's version that she was never informed by Valley Pines of the circumstances when she needed to report charges between background checks. Ms. Gerimonte's testimony supports this finding.

In its briefing, Valley Pines still disputes that Ms. Gerimonte was unaware she had to report disqualifying crimes and alleges this issue remains “contested.” Br. Resp’t 11. But this Court may not reweigh conflicting evidence or substitute its judgment on the credibility of witnesses. *Tapper*, 122 Wn.2d at 403; *William Dickson Co.*, 81 Wn. App. at 411; *Smith*, 155 Wn. App. at 35-36. Thus, the issue is not “contested;” it is Valley Pines’s burden to demonstrate to this Court that the finding is not supported by the record. Because substantial evidence supports the finding, the Court should uphold it.

Considering those factual findings, the Commissioner applied the law to those facts and correctly concluded that Ms. Gerimonte did not violate a reasonable employer policy of which she knew or should have known. CR 116-117 (CL 11). Valley Pines relies on *Daniels v. Employment Security Department* to argue that a rule does not need to be in writing in order for an employee to be aware of the rule. *Daniels v. Empl. Security Dep’t*, 168 Wn. App. 721, 729, 281 P.3d 310 (2012); Br. Resp’t 17. But the issue in this case is not solely whether there was a written policy. The Commissioner made factual findings both that there was not a written policy and also that Ms. Gerimonte was generally unaware of any policy, written or unwritten. CR 114 (FF 5), 115 (FF 14). Since there was no written policy, and Ms. Gerimonte was unaware of the

specific requirements for disclosure, she did not violate a policy she should have known. Valley Pines has the burden to show that the Commissioner erred in its decision and it has not met this burden. The Court should uphold the findings and conclusions of the Commissioner.

C. Ms. Gerimonte Did Not Have a Duty to Disclose Pre-Employment Conduct That May or May Not Have Resulted in Charges, and Her Failure to Disclose This Conduct Is Not Disqualifying Misconduct

Ms. Gerimonte's failure to disclose pre-employment conduct that she did not know might someday impact her employer's interest was not disqualifying misconduct. Yet Valley Pines argues that Ms. Gerimonte had a duty to disclose her pre-employment conduct that could eventually result in criminal charges and that her failure to do so was work-related misconduct. Br. Resp't 8, 15. It argues that since Ms. Gerimonte was the only person who knew she participated in illegal activities, she was under a duty to disclose this on her employment application, even though it only asked about criminal charges and convictions. Br. Resp't 8. But the Commissioner disagreed, and this argument is unsupported by the law. Because Ms. Gerimonte truthfully answered all of the questions on her application and background check forms, she did not commit misconduct under the Employment Security Act, RCW 50.04.294.

1. Pending charges are those that have already been filed in court, not conduct that might result in criminal charges.

Ms. Gerimonte had no obligation to report charges that had not been filed in court when she was asked on the April 2014 background check form whether she had any pending charges. The Department of Social and Health Services's regulations require that an individual undergo a background check to ensure that they do not have a disqualifying conviction or pending charge. WAC 388-76-10180. The governing DSHS regulations define a pending charge as "a criminal charge for disqualifying crime that has been *filed in a court of law* for which the department has not received documentation showing the disposition of the charge." WAC 388-113-0010 (emphasis added). Because these regulations define "pending charge," there is no need to look to the dictionary for the meaning of "pending." See Br. Resp't 8-9.

