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NO. 69807-9

COURT OF APPEALS FOR DIVISION I

STATE OF WASHINGTON

JEFF KIRBY and PUGET SOUND SECURITY PATROL, INC.
Appellant-Petitioner,

v.

STATE OF WASHINGTON DEPARTMENT OF EMPLOYMENT SECURITY,
Respondent.

BRIEF OF APPELLANT

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I. Introduction

In this appeal from an Employment Security Department decision awarding benefits, the Court of Appeals is invited to analyze evidence of insubordination and misconduct, to decide whether an employee's breach of the duty of loyalty affects the defense of a good faith error in judgment, and to clarify the employer's burden in proving misconduct in an unemployment benefits case.

The fundamental requirements of a security guard job is to observe and report. If these duties are not performed, a security company cannot be successful. The job of a private security officer is to observe and report. Puget Sound Security Patrol, Inc. fired security guard Dorothy Thomas for the willful and repeated refusal to write a report; she refused to obey her supervisor and manager, and her CEO. She was fired for insubordination. Dorothy Thomas' employer instructed her three times to do her job, which was to write an incident report. She was threatened with termination, yet she refused three times. The incident report related to Ms. Thomas' oral accusations of criminal gang-related activity taking place at a client facility. She was trained on the report-writing requirement and knew the importance of the incident report to her employer. When asked, she testified that she refused because she thought it was not in her own personal interest to write it. This willful refusal to obey the reasonable

instruction from an employer constitutes a willful and wanton disregard for the employer's interest, which disqualifies a claimant for benefits under the Employment Security Act.

The statute defining misconduct is clear. If an employee exhibits a deliberate, willful, or purposeful refusal to follow the reasonable directions of her employer, she is disqualified from benefits. Insubordination and rule violations are specifically designated as misconduct under the statute, and Ms. Thomas committed both. Everyone agrees that the orders were reasonable, yet she refused. The department and the superior court misread the law, and misapplied the law to the facts of this case.

Ms. Thomas is disqualified for insubordination, which is consistent with the common law of agency for her disloyalty of placing her own interests above her employer's. She willfully refused direct orders from the highest ranking officers of her employer several times, reportedly believing that the incident report requested as part of her job would be used against her. Her actions constitute misconduct under the statute, and the department and superior court erred in allowing benefits. The decision should be reversed.

II. Assignments of Error

1. The Employment Security Department erred in awarding benefits to claimant Dorothy Thomas by finding that she did not commit misconduct as defined in RCW 50.04.294(1)(a) and (2)(a), (f), and (g).

2. The Employment Security Department erred in finding that claimant Dorothy Thomas's refusal to labor did not constitute willful and wanton disregard for her employer's interests.

3. The Employment Security Department erred in concluding that the claimant's conduct constitutes a good faith error in judgment and that her motivation was proper is supported by substantial evidence.

4. The superior court erred in affirming the Employment Security Department's decisions.

III. Issues Pertaining to Assignment of Error

1. Whether an employee commits disqualifying misconduct under RCW 50.04.294 when she refuses to provide written reports to her employer where such reports relate to the job of a security guard, the refusal is willful, and the refusal prevents the employer from providing security services to the paying client?

2. Whether the Commissioner's Review Office erred in considering the claimant's motivations and intent in refusing to follow her employer's reasonable direction?

3. Whether an employee's refusal to obey her manager's and CEO's directives to write a report, when premised on an unjustified, subjective fear that such report could be used against her, constitutes a "good faith error in judgment" and is thereby exempted from the definition of "misconduct" under RCW 50.04.294(3)(c)?

4. Whether the refusal to obey a directive to write a report involves any judgment whatsoever, as to be subject to the "good faith error in judgment" exemption from the definition of "misconduct?"

5. Whether any error in judgment can be made in good faith when that purported error constitutes a breach of the duty of loyalty to the employer?

6. Whether an employee's disloyalty by prioritizing her personal interests above the business interests of her employer, thereby damaging the employer, constitutes misconduct?

IV. Statement of the Case

A. Employment Context

1. Incident reports are urgent, important, and essential to provide security.

Puget Sound Security is a locally owned private security provider. In order to effectively guard the security of a client, the guards must

observe, and then report information. Commissioner's Record[1] (CR) 50; CR 93; CR 122.

Report writing and documentation of events are essential functions of security guards. Guards are responsible for writing daily logs to document everything they observe, and to "start [their] log the second [they] arrive and keep it current..." CR 217; CR 275-76 (FOF 7). They are also responsible for completing detailed incident reports whenever there is "theft, damage, verbal or physical events" or to document important, unusual, or extraordinary events. CR 217; CR 275-76 (FOF 7 & 8). Security guards are extensively trained on the importance of report writing. CR 34-35; CR 122-23.

Guards are trained to write information in two different forms: daily logs and incident reports. Guards write daily logs to document everything they observe, and to "start [their] log the second [they] arrive and keep it current..."CR 217, CR 275-76 (FOF 7). Incident reports, by contrast, detail more extraordinary events, such as "theft, damage, verbal or physical events." *Id.* Daily logs are kept on site, while the incident reports must be submitted to the employer. CR 276 (FOF 9). Unlike the

[1] Appellants designated the Commissioner's Record on appeal, which is also the Administrative Record. The internal numbering in the record contains two separate numbers on each page. The cited numbers herein are consistent with the bottom center numbering scheme, "page X of 308," in the Commissioner's record.

activities recorded on daily logs, incident reports often require some investigation or action by the employer; incident reports are vital to securing the client's property and personnel. CR 50; CR 93. These reports are crucial to maintain client relationships and to continue securing the properties.

Puget Sound Security considers written incident reports to be reliable and provable accounts of fact related to their mission. It prefers incident reports so that it is not relying on untrustworthy "verbal hearsay." CR 278 (FOF 14). Without documentation of extraordinary events such as theft, Puget Sound Security cannot safeguard the client's site and reputation, which is the primary service contracted for by the client. The failure to provide a written report harms Puget Sound Security's relationship with its customers.

Puget Sound Security has a number of rules to ensure its employees properly assist in its investigative duties. *See* CR 214 (Employees must comply with directions from supervisor; must carry out duties diligently; must not give false testimony and must cooperate in criminal investigations); CR 215 (Employees must report all criminal acts); and CR 216 (Employees must report all safety hazards, observed criminal acts, and unprofessional conduct by fellow employees.).

Claimant Dorothy Thomas, a security guard employed by Puget Sound Security, acknowledged reading and understanding each of these rules. *Id.* Through her state training and reading of Puget Sound Security rules, Thomas was aware of the importance that written reports have to both clients and Puget Sound Security.

2. Report writing is mandated by Washington regulation.

The employer's policies are consistent with the security guards' obligations to the state. Washington regulations governing the security guard industry also stress that report writing is a requirement for security guards. Before a person may earn her security guard license, she must undergo eight hours of formal training on subjects that include report writing, followed by testing. WAC 308-18-300. Post assignment training must also include subjects such as "observation and incident reporting." WAC 308-18-305. The basic functions of observing and reporting are what makes a person a security guard; without report writing, one is not a security guard.

The employee in this case owes an obligation to understand the importance of writing incident reports both to her employer and to the state, as part of her keeping her license to hold the very job she was working at the time.

B. Dorothy Thomas orally reported incidents but refused to do her job of writing them.

1. Ms. Thomas was removed from the client site.

Ms. Thomas, a security guard, orally claimed to have seen very serious criminal behavior at the client's warehouse where she was stationed by her employer. She claims to have observed drug use, gang-related activities, illegal weapons, and an organized theft ring. CR 276-77 (FOF 10-12). She testified that, in her two years of employment, she perhaps wrote five or six incident reports. CR 146 ("I don't remember. It could be – I tried to make sure that they were something that [inaudible] to the police. Maybe five or six.") Despite her claims that she had submitted documents, it is undisputed that her employer never saw or received any such incident report. No incident reports were offered as evidence by the claimant at the unemployment benefits hearing.

2. The client does not need to manage security employees.

One consideration that leads many clients to hire private security companies to take care of their security needs is the freedom it provides them from the time and expense of hiring, training and managing employees. They do not want to deal with the day-to-day issues of the employees, or to address each and every potential breach of security. Instead, they hire Puget Sound Security as an expert in providing security

services to deal with any security issues, leaving the responsibility for the individual guards with their employer.

As a guard, Ms. Thomas had specific protocols regarding the six people whom she could call and in what priority she was to call those people. Nevertheless, she routinely ignored protocol, in contravention of the employer's rules. CR 111.

3. The guard refused to tell her employer what she told the client.

Puget Sound Security did not find out that Ms. Thomas claimed to observe illegal activity until the client contacted it on June 8. CR 80. Puget Sound Security later found out that Ms. Thomas contacted the client's human resource representatives to address the issues. CR 124-25. Most of her allegations were unfounded. CR 125; CR 277 (FOF 14).

Ms. Thomas was not authorized to make this kind of direct client contact. CR 98. Ms. Thomas finally went so far outside of her employer's and her client's chain of command as to contact the head of security for the entire client corporation in Arizona. CR 98; CR 277 (FOF 13).

After becoming annoyed with its private security company, the client indicated that Ms. Thomas was no longer welcome as a security guard. CR 277 (FOF 12). Puget Sound Security responded by removing her from this client account as requested.

It is Puget Sound Security's contractual obligation to provide security to its client. It needed information to do so. However, Puget Sound Security never saw a single incident report authored by Ms. Thomas. CR 278 (FOF 16). It had no reason to believe that one existed; to the contrary, it had reason to believe that no such report existed.

Ms. Thomas's supervisor told her to write an incident report so they could investigate her oral reports, and to present the written report at a meeting with him. CR 278 (FOF 15).

C. Thomas was given time to write a report.

The client requested that Ms. Thomas be removed from the site on June 8, 2011. The appointment to present the written report to her supervisor was scheduled at the employer's headquarters two days later.

Ms. Thomas arrived at the meeting late and without a written report. CR 117-18; CR 278 (FOF 16). While at the office, she was again instructed to write a report by a superior. CR 118. She, again, refused. CR 118-19; CR 278 (FOF 16); CR 279 (FOF 21).

Unable to obtain the information any other way or to persuade Ms. Thomas to complete the report, the supervisor enlisted the help of Puget Sound Security's CEO, George Schaeffer. CR 119; CR 278 (FOF 16).

The employer's CEO, Mr. Schaeffer, introduced himself to Ms. Thomas directed her to draft an incident report. CR 127; CR 278 (FOF 16). She refused a third time. CR 278 (FOF 16). Mr. Schaeffer told Ms. Thomas that the company could only act when it had information, and that it was Ms. Thomas' job to provide the information she had. CR 127. Still, Ms. Thomas refused. CR 281 (FOF 21).

Ms. Thomas did not ask to clarify the request, and did not ask to speak to anyone about it. CR 81. **She did not want to write a report because she was afraid it would be used against her.** CR 278 (FOF 16). She gave no other explanation why she would refuse to do her job and write the report until after the disciplinary hearings, in front of the ALJ.

When Mr. Schaeffer indicated to her that she could be fired for insubordination if she refused to write the report as instructed, Ms. Thomas still refused to do her job. CR 36.

D. Ms. Thomas was given more time to write the report and warned of the consequences.

Ms. Thomas was suspended. CR 278 (FOF 16). She was told to return in a few days with the written report for a disciplinary hearing about what, if any, additional discipline should be imposed. Five days later, she came in for a disciplinary hearing without having completed an incident

report. CR 278 (FOF 18); CR 84-85.[2] She was given an opportunity to explain or justify her refusal to write the report. CR 85. She remained silent. *Id.* The employer finally terminated her for insubordination. *Id.*

By knowingly, willfully refusing to perform her job after being warned about repercussions from insubordination, Ms. Thomas became the primary moving party in her termination.

E. The Department denied, then awarded unemployment benefits.

The Employment Security Department denied Ms. Thomas unemployment benefits. It found she had been terminated for misconduct. CR 8; CR 202. Ms. Thomas appealed, and her hearing was September 30, 2011. CR 6-54.

At the initial hearing, just over three months after her discharge, Ms. Thomas justified her refusal to follow orders by stating that she wanted to speak with her supervisor because he was "the one that pulled me off site." CR 39. When she was unable to do so, she "felt defensive and afraid" and refused the direct orders of her supervisors. CR 39-40. She did not claim to have previously written an incident report. She summarized her understanding of why she was fired: "I wouldn't write

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[2] Prior to the direct examination of the employer's witnesses, the employer testified from Puget Sound Security business records to provide a detailed summary of the timeline relevant to this action. CR 80-86. These pages are attached for the court's review.

immediately an incident report and I wanted to talk to somebody first." CR 38. She offered no other explanation for what happened. When asked if there was anything to add, Ms. Thomas replied "No. That's it. It covers it all." CR 41.

The ALJ set aside the ESD decision and allowed benefits. CR 250-55. The Commissioner's Review Office remanded for a new hearing, requesting additional evidence regarding the employer's demand for an incident report, the claimant's motivation for refusing to write the report,[3] and the reasonableness of the employer's order. CR 271; CR 275 (FOF 3). A second hearing was held on February 2, 2012. CR 60-197.

Four months later at the February hearing, Ms. Thomas admitted to refusing the order, (CR 148-49), and also remembered a number of things to add that were missing from her initial testimony. She claimed to have written up numerous reports and logs and to have submitted them to her supervisor. CR 135-36. She also claimed that she asked to write a report to save her job **after** she was fired. CR 297 (FOF 18).

[3] For reasons explained more fully below, the request regarding evidence of the claimant's motivations for the insubordination is contrary to established case law regarding misconduct, and was therefore an erroneous view of the law. This error was adopted by the ALJ, approved by the Commissioner, and disregarded by the superior court.

The administrative law judge acknowledged that the employer's orders were reasonable, and recognized that Ms. Thomas refused to obey them. CR 281 (Conclusion of Law 8). However, the ALJ states that "these events did not occur in a vacuum." *Id.* The insubordination was excused due to her finding that Ms. Thomas did not intend harm to the employer. CR 280 (FOF 23). In reaching her conclusions, the ALJ considered the motivation of the employee: "the claimant acted out of apprehension and confusion rather than out of a conscious intent to harm the employer. The claimant's failure ... was at worst the kind of error of judgment that the statute states is not misconduct." CR 282 (Concl. of Law 9). The Commissioner's Review Office affirmed the ALJ's decision, noting that it "turns largely upon credibility findings" (CR 296) and that "the claimant's conduct here ... is best characterized as a good faith error in judgment." Benefits were awarded.

F. The ALJ's decision poses a threat to the employment relationship.

An employee's insubordination is a threat to the employer regardless of the industry. It threatens very relationship between the employee and employer, agent and principal. It threatens the cohesiveness of a team, where strong teamwork is one of the most important assets a company can possess. It can hurt the morale and success of a business and

cause poor work performance. It undermines the authority of the business's principals and increases workplace stress. For this reason, insubordination is the first listed example of the "willful and wanton disregard of the employer's interest" defined in the misconduct statute. RCW 50.04.294(2)(a). If an employee does not do as instructed, it harms the employer's interests.

More so than in other industries, a security guard's insubordination jeopardizes her employer's ability to provide security. Clients contract with Puget Sound Security's principals to protect its personnel and property. Chain of command is an essential piece of this service: Principals gather information about the client needs and create policies and directives to address them. Those directives are issued to the security guards, who are expected to perform as ordered and to report back with information. If the guards fail in this, the employer cannot meet the client's objectives, exposing that client to risks against which Puget Sound Security is paid to protect, endangering the employer's interests.

The implications of the department's decision are dangerous and far-reaching for the security industry. By withholding the information from Puget Sound Security, Ms. Thomas denied the company the ability to investigate the situation and fulfill its contractual responsibilities to the client. It also interfered with the company's relationship with the client.

Without information, Puget Sound Security cannot react, which jeopardizes its business and the safety and security of the property, workers, and guests it is paid to guard.

Report writing is a fundamental role of a security guard, and is essential to the industry. Rewarding the intransigent refusal to carry out that role and countenancing the guard's insubordination poses a genuine risk to the company and to the public. Rewarding refusal also provides no legitimate benefit to employees.

V. Argument

A. Standard of Review

Appellate review is pursuant to Washington's Administrative Procedure Act. *See* RCW 50.32.120; RCW 34.05.510. The court considers the entire agency record. RCW 34.05.558. A reviewing court should reverse an agency decision when the administrative decision is based on an error of law, or the decision is arbitrary and capricious. RCW 34.05.570(3); *Tapper*, 122 Wn.2d 397, 402, 858 P.2d 494 (1993).

The court should look to see whether the agency understood and correctly applied the law. The court reviews determination of the correct law *de novo*. *Henson v. Employment Sec. Dep't*, 113 Wn.2d 374, 377, 779 P.2d 715 (1989) ("Issues of law are reviewed under the error of law standard, in which the reviewing court may 'essentially substitute its

judgment for that of the administrative body.'") (quoting *Franklin Cy. v. Sellers*, 97 Wn.2d 317, 325, 646 P.2d 113 (1982), *cert. denied*, 459 U.S. 1106 (1983)). In reviewing the agency's conclusions of law, the court is not bound by the agency's interpretation. *Tassoni v. Department of Retirement Systems*, 108 Wn. App. 77, 84, 29 P.3d 63 (2001).

This Court reviews the Commissioner's findings of fact for substantial evidence in the administrative record to support them. *Smith v. Employment Security Department*, 155 Wn. App. 24, 32 (2010). Substantial evidence is that evidence which "would persuade a fair-minded person of the truth or correctness of the matter." *Id.* at 33

In understanding whether Thomas' actions were misconduct, the Court should remember the policy for the Employment Security Act. The Act employs "the insurance principle of sharing the risks" of unemployment between the employer and employee, and funds should be used "for the benefit of persons unemployed **through no fault of their own**[.]" RCW 50.01.010 (emphasis added). This fault principle preserves the use of the state's resources for "innocent" workers, who are involuntarily unemployed and more deserving. *Tapper*, 122 Wn.2d, 409

B. The law on insubordination is clear, and its plain language requires the denial of benefits.

1. Ms. Thomas committed misconduct.

a. The Washington legislature codified the common law.

RCW 50.20.066(1) provides that "an individual shall be disqualified from benefits ... [if] he or she has been discharged or suspended for misconduct connected with his or her work ..." The law defines misconduct to include insubordination.

In 2006, the Washington legislature amended the Employment Security Act to change the definition and description of disqualifying misconduct. These changes codified the common law regarding misconduct and the duty of loyalty. The definition of "misconduct" has incorporated and restated the other criteria from the common law:

> "Misconduct" includes, but is not limited to, the following conduct by a claimant: (a) Willful or wanton disregard of the rights, title, and interests of the employer ... (b) Deliberate violations or disregard of standards of behavior which the employer has the right to expect of an employee; ... or (d) Carelessness or negligence of such degree or recurrence to show an intentional or substantial disregard of the employer's interest.

RCW 50.04.294(1). The employer's position is that her actions meet the statutory definition of misconduct and the interpretive regulations.

Examples of "willful and wanton disregard" are *per se* misconduct, and are listed in RCW 50.04.294(2). These include "insubordination showing a deliberate, willful or purposeful refusal to follow the reasonable directions or instructions of the employer," and "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." RCW 50.04.294(2)(a), and (f).

Insubordination is the deliberate, willful, or purposeful refusal to follow the reasonable directions or instructions of the employer. RCW 50.04.294(2)(a). This is consistent with the definition of misconduct in RCW 50.04.294(1)(a).

The agency, court, and department all seem to agree that she failed to do her job, but they excuse her actions for reasons not supported by law.

b. The department erred in considering motivation and intent.

Motive is not relevant. To satisfy the definition of misconduct, "the employee must have voluntarily disregarded the employer's interest. **[The employee's] specific motivations for doing so, however, *are not relevant.***" *Hamel v. Employment Sec. Dept.*, 93 Wn. App. 140, 146 (1998) (emphasis added); *see also Griffith v. State Dept. of Employment Security*, 163 Wn. App. 1, 10 (applying *Hamel* under new statute). In other words, the test for determining whether an employee has willfully

disregarded her employer's interests focused on consequences of the conduct, not the employee's subjective motivation.

Willful disregard does not require intent to harm the employer's business. *Hamel,* 93 Wn.App. at 146. The term "willful" is defined by regulation. "'Willful' means intentional behavior done deliberately or knowingly, where you are aware that you are violating or disregarding the rights of your employer." WAC 192-150-205(1). WAC 192-150-200(2) states that "action or behavior must result in harm or create the potential for harm to your employer's interests. This harm may be ... intangible, such as damage to your employer's reputation."

The primary error at issue in this appeal is the consideration of the claimant's motivation in refusing to follow her employer's direction to write an incident report. This error has at its roots the initial Commissioner's Review Office ruling, in which it specifically required the ALJ to find and apply the facts and law concerning the "claimant's motivation, if any, for wanting to talk with 'someone' ... before preparing an incident report, and about what." CR 271. The request to explore the claimant's motivation on remand for refusing to obey her employer's directions is contrary to the common law regarding misconduct, as it invites an unnecessary weighing of the claimant's state of mind. The order predetermined the erroneous outcome of the case.

In response to the CRO's invitation, the ALJ specifically justified Ms. Thomas' insubordination by claiming a lack of intent to harm. CR 280 (FOF 23). She improperly considered Ms. Thomas's motivation for refusing the order. CR 279 (FOF 16) ("She said she did not want to write a report because she was afraid it would be used against her and cause harm.") She cited Ms. Thomas' belief that the information had been submitted previously (CR 281 (Conclusion of Law 8)) and her "apprehension and confusion" (CR 282 (Conclusion of Law 9)). Regardless of whether Ms. Thomas completed the reports, and or how she thought the reports may be used, she refused the employer's reasonable requests that she do so again, following her removal from the site. The directive to write the report was reasonable, and employees do not get to refuse to do their job.

This was not an "error of judgment." It was a willful refusal. The reasons she refused are not relevant. Ms. Thomas committed misconduct. The ALJ erred by considering Ms. Thomas' motivations in refusing the employer's directions, and by excusing them on that ground.

c. Insubordination is disqualifying misconduct.

RCW 50.04.294(2)(a)(1) designates insubordination as an example of "willful and wanton disregard of the rights, title, and interests of the employer or a fellow employee." Insubordination is the deliberate,

willful, or purposeful refusal to follow the reasonable directions or instructions of the employer. RCW 50.20.294(2)(a)(1).

The term "insubordination," as defined by statute, is so clear as to need no interpretation. In other words, where a willful or deliberate refusal to follow the reasonable instructions of the employer is demonstrated, a willful and wanton disregard of the employer's interests is established.

In *Smith v. Employment Security Department*, 155 Wn. App. 24 (2010), the claimant was employed by Kitsap County Department of Public Works. *Id.* at 29. He maintained secretly recorded conversations on his county-owned laptop. *Id.* at 30. During an investigation relating to these recordings, he was instructed by the department director to return his laptop and refrain from deleting files therefrom. *Id.* Before turning in the laptop, the claimant removed a program that allowed him to download and store the recordings. *Id.* at 31. He was fired and applied for benefits. The department initially awarded benefits. That decision was affirmed by the Administrative Law Judge, but overturned by the Commissioner, who determined that the claimant committed misconduct. The Court of Appeals affirmed this decision, on the basis that the claimant's conduct violated a reasonable rule against secretly recording conversations (RCW 50.04.294(2)(f)); that "such conduct, if known by the general public of

Kitsap County, could certainly impact a citizen's willingness to discuss issues with a county employee, thereby adversely impacting the county's interest..."; that the recordings violated the Washington Privacy Act;[4] and that the claimant violated his employer's directive to return the laptop without deleting anything, establishing insubordination and potentially exposing the employer to liability. *Id.* at 39-41.

An employee commits insubordination, and therefore statutory misconduct, if she willfully or purposefully refuses to follow the reasonable directions or instructions of the employer. Ms. Thomas was instructed to do her job and write a report. She willfully and purposefully refused multiple times. She did not refuse accidentally or mistakenly. She was told in very plain terms that if she refused to write the report, she would be fired. Still she refused. CR 127-28.

2. A deliberate refusal to labor constituted misconduct.

Prior to the statute's amendment, courts employed a test to interpret whether an employee's conduct constituted disqualifying misconduct under that definition. The Court announced a three part test in

[4] In addition to being in violation of the policy embodied Washington Administrative Code, Ms. Thomas' actions may be in violation of RCW 49.44.080 (endangering life or property by refusing to labor); RCW 18.235.130(1)(a) (Unprofessional conduct standards for security guards); or RCW 9A.76.050 (Rendering criminal assistance).

Macey v. State, Department of Employment Security, 110 Wn.2d 308 (1988): "(1) There must be misconduct which (2) is connected with the employee's work which leads to (3) unemployment which is the fault of the employee such that his unemployment is in effect voluntary." *Id.* at 316. Invariably, the steadfast refusal to labor has been held to be misconduct. The amendments to the statute do not interfere with the analysis that these cases support the denial of benefits.

In *Harvey v. Dept. of Employment Security*, 53 Wn. App. 333 (1988), the claimant was employed as a kitchen aid, whose duties regularly included folding linens. *Id.* at 334. She was instructed by both her supervisor and her manager to fold linens, yet she refused. *Id.* She was terminated and claimed unemployment benefits. The department denied benefits, determining that "Claimant was given the order on two separate occasions by two levels of management, and claimant did willfully and intentionally refuse to do same, even if for that period of time." *Id.* at 335. Despite the claimant's contention that she did not intend to refuse the order, only to delay, the Department found the refusal willful and intentional. On appeal, the Court of Appeals confirmed this decision. Applying the *Macey* criteria, the court found that (1) the instruction to fold the linens was reasonable and the failure to do so was of significance to the employer; (2) the instruction was not trivial and related

to the employer's business, establishing a nexus; and (3) the refusal to fold the linens was a violation of the employer's reasonable instruction. *Id.* at 338-41. Benefits were denied.

Similarly, in *Peterson v. Employment Security Department*, 42 Wn. App. 364 (1988), the claimant delivered mail for the U.S. Postal Service. His supervisor questioned him about a brief absence from work and instructed him to answer; he refused. *Id.* at 365. He was terminated for failure to follow instructions. *Id.* He applied for benefits, which the Department denied based on a finding of misconduct. *Id.* at 366. The Court of Appeals affirmed, applying a three part test set forth in *Nelson v. Employment Security Department*, 98 Wn.2d 370, 375 (1982). Specifically, the court found that (1) the conduct underlying the termination occurred on the job, and thus had a nexus with the claimant's work; (2) the employer did not know whether the claimant had returned to work due to his refusal to obey her instructions to answer her questions, causing harm to the employer's interest; and (3) his purpose in refusing to respond was a deliberate act. *Peterson*, 42 Wn. App. at 370-71.

Ms. Thomas's actions similarly qualify as misconduct under the common law tests. Because report writing and chain-of-command are essential duties for security guards, there is a nexus to her employment. Her refusal to obey the directive and write a report prevented the employer

from investigating the allegations and potentially involving law enforcement to address any criminal activity, undermining the purpose of the security company's agreement with its client. It further undermined the employer's relationship with its client. Finally, her steadfast refusal to multiple supervisors on several occasions was a deliberate act: she had the opportunity to do her job, but she refused or delayed, placing her interests above those of her employer.

3. Ms. Thomas is responsible for her own unemployment.

The overriding purpose of the Employment Security Act is to provide unemployment benefits for "persons unemployed through no fault of their own. ..." RCW 50.01.010. Here, Ms. Thomas is at fault for her unemployment. She refused to do her job and write the required report. She disobeyed more than three orders to do so, even after being informed that her refusal would result in her termination. She was the primary moving party in this employment separation. Benefits are improper.

C. The Department erred in concluding that Ms. Thomas's actions were a "good faith error in judgment."

1. The insubordination was willful, not an error in judgment.

At the administrative hearing, the ALJ found, and the Commissioner adopted the finding, that there was an "information gap" that caused the employer to believe that a directive to write a report was reasonable, and cause the employee to believe that the report had already

been written so the instruction to write a report was suspect. CR 281 (Conclusion of Law 8). The ALJ found that this "information gap" was not Ms. Thomas' fault and that the refusal to write a report was not willful insubordination. *Id.* [5] This is a misapplication of the law.

RCW 50.04.294(2)(a) provides that it is an example of willful and wanton disregard of an employer's interests, and therefore *per se* misconduct under RCW 50.04.294(1)(a), where an employee shows "a deliberate, willful, or purposeful refusal to follow the reasonable directions or instructions of the employer." If the refusal is deliberate and considered, the employee has committed insubordination. In contrast, RCW 50.04.294(3)(c) states that "Misconduct" does not include "Good faith errors in judgment or discretion."[6]

It is a principle of statutory construction that "courts must not construe statutes so as to nullify, void or render meaningless or superfluous any section or words" of the statute. *Taylor v. City of*

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[5] To the extent these are considered as facts, these are not supported by substantial evidence. A disinterested trier of fact could not conclude that the employee's deliberate refusal was objectively reasonable. The employer took all reasonable measures to direct her to do her job and inform her of the consequences of her continued refusal. The employee did not take reasonable steps to alert the employer of any confusion.

[6] While the regulations do not define "good faith errors," WAC 192-150-200(3)(b) states that "'inadvertence or ordinary negligence in isolated instances'" means that your action is an accident or mistake."

Redmond, 89 Wn.2d 315, 319 (1977). Allowing benefits where an employee has shown a deliberate and considered refusal to obey the reasonable instructions of her employer because the refusal was based on an information gap that she does not bring to the employer's attention at the time would render the text of RCW 50.04.294(2)(a) meaningless. The exception would swallow the rule. It was error for the ALJ to excuse the refusals to write a report on the basis of a good faith error of judgment, because the refusals were willful.

2. The "good faith error" exemption does not apply.

A review of cases applying the "good faith error" exception supports this reasoning. In *Markam Group, Inc. v. Department of Employment Security*, 148 Wn. App. 555, 561 (2009), an employee was terminated for making a series of mistakes in her job as a paralegal. *Id.* at 563. The court held that the employee did not intentionally do a poor job, but was merely unable to perform to the employer's standards. This was good faith error, therefore not misconduct. *Id.* at 563-64.

In contrast, in *Griffith v. State Department of Employment Security*, 163 Wn. App. 1 (2011), the claimant made a series of offensive and insensitive comments to his customers and was terminated. *Id.* at 5. He was initially granted benefits by the ALJ, in a decision that was reversed by the Commissioner. *Id.* On appeal, the claimant cited *Markam*

because his actions were not done for the purpose of violating the rights of the employer, and indeed, may not even have been meant to be offensive; therefore the acts did not intentionally or deliberately violate the employer's interests. *Id.* at 9. The court rejected this argument because the claimant "engaged in intentional conduct by commenting to the customer ... Whether he understood that he was behaving in an offensive manner is irrelevant. He **intentionally behaved** in a manner that offended the customer." *Id.* at 10 (emphasis added).

As was the case in *Griffith*, Ms. Thomas's actions here were deliberate and intentional. It is an exercise of judgment that caused her to refuse to write the report; she deliberately refused to do so. Her reasons for the refusal, or her belief that she was not violating the employer's interests, are not relevant. The insubordination was willful, and therefore constitutes misconduct.

3. Disloyal motives are not "good faith" errors in judgment.

To the extent that the department concluded that Ms. Thomas's insubordination was a good faith error of judgment, it is a clear error of law. The Restatement (Second) of Agency s 381 (1958) imposes the general duty to use "reasonable efforts to give his principal information which is relevant to affairs entrusted to him", which "the principal would desire to have." *See Cogan v. Kidder*, 97 Wn.2d 658, 663 (1982). The

finding that her reason for refusing to obey the directive was her fear that it would be used against her similarly violates agency-principal law. *See infra.* It is common sense that an action cannot be both in good faith yet also in violation of the actor's fiduciary duties. Ms. Thomas did not act in good faith.

To the extent that the "good faith error of judgment" finding constitutes a finding of fact, it is not supported, and controverted, by the record. Ms. Thomas testified that she did not write the report because she was afraid it would be used against her. It was therefore a considered decision, and not a judgment. Her contention that she wanted to delay the writing of the report is controverted by her refusal to produce a written report after multiple requests over eight days that she do so.[7] There was no good faith error of judgment. Ms. Thomas committed misconduct.

D. Ms. Thomas's actions violate principal-agent law.

An employee owes a fiduciary duty of loyalty to her employer. *Restatement Third of Agency*, § 8.01.[8] This duty is defined as "the duty to act loyally for the principal's benefit in all matters connected with the

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[7] *Cf. Harvey*, 53 Wn. App. at 335 (Claimant's intention to delay obeying instruction constituted a willful and intentional refusal to do the same, "even if for that period of time.")

[8] Washington has adopted the laws of the Restatements of Agency as a restatement of its common law. *See Kieburtz & Associates, Inc. v. Rehn*, 68 Wn. App. 260, 265-66 (1992).

relationship." *Id.* at § 8.04. It has been codified in the misconduct statute, which states that "misconduct" includes the "willful and wanton disregard of the rights, title, and interests of the employer." RCW 50.04.294(1)(a). The duty of loyalty requires the employee to act only in the interests of her employer. If an employee's personal interests conflict with those of her employer, and she protects her personal interests to the detriment of her employer, she has breached her duty of loyalty as agent. *Raymond v. McFadden*, 21 Wn.2d 328, 332 (1944) (agent or employee is "duty bound not to act adversely to the interest of his employer by serving...any private interest of his own in antagonism or opposition thereto.").

In *Williams v. Queen Fisheries, Inc.*, 2 Wn. App. 691 (1970), Williams was employed by the defendant as president for three years. *Id.* at 693. He had agreed with another company to start a personal business using Queen Fisheries' equipment. *Id.* at 693-94. On his last day in office, he wrote checks from the Queen checking account for the benefit of a separate business he owned. *Id.* at 694. After suit was filed, the court found that Williams was an agent of the defendant, and therefore owed the fiduciary duty of loyalty to Queen. *Id.* It also found that the use of Queen's equipment, credit and monies to establish a personal business constituted a breach of that duty because the agent was placing his private interests and disregarding that of his principal. *Id.* This breach constituted

a breach of employment contract and established good cause for the early termination of Williams as president. *Id.* at 695.

In this case, Ms. Thomas was assigned to write logs and incident reports while on duty at the client location, and to submit them to her superiors so the corporate principals could use the information in servicing the client contract. She was directed by her supervisors to write an incident report. She refused. The chief executive officer of the company explained to her the importance of the incident report and the principles of institutional knowledge and ordered her to write the report. She refused, claiming that she did not want to imperil herself.[9]

A disciplinary proceeding took place eight days after her suspension. Ms. Thomas reported without having written the incident report. She was fired for breaching her duty of loyalty to her employer. She stubbornly and repeatedly placed her interests above those of her employer in the course of her duties. Her actions deprived the company of information essential to the provision of security services to the client. In

[9] In fact, after the first hearing, the ALJ found that "the claimant told the employer that **it was not in her best interest to complete a written incident report at that time.**" CR 252 (FOF 9) (emphasis added). The consideration of the agent's interest above or in contravention of the principal's interest, violates the agent's duties to the principal.

fact, her actions deprived the company of knowledge it is charged with knowing[10] as a matter of law.

VI. Conclusion

Writing reports for one's chain of command is essential in the private security industry. Dorothy Thomas went outside her own company with information and disobeyed direct orders to write reports conveying the very information she told the client. The Commissioner erred as a matter of law by relying on Thomas's stated subjective beliefs and granting her unemployment benefits.

Additionally, the decision has far-reaching and dangerous implications for the security industry. Rewarding the refusal to obey an order and the failure to corroborate a verbal report of criminal activity at a client's site undermines the purpose of security guards and diminishes the

[10] As to third parties, such as the client, an employer is imputed to have the knowledge of its employees where those employees have a duty to report. *Peck v. Siau*, 65 Wn. App. 285, 291 (1992) (citing Restatement (Second) of Agency) (Knowledge of agent is imputed to her principal if "the agent, by virtue of [her] employment, has a duty to report [her] knowledge to the principal or to another agent of the principal.") Ms. Thomas's refusal to provide the report, and therefore enable the employer to have the knowledge they are imputed to have, put the employer's business interests at risk. If Ms. Thomas's allegations of criminal activity were correct, and the employer is imputed with knowledge of that activity but fails to act, the employer is arguably at risk to civil liability. Ms. Thomas's refusal was dangerous to her employer and the customer they were supposed to serve.

employer's business. It also endangers the people and property of the client by encouraging behavior that is contrary to mission of a security provider.

More importantly, the award of benefits in this case assumes an insurmountable burden of evidence on the part of an employer alleging insubordination and is an outrageously offense to employers. Allowing benefits under these facts shows employees that benefits will be granted if one refuses to work and elevates their own interests above those of their employer if they offer a sympathetic story in a hearing.

The agency erred in applying the law regarding misconduct. The decision is erroneous and should be reversed.

Respectfully submitted this 28th day of March, 2013.

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Declaration of Service

I caused a copy of the foregoing Appellant's Opening Brief to be served on the following in the manner indicated below:

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on today's date.

I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct to the best of my belief.

SIGNED this 28th day of March, 2013, at Seattle, Washington.

Jessica Williams

Jessica Williams, Legal Assistant