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FILED

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No. 42023-6-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

JAMES E. WATKINS,

Appellant,

v.

EMPLOYMENT SECURITY DEPARTMENT,
STATE OF WASHINGTON,

Respondent.

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

A. INTRODUCTION..... 1

B. STATEMENT OF THE CASE 4

1. The employer sent Mr. Watkins a “notice of your termination ... for violation of company policy.” 4

2. The employer argued at its appeal hearing that it had fired Mr. Watkins for misconduct, specifically citing the misconduct statute..... 4

3. But contrary to two prior decision makers, the commissioner said Mr. Watkins quit..... 5

C. ARGUMENT 6

1. THE EMPLOYER FIRED MR. WATKINS – AND ARGUED ON APPEAL IT HAD DONE SO – WHEN MR. WATKINS TOLD THE EMPLOYER, AFTER A WORKPLACE INJURY, THAT HE “HURT TOO BAD” TO WORK A JOB TO WHICH HE HAD BEEN ASSIGNED. 6

2. NO NEED EXISTS TO REMAND THIS CASE SO THE COMMISSIONER CAN DECIDE WHETHER THERE WAS MISCONDUCT OR NOT: THAT QUESTION WAS ALREADY CONSIDERED – AND MISTAKENLY DECIDED – BY THE COMMISSIONER. 10

D. CONCLUSION 11

TABLE OF AUTHORITIES

Table of Cases

Washington Cases

Korte v. ESD,
47 Wn. App. 296, 734 P.2d 939 (1987)..... 8, 9

Safeco Ins. Co. v. ESD,
102 Wn.2nd 385, 687 P.2d 195736 (1984)..... passim

Vergeyle v. ESD,
28 Wn. App. 399, 623 P.2d 736 (1981)..... passim

Statutes

RCW 50.04.294.....5

A. INTRODUCTION

Some employers have discovered how to shift the burden of proof in unemployment cases: Rather than admit it has fired someone, as all the evidence proclaims, some employers now claim that the person quit. In a quit case, the employee has the burden to prove there was “good cause” for the quit. When an employee is fired, the employer has the burden to prove misconduct.

In this case, the employer sent Mr. Watkins a letter: “This letter is written to serve notice of your termination . . . due to your violation of Company policy” CP Comm. Rec. 122, Exh. 11, p. 37; 127, FF 4 (emphasis added).¹ No one “quits” due to violating company policy. The ESD granted Mr. Watkins unemployment benefits because he was fired without proof of misconduct. CP Comm. Rec. 42. When the employer appealed, it argued in its closing argument at the hearing as follows: “he was **terminated for job abandonment**. This claimant clearly shows a **willful and deliberate act of (unintelligible) reasonable company policy we**

¹ Thurston County Superior Court has transmitted the Administrative Record, aka Certified Appeals Board Record, in this matter as a single, stand-alone document; that Record is separately paginated so references in this brief to that record will appear as “CP Comm. Rec.,” meaning “Clerk’s Papers Commissioner’s Record.” All other references to the Clerk’s Papers will be in standard citation format, “CP,” with reference to the page number as it appears on the Superior Court Clerk’s Papers Index.

respectfully ask that the determination be set aside and benefits be denied.” CP Comm. Rec. 36 (emphasis added).

Therefore, the ALJ affirmed the ESD’s grant of benefits, holding Mr. Watkins was fired with no proof of misconduct. CP Comm. Rec. 127.

On further appeal the employer argued it had not fired Mr. Watkins: he quit. CP Comm. Rec. 148. The ESD’s Commissioner bought it and denied Mr. Watkins the benefits he had received and had been entitled to receive in the future. CP Comm. Rec. 140, Conclusions of Law II & III. The Superior Court affirmed. CP 85-87. This appeal timely followed. CP 88-92.