Under the plain language of WAC 388-113-0010, when Ms. Gerimonte responded to the background check, she had a duty to disclose only charges that had already been filed in court. At the time of hire, she had no pending charges for theft and so, as the Commissioner found, she was truthful in her responses. CR 116 (Conclusion of Law (CL) 9). And because she had a duty to report only pending charges and convictions, the details of when the investigation began and when the

Court should assume she had knowledge she was under investigation are not relevant to the ultimate question of whether she committed disqualifying misconduct.²

2. Ms. Gerimonte's actions did not amount to willful misconduct.

Misconduct includes conduct that is in “*willful or wanton* disregard of the rights, title, and interests of the employer.” RCW 50.04.294(1) (emphasis added). Dishonesty related to employment is an example of per se misconduct because it signifies that willful or wanton disregard of the interests of the employer. RCW 50.04.294(2)(c). Valley Pines argues that Ms. Gerimonte's actions amounted to misconduct because she deliberately deceived Valley Pines in her application. Br. Resp't 11. But because there was no duty to disclose an investigation that may or may not result in charges, and Ms. Gerimonte answered all the questions on the employment application and background check form truthfully, Ms. Gerimonte did not willfully disregard any identified interest by failing to disclose pre-employment conduct that had not yet resulted in a pending charge or conviction, so she was not aware the conduct would affect the

² Valley Pines writes, “The finding by Administrative Law Judge Thomas she was unaware that she was under investigation is false.” Br. Resp't 8. However, it does not point to evidence in the record that contradicts this finding. The only evidence of police investigation were presented after the administrative hearing and so does not constitute evidence on which findings may be based. Because Valley Pines cannot show that this finding is unsupported by substantial evidence from the record, it should be upheld by this Court.

employer's interests. The Commissioner correctly held Ms. Gerimonte did not act in willful or wanton disregard of her employer's interests. CR at 117 (CL 11).

The cases cited by Valley Pines all involve conduct by an individual who was already a company employee. Br. Resp't 9-11; *Ciskie v. Emp't Sec. Dep't*, 35 Wn. App. 72, 663 P.2d 1318 (1983); *Smith*, 155 Wn. App. 24; *Tapper*, 122 Wn.2d 397; *Hamel v. Emp't Sec. Dep't*, 93 Wn. App. 140, 966 P.2d 1282 (1998). More importantly, the claimants in these cases were specifically aware of their employer's interests and chose to engage in conduct they knew would affect these interests. *Smith*, 155 Wn. App. at 39 (employee acted intentionally and willfully when he surreptitiously recorded conversations without consent in violation of the Privacy Act); *Tapper*, 122 Wn.2d at 411-412 (employee who willfully refused to follow her supervisor's instructions committed disqualifying misconduct); *Hamel*, 93 Wn. App. at 146-47 (waiter who sexually harassed female co-workers and customers intentionally performed the act despite repeated warnings, and in turn, willfully disregarded its probable consequences to the employer).

In contrast, Ms. Gerimonte did not intentionally disregard known interests of her employer through her conduct. *C.f. Ciskie*, 35 Wn. App. at 76 (employee's deviation from proper notification procedure was not in

willful or wanton disregard of employer's interest, as the employee attempt to comply with the employer's rules so his conduct was not motivated by bad faith). The Commissioner found that Ms. Gerimonte truthfully responded to the questions on the background check. CR 116 (CL 10). And Ms. Gerimonte was simply unaware that she needed to inform her employer that charges had been filed and she had entered a diversion program between background checks. CR 115 (FF 14), 116 (CL 10, 11). She did not act in willful disregard of her employer's interests since she was not aware of her employer's interests. Based on the facts of this case, the Commissioner properly concluded that Ms. Gerimonte's actions did not amount to a willful or wanton disregard of the employer's rights, title, and interests. CR 117 (CL 11). This Court should affirm.

D. The Issue for This Court Is Whether Ms. Gerimonte Was Discharged for Misconduct, Not Whether There Was Good Cause for Discharge

As the Commissioner concluded, "This decision does not question the employer's right to discharge claimant, nor the wisdom of that act. Under these facts, discharge may have been an appropriate course of action for employer. It is decided only that the evidence presented will not support a denial of benefits under the misconduct statute." CR 117; *see also* CR 135 ("[W]e do not question the employer's right to discharge the

claimant, but do hold the evidence does not support a denial of benefits under the Employment Security Act.”). Whether the employer appropriately terminated Ms. Gerimonte is not the issue before this Court. The issue is whether the Commissioner properly concluded that having been discharged and having applied for unemployment benefits, Ms. Gerimonte did not engage in misconduct under the Employment Security Act and thus was entitled to benefits. *Ciskie*, 35 Wn. App. at 76 (“Good cause for discharge is not to be equated with misconduct disentitling the worker to benefits.”).

