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Court of Appeals No. 73024-0-I

IN THE WASHINGTON COURT OF APPEALS
DIVISION ONE

SARAH CHRISTNER,

Appellant,

v.

STATE OF WASHINGTON DEPARTMENT OF EMPLOYMENT SECURITY,

Respondent.

APPELLANT'S OPENING BRIEF

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I. INTRODUCTION

Appellant, Sarah Christner, was a receptionist at Washington Center for Pain Management ("WCPM")—a medical clinic with several locations in Puget Sound. WCPM demanded Ms. Christner's two week resignation because it chose not to continue to accommodate her short notice time off requests beyond two weeks, as they needed a receptionist who could reliably work full-time. WCPM considers any request for time off with less than two weeks' notice to be a "short notice" request, including partial-day absences for medical appointments or other urgent matters. Despite this, WCPM previously approved Ms. Christener's requests for partial days off, including instances when she provided less than two weeks' notice, and never issued any formal discipline.

After Ms. Christner experienced some health issues necessitating several doctors' appointments, WCPM sent her an email stating her health condition and frequent medical appointments were "becoming very difficult with scheduling" and asked her to provide a doctor's note to project the number of future doctor appointments anticipated. A few minutes later, WCPM issued her a directive that in the future she must provide two weeks' notice for time off—"no exceptions."

About two weeks later, Ms. Christner submitted a request to leave early. This request was made only 12-13 days in advance. While most of Ms. Christner's requests for time off had been for doctor appointments, this request was for a personal reason—to leave work early to attend a job interview with a law enforcement agency. When Ms. Christner was hired at WCPM, she disclosed her career aspiration to work in law enforcement and was hired with that knowledge. At first WCPM did not respond to her request. When Ms. Christner followed up, WCPM responded by approving the afternoon off, but demanding her two week resignation.

Ms. Christner applied for unemployment benefits, reporting she was discharged for requesting too much time off; WCPM reported she quit for needing too much time off. The Employment Security Department adjudicated the job separation as a discharge and allowed benefits, finding there was no statutory misconduct.

WCPM appealed the initial unemployment eligibility decision on the basis that Ms. Christner quit and therefore it was entitled to relief of benefit charges on its experience rating account. At the hearing, WCPM did not allege misconduct, did not produce or offer into evidence any supporting documentary evidence to support misconduct such as a policy or copies of warnings, did not provide dates or details of the alleged absences or other facts to show misconduct, and it did not make any

closing argument. Nevertheless, the administrative law judge denied unemployment benefits, finding Appellant's behavior to be disqualifying misconduct. The Commissioner affirmed, concluding Appellant's conduct was a "deliberate violation and disregard of standards of behavior which an employer has the right to expect."

Ms. Christner believes she should be eligible for unemployment benefits. She appeals the Commissioner's decision and asks this court to reverse.

II. ASSIGNMENTS OF ERROR

1. The Commissioner erred in adopting Conclusions of Law (CL) No. 7 and 8, because they misinterpret and misapply RCW 50.04.294(1) and (2) and in ultimately finding statutory misconduct pursuant to RCW 50.04.294(1)(b) and RCW 50.20.066 CP 163.

2. The Commissioner erred in adopting Findings of Fact (FF) No. 5 and 8 because it erroneously mischaracterized a certain email as a "final warning" sufficient to put the employee on notice that her job was in jeopardy, found the claimant did not disclose the reasons for the requests for time off, and found the employer believed all of the requests for time off were due to illness; and where that "warning" was not properly admitted into evidence. CP 162, FF 5 and FF 8.

3. The Commissioner erred in adopting FF No. 6 and CL No. 11, which erroneously found the repeated requests for time off created a "hardship" on the employer and staff, which it found to support a finding of misconduct. CP 162, 164, FF 6 and CL 11.

4. The Commissioner erred in adopting FF No. 7, which erroneously found, "Following the final warning, the claimant requested time

off on approximately five separate occasions in a 5-week period." CP 162, FF 7.

5. The Commissioner erred in adopting FF No. 9 and FF No. 10, which erroneously misrepresent the facts and leave out key exculpatory information. CP 162.

6. The Commissioner erred in adopting Finding of Fact No. 11 which erroneously states the claimant's two-week notice of resignation is effective, "November 1, 2013" [sic]. CP 162.

7. The Commissioner erred when it failed to address the exceptions to misconduct stated in the third prong of the statute. RCW 50.04.294(3) CP 163, CL 8.

8. The Commissioner erred in adopting Conclusion of Law No. 10 because the evidence in the record fails to show the employer met its burden of proof. CP 163-164, CL 10.

9. The Commissioner erred when it overlooked procedural irregularities such as considering documentary evidence that was not properly marked or admitted by the ALJ and the Appellant's lack of opportunity to cross-examine the employer's witnesses, CP 113-114.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the Commissioner erred in affirming the ALJ's findings of fact and conclusions of law that Ms. Christner deliberately violated and disregarded standards of behavior Washington Center for Pain Management has the right to expect pursuant to RCW 50.04.294(1)(b) when there is insufficient substantial evidence to show its policy is reasonable and that it provided warnings and where there was no deliberate violation?

2. Whether the Commissioner erred in affirming the ALJ's findings of fact and conclusions of law that Ms. Christner deliberately violated and disregarded standards of behavior which an employer has the right to expect of an employee where the employer's decision to discharge

was based on *anticipated future* conduct and the employer absolved any alleged "violations" by approving the time off requests?

3. Whether the Commissioner erred in affirming all of the ALJ's findings of fact and conclusions of law when there is sufficient evidence in the record to show that a two-week "no exceptions" notice policy for requesting time off in all circumstances is not reasonable?

4. Whether the Commissioner erred in affirming all of the ALJ's findings of fact and conclusions of law when there is no substantial evidence in the record to show that the claimant violated any other part of RCW 50.04.294(1) or (2) or that the substantial evidence in the record supports an exception under (3)?

5. Whether the Commissioner erred in concluding there was misconduct when substantial evidence in the record fails to support the employer met its burden of proof by a preponderance of evidence?

6. Whether the Commissioner erred in failing to address procedural defects at the administrative hearing which unduly abridged the claimant's due process rights to confront witnesses and rebut evidence pursuant to RCW 34.05.461(4)?

7. Whether Appellant is entitled to an award of attorneys' fees and costs if the Commissioner's order is reversed or modified?

IV. STATEMENT OF THE CASE

1. EMPLOYMENT BACKGROUND AND JOB SEPARATION

Ms. Sarah Christner, appellant and unemployment claimant, began working as a receptionist at Washington Center for Pain Management ("WCPM"), a medical clinic, on November 5, 2012 where she earned $15.00 per hour and worked full-time. CP 96–97, 109. WCPM operates multiple clinics. CP 102. At her initial interview for the receptionist

position, Ms. Christner informed WCPM of her long-term career goal to work in law enforcement, given her bachelor's degree in sociology and law. CP at 135, 155, 158.

From September 26, 2013 to November 1, 2013, Ms. Christner requested to take partial time off from work approximately five to six times. CP 99–100, 125. Most of her requests were for medical appointments, but at least one, was for a job interview with the Department of Corrections. CP 114–15, 135, 150, 155, 158. However, the only dates, times, and reasons that are clear from the record that WCPM approved partial days off were September 30, 2013 (for a doctor's appointment), and October 23, 2013 (for the interview). CP 003162, 188, 134.

WCPM's attendance policy requires that all absences from work must be submitted in writing to the supervisor and approved by the director of operations at least two weeks in advance "whenever possible." CP 132. Ms. Christner gave WCPM written notice when she needed to take a morning off or leave early. CP 99–100. She submitted doctors' notes for certain medical appointments and at Clinic Lead, Sarah Bundy's, request. CP 107. Except for one instance that Ms. Christner was able to reschedule, WCPM approved all of the prior time off. CP 116, 126 173, 188.

On September 26, 2013, Ms. Bundy exchanged emails with Ms. Christner about her request to take part of September 30, 2013 off for a doctor's appointment. CP 188.[1] Ms. Bundy approved the time off for the September 30 appointment, but testified that Ms. Christner's "health conditions" necessitating her to "go to the doctor often [are] becoming very difficult with scheduling especially when there is not adequate time given prior to the request." CP 188. Ms. Bundy asked Ms. Christner to provide a note from her doctor to project the number of future doctor appointments anticipated and suggested she try to schedule all future doctor appointments without missing work. *Id.* A few minutes later, Ms. Bundy sent Ms. Christner another email stating, "In the future, we do request two weeks [sic] notice for requesting time off, no exceptions." *Id.*

On October 10 or 11, 2013, Ms. Christner entered a request for time off through WCPM's clock in, clock out system for time off on October 23, 2013 for "personal reasons." CP 115, 117. This request was made 12-13 days in advance. *Id.* When Ms. Bundy did not respond, Ms. Christner followed up on her request. CP 189. On October 17, 2013, Ms.

[1] The email with the subject line, "Dr [sic] appointment" was not admitted as documentary evidence before the ALJ at any point during the hearing, yet was included in the Commissioner's Record. *See* CP 187–89.

Christner sent a follow up email[2] stating she needed to take the afternoon of October 23 off for a "very important matter to attend to....I would need to be off at 1:30 p.m. at the latest." CP 189.

The next day, October 18, Ms. Christner disclosed to Ms. Bundy that the personal matter was a job interview and that she had told the hiring manager, Loni, before she was hired, that she was pursuing a career in her field of studies and that her long-term career goal was to work in law enforcement. CP 114–15, 155. Ms. Christner also pointed out that most of her requests were for medical appointments and only recently the requests were for job seeking activities. CP 114, 155.

Ms. Bundy granted the requested time off for October 23, but told Ms. Christner they were ending her employment and asked for Ms. Christner's two-week resignation because WCPM could not "continue to accommodate these short notice time off requests beyond the two weeks as we need a reliable full time front desk receptionist." CP 135, 146, 153, 155–56. Ms. Christner complied with the request in lieu of being fired and tendered two weeks' notice. CP 135–36, 153, 155–56. WCPM terminated her employment on November 1, 2013. CP 109, 147.

[2] The email with subject line "Also..." was not admitted as documentary evidence and was not addressed at the hearing, but it was included as part of the Commissioner's Record under review. CP 189. It appears to have been faxed by WCPM on 1/16/2014. *Id.*

2. PROCEDURAL FACTS

a. The Department Adjudicated the Job Separation as a Discharge and Allowed Unemployment Benefits, Finding there was No Misconduct.

Ms. Christner applied for unemployment benefits the week ending October 27, 2013. CP 149, 152, 161 ("BYE: 10/25/2014"). WCPM reported in writing to the Department that Ms. Christner voluntarily quit her job. *See* CP 147-48. WCPM wrote, "Voluntary resigned to pursue a position w/another employer. Requested time off, to do preliminary testings [sic] for new employer." CP 147. WCPM, a base year employer, left blank the section regarding misconduct and did not mark either the "Employee quit, not employer's fault" box or the "Employee was fired for misconduct" box on the form to request relief of benefit charges. CP 148.

After conducting written and telephonic fact-finding with Ms. Christner and WCPM, the Department awarded unemployment benefits to Ms. Christner beginning 11/3/2013, finding there was no misconduct. *See* CP 139-143. The Department's decision defined misconduct:

> "Misconduct" includes acts that show a willful or wanton disregard for your employer or co-workers, *deliberate violations of customary standards of behavior,* and carelessness or negligence that is repeated or could result in serious bodily harm. See RCW 50.04.294 and WAC 192-150-200."

CP 140 (emphasis added).

b. Washington Center for Pain Management Appealed, Alleging the Employee Quit and therefore it should be Relieved of Benefit Charges.

WCPM appealed the ESD's determination to allow benefits to the Office of Administrative Hearings (OAH). CP 146. In WCPM's letter of appeal, it made its position clear that Ms. Christner quit and there was no misconduct. *Id.* Mr. Lee asserted WCPM was entitled to relief of charges of its experience rating account. *Id.* Mr. Lee's letter states in pertinent part:

> "…**Our intent was not to establish misconduct,** but rather to show that the claimant's **departure was due to a voluntary quit.** We believe a statement we made during a phone call was taken out of context. Per attached emails, while we did request the claimant to resign, it was as a result of her repeated requests for time off on short notice, even by her own admission. The claimant's position requires full time staffing and **the business cannot accommodate** multiple short notice requests for time off. We therefore request relief of benefit charging."
>
> …
>
> Letter from Jae Lee, CEO, Washington Center for Pain Management, December 27, 2013 (emphasis added).

Id., CP 153-54.

A Notice of Hearing was sent to the parties.[3] CP 182-84. The "Purpose of the Hearing" states the hearing will address (1) whether "[t]he claimant was discharged from employment for misconduct pursuant to RCW 50.20.066, or voluntarily quit without good cause pursuant to RCW 50.20.050," and (2) whether "[t]he claimant was able to, available for, and actively seeking work in accordance with the standards of RCW 50.20.010(c)[.]" CP 183.

c. The Hearing before the Office of Administrative Hearings (OAH).

The administrative appeal hearing was held telephonically on January 21, 2014 before an Administrative Law Judge (ALJ) of OAH. CP 2, 107. CEO Jae Lee, Controller Steve Bromberg,[4] and Clinical Lead Sarah Bundy appeared as witnesses for the employer. CP 82. Mouang Saeteurn from Human Resources, who prepared several of the admitted and non-admitted documents, did not appear. *Id.* Ms. Christner represented herself *pro se. Id.*

The ALJ explained the parties' cross-examination rights after each person testified. CP 87-88. Ms. Bundy, who was designated by the ALJ as the "employer's representative" after the start of the hearing, had not read

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[3] The *Notice of Hearing* was not one of the admitted exhibits, but it is included in the Commissioner's Record. CP 182–84.

[4] The witness is inadvertently identified as 'Brombert' in the ALJ's order. CP 161.

or possessed any of the proposed exhibits in the hearing packet, as she was on vacation during the hearing. CP 89–90. Mr. Bromberg was the only employer witness who had reviewed the documents. CP 89–90.

The ALJ called Mr. Bromberg as a witness, but after a couple of questions decided not to question him further and did not offer Ms. Christner an opportunity to cross-examine him. CP 111–12. After Mr. Lee interrupted the ALJ toward the end of the hearing, the ALJ took additional testimony but did not offer Ms. Christner an opportunity to cross examine Mr. Lee before closing the evidence portion of the hearing. CP 133–34.

WCPM did not provide a copy of the policy to the Department or to OAH; Ms. Christner offered to read a portion of it during direct examination. CP 132-33 Ms. Christner read the policy:

> "Um, [I'll] try to read it as accurately as possible. It says, 'All requests from (Inaudible) must be submitted in writing, um -- um, through your supervisor at least two weeks in advance of approval by the director of operations and will be granted as staffing allows."

CP 132.

Ms. Christner also read, "The objective of the time off [sic] is to ensure that absences will be scheduled in advance *whenever possible."* CP 132 (emphasis added).

No employment policy was provided at the hearing for the alleged policy at issue. Mr. Lee acknowledged that he did not have that information with him at the hearing. CP 110. The employer did not ever produce a copy of the policy.

No testimony and no documentary evidence was proffered as to whether the asserted policy provides time off for medical issues or other exceptions. CP 81–137. Likewise, there was no evidence as to whether the time taken was paid time—such as under a sick leave or paid time off (PTO) plan—or whether the policy applied to all employees or a certain class of employees, or whether WCPM is subject to the Family Medical Leave Act (FMLA), and if so, whether Ms. Christner might have been eligible for intermittent FMLA or protected medical leave under federal, state or local leave or disability laws. *Id.*

At the unemployment appeal hearing, Ms. Bundy did not recall specific details about Ms. Christner's time off requests. CP 102. She could only recall that in the month of October, Ms. Christner was "beginning to request, um, multiple days off," and it was "becoming more and more difficult to accommodate this." CP 96–99. Likewise, Ms. Bundy did not recall the last conversation with Ms. Christner before the separation. CP 97. She could only recall having "some conversations" with Ms. Christner

about WCPM's need for at least two weeks' notice for "[s]ome mornings" Ms. Christner worked. CP 96–97.

At first, Ms. Bundy did not recall if she had given Ms. Christner that her job was in jeopardy, testifying that, "I can't say if those were my words, no, but there was [sic] warnings given....I don't think it included her resignation, however." CP 97–99. " When pressed, Ms. Bundy testified that she "...was making it very clear that these accommodations were becoming very, very difficult, um, that we needed the coverage, that -- that this was becoming an issue." CP 99 (FF6 and CL 11). Ms. Bundy could "...not recall if that warning included us saying that she would be fired if it continued." *Id.*

Ms. Bundy did not recall or describe any specific incidents where Ms. Christner's requests made it difficult to find staffing coverage, but instead testified how the "short notice time off" requests would require her to "scramble" to find coverage or cover that part of the shift herself. *Id.* (FF6 and CL 11). Ms. Bundy testified "on average, within a two-week period," Ms. Christner gave one week's notice, but Ms. Bundy admitted that sometimes she gave two weeks. CP 102-03. Ms. Bundy testified that "...although [she] was doing [her] best to accommodate the requests, it was -- it was definitely an issue." CP 102.

Ms. Bundy was unable to recollect specifics about the frequency of the time off requests. CP 103. She testified that she "…remember[ed] a time where there would be two requests for the same week. Multiple requests for that month, um, quite a few requests at a time." *Id.* No follow up testimony was elicited about whether those requests were for medical appointments. Ms. Bundy testified the policy required two weeks' notice, but admitted that one week notice was adequate but not when it was on a such a regular basis. CP 103.

Then, for the first time in the hearing, the ALJ characterized the "warning" as a "final warning" and asked the witness when it was given and whether it was verbal or written. CP 104.

> ALJ: And you don't recall when you gave the final warning before Ms. Christner sent this October 18th email?
>
> MS. BUNDY: No, not the exact date.
>
> ALJ: Well, just approximate.
>
> MS. BUNDY: I would -- imagine it would be towards the middle of October. Just, you know, a little bit prior to her email to me.
>
> ALJ: And -- and let me see if I understand your testimony. You -- you -- this final warning, was this verbal or written?
>
> MS. BUNDY: Gosh. You know, I apologize. I'm not sure. I believe I had given a written warning, and I think that was the final one. There have been verbal conversations. But if I remember correctly, I had, um, seeked (sic) advice from our human resources and Jae [Lee], and I believe I did send a written warning.

CP 104.

Ms. Bundy did not recall what she wrote in the alleged written warning. At first she testified that she "would have said something along the lines of, 'If this continues, there will be consequences.'" CP 105. When the ALJ asked Ms. Bundy on direct whether she had explained the consequences to Ms. Christner, Ms. Bundy immediately recanted her testimony:

> ALJ: Okay. Now, in that -- in that written warning, did you state that if Ms. Christner continued to violate this policy it could result in her termination?
>
> MS. BUNDY: I can't recall if those were my exact words. But I know I would have said something along the lines of, "If this continues, there will be consequences."
>
> ALJ: Well, did you explain what you meant by consequences?
>
> MS. BUNDY: You know I apologize, I would have to -- to look back to see exactly what I wrote. Because I don't believe I did say that there would be, uh consequences -- consequences including termination, no.
>
> ALJ: You believe you did or did not?
>
> MS. BUNDY: I believe I did not.

Id.

The ALJ was the first to characterize the warning as a "final warning. *See* CP 104. (CL 7, FF 5). The ALJ continued to characterize the

written warning as a "final warning" throughout examination portion of the hearing. CP 104, 105, 109, 110, 117, 118, 119, 123, 124, 134. (CL 7, FF 5). Ms. Bundy referenced she thought the written warning was the "final one." CP 104. Mr. Lee said that Ms. Bundy communicated that she gave a final written warning. CP 109.

Ms. Christner also read the lower portion of the September 26 2013 "Dr [sic] Appointment" email into the record. CP 119. At the hearing, the ALJ did not ask the employer to produce a copy of this documentary evidence. CP 81-137. The ALJ ascribed the portion that Ms. Christner read into the record as a "final warning." CP 162 (FF 5, CL 7).

Ms. Bundy testified that she gave Ms. Christner a warning in mid-October. *See* CP 104. The ALJ acknowledged this testimony later in the hearing. *See* 110. The ALJ concluded in initial order that the September 26, 2013 email with the subject "Dr[.] Appointment" was the "final warning" and was the first to characterize the email as such. CP 98, 188 (FF 5, CL 7).

The employer did not make any closing argument at the hearing. CP 136. The ALJ did not make any findings based substantially on credibility of evidence or demeanor of witnesses.

d. The ALJ Reversed the Department's Decision to Allow Benefits, Finding the Employer Proved Misconduct, but Did Not Specify the Specific Portion of the Applicable Statute.

The ALJ issued an initial order on January 24, 2013, reversing the Department's decision to allow benefits and remanding the issue of the overpayment. CP 161-68. The ALJ entered several findings of fact and conclusions of law for which Appellant assigned error in her petition for review. CP 172-75. The ALJ cited several provisions of law that applied to the case, including RCW 50.04.294 apply. CP 163, (CL 6). Conclusions of law 7 and 8 only reference RCW 50.04.294(1)(a) and RCW 50.04.294(2). CP 163, (CL 7 and 8).

e. Ms. Christner Petitioned the Commissioner.

Still proceeding pro se, on February 18, 2014, Ms. Christner filed a petition for review to the Commissioner. CP 172-75. Her petition for review outlined several arguments, including the fact that neither she nor her employer alleged "misconduct" at the hearing. CP 172. She also argued the hearing itself was fundamentally unfair because she did not have notice she would be examined for misconduct and asserted the ALJ had acted as an "agent" of the employer at the hearing. *Id.* WCPM did not file a Reply to the Petition for Review. CP 103.

f. The Commissioner "Affirmed" the ALJ, Adopting All of the Findings of Fact and Conclusions of Law, but identified RCW 50.04.294(b)(1) as the statute at issue and denied an additional week of benefits.

The Commissioner affirmed the ALJ's order in a decision dated March 14, 2014 and like the ALJ, remanded the overpayment issue for the benefit weeks at issue. CP at 177–180. The Commissioner concluded, "[t]he claimant's discharge precipitating conduct has been shown, by a preponderance of substantial evidence of record, to have evinced a deliberate violation and disregard of standards of behavior which an employer has the right to expect of an employee," and therefore was disqualified pursuant to RCW 50.04.294(1)(b). CP 178–179.

g. Ms. Christner Petitioned for Judicial Review.

Ms. Christner filed a petition for judicial review in Snohomish County Superior Court, and the court affirmed the Commissioner. CP 190–92, 6–8. Appellant's timely appeal followed. CP 2–5.

V. STANDARD OF REVIEW

Washington's Administrative Procedure Act (APA), chapter 34.05 RCW, governs judicial review of a final decision of the Commissioner of

the Commissioner's Review Office ("Commissioner")[5]. RCW 34.05.510; RCW 50.32.120; *Tapper v. Employment Sec. Dep't*, 122 Wn.2d 397, 402, 858 P.2d 494 (1993).

The reviewing court must grant relief if it determines Appellant is successful in showing the agency's final decision is invalid on any one or more of nine possible grounds. *See* RCW 34.05.570(3)(a)-(i). Ms. Christner challenges the Commissioner's decision on four separate bases:

> (d) The agency **erroneously interpreted or applied** the law; [or]
>
> (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; [or]
>
> ...
> (h) The order is **inconsistent with a rule of the agency** unless the agency explains the inconsistency by stating facts and reasons to demonstrate a rational basis for inconsistency; [or]
>
> (i) The order is **arbitrary or capricious**.

RCW 34.05.570(3)(d), (e), (h), or (i) (Emphasis added).

To determine whether the Commissioner's decision is invalid on one or more of these bases, this court reviews the findings of fact of the

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[5] "Commissioner," as used in Appellant's brief, refers to a review judge of the Commissioner's Review Office, which is the delegated judicial office of the Employment Security Department defined at WAC 192-04-020(5)—not be confused with the "Commissioner" as defined at RCW 50.04.060 who is the politically appointed administrative head of the Employment Security Department and who has vested rule-making authority for the agency pursuant to Chapter 50.12 RCW and RCW 34.05.010(4).

Commissioner as opposed to the ALJ—except to the extent the Commissioner modified or replaced those findings. *See Tapper*, 122 Wn. 2d at 406.

This court reviews the same record on the same basis as did the superior court, and without reference to the conclusions reached by that court. *Durham v. Employment Sec. Dep't* 31 Wn. App. 675, 676, 644 P.2d 154, 156 (1982). This court sits in the same position as the superior court and applies the APA standards directly to the entire administrative record of the agency. *Tapper*, 122 Wn.2d at 402, (citing *Macey v. Employment Sec. Dep't*, 110 Wn.2d 308, 752 P.2d 372 (1988). Any findings of fact and conclusions of law made by the superior court are superfluous. *Verizon NW, Inc. v. Employment Sec. Dep't*, 164 Wn.2d 909, 915, 194 P.3d 255 (2008); *Durham v. Employment Sec. Dep't.*, 31 Wn. App. 675, 644 P.2d 154 (1982).

In all court proceedings under Title 50 RCW, there is a rebuttable presumption the Commissioner's decision is *prima facie* correct and the party asserting its invalidity—here, Ms. Christner—has the burden to overcome that presumption. RCW 50.32.150; RCW 34.05.570(1)(a); *Smith v. Employment Sec. Dep't*, 155 Wn. App. 24, 32, 226 P.3d 263 (2010).

Absent a statutory disqualification, unemployed workers are generally eligible for benefits. *Griffith v. State Dep't of Employment Sec.*, 163 Wn. App. 1, 8, 259 P.3d 1111 (2011). If the court determines the Commissioner acted within his or her power and correctly construed the law, the decision of the Commissioner shall be confirmed; otherwise, it shall be reversed or modified. RCW 50.32.150. "Construction of the benefits statute which 'would narrow the coverage of the unemployment compensation laws' is viewed 'with caution.' " *Id.* (quoting *Shoreline Comm. College Dist. No. 7 v. Employment Sec. Dep't,* 120 Wn.2d 394, 406, 842 P.2d 938 (1992)); see *also* RCW 50.01.010 (stating the Employment Security Act "shall be liberally construed").

1. Conclusions of Law are Reviewed de novo, under the Error of Law Standard

The Commissioner's conclusions of law, including whether the Commissioner erroneously interpreted or applied the law, are reviewed *de novo,* under the error of law standard. RCW 34.05.570(3)(d); *Tapper,* 122 Wn.2d at 407. Whether the agency properly interpreted the legal meaning of a statutory disqualification is a pure question of law, which the court reviews independently from the decision of the administrative agency. *Othello Cmty. Hosp. v Employment Sec. Dep't,* 52 Wn. App 592, 762 P.2d 1149 (1988). A reviewing court may substitute its view of the law for that

of the administrative agency, although substantial weight is accorded to the agency's view of the law within its special expertise. *Overton v. Econ. Assistance Auth.,* 96 Wn.2d 552, 555 637 P.2d 652 (1981).

While the reviewing court should give deference to the agency's interpretation of the statutes and regulations it administers, it is not bound by the agency's interpretation. *City of Redmond v. Central Puget Sound Growth Mgmt. Hearings Bd.*, 136 Wn.2d 38, 959 P.2d 1091 (1998), citing *Tapper*, 122 Wn.2d 402.

2. Factual Findings are Reviewed for Substantial Evidence

This court reviews the Commissioner's factual findings for substantial evidence. *Smith v. Employment Sec. Dep't*, 155 Wn. App. 24, 32, 226 P.3d 263, 266 (2010)

Substantial evidence is evidence that is of sufficient quantity persuade a fair-minded person of the truth or correctness of the order. RCW 34.05.570(3)(e); *King Cnty. v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 142 Wn. 2d 543, 14 P.3d 133 (2000). A finding is clearly erroneous when, considering the entire record, the reviewer is left with a definite and firm conviction that a mistake has been made—even if there is supporting evidence in the record to support the administrative agency action. *See Johns v. Employment Sec. Dep't,* 38 Wn. App. 566, 569-570,

686 P.2d 517, 520 (1984); *Durham v. Dep't of Employment Sec. Dep't.*, 31 Wn. App. 675, 676, 644 P.2d 154, 156 (1982).

Unchallenged findings of fact are verities on appeal. *Tapper*, 122 Wn.2d at 407; RAP 10.3(g). If Appellant challenges one or more of the agency's factual findings, the question is whether the finding is 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. RCW 34.05.570(3)(e) (Emphasis added). *See William. Dickson Co. v. Puget Sound Air Pollution Control Agency,* 81 Wn. App. 403, 411, 914 P2.d 750 (1996); see also *Olmstead v. Dep't of Health,* 61 Wn. App. 888, 893, 812 P.2d 527 (1991).

This court views the evidence and reasonable inferences in the light most favorable to the party who prevailed at the administrative proceeding below. *William Dickson Co.*, 81 Wn. App. at 411. Here, the Commissioner, in finding misconduct, absolved charges to the WCPM's experience rating account. CP 179. Thus, the employer, not the Commissioner or the Department, is the "prevailing party" from the administrative hearing. *Id.*

The ESA requires the Department to analyze the facts of each case to determine what actually caused the employee's separation. *Safeco,* 102

Wn.2d at 392-93. The statute requires that the Commissioner's findings must be supported by substantial evidence *in light of the whole record* before the Commissioner. RCW 34.05.570(d). (Emphasis added.) This court must search the entire record for evidence both supportive of and contrary to the agency's findings. *Franklin Cnty,* 97 Wn.2d at 324 (citing to *Universal Camera Corp. v. NLRB*, 340 U.S. 474, (1951)).

3. Mixed Questions of Law and Fact are Reviewed *de novo,* under the Error of Law Standard

Whether an employee's actions constitute misconduct, so as to warrant a denial of unemployment benefits, is generally a mixed question of fact and law. *Griffith* v. *Dep 't of Emp't Sec.,* 163 Wn. App. 1, 8, 259 P.3d 1111 (2011).[6] The *manner* in which an individual's employment is terminated is a matter of fact. *In re Bauer,* Empl. Sec. Comm'r Dec 2d 220 (1976). Determining whether the claimant was properly discharged for disqualifying misconduct, as defined by RCW 50.20.066(1) and more particularly at RCW 50.04.294, is a question of law. *Haney* v. *Emp't Sec. Dep't,* 96 Wn. App. 129, 138-39, 978 P.2d 543 (1999). This court has the ultimate authority to determine the purpose and meaning of statutes. *Overton v. Econ. Assistance Auth.,* 96 Wn.2d at 555.

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[6] The Commissioner designates certain Decisions of Commissioner as precedential for the agency and which are persuasive authority for this court. RCW 50.32.095; *Martini v. Emp't Sec. Dep't,* 98 Wn. App. 791, 795, 990 P.2d 981 (2000).

4. Review of Arbitrary and Capricious actions

When this court reviews matters of discretion, the court's reviewing power limited to ensuring that the agency has exercised its discretion in accordance with the law and has not abused its discretion. RCW 34.05.574(1); *Lenca v. Employment Sec. Dep't of State*, 148 Wn. App. 565, 575, 200 P.3d 281, 285 (2009); *Conway v. Dep't of Soc. & Health Servs.,* 131 Wash.App. 406, 419, 120 P.3d 130 (2005).

An agency abuses its discretion when it exercises its discretion in an arbitrary and capricious manner. *Conway v. Dep't of Soc. & Health Servs., 131 Wn. App. 406, 419, 120 P.3d 130 (2005).* An agency acts in an arbitrary and capricious manner if its actions are willful, unreasoning and in disregard of facts and circumstances. *Lenca v. Employment Sec. Dep't of State*, 148 Wn. App. 565, 575, 200 P.3d 281, 285 (2009); *Wash. Waste Sys., Inc. v. Clark County,* 115 Wn.2d 74, 81, 794 P.2d 508 (1990).

VI. ARGUMENT

The Employment Security Act "...shall be liberally construed for the purpose of reducing involuntary unemployment and the suffering caused thereby to a minimum...."
Preamble to the Employment Security Act, RCW 50.01.010.

1. It is the Public Policy of Washington that All Provisions of the Employment Security Act are to be Liberally Construed.

The Washington Legislature, in recognizing that involuntary unemployment is the "*greatest hazard* of our economic life," and the "economic insecurity due to unemployment is a *serious menace to the health, morals, and welfare* of the people of this state," and under its police and sovereign powers, mandated that the Employment Security Act (ESA), Title 50 RCW, "shall be *liberally construed* for the purpose of reducing involuntary unemployment and the suffering caused thereby to the minimum." *See* RCW 50.01.010 (emphasis added).

The Employment Security Department, in administering the ESA, must grant unemployment benefits to a claimant who is "unemployed through no fault of their own" and is otherwise eligible. RCW 50.01.010; RCW 50.20.010. The 'unemployed through no fault of their own' principle enables a claimant to maintain purchasing powers with a partial wage replacement during periods of unemployment, which helps to stabilize the economy and limits the burden on other types of relief assistance while the claimant seeks new work. RCW 50.01.010.

The Legislature's "mandate of liberal construction requires that courts view with caution any construction that would narrow the coverage of the unemployment compensation laws." *Western Ports Transp. v. Employment Sec. Dep't,* 110 Wn. App. 441, 450 (2002); *see also*

Shoreline Community College District No. 7 v. Employment Security Department, 120 Wn.2d 394, 406 (1992).

When the Department decides issues of benefit eligibility under the law and applies the laws and regulations under Title 50 RCW and Title 192 WAC, it must by mandate, apply a liberal construction in favor of allowing benefits in light of the strong public policy reasons contained in the ESA. *See* RCW 50.01.010.

2. **The Commissioner misinterpreted and misapplied the law and incorrectly concluded the employer established misconduct under RCW 50.04.294(1)(b).**

Claimants who are unemployed through no fault of their own should be eligible for benefits unless they are statutorily disqualified. *Safeco Ins. Cos. v. Meyering,* 102 Wn.2d 385, 388-389, 687 P.2d 195 (1984).

The Commissioner affirmed the ALJ's adjudication of the job separation as a discharge. CP 140, 162 (CL 5). 178-79. Ms. Christner does not dispute that she was discharged, and does not assign error to this finding. *Id.*

The party alleging misconduct must prove, by a *preponderance of evidence,* (1) the employee's alleged misconduct was work-connected, and (2) the claimant's alleged misconduct causing the discharge rises to the

level of statutory misconduct as defined in RCW 50.20.294. "'Preponderance of evidence' is that evidence which, when fairly considered, produces the *stronger* impression, has the *greater* weight, and is the *more convincing* as to its truth when weighted against the evidence in opposition thereto." WAC 192-100-065 (emphasis added). *Yamamoto v. Puget Sound Lbr. Co.,* 84 Wash. 411, 146 P. 861 (1915).

Here, the employer did not allege misconduct to the Department or to at the hearing. When asked how the employee's job came to an end, the employer testified that Ms. Christner "ultimately quit." CP 96. Its position that Ms. Christner quit is consistent with the facts provided to the Department when the Department was investigating the matter and when WCPM filed its appeal.[7] *See* CP 147-148, 146. It is clear the employer had failed to request relief of benefit charges as it should have at the Department level. *See* CP 148. Likewise it did not allege misconduct at the hearing. While WCPM provided testimony about whether or not it issued warnings and the great difficulty Ms. Christner's partial absences had, it did not put forward any documentary evidence to support a finding of misconduct and it did not otherwise meet its burden of proof.

[7] Ms. Christner did not voluntarily quit pursuant to RCW 50.20.050. The employer was the moving party and specified her end date and the job separation was properly adjudicated as a discharge as found by the judge at CL 4–5.

Under RCW 50.04.294(1), the following four non-exhaustive categories of work-connected misconduct disqualify a claimant:

> (a) willful or wanton disregard of the rights, title and interests of the employer or a fellow employee;
>
> **(b) deliberate violations or disregard of standards of behavior which an employer has the right to expect of an employee;**
>
> (c) carelessness or negligence that causes or would likely cause serious bodily harm to the employer or a fellow employee; or
>
> (d) carelessness or negligence of such degree or recurrence to show an intentional or substantial disregard of the employer's interest.

RCW 50.04.294(1)(a)-(d) (emphasis added).

RCW 50.04.294(2) provides seven non-exclusive examples of *per se* disqualifying misconduct, including "Violation of a company rule if the rule is reasonable and if the claimant knew or should have known of the existence of the rule." RCW 50.04.294(2)(f). A company rule is reasonable if it is related to the employee's job duties or it is a normal business requirement or practice for the employee's occupation or industry. WAC 192-150-210(4).

The Commissioner determined that Ms. Christner was disqualified from receiving benefits based on RCW 50.04.294(1)(b). CP 178. Here, WCPM failed to establish misconduct under this statute for three reasons. First, it did not show Ms. Christner deliberately disregarded any standard of behavior they had the right to expect because her absences were

approved and excused and its policy was not reasonable. Second, WCPM discharged Ms. Christner based on *anticipated future* conduct for which it believed might create a hardship but not because of any current misconduct—because WCPM had approved Ms. Christner's prior requests, thus absolving any underlying "violations." Third, Ms. Christner's conduct does not rise to the level of misconduct under subsections (a), (c), or (d) of RCW 50.04.294.

a. WCPM failed to prove Ms. Christner deliberately disregarded any standard of behavior it had the right to expect because it failed to produce any evidence of its policy and Ms. Christner's conduct was approved.

Without documentary evidence of an existing policy, WCPM cannot show a standard of behavior that it can reasonably request of its employees. As such, it did not meet its burden to establish a standard it had the right to expect under RCW 50.04.294(1)(b).

WCPM failed to produce a copy of the alleged policy at issue on requesting time off to the Department or at the administrative appeal hearing; instead, a portion of this policy was read by Ms. Christner during her direct examination by the ALJ. CP 132-33. However, this "documentary evidence" was not properly admitted into the record and it was never authenticated by the employer. *Id.* The employer did not testify

about the policy even after it was read aloud in part. The only testimony that WCPM proffered about its attendance policy was when Ms. Bundy responded that it was her "understanding" that WCPM's policy requires two weeks' notice for all time off requests. CP 103.

However, the policy was never provided by the employer at the hearing. It is unknown whether the policy applies to all employees or a certain class of employees, whether there are any exceptions to the policy, or other factors. Ultimately, the employer's failure to produce a copy of the policy and testify about it at the hearing means it cannot meet its burden to establish for a reasonable fact finder that policy can reasonably support a standard of behavior that the employer "has the right to expect." That is particularly in this case, where WCPM consistently pardoned the "multiple" short notice requests it alleged Ms. Christner made in the month of October. CP 96–99. Ms. Bundy testified that one week's notice is only not adequate when it is made on "such a regular basis," which implies that if it is on an irregular basis, one week's notice would be okay. CP 103. Additionally, Ms. Bundy testified that she tried to accommodate and did accommodate Ms. Christner, therefore obviating a reasonable "standard." CP 102.

Ultimately, because the policy was not properly introduced, authenticated, or admitted as evidence by the employer, and because such

documentary evidence cannot be reasonably relied upon under the Rules of Evidence and procedural requirements in the APA, the evidence should be given less weight and should not form the basis to support the employer's case in chief to prove misconduct. *See* ER 403. WCPM's failure to produce a copy of any such documentary evidence here means it cannot support its burden to establish that the policy was reasonable insofar as it could permit a reasonable fact-finder who customarily relies upon reliable evidence to determine whether that policy is reasonable. *Id.*

b. WCPM failed to prove Ms. Christner deliberately disregarded any standard of behavior it had the right to expect where it excused and approved medical absences but counted them against her simply because they were frequent, and requiring two week's notice in all cases is not reasonable.

Repeated inexcusable tardiness or excessive absenteeism after reasonable warnings is generally misconduct under RCW 50.04.294(2)(b) and (d). An absence may be excused if it is caused by circumstances beyond the employee's reasonable control, and the employee has given adequate notice. *See In re Collins,* Empl. Sec. Comm'r Dec.2d 433 (1978).

Here, the Commissioner did not find misconduct for excessive absenteeism or tardiness. CP at 177–180. There is no evidence in the record to suggest there was an abuse of the policy. Ms. Christner's requests were approved and accommodated. CP 116, 126 173, 188. Each

absence was requested in writing and approved in advance so she would not be in violation under the statute anyway. *Id. See* RCW 50.04.294(2)(b). Additionally, most of the absences were for medical appointments that necessitated immediate attention and would cause a reasonably prudent person in the same circumstances to be absent. CP 188.

Ms. Christner could not always control when her medical appointments were scheduled because the physician's office was open similar hours as the medical clinic in which she worked, and this made it difficult for scheduling. CP 123. Ms. Christner testified she was seeing a specialist, and was not always able to give two weeks' notice for her medical appointments. CP 125.

According to Ms. Bundy, Ms. Christner gave, on average, at least one weeks' notice, other times she provided two weeks' notice. CP 102. Ms. Christner provided doctor's notes upon request. CP 32, 48, 102–03. There was no evidence presented by the employer that Ms. Christner ever took time off when WCPM denied a request. CP 126, 173.

The only evidence of a "no exceptions" rule was the email from September 26, 2013. CP 188. However, his document was not properly admitted into evidence or authenticated during the evidence portion of the

hearing but somehow became part of the Commissioner's Record. *See* CP 187–89.

Even if WCPM's policy required Ms. Christner to request time off with two weeks' advance notice at all times with "no exceptions," such a policy is not reasonable. *Id.* It is not a customary business requirement to make "no exceptions" to an attendance policy for an employee's medical appointments or other last minute life events. *Id.* The Family Medical Leave Act of 1993 and Washington family and medical leave laws provide notice must be given as soon as is practicable including for intermittent leave for personal medical care and disability. *See* e.g., 29 C.F.R. § 825.202, .203, .205, .302(a); 29 U.S.C. § 2612(b)(1); and RCW 49.78.250.

In this case, WCPM simply made a business decision to let Ms. Christner go because it could no longer accommodate requests beyond a two week period of time. CP 135, 146, 153, 155–56. This conduct does not rise to the level of misconduct under the statute. RCW 50.04.294 and RCW 50.20.066(1).

c. It was legal error to conclude there was statutory misconduct when the employer's decision to discharge was based on *anticipated future* conduct.

To constitute misconduct, the action or behavior that resulted in the claimant's discharge from employment must be connected with work. WAC 192-150-200(1). An action or behavior is connected with work "if it results in harm or creates the potential for harm to your employer's interests." WAC 192-150-200(2). Harm must be more than imaginary or hypothetical. *Anderson v. Employment Sec. Dept. of State,* 135 Wn. App. 887, 146 P.3d 475 (2006).

To properly justify a disqualification from benefits based on misconduct, WCPM must objectively demonstrate actual detriment to its operations. *Id.* At the hearing, WCPM asserted it was "becoming difficult" to accommodate Ms. Christner's requests for time off on short notice, regardless of whether it was for medical appointments or personal reasons. CP 96–99. However, WCPM did not identify how the short notice requests were detrimental to its business—beyond mere inconvenience—despite having accommodated those requests in the past.

Here, the employer's primary concern was on accommodating Ms. Christner's short notice requests and in their desire to have a "full-time" receptionist (who did not have medical issues or job searching activities). CP 135, 146, 153, 155–56. The evidence at the hearing revealed that Ms. Christner had recently had medical issues, the frequency of which was creating scheduling difficulties for WCPM. But that is not enough to show

deliberate harm sufficient to disqualify someone from unemployment benefits. Requiring two weeks' notice in all cases is not reasonable. WCPM has multiple locations and multiple receptionists, and it failed to show specifically it is more than an administrative or business inconvenience. CP 102.

Ms. Christner did not know, nor should she have known, that just *asking* for time off for appointments less than two weeks in advance could get her fired. Any concern WCPM had about Ms. Christner's ability to comply with the alleged policy in the future was purely hypothetical and does not fall under any definition of misconduct. Not every deviation from the reasonable demands of an employer bars unemployment benefits; the deviation must be such as to evince a willful or wanton disregard of employer's interest. *Ciskie v. State, Employment Sec. Dep't*, 35 Wn. App. 72, 76, 664 P.2d 1318 (1983). An administrative and business inconvenience like making sure a business has staffing coverage, should not amount to misconduct under the statute. *See Id.*

d. Ms. Christner did not commit misconduct under RCW 50.04.294(1)(a), (c), or (d).

i. No willful disregard of the rights, title, and interests of the employer when employer routinely approves the absences. *See* RCW 50.04.294(1)(a).

An employer cannot show willful disregard of its interest when it alleges a rule violation, but routinely absolves any violation by disregarding the rule. *In re Griswold*, 102 Wn. App. 29, 32, 15 P.3d 153, 155 (2000). In *In re Griswolds's,* the Commissioner held the claimant's private purchase of meat did not constitute disqualifying misconduct because the grocery store's written policies suggested such purchases were appropriate with proper authorization, and the purchase of past pull-date meat by employees was routinely authorized and encouraged by Griswold's immediate supervisor.

Here, Ms. Christner's conduct was similar to Griswold's. WCPM approved and excused Ms. Christner's time off requests—even when her requests were made less than two weeks in advance. CP 116, 126 173, 188. While the Employer expressed dissatisfaction with having less than two weeks' notice for Ms. Christner to request time off in the past and the future, it waived its objection, at least from a disciplinary standpoint, when it repeatedly granted those requests anyway. If it did not approve the absences ahead of time or did not excuse them and Ms. Christner took the time off anyway, that would be a different story.

ii. <u>WCPM did not issue a "final warning" to put employee on notice that her job was in jeopardy</u>

RCW 50.04.294(2)(b) requires warnings by the employer before repeated inexcusable tardiness can be considered misconduct. As argued above, Ms. Christner's absences were not inexcusable. But, even if the court found that her tardiness to work or early departures was inexcusable despite having permission from the employer, WCPM did not give her any discipline that her job would be in jeopardy if she continued to ask for time off less than two weeks in advance. WCPM did not present evidence of any "final warning" sufficient to meet its burden of proof. (CL 7, 10, FF 5).

The ALJ may have considered the upper portion of an email dated September 26, 2013 with the subject line "Dr [sic] Appointment" as a final warning because it said, "In the future we do request two weeks [sic] notice for requesting time off, no exceptions." CP 188. However, this documentary evidence *was not admitted during the hearing. Id.* The first part of the email that addresses the "no exceptions" rule did not come up in the hearing. Rather, the testimony at the hearing addressed the September 26, 2013 email, but Ms. Christner only read aloud the bottom portion of the document at the hearing; the "no exceptions" rule did not come up in the hearing. CP 132. The bottom portion of the email cannot reasonably be seen as a warning sufficient to put someone on notice that there job is lawfully in jeopardy. *Id.*

It was error for the Commissioner to affirm a decision where the transcript of the hearing indicates that the ALJ first injected the word "final" into her questions, and led the parties down a path of acknowledgement in the taking of testimony. The ALJ construed the September 26, 2013 email (which was not admitted into evidence at that point) as a "final warning" and interlineated the word, "final" to it in contrast to the testimony by Ms. Bundy. However, nowhere on the September 26, 2013 email does it state the document serves as a warning, let alone indicate it serves as a final and last warning. CP 132. (CL 7). To the extent this email is a "warning," it was error for the Commissioner to adopt the finding this was a "final" warning when WCPM failed to provide any other dates of warnings.

3. Even if WCPM presented enough evidence to prove misconduct under RCW 50.04.294(1)(b), it waived the argument because they kept her employed for an additional two weeks after the discharge.

Contrary to the Commissioner's findings and conclusions, there was no "precipitating conduct" to trigger an immediate termination. CP 178–179. After Ms. Christner's alleged discharge inducing misconduct, the employer approved her request for time off on October 23, 2013, and *permitted her to remain employed* through November 1, 2013. CP 135–36,

153, 155–56, 109, 147. However, if Ms. Christner had truly committed "misconduct," WCPM would have and should have terminated her immediately—or at least within a reasonable amount of time of the alleged violation to take care of administrative matters—not permit her to remain employed for two weeks.

Ultimately, the timing between when the employer became aware of the alleged act and the resulting discharge is probative, as it is inconsistent with a finding of misconduct. The unreasonable delay between the alleged final incident of "misconduct" and the actual termination of her employment contradicts any argument by the employer that she was discharged for "statutory misconduct." RCW 50.04.294(1); RCW 50.20.066.

a. It was legal error for the Commissioner to ignore the applicable statutory exceptions of misconduct including RCW 50.04.294(3)(a).

There are three categories of conduct that are per se excluded from the definition of "misconduct," including but are not limited to (a) inefficiency, unsatisfactory conduct, or failure to perform well as a result of inability or incapacity, (b) inadvertence or ordinary negligence in isolated instances, or (c) good faith errors in judgment or discretion. RCW 50.04.294(3)(a)-(c). An employer has the right to discharge an employee

for any of these reasons, but the Department should allow benefits in these circumstances if all other eligibility criteria are met. RCW 50.20.010.

Neither the initial order by the ALJ nor the Commissioner's decision referenced one or more potential exceptions to the misconduct prong of the misconduct statute. CP 161–68, 178–180. (CL 8). Therefore, it is unknown whether proper consideration was given to the conduct at issue falling within one or more of the exceptions. *See* RCW 50.04.294(3)(a)-(c). However, under subsection (a) a worker who acts in a manner that creates inefficiency on the employer due to inability or incapacity is not disqualified for misconduct. RCW 50.04.294(3)(a).

Here, WCPM, contended that Ms. Ms. Christner's requests for time off less than 14 days were in violation of its two-week notice policy and created a reliability problem for the receptionist position. But Ms. Christner testified that most of her absences were due to acute medical issues, necessitating doctor's appointments. CP 114–15, 135, 150, 155, 158. These were issues that were largely outside her control. *Id.* 'Inability' falls under the misconduct exception. While WCPM may find it unsatisfactory behavior for one of its receptionists to make, it is not misconduct.

4. The Substantial Evidence in the Record Fails to Support a Finding of Misconduct.

"'Preponderance of evidence' is that evidence which, when fairly considered, produces the *stronger* impression, has the *greater* weight, and is the *more convincing* as to its truth when weighted against the evidence in opposition thereto." WAC 192-100-065 (emphasis added).

Here, the Commissioner's order is not supported by substantial evidence in the record to reasonably conclude that Ms. Christner deliberately violated a reasonable policy or disregarded standards of behavior that WCPM could reasonably expect when (i) the employer's policy requiring two weeks' notice for each absence is not reasonable when it penalizes an employee for simply making the request to take time off, and (ii) the employer absolved any "violation" of that policy when it granted permission for the time off anyway.

5. Procedural errors at hearing unduly abridged Ms. Christner's right to cross-examine parties and object to or rebut evidence

Due process requires an agency to give the appealing party adequate notice and an opportunity to be heard; this is to ensure that procedural irregularities do not undermine the fundamental fairness of the proceedings. *Sherman v. State*, 128 Wn. 164, 184, 905 P.2d 355 (1955). Allowing testimony about the basis of misconduct without producing the reliable and admissible evidence to support it, unduly abridges the claimant's opportunity to confront witnesses and rebut evidence and is not

harmless error. *See e.g., In re: Daren S. Andrus,* Emp. Sec. Comm'r Dec.2d 960 (2010) (Opportunity to confront witnesses and rebut evidence was abridged where a written policy and video surveillance tape were not entered into evidence.). While the rules of evidentiary procedure may be more relaxed at administrative hearings, "findings of fact shall be based exclusively on the evidence of record in the adjudicative proceeding and on matters officially noticed in that proceeding." RCW 34.05.461(4).

For Ms Christner's hearing, there were several procedural defects that affected both her right to notice and her opportunity to cross-examine parties and object to and rebut evidence. First, the agency is required to promulgate the specific statutes at issue for the hearing on the Notice of Hearing. RCW 34.05.434(2)(g). The Notice of Hearing[8] in Ms. Christner's case identified "RCW 50.20.066," and not "RCW 50.04.294" as the only relevant misconduct statute at issue for the hearing. CP 183. However, Ms. Christner, a pro se claimant, was prejudiced by the oversight because it deprived her of notice of the specific statute and conduct she would have to defend against. *See Pal v. Department of Social & Health Servs.*, 342 P.3d 1190, 1196 (Ct. App. Div. 2 2015); CP 172. As Ms. Christner stated in her petition for review, she believed it was

[8] The ALJ did not include the *Notice of Hearing* as part of the admitted exhibits on review. However, it was included in the Commissioner's Record. *See* CP 182-86.

"fundamentally unfair" to not have proper notice of what she was being accused of at the hearing, particularly where WCPM had not alleged any misconduct behavior to her when she was terminated, or to the Department. CP 172, 147-48.

Second, Ms. Christner was not offered the opportunity to cross examine the Controller Mr. Bromberg, and the only employer witness who had reviewed the hearing exhibit packet and who had talked with the Department; and Mr. Lee, after he testified a second time toward the latter part of the hearing and raised new issues. It was procedural error not to offer Ms. Christner the opportunity to cross-examine these witnesses.

Third, the employer failed to produce two items of documentary evidence, both of which were partially read by Ms. Christner, rather than an employer witness, during the taking of her testimony. But this documentary evidence was not properly admitted and it was the employer's burden to produce and offer to admit this evidence. The ALJ did not ask if she had any objections to it and just bec Just because Ms. Christner read a portion of it does circumvent her right to object to the evidence to it. While she read a portion of the policy during her testimony, production of admissible documentary evidence to support a finding of misconduct is on the employer, not the claimant.

Ms. Christner asserted in her petition for review the ALJ appeared to act as an "agent" of the employer at the hearing. CP 172. This perception could have been avoided if Ms. Christner had been given equal opportunities to cross-examine the employer's witnesses and object to evidence.

Finally, upon receiving documents that were not properly admitted, the Commissioner should have directed the OAH to reopen the record and provide a meaningful opportunity to Ms. Christner to object to or rebut that new evidence. Failure to offer Ms. Christner an opportunity for a fair hearing is an abuse of discretion and is reversible error. *See* RCW 50.32.080.

The Commissioner erred in ignoring these procedural problems which constitutes an arbitrary and capricious action and a violation of claimant's due process rights to notice under the APA. RCW 34.05.570(3)(i).

6. The Court Should Award Attorneys' Fees and Costs if it Reverses or Modifies the Commissioner's Decision.

Unemployment benefit claimants are entitled to reasonable statutory attorney's fees and costs when the decision of the Commissioner

is reversed or modified on appeal. RCW 50.32.160; RCW 50.32.100; and RCW 4.84.010. Only if the Commissioner's decision is affirmed and not disturbed, shall reasonable attorneys' fees not be awarded. See *Id.* Once entitlement to attorney fees is established, a trial court has broad discretion in determining the amount of attorney fees to be awarded, so long as the award is reasonable. *In re Griswold,* 102 Wn. App. 29, 45, 15 P.3d 153, 162 (2000)

If Ms. Christner prevails in this appeal and this court finds modifies or reversed the Commissioner's decision, she is entitled to an award of reasonable attorneys' fees and costs in an amount to be determined upon filing of a cost bill subsequent to this order pursuant to RAP 18.1. RCW 50.32.160.

VI. SUMMARY

Ms. Christner became unemployed through no fault of her own. Her former employer, WCPM, terminated her because it would be unable to accommodate her short notice requests in the future and her requests were "becoming" and "beginning" to pose a difficulty for scheduling. But up to that point, the employer had accommodated her. However, *anticipatory, future* conduct is not misconduct—even if the anticipated future conduct would be in violation of an employer policy if it were to

occur. WCPM asked for Ms. Christner's resignation because it could no longer accommodate her requests for time off in the future. But conduct that has not yet occurred is merely a hypothetical hardship and cannot constitute deliberate harm.

The Commissioner erred when it categorized Ms. Christner's requests for time off on short notice as 'misconduct.' Even if WCPM's two week notice requirement for requesting time off is reasonable, WCPM expressly approved each instance of Ms. Christner's partial-day absences—most of which were necessitated for medical reasons, but including her early departure to attend the job interview—thereby absolved any "violations" that would constitute statutory misconduct under RCW 50.04.294.

There was insufficient evidence before the Commissioner to show the employer met its burden of proof by a preponderance of evidence to establish disqualifying misconduct. (CL 10). WCPM's rule requiring two weeks "no exceptions" notice for all requests for time off—including for medical appointments—is not reasonable. Such a constraint is contrary to employment disability and leave laws. It is also unreasonable to expect Ms. Christner to schedule doctor's appointments outside of WCPM's regular clinic hours given that many medical facilities are only open during those same hours. Additionally, it is not reasonable for workers to

give such advance notice for acute or chronic medical issues which are out of their control.

Additionally, WCPM failed to meet its burden of proof by a preponderance of evidence during its case in chief; it did not produce a copy of the handbook policy or policies, warnings, attendance records, or other documentation that showed the employee was in violation of its standards and aware her job was in jeopardy if she were to engage in further "violations." Significantly, the employer did not make any closing argument that there was misconduct; and the evidence in the record shows it neither alleged misconduct, nor argued misconduct before the Commissioner. If the employer does not allege misconduct, then it is error of law to conclude the employer's burden can be met. Finally, the substantial evidence in the record supports a finding Ms. Christner was discharged for reasons that do not constitute misconduct.

The Commissioner erred in ignoring several procedural problems and this constitutes arbitrary and capricious action and a violation of due process. In Ms. Christner's petition for review to the Commissioner, she highlighted several deficiencies and articulated arguments that raised a question of fairness at the hearing. Specifically, Ms. Christner alleged the ALJ appeared to act as an "agent" of the employer at the hearing. The hearing transcript reveals several procedural defects, including Ms.

Christner's not having a full and fair opportunity to confront witnesses and rebut evidence. This reason alone should have been sufficient for the Commissioner to reverse the ALJ's findings of fact and conclusions of law.

VII. CONCLUSION

The Commissioner erred in concluding that sufficient evidence in the record to support a finding of disqualifying misconduct to bar Ms. Christner from collecting unemployment benefits. Therefore, this court should reverse the superior court's decision and the *Decision of Commissioner*, and reinstate Ms. Christener's benefits. This court should further grant Ms. Christner an award of attorney's fees and costs, as authorized by RCW 50.32.160, in an amount to be determined upon filing of a cost bill subsequent to this order pursuant to RAP 18.1.

RESPECTFULLY SUBMITTED this 8th day of June, 2015.

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COURT OF APPEALS FOR DIVISION I
STATE OF WASHINGTON

SARAH CHRISTNER, Appellant, v. WASHINGTON STATE DEPARTMENT OF EMPLOYMENT SECURITY Respondent.	No. 73024-0-I Snohomish County Superior Court No. 14-2-03295-0 PROOF OF SERVICE

PROOF OF SERVICE

On June 8, 2015, the undersigned caused Appellant's Opening Brief to Division I Court of Appeals in the above-captioned matter to be served on the following parties:

1. Attorney for the Respondent, Dionne Padilla-Huddleston, WSBA # 38356, Assistant Attorney General, Attorney General of Washington, Licensing and Administrative Law Division, 800 Fifth Avenue, Suite 2000, Seattle, WA 98104 by email (upon agreement of the parties) to DionneP@atg.wa.gov and lalseaef@atg.wa.gov.

2. Interested employer, Washington Center for Pain Management, PLLC, Attn: Jacky Hong, Registered Agent, 2840 Northup Way, Ste 140, Bellevue, WA 98004-1433; by first class mail.

3. Court of Appeals Division I, Richard Johnson, Clerk to the Court of Appeals, Division I, One Union Square, 600 University Street, Seattle, WA 98101-1176; by hand delivery.

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

Dated at Seattle, Washington, this 8th day of June, 2015.

LOCKERBY LAW, PLLC

By: _____

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