69807-9

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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.

APPELLANT'S REPLY BRIEF

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I. Restatement of Argument

Stripped of all superfluous fact and irrelevant consideration, this appeal comes down to the following fact pattern: Security guard Dorothy Thomas made serious, verbal allegations to her employer, Puget Sound Security Patrol, and to the UPS client, about security problems and criminal behavior she claims to have observed at her workplace. UPS complained to Puget Sound Security, requesting that it investigate. In order to do so, the employer gave Ms. Thomas three separate orders to write a detailed and specific incident report over an eight-day period.[1] Ms. Thomas refused to do so and failed to resolve her personal resistance for refusing to follow her employer's instruction. Without the written report, Puget Sound Security could not advance its investigation and serve the client. She was terminated. She applied for, and received, unemployment benefits.

Puget Sound Security Patrol appeals this decision, stating that the willing refusal to follow a direct order is insubordination, and willful and

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[1] The department's argument that the employer made a "demand that Ms. Thomas immediate[ly] write an incident report on the spot without allowing her to seek clarification and guidance" is not supported by the record. As soon as Ms. Thomas was removed from the site, and the interview with the employer scheduled, Ms. Thomas was instructed to write an incident report. She was given eight days to do this. *See timeline, infra.*

wanton disregard of the rights, title, and interests of her employer. Ms. Thomas's actions prohibited Puget Sound Security from serving its customer. Her actions fit the first example of *per se* misconduct in RCW 50.04.294(2)(a); she should be disqualified from benefits. RCW 50.20.066.

In its response, the Employment Security Department argues that Ms. Thomas was entitled to question and resist the authority of her employer due to an alleged misunderstanding as to the reason for the order. Because she was confused, the department argues, her repeated refusal to write the report is best described as a "good faith error," specifically exempted by RCW 50.04.294(3).

For the following reasons, the department's position is contrary to law and unsupported by the evidence. Benefits were improperly awarded, and the decision should be reversed.

A. Employment law provides important context for the case.

The department advances the argument that the employer's attempt to insert employment law in an employment misconduct case is "misguided," because it does not take into account a claimant's willfulness. Op. Brief, p. 21-22. However, principles of agency and common law duties owed by employees are naturally central to a determination of unemployment benefits. Misconduct includes

"[d]eliberate violations or disregard of standards of behavior which the employer has the right to expect of an employee." RCW 50.04.294(1)(b) The relationship between employee and employer, and the duties and obligations an employer may expect of an employee, are set by employment law.[2] Employment law also defines the amount of discretion an employee has in a given situation, and provides insight into whether a directive from an employer is reasonable.

1. Employment law establishes an employee's standards of behavior.

An employee owes several duties that have evolved over time and become enshrined in their own body of law. For example, an employee is an agent of her employer, and must act solely for the benefit of her employer in the course of her agency. *Raymond v. MacFadden*, 21 Wn.2d 328, 332 (1944) (citing 2 Am. Jur. 203, § 252). This is the duty of loyalty. An employee may not place her own interests ahead of those of her employer in matters regarding her employment.

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[2] To the extent the department is arguing that the Employment Security Act displaces the common law, it is incorrect. "Statutes in derogation of the common law ... are construed strictly, not operating beyond their words, or the clear repugnance of their provisions; that is, the new displaces the old only as directly and irreconcilably opposed in terms." *State v. Binnard*, 21 Wash. 349, 353 (1899).

Furthermore, an employer retains a right of control over its employee's behavior, at least insofar as it relates to the scope of the employment. Indeed, the right of control is the central aspect in any analysis as to whether an employee-employer relationship exists. *See, e.g., Anfinson v. FedEx Ground Package System, Inc.*, 159 Wn. App. 35, 42 (2010) (for purposes of Minimum Wage Act, RCW 49.46.010, relationship is defined by "economic realities" test, the first factor of which is "the degree of control that the business has over the worker."); *Afoa v. Port of Seattle*, 160 Wn. App. 234, 239 (2011) (for purposes of vicarious liability, liability hinges on whether employer has right to direct the manner in which work is performed, even where that right is not exercised); *Gary Merlino Const. Co., Inc. v. City of Seattle*, 167 Wn. App. 609, 616 (2012) (for purposes of workers' compensation, employment relationship exists when employer has right to control servant's physical conduct in the performance of his duties, and there is consent by the employee to this relationship.) "The hallmark of an employment relationship is the employer's right to control the employee's conduct." *Gary Merlino*, 167 Wn. App. at 616 (citing *Judy v. Hanford Envtl. Health Found.*, 106 Wn. App. 26, 35 (2001)).

