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NO. 70163-1-I

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**COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON**

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KATHERINE CANNING,

Respondent,

v.

STATE OF WASHINGTON DEPARTMENT OF EMPLOYMENT  
SECURITY,

Appellant.

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**AMENDED BRIEF OF APPELLANT**

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## I. INTRODUCTION

This is a judicial review of the Department of Employment Security (Department) Commissioner's decision denying Katherine Canning unemployment benefits. Canning was discharged after she gave her coworker marijuana-laced candy at their place of employment. She intentionally brought the marijuana candy to her workplace despite knowing that her employer had a drug and alcohol free workplace policy.

Canning's employer discharged her after learning that she brought marijuana to work. Given that Canning violated her employer's reasonable rule which signified a willful disregard for the rights and interests of the employer or a fellow employee, Canning was found to have committed disqualifying misconduct and was denied unemployment benefits. Canning also disregarded a standard of behavior the employer had a right to expect of an employee. The Commissioner correctly concluded that Canning committed misconduct.

The King County Superior Court erroneously reversed the Commissioner's decision, and the Department appealed. The Commissioner's decision is supported by substantial evidence and is consistent with the statutory language and established precedent. The Department asks the Court to reverse the superior court and affirm the Commissioner's decision denying Canning unemployment benefits.

## II. ASSIGNMENTS OF ERROR<sup>1</sup>

1. The superior court erred in reversing the Commissioner's decision that denied Canning unemployment benefits.
2. The superior court erred in concluding that Canning made a mere good faith error in judgment and thus did not commit misconduct.
3. Because the superior court erred in reversing the Commissioner's decision, the superior court erred in awarding attorney fees and costs to Canning.

## III. STATEMENT OF THE ISSUES

1. Did the Commissioner correctly conclude that Canning committed misconduct under the Employment Security Act when she brought marijuana to her workplace and gave it to her coworker in violation of the employer's reasonable zero-tolerance drug policy, disregarding her employer's interests and standards of behavior the employer rightfully expected of her?
2. Misconduct does not include good faith errors in judgment or discretion. Did the Commissioner correctly conclude that Canning's conduct was not a good faith error in judgment because Canning was unreasonable in unilaterally deciding it was okay to bring marijuana to her workplace and give it to a coworker after the coworker said he had a medical marijuana prescription?
3. An unemployment benefits claimant is entitled to reasonable attorney fees and costs under RCW 50.32.160 only if the Commissioner's decision is modified or reversed. If this Court reverses the superior court and affirms the Commissioner's decision, should this Court also reverse the superior court's award of attorney fees and costs?

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<sup>1</sup> This is a judicial review where the Respondent, Canning, must assign error to the Commissioner's findings and conclusions she challenges. See RAP 10.3(h); RCW 50.32.120 (judicial review of the commissioner's decision is governed by the Administrative Procedures Act). "[A]ssignment of error to the superior court findings and conclusions are not necessary in review of an administrative action." *Waste Mgmt. of Seattle, Inc. v. Utils. & Transp. Comm'n*, 123 Wn.2d 621, 633, 869 P.2d 1034 (1994).

#### IV. STATEMENT OF THE FACTS

The following facts are mostly undisputed.<sup>2</sup> Canning was employed as a meat cutter for Puget Consumers Co-op (PCC) from July 2011 until she was discharged in March 2012. Certified Appeal Board Record (CABR)<sup>3</sup> at 11-12, 59; Finding of Fact (FF) 1.

PCC had a drug and alcohol free workplace policy that prohibited employees from possessing illegal or illicit drugs while on the company's premises, and the policy was noted in the employee handbook. CABR at 17, 77; FF I. The policy handbook provided: "PCC staff are not to have alcohol, or illegal or illicit drugs in their possession while on the premises . . . Violation of this policy will result in termination of employment."<sup>4</sup> CABR at 17, 77; FF I. Canning was given a copy of the employee handbook at orientation. CABR at 16-17, 77; FF I.

On or about March 2, Canning was conversing with two coworkers, one of whom was the acting meat manager for the day. CABR at 20-21, 30, 59-60; FF 2, 5. The other coworker mentioned he had a "prescription" for medical marijuana. CABR at 20, 59; FF 2. Canning

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<sup>2</sup> At the superior court, Canning did not challenge any of the Commissioner's findings of fact. Clerk's Papers (CP) at 9-26.

<sup>3</sup> The superior court transmitted the Certified Appeal Board Record (CABR) as a stand-alone document. See Index to Clerk's Paper's (CP). Because it is separately paginated from the clerk's papers, this brief cites to the appeal board record as "CABR."

