

FILED

AUG 04 2010

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 289681

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OF THE STATE OF WASHINGTON**

ANJELIA NEUSON, APPELLANT

v.

MACY'S, INC., RESPONDENT

BRIEF OF APPELLANT

GREGORY G. STAEHELI

WSBA # 04452

Attorney for Appellant

301 W. Indiana Ave.

Spokane, WA 99205

(509) 326-3000

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I. INTRODUCTION

Appellant alleges she was terminated from her employment for pursuing a worker's compensation claim in violation of RCW 51.48.025 occurring shortly after she was hired by Macy's (Spokane).

Respondent, Macy's contends that her claim can only be resolved by peer review/arbitration on the basis of a past employment at Macy's (Silverdale) which ended in March 2006, during which time, Respondent alleges that Appellant failed twice to return a written form rejecting peer review/arbitration. Further, Respondent claims that she was a "new hire" and received a new peer review/arbitration proposal on October 4, 2006, at her new employment at Macy's Spokane.

Appellant denies she was ever sent peer review/arbitration forms in Silverdale, for an employment which had ended and was never present on October 4, 2006, to receive a new proposal as evidenced in the records in which the employer referenced a driver's license number which had not been yet issued.

The Trial Court resolved issues of fact and credibility in a Motion for Summary Judgment granted to Respondent.

This appeal followed.

IV. ASSIGNMENTS OF ERROR

1. The Trial Court resolved contested issues of fact and credibility on a motion for Summary Judgment.
2. The Trial Court improperly allowed a presumption of mailing and applied terms and conditions to an employment which had ended at Macy's Silverdale and when Appellant was considered a "new hire" at Macy's Spokane.

II. STATEMENT OF CASE

Appellant, Anjelia Neuson, is a fifty-four (54) year old woman who was employed by Defendant (hereinafter Macy's) in Silverdale, Washington, as a sales associate beginning on July 21, 1994. (CP 382) In January, 2006, Appellant's husband took a new job in Spokane and Anjelia ended her work at Macy's Silverdale in

March 2006, and began work for Macy's Spokane on October 9, 2006 (CP 384). Appellant met with Sarah Allie who notes in her own words as follows:

In October (no date) 2006, I recall meeting with Anjelia Neuson when she completed her new hire paperwork. (CP 489-490)

As an exhibit to Allie's Affidavit, Allie added Exhibit BB, a Work Availability Form, signed by Appellant and dated October 9, 2006. This date is not overwritten as the overwritten date of 10/04/06 on another form signed by Appellant.

When Appellant applied for work at Macy's in Spokane she was treated as a "new hire". (CP 490) Appellant was then terminated from her employment in 2007 and Appellant claims the termination was subsequent to an on-the-job Labor & Industry Claim resulting in minor work limitations. (CP 3-7) Respondent contends Appellant is bound to mandatory arbitration of this claim through an unsigned peer review/arbitration agreement. (CP 8)

At Macy's Silverdale, various employees and Appellant had a disagreement with Macy's over hours. (CP 382) They hired a lawyer to advise them. (CP 382) Their lawyer advised the employees, including Appellant, to never sign an agreement by which labor disputes would be resolved by a peer review by other employees or by an arbitrator. (CP 382)

Subsequently, during her employment at Silverdale, the employees were brought in small groups by management and asked to sign an agreement for peer review/arbitration. (CP 382-383) When Appellant was asked at this meeting to sign a written agreement for peer review/ arbitration, she refused. (CP 383) In fact, she signed a written document refusing peer review/arbitration. (CP 383) This has never been contested by Macy's. She was then asked by management why she would not agree and she explained that she did not want her co-workers deciding her employment issues because of pressure from management. (CP 383) She also explained that she would not

sign an peer review/arbitration agreement on the advice of an attorney. (CP 383)