E. Valley Pines Has Not Proven Any of the Exceptions Allowing Remand Under RCW 34.05.562

Valley Pines closes its brief by asking the Court to remand this case “back to the agency based on new evidence that became available that relates to the agency action[.]” Br. Resp’t 18. The APA allows for remand to an agency for further fact-finding only in very limited circumstances, including if:

The court finds that (i) new evidence has become available that relates to the validity of the agency action at the time it was taken, that one or more of the parties *did not know and was under no duty to discover or could not have reasonably been discovered* until after the agency action, and (ii) the interests of justice would be served by remand to the agency

RCW 34.05.562(2)(b)(emphasis added). The burden to prove that the court should accept additional evidence is on the person requesting post-

hearing admission. *See* RCW 34.05.570. Valley Pines has not met this burden, and its request should be denied.

Valley Pines has not specified the new evidence that should have been presented at the administrative hearing or argued why the evidence was unavailable at the time of the hearing or could not have been discovered until after the hearing. It also has not explained how justice would be served by a remand or why additional evidence is integral to the actual issues in this case. This Court should decline to remand this case to the agency for further fact finding.

To the extent that Valley Pines is arguing that the documents it submitted to the Commissioner with its petition for Commissioner's review and petition for reconsideration—which includes the police reports—constitute the “new evidence” needed to serve justice, this argument also fails. First, the party asking to introduce new evidence must not have known of the existence of the evidence before the administrative hearing and the party must not have had a duty to discover it. RCW 34.05.562(2)(b)(i). Valley Pines argues that it had no knowledge that Ms. Gerimonte would argue at the hearing that she was unaware she was under investigation at the time of the 2014 background check. Br. Resp't at 8. But in her appeal of the initial determination and request for hearing, she indicated she was not given any policies to read, that she

was not convicted of any crimes at the time of hire, and that she had no knowledge she needed to disclose unless she was actually convicted. CR 82. Thus, Valley Pines was on notice prior to the administrative hearing that the details of her 2014 background check, the date she was charged with the crimes, and the employer policies would be directly relevant to the hearing. It cannot now seek remand because it did not adequately prepare for the administrative hearing.

Second, even if the Court finds that the additional documents submitted by Valley Pines to the Commissioner after the administrative hearing meet the requirements of RCW 34.05.562(2)(b)(i), the evidence is not necessary to ensure justice is done in this case. The fact that charges were not filed until after she passed her initial background check remains undisputed and supported by the record, since the 2014 background check results revealed no pending theft charges. CR 114 (FF 9). The police report would simply confirm that no charges were filed until October 2014—after Ms. Gerimonte’s initial background check. CR 167-68. Whether the police interviewed her or when thought they had enough to file charges is irrelevant; what matters when those charges were filed and whether Ms. Gerimonte honestly completed her employment application and background check form. She did. Thus the additional documents Valley Pines submitted just provide further evidence to support the

Commissioner's findings of fact and have no effect on the legal conclusions that flow from that finding.

F. Ms. Gerimonte Is Not Entitled to Attorney Fees

In general, each party in a civil action pays its own attorney fees and costs (known as the "American Rule"). *Wagner v. Foote*, 128 Wn.2d 408, 416, 908 P.2d 884 (1996). Attorney fees are not generally recoverable absent specific statutory authority, by agreement of the parties, or upon a recognized equitable ground. *Id.*; *Clark v. Horse Racing Comm'n*, 106 Wn.2d 84, 92, 720 P.2d 831 (1986). Ms. Gerimonte requests attorney fees for seeking review to this Court under the Employment Security Act, RCW 50.32.160. Br. of Appellant Kasandra Gerimonte at 21-22.

