No. 93429-1
SUPREME COURT
OF THE STATE OF WASHINGTON

SARAH CHRISTNER, Petitioner, v. STATE OF WASHINGTON DEPARTMENT OF EMPLOYMENT SECURITY, Respondent.	PETITIONER'S STATEMENT OF ADDITIONAL AUTHORITY

Pursuant to RAP 10.8, Petitioner Sarah Christner respectfully submits the following additional authority that was published as a Precedential Decision of the Commissioner by the Respondent, Employment Security Department: *In Re Marquart,* Empl. Sec., Comm'r Dec.2d 999 (2015) (See attached).

Although *In Re Marquart's* citation date is May 29, 2015, the precedential decision was just published on September 22, 2016 by Westlaw/Thomson Reuters.

A. On the issue of whether an employer policy can be the basis of misconduct without analyzing reasonableness, Ms. Christner points the Court's attention to following:

III

In this case, the employer discharged claimant for violations of the policies cited above in Findings of Fact Nos. IV, V, and VI. It is not clear from the record which specific policies the employer considered claimant to have violated. Regardless, we must first resolve whether the policies were reasonable. *In Re Marquart,* at 3.

...

B. On the issue of whether an employer policy that has the potential to chill an employee's rights under the law can form the basis of disqualifying misconduct under RCW 50.04.294(1)(a) and (2)(f), Ms. Christner points the Court's attention to following:

V

Section 8(a)(1) of the NLRA makes it an unfair labor practice for an employer ""to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed" in Section 7 of the Act. 1 *See* 29 U.S.C. § 158(a)(1). For example, an employer may not "[p]romulgate, maintain, or enforce work rules that reasonably tend to inhibit employees from exercising their rights under the Act." *See* Interfering with Employee Rights (Section 7 & 8(a)(1)), National Labor Relations Board, http://www.nlrb.gov/rights-we-protect/whats-law/employers/interfering-employeerights- section-7-8a1 (last visited July 5, 2016). *In Re Marquart,* at 3.

...

X

*5 Applying the principles outlined above to the present case, we now evaluate whether the employer policies at issue here inhibit the employees' right to engage in concerted criticism of the

> employer. One of the employer policies explicitly prohibits "discussion that is detrimental in any way to the business or any person." *See* Exhibit No. 23. This policy is contrary to employees being allowed to criticize their employer as part of their Section 7 rights, which employees sometimes exercise by appealing to their co-workers or the public in order to gain support. *See* Quicken Loans, 361 NLRB No. 94. *In Re Marquart,* at 5.

C. On the issue of how the Employment Security Department interprets a "[d]eliberate violations or disregard of standards of behavior which the employer has the right to expect of an employee under RCW 50.04.294(1)(b), Ms. Christner points the Court's attention to following:

> Next, we consider whether claimant's conduct was a deliberate violation of a standard of behavior that the employer ***5** had the right to expect of claimant. *See* RCW 50.04.294(1)(b). Employees have a right, under Section 7 of the NLRA, to discuss their wages and other terms and conditions of employment. Although claimant's Facebook postings are not part of the record, other competent evidence of record indicates that claimant's social media postings generally discussed his dissatisfaction with the terms and conditions of his employment, *i.e.*, his wages and assigned shifts. Thus, these postings constitute protected activities under Section 7 of the NLRA and, as such, they cannot constitute a deliberate violation of a standard of behavior that the employer had the right to expect. Misconduct as defined in RCW 50.04.294(1)(b) is, therefore, not established. *In Re Marquart,* at 4-5.

RESPECTFULLY SUBMITTED this 6th day of October, 2016.

LOCKERBY LAW, PLLC

By: /s/ Joy Lockerby
Joy M. Lockerby, WSBA #44343
PO Box 19444
Seattle, WA 98109
Phone: (206) 854-2869
Fax: (206) 299-9843
Email: Joy@LockerbyLaw.com
Attorney for Petitioner, Sarah Christner

PROOF OF SERVICE

The undersigned attorney, Joy Lockerby, declares under penalty of perjury under the laws of the State of Washington that on this day, October 6, 2016, a true and correct copy of the foregoing *Petitioner's Statement of Additional Authority* was filed with the court and served to counsel of record and interested parties as indicated below:

Leah Harris, Assistant Attorney General Attorney General of Washington Licensing and Administrative Law Division 800 Fifth Avenue, Suite 2000 Seattle, WA 98104 Phone: (206) 389-2797 Email: LeahH1@atg.wa.gov *Attorney for Respondent*	☐ ☐ ☑ ☑ ☐ ☐	Via Legal Messenger Via Fax Via Email Via U.S. Mail Via Electronic Filing Via Hand Delivery
Susan L. Carlson, Supreme Court Clerk Temple of Justice PO Box 40929 Olympia, WA 98504-0929 Phone: (360) 357-2077	☐ ☐ ☐ ☐ ☑ ☐	Via Legal Messenger Via Fax Via Email Via U.S. Mail Via Electronic Filing Via Hand Delivery
Washington Center for Pain Management, PLLC Attn: Jacky Hong, Registered Agent 1900 116th Ave NE Ste 201 Bellevue, WA 98004-3013 *Interested employer*	☐ ☐ ☐ ☑ ☐ ☐	Via Legal Messenger Via Fax Via Email Via U.S. Mail Via Electronic Filing Via Hand Delivery

Thomas G. Jarrard, Attorney at Law Law Office of Thomas G. Jarrard, PLLC 1020 N. Washington Street Spokane, WA 99201 Email: TJARRARD@att.net Phone: (425) 239-7290 *Attorney for Petitioner*	☐ ☐ ☑ ☐ ☐ ☐	Via Legal Messenger Via Fax Via Email Via U.S. Mail Via Electronic Filing Via Hand Delivery

DATED this 6th day of October, 2016.

Lockerby Law, PLLC

By: /s/ Joy Lockerby
JOY M. LOCKERBY
WSBA #44343
PO Box 19444
Seattle, WA 98109-1444
Phone: (206) 854-2869
Fax: (206) 299-9843
Email: Joy@LockerbyLaw.com
Attorney for Petitioner, Sarah Christner

Empl. Sec. Comm'r Dec.2d 999 (WA), 2015 WL 12573385

Commissioner of the Employment Security Department

State of Washington

IN RE: CAM MARQUART

Case No. 999
Review No. 2015-1200
Docket No. 032015-00969
May 29, 2015

DECISION OF COMMISSIONER

***1** On May 1, 2015, CAM MARQUART petitioned the Commissioner for review of an Initial Order issued by the Office of Administrative Hearings on April 8, 2015. Pursuant to chapter 192-04 WAC this matter has been delegated by the Commissioner to the Commissioner's Review Office. Having reviewed the entire record (including the audio recording of the hearing) and having given due regard to the findings of the administrative law judge pursuant to RCW 34.05.464(4), we do not adopt the Office of Administrative Hearings' findings of fact or conclusions of law, but instead enter the following.

FINDINGS OF FACT

I

On February 19, 2015, the Employment Security Department issued a written Determination Notice which denied claimant unemployment benefits. Claimant is the Appellant in this matter and filed a timely appeal on March 16, 2015.

II

Claimant worked full-time as a front desk clerk for Go Bowl ("employer") from September 2010 to January 18, 2015, when he was fired. Claimant was previously employed by the same employer from 1998 to 2009. His final rate of pay was $11.00 per hour. This was a non-union position.

III

The employer was provided notice of the time and date of the hearing held in this matter, but did not appear. Therefore, the findings of fact are based primarily upon evidence presented by or on behalf of claimant.

IV

Although the employer did not appear at the hearing, the evidence establishes that claimant was discharged for violations of the following employer policies:

◆ Go Bowl/Stardust employees are expected to be team players, to work well with others, be energetic, polite and friendly.

◆ Employees are to be honest and loyal in words and actions.

◆ Go Bowl/Stardust requires collegiality among coworkers. The First Amendment grants the right to freedom of speech, this applies to government, not to private entities, such as Go Bowl/Stardust. Go Bowl/Stardust is within its legal rights to have policies in place to prevent discussion that is detrimental in any way to the business or any person. When the employee steps into the place of business they are required to act professionally and not verbally dress down a co-worker, management or the business.

See Exhibit No. 23.

V

Another employer policy states:
Before publishing your status on Facebook, Twitter or Myspace, please strongly consider what you have written. The attitude of each of us as team members reflects upon everyone as a whole. As people who make their living on customer service, we want to be perceived as positive and professional. Remember, everyone sees what you write. People don't even need to go to Facebook. Your status flashes across their phone when you call. Keep it positive, and keep it clean, or send a private message please.

***2** *See* Exhibit No. 25.

VI

Under the heading "Zero Tolerance Failure to meet these expectations will result in termination," the policy states:
Customer Service: Customer service will be priority and provided with a positive, outgoing, informative attitude .... Personal lives will not be discussed with customers. We want to create a happy, positive, desirable environment for the customer without burdening them with personal stresses.

See Exhibit No. 27.

VII

Sometime in January 2015, the employer became aware of claimant's employment-related Facebook postings. Claimant posted that he had not had a raise since 1998 and that he was unhappy with his schedule. Claimant's Facebook postings were public. Copies of the claimant's Facebook postings are not part of the hearing record.

VIII

Claimant had been warned by the employer about his Facebook postings on at least three prior occasions: on or about November 10, 2012, when claimant posted that he was not getting enough hours; and on or about March 17 and April 5, 2013 respectively, when claimant posted complaints about the employer and/or the employer policies. After each posting, claimant was told that he was in violation of the employer policies.

IX

The interested employer in this case is subject to the provisions of the National Labor Relations Act ("NLRA" or "Act"), 29 U.S.C. §§ 151-169. *See* 29 U.S.C. § 152(2). Claimant is a covered employee under the NLRA. *See* 29 U.S.C. § 152(3).

ISSUES PRESENTED

I

Should claimant be disqualified from benefits pursuant to RCW 50.20.066(1) for misconduct as more particularly defined in RCW 50.04.294?

II

Is claimant eligible for benefits during the weeks at issue under RCW 50.20.010(1)(c)?

CONCLUSIONS OF LAW

I

As claimant was discharged, this case is adjudicable pursuant to RCW 50.20.066(1), which provides for disqualification from unemployment benefits if a claimant has been discharged for misconduct connected with his or her work. Misconduct includes willful or wanton disregard of an employer's rights, title, and interest; deliberate violations or disregard of standards of behavior that the employer may rightfully expect; carelessness or negligence that causes or would likely cause serious bodily harm to the employer or a fellow employee; or carelessness or negligence of such degree or recurrence as to show an intentional or substantial disregard of the employer's interest. *See* RCW 50.04.294(1). Misconduct also includes the 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. *See* RCW 50.04.294(2)(f). A claimant will be found to have known about a company rule if the claimant was provided an employee orientation on company rules; if the claimant was provided a copy or summary of the rule in writing; or if the rule is posted in an area that is normally frequented by the claimant and the claimant's co-workers, and the rule is conveyed or posted in a language that the claimant understands. *See* WAC 192-150-210(5).

II

***3** Misconduct may not be inferred or presumed. *See* In re Hawkins, Empl. Sec. Comm'r Dec.2d 465 (1978); In re Carpenter, Empl. Sec. Comm'r Dec.2d 176 (1976). Rather, the employer has the burden of establishing misconduct by a preponderance of evidence. *See* In re Andrus, Empl. Sec. Comm'r Dec.2d 960 (2010); In re Dow, Empl. Sec. Comm'r Dec.2d 948 (2010); In re Verner, Empl. Sec. Comm'r Dec.2d 617 (1980); In re Hutcheson, Empl. Sec. Comm'r Dec.2d 268 (1976). A preponderance of evidence is that evidence which, when fairly considered, produces the stronger impression, has the greater weight, and is the more convincing as to its truth when weighed against the evidence in opposition thereto. *See* WAC 192-100-065; *see also* Yamamoto v. Puget Sound Lumber Co., 84 Wash. 411, 417, 146 P. 861 (1915).

III

In this case, the employer discharged claimant for violations of the policies cited above in Findings of Fact Nos. IV, V, and VI. It is not clear from the record which specific policies the employer considered claimant to have violated. Regardless, we must first resolve whether the policies were reasonable.

IV

A company rule is reasonable if (1) it is related to the claimant's job duties; (2) it is a normal business requirement or practice for the claimant's occupation or industry; or (3) it is required by law or regulation. *See* WAC 192-150-210(4). We evaluate the interested employer's social media policy in accordance with these three elements. First, since employees are forbidden from using social media while on duty, it is clear that the employer's social media policy is intended to cover

an employee's conduct while off duty. *See* Exhibit No. 24, Policy No. 2. As such, the policy set out above in Finding of Fact No. V does not relate to the employee's job duties. Second, a restriction of posting on social media while off duty was not shown at hearing to be a business requirement or practice for the claimant's occupation or industry. Third, as to whether the employer's social media policy is required by law or regulation, we find the legal authority and guidance set out by the National Labor Relations Board ("NLRB") to be instructive.