The trouble for the employer and the ESD is that under Washington case law, and decisions from this court, a “voluntary termination requires a showing that an employee intentionally terminated her own employment.” *Safeco Ins. Co. v. Meyering*, 102 Wn.2d 385, 687 P.2d 195 (1984) (citing for this proposition: *Vergeyle v. Department of Empl. Sec.*, 28 Wn. App. 399, 402, 623 P.2d 736 (1981)). *Vergeyle* was even more explicit that a person will only be held to have quit through “the commission of ***an act which the employee knowingly intended to result in his***

discharge” Vergeyle v. Department of Empl. Sec., 28 Wn. App. at 402 (emphasis added).

No such act occurred here and therefore the ESD’s original decision and the ALJ’s decision affirming it was correct: Mr. Watkins was fired without proof of misconduct and was therefore entitled to unemployment benefits. The Commissioner’s decision to the contrary should be reversed.

The opening line of the ESD’s brief in this case says that an “individual who refuses to report for work . . . quits his job without good cause.” Resp. Brf. Pg. 1. The ESD provides no citation to authority for this proposition either on page 1 or on any page of its brief. Furthermore, Mr. Watkins long ago replied to this claim in his handwritten reply to the employer’s appeal: “I did not refuse to work – I told them that I hurt to [sic] bad, I could not sit, stand or even walk very far. I was on strong pain medication, I could not even drive my car.” CP Comm. Rec. 136.

Finally, even if he had “refused to report to work,” such a refusal *might*, at worst, be considered as misconduct due to “insubordination,” not a “quit.” Both the ESD’s original determination and the ALJ’s decision held that Mr. Watkins had been fired without proof of misconduct and was therefore eligible

for benefits. The Commissioner's Decision to the contrary was an error of law and should be reversed.

B. STATEMENT OF THE CASE

1. The employer sent Mr. Watkins a "notice of your termination ... for violation of company policy."

Mr. Watkins has fully stated the substantive and procedural facts in his opening brief and notes here only the most salient facts.

On August 24, 2009, the employer sent Mr. Watkins a termination notice: "This letter is written to serve **notice of your termination . . . due to your violation of Company policy**"

CP Comm. Rec. 122, Exh. 11, p. 37; 127, FF 4. In documents submitted to the ESD the employer stated that he had been discharged for "violation of a company rule." CP Comm. Rec. 55.

The ESD granted benefits, finding Mr. Watkins had been fired without a showing of misconduct and that he "did not have the intention to quit" and had expressed no such intention. CP Comm. Rec. 42.

2. The employer argued at its appeal hearing that it had fired Mr. Watkins for misconduct, specifically citing the misconduct statute.

On its appeal, the employer argued it had fired Mr. Watkins, specifically citing the "misconduct" statute and using its language

as justification for the firing, here in the employer's own words:
"According to RCW 04.294 [RCW 50.04.294, the "misconduct"
provision of the Employment Security Act] there are some
examples of willful and wanton disregard of the interest of
(unintelligible) repeated and inexcusable absences, deliberate acts,
violation of reasonable rules. . . . **[H]e was terminated for job
abandonment.** This claimant clearly **shows a willful and
deliberate act** of (unintelligible) reasonable company policy we
respectfully ask that the determination be set aside and benefits be
denied." CP Comm. Rec. 36 (emphasis added).

The ALJ agreed with the employer that it had fired Mr.
Watkins, but disagreed there was proof of misconduct: "Nothing in
the record establishes that the claimant intended to be absent. . . I
am persuaded that the employer discharged the claimant due to
absenteeism. I adjudicate this case as a discharge." CP Comm.
Rec. 127.

**3. But contrary to two prior decision makers, the
commissioner said Mr. Watkins quit.**

Reversing all prior decision makers, the Commissioner
concluded as follows: "We conclude that claimant was the moving
party: he was offered a job assignment which fell within the

restrictions his doctor had ordered, but failed to respond or show up for work. Rather, he abandoned his job. Consequently, we conclude that he voluntarily quit employment.” CP Comm. Rec. 140 (Conclusions of Law I & II).

C. ARGUMENT

1. THE EMPLOYER FIRED MR. WATKINS – AND ARGUED ON APPEAL IT HAD DONE SO – WHEN MR. WATKINS TOLD THE EMPLOYER, AFTER A WORKPLACE INJURY, THAT HE “HURT TOO BAD” TO WORK A JOB TO WHICH HE HAD BEEN ASSIGNED.

