

Court of Appeals' No. 33284-1 II



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**IN THE COURT OF APPEALS, DIVISION II,  
OF THE STATE OF WASHINGTON**

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CARL ANDERSON,

Appellant,

vs.

EMPLOYMENT SECURITY DEPARTMENT OF THE STATE OF  
WASHINGTON,

Respondent.

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**AMENDED OPENING BRIEF OF APPELLANT**

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## TABLE OF CONTENTS

I. ASSIGNMENTS OF ERROR .....	1
A. Assignments of Error .....	1
B. Issues on Appeal .....	1
II. STATEMENT OF THE CASE .....	2
A. Statement of Facts .....	2
B. Procedural History .....	14
III. ARGUMENT .....	16
A. Standard of Appellate Review .....	16
B. “Misconduct” Defined .....	18
C. “Harm to Employer” .....	24
IV. CONCLUSION .....	29

## TABLE OF AUTHORITIES

### CASES

<i>Ciskie v. Department of Employment Security</i> , 35 Wn.App. 72, 664 P.2d 1318 (1983).....	20,21,22,25
<i>Galvin v. Employment Sec. Dept.</i> , 87 Wn. App. 634, 643, 942 P.2d 1040 (1997).....	19
<i>Hamel v. Employment Sec. Dep't</i> , 93 Wn.App. 140, 146 - 147, 966 P.2d 1282 (1998).....	20,23
<i>Haney v. Employment Sec. Dep't</i> , 96 Wn.App. 129, 146, 978 P.2d 543 (1999).....	19, 20, 25,26
<i>Henson v. Employment Sec. Dep't</i> , 113 Wn.2d 374, 779 P.2d 715 (1989).....	18
<i>Johnson v. Department of Empl. Sec.</i> , 112 Wn.2d 172, 769 P.2d 305 (1989).....	18
<i>Leibbrand v. Employment Sec. Dep't</i> , 107 Wn.App. 411, 27 P.3d 1186 (2001).....	25
<i>Pierce County Sheriff v. Civil Service Com'n of Pierce County</i> , 98 Wn.2d 690, 658 P.2d 648 (1983).....	18
<i>Shaw v. Department of Empl. Sec.</i> , 46 Wn.App. 610, 731 P.2d 1121 (1987).....	17
<i>Tapper v. State Employment Sec. Dept.</i> , 122 Wn.2d 397, 858 P.2d 494 (1993).....	17, 18, 19
<i>Wilson v. Employment Sec. Dep't</i> , 87 Wn. App. 197, 202, 941 P.2d 671 (1997).....	18

### STATUTES

RCW 34.05.570 (3).....	17
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RCW 50.04.293.....	18
RCW 50.20.060.....	21

**I. ASSIGNMENTS OF ERROR/ ISSUES ON APPEAL**

***A. Assignments of Error***

1. It was error to uphold the denial of Appellant’s unemployment compensation benefits on the basis of “misconduct” where the unchallenged findings of the Administrative Law Judge demonstrated repeated attempts on the part of the Appellant to comply with the regulations of his employer.
  
2. It was error to uphold the denial of Appellant’s unemployment compensation benefits on the basis of “misconduct” where the unchallenged findings of the Administrative Law Judge demonstrated no intent on the part of the Appellant to cause injury or harm to his employer, or that the Appellant acted with “reckless disregard” of the interests of his employer.
  
3. It was error to uphold the denial of Appellant’s unemployment compensation benefits on the basis of “harm” where the unchallenged Findings demonstrate no tangible evidence of harm caused to the employer.

***B. Issues on Appeal***

1. Whether it was error to uphold the denial of Appellant’s unemployment compensation benefits on the basis of “misconduct” to the employer where the record clearly indicated that the Appellant made repeated disclosures to his employer of a conflict of interest in accordance with the rules which required such disclosure, and where there was no showing that the Appellant acted with knowledge that his conduct would result in “serious injuries,” or with “reckless disregard” of its probable consequences.

2. Whether it was error to uphold the denial of Appellant's unemployment compensation on the basis of "harm" where there was no evidence of "actual detriment to the employer's operations" that could be "objectively demonstrated."
3. Whether it was error to uphold the denial of Appellant's unemployment compensation on the basis of "harm" despite the undisputed Findings of the Administrative Law Judge that it was "impossible" or "virtually impossible" to determine whether the conduct of the Appellant resulted in any harm and despite a finding that the supposed harm upon which the disqualification was based was a "possibly never known potential."

## II. STATEMENT OF THE CASE

### A. *Statement of Facts*

Carl Anderson's employment with the Property Services Division of King County was terminated in May, 2003.<sup>1</sup> King County alleged that Mr. Anderson failed to disclose a conflict of interest and did not truthfully complete annual employment disclosure reports.

#### a. *Mr. Anderson's Employment Background With King County*

Mr. Anderson was originally hired in July, 1996 as a temporary real estate consultant with a status of that of a temporary employee of King County. The "temporary employee" status changed in April, 1998, when

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<sup>1</sup> See Administrative Record, Initial Order, (hereinafter "*Initial Order*"), Finding of Fact 27, p. 7.

he became a permanent employee.<sup>2</sup> Mr. Anderson described that as a “temporary employee” he would be paid on an hourly basis and job-by-job basis on an “as-needed” basis only. At the time he was hired, Mr. Anderson made it clear to his supervisor, Mr. Preugshat, that he planned to continue with other business ventures that he was involved in, including his attempts to develop and operate senior assisted living throughout the state of Washington, and especially in Pierce and King County. Mr. Anderson testified that he had no expectation of continuing employment until when he was hired full time in April, 1998.<sup>3</sup>

The change to Mr. Anderson’s status as a “full time employee” came about because King County in early 1998 could no longer pay Mr. Anderson as a temporary consultant and could only retain his services if he were to become an employee willing to work full time. Mr. Anderson agreed to become a County employee with his supervisor’s knowledge and agreement that he could continue with his on-going work and involvement, including his professional and personal relationships, in the senior assisted living housing industry.<sup>4</sup>

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<sup>2</sup> *Initial Order*, Finding of Fact 1, p. 2.

<sup>3</sup> See Administrative Record, Commissioner’s Record, (hereinafter “Transcript”) at 238 and 239.

<sup>4</sup> Transcript at 255-256.

**b.     *The Washington Center Building***

In 1996, King County owned a building known as the Washington Center Building. The building was deemed to be a “surplus” property, meaning that pursuant to County ordinance, King County made the determination to sell the building for use as affordable housing.<sup>5</sup> Mr. Anderson was placed in the position as the “Project Manager” for the sale of the property. The sale process would involve issuing a Request for Proposal (“RFP”) to the public, choosing the best proposal candidate (by way of a Review Board), negotiating sales terms with the successful candidate, and the resulting sale.<sup>6</sup>

The sale process for the property began in late 1996 and continued to completion until closing in August 1999. The sale process consisted of the following significant activities:

- Declaring the property to be “surplus” for the sale consistent with King County Ordinance for the sale of surplus properties for use as affordable housing.
- Preparing the Request for Proposal “RFP” document with the assistance of King County staff, City of Seattle staff

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<sup>5</sup> *Initial Order*, Finding of Fact 7, p. 3.

<sup>6</sup> *Initial Order*, Finding of Fact 8, p. 3.

and representatives from the communities in which the property was located.

- Issuing a RFP to the public. (The RFP for this property was issued in August 1997).
- Receipt of responses to the RFP. (On November 10, 1997, King County received four responses to the RFP. The bids ranged from \$100,000.00 to \$1.8 million, along with different plans for reuse of the building for affordable housing.)
- Establishing an independent RFP Review Board. The RFP Review Board members were made up of King County employees, King County Council staff, representatives from the City of Seattle and members of the community in which the property was located. (In December, 1997, the Board reviewed each proposal, ranked them and voted as to which proposal it would recommend for approval. In January, 1998 the Board's recommendations were accepted by King County Executive and the King County Council.)
- Negotiating sales terms with the successful bidder in accordance with the overall terms and conditions approved

in the sale Ordinance - all of which were included in the purchase and sale agreement. (This process lasted from January 1998 to August 1998, culminating in a signed agreement between King County and WCB Properties, LLC.)

- Closing the transaction, which occurred with Faerland Terrace LLC, as the assignee of WCB Properties, LLC, in September 1999.
- Post Closing oversight. (The condition to sale called for the buyer, Faerland Terrace, LLC, to file annual compliance reports and meet certain performance thresholds over a 20-year period.)

Mr. Anderson testified that he and two individuals, Vera Taylor and Ginger Marshall, had earlier become interested in acquiring and developing senior housing. Mr. Anderson, Ms. Marshall and Ms. Taylor had met through their work with the Hillhaven Corporation. Their initial plan was to acquire three to five buildings and have another company operate the buildings until they could get to “the point of size and dimension” that they could hire sufficient people to operate the buildings on their own. This “plan” *predated* the Washington Center Building

RFP.<sup>7</sup>

The RFP for the Washington Center Building was sent out to the public in August, 1997.<sup>8</sup> Mr. Anderson testified that at the time the bids were coming in, he was not certain of his long term employment with the county. This was one of the reasons that he was doing other consulting work and “looking for anything out there that would bring some money.”<sup>9</sup>

**c. *Anderson’s Disclosures of His Conflict of Interest***

At the outset, Mr. Anderson disclosed to his supervisors (Tim Clancy and David Preugshat) that the Washington Center Building had once been owned by The Hillhaven Corporation -- a Tacoma based long-term care company -- and that Mr. Anderson had not only worked for Hillhaven in its acquisition and development division, but that Hillhaven had previously sold the Washington Center Building to the County. Mr. Anderson’s supervisors opined that they had no concerns with Mr. Anderson's disclosures of a potential for a conflict of interest.<sup>10</sup>

It was also during the early stages of the RFP process that Mr.