An employee commits misconduct if she deliberately violates the standards of behavior her employer has a right to expect of her. RCW

50.04.294(1)(b). For the purposes of this case, an employer has a right to control the employee's conduct in the course of the employment, and to expect that the employee will follow those orders instead of putting her interests ahead of its own. Ms. Thomas was given an order by the employer to allow it to honor its obligations to its client. She was told that if she did not write the report as ordered, she would be fired. Nevertheless, she refused to write the report, because she was worried that it might harm her own interests by incriminating her or being used against her. CR 36. By refusing, or even by delaying, to write the report, she was undermining the employer's right to control her actions, and disregarding her duty of loyalty. *Cf. Harvey v. Dept. of Employment Security*, 53 Wn. App. 333 (1988) (delay in obeying instruction is disqualifying misconduct). Her deliberate actions violated the standards of conduct her employer had a right to expect of her. She committed misconduct under RCW 50.04.294(1)(b).

2. Ms. Thomas had no discretion in refusing to follow orders.

The department contends that the instruction in this case was not reasonable due to the claimant's state of mind. It argues that Ms. Thomas "was confused by the Employer's order that she immediately write an incident report," so her refusal to labor was a "good faith error" in

judgment. Op. Brief, p. 16. However, the instruction at issue was not ambiguous, so her judgment or discretion was not relevant:

> Insofar as the agent is invested with discretionary powers the agent is required to act only according to the best of his or her judgment for the interest of the principal, and in the absence of negligence or bad faith the agent will not be liable. **However, if the instructions are direct and positive, the agent has no discretion, and the agent's motives in departing therefrom are not material.** It will not affect the agent's liability that the agent departed from instructions in good faith for what the agent's [*sic*] believed to be the advantage of the principal.

(3 C.J.S. Agency 551, § 272 (emphasis added) (footnotes omitted)).

The instructions at issue here were described by the Administrative Law Judge as follows:

- On June 8, 2011, "[t]he claimant started to tell [Steve Squire] about what had been happening at the warehouse, and he asked[3] her to write an incident report and then come in and discuss it with him and [William Cottringer] on June 10, 2011." CR 278 (FOF 15).

[3] While the ALJ uses the term "asked" to describe the action, it is undisputed that the directive to write a report was an order.

- On June 10, 2011, "The HR Assistant asked the claimant to write the incident report and said that the Mr. Squire [*sic*] would be back." CR 278, (FOF 16).
- The CEO "told her that the report was a required document that they needed so they would have the … details that he had told the UPS Site Supervisor he would provide to them and "as the highest ranking official in the company, he was asking her one more time to write down what she had already told to the UPS HR Department and the investigator at their 800 number." CR 278 (FOF 16).

These instructions left no room for interpretation.[4] CR 127-28. They did not call for judgment or discretion. Her refusal to write the report was not accidental. Ms. Thomas's conduct was not a "good faith error in judgment," but rather a deliberate action contrary to the standards of behavior her employer had a right to expect. It was a willful refusal to follow the reasonable direction of her employer. It was misconduct.

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[4] The department claims that the employer's reliance on *Harvey* and *Peterson* is misplaced, because those cases involved refusal of a "clear and direct order." The order given to Ms. Thomas was not ambiguous. Her subjective reasons for not following it do not render it unclear or indirect. *Harvey* and *Peterson* are controlling law, and should apply here to reverse the department's decision.

3. The employer's directive was reasonable.

The department argues that the repeated orders to write the incident report were not reasonable, given Ms. Thomas's claims that she had already written the report and the apparent communication gap as to why another report was being requested. The department has created no regulation to interpret whether an order is reasonable, and suggests that the instruction was not "objectively reasonable." Op. Brief, p. 24. However, as the department rightly contends, the order and the refusal should not be considered in a vacuum. Op. Brief, p. 25.

Ms. Thomas was an employee of Puget Sound Security Patrol. She owed her employer a duty of loyalty. Puget Sound Security had the right to control her physical conduct in the scope of her employment. This included writing reports, even if those reports had been written but misplaced. In this particular instance, the report was required to permit the employer to perform its contractual obligation to its client, so there was a legitimate business reason for the order. The report was unreasonably withheld by Ms. Thomas. Her insubordination harmed her employer's interest. No additional showing is necessary to prove misconduct, and to deny benefits.

B. The refusals were willful and deliberate.

The department claims that Ms. Thomas's actions cannot be considered misconduct, contending instead that the refusal to write the report after three direct orders was not willful. As the department notes, "willful" behavior is "intentional behavior done deliberately or knowingly, where you are aware that you are violating or disregarding the rights of your employer or a co-worker." WAC 192-150-205(1). It is undisputed that Ms. Thomas understood that her employer was instructing her to write the incident report. The employer even informed her that her refusal to write the report would result in a disciplinary hearing. Still, she refused. This refusal was deliberate and knowing. Further, a reasonable person would understand that refusal to follow an employer's order would be in violation of or contrary to the employer's rights and interests.

The department stresses that Ms. Thomas had written incident reports and filed them with her supervisor, and that the employer was unaware of these reports. It emphasizes that Ms. Thomas' direct supervisor had been pulled out of the office the morning of her disciplinary hearing. Even if these considerations were relevant, the act precipitating the termination of employment – the refusal to follow three direct orders to write a report – was not a matter for Ms. Thomas' discretion. It was not ambiguous, and it was not optional. There was no

room for confusion, despite the department's protest that her refusal was somehow the fault of Puget Sound Security. She was told by the CEO of Puget Sound Security that she would lose her job if she did not write the report. Despite all of these warnings, Ms. Thomas steadfastly and willfully refused to write the report. Each refusal was deliberate, and in contravention of an order. This is the classic definition of insubordination.

C. Consideration of motive is contrary to law.

The department's insistence that the court consider the motivations and mindset of the claimant when refusing a direct order is contrary to Washington law. The department spends a great deal of time arguing that Ms. Thomas's refusal to write the report was due to her confusion and fear, as she had allegedly already written such reports before. As argued in the Petitioner's Brief, consideration of Ms. Thomas' state of mind is irrelevant and erroneous. *See Hamel v. Employment Security Dept.*, 93 Wn. App. 140, 146 (1998). "Generally, an agent is required to adhere faithfully to the instructions of the principal, regardless of the agent's own opinion as to the propriety or expediency thereof." (3 C.J.S. Agency 550-

51§ 272) (citing, *inter alia*, *Cultum v. Heritage House Realtors, Inc.*, 103 Wn.2d 623, 632 (1985)).[5]

Here, the department invites the court to consider the client's fear and confusion as lack of intent to harm the employer. However, the department does not, and cannot, suggest that the refusal to write the report was not a willful and deliberate act. It was this act that constitutes the insubordination, and which establishes the willful or wanton disregard of the rights, title, and interests of her employer. There is no *mens rea* requirement of intent to harm the employer. The knowing and considered act of refusing the directives was bound to harm the employer, and that potential to harm was explained to Ms. Thomas. CR 278 (FOF 16) (CEO "told her that the report was a required document that they needed so that they would have the shift times and details that he had told the UPS Site Supervisor he would provide to them.")

The department disingenuously argues that "Ms. Thomas was not aware that the likely consequence of her action was harm to her employer." Op. Brief, p. 23. Having established the requisite knowledge,

[5] "It is the duty of an agent to obey all reasonable instructions and directions given by the principal and to adhere faithfully to them in all cases where they ought properly to be applied and in which they can be obeyed by the exercise of reasonable and diligent care."

any further consideration of Ms. Thomas's intent to harm the employer is prohibited by Washington law. *Hamel*, 93 Wn. App. at 146 (1998).

D. *Ciskie* is inapposite.

Finally, the department relies on *Ciskie v. Emp't Sec. Dep't.*, 35 Wn. App. 72, 76 (1983), to argue that Ms. Thomas attempted to comply with the employer's procedures and rules. The claimant in *Ciskie* had to leave work on an emergency, and made numerous but futile efforts to notify his supervisor before leaving. He was not given a large amount of time to alert the necessary supervisor. In contrast, Ms. Thomas had *eight days*[6] to write the incident report, having been told numerous times that it had to consist only of what she had already orally reported to the client. She made no effort whatsoever to do so. Instead, she steadfastly declined any responsibility to provide documentation of her serious allegations. She refused to permit the employer to perform services for its client. Unlike the claimant in *Ciskie*, Ms. Thomas made no efforts to comply with her employer's instructions.

II. Conclusion

A security company can only perform its contractual duty to investigate allegations of criminal activity when it has written, provable

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[6] A timeline is submitted attached to this brief to allow the court to visualize the relevant dates in this matter. *See infra.*

information. In order to ascertain such information, Puget Sound Security instructed its employee to write an incident report no fewer than three times over the course of eight days. She refused. The employer was unable to follow up on its obligations to the client. Ms. Thomas was fired.

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 v. State Emp. Sec. Dept.*, 122 Wn.2d 409 (1993)(citations omitted). It was Ms. Thomas's job to write a report. If she had opted to do her job, she would not have been terminated. She became responsible for her unemployment when she committed insubordination and prevented her employer from doing its job. Benefits were improperly granted, and the decision should be reversed.

Respectfully submitted this 24th day of June, 2013.