Mr. Watkins was fired because he missed work that the employer thought he could perform. People get fired all the time for missing work – but being unable to work, or missing work, or even refusing work is not quitting one’s job – by logic, and by law:

The act requires the Department analyze the facts of each case to determine what actually caused the employee’s separation. *A voluntary termination requires a showing that an employee intentionally terminated her own employment. Vergeyle v. Department of Empl. Sec., 28 Wn. App. 399, 402, 623 P.2d 736 (1981).*

Safeco Ins. Co. v. Meyering, 102 Wn. 2d 385, 393, 687 P.2d 195 (1984) (emphasis added).

The State’s brief in this case argues that an “individual who refuses to report for work despite his employer having work

available for him quits his job without good cause.” State’s Brief, pg. 1, 10. The State provides absolutely no legal authority for this proposition. There is no legal authority for this proposition.

As a variation, the State’s brief argues that “[j]ob abandonment is treated a [sic] voluntary quit under the Employment Security Act” State’s Brief, pg. 9. Again, despite invoking the name of the Act, there is no citation to a statute, a regulation, or a reported decision that holds this alleged legal proposition to be true or to be authority in this State or any other.²

The State argues on pages 15 to 16 of its brief that Mr. Watkins “manifested intent to quit” by analogy to two cases that both sides have cited: *Safeco Ins. Co. v. Meyering*, 102 Wn. 2d 385, 687 P.2d 195 (1984) and *Vergeyle v. ESD*, 28 Wn. App. 399, 623 P.2d 736 (1981).

Rather than support the State’s argument, these cases prove Mr. Watkins’ argument that his actions, by comparison to the

² In this section of its brief, pg. 12, the State cites to two Commissioner’s Decisions, *In re Millholland* (1975) and *In re Hensley* (1980), neither one of which states or supports the proposition the State advances, neither one of which says anything like the proposition alleged by the State as law, and even if the cases did, both cases precede and would be overruled by the controlling case here, *Safeco Ins. Co. v. Meyering*, 102 Wn.2d 385 (1984). The State’s citation on page 14 of its brief to *Nordlund v. ESD*, 135 Wn. App. 515, 144 P.3d 1208 (2006), is equally unpersuasive. That case was confined by the court to the issue of whether the claimant had good cause to quit under the “medical good cause” provisions of the Act, an issue completely irrelevant to the instant case.

claimants in those two reported cases, showed no intent to quit. In the *Safeco Ins. Co.* case, Ms. Meyering “unilaterally and voluntarily **submitted her resignation to her supervisors,**” an unambiguous sign she intended to quit and completely the opposite of Mr. Watkins’ actions.

Similarly, in *Vergeyle*, the claimant quit and signed a piece of paper that stated “I will not report for work beginning 9-2-77 thru 10-2-77. **I understand termination of employment will result.**” *Vergeyle v. ESD*, 28 Wn. App. 399, 401, 623 P.2d 736 (1981)(emphasis added). The Court there, analogizing to an out-of-state case, found that the claimant’s signature on the paper in *Vergeyle* was a “quit” because it was “the commission of an act **which the employee knowingly intended to result in his discharge**” *Id.* at 402 (emphasis added). Again, Mr. Watkins signed no such paper and was never told that his inability to work a job the employer thought him able to work would result in his discharge.

Finally, the State discusses *Korte v. ESD*, 47 Wn. App. 296, 734 P.2d 939 (1987). In that case the employer told the claimant to sign a contract, which was presented to her “as nonnegotiable and a condition of continued employment.” 47 Wn. App. at 297. The

employer told the claimant to sign the contract or “leave her keys on her desk.” She did not sign the contract and was deemed to have quit. This is analogous to *Vergeyle*, who signed a document that said she understood by her actions that she would be deemed to have been terminated. But neither case is analogous to Mr. Watkins’ case.