<sup>4</sup> The policy contained a specific exception that allowed employees to purchase beer or wine for consumption off-premises for a company-sponsored event. CABR at 17.

responded that she made candy containing marijuana as one of its ingredients to help her sleep. CABR at 20, 59-60; FF 3, 4. She suggested that she should bring some of the marijuana candy to work. CABR at 20, 59-60; FF 3, 4. Neither coworker dissuaded Canning from doing so. CABR at 20-21, 60; FF 5.

The next day, Canning brought marijuana candy to work and left it in her vehicle. CABR at 21, 60; FF 6. After completing her shift, Canning went to her car, retrieved the marijuana candy, and brought the marijuana candy into the store and gave it to her coworker, another meat cutter, who still had an hour of work left on his shift. CABR at 20-21, 60; FF 6. PCC discharged Canning for violating the company's drug and alcohol free workplace policy. CABR at 15, 60; FF 7.

Canning applied for unemployment benefits, and the Department denied her claim. CABR at 41. Canning appealed and a hearing was held at the Office of Administrative Hearings (OAH). CABR at 41.

At the hearing, there was a dispute about the acting meat manager's role. The employer's human resources director testified that the acting meat manager "just fills in running the physical part of the department and telling people what needs to be cut on the [meat manager's] day off." CABR at 30. "[T]he person that runs the department and oversees personnel issues and handles the problem[s] for

the department and deals with those issues was not there that day.” CABR at 30. Canning responded, “Barbara<sup>[5]</sup> once told me that in her absence Jeffrey<sup>[6]</sup> is her, was her exact words to me, so I think that he was the meat manager.” CABR at 30.

After the hearing, the Administrative Law Judge (ALJ) issued an initial order determining that Canning did not commit misconduct, concluding that her actions did not constitute a willful and wanton disregard for her employer’s interests. CABR at 61; Conclusion of Law (CL) 5.

PCC petitioned the Department’s Commissioner for review of the ALJ’s decision. CABR at 77. The Commissioner adopted the ALJ’s findings of fact and entered an additional finding, noting that the employer had a drug and alcohol free workplace policy in its employee handbook and Canning was given the employee handbook at orientation. CABR at 77, 78; FF I. The Commissioner ultimately rejected the ALJ’s conclusion and determined that Canning engaged in disqualifying misconduct on the grounds that she (1) violated a reasonable employer rule of which she knew or should have known and (2) disregarded a standard of behavior that her employer had a right to expect of an employee. CABR at 78;

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<sup>5</sup> Barbara was the meat department manager. CABR at 30.

<sup>6</sup> Jeffrey was the acting meat manager. CABR at 20, 30.

CL V. The Commissioner concluded that it was unreasonable for Canning “to believe it was acceptable under company policy for her to bring marijuana onto the employer’s property and give it to a coworker because the coworker stated he had a prescription.” CABR at 78; CL VI. Accordingly, the Commissioner reversed the initial order and denied Canning unemployment benefits. CABR at 78.

Canning appealed the Commissioner’s decision to the King County Superior Court. Clerk’s Papers (CP) at 1-8. The superior court reversed the Commissioner and concluded that Canning made a good faith error in judgment and did not commit misconduct. CP at 45-46. The superior court also awarded Canning attorney fees and costs. CP at 101-02. The Department now appeals. CP at 103-109.

## V. STANDARD OF REVIEW

Washington’s Administrative Procedure Act (APA), chapter 34.05 RCW, governs judicial review of a final decision by the Department’s Commissioner. RCW 34.05.510; RCW 50.32.120; *Rasmussen v. Dep’t of Emp’t Sec.*, 98 Wn.2d 846, 849, 658 P.2d 1240 (1983). Although this is an appeal from the superior court order reversing the Commissioner’s decision, an appellate court “sits in the same position as the superior court” and reviews the Commissioner’s decision, applying the APA standards “directly to the record before the agency.” *Tapper v. Emp’t Sec.*

*Dep't*, 122 Wn.2d 397, 402, 858 P.2d 494 (1993); *Employees of Intalco Aluminum Corp. v. Emp't Sec. Dep't*, 128 Wn. App. 121, 126, 114 P.3d 675 (2005) (“The appellate court reviews the findings and decisions of the commissioner, not the superior court decision or the underlying ALJ order.”); RCW 34.05.558. This is of particular importance in this case because the Commissioner reversed the ALJ’s order and the superior court reversed the Commissioner’s decision. Although the Department appeals the superior court’s order, this Court reviews the Commissioner’s decision.

