NO. 93429-1

SUPREME COURT OF THE STATE OF WASHINGTON

SARAH CHRISTNER,

Petitioner,

v.

STATE OF WASHINGTON
DEPARTMENT OF EMPLOYMENT
SECURITY,

Respondent.

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

Sarah Christner, a full-time front desk receptionist at a medical clinic, was discharged from employment after repeatedly taking time off on short notice despite her employer's repeated warnings that this practice created a hardship for the employer to find front-desk coverage. Although some of the requests were for medical appointments, increasingly, the requests were related to her search for other employment, which she did not initially reveal to her employer. Until she disclosed her job search activities, her employer believed that all the requests were for medical reasons and tried to accommodate those requests. When they learned that many of the requests were in fact for job interviews, and that she intended to continue to make frequent requests for time off on short notice until she found alternate employment, the employer ended Christner's employment. The Commissioner of the Employment Security Department and the Court of Appeals properly concluded that Christner's conduct amounted to a "deliberate violation[] or disregard of the standards of behavior which the employer has the right to expect of an employee," RCW 50.04.294(1)(b), disqualifying her from unemployment compensation.

This case involves a routine application of the Employment Security Act to the distinct facts of this case, and the Court should reject Christner's attempts to constitutionalize alleged procedural errors that are

not supported by the record or the law. There is no basis for review under RAP 13.4(b). The Department respectfully asks the Court to deny the Petition for Review.

II. COUNTERSTATEMENT OF THE ISSUES

For the reasons set forth below, the issues raised in Christner's Petition are not appropriate for this Court's discretionary review under RAP 13.4(b). If the Court were to accept review, however, the issues that would be presented would be:

1. The Commissioner found that Christner made repeated requests for time off, often with short notice; that she only later revealed to the employer that many of the requests were for job interviews, when the employer believed all of the requests were for medical appointments; that the employer warned Christner that the repeated requests on short notice created a hardship because it had to scramble to find coverage; that Christner then made approximately five short-notice requests for time off in a five week period; and that Christner stated that she would require additional time off on short notice for job-seeking activities. Given these findings, did the Commissioner properly conclude that Christner was discharged for misconduct under the Employment Security Act for a "[d]eliberate violation[] or disregard of standards of behavior which the employer has the right to expect of an employee." RCW 50.04.294(1)(b).

2. Did the Court of Appeals properly reject Christner's claimed procedural errors when she was afforded notice that the hearing would concern misconduct and she had an opportunity to examine the employer witnesses and rebut the evidence the employer offered?

III. COUNTERSTATEMENT OF THE CASE

Sarah Christner was hired by the Washington Center for Pain Management (WCPM) as a full-time front desk receptionist at one of its clinics in November 2012. CP 96, 109, 161 (Finding of Fact (FF) 3), 162 (FF 4). WCPM has multiple clinics, and it requires a receptionist at each clinic. CP 102. If a receptionist is going to be absent on a given day, WCPM must arrange for coverage. *Id.* Christner testified that the employer had a policy that required requests for time off to be submitted in writing at least two weeks in advance. CP 132.

During her employment with WCPM, Christner made repeated requests for time off, often with short notice, which created a hardship on the employer and its staff to find front desk coverage. CP 97, 99, 102-03, 110-11, 114, 120-21, 155-56, 162 (FF 6). While some of the requests were for medical appointments, Christner eventually revealed to her employer that many of the requests were related to her pursuit of other

employment.[1] CP 114-15, 117, 121-25, 155, 162 (FF 5, 8). Until Christner disclosed that some of the requests were for job seeking activities, the employer believed that all of the requests were for medical reasons. CP 106-07, 162 (FF 5).

The employer then warned Christner both verbally and in writing that her frequent requests for time off were creating a hardship because it was difficult to find coverage so frequently and on short notice. CP 102-04. Her manager often had to scramble to find another receptionist to cover Christner's shift, or the manager would fill in herself. CP 102. On September 26, 2013, the employer sent Christner an email warning about her repeated requests for time off with short notice. CP 98-99, 117-18, 120-21, 162 (FF 5). The warning stated that it was becoming very difficult for scheduling purposes to accommodate her frequent leave requests, especially when there was not adequate time prior to the requested leave. CP 120.

