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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

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

STATE OF WASHINGTON DEPARTMENT OF
EMPLOYMENT SECURITY,

and

KASANDRA GERIMONTE,

Appellants,

vs.

VALLEY PINES RETIREMENT HOME,

Respondent,

**BRIEF OF RESPONDENT VALLEY PINES
RETIRMENT HOME**

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I. STATEMENT OF FACTS

Valley Pines Retirement Home, herein after Valley is owned by James Lowell, and he operates a retirement home for vulnerable citizens in Spokane Valley, Washington.¹ On or about the end of March or early April 2014 (CR 28, 113) Appellant Kasandra Gerimonte applied for employment at Valley as a care provider. She provided the employer with authorization to do a background check on April 8, 2014 (CR 110, 114). In that authorization she filled out several sections regarding her past. In Section 11A, when asked if she had been convicted of a crime, she answered "NO." In Section 11B when asked if she had any pending charges against her, she answered "NO" under penalty of perjury (CR42, 110, 114). This was an inaccurate statement. She knew at the time she was under investigation for criminal activity for actions occurring on January 3, 2014 (CR 43, 44, 53, 95), that ultimately resulted in charges being filed against her in the fall of 2014 (CR 54, 58). Based on the background

¹ For purposes of consistency as Appellant referenced the Commissioner=s Record (CR) Respondent will continue citing the Commissioner=s Record in a fashion similar to Appellant=s.

check results, charges had not yet been filed, and Valley hired her and she worked for them approximately two years. However Valley must conduct background checks every two years and in April 2016, Gerimonte signed a new authorization and in question 11B she responded "YES" that she has pending charges against her. The background check revealed there was disqualifying information for events that occurred January 3, 2014 (CR 31, 43, 93, 94, 95). Ms. Gerimonte objected to CR 95 and on page 44 of her testimony she stated as follows:

"Judge Thomas: what was your objection?

Ms. Gerimonte: Um I wasn't filed on. These were -- when the actual crime was committed. This is the violation, if you look.

Judge Thomas: Okay, well -

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 didnt get -- they didn't file on me until a while -- a year or so after that".

When asked further by Judge Thomas about the events on January 3, 2014 she responded "Yes. That was when the crime actually occurred. That was not when it was file on" (CR 53). In her testimony she said the charges were filed around

January 2015 but she took a diversion (CR 54, 55). She further testified that if she didn't complete the diversion, she would be convicted of a crime. (CR 58) She did not tell employer Lowell about the charges stemming from the January 3, 2014 activities until two years later in a new background check in April, 2016 (CR 57). She claimed she didn't know pending charges were disqualifying (CR 59).

The employer is bound by WAC 388-113-0020 which states certain criminal convictions and pending charges would disqualify a person from having unsupervised access to adults who receive services under the various WAC provisions. (CR 30). Various degrees of theft are included in the disqualifying list of pending charges. 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 and certification process that employers are required to have to maintain certification (CR 46, 47). Gerimonte is a certified nursing assistant and had such training. As a result of the second background check,

Valley was mandated to terminate Ms. Gerimonte. If he had not done so, he would lose his business operating license (CR 50). Gerimonte applied for Unemployment benefits and was denied such benefits on May 14, 2016 by Employment Security Department on the basis that she had been discharged from work due to work connected misconduct (CR 113). She appealed that decision on May 19, 2016 and a hearing was held in front of the Honorable Christopher Thomas Administrative Law Judge on June 21, 2016 (CR 113). Both Gerimonte and Valley were Pro Se. Administrative Law Judge Thomas found that she was unaware that she was being investigated for theft until sometime in late 2015 (CR 115). Gerimonte stated shortly thereafter she entered a diversion program (CR 54, 55). And upon successful completion, the charges would be dropped and she would not have any convictions on her record. She testified that if she failed the program she would be convicted (CR 58). She further testified she was unaware of any rule or policy that required her to report to her employer, her involvement with the diversion program. Valley owner, Jim Lowell, testified that he explained to her

about the reporting requirements of disqualifying crimes at the time of hire and going over the background authorization, and that it was also part of her training to become certified for her license (CR 46-49). Lowell said in a letter dated May 31, 2016, "prior to employment, and at all times during employment of care givers, our employees know, both from their NAC/NAR training as well as from our interviews and employment orientation, that disqualifying crimes on their background checks are grounds for immediate dismissal." He attached WAC 388-113-0020 evidencing three pages of disqualifying crimes (CR 89-92)). Upon completion of the background check done two years later on April 25, 2016 information reflected that there were three charges pending including first degree theft, and two charges of first degree identity theft pending as a result of activity on January 3, 2014 (CR 95-98). He stated his testimony when asked about if he has a rule that requires his employees to report, he responded "yes". At no time did Gerimonte report the crimes that she had been involved until April 2016. Further, the authorization for background check filed in 2014 provides