V

Section 8(a)(1) of the NLRA makes it an unfair labor practice for an employer ""to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed" in Section 7 of the Act. *See* 29 U.S.C. § 158(a)(1). For example, an employer may not "[p]romulgate, maintain, or enforce work rules that reasonably tend to inhibit employees from exercising their rights under the Act." *See* Interfering with Employee Rights (Section 7 & 8(a)(1)), National Labor Relations Board, http://www.nlrb.gov/rights-we-protect/whats-law/employers/interfering-employee-rights-section-7-8a1 (last visited July 5, 2016).

VI

Moreover, a recent NLRB Office of the General Counsel Memorandum states, in pertinent part, that:
***4** Employees also have the Section 7 right to criticize or protest their employer's labor policies or treatment of employees. Thus, rules that can reasonably be read to prohibit protected concerted criticism of the employer will be found unlawfully overbroad. For instance, a rule that prohibits employees from engaging in "disrespectful," "negative," "inappropriate," or " "rude" conduct towards the employer or management, absent sufficient clarification or context, will usually be found unlawful. *See* Casino San Pablo, 361 NLRB No. 148, slip op. at 3 (Dec. 16, 2014).

See NLRB General Counsel Memorandum GC 15-04 (March 18, 2015) at 7.

VII

The Memorandum cited above sets out the following examples of unlawfully overbroad rules. These examples are deemed overbroad and, thus, unlawful, because employees reasonably would construe them to ban protected criticism or protests regarding their supervisors, management, or the employer in general:
· "[Be] respectful to the company, other employees, customers, partners, and competitors."

· Do "not make fun of, denigrate, or defame your co-workers, customers, franchisees, suppliers, the Company, or our competitors."

· "Be respectful of others and the Company."

· No "[d]efamatory, libelous, slanderous or discriminatory comments about [[the Company], its customers and/or competitors, its employees or management.["]

See NLRB General Counsel Memorandum GC 15-04 (March 18, 2015) at 7.

VIII

An employee's right to criticize an employer's labor policies and treatment of employees includes the right to do so in a public forum. *See* Quicken Loans, Inc., 361 NLRB No. 94, slip op. at 1 n.1 (Nov. 3, 2014). The NLRB determined that

the following rules were unlawfully overbroad because they reasonably could be read to require employees to refrain from criticizing the employer in public:

· "Refrain from any action that would harm persons or property or cause damage to the Company's business or reputation."

· "[I]t is important that employees practice caution and discretion when posting content [on social media] that could affect [the Employer's] business operation or reputation."

· Do not make "[s]tatements []that damage the company or the company's reputation or that disrupt or damage the company's business relationships."

· "Never engage in behavior that would undermine the reputation of [the Employer], your peers or yourself."

See NLRB General Counsel Memorandum GC 15-04 (March 18, 2015) at 8.

IX

An employee is protected under the NLRA even if the employee's criticism of the employer is false or defamatory. A rule prohibiting false or defamatory statements is unlawful unless it specifies that *only maliciously* false statements are prohibited. A rule that fails to define the areas of impermissible conduct in a manner that is clear to employees is also unlawful. *See* Casino San Pablo, 361 NLRB No. 148, slip op. at 5 (Dec. 16, 2014). However, a rule whose purpose is to prevent incivility and rudeness to co-workers, clients, or competitors, but does not mention the employer or management, will generally be found lawful. *See* Copper River of Boiling Springs, LLC, 360 NLRB No. 60 (Feb. 28, 2014).

X

***5** Applying the principles outlined above to the present case, we now evaluate whether the employer policies at issue here inhibit the employees' right to engage in concerted criticism of the employer. One of the employer policies explicitly prohibits "discussion that is detrimental in any way to the business or any person." *See* Exhibit No. 23. This policy is contrary to employees being allowed to criticize their employer as part of their Section 7 rights, which employees sometimes exercise by appealing to their co-workers or the public in order to gain support. *See* Quicken Loans, 361 NLRB No. 94. The interested employer further attempts to control the content of the employees' discussions with these policy provisions: "Before publishing your status on Facebook, Twitter or Myspace, please strongly consider what you have written," *see* Exhibit No. 25; "Personal lives will not be discussed with customers," *see* Exhibit No. 27; and "Keep it positive, and keep it clean, or send a private message please." *See* Exhibit No. 25. Another employer policy states: "Employees are to be *honest and loyal* in words and actions." *See* Exhibit No. 23 (emphasis added). This policy lacks any specificity regarding impermissible conduct and is contrary to the NLRB decision holding that the NLRA protects even false, but not maliciously false, statements by employees. *See* Casino San Pablo, 361 NLRB No. 148. Finally, the portion of the employer policy that requires employees "to act professionally and not verbally dress down a co-worker, management or the business," is impermissible because it lacks sufficient clarification or context and refers to "management" and "the business," rather than just co-workers or customers. *See* Copper River of Boiling Springs, 360 NLRB No. 60. Employees reasonably could construe this policy to ban protected criticism or protests regarding their supervisors, management, or the employer in general.