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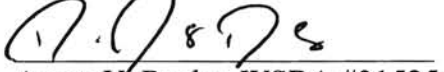

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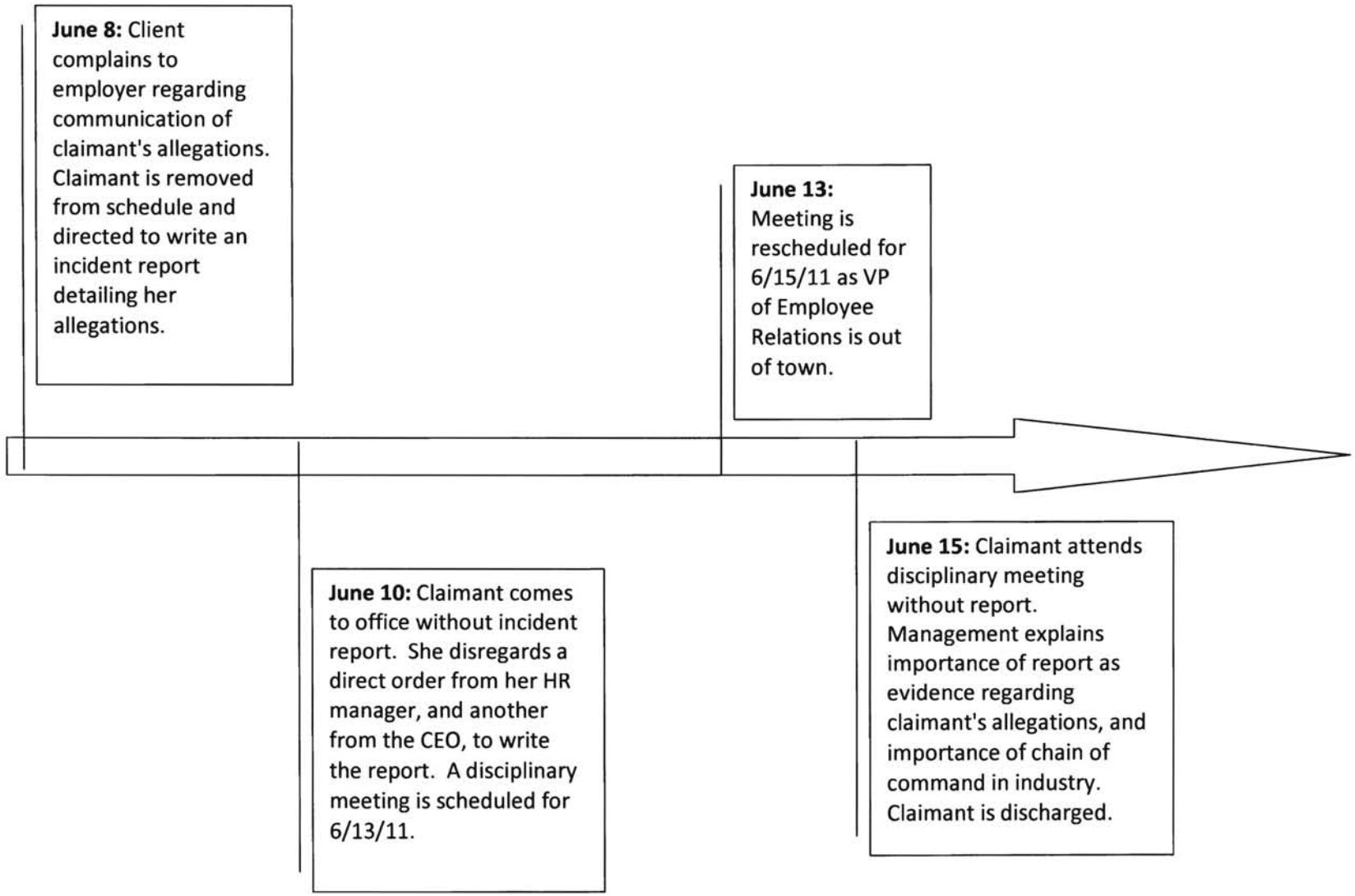
Timeline


June 8: Client complains to employer regarding communication of claimant's allegations. Claimant is removed from schedule and directed to write an incident report detailing her allegations.
June 13: Meeting is rescheduled for 6/15/11 as VP of Employee Relations is out of town.
June 10: Claimant comes to office without incident report. She disregards a direct order from her HR manager, and another from the CEO, to write the report. A disciplinary meeting is scheduled for 6/13/11.
June 15: Claimant attends disciplinary meeting without report. Management explains importance of report as evidence regarding claimant's allegations, and importance of chain of command in industry. Claimant is discharged.

Declaration of Service

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

Via Hand Delivery to

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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 24th day of June, 2013, at Seattle, Washington.

Sarah Borsic, Legal Assistant