The letter Mr. Watkins received on August 6 telling him about the new job placement simply stated there was a shift available, stated the \$9.50 per hour wage, and the hours. This letter simply said the following: “Please sign below if you agree to this or if you are declining this position.” At the bottom of the letter were two check boxes, one for “I agree to take this position” and one for “I decline to accept this assignment” CP Comm. Rec. 70. The letter presented no ultimatum to him as the employer’s contract did in *Korte* or as the document did in *Vergeyle*. But when Mr. Watkins told the employer he was not physically able to do the new job, he was fired in a letter dated August 26: “This letter is written to serve notice of your **termination effective immediately. Your termination is due to you violation of Company policy, Section V, Subsection B.**” CP Comm. Rec 71. No one quits and is told the reason they have quit is that they

violated company policy. The State and the Commissioner were mistaken here: Mr. Watkins did not quit, the employer fired him, without proof of misconduct.

2. NO NEED EXISTS TO REMAND THIS CASE SO THE COMMISSIONER CAN DECIDE WHETHER THERE WAS MISCONDUCT OR NOT: THAT QUESTION WAS ALREADY CONSIDERED – AND MISTAKENLY DECIDED – BY THE COMMISSIONER.

The State argues here that should this Court agree with Mr. Watkins, as well as with the ESD's original determination and the ALJ, that Mr. Watkins was fired, this Court should remand the case to the Commissioner. This is argued "to afford the Commissioner the opportunity to determine whether Mr. Watkins' conduct rose to the level of disqualifying misconduct." State's Brief, page 26.

The Commissioner was fully apprised that the issues in the case were the nature of the job separation and whether there was "misconduct" or not. The ESD had determined it was a discharge without misconduct. CP Comm. Rec. 42. When the employer appealed this order, the Notice of Hearing stated that the issues at the hearing would be "whether the claimant was discharged from employment for misconduct...or voluntarily quit without good cause" CP Comm. Rec. 39.

The ALJ plainly decided the employer had fired Mr. Watkins and had not proved misconduct. CP Comm. Rec. 127 (Conclusion of Law 2); 129 (Conclusion of Law 9). Furthermore, the Employment Security Act states that in any appeal “all issues” are before the appeal tribunal: “In any proceeding before an appeal tribunal involving a dispute of an individual's initial determination, **all matters covered by such initial determination shall be deemed to be in issue** irrespective of the particular ground or grounds set forth in the notice of appeal.” RCW 50.32.040 (emphasis added).

Thus, the issue of misconduct was before the Commissioner and it has already determined this issue – albeit mistakenly – and that determination should be reversed, without need of remand.

D. CONCLUSION

For the reasons stated above, James E. Watkins respectfully requests that this court reverse the Commissioner’s Decision in this case because he did not quit his job, but was fired without proof of misconduct.

Petitioner also requests that reasonable attorney fees be awarded in an amount to be determined upon filing of a cost bill subsequent to a decision in this matter and under authority of RCW

50.32.160 that mandates attorney fees and costs be awarded upon reversal or modification of a Commissioner's Order.

Dated this 12th Day of September 2011.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Marc Lampson', is written over a horizontal line. The signature is fluid and cursive.

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

JAMES E. WATKINS,
Respondent,
and
STATE OF WASHINGTON,
EMPLOYMENT SECURITY
DEPARTMENT,
Appellant.

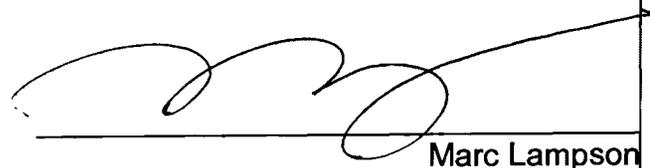
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CERTIFICATE OF SERVICE BY MAIL

CERTIFICATE

I certify that I emailed an electronic copy and mailed a paper copy of the Appellant's Reply Brief in this matter postage prepaid, on September 12, 2011, to the Respondent ESD's attorney, Dionne Padilla-Huddleston, WSBA# 38356, Office of the Attorney General, PO Box 40110, Olympia, WA 98504-0110.

Dated this September 12, 2011.



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