

No. 35173-4-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

KASANDRA GERIMONTE,

and

STATE OF WASHINGTON
DEPARTMENT OF EMPLOYMENT SECURITY,

Appellants,

vs.

VALLEY PINES RETIREMENT HOME,

Respondent.

REPLY BRIEF OF APPELLANT KASANDRA GERIMONTE

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1. INTRODUCTION

Valley Pines Retirement Home (“Valley Pines” or “Employer”) appears to take the position that Kasandra Gerimonte acted in bad faith when she completed required background checks in April 2014 and April 2016. As the Commissioner properly found, Ms. Gerimonte answered all questions on both background checks truthfully and honestly. Comm. Rec. 116, Conclusions of Law (“CL”) 10. When Ms. Gerimonte disclosed in the April 2016 background check that she had pending criminal charges filed against her, Valley Pines terminated her. Comm. Rec. 11, Finding of Fact (“FF”) 10, 12, Comm. Rec 42, Comm. Rec 50. However, as the Commissioner found, there was no statutory misconduct following her truthful and accurate disclosure, the decision was based on substantial evidence with no errors of law, and Ms. Gerimonte was entitled to her unemployment benefits.

The Employer’s assertion that Ms. Gerimonte knew at the time that she completed the April 2014 background check that she was “under investigation for criminal activity” (Valley Pines Brief, p. 1) is false, wholly unsupported by the record, and contrary to the Commissioner’s findings. Comm. Rec. 115, FF. 14. Further, both the record and the Commissioner’s findings are clear that there was no policy requiring Ms. Gerimonte to

disclose her participation in a diversion program between background checks. Comm. Rec. 116, CL 11.

2. ISSUE IN REPLY

Whether the Commissioner correctly concluded Ms. Gerimonte had not committed misconduct under the Employment Security Act when she truthfully and accurately responded to background check questions both in 2014 and 2016; Valley Pines did not have a set of written policies or an employee handbook and Ms. Gerimonte was unaware of a rule or policy requiring disclosure of her participation in a diversion program.

3. STATEMENT OF THE CASE IN REPLY

3.1 Substantive Facts: Job Separation

3.1.1 The Employer's assertion that Ms. Gerimonte 'knew that she was under investigation for criminal activity' when she completed the April 2014 background check is not supported by the record and is contrary to the Commissioner's adopted findings.

The Valley Pines brief claims that when Ms. Gerimonte completed her background check for employment with them in April 2014 that she 'knew at the time she was under investigation for criminal activity for actions occurring on January 3, 2014.' Valley Pines Brief, p. 1. This is directly contrary to the Commissioner's finding that *'Ms. Gerimonte was*

unaware that she was being investigated for theft until sometime late in 2015.’ Comm. Rec. 115, FF 14, (emphasis added).

Ms. Gerimonte testified that: “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.”

Comm. Rec. 44.

Ms. Gerimonte also testified:

ALJ Thomas: So what -- on what day did you learn that the charges were filed?

Ms. Gerimonte: Um, they were like in, uh -- close to 2016. I think it was like October. No.

ALJ Thomas: Well, you said earlier that is was January of ‘15.

Ms. Gerimonte: Well, no --...2015. It was like 2015, I do believe. It was almost -- it was just about a year later.

ALJ Thomas: Okay. You said you were officially charged with a crime in January?

Ms. Gerimonte: Somewhere around there. But not -- I don’t know exactly what the dates are. All I know is I took a diversion. The crime was never -- I never knew it was a crime.”

Comm. Rec. 54.

The Valley Pines brief cites to “(CR 43, 44, 53 and 95)” to support its assertion that ‘Ms. Gerimonte ‘knew she was under investigation for criminal activity,’ however none of these citations actually support this

claim. Further, the brief's reliance on Ms. Gerimonte's testimony that January 3, 2014 is "when the crime actually occurred" is misleading and taken out of context. Comm. Rec. 53. Valley Pines attempts to use this testimony to establish that Ms. Gerimonte knew her actions constituted a "crime" when she completed the April 2014 background check because she refers to the "crime" in her testimony. The fact that she knew by the June 2016 hearing that charges had been filed does not transfer retroactively to what she knew in April 2014. Ms. Gerimonte was speaking from the benefit of hindsight. She disclosed that she had pending charges on her second background check in 2016 but she did not have this knowledge when she completed the first background check. Comm. Rec. 11, Finding of Fact ("FF") 10, 12, Comm. Rec 42, Comm. Rec 50.

3.1.2 The Employer's assertions that it "verbally went over" disqualifying activities refers only to disclosing criminal convictions and pending charges on background checks, which Ms. Gerimonte did truthfully in 2014 and 2016.

The Valley Pines brief states that "Valley did not have a specific written handbook that set out policies of reporting these disqualifying activities *but verbally went over them* with Ms. Gerimonte at hire and relied on various training process[sic] that employers are required to have to maintain certification." Valley Pines Brief, p. 3, (emphasis added). The

brief cites to “(CR 46, 47)” to support this assertion, where the testimony is the following:

ALJ Thomas: Is there a policy or some sort of procedure [that] would inform, um, people who are hired in these caregiver positions what their responsibility is?

Mr. Lowell: Yes. When we, uh --, present the background authorization to the applicant, we indicate that they need to fill it out and answer each question on it. And sign it. And that it's, uh --it's part and parcel to making sure that there are no disqualifying *crimes or charges* against them, uh, to ensure that -- that we are able to hire them. (Emphasis added).

It is clear from the employer's testimony and its brief that the only 'disqualifying activities' that Valley Pines 'verbally went over' with Ms. Gerimonte were *criminal convictions* and *pending criminal charges* provided in WAC 388-113-0020 that would disqualify a person from having unsupervised access to adults. Valley Pines Brief p. 3. Indeed, the background checks that Ms. Gerimonte completed for the employer in April of 2014 and April 2016 asked **only** about pending criminal charges or actual criminal convictions. Comm. Rec. 110, 114, FF 6, 7, 8, 10, 11, 12. Importantly, neither the Commissioner nor the ALJ adopted Valley Pines' assertions that it 'verbally went over disqualifying activities' with Ms. Gerimonte. Comm. Rec. 114, FF 5.

3.1.3 The Respondent's assertions that it "has a rule that requires [employees] to report" is vague, misleading and lacks any citation to the record.

The Valley Pines brief states,

"[Mr. Lowell] stated his testimony when asked about if he has a rule that requires his employees to report, he responded "yes." Valley Pines Brief, p. 3.

This assertion is vague, without context and unsupported by any citation to the record. The record and the ALJ's findings and conclusions, all of which were adopted by the Commissioner, are clear that the only reporting requirements involve disclosure of pending criminal charges or convictions. Comm. Rec. 46, 47, 114, FF 2. The employer's brief attempts to utilize this vague and open ended statement to support its apparent position that Ms. Gerimonte acted in bad faith by not reporting anything other than what the background checks required of her - pending criminal charges or convictions.

3.1.4 The Respondent's characterization that there was a "criminal record" to be verified when Ms. Gerimonte applied for employment in April 2104 is misleading, contrary to the record, and to the findings of the ALJ that the Commissioner adopted.

The Valley Pines brief states, "[e]mployer Valley [sic] through James Lowell did everything within his power in 2014 to verify the criminal

record following Ms. Gerimonte’s application for employment.” Valley Pines Brief, p. 7.

This is a false and misleading statement. There is simply no way Mr. Lowell could have done anything to verify a criminal record when Ms. Gerimonte applied for employment in 2014 when no criminal record existed at that time. Comm. Rec. 116, CL 10. Ms. Gerimonte was not even aware that she was being investigated until late 2015. Comm. Rec. 115, FF 14.

Valley Pines’ repeated assertions that ‘it is clearly false’ (Valley Pines Brief, p. 15) that she knew she was being investigated when she applied for unemployment are purely speculative, unsubstantiated by any evidence whatsoever, and are contrary to the ALJ’s findings that the Commissioner adopted. Comm. Rec. 116, CL 10.

3.2. Procedural Issues

3.2.1 Valley Pines brief applies the incorrect 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, except to the extent that the Commissioner adopted the ALJ’s findings or conclusions.” *Campbell at 713, 716, Tapper v. Emp’t. Sec. Dep’t.*, 122 Wn.2d 397, 405-06, 858 P.2d 494, 499-500 (1993). “The party challenging the agency action carries the burden to show the decision was in error.” *Campbell*, 180 Wn.2d at 571, 326 P.3d at 716. (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).

Here, the burden is on Valley Pines to show that the Commissioner’s decision is not supported by substantial evidence or is based on an error of law or is arbitrary or capricious. Instead the Valley Pines brief argues that Superior Court Judge Linda Tompkins’ findings and conclusions are correct and asks this Court to affirm the Superior Court decision. Valley Pines Brief pps. 18-19. The brief fails to allege any facts regarding how the Commissioner’s decision was not supported by substantial evidence or argument to show how or where the Commissioner made an error of law or

that the decision was arbitrary or capricious and therefore Valley Pines has failed to meet their burden.

3.2.2 Whether viewed as argument or evidence, the Commissioner properly denied the additional documents that Valley Pines attempted to submit after the hearing.

Evidentiary rulings are reviewed under the abuse of discretion standard. *University of Washington Medical Center v. Washington State Dep't. of Health*, 164 Wn.2d 95, 104, 187 P.3d 243, 246 (2008); *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. Comm. Rec. 3; *see* Comm. Rec. 35. Following the ALJ's June 21, 2016, Initial Order finding that Ms. Gerimonte was not fired for actions constituting misconduct, Valley Pines filed a petition for review with the Commissioner of the Employment Security Department and attempted to introduce additional evidence. Comm. Rec. 122-172. The Commissioner affirmed the ALJ's Order, and found that Valley Pines' additional documents were unsworn newly raised matters that "must constitute argument, not evidence."¹ Decision of

¹ Valley Pines then submitted a petition for reconsideration on August 17, 2017, which the Commissioner denied, finding that Valley Pines was not denied a reasonable opportunity to present argument under WAC 192-04-190.

Commissioner, CP 134, *citing In re Wolstenhome*, Empl. Sec. Comm'r Dec.2d 349 (1977).

Ms. Gerimonte reiterated the finding of the Commissioner in her opening brief, relying on *Wolstenhome* for the proposition that the additional documents constituted argument, not evidence. Gerimonte Opening Brief, pps. 9-10. Valley Pines now attempts to argue that since the additional documents are viewed as argument, that they should be considered since they are merely argument. Valley Pines Brief, p. 17-18. This argument fails, however, since Valley Pines had the opportunity to present this 'argument' during the hearing. Under this reasoning, there would be no point in having a 'record' of evidence for review and cross examination since documents could be submitted on an ongoing rolling basis throughout the appeals process. This undermines the evidentiary process and is contrary to notions of justice.

4. ARGUMENT IN REPLY

The Commissioner properly found that Ms. Gerimonte did not commit misconduct under RCW 50.04. 294(1) when she answered both background checks truthfully and completely; Valley Pines did not have a set of written policies or an employee handbook; and Ms. Gerimonte was unaware of a rule or policy requiring disclosure of her participation in a diversion program.

4.1 Ms. Gerimonte answered the April 2014 background check truthfully and accurately.

One form of misconduct resulting in the denial of unemployment benefits is dishonesty related to employment. RCW 50.04.294(2)(c).

Valley Pines claims that Ms. Gerimonte knew at the time she completed her first background check in April 2014 that she was ‘under investigation’ for ‘criminal activity’ for actions occurring on Jan. 3, 2014. Valley Pines Brief, p. 1. The record and the ALJ’s findings as adopted by the Commissioner establish that she did not know she was under investigation until sometime in late 2015. Comm. Rec. 53, 54, 115, FF 14. Even if Ms. Gerimonte had known that she was under investigation in April 2014, the background check did not inquire about criminal investigations.

Question 11A of the background check asks, “*Have you been convicted of any crime?*” Comm. Rec. 110, 114, FF 11. The question further asks the applicant to list “*Felony and gross misdemeanor crimes,*” “*Degree,*” “*State,*” and “*Conviction date.*” Comm. Rec. 110. Ms. Gerimonte checked the box for “No.” Comm. Rec. 110 114, FF 11

Question 11B asks, “*Do you have any charges (pending) against you for any crime?*” *Id.*, at FF 12. Question 11B further asks, “*If yes, fill in the blanks below. Add a page if you need more room.*” The question further asks the applicant to list “*Felony and gross misdemeanor crimes,*”

“*Degree*,” and “*State*.” Ms. Gerimonte checked the box for “No.” Comm. Rec. 110, 114, FF 11.

Ms. Gerimonte completed this background check truthfully. She did not have any pending criminal charges or convictions that she could identify and list by degree, state, or conviction date when she completed the April 2014 background check. The background check does not ask about potential criminal activity that could eventually lead to an investigation that could potentially lead to charges being filed. The background check does not even ask about investigations, for obvious reasons. Investigations are fact collecting endeavors that are indeterminate, and subject to the possibility of being dismissed. An investigation precedes the *possibility* of charges being filed; it does not equate to charges being filed. Ms. Gerimonte did not know about an investigation until late 2015, well after she completed the April 2014 background check. Comm. Rec. 115, FF 14.

The background check asks only about actual, pending criminal charges or convictions. “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 charge.” WAC 388-113-0010.

There were no pending criminal charges or convictions when Ms. Gerimonte completed the 2014 background check and therefore substantial

evidence existed for the Commissioner to find that Ms. Gerimonte answered all questions truthfully.

4.2 With no evidence of a written policy, employee handbook, or even a conversation, there was no duty for Ms. Gerimonte to provide voluntary information to her employer between background checks regarding her participation in a diversion program.

Beyond being truthful on both background checks, Valley Pines appears to assert that Ms. Gerimonte had some duty to go above and beyond the background checks and voluntarily disclose to her employer her participation in a diversion program. It is undisputed that there was no employer policy, handbook, or specific rule to support this argument. Comm. Rec. 116, CL 11, Valley Pines Brief, p. 3. The only policy that the employer discussed with Ms. Gerimonte was strictly in the context that state background checks would need to be completed to screen for any disqualifying *crimes or pending charges*, nothing else. Comm. Rec 45-47, (emphasis added), 114, FF 3,6.

Because there was no policy or rule other than the policy to disclose pending criminal charges and convictions on background checks every two years, Ms. Gerimonte had no reason to disclose her participation in a diversion program, which she entered between background checks. Comm.

Rec. 55, 115, FF 14. Substantial evidence supports these findings; the Commissioner agreed with the ALJ's findings that:

Indeed, the employer provides no oral or written policies to its new employees. It only requires that a W-4 and background check authorization be filled out. Comm. Rec. 117, CL 11.

Valley Pines asserts in its brief that the court in *Smith v. Employment Security Department* held “[a]ction or behavior must result in harm or create the potential for harm to your employer’s interest. This harm may be intangible” *Smith v. Emp’t. Sec. Dep’t.*, 155 Wn.App. 24, 37, 226 P.3d 263, 268-69 (Div. 2 2010); Valley Pines Brief, p 10. This statement was *not* included in that court’s holding, and was in fact a reference to WAC 192-150-200(2) (2005) when evaluating whether the employee’s conduct in secretly recording conversations with co-workers and the general public was adverse to his employer’s interests. *Smith*, 155 Wn.App. at 36-37, 226 P.3d at 268-69. Valley Pines has failed to advance an argument as to how the facts of *Smith* are relevant to the facts at hand.

The Valley Pines brief also attempts to rely on *Hamel v. Emp’t. Sec. Dep’t.*, 93 Wn.App. 140, 966 P.2d 1282 (Div. 2 1998) which is inapplicable to this case for several reasons.

First, *Hamel* involved an employee in the restaurant industry who was discharged for making repeated inappropriate, sexual comments to co-workers and customers. *Id.* at 142-43, 1284. The employee received

repeated warnings and was aware that the next incident would result in immediate termination. *Id.* These facts have no bearing on the facts in this case.

Second, Valley Pines misconstrues *Hamel's* holding. The *Hamel* court found that the employee was repeatedly warned and therefore the employee knew or should have known that the behavior was harmful to the employer's interest. *Id.* The *Hamel* court said:

“[w]e hold that evidence . . . that [the employee] intentionally engaged in conduct that he knew or should have known was harmful to his employer's interest is sufficient to prove ‘willful disregard of [the] employer's interest.’” *Id.*

Ms. Gerimonte was not warned about any bad behavior that she committed on the job. She was told that she must disclose pending charges or criminal convictions on background checks, nothing else, and this is exactly what she did. The *Hamel* holding that the employee committed willful misconduct for making continued offensive remarks after warnings is inapplicable to this case.