Following this warning, Christner requested time off on approximately five separate occasions in a five-week period.[2] CP 97, 103,

[1] Christner asserts in her Petition for Review that she "experienced two acute medical issues" "[i]n the last few weeks of employment." Pet. for Review at 3. There is no finding that Christner's medical issues arose in the last few weeks of employment, and there is nothing in the record to support that claim. Christner's own email to her supervisor prior to her discharge stated, "More recently, however, I have been requesting time off for personal matters regarding appointments for other employment." CP 155.

[2] At the Court of Appeals, Christner challenged the finding that she requested time off on short notice approximately five times in a five-week period following the

124-25, 162 (FF 7). On October 10, 2013, Christner requested October 23, 2013, off from work to participate in an "oral board" for a job opportunity with the Snohomish Department of Corrections, though at the time, she did not disclose the reason for the request. CP 114-16, 162 (FF 8). When she had not received a response from her employer by October 18, Christner sent a follow-up email to her supervisor to renew the request. It was in this email that she disclosed that she "had been requesting time off for personal matters regarding appointments for other employment." CP 114-15, 132, 155, 162 (FF 9). Christner had applied for several different positions with the Snohomish Department of Corrections, and there were many boards and exams for each position. CP 122, 155. She further indicated that she would need to continue to request time off on short notice to participate in the various stages of the hiring process with the Department of Corrections. CP 105, 155. Following this email, the employer requested Christner to submit her resignation, explaining they needed a reliable, full-time front desk receptionist. CP 155-56, 162 (FF 10). Christner submitted a letter of resignation, which became effective November 1. CP 127, 153, 155, 162 (FF 11).

Christner applied for unemployment benefits, which the Department initially allowed. CP 139-40, 161 (FF 1). The initial determination concluded

written warning. Appellant's Opening Br. at 3-4. But it was Christner's own testimony that established this fact. CP 124-25; Resp'ts Br. at 11; Slip op. at 8.

Christner was discharged without misconduct, citing RCW 50.04.294, the Employment Security Act's definition of misconduct. CP 139-40. The employer appealed the allowance of benefits, and an administrative law judge (ALJ) convened an evidentiary hearing. CP 71, 161 (FF 2). The Notice of Hearing stated that the purpose of the hearing was to determine whether Christner "was discharged from employment for misconduct pursuant to RCW 50.20.066, or voluntarily quit without good cause pursuant to RCW 50.20.050." CP 183. At the hearing, Christner argued she was fired. CP 113.

Following the hearing, the ALJ issued an initial order finding that "the employer was the moving party" in the job separation and, therefore, Christner was discharged from employment and did not voluntarily quit. CP 163 (Conclusion of Law (CL) 5). The ALJ further concluded that Christner was discharged for disqualifying misconduct because of her frequent and continued requests for time off on short notice—five in a five-week period—despite knowing that such requests created a hardship on the employer. CP 164 (CL 11).

Christner petitioned the Commissioner of the Department for review of the ALJ's decision. CP 172-75. The Commissioner adopted the ALJ's findings and conclusions and clarified that Christner's conduct amounted to misconduct under RCW 50.04.294(1)(b), because it "evinced a deliberate

violation and disregard of standards of behavior which an employer has the right to expect of an employee." CP 178-79.

Christner petitioned for judicial review in the Snohomish County Superior Court, which affirmed the Commissioner's decision. CP 6-8. She then appealed to the Court of Appeals, which affirmed the Commissioner's decision in an unpublished opinion. *Christner v. Dep't of Emp't Sec.*, No. 73024-0-I (Wash. Ct. App. June 6, 2016).

IV. REASONS WHY THE COURT SHOULD DENY REVIEW

Rule of Appellate Procedure 13.4(b) provides the criteria for when this Court will review a Court of Appeals decision. Christner is incorrect when she argues that the decision of the Court of Appeals involves issues of substantial public interest, conflicts with other appellate decisions, and presents constitutional due process questions. RAP 13.4(b)(2), (3), (4). Instead, this is a matter where Christner has lost at all levels of review and now attempts to constitutionalize perceived errors to convince the Court to accept review. But this case involves a straightforward application of the Employment Security Act to the specific facts of this case. The Court of Appeals properly rejected the alleged procedural errors that are not supported by the law or the record. Thus, the decision below presents no conflict, no issue of public importance, and no issue of constitutional dimension that merits this Court providing a third level of judicial review.

A. The Court of Appeals Decision Does Not Conflict with Other Appellate Decisions

Christner suggests this case presents a "conflict of legal interpretations under RCW 50.04.294(1)(a) and (2)(f)." Pet. for Review at 9. But in finding Christner's conduct amounted to misconduct, the Commissioner relied solely on RCW 50.04.294(1)(b), "Deliberate violations or disregard of standards of behavior which the employer has the right to expect of an employee." CP 178-79. Thus any comparison to cases applying different provisions of the Employment Security Act's misconduct definition is inapt. *See* slip op. at 11 n.22. Even if such comparison were appropriate, the alleged conflict between those other provisions not relied on by the agency here does not warrant review under RAP 13.4(b).

Christner claims that the decision below presents a conflict, but she does not specifically identify with which cases the Court of Appeals decision supposedly conflicts. The only decisions Christner cites as possibly conflicting with the Court of Appeals decision here are *In re Griswold*, 102 Wn. App. 29, 15 P.3d 153 (2000), *Rapada v. Nooksack Indian Tribe*, No. 74116-1-I, 2016 WL 3456865 (Wash. Ct. App. June 20, 2016) (unpublished), and *Kirby v. Dep't of Emp't Sec.*, 179 Wn. App. 834,

320 P.3d 123 (2014), *review denied*, 181 Wn.2d 1004 (2014). Pet. for Review at 14, 20. None of these cases presents a conflict.

Griswold involved a grocery store meat wrapper who was fired for purchasing outdated meat at a marked down price. *Griswold*, 102 Wn. App. at 31-32. The court determined this did not amount to misconduct because the employer's policy seemed to permit purchases of past pull-date meat, the store managers routinely authorized such purchases to boost their monthly sales totals, and the employee received no warnings about her conduct. *Id.* at 33, 38. In contrast here, Christner received ample warning that her frequent requests for time off on short notice created a hardship on her employer, yet she continued to engage in the practice. Neither the record nor the findings support Christner's bare assertion that the employer's policy "was not uniformly applied to all employees." Pet. for Review at 14. There is no conflict between these two, factually different cases.

Rapada, an unpublished decision, also involved an inconsistently applied employer policy. *Rapada*, No. 74116-1-I, 2016 WL 3456865, at *5. Even there, the court stated that an "employer's practices may create a reasonable expectation as to workplace rules." *Id.* at *4. The case poses no conflict because that court held that there was no evidence the employee's

conduct jeopardized the employer's interests; therefore, misconduct was not established under RCW 50.04.294(1)(a). *Id* at *5.

In *Kirby*, the court upheld the Department's *allowance* of benefits because the employee's refusal to write an incident report on command was based on confusion and apprehension as she had already written the report, and there was no evidence she was aware she was disregarding the employer's rights and interests. *Kirby*, 179 Wn. App. at 847. Given the previously-discussed warnings that Christner received, it cannot be said that she was unaware that she was disregarding her employer's interests or standards. Again, there is no conflict given this factual difference.

Christner further argues, without citing to authority, that "[b]ehavior that an employer has 'the right' to expect under (1)(b) is that behavior for which no warning is required." Pet. for Review at 12. She reasons that since Christner *was* warned that her frequent, short-notice leave requests were burdensome for the employer, this could not amount to a standard the employer had the right to expect. But no case says that standards of behavior employers have the right to expect must be "universally" accepted rules. *See* Pet. for Review at 12. Moreover, it is precisely *because* she was warned and put on notice that her conduct created a hardship that the employer had a right to expect Christner to not continue engaging in the conduct—especially to not make five short-

notice requests for non-emergent reasons within a five week period following the warning. *See* slip op. at 12 (finding the examples in the Unemployment Insurance Resource Manual illustrative, not exhaustive, and that Christner's conduct was not inconsistent with those examples). The court's conclusion that these facts showed misconduct is unremarkable and does not warrant this Court's review, given that the conclusion is uniquely tied to the specific facts of this case.

In short, the court appropriately found that once the employer put Christner on notice that her frequent short-notice requests for time off created a hardship for them to accommodate, the employer had the right to expect that she would not continue to make such requests except for emergency situations. Yet even after receiving this warning, she made approximately five short-notice leave requests in a five week period—for job seeking activities. The court correctly affirmed the Commissioner's conclusion that these facts demonstrated a deliberate disregard of the standards of behavior the employer had the right to expect. That conclusion does not conflict with any other case.

B. The Petition Does Not Involve an Issue of Substantial Public Interest That Should Be Determined by This Court

Christner asserts that this case presents an issue of first impression because it involves the "definition and application of

RCW 50.04.294(1)(b) to an alleged rule violation." Pet. for Review at 11. She is mistaken. First, RCW 50.04.294(1)(b) is itself a part of the definition section of misconduct under the Employment Security Act. And the misconduct definition statute has been analyzed in numerous Washington appellate decisions. More importantly, Christner was not disqualified for having violated a rule under RCW 50.04.294(2)(f); she was disqualified for having disregarded a standard of behavior her employer had the right to expect of her under RCW 50.04.294(1)(b), as explained earlier.

The Court also does not need to accept review to announce a broad rule that a "standard of behavior" under (1)(b) must be an objective or "universal" standard. Pet. for Review at 12. Here, the Commissioner and Court of Appeals analyzed RCW 50.04.294(1)(b) and held that an employer has a right to expect that its employee will not continue to engage in conduct once the employer puts the employee on notice that that conduct creates a hardship for the employer. This is not a "subjective" standard, as Christner suggests. *Id.* This is a reasonable application of RCW 50.04.294(1)(b) to the facts of this case. And, given the fact-specific nature of the case, it is unlikely to have broad application to future unemployment benefits decisions. *See* Pet. for Review at 20.

Putting aside these fundamental reasons for denying review, the petitioner's arguments are legally unsound. An employer may reasonably require advance notice for leave requests, particularly from an employee whose job duties require coverage in her absence. But the Petition at 12 argues that employers do not have "the right" to require employees to not request time off on short notice. The employer here also acted reasonably in making exceptions to this policy when Christner's leave requests were for medical appointments. CP 106, 155-56. But when the employer learned that the more recent, frequent requests were not for a medical reason, that Christner was disregarding the policy in order to pursue other employment, and that Christner would continue to request time off on short notice for reasons other than medical need, the employer asked her to resign.[3] CP 108, 155-56.

Christner also is wrong when she argues that a "'deliberate disregard' under (1)(b) is a lesser standard than a 'willful or wanton disregard' under (1)(a) . . . ." Pet. for Review at 13. There is no significant difference between the terms—"willful" means the same thing as

[3] Christner invites this Court to reweigh evidence by suggesting the employer knew she was looking for other work. Pet. for Review at 3. But the Commissioner found that Christner "did not disclose to the employer that she was requesting time off to participate in interviews . . . . The employer believed that all of the requests for time off were due to illness." CP 162 (FF 5). And substantial evidence supports this finding. Sarah Bundy, Christner's supervisor—from whom she would request leaves of absence—testified that her understanding was that the leave requests were for medical reasons only. CP 107. The record shows Christner merely told a person she interviewed with of her desired career path nearly a year before she was discharged. CP 155.

"deliberate." An employee acts with willful disregard when she "(1) is aware of his employer's 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." *Hamel v. Emp't Sec. Dep't*, 93 Wn. App. 140, 146-47, 966 P.2d 1282 (1998). Christner's October 18 email establishes that she was aware that it had become "increasingly difficult to accommodate as many time off requests as I have requested in such short notice." CP 155. Yet she continued to make short-notice requests. This evidence and finding confirms that she deliberately disregarded this known standard.

Even if she were correct that the standards were different, it is no reason for review. The legislature was entitled to identify broad categories of conduct that amount to misconduct, each of which may evince different degrees of wrongdoing. This is a common and appropriate legislative choice, and Christner's argument on this topic is not an issue of substantial public interest requiring this Court's intervention. RAP 13.4(b)(4).

