FINDINGS AND DECISION OF THE HEARING EXAMINER
CITY OF SEATTLE
UNDER DELEGATION FROM THE CIVIL SERVICE COMMISSION

In the Matter of the Appeal of

VICKI JOY

Appellant,

v.

SEATTLE CENTER,

Respondent.

CSC No. 05-01-010

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CIVIL SERVICE COMMISSION

Background

Vicki Joy timely appealed her discharge from employment with the Seattle Center. The Civil Service Commission, pursuant to SMC 4.04.250, delegated the appeal to the Office of Hearing Examiner.

The matter was heard by the undersigned Deputy Hearing Examiner on February 1 and 3, 2006. The appellant was represented by John Scannell, attorney at law; respondent Seattle Center was represented by Amy Lowen, Assistant City Attorney.

At the prehearing conference, the following were established as the issues in this appeal:

1. Whether the unemployment claim that the appellant filed with the state Employment Security Department was not a misrepresentation, in light of her actual employment status;
2. Whether the appellant "failed to report" to work, in light of the terms of her medical release and her communications with the Department;
3. Whether her communications in the form of voicemail to Human Resources Manager John Cunningham constituted protected activity, and so could not be used as a reason to discharge her.

After due consideration of the evidence elicited during the appeal hearing, the following shall constitute the findings of fact, conclusions and decision of the Hearing Examiner in this appeal.

Findings of Fact

1. The Appellant, Vicki Joy, was hired by the Seattle Center {hereinafter Department or Center) in 1999. Her last position with the Center was as a janitor with the Technical Facility Management (TFM) division.

2. When the Appellant was hired by the Center, she was shown a copy of the "Employee Rights and Responsibilities" document, which lists standards of behavior that are expected of Center employees towards each other. (Exhibit 2)

3. The Appellant has experienced medical problems over the past few years. She noted at hearing that she has been diagnosed as bipolar, and has taken medications to treat this condition.

4. On several occasions during 2004 and 2005, the Appellant arrived at work late or was absent without notifying the Center prior to the commencement of her shift, in violation of the policy for her crew.

5. The Appellant's immediate supervisor is Troy Clark. Mr. Clark in turn reports to Carson Jones, Assistant Facilities Maintenance Supervisor. Michael Moon is the Manager of the TFM division.

6. In 2004 and 2005, at least five fact-finding meetings were held concerning the Appellant's interactions with other employees, or her absence from or late arrival to her workplace, without notifying the Center that she would be late or absent. Exhibit 10; testimony of Moon, Jones.

7. On June 20, 2005, Mr. Moon sent a memo to Robert Nellams, Deputy Director of the Center, recommending that the Appellant be suspended for three days, and that she be required to participate in counseling to assist her in addressing behavioral problems.

8. On June 29, 2005, Mr. Nellams met with the Appellant and her Local Business Representative, Bo Jeffers, to discuss the recommended suspension. Mr. Nellams sent a letter to the Appellant dated June 29, 2005, noting that the Appellant had taken responsibility for her attendance problems and her behaviors towards other co-workers, and had discussed her intention to prevent them from reoccurring. The letter stated that a 3-day suspension would be imposed but that it would be held in abeyance and would not take effect if no further instance similar in nature occurred for six months.

9. For some part of 2005 prior to July, the Appellant was out on Family Medical Leave. When she returned from that leave, she was assigned to the night shift. Because Dr. Salmon, her physician, had recommended that she work a "steady" shift that did not change, the Department assigned her to a night shift. According to the Department (Exhibit 17) the night shift is one of the most stable shifts for janitors at the Seattle Center, with a consistent schedule.

10. There are fewer day shift janitor positions than night shift positions at the Seattle Center.

11. The Appellant found that the night shift work was substantially harder for her than the day shift work; it involved physical tasks that were more challenging than those she experienced in her day shift work.

12. In July of 2005, the Department received a letter from a Dr. Engel, dated July 13, 2005, stating that the Appellant was unable to work any shift but a day shift, and that she could not return until further notice. The Department also received a letter dated July 18, 2005, from Dr. Salmon, who stated that the Appellant was medically incapable of working the night shift.

13. In response to these letters, the Department sent a letter to the Appellant, dated July 20, 2005 (Exhibit 17). Because the Appellant had exhausted her sick leave and Family Medical Leave, the Appellant could not be granted pay status. However, the Department's letter stated that "We will grant you leave without pay status as a temporary accommodation until we can determine whether or not you may be further accommodated in some other manner. This leave is conditioned upon the successful completion, return and approval of the enclosed materials. This temporary accommodation cannot last indefinitely and may be rescinded if it is determined either that you are not eligible for accommodation or that the duration of the leave causes Seattle Center an undue hardship."

14. The Department could not find a day shift to which the Appellant could be reassigned.

15. When an employee receives medical clearance from their physician releasing them to return from work, the Department policy requires employees to return to the workplace immediately, with the medical release information. The proper procedure is for the employee to return to their regularly scheduled place and shift of work. The Appellant had returned from a medical leave of absence prior to September 2005, and had followed this procedure.

16. The Appellant filed a "Voluntary Quit Statement" dated September 7, 2005, with the state Employment Security Department (Exhibit 16). On the form, the Appellant wrote that she "did not quit, I got separated from job" and that her last day of work was July 8, 2005.

17. On September 21, 2005, Mr. Cunningham received a letter that was faxed from Dr. Engel, dated September 19, 2005 (Exhibit 5). The letter stated that the Appellant had been seen on that date by the doctor, and that she was "able to return to full-time work effective immediately. No restrictions. No shift is to be excluded ie [sic] she may work night shift."

18. On or about this same date, it appears that the Appellant attempted to call Mr. Jeffers, but he was on his way out of town to the east coast to attend a conference. Mr.

Jeffers does not recall speaking with the Appellant during his trip or immediately prior to leaving for that trip.

19. On September 26, 2005, the Appellant called Mr. Cunningham and left two voice mail messages for him. The messages (Exhibits 6) stated, among other things, that Mr. Cunningham had ruined the Appellant's life, that he had promised her work but hadn't called her, that she was living on the street, and that he was " a big piece of shit."

20. On September 26, 2005, the Appellant also called her supervisor, Troy Clark, and left a message for him, stating that her doctor had released her to full duty, and "I didn't know that I was supposed to call you guys." She left her phone numbers and told him "I am able to work, so whenever you want me to come in just call."

21. On or about that same day, the Appellant had a phone conversation with Mr. Jeffers. Mr. Jeffers told her that since she was released for work, she needed to report back to work.

22. The Appellant was placed on paid Administrative Leave on September 27, 2005.

23. On October 11, 2005, Mr. Moon conducted a fact-finding hearing on circumstances of her absence from work during the week of September 19-26, 2005, her application with the Employment Security Department, and her voice mail messages to Mr. Cunningham. The appellant, Mr. Jeffers, and Mr. Jones attended the meeting.

24. After the meeting, Mr. Moon issued his recommendations in a memo dated October 18, 2005, to Deputy Director Nellams. Mr. Moon recommended that the Appellant be separated from employment for misconduct related to the Rights and Responsibilities policy; for her failure to return to work immediately following her release to work; and for her failure to give correct information to the Employment Security Department.

25. On November 7, 2005, a meeting to discuss the recommended termination was conducted by Mr. Nellams. The Appellant and her attorney were present. Following the meeting, Mr. Nellams issued a letter dated November 8, 2005, which directed the Appellant's dismissal from service, effective that day. The letter cited as reasons the Appellant's failure to return to work after the doctor's release, the claim she filed with Employment Security (which resulted in the Appellant receiving compensation from the City as well as unemployment benefits during the same period); and the messages she left on Mr. Cunningham's voicemail.

Conclusions

1. The Hearing Examiner has jurisdiction over this appeal pursuant to delegation from the Civil Service Commission under SMC 4.04.250.

2. The Department must show by a preponderance of the evidence that there was justifiable cause for the Department's decision to terminate the Appellant. In this case, the Department's decision to terminate the Appellant was based on her failure to return to work, her making untrue statements in an application for unemployment benefits and the voice mail messages that she left for Mr. Cunningham.

3. The Appellant did not return to work immediately after the September 19, 2005 release from her medical provider and did not contact her supervisor until nearly a week later. The voice mail message that she left for Troy Clark on September 26, 2005 did not fulfill her responsibility to report back for work. The Appellant's phone calls to her Local Business Representative also did not excuse her from her responsibility to return to work. It may that the Appellant was confused as to her responsibilities, but this confusion does not excuse her failure to immediately report back to work, or even to make immediate contact with her supervisor. The Appellant had on a prior occasion returned to work after medical leave, and at hearing she also stated that she understood that employees were required to physically report back to their assigned shift after obtaining medical clearance to return to work.

4. Job abandonment is defined in Personnel Rule 6.1.1 as the failure to appear for work as regularly scheduled for three consecutive work days absent proper authorization. The Appellant's failure to report to the workplace for her next shift after being given medical clearance constituted job abandonment. Under Personnel Rule 6.1.4, job abandonment <u>must</u> be treated as a major disciplinary offense, and an appointing authority has discretion to discharge an employee who abandons his or her job.

5. The next issue is whether the Appellant's actions in leaving the two voicemail messages for Mr. Cunningham violated the Center's Employee Rights and Responsibilities (Exhibit 2). The Appellant argued that the messages were protected under the "equality principle" of the National Labor Relations Act, which protects frank and even insulting language that may arise between employers and employees during collective bargaining. The City is not an "employer" under the NLRA, and the Appellant is not covered by that Act. Thus, the issue is whether the "equality principle" should nevertheless be considered in this context. The cases cited by the Appellant do not support such an application, or show that the purposes behind the equality principle would be furthered by applying it here.

6. The state Court of Appeals considered the application of the principle in a case involving the Employment Security Act, *Haney v. Employment Security Department*, 96 Wn. App. 129, 978 P.2d 543 (1999). A worker was discharged for insubordination when,

after receiving a letter of reprimand from her employer, she wrote a letter accusing the management of having big egos and self-serving personal agendas. In considering the worker's disqualification for unemployment benefits, the Court considered whether, although the worker was not covered by the NLRA, the equality principle should nevertheless apply to her letter. The Court noted that the reason the National Labor Relation Board tolerates "otherwise insubordinate behavior is to further the equal bargaining power and collective representation aims of the NLRA," and that this principle would not apply where the worker did not act on behalf of a union or fellow employees. *Id.* at 137. The Court also noted that if insubordination in response to a disciplinary action did not constitute misconduct under the ESA, an employee could invoke the disciplinary procedures, "harangue management, and be discharged without sacrificing unemployment benefits" in contravention of the purposes of the Employment Security Act. 96 Wn.App. at 137.

7. In this case, as in *Haney,* the Appellant was not covered by the NLRA and was not acting on behalf of her union or fellow employees when she left the voice messages for Mr. Cunningham. The messages cannot be considered to have been made in the context of a grievance or collective bargaining process, or on behalf of fellow employees or the union. The messages were not shown to be a direct response to a specific communication from Mr. Cunningham or the Center, as opposed to the "exchange" of statements between negotiating parties, such as that contemplated and encouraged by the equality principle. Further, to treat the Appellant's voicemails as protected communication under the facts in this case, would not further policies of the NLRA, but would undermine the Department's ability to enforce its Rights and Responsibilities policies regarding how employees are to treat each other.

8. It does appear that the Appellant was angry and fearful about her financial situation at the time of her phone calls, and she later expressed regret for having left the messages. But the Department did not err in deciding that the voicemails violated the Employee Rights and Responsibilities policies.

9. The Appellant's action in filing for unemployment compensation resulted in the Appellant's receiving unemployment compensation while she was on paid administrative leave. Although the Appellant argued that she was separated from her job, the evidence in the record shows that she was not suspended, nor had she quit or been terminated at the time she applied for unemployment compensation. It appears that the Appellant may have equated her non-pay status (prior to being placed on paid administrative leave) with separation, but her confusion cannot be excused as reasonable; there is nothing in the communications from the Department to the Appellant that would have led to her confusion in this regard.

10. The Department had justifiable cause to terminate the Appellant. Her failure to report back to work following her medical release constituted job abandonment, which the Rules define as a major disciplinary offense. The abandonment, along with the voice

mails and the claim for unemployment benefits, gave the Department justifiable cause to terminate.

11. Discharge from employment is obviously a severe outcome for the Appellant, who was a diligent worker (Exhibit 17) before she experienced the problems that ultimately led to her termination. The Department would have been acting within its discretion had it chosen a lesser measure than discharge. But the Department had already issued warnings and a three-day suspension to the Appellant for previous incidents involving absenteeism and behavior towards other employees. The Department could reasonably conclude that further disciplinary actions short of termination would not result in a change in the Appellant's behavior, and could be viewed by other employees as tolerance of the Appellant's behavior. The decision to discharge the Appellant should be affirmed.

Decision

The Seattle Center had justifiable cause to terminate the Appellant. The Department's decision is **AFFIRMED.**

Entered this 9th day of February, 2006.

Anne Watanabe
Deputy Hearing Examiner

Concerning Further Review

NOTE: It is the responsibility of the person seeking to appeal a Hearing Examiner decision to consult Code sections and other appropriate sources, to determine applicable rights and responsibilities.

The decision of the Hearing Examiner is subject to review by the Civil Service Commission. To be timely, the petition for review must be filed with the Civil Service Commission no later than ten (10) days following the date of issuance of this decision, as provided in Civil Service Commission Rules 6.02 and 6.03.

BEFORE THE CITY OF SEATTLE CIVIL SERVICE COMMISSION

Vicki Joy Appellant **Vs.** **Seattle Center** City of Seattle, Respondent	**DISMISSAL ORDER** **CSC APPEAL No. 05-01-010**

The Executive Director of the City of Seattle, Civil Service Commission hereby enters the following

ORDER OF DISMISSAL

WHEREAS the Office of the Hearing Examiner issued Findings and a Decision on February 9, 2006,

WHEREAS the Appellant did not file a Petition for Review of the Hearing Examiner's decision (due no later than February 21, 2006),

WHEREAS the Commission reviewed, discussed and voted to affirm the Office of the Hearing Examiner decision, at its February 15, 2006 meeting,

The Civil Service Commission hereby **DISMISSES THIS APPEAL WITH PREJUDICE.**

Issued this *21st* of *February, 2006*

FOR THE CITY OF SEATTLE CIVIL SERVICE COMMISSION

Glenda J. Graham-Walton, Executive Director

Note: Commission decisions are final and conclusive unless a party of record makes application for a writ of review to the Superior Court of the State of Washington for King County within fourteen days of issuance