in the authorization signed April 8, 2014 in box 18 "If I do not tell the **whole** truth on this form, I understand that I can be charged with perjury and I may not be allowed to work with vulnerable adults.....".(CR 110) However, he stated that he did not have a handbook given to new employees. Ms. Gerimonte told Administrative Law Judge Thomas that she didn't plead guilty in order to get into the diversion program but if she didn't complete the program, she would have been convicted of the crimes. (CR 57-58) Administrative Law Judge Thomas reversed the initial finding by the department and awarded her unemployment benefits (CR 117). Valley timely filed an Appeal. However, Commissioner John Sells affirmed the Administrative Law Judge decision (CR 134-137). Valley timely moved for reconsideration and on August 26, 2016 review Judge John Sells denied reconsideration (CR 176-177).

II. ARGUMENT OF CASE

It is undisputed that once information is disclosed to the employer that applicant has been charged or has pending charges for disqualifying crimes it is mandated that he

either not hire that individual or once discovered terminates the individual from his employment. According to WAC 388-76-101631 states:

"If the results of the Washington State name and date of birth background check indicate an individual has a disqualifying criminal conviction or a pending charge for a disqualifying crime under Chapter 388-113 WAC, or a disqualifying negative action listed in WAC 388-76-10180 then:

(1) if the individual is a care giver, and a representative or resident manager, the adult family home must not employ the individual, either directly or by contract

Employer Valley through James Lowell did everything within his power in 2014 to verify the criminal record following Ms. Gerimonte's application for employment. Furthermore, there can be no question that the crimes ultimately charged were disqualifying crimes that would have subjected vulnerable adults to risk of harm from Gerimonte. Whether harm occurred during her employment between 2014-2016 is irrelevant as Valley could have lost its operating license if it had been discovered that he employed someone convicted of these charges or under pending investigation of these charges. There can be no dispute

that Mr. Lowell did everything within his power to research her past history. Other than the investigating officer, the only person who could have disclosed the actions that resulted in charges being filed against her is in fact Ms. Gerimonte. She had it within her power to disclose or withhold the fact that she participated in activities on January 4, 2014 that resulted in charges. She chose to withhold. She is the only one who knew whether or not at the time of application April, 2014 that she had participated in activities and that a common sense person would assume were illegal. She is the only person in this scenario who knew that she participated in the activities and knew that it was as she called it a violation or a crime. Mr. Lowell did not know until she testified at the hearing that she would lie about her participation in those activities. There can be no doubt that she intentionally withheld this information from Valley and her application process. The finding by Administrative Law Judge Thomas she was unaware that she was under investigation is false. In Blacks Law Dictionary Fourth Edition, Copyright 1968, it defines "pending" as

"Begun, but not yet completed; during; before the conclusion of; unsettled;". Webster's New Collegiate Dictionary, copyright 1979 defines pending as "during; while awaiting" or "not yet decided; being in continuance". Ms. Gerimonte clearly knew she was under investigation as she called them "violation" or "crime" but not yet filed. Yet she knew of the acts formulating the concern. Did she not have concern for Valley and its license or the vulnerable adults therein?

RCW 50.04.294 provides:

A(1) "Misconduct" includes but is not limited to, the following conduct by claimant:

(a) Willful or wanton disregard of the rights, title, and interest of the employer or a fellow employee:

(b) Deliberate violations are disregard of standards of behavior which the employer has a right to expect of an employee;

(2) (c) Dishonesty related to employment, including but not limited to deliberate falsification of company records, theft, deliberate deception, or lying;

(d) violation of a company rule if the rule is reasonable and if the claimant knew or should have known of the existence of the rule."

In Ciskie vs. Employment Security Department 35 Wn App. 72, 664 P.2d 1318 (1983), on page 75 the court citing Boynton

Cab Co. vs. Neubeck, 237 Wis.249, 259-60, 296 N.W.636 (1941)

said the following:

"the intended meaning of the term "misconduct",... is limited to conduct evincing such willful or wanton disregard of an employer's interests as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee, or in carelessness or negligence of such degree or recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests..."