Finally, Christner resorts to a claim that the Commissioner and Court of Appeals failed to liberally interpret the Employment Security Act and suggests, for the first time before this Court, that this could jeopardize the Department's federal funding. Pet. for Review at 9-11. But the Department is to construe the Act "for the purpose of reducing involuntary

unemployment." RCW 50.01.010. That is not a mandate to construe the Act to ensure that every claimant prevails. Moreover, it is well established that the disqualification provisions of the Act "are based upon the fault principle and are predicated on the individual worker's action, in a sense his or her blameworthiness." *Safeco Ins. Cos.*, 102 Wn.2d 385, 391-92, 687 P.2d 195 (1984) (declining to award benefits despite "legislatively expressed policy of liberal construction"). Accordingly, "in order for a claimant to be eligible for benefits, the act requires that the reason for the unemployment be external and apart from the claimant." *Id.* (citing *Cowles Publ'g Co. v. Emp't Sec. Dep't*, 15 Wn. App. 590, 593, 550 P.2d 712 (1976)). Here, the Commissioner and Court of Appeals reasonably determined that the reasons for Christner's unemployment were not "external and apart" from her.

The employer had the right to expect Christner to fulfill her job duties as a full-time receptionist without making five to six requests for time off in a five week period. The employer made this standard known through both verbal and written warnings, informing her of their need for sufficient notice and of the difficulty in accommodating her requests. CP 99, 104, 111, 120, 87 (FF 5), 89 (CL 11). Yet she continued to make frequent requests and indicated she would continue to do so until she found other, preferable employment. CP 105, 110, 124-25, 87 (FF 7), 89

(CL 11). The employer should not have to bear the burden of Christner's time-consuming job search activities, by entertaining frequent requests for time off on short notice and scrambling to find coverage, or through benefit charges, in turn impacting its tax liabilities. Liberal construction cannot override the disqualification provisions for misconduct. The Court should deny review.

C. This Case Does Not Involve any Constitutional Issues

The Court of Appeals properly rejected the alleged procedural errors that Christner raised for the first time before that court. The alleged errors are neither supported by the record nor of constitutional magnitude. RAP 13.4(b)(3).

First, Christner claims that she was never on notice that she was going to have to defend against an allegation of misconduct because the employer asserted she quit. Pet. for Review at 15-16, 18. The record shows otherwise. When Christner first applied for benefits, the Department determined the job separation was the result of a discharge but concluded that misconduct had not been established. CP 139-40. When the employer appealed, the Notice of Hearing identified the issues to be considered at the administrative hearing were whether "[t]he claimant was discharged from employment for misconduct pursuant to RCW 50.20.066, or voluntarily quit without good cause pursuant to RCW 50.20.050." CP

183. And, at the administrative hearing, Christner argued she was fired such that misconduct became the salient legal issue. CP 113. For all these reasons, Christner was afforded ample notice that one purpose of the hearing was to determine whether she was discharged for misconduct.

Further, the absence of a citation to the statutory definition of misconduct on the Notice of Hearing did not deprive Christner of due process. CP 182-83; Pet. for Review at 6, 18. Due process requires notice and an opportunity to be heard. *Soundgarden v. Eikenberry,* 123 Wash.2d 750, 768, 871 P.2d 1050 (1994). Christner received both. As mentioned above, the hearing notified the parties that the issues to be considered at the administrative hearing were whether "[t]he claimant was discharged from employment for misconduct pursuant to RCW 50.20.066, or voluntarily quit without good cause pursuant to RCW 50.20.050." CP 183. Thus it identified the misconduct disqualification statute, RCW 50.20.066, but not the definition of misconduct under RCW 50.04.294. *Id.* Christner cites no authority for the proposition that in the civil administrative context, hearing notices must include statutory definitions.

In the civil administrative context, the "APA requires that parties be put on notice of the issues to be litigated." *McDaniel v. Dep't of Soc. and Health Servs.*, 51 Wn. App. 893, 898, 756 P.2d 143 (1988). Here, the initial determination and the Notice of Hearing put Christner on notice that

misconduct was an issue to be litigated. CP 140, 183. Just as a criminal charging document is not required to include definitions of essential elements, the Notice of Hearing was not required to include the definition of misconduct.[4] The Court of Appeals ruling on this point is correct, and it does not involve a significant constitutional issue. Slip op. at 10-11.

Next, Christner wrongly asserts she was denied an opportunity to cross examine two witnesses, Jae Lee, the CEO, and Steve Bromberg, the Controller. Pet. for Review at 7, 19. With respect to Lee, this is the first time she has claimed that she was not afforded the opportunity to cross examine Lee. *See* CP 15-29, 43-70; Appellant's Opening Br. It is therefore not properly raised. *See* RAP 2.5(a); RCW 34.05.554(1). The claim is also contradicted by the record. At the end of Lee's testimony, the ALJ asked, "Ms. Christner, do you have, uh, direct questions for Mr. Lee?" And Ms. Christner replied, "No, I do not."[5] CP 111.

With respect to Bromberg, he offered no substantive testimony on the job separation, the ALJ indicated she would not consider what little testimony he offered, and Christner did not ask to question him. CP 110.

[4] The Washington Supreme Court has held that even in the criminal context, an information need not include definitions of the essential elements of the crime charged. *State v. Johnson*, 180 Wn.2d 295, 302, 325 P.3d 135 (2014). This is despite the fact that the accused have the constitutional right to know the charges against them. *Id.* at 300 (citing U.S. Const. amend. VI; Wash. Const. art. 1, §22).

[5] The transcript attributes the response, "No, I do not," to Mr. Lee. CP 111. But, given the context and the fact that the ALJ asked the question directly of Ms. Christner, this is obviously a scrivener's error.

After Lee testified, and Christner declined to cross examine him, CP 111, the ALJ asked Bromberg if he had anything to add. CP 111-12. Bromberg began to testify that he had a phone call with the Department and then received the notice that Christner would be eligible for benefits, but the ALJ immediately interrupted him, stating she would not take testimony about events that occurred after the job separation. CP 112. She then asked, "So you weren't involved in her separation, correct?" *Id.* Bromberg replied, "Correct." *Id.* That concluded his testimony. *Id.* Christner did not then request to question him. *Id.* Accordingly, there was nothing of substance for Christner to cross examine Bromberg about, and what little was offered had no bearing on the job separation and was not considered by the ALJ. There was no error, and the Court of Appeals correctly held that Christner's allegations were "not borne out by the record." Slip op. at 11.

Lastly, Christner makes a new allegation, claiming the ALJ added evidence to the record after closing it.[6] Pet. for Review at 19. She cites an email chain at CP 187-89 that the employer faxed on January 16, 2014, five days before the administrative hearing, which indicates they sent a

[6] At the Court of Appeals, Christner made only a vague allegation about the administrative tribunal having "received documents that were not properly admitted." Appellant's Opening Br. at 46. Without a citation to the record where this was alleged to have occurred or any specific identification of what documents she refers to, the Court of Appeals properly rejected it. Slip op. at 11.

copy to Christner. CP 187. She makes no argument about how inclusion of this document in the administrative record prejudiced her. This is not a colorable theory of a constitutional error for purposes of review under RAP 13.4(b)(3). The Court of Appeals correctly so ruled. Slip op. at 11.

V. CONCLUSION

Christner's disagreement with the Commissioner's application of the law to the facts does not make this case worthy of the Court's review under RAP 13.4(b). The Court should reject Christner's attempts to manufacture conflict and issues of public interest and constitutional magnitude. The Department respectfully asks the Court to deny the Petition for Review.

RESPECTFULLY SUBMITTED this 2nd day of September, 2016.

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Assistant Attorney General
Attorneys for Respondent

PROOF OF SERVICE

I, Roxanne Immel, hereby state and declare as follows:

1. That I am a citizen of the United States of America, a resident of the State of Washington, over the age of eighteen (18) years, and not a party to the above-entitled action.

2. That on the 2nd day of September 2016, I caused to be served a true and correct copy of **Answer to Petition for Review** as follows to:

U.S. Mail

JOY LOCKERBY	THOMAS JARRARD
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Filed by Email

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I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON that the foregoing is true and correct.

DATED this 2nd day of September 2016, in Seattle, Washington.

Roxanne Immel, Legal Assistant

OFFICE RECEPTIONIST, CLERK

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Dear Clerk,

Attached for filing is the Department Answer to Petition for Review in *Sarah Christner v. State of Washington Department of Employment Security*, No. 93429-1.

The attorneys for the Petitioner are cc'd on this email. A hard copy will follow by mail.

Sincerely,
Roxanne Immel

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