Under RCW 50.32.160, reasonable attorney fees in connection with judicial review may be recovered and paid from the unemployment administration fund "if the decision of the *commissioner* shall be reversed or modified." RCW 50.32.160 (emphasis added). Here, the Commissioner held Ms. Gerimonte was entitled to benefits, yet the superior court reversed that decision. Ms. Gerimonte argues that if she prevails on appeal to this Court and the Court affirms the Commissioner's decision, she should be entitled to attorney fees under RCW 50.32.160 because having to defend the Commissioner's decision at the Court of Appeals should be

considered the same as having to go to the Superior Court to have the Commissioner's decision reversed. Br. Appellant Kasandra Gerimonte 21. This argument is not supported by the plain language of the Employment Security Act and should be rejected.

The statute awarding attorney fees is unambiguous. It states that attorney fees may be awarded under RCW 50.32.160 "if the decision of the commissioner shall be reversed or modified." It does not state that attorney fees may be awarded if the *superior court's* decision is reversed or modified. A court must accept, without interpretation, the plain meaning of an unambiguous statute. *Biggs v. Vail*, 119 Wn.2d 129, 134, 830 P.2d 350 (1992). A statute awarding attorney fees against the state must be strictly construed because it constitutes a waiver of sovereign immunity and an abrogation of the American rule on attorney fees. *Rettkowski v. Dep't of Ecology*, 76 Wn. App. 384, 389, 885 P.2d 852 (1994), *aff'd in part, rev'd on other grounds in part* 128 Wn.2d 508, 910 P.2d 462 (1996). The language is unambiguous and does not allow for an award of fees when the Commissioner's decision is upheld.

This plain reading makes sense: the Department must reimburse benefits claimants for their legal efforts only when it has wrongfully denied benefits. Ms. Gerimonte is asking the Court to make the Department pay—out of the unemployment compensation administration

fund—for the Commissioner reaching the correct decision. This is illogical and contravenes the plain purpose of the requirement that fees are only awarded if the decision of the Commissioner is reversed or modified. The Department should not be penalized for having gotten it right in the first place.

Further, Ms. Germionte asks for fees under RCW 50.32.160, yet she cites policies that support attorney fee awards under the Equal Access to Justice Act (EAJA). The EAJA does not apply here. It only applies when no other statute specifically addresses the issue of attorney fees. RCW 4.84.350(1). Here, there is another statute—the Employment Security Act—that already specifies when attorney fees can be granted in unemployment benefits cases, and thus EAJA does not apply. *Markam Group, Inc. v. Emp't Sec. Dep't*, 148 Wn. App. 555, 200 P.3d 748 (2009).

Because the Commissioner's decision would not be reversed or modified if Ms. Gerimonte prevails at this Court, Ms. Gerimonte is not entitled to attorney fees under the plain language of the Employment Security Act.

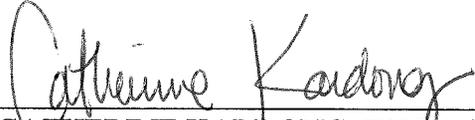
II. CONCLUSION

The Department asks the Court to reverse the superior court's decision and affirm the Commissioner's decision awarding Ms. Gerimonte

unemployment benefits. Additionally, the Department asks the court to deny Ms. Gerimonte's request for attorney fees.

RESPECTFULLY SUBMITTED this 21st day of September, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that I caused the foregoing **Reply Brief of Appellant Employment Security Department** to be filed with the Clerk of the Court, and I certify that I served all parties, or their counsel of record, a true and correct copy of this document by United States Mail, postage prepaid, at the following addresses:

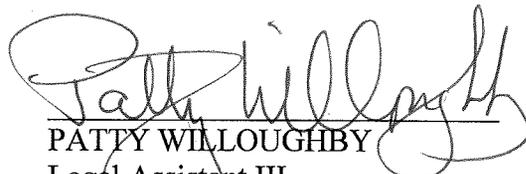
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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 21st day of September, 2017 at Spokane, WA.


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