In Smith vs. Employment Security Department, 155 Wn. App. 24, 226 P.3d 263 (2010), the court held on page 37 that "Action or behavior must result in harm or create the potential for harm to your employer's interest. This harm may be... intangible..." (Emphasis added).

In applying these standards the court in Hamel vs. Employment Security Department 93 Wn. App. 140, 966 P.2d 1282 (1998), held that willful misconduct means more than mere negligence. It contemplates the intentional doing of something with knowledge that it is likely to result in serious injuries or with reckless disregard of its probable consequences. It went on to say on page 146 "His specific motivations for doing so, however, are not relevant." On

page 147 it said that "Applying the objective, "should have known" standard, we assume that Hamel knew what a "reasonable person" would have known."

Ms. Gerimonte's withholding of information or her failure to disclose her participation in these criminal acts is certainly willful and certainly had the potential for failing to protect the rights and interests of the employer and the vulnerable adults Valley cared for. The common sense person would certainly understand and believe that reasonable standards of behavior which the employer has the right to expect is that dishonesty and misrepresentation are not allowed in an application process. Her knowledge of the events and her failure to disclose the events is clearly dishonest, false and a deliberate deception in her application at Valley. Although contested, Mr. Lowell clearly stated on numerous occasions that she was made aware of disqualifying crimes that if she had one he had to report it. He testified that it was part and parcel of the certification process for her to get licensing because he had gone through it himself and he testified that he went

over this at the time of application with her. Further, the document that she signed in April 2014 and again in 2016 both clearly state "if I do not tell the **whole** truth on this form, I understand that I can be charged with perjury and may not be allowed to work with vulnerable adults...". She is the only person that had the knowledge and ability to convey this information to Valley.

Ms. Gerimonte apparently argues that her behavior was not work related. In Tapper vs. Employment Security Department, 122 Wa. 2nd 397, 358 Pacific 2nd 494, (1993) the Court discussed work related misconduct. The court held it as mixed question of law and facts and that deference should be given to the administrator and fact finder but it is not universal. The application of law is de novo. In this case, Ms. Tapper had been warned of her behavior and written up for her behavior and corrective measures should be applied. Ms. Tapper failed to conform to the requirements of the employee after said warnings and was ultimately discharged. In questioning whether or not her behavior was work related misconduct, the court went over a variety of

principles that basically concluded disqualifications for misconduct must have been intentional and willful and further stated on page 409 "it is unfair to force employers to compensate employees who had engaged in and were discharged for misconduct." It said that inefficiency or ordinary negligence is not misconduct. It is not misconduct if once warned the employee is basically incapable of the desired level of performance. In Tapper the court determined that claimant affirmatively ignored directions to follow company procedure after several warnings. All Gerimonte's actions were also intentional, and a willful deception or failure to disclose information. She failed to disclose that she had been involved in the January, 2014 activity at the time of application in April 2014; she further failed to disclose that she was eventually charged with offenses in October 2014 and lastly failed to disclose that she entered into a diversion program that in essence determined that if she did not complete the program she would be guilty of the offenses charged. She stated that she had no knowledge that she should report it. Common sense, when

you are working with vulnerable adults dictates that she should report it.

In Griffith vs. State Department of Employment, Sec. 163 Wa. App 1, 259 Pacific 3rd 1111 (2011) in ruling on RCW 50.04.294 regarding misconduct, the court stated on page 9:

"Our appellate courts have held that an employee acts with willful disregard of an employer's interest when the employee is:
(1) aware of this employer interest;(2) knows or should have known that certain conduct jeopardizes that interest; but(3) nonetheless intentionally performs the act, willfully disregarding its probable consequences."

In the Griffith case, the claimant argued his behavior was not misconduct even though his employer had been given several warnings about his behavior and he did it anyway. The court held his behavior harmed his employer by offending a customer and getting himself banned from a location that was contrary to the employers interest if it couldn't deliver its products to the customer. The Griffith behavior would have had the same deleterious effect to Valley if Valley lost its license due to the undisclosed actions and charges. The Administrative Law Judge did not question the employer's

right to discharge her in 2014 but held her behavior did not amount to misconduct. On the contrary, WAC 388-76-101631 states he was mandated to terminate her. Any implication that the dismissal was voluntary was in fact false it was required. In her testimony Gerimonte states she did not know about the charges until late 2015. In finding of fact 14, the Administrative Law Judge stated Gerimonte was unaware she was being investigated for theft until sometime in late 2015. It is clearly false as she knew before even applying for employment and was actually charged with three felonies even though she called them a violation and claimed she did not know that they were criminal behavior. At no time did she disclose the investigation during the application process nor the subsequent events that resulted in charges. She clearly lied when she stated she did not know until late 2015. In her testimony she states "if I knew about the charges I would have disclosed them with him". (CR 52) Which basically says she knew she should have disclosed this information, but she didn't because she didn't know about them when in reality she did.(CR 53) She also refers

to the events on January 13, 2014 (the date of passing bad checks) as a crime. When discussing diversion by the judge, the judge said "why would you have gone through a diversion if there was no crime"(CR 56). She inferred she did not know because if she did know she would disclose them to him. (CR 54) Administrative Law Judge Thomas asked her if when she went to court on the three charges in January, did she inform Mr. Lowell. She says "uhuh" implying that she did, but she did not disclose that she was in court.

Once again RCW 50.04.294 going through the specific subjects the court should consider the following: (1)(a) Willful disregard of the rights of the employer. Gerimonte never mentioned the crimes despite knowing their importance from filling out and signing the background check authorization and knowing Valley had to do a suitability assessment of any findings. (2)(c) Regarding dishonesty related to employment, she stated several times she was unaware of being investigated for almost two years even though she admits there was "violation" and was later was actually charged. Somehow Administrative Law Judge found

this credible in these findings of fact. (3)(e) Regarding deliberate and illegal acts, in her testimony she calls them crimes. (4)(f) Regarding a violation of company rule if the rule is reasonable and if the claimant knew, or should have known, of the rules existence; she signed the background authorization, was briefed on it and had signed them on prior jobs. In Daniels vs. Employment Security Department 168 Wn. App. 721, (2012), the court held on page 729,

"...there is no requirement in the ESA or the Department's regulations that a company rule be written or contained in a handbook for its violation to constitute misconduct. The statute requires only that the rule be "reasonable" and one of which the employee" knew or should have known".

Jim Lowell testified on several occasions, he relied on the certification process, and that he told her at the time of application that she had to report truthfully her participation in any crimes. His license was at risk.

Lastly, Appellant Gerimonte argues that additional documents should be considered as argument and not evidence. First of all, nothing cited herein is based on anything other than the record in front of the Administrative Law Judge. However, Judge Tompkins can review additional argument and

that is all that it did. Judge Tompkins simple reversed the finding of fact #14 of the Administrative Law Judge regarding substantial evidence being found. Any new additions in the record presented by the Office of Hearings and Appeals were argument that merely supported the record presented at the hearing. Judge Tompkins correctly found that the Administrative Law Judge's Conclusion of Law # 10 was an error of law. If on the other hand under RCW 34.05.562 it can remand the case back to the agency based on new evidence that became available that relates to the agency action, that Mr. Lowell did not know about at the time of hearing and the interests of justice would be served by a remand. Justice is not served by ignoring the argument of the additional record.

III. CONCLUSION

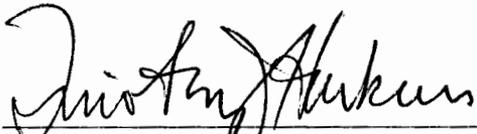
It is clear from the testimony and documentation presented at the time of hearing in front of the Administrative Law Judge Thomas that she knew she had participated in actions that were criminal. She knew she was eventually charged and she knew that she went into a

diversion program. She never disclosed any of this information until she was required to fill in another background check in April 2016. Her behavior clearly put Valley Pines license at risk. She knew through the testimony of Mr. Lowell that she had to report truthfully any of her behavior that would put him at risk and that the activities that she participated in were crimes that would disqualify her. She willfully withheld this information. This clearly was misconduct relating to her employment. Clearly she should be denied benefits as a willing participant in this criminal activity.

For the reasons and law cited herein Valley respectfully requested that this court affirm the Superior Court decision in denying unemployment benefits to Ms. Gerimonte.

DATED this 22 day of August, 2017.

Respectfully submitted,



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CERTIFICATE OF SERVICE

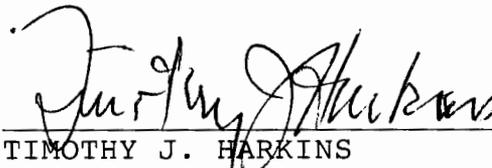
I hereby certify that on August *22*, 2017 I caused the foregoing **Brief of Respondent Valley Pines Retirement Home** to be filed with the Clerk of the Court, and I certify that I served all parties, or their counsel of record, a copy of this document by United States Mail, proper postage addressed to:

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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.



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