Third, Valley Pines attempts to rely on *Hamel's* standard that the employee in *Hamel* knew what a “‘reasonable person’ would have known.” Valley Pines Brief p.11. Valley Pines instead references to a “common sense person” with no legal definition and seems to imply that Ms. Gerimonte should have known to voluntarily disclose her participation in a

diversion program. *Id.* What is missing from this analysis is the fact that the court in Hamel acknowledged that “evidence of [knowledge] is susceptible to multiple interpretations *but the Commissioner, to whom we defer, found* that ‘a reasonable person would understand that what [Hamel] said would harm the employer’s interest.’” (Emphasis added). *Hamel*, 93 Wn.App. at 147, 966 P.2d at 1286. In the present case, the Commissioner made no similar finding with regard to what Ms. Gerimonte knew or reasonably should have known because there were no rules, policies, updated policies, meetings, emails, or conversations or any understanding whatsoever directing employees to voluntarily disclose events that occurred between background checks, such as participation in a diversion program.

The Valley Pines brief further relies on *Tapper v. Emp’t. Sec. Dep’t.*, 122 Wn.2d 397, 858 P.2d 494 (1993) and *Griffith v. Emp’t. Sec. Dep’t.*, 163 Wn.App. 1, 259 P.3d 1111 (Div. 3 2011) yet the facts in both cases also are inapplicable to Ms. Gerimonte’s case. In *Griffith*, the employee was reprimanded for having a verbal altercation with a customer, then acted independently without the employer’s consent in an attempt to apologize, and as a result was banned from the customer’s premises. *Griffith*, 163 Wn.App. 1, 4-5, 259 P.3d 1111, 1112. The facts of *Griffith* do not apply to the present case. *Tapper* involved an employee who was discharged for an “accumulation of problems” and who specifically “ignored” instructions

from management regarding her behavior. *Tapper*, 122 Wn.2d 397, 407, 858 P.2d 494, 500.

The Valley Pines brief compares Ms. Gerimonte's actions to that of *Tapper*, alleging they were also "intentional and a willful deception or failure to disclose information." Valley Pines Brief p.13. The court in *Tapper* found the employee "willfully **refused**" to comply with the instructions from the employer and as a result this constituted misconduct. (Emphasis added). *Tapper*, 122 Wn.2d 397, 411, 858 P.2d 494, 503. Ms. Gerimonte, by contrast, fully complied with her employer's only instructions, which were to complete background checks every two years and to report pending criminal charges or convictions. There was no 'accumulation of problems' or disregard of her employer's instructions. There were no additional explicit or implicit employer instructions, or a mutual understanding or even a conversation regarding a duty to disclose anything other than what the background checks required.

Because Valley Pines has failed to demonstrate how any of its cited cases are relevant and applicable to the present case, the Commissioner's decision affirming the ALJ was not an error of law.

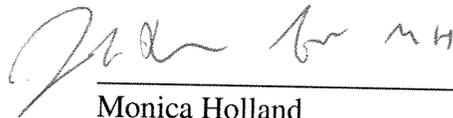
5. CONCLUSION

For the reasons stated above, Kasandra Gerimonte respectfully requests that this court affirm the Commissioner's Decision that Ms. Gerimonte did not commit any work related misconduct.

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

Dated this 20th day of September 2017.

Respectfully submitted,



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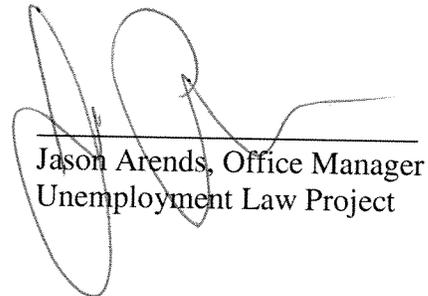
I hereby certify that I caused the foregoing **Reply Brief of Appellant **Kassandra Gerimonte**** be filed with the Clerk of the Court, and I certify that I served all parties, or their counsel of record, a copy of this document by United States Mail, proper postage attached, to the following addresses:

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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 September 2017, in Seattle, WA.



Jason Arends, Office Manager
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