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<sup>7</sup> Transcript at 243.

<sup>8</sup> *Id.*

<sup>9</sup> Transcript at 253.

<sup>10</sup> Transcript at 241

Anderson *once again* told his supervisors that he was “getting uncomfortable” with his involvement in the RFP process because “a lot of people coming in looking at the building were people who I knew.”<sup>11</sup> (Mr. Anderson’s supervisor, Mr. Preugshat, had actually encouraged Mr. Anderson to make contact with people that Mr. Anderson knew in the health care industry to “get some interest” in the property.<sup>12</sup>)

Mr. Anderson told Ms. Marshall and Ms. Taylor of the RFP for the Washington Center Building. Mr. Anderson, Ms. Marshall and Ms. Taylor and other former business associates from Hillhaven had been looking at various properties for developments as assisted senior living facilities before and during this time.<sup>13</sup> Mr Anderson testified that he instructed Ginger Marshall to contact CT Corporations Systems, so that CT Corporations Systems could assist Ms. Marshall in forming an LLC for purposes of submitting a response to the RFP.<sup>14</sup> *Mr. Anderson never acquired a membership or ownership interest in the LLC.*<sup>15</sup> *(In fact, in 200 both Marshall and Taylor filed a private business lawsuit against Mr.*

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<sup>11</sup> *Initial Order*, Findings of Fact 16, pp. 4 - 5.

<sup>12</sup> Transcript at 245.

<sup>13</sup> Transcript at 246-257.

<sup>14</sup> Transcript at 248

<sup>15</sup> Transcript at 250; 257; 258.

*Anderson alleging that he was neither in partnership with them nor a member of the LLC.)*<sup>16</sup>

Mr. Anderson had, during this time, and *prior* to the time that bids were received by the County, sought the advise of an attorney to obtain counsel concerning his position of employment and potential conflicts of interest. Mr. Anderson actually knew individuals other than Marshall/Taylor who had submitted bids. Mr. Anderson testified that the attorney told him to “stay out” of the decision making process. When bids were submitted in response to the RFP he disclosed to his supervisors, Dave Preugshat and Tim Clancy that he had “professional, personal relationships” with interested parties and that he “didn’t want to be in the decision making process.”<sup>17</sup> Mr. Anderson testified that “in my mind I had a conflict of interest at that time, I was disclosing it to Dave and Tim.”<sup>18</sup>

On November 10, 1997, four bids were submitted to the County for the purchase of the buildings. The bids ranged from \$100,000 to \$1.8 million. Two of the four proposals wanted to re-use the building for assisted living housing. ***Mr. Anderson testified that no information***

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<sup>16</sup> *Initial Order*, Findings of Fact 16, pp. 4 - 5.

<sup>17</sup> Transcript at 251 - 253.

<sup>18</sup> Transcript at 264.

*obtained from the county was passed in either Ms. Marshall or Ms. Taylor during their preparation of the RFP: “there was no information from the county I could (unin) because they were looking at an assisted living facility and the county had absolutely nothing or any knowledge about assisted living businesses or facilities.”*<sup>19</sup>

After the bids were received, the King County housing liaison officer, Jean Carpenter, formed an RFP Review Board. At the first meeting of the Board, Mr. Anderson disclosed that he had a conflict of interest with two of the four bidders (WCB Properties, LLC, and Columbia, LLC). He said that he could not be a member of the Board nor could he vote on the proposals.<sup>20</sup> *Mr. Anderson did not make recommendations or provide guidance to the board, the county counsel, or the County Executive.*<sup>21</sup>

Tim Clancy confirmed in his testimony that Mr. Anderson disclosed that he knew individuals responsible for two of the four RFP Proposals and that Mr. Anderson told him that he “needed to extract

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<sup>19</sup> Transcript at 256.

<sup>20</sup> Transcript at 262-263.

<sup>21</sup> Transcript at 269.

himself from any decision making process.”<sup>22</sup> Mr. Preugshat testified that Mr. Anderson disclosed that he knew people that were the principles of WCB properties (the Marshall/Taylor LLC), that he met occasionally socially with some of the principles, and that he knew people involved with a different entity that was submitting a proposal.<sup>23</sup>

As a result of Mr. Anderson’s disclosures, Mr. Clancy confirmed that Mr. Anderson was not a member of the [RFP] selection committee, which ranked that various proposals for the project, nor was he involved in the subsequent negotiations of the Purchase and Sale Agreement.”<sup>24</sup> Mr. Anderson testified that he disclosed to the members of the review board that had been appointed to review the RFP’s that he had a conflict of interest with two of the four proposals and that he named the two proposals. Mr. Anderson testified that he could not vote on the proposals as a result and that the only thing he could do, according to Mr. Preugshat, was “just provide information to and from Property Services when it was applicable.”<sup>25</sup> Mr. Preugshat confirmed that Mr. Anderson was not

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<sup>22</sup> Transcript at 216.

<sup>23</sup> Transcript at 182. Mr. Prugschat’s testimony was that “When proposals were received, Mr. Anderson appropriately came forward and notified Mr. Clancy and me that he, Mr. Anderson, had worked with principals of two of the proposers.”

<sup>24</sup> Transcript at 223.

<sup>25</sup> Transcript at 262-263.

involved as a voting member of the review panel that rated the RFP's.<sup>26</sup>

- d. ***The Washington Center Building is Sold to the Marshall/Taylor LLC at a Price \$800,000.00 Higher than the Next Highest Bidder.***

Ultimately, the Marshall/Taylor LLC was the successful RFP applicant with a bid that was \$800,000.00 *higher* than the next bidder.<sup>27</sup>

Mr. Preugshat testified that

- Mr. Preugshat knew of nothing that Mr. Anderson did to influence the outcome of the RFP;
- Mr. Anderson did nothing to his knowledge that was detrimental to the position of the county with respect to the RFP process or the eventual sale of the property; and
- Mr. Anderson “did everything” to “support a strong county position.”<sup>28</sup>

Purchase and Sale negotiations commenced following the award of the bid. Mr. Anderson did not participate in the purchase and sale negotiations between the successful bidder and the County.<sup>29</sup> Mr. Clancy

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<sup>26</sup> Transcript at 182.

<sup>27</sup> Transcript at 270.

<sup>28</sup> Transcript at 181-182.

<sup>29</sup> Transcript at 272.

testified that from the point in time between the selection of WCB as the successful bidder and the execution of the Purchase and Sale Agreement, Mr. Anderson's role was that of "verifying and collecting information only."<sup>30</sup> Thereafter, Mr. Preugshat testified that once the real estate transaction actually closed, Mr. Anderson had no further involvement with the project.<sup>31</sup>

King County requested employees such as Mr. Anderson to complete annual "employment disclosure reports". The report required the employee to identify potential conflicts with respect to instances where the employee had "decision making" authority. Mr. Anderson possessed no decision making authority with respect to the Washington Center Building, a fact that was confirmed by the county's own witnesses.<sup>32</sup> Moreover, Mr. Anderson had also declared a conflict of interest and disqualified himself in accordance with the King County Employee Code of Ethics and applicable Ethics Board advisory opinions. When Mr. Anderson subsequently (i.e., post closing) commenced to aid in the development of the project, there was no involvement on the part of the County that came

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<sup>30</sup> Transcript at 212.

<sup>31</sup> Transcript at 179.

<sup>32</sup> Transcript at 223; 212; 262; 182.

within the ambit of the disclosure report – stated differently, the deal had closed and the County’s involvement, for all practical purposes, was done.

**B. Procedural History**

This matter proceeded to hearing before ALJ Michelle Whetsel on September 4, 2003 and thereafter was heard by ALJ Cindy L. Burdue on December 10 and 11, 2003. Judge Burdue issued her findings and order on December 23, 2003. The lack of *any* harm to the employer was confirmed by Judge Burdue in Findings of Fact 30 and 29.<sup>33</sup> In Finding of Fact No. 30, Judge Burdue found that there was no evidence that the access to any of the information obtained by Mr. Anderson caused *any* financial harm to his employer, King County. Moreover, in Finding of Fact No. 29,<sup>34</sup> Judge Burdue observed that

It can never be known what, if any, affect the Claimant’s insider knowledge of the WCB deal had on any of the other bidders or how it might have influenced the Review Board’s choice of WCB as the winning bid.

Mr. Anderson thereafter timely filed an appeal of Judge Burdue’s ruling. During the pendency of that appeal, Mr. Anderson and King County executed a Settlement Agreement wherein the County agreed to waive its

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<sup>33</sup> *Initial Order*, p. 7.

<sup>34</sup> *Id.*

right to respond or to any further challenge and request for relief made by Mr. Anderson as to the denial of his unemployment compensation benefits. On February 20, 2004, Judge Burdue's findings and order were affirmed by Commissioner Anthony J. Philippsen, Jr.<sup>35</sup>

Mr. Anderson then timely appealed this matter to Pierce County Superior Court under Cause No. 04 2 06165 8. On April 29, 2005 oral argument was presented to the Honorable Kitty Ann Van Doorninck. At oral argument, the Department conceded that was "virtually impossible in some sense here to determine what damage was done by Mr. Anderson's refusal to be fully forthcoming about his relationship with this WCB properties."<sup>36</sup> The Department argued

So it is our position that where you have a *potential* and *possibly never known potential* for what other potential bidders may have shied away from making a bid or would be involved in the process, we're dealing with a potential which we believe is more than just imaginary or more than theoretical.<sup>37</sup> (emphasis added).

Judge Van Doorninck upheld the Department's decision, stating in her oral decision that "[m]aybe they can't demonstrate a financial

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<sup>35</sup> See Administrative Record, Decision of Commissioner, pp. 1 - 4.

<sup>36</sup> See Superior Court Verbatim Report of Proceedings, (Hereinafter "VRP") @ p. 12, ll. 1- 4.

<sup>37</sup> VRP @ p. 13, ll. 17- 22.

detriment, but I still think there is a detriment to process and to the integrity of the system.”<sup>38</sup> Judge Van Doorninck confirmed the ruling of the Department on April 29, 2005.<sup>39</sup> Mr. Anderson filed the instant appeal on May 24, 2005.

### **III. ARGUMENT**

Carl Anderson came forward and made repeated disclosure’s to his supervisors and co-workers concerning his conflict of interest. As a result, he was removed from any active participation in the sale of the Washington Center Building. Despite this, and despite the fact that no proof of any tangible harm has ever been demonstrated by anyone, Mr. Anderson’s unemployment benefits were denied. As demonstrated below, this was error.

#### ***A. Standard of Appellate Review***

The Washington Administrative Procedure Act (“WAPA”) allows a reviewing court to reverse an administrative decision when (1) the administrative decision is based on an error of law; (2) the decision is not based on substantial evidence; or (3) the decision is arbitrary or capricious.

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<sup>38</sup> VRP @ p. 17, ll. 13- 16.

<sup>39</sup> Clerk’s Papers 44 - 47.

RCW 34.05.570(3).<sup>40</sup> In reviewing administrative action, this court sits in the same position as the superior court, applying the standards of the WAPA directly to the record before the agency. *Shaw v. Department of Empl. Sec.*, 46 Wn.App. 610, 613, 731 P.2d 1121 (1987); *Tapper v. State Employment Sec. Dept.*, 122 Wn.2d 397, 402, 858 P.2d 494 (1993).

The characterization of "misconduct" as a mixed question of law and fact. Factual findings of an agency are entitled to the same level of deference which would be accorded under any other circumstance. The process of applying the law to the facts, however, is a question of law and is subject to *de novo* review. *Tapper v. State Employment Sec. Dept.*, Wn.2d at 397; (citing *Henson v. Employment Sec. Dep't*, 113 Wn.2d 374, 377, 779 P.2d 715 (1989) and *Johnson v. Department of Empl. Sec.*, 112 Wn.2d 172, 175, 769 P.2d 305 (1989)). The right to review includes a the

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<sup>40</sup>RCW 34.05.570(3) provides as follows:

- (3) Review of agency orders in adjudicative proceedings. The court shall grant relief from an agency order in an adjudicative proceeding only if it determines that:
- (a) The order, or the statute or rule on which the order is based, is in violation of constitutional provisions on its face or as applied;
  - (b) The order is outside the statutory authority or jurisdiction of the agency conferred by any provision of law;
  - (c) The agency has engaged in unlawful procedure or decision-making process, or has failed to follow a prescribed procedure;
  - (d) The agency has erroneously interpreted or applied the law;
  - (e) The order is not supported by evidence that is substantial when viewed in light of the whole record before the court, which includes the agency record for judicial review, supplemented by any additional evidence received by the court under this chapter;
  - (f) The agency has not decided all issues requiring resolution by the agency;

court's inherent power to review an agency's action to assure its compliance with applicable rules. *Pierce County Sheriff v. Civil Service Com'n of Pierce County*, 98 Wn.2d 690, 694, 658 P.2d 648 (1983).

**B. "Misconduct" Defined**

RCW 50.04.293 defines "misconduct" as an "employee's act or failure to act in willful disregard of his or her employer's interest where the effect of the employee's act or failure to act is to harm the employer's business." The effect of the statutory definition is to preserve eligibility for benefits where the employee merely makes an error of judgment.

*Wilson v. Employment Sec. Dep't*, 87 Wn. App. 197, 202, 941 P.2d 671 (1997).

In order to constitute misconduct, there must not only be a violation of a "reasonable, work-related rule," but the employee's conduct must be "intentional, grossly negligent, or continue to take place after notice or warnings." *Galvin v. Employment Sec. Dept.*, 87 Wn. App. 634, 643, 942 P.2d 1040 (1997)(see also *Haney v. Employment Sec. Dep't*, 96 Wn.App. 129, 146, 978 P.2d 543 (1999): "In the workers' compensation context, courts have concluded that the term "willful misconduct" means more than mere negligence. It "contemplates the intentional doing of something with knowledge that it is likely to result in serious injuries, or

with reckless disregard of its probable consequences.”” (citation omitted)).

Inherent in this analysis is the concept of fault: behavior that is mere incompetence, inefficiency, erroneous judgment, or ordinary negligence does not constitute misconduct for purposes of the statute. *Galvin v.*

*Employment Sec. Dept.*, 87 Wn. App. at 643; (citing *Tapper v.*

*Employment Sec. Dep't*, 122 Wn.2d 397, 858 P.2d 494 (1993)).

**“Willful Disregard”**

An employee acts with willful disregard when he or she

(1) is aware of his or her 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.

*Haney v. Employment Sec. Dep't*, 96 Wn.App. 129, 139, 978 P.2d 543

(1999). An employer cannot satisfy the “willful disregard” element

through evidence of an employee’s incompetence, inefficiency, erroneous judgment, or ordinary negligence. *Id.* (citing *Hamel v. Employment Sec.*

*Dep't*, 93 Wn.App. 140, 146 - 147, 966 P.2d 1282 (1998)).

There is a distinction between conduct that will support a discharge of employment and conduct that will support a denial of unemployment compensation. This distinction is illustrated in *Ciskie v. Department of*

*Employment Security*, 35 Wn.App. 72, 664 P.2d 1318 (1983), where the employee was denied benefits on the ground that he had been discharged for misconduct because he violated a company policy requiring an employee to notify a supervisor prior to leaving the work site. The discharge stemmed from the employee's decision to return home to respond to a family emergency. The employee, Mr. Ciskie, was unable to locate a supervisor prior to leaving. Ciskie knew that his supervisor had not yet arrived at work and that his supervisor's supervisor was on vacation. Ciskie asked a fellow employee to explain the emergency to his supervisor when the supervisor arrived. Also, as Ciskie was leaving, he searched the parking lot for a car belonging to yet another supervisor, but did not see it. Ciskie then left the work site without informing a supervisor. *Ciskie v. Department of Employment Security*, 35 Wn.App. at 75.

In its opinion reversing the denial of unemployment compensation under RCW 50.20.060, the court agreed with the employer that its policy requiring notification of supervisors before leaving the work site was reasonable, and found that the employer was clearly justified in terminating the employee for violating this policy. However, the court noted that "[g]ood cause is not to be equated with misconduct disentitling

the worker to benefits." *Id.* 35 Wn.App. at 76. The court found the employee's deviation from the proper notification procedure reflected poor judgment or negligence, but the fact that Ciskie had attempted to comply with the rule dispelled any inference that his conduct was motivated by bad faith or a lack of care about the consequences of his actions:

No doubt, Ciskie's deviation from the proper notification procedure reflected poor judgment or negligence. He did, however, attempt to comply with his employer's rule. These efforts were sufficient to dispel any inference that Ciskie's conduct was motivated by bad faith or that he simply did not care about the consequences of his actions. We note further, that although Portco's interests were adversely affected by Ciskie's conduct, this is not a situation where the deviation exposed the employer to the risk of immediate and substantial harm as where an employee leaves a dangerous instrumentality unattended or fails to complete a critical task. (citation omitted). In sum, we have reviewed the administrative record bearing in mind that conduct which will support a discharge will not necessarily support the denial of unemployment compensation. Looking to all the facts and circumstances as found by the Commissioner, we conclude that Ciskie's deviation from the proper notification procedure was not sufficiently culpable to constitute a willful or wanton disregard of his employer's interests. Accordingly, the Superior Court's affirmance of the Commissioner's decision is reversed.

*Ciskie v. State, Employment Sec. Dept.*, 35 Wn.App. at 76.

***Anderson's Conduct Did Not Meet the Level of Misconduct as Defined by Statute.***

In this case the record is clear that Mr. Anderson did not set out to

violate the law or the regulations of employer. As in *Ciskie*, Mr. Anderson made repeated attempts to comply with the county's disclosure requirements when he repeatedly informed his supervisors of his relationship with the applicants, (including the successful bidders), stating that he had both "professional" and "personal" relationships with the bidders. Mr. Anderson told his supervisors he was "uncomfortable with continued involvement." Mr. Anderson recused himself from the review board in charge of evaluation the RFP's and abstained from the negotiations resulting purchase and sale. The worst that could possibly be said is that Mr. Anderson acted ineffectually or negligently.<sup>41</sup> While incompetence or poor judgement may have been grounds for termination, they are not grounds under the statute for a finding of misconduct. *Hamel*, 93 Wn. App. at 146-47.

King County failed to satisfy two of the three elements necessary for a finding of willful disregard. Although the Mr. Anderson was aware

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<sup>41</sup> The same can be argued of Mr. Anderson's supervisors, who instead of removing him entirely from the RFP process insisted that he stay in the sale process and provide ministerial duties to the County. At no time did Mr. Anderson's supervisors inform King County officials, including the King County Council and the County Executive, that Mr. Anderson had declared a conflict of interest and disqualified himself from the transaction and decision making process. It was Mr. Anderson, not his supervisors, that stated clearly to the RFP Review Board that he had conflicts of interest and once again disqualified and recused himself from the transaction. Mr. Anderson told the Board that he could not be a member, vote or participate in their review proceedings, and he did not.

of the employer's concerns pertaining to disclosure of conflicts of interest (and did in fact repeatedly disclose a conflict interest), there was no evidence indicating he knew that his conduct jeopardized the country's position in selling surplus property or that he intended to jeopardize the county's position. (Moreover, as demonstrated below, Mr. Anderson's employer failed to produce *any evidence* of resulting damage or harm).

The record shows that Mr. Anderson sought advice and acted on advise from counsel in making repeated disclosures to ensure that his conflict was known by all and that he voluntarily reported his conflict of interest (on multiple occasions) to his supervisors rather than concealing the conflict. Testimony of Mr. Anderson's supervisors also demonstrate Mr. Anderson's attempts to act in the best interest of the county (i.e., Preugshat testimony; Exhibit #21). Under cross examination, Mr. Preugshat stated that Mr. Anderson's actions and comments were "supportive of a strong county position." At one point, an email from the Mr. Anderson even proposed exacting the sum of \$5,000.00 from WCB Properties in exchange for an additional extension of the purchase and sale agreement (Exhibit #17). Additionally, Mr. Preugshat admitted he had no knowledge of the Mr. Anderson influencing the outcome of the sale in any

way.<sup>42</sup> These events were indicative of an employee acting in the best interest of the county instead of contrary to such interests.

Although Mr. Anderson's employer introduced testimony wherein Mr. Anderson described his intent to keep his involvement with the project "secret," the time frame which pertained his involvement occurred *subsequent* to the closing of the sale – a time when there was no further involvement on the part of the county. At that time, with the involvement on the part of the county over, no conflicting interests existed between Mr. Anderson and his employer.

Given Mr. Anderson's repeated disclosures and abstention from participation, it was error to conclude Mr. Anderson's conduct was sufficiently culpable to constitute a willful or wanton disregard of his employer's interests. *See Ciskie v. State, Employment Sec. Dept.*, 35 Wn.App. at 76.

**C. "Harm to Employer"**

To show that misconduct resulted in harm to the employer, "actual detriment to the employer's operations must be objectively demonstrated." *Leibbrand v. Employment Sec. Dep't*, 107 Wn.App. 411, 426, 27 P.3d 1186 (2001) (quoting *Haney v. Employment Sec. Dep't*, 96 Wn.App. at

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<sup>42</sup> Transcript at 181.

141). While the harm need not be “tangible nor economic,” it must be more than “imaginary or theoretical.” *Id.* at 426 (quoting *Haney*, 96 Wn.App. at 141). Each case is to be examined each on its own facts. *Leibbrand*, 107 Wn.App. at 426.

In Judge Burdue’s Order of December 23, 2003, she concluded that the alleged harm to the county is that if other bidders *had discovered* Mr. Anderson’s conflict of interest the county process would have be “highly suspect” to other bidders.<sup>43</sup> The order goes on to assert that the situation was “potentially harmful to the County’s reputation for honest dealing.”<sup>44</sup> This is contrary to law; while the harm suffered need not be tangible or economic, the harm must be more than *imaginary or theoretical*. *Haney v. Employment Sec. Dep’t*, 96 Wn. App. 129.

Here, there is no objective evidence that the County was harmed in any matter. Cathy Brown, the County’s Facilities Management Division Director, testified that “it was not publicized that there was a conflict of interest, it wasn’t publicized to the general public or anything like that.”<sup>45</sup>

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<sup>43</sup> *Initial Order*, Conclusion of Law 11, p. 10.

<sup>44</sup> *Id.*

<sup>45</sup> Transcript at 33.

The County failed to present any evidence that its reputation<sup>46</sup> (and/or the surplus property sale process) was damaged or tarnished in any manner or even that word of the conflict even reached the public forum.

It is undisputed that the County took *no action* against those persons that it alleged Mr. Anderson had a conflict of interest with in the first place (i.e., Marshall, Taylor and WCB Properties, LLC). Mr. Anderson himself declared his conflict and disqualified himself from the transaction. If the County's allegations were correct, then under the Code of Ethics Ms. Marshall, Ms Taylor, WCB Properties, LLC, and Faerland Terrace, LLC, and its investors would have been deemed "accomplices." The County took no action to rescind or cancel the sale contract. The record shows that the Chairperson of the RFP Review Panel, Jean Carpenter, stated that "there was no conflict of interest" and that "she would not participate in what appeared to be someone's agenda against Mr. Anderson."

King County also alleged that morale in the office was damaged because of the Mr. Anderson's actions, thus resulting in employer harm. Although lowered office moral has before been grounds for a finding of harm to the employer, Mr. Preugshat testified that office morale was

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<sup>46</sup> Transcript at 181.

affected because office workers were upset that Mr. Anderson was on paid administrative leave and was being paid to do “nothing.”<sup>47</sup> Morale was not affected because of Mr. Anderson’s conflict of interest, but because other workers were upset based upon their perception that Mr. Anderson was being paid not to work. Mr. Anderson did not cause this resentment and even asked to stay on during the investigation and not be put on administrative leave.<sup>48</sup> To follow the logic that any administrative action that results in a lowering of office morale causes “harm to the employer,” then any time an employee is put on administrative leave pending an investigation, the employee could be terminated (and benefits denied) due to misconduct.

The record also shows that when questions (via a complaint from Ms. Marshall and Ms. Taylor) arose about a possible conflict of interest on the part of Mr. Anderson, Mr. Anderson requested that the complaint be sent to the King County Ombudsman pursuant to the King County Code of Ethics for an impartial and objective investigation of the allegations to determine whether there was reasonable cause to suspect that his recusal and disqualification resulted in a conflict of interest. Mr. Anderson’s

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<sup>47</sup> Transcript at 189 - 190.

<sup>48</sup> Transcript at 298.

supervisor denied the request. In denying Mr. Anderson's request, Mr. Preugshat stated in writing "that he would not send any thing to the Ombudsman office because it did not know how to conduct invitations (conflict of interest) or management reviews."

Financially, the bid by WCB was \$800,000 higher than the next closest bid. Thus the issue of financial harm is nonexistent.

There was been no objective demonstration that Mr. Anderson's actions caused harm to the employer. Mr. Preugshat testified that the Mr. Anderson was not in a decision-making position and the County has presented absolutely no evidence that the Mr. Anderson unfairly altered the selection and bidding process in any way.

The lack of *any* harm to the employer was confirmed by the Administrative Law Judge in Findings of Fact 30 and 29. In Finding of Fact No. 30, the ALJ found that there was no evidence that the access to any of the information obtained by Mr. Anderson caused *any* financial harm to his employer, King County. Moreover, in Finding of Fact No. 29, the ALJ observed that

It can never be known what, if any, affect the Claimant's insider knowledge of the WCB deal had on any of the other bidders or how it might have influenced the Review Board's choice of WCB as the winning bid.

As described above, finding of harm sufficient to disqualify an

employee from benefits requires *more* than speculative or hypothetical claims; real harm must be demonstrated. In this case, the ALJ disqualified Mr. Anderson without the requisite showing of harm. This was error.

#### **IV. CONCLUSION**

Mr. Anderson made repeated disclosures to his employer of a conflict of interest as required by the rules of his employer. He affirmatively recused himself from participation. Thereafter, and after the fact, his unemployment compensation benefits were denied apparently because his disclosures were simply “not good enough.” This is despite the fact that the advent of Mr. Anderson’s disclosures caused him to be removed from participation and decision making with respect to the transaction from which he extricated himself.

When no harm was demonstrated by Mr. Anderson’s employer, the denial of his unemployment benefits was upheld due to the “potential” for harm that could have been caused.

The reasons which justified the denial of Mr. Anderson’s benefits were contrary to law. The decision of the ALJ and the Superior Court should be REVERSED, with full benefits restored to Mr. Anderson and

reimbursement of his attorneys fees incurred throughout the appellate process.

RESPECTFULLY SUBMITTED March 9, 2006.

LOWENBERG, LOPEZ & HANSEN, P.S.

A handwritten signature in black ink, appearing to read "S M Hansen", written over a horizontal line.

STEPHEN M. HANSEN, WSBA #15642  
Attorney for Appellant, Carl Anderson

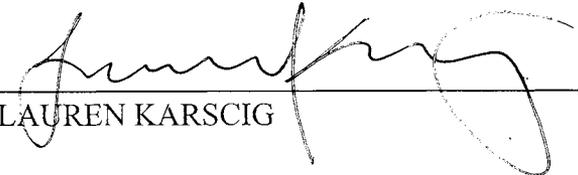
**CERTIFICATION OF SERVICE**

I, LAUREN KARSCIG, hereby certify that on March 9, 2006, a copy of the Appellant's Opening Brief was served on counsel via U.S. Certified Mail, Postage Prepaid, in care of the following addresses:

Mr. David I. Matlick  
Attorney at Law  
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Tacoma WA 98401-2317

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED at Tacoma, Washington this 9<sup>th</sup> day of March, 2006.

  
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LAUREN KARSCIG

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