XI

We conclude that an employee reading the restrictions stated in the employer policies could reasonably construe them as restricting his or her rights to engage in protected concerted activities under Section 7 of the NLRA. Accordingly, the portions of the employer policies discussed herein are unlawfully overbroad and, thus, are in violation of Section

8(a)(1) of the NLRA. Consequently, we cannot say that the employer policies at issue here are reasonable under WAC 192-150-210(4). Without reasonable employer policies or rules related to the conduct for which claimant was discharged, misconduct as defined at RCW 50.04.294(2)(f) cannot be established.

XII

Next, we consider whether claimant's conduct was a deliberate violation of a standard of behavior that the employer had the right to expect of claimant. *See* RCW 50.04.294(1)(b). Employees have a right, under Section 7 of the NLRA, to discuss their wages and other terms and conditions of employment. Although claimant's Facebook postings are not part of the record, other competent evidence of record indicates that claimant's social media postings generally discussed his dissatisfaction with the terms and conditions of his employment, *i.e.*, his wages and assigned shifts. Thus, these postings constitute protected activities under Section 7 of the NLRA and, as such, they cannot constitute a deliberate violation of a standard of behavior that the employer had the right to expect. Misconduct as defined in RCW 50.04.294(1)(b) is, therefore, not established.

XIII

***6** Because the employer did not appear at hearing, we have no other basis to consider whether claimant's conduct constituted statutory misconduct. As such, we must conclude that claimant is not subject to disqualification pursuant to RCW 50.20.066(1) on the basis of the job separation that is before us.

XIV

We note that this case is distinguishable from In re Owens, Empl. Sec. Comm'r Dec.2d 989 (2012), cited by the administrative law judge in the Initial Order. The claimant in Owens had also expressed frustration with his employer on social media. However, that claimant's postings did not discuss the terms and conditions of employment but, rather, they discussed the work ethic of his co-workers and lack of support from management. As such, his social media postings had an attenuated connection with the terms and conditions of his employment, and were primarily aimed at his co-workers. Such is not the case in the matter before us. Claimant's social media postings are specifically about the terms and conditions of his employment and, as discussed above, are protected under Section 7 of the NLRA.

XV

As for claimant's availability for work pursuant to RCW 50.20.010(1)(c), based on the content of the Petition for Review, we remand this issue to the Department for its investigation.

Now, therefore,

IT IS HEREBY ORDERED that the April 8, 2015, Initial Order of the Office of Administrative Hearings is **SET ASIDE** on the issue of job separation. Claimant is not disqualified from benefits pursuant to RCW 50.20.066(1). The Initial Order is **VACATED** on the issue of availability. The matter is **REMANDED** to the Department for an investigation of claimant's availability pursuant to RCW 50.20.010(1)(c) during the weeks at issue. *Employer*: If you are a base year employer for this claimant, or become one in the future, your experience rating account will be charged for any benefits paid on this claim or future claims based on past wages you paid to this individual. If you are a local government or reimbursable employer, you will be directly liable for any benefits paid. Benefit charges or liability will accrue unless this decision is set aside on appeal. *See* RCW 50.29.021. If you pay taxes on your payroll, any charges for this claim could be used to calculate your future tax rates. *Notice to claimant*: Your former employer has the right to appeal this decision. If this decision is reversed because it is found you committed misconduct connected with your work, all benefits paid as a result of this decision will be an overpayment. State law says you will not be eligible for waiver of the overpayment, nor

can the Department accept an offer of compromise (repayment of less than the total amount paid to you). The benefits must be repaid even if the overpayment was not your fault. *See* RCW 50.20.066(5).

Dated at Olympia, Washington, May 29, 2015.

Rhonda J. Brown
Review Judge
Commissioner's Review Office

RECONSIDERATION

*7 Pursuant to RCW 34.05.470 and WAC 192-04-190 you have ten (10) days from the mailing and/or delivery date of this decision/order, whichever is earlier, to file a Petition for Reconsideration. No matter will be reconsidered unless it clearly appears from the face of the Petition for Reconsideration and the arguments in support thereof that (a) there is obvious material, clerical error in the decision/order or (b) the petitioner, through no fault of his or her own, has been denied a reasonable opportunity to present argument or respond to argument pursuant to WAC 192-04-170. Any request for reconsideration shall be deemed to be denied if the Commissioner's Review Office takes no action within twenty (20) days from the date the Petition for Reconsideration is filed. A Petition for Reconsideration together with any argument in support thereof should be filed by mailing or delivering it directly to the Commissioner's Review Office, Employment Security Department, 212 Maple Park Drive, Post Office Box 9555, Olympia, WA 98507-9555, and to all other parties of record and their representatives. The filing of a Petition for Reconsideration is not a prerequisite for filing a judicial appeal.

JUDICIAL REVIEW

If you are a party aggrieved by the attached Commissioner's decision/order, your attention is directed to RCW 34.05.510 through RCW 34.05.598, which provide that further appeal may be taken to the Superior Court within thirty (30) days from the date of mailing as shown on the attached decision/order. If no such appeal is filed, the attached decision/order will become final.

If you choose to file a judicial appeal, you must both:

Timely file your judicial appeal directly with the Superior Court of the county of your residence or Thurston County. If you are not a Washington state resident, you must file your judicial appeal with the Superior Court of Thurston County. *See* RCW 34.05.514. (The Department does not furnish judicial appeal forms.) AND

Serve a copy of your judicial appeal by mail or personal service within the thirty (30) day judicial appeal period on the Commissioner of the Employment Security Department, the Office of the Attorney General, and all parties of record.

The copy of your judicial appeal you serve on the Commissioner of the Employment Security Department should be served on or mailed to: Commissioner, Employment Security Department, Attention: Agency Records Center Manager, 212 Maple Park Drive, Post Office Box 9046, Olympia, WA 98507-9046. To properly serve by mail, the copy of your judicial appeal must be received by the Employment Security Department on or before the thirtieth (30^{th}) day of the appeal period. *See* RCW 34.05.542(4) and WAC 192-04-210. The copy of your judicial appeal your serve on the Office of the Attorney General should be served on or mailed to the Office of the Attorney General, Licensing and Administrative Law Division, 1125 Washington Street SE, Post Office Box 40110, Olympia, WA 98504-0110.

Footnotes

1 Section 7 of the NLRA states that:

Employees shall have the right to self organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or *other mutual aid or protection*, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3) section 158(a)(3) of this title]. (Emphasis added.)
See 29 U.S.C. § 157.

Empl. Sec. Comm'r Dec.2d 999 (WA), 2015 WL 12573385

End of Document

OFFICE RECEPTIONIST, CLERK

From: OFFICE RECEPTIONIST, CLERK
Sent: Thursday, October 06, 2016 5:00 PM
To: 'Joy Lockerby'
Cc: Thomas Jarrard, Attorney at Law; Harris, Leah (ATG)
Subject: RE: For filing - Petitioner's Statement of Additional Authority, No. 943429-1

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Supreme Court Clerk's Office

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From: lockerbyjoy@gmail.com [mailto:lockerbyjoy@gmail.com] **On Behalf Of** Joy Lockerby
Sent: Thursday, October 06, 2016 4:59 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Cc: Thomas Jarrard, Attorney at Law <tjarrard@att.net>; Harris, Leah (ATG) <LeahH1@atg.wa.gov>
Subject: For filing - Petitioner's Statement of Additional Authority, No. 943429-1

Dear Clerk and Counsel,

For filing is Petitioner's Statement of Additional Authority for case No. 943429-1, Sarah Christner v. State of Washington Department of Employment Security.

Sincerley,

Joy Lockerby
WSBA 44343

Joy Lockerby, Attorney at Law
Lockerby Law, PLLC
1100 Dexter Ave. N, Suite 100
P.O. Box 19444
Seattle, WA 98109
Phone: (206) 854-2869
Joy@LockerbyLaw.com
www.LockerbyLaw.com
Employment Law | Unemployment Law

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