Roy Boholst was also employed at Macy's Silverdale during Appellant's employment and they worked together on the employee petition to management in January 2004. (CP 391) By Affidavit, Boholst testified that, in January 2002, Macy's brought in small groups of employees to discuss a peer review/arbitration process. (CP 392) Management provided a written form for Boholst and other employees to sign stating whether they agreed or not. (CP 392) Boholst was asked to sign that he agreed to peer review/arbitration and he refused. (CP 392) Boholst recalled Appellant also refused this process of peer review/arbitration. (CP 392) Boholst states he believes he signed a document refusing the peer/review arbitration proposal. (CP 392) Boholst was then brought in for what was called a "review" and asked why he did not agree to peer review/arbitration. (CP 392) Boholst stated that while employed at Macy's Silverdale, he never got any mailings

from Macy's which required him to refuse peer review/arbitration in writing. (CP 392)

Appellant had worked for Macy's Silverdale for twelve (12) years when her husband took a job in Spokane, Washington. (CP 382) She set up three (3) job interviews at the Macy's stores in Spokane. (CP 382) While employed at Macy's Silverdale, Neuson lived at three (3) addresses over her twelve (12) years there. (CP 383) As it relates to Macy's mailing department, on December 10, 2009, Tonya Leist from Macy's headquarters contacted Appellant and informed her that the Macy's computer had her listed at an address in Silverdale which was a four (4) year old past address. (CP 519) If Macy's was using four (4) year old addresses at Silverdale this may explain why no peer review arbitration proposals were received. This has never been contested by Macy's. At no time did she ever receive a peer review/arbitration proposal in the mail. (CP 383) If she had, she would have sent in the refusal within the thirty (30) day time limit, but these mailings were never received by her. (CP 383) Her only

written rejection of peer review/arbitration was signed by her and given to management with no copy to Neuson as described above at a small group employee meeting which is now denied by Macy's. (CP 383-384)

When Neuson was hired by Macy's Spokane she was treated as a "new hire" (CP 489-490) Therefore, any of the terms and conditions of employment at Macy's Silverdale store were ended. Macy's contends and Neuson denies that Neuson's first day of work was on October 4, 2006, at which time Macy's contends that Neuson entered on the computer her electronic signature which consists of her name, social security number, zip code. (CP 384) All of this was known by Macy's Spokane. Macy's contends and Neuson denies that on October 4, 2006, she was given a new peer review/arbitration proposal requiring her to send in a written document refusing peer review/arbitration. (CP 384)

Sarah Allie further contends that Neuson was hired and trained on October 4, 2006. (CP 490) Neuson contends that her

first day of work was on October 9, 2006, and there would be a business record of the person conducting the training on October 9, 2006, along with their associate number. (CP 480) This record was never presented by Macy's. (CP 480) Neuson contends that, if she was not there on October 4, 2006, she could not have entered her name and social security number and zip code as evidence of her presence and acceptance of the peer review/arbitration proposal. (CP 480) In fact, Neuson even attached her "attendance sheet" which shows her attendance record for October 9, 2006 and nothing for October 4, 2006. (CP 390) Only someone at Macy's could have entered her name, social security number, and zip code. Neuson contends that she met with Macy's representative, Sarah Allie, for the first time on October 9, 2006. Sarah Allie contends she met with Neuson in October 2006, however, did not list an exact date. (CP 489)

Allie met with Neuson and was required to list two forms of identification. (CP 491) Allie contends Neuson presented her driver's license and social security card. (CP 491) Allie attaches

Exhibit BB to CP 35 which is an Availability Form signed by Appellant and lists the date October 9, 2006. (CP 501)

Allie asserts that on October 4, 2006, she wrote down Appellant's driver's license number as NEUSOAY452PL which was immediately followed by the date October 13, 2006, on an employee eligibility form for Appellant which is dated October 4, 2006. (CP 497) There are alterations to the written date October 4, 2006. (CP 497)

As a factual matter, Neuson noted her driver's license under NEUSOAY452PL has no date consistent with October 4, 2006. Her driver's license number is correct as recorded by Allie as NEUSOAY452PL, but the date of issue recorded by Allie is October 13, 2006, or nine (9) days after the claimed meeting with Allie on October 4, 2006. This license was issued nine (9) days after the claimed meeting with Allie on October 4, 2006. (CP 28, Exhibit A)

Despite the fact that all the terms and conditions of employment in Silverdale ended in March, 2006, Macy's contends

that it mailed two letters offering peer review/arbitration to Neuson while in Silverdale which required a written rejection within thirty (30) days. No rejections were received by Macy's. Neuson received periodic mailing from Macy's but denies ever receiving any peer review/arbitration proposals. (CP 520)

Macy's seeks to bind Neuson to arbitration based upon the claim of two past mailing with no rejection for an employment which ended in March 2006, and one receipt of the peer review/arbitration proposal on October 4, 2006, as a new hire in Spokane with Sarah Allie who recorded a driver's license which was issued nine (9) days after the alleged meeting.

Neuson denies 1) any mailing related to peer review/arbitration which related to the Silverdale employment which ended, and, 2) she denies any receipt of such a proposal on October 4, 2006, in Spokane, because she was not there on October 4, 2006, and the documented driver's license issue date recorded by Macy's form was nine (9) days after October 4, 2006,. Further, Macy's admits her employment ended in Silverdale and she was

considered a new hire in Spokane. If so, all past terms and conditions including peer review/arbitration mailings are null and void. If they were confident that the past terms of employment applied, Macy's did not need the arbitration proposed again in Spokane.

Further, to establish the irrelevant mailings while still employed at Macy's in Silverdale, the Defense provides the Affidavit of Robert Noeth to establish evidence of mailings relating to an employment which had ended in Silverdale.

The following dates and events below are relevant to the issue of presumption of mailings and to the contested facts at issue. Noeth's assertions are also contradicted by Boholst and Neuson.

V. ARGUMENT

- 1. Past claimed agreements, based upon terminated employment, do not apply to a new employment agreement.**

Respondent affirmatively states that Appellant's employment with Macy's in Silverdale ended and Appellant was considered a new hire in Macy's Spokane.

In *Hubbard v. Spokane County*, 146 Wn. 2d 699, 50 P.3d 602 (2002) our Supreme Court ruled as follows at page 707:

Employment contracts that are indefinite in duration may generally be terminated by either the employer or the employee at will.

Despite admissible and credible evidence contesting the so-called arbitration claims, the Respondent cannot bind Appellant to any terms or condition of an employment which had ended. This argument by Respondent Macy's highlights their lack of confidence in the claim of a new peer review/arbitration agreement based upon an alleged meeting which could not have taken place on October 4, 2006, as detailed below.

2. The Defendant is not entitled to a presumption of mailing as it relates to events at Macy's Silverdale.

The Trial Court granted a presumption of mailing of the peer review/arbitration proposal with the thirty (30) day rejection for Appellant's past employment on the strength of an affidavit of Robert Noeth who was hired by Macy's six (6) years after the events in question.

First, in *Tassoni v. Dept. of Ret. Sys.*, 108 Wn.App. 77, 29 P.3d 63 (2001) our Court of Appeals ruled as follows at page 86-87:

Under Washington law, a party seeking to prove mailing must show (1) an office custom with respect to mailing and (2) compliance with the custom in the specific instance. *Kaiser Aluminum & Chem. Corp. v. Dep't of Labor & Indus.*, 57 Wn.App. 886, 890, 790 P.2d 1254 (1990). Here one DRS employee described DRS's mail pickup and distribution system, including both U.S. mail and "campus mail" (mail between State agencies). Another DRS employee described how DRS

generates restoration notices and prepares them for mailing. Neither employee testified that DRS complied with the mailing custom in this specific instance or even on the day Tassoni's restoration notice was printed. In fact, the employee who described the custom regarding preparation, and mailing of restoration notices said she had "no idea" if she had personally mailed these notices. AR at 232.

The only evidence that suggests that DRS complied with the mailing custom in this case was the presence of a copy of the disputed notice in Tassoni's DRS file...But this supports only an inference that DRS generated the notice, not that it mailed the notice.

In its final order, DRS acknowledged that there was no testimony regarding compliance with the mailing custom in this instance. But, it said, "[t]hat

is ...the point of the *Farrow* [*v. Dep't of Labor & Indus.*, 179 Wash. 453, 38 P.2d 240 (1934)]

presumption: in an office handling a large amount of mail, no one can remember that fact of mailing any particular notice.” AR at 270 n.8. This statement ignores or misunderstand *Farrow*'s requirement that there be evidence of compliance with the mailing custom in the specific instance at issue, which is lacking here. Thus, substantial evidence does not support DRS's finding that it properly mailed the notice as required by statute.

Here, Noeth is testifying to events on mailing procedures which is claimed to have existed six (6) years before he ever became employed by Respondent. No then current employee contended the mailing custom was followed in this instance. Macy's Silverdale and Noeth did not offer in evidence a copy of a single written notice to Appellant regarding peer review/arbitration

which is dated and lists her name and address despite the fact that the forms provide for it.

In *Sheeter v. Employment Sec. Dept.*, 122 Wn.App 484, 93 P.3d 965 (2004) our Court of Appeals ruled as follows at page 488:

But generally “[u]nder Washington law, a party seeking to prove mailing must show (1) an office custom with respect to mailing and (2) compliance with the custom in the specific instance. Once a party proves the item was mailed, the law presumes that “the mails proceed in due course and that the letter is received by the person to whom it is addressed.” In this case, the Department offered no proof the notice was mailed within the appeal period. It offered no testimony or affidavit from the person at the Department who purportedly mailed the notice to Scheeler. Nor did it offer any evidence of its custom in mailing these notices or whether a custom, if it exists, was followed in this

case. Although the determination notice states that “[a] copy of this determination notice was mailed to the interested parties at their address on 12/07/2001” and the mailing address listed on the top of the notice was Scheeler’s address, this evidence is insufficient to establish proof of mailing under *Farrow v. Department of Labor & Industries*. In that case, the Supreme Court concluded that the mere fact that a “ ‘letter bore a certain date, was at some time mailed, and was at some subsequent time received’ ” was insufficient to establish a presumption that the letter was received “ ‘within any particular period.’ ” Without any additional proof, such as testimony from the mailing clerk, the court determined there was no evidence from which the presumption of “receipt in due course of the mails” could arise.

In the Neuson case, the Defense failed to show any letter bore a certain date and also failed to produce one letter with Appellant's name and address on it.

In *Kaiser Aluminum v. Labor & Indus.*, 57 Wn.App. 886, 790 P.2d 1254 (1990) the Court ruled as follows at page 889-892:

Kaiser contends it met this requirement through testimony of office custom in mailing correspondence...Mr. Stuart was unable to name the individual in charge of mailing the letters or the individual who picked up the mail from the office. Kaiser did not offer proof identifying any custom or mailing routine. This could have been done by the person who took the letters from the basket and continued the routine for mail preparation and final mailing. Not having done so, Kaiser's contention must fail...Mr. Kelp does not argue the mailing practice or custom of the company handling Kaiser's self-insurance claims is inadmissible;

rather, he contends the evidence is insufficient to raise the presumption of mailing. Thus, application of ER 406 does not affect the outcome of this case. Even if it was determined ER 406 replaces *Farrow*, Kaiser's proof falls short of establishing the complete mailing cycle.

When the author of a letter puts it in his "out" box, there must be additional proof to establish the custom and routine thereafter. Mr. Kelp's conclusory statement that the office routine was followed is insufficient when he cannot testify to that routine. Other jurisdictions maintain a strict level of proof for establishing the presumption of mailing. The key focus is on the witness' knowledge of the interoffice mailing procedure. This is one setting where it is more important to know the work habits of a support staff than the routine assumed by the boss. See *Peirson-Lathrop*

Grain Co. v. Baker, 223 S.W. 941 (Mo. Ct. App. 1920) in which the court found the testimony of an individual writing a confirmation letter and instructing a clerical worker to mail the same was insufficient to establish the mailing routine of the office; the clerical worker's testimony was necessary to establish that he generally and invariably deposits all letters in the mail. *Accord*, *William Gardam & Son v. Batterson*, 198 N.Y. 175, 91 N.E. 371 (1910); *Haak v. Brost Motors Inc.*, 69 Misc. 2d 820, 331 N.Y.S.2d 329 (1970), *aff'd*, 332 N.Y.S.2d 423, 332 N.Y.S.2d 424 (1972); *see also* Annot., 45 A.L.R.4th 476, 499-502 (1986). Here, Mr. Stuart relies upon his secretary or another office worker to properly prepare, process, and mail his correspondence. Therefore, his testimony in isolation is not sufficient to establish the office mailing routine. There is no evidence any

envelopes were prepared, sufficient postage stamps placed thereon, or what happened to the letters after they left Mr. Stuart's "out" basket.

Here, Noeth cannot testify to an office custom which existed five (5) to six (6) years before he was hired. He also cannot testify that he complied with the custom in this case because he was not there. He also cannot point to a single dated letter with Appellant's name or address on it.

The Affidavit of Noeth (who was employed by Macy's for the first time in six (6) years after the mailings) contained one hundred forty-four (144) pages of documents listed as Exhibit A thru W. In all these 144 pages of exhibits from Macy's, there is not one single dated letter or form prepared by Macy's which has Appellant's name or address on it despite the fact that the documents provide spaces for such. For example, Exhibit F to Noeth's Affidavit is an election form allegedly sent to Appellant which has a boxed out space for her name and address and it is blank. This is a form letter sent to allow an employee to, in

writing, decline the “benefits” of peer review/arbitration. Macy’s contends they sent it to Neuson who says she never got it. The form is blank for name, date, and address. Macy’s cannot point to one single dated letter to Neuson with her name and address on it in one hundred forty –four (144) pages of documents attached to an affidavit of a witness who was not even employed by Macy’s until six (6) years after the event.

The Trial Court ignored the clear requirements for the presumption of mailing and, further, applied disputed terms and conditions of an old employment to a new employment.

3. The Trial Court resolved issues of fact and credibility as it relates to Robert Noeth.

Noeth claimed that there were no group meetings over peer review/arbitration with employees and that the decision to accept or reject peer review/arbitration was never ever made known to the employers. Appellant and co-employee Boholst contradicted Mr. Noeth who was not even employed by Macy’s at the time of these events.

Both Appellant and Boholst said management called in small groups, presented the peer review/arbitration proposal which was rejected by both Boholst and by Appellant who also rejected it in writing. They were then called in to a meeting with management to explain their rejection of peer review/arbitration. Macy's pointedly never offered the testimony of a single management employee from Macy's Silverdale to contradict Boholst and Neuson. They offered only the contradicted affidavit of Noeth who wasn't even employed by Macy's at that time.

These were contested issues of fact and credibility resolved in favor of Respondent in a Motion for Summary Judgment.

Example of contested issues of fact and credibility are as follows:

Noeth

Employees choice to opt out is confidential...so local management is unaware of employee's election. (CP 201)

Boholst

Management provided information about peer review/arbitration, then management presented a form to sign in a group

setting. I was later brought in for a review and asked by management why I didn't sign the agreement to arbitrate. I received no mailings on this. (CP 392)

Neuson

I was called in to explain my rejection to management. (CP 383) I never received peer review/arbitration proposals from Macy's (CP 383)

Macy's claims a presumption of mailing on two (2) occasions when Neuson was an employee in Silverdale and before the employment at Silverdale ended. They claim this presumption on the basis of an Affidavit of Robert Noeth who testifies by affidavit to events alleged to have occurred six (6) years before he was ever hired by Macy's. For example:

Noeth

March 2009, Noeth becomes
Vice President of Employee
Relations for Macy's (CP
200)

Events

September 2003- peer
review/arbitration proposal
claimed to be sent to Neuson.
(six years before Noeth was
hired by Macy's) (CP 204)

January 2004- another peer
review/arbitration proposal
mailed to Neuson (5 years
before Noeth was hired by
Macy's)

October 2004-
Neuson allowed to refuse
peer review/arbitration in
second mailing No responses
from Neuson to peer
review/arbitration proposals
(5 and 6 years before Noeth
hired by Macy's)

4. The Trial Court resolved issues of fact and credibility as it relates to a claimed meeting on October 4, 2006.

The Trial Court concluded Plaintiff was physically present on October 4, 2006, with Sarah Allie based upon documents including a copy of a document dated October 4, 2006, with Appellant's admitted signature on it.

The Trial Court ignored the fact that the written date shows signs of alteration but more importantly ignores one central and simple fact. The form includes the driver's license number as NEUSOAY452PL, and what could only be an issuance date of October 13, 2006. (CP 529)

If the Trial court can accept the disputed and overwritten date of October 4, 2006, and bind this to Appellant, the Trial Court resolved this contested issue of fact by ignoring Macy's driver's license date what could only be the issue date of the driver's license which was nine (9) days beyond October 4, 2006, when Macy's claims they met with Appellant. The Trial Court also ignored Respondent's document entitled "Rolling 12 Month

Attendance Detail” for associate # 051946 Anjelia Neuson as of September 18, 2007. (CP 487) This exhibit records her attendance on October 9, 2006, and no attendance on October 4, 2006, which is the date Macy’s claims she was given the peer review/arbitration proposal. (CP 487)

Please recall Appellant maintained she never met with Allie until October 9, 2006. Plaintiff could not have produced her driver’s license on October 4, 2006, with the number NEUSOAY452PL because their form shows an issue date of October 11, 2006, which is still nine (9) days into the future from October 4, 2006.

This is an objective issue of fact ignored by the Trial Court and resolved in favor of Macy’s without a trial on a motion.

Macy’s then cited seven (7) unpublished cases in support of Summary Judgment. (CP 357-379) The cases have no comparison to Neuson who affirmatively stated that she was never sent the claimed documents from Macy’s either at her addresses in

Silverdale or on October 4, 2006, in Spokane. The summaries of Macy's unpublished cases are as follows:

1. *Somerville v. Macy's* (Eastern District of Washington) – Somerville acknowledged she received the SIS brochure understood she had 30 days to decline and provided no evidence that she returned the opt out form.
2. *Allen & Frye v. Bloomingdales-* Allen admits he regularly threw out mail from his employer says he has no independent memory of receiving the opt-out form. Frye never filed an opposing affidavit.
3. *Stackhouse v. Macy's-* Stackhouse never claimed that he did not get the documents.
4. *Unsell v. Bloomingdales-* Unsell never claimed he did not get the documents.
5. *Garcia v. Macy's-* Garcia never argued that he did not get the opt-out documents.

6. *Lee v. Macy's*- There was no issue over the agreement to arbitrate.

7. *Mansury & Nisem v. Macy's*- Nisem never filed a declaration and Mansury claimed no independent recollection of receiving the mailing.

In contrast to these cases, Appellant does not claim “no independent memory” of receiving the documents. She says they were never in her mail. Appellant did not claim she threw out mail from Macy’s as junk mail. She says it never came in the mail and if it did she would have mailed in her decision to opt out.

As to the claim that she received these documents on October 4, 2006, this claim is based on an “electronic signature” which consists of Appellant’s name and a series of numbers that were all known by Macy’s. The electronic signature could have been entered by any employee with access to Neuson’s social security number, date of birth, and zip code. What Macy’s cannot explain is the driver’s license issuance date on their own form filled out by their own representative. The driver’s license

allegedly recorded by Macy's on October 4, 2006, reflects an issuance date which had not yet occurred. This may explain why Macy's has spent considerable effort in trying to rely on claimed peer review/arbitration agreement which ended when Neuson's employment was terminated in Silverdale in 2006.

VI. CONCLUSION

The Respondent demonstrated their lack of confidence in the meeting of October 4, 2006, by trying to rely on claimed agreements occurring years before in an employment which ended.

They never disputed that the "electronic signature" of October 4, 2006, could be entered by any employee who had access to Plaintiff's name social security number and zip code.

They have no explanation for the recording of a driver's license on October 4, 2006, when the license was not issued until October 13, 2006.

The Trial Court order should be reversed and this matter should be remanded for trial.

Dated this 29th day of July, 2010.



Gregory G. Staeheli, WSBA 4452
Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of July, 2010, I caused to be served a true and correct copy of the Appellant's Brief by the method indicated below, and addressed to the following:

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