In this appeal, the Commissioner’s decision is *prima facie* correct, and it is Canning’s burden to establish its invalidity. RCW 34.05.570(1)(a); *Smith v. Emp’t Sec. Dep’t*, 155 Wn. App. 24, 32, 226 P.3d 263 (2010). Under the APA, a reviewing court may reverse if, among other things, the Commissioner’s decision is based on an error of law. RCW 34.05.570(3). Canning must therefore show that the Commissioner’s conclusion that she was discharged for misconduct was incorrect.

Findings of fact will be upheld if supported by substantial evidence. RCW 34.05.570(3)(e); *William Dickson Co. v. Puget Sound Air Pollution Control Agency*, 81 Wn. App. 403, 411, 914 P.2d 750 (1996). On appeal in the superior court, Canning did not challenge any of the

Commissioner's findings of fact. CP at 9-26. Accordingly, they are verities on appeal. *Tapper*, 122 Wn.2d at 407.

Questions of law are reviewed under the error of law standard and are subject to de novo review. *See Shaw v. Emp't Sec. Dep't*, 46 Wn. App. 610, 731 P.2d 1121 (1987); *Ciskie v. Dep't of Emp't Sec.*, 35 Wn. App. 72, 74, 664 P.2d 1318 (1983). While review is de novo, courts have consistently accorded a heightened degree of deference to the Commissioner's interpretation of employment security law in view of the Department's expertise in administering the law. *See Safeco Ins. Cos. v. Meyering*, 102 Wn.2d 385, 391, 687 P.2d 195 (1984).

Whether an employee's actions constitute misconduct is a mixed question of law and fact. *Griffith v. Dep't of Emp't Sec.*, 163 Wn. App. 1, 9, 259 P.3d 1111 (2011). This Court must: (1) determine whether substantial evidence supports the Commissioner's factual findings, (2) make a *de novo* determination of the correct law, and (3) apply the law to the applicable facts. *Tapper*, 122 Wn.2d at 403.

## VI. ARGUMENT

The Commissioner properly concluded that Canning committed misconduct when she brought marijuana candy to her workplace, where she worked as a meat cutter, and gave it to her coworker. Her actions

violated her employer's drug and alcohol free workplace policy, which she was made aware of in an employee handbook at orientation.

Canning's actions also constituted a disregard of the standard of behavior her employer had a right to expect in its employees. Additionally, even if Canning's conduct did not amount to misconduct on those grounds, it constituted misconduct because she exhibited carelessness of such degree to show substantial disregard of her employer's interest.

Furthermore, because Canning's actions constituted misconduct per se, they cannot also constitute a good faith error in judgment. Here, Canning had no opportunity to exercise her judgment, because the employer had a reasonable, unambiguous drug and alcohol free workplace policy that expressly prohibited her conduct. The Court should reverse the superior court's decision, including the award of attorney fees and costs, and affirm the Commissioner's decision denying Canning unemployment benefits.

**A. The Commissioner correctly concluded that Canning committed misconduct**

The Commissioner correctly applied the plain statutory language and established precedent to the unchallenged facts to conclude Canning committed misconduct and is thus ineligible for unemployment benefits.

The purpose of the Act is to assist persons who are “involuntarily” unemployed “through no fault of their own.” RCW 50.01.010; *Tapper*, 122 Wn.2d at 408. For Canning to receive benefits, the Act requires that “the reason for [her] unemployment be external and apart from” her. *Cowles Publ’g Co. v. Emp’t Sec. Dep’t*, 15 Wn. App. 590, 593, 550 P.2d 712 (1976). Accordingly, she is disqualified from receiving benefits if she was discharged for work-related misconduct. RCW 50.20.066.

Canning’s conduct in bringing marijuana candy to work is connected with work so long as her action resulted in harm or created the potential for harm to her employer’s interests. WAC 192-150-200(2). “This harm may be tangible, such as damage to equipment or property, or intangible, such as damage to [her] employer’s reputation or a negative impact on staff morale.” WAC 192-150-200(2). As shown below, Canning’s conduct is work-related, because it created the potential for harm to her employer’s legitimate interest in ensuring a safe, drug-free workplace.

Subsection (1) of RCW 50.04.294 broadly defines misconduct. “Misconduct” includes, *but is not limited to*, the following conduct by 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 the employer has the right to expect of an employee;

...

(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), (b), (d). Subsection (2) of the statute lists seven specific acts that are considered misconduct "because the acts signify a willful or wanton disregard of the rights, title, and interests of the employer or a fellow employee." RCW 50.04.294(2). These specific acts constitute misconduct per se. *Daniels v. Dep't of Emp't Sec.*, 168 Wn. App. 721, 728, 281 P.3d 310 (2012). These acts "include" a "[v]iolation 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).

The Commissioner correctly concluded that Canning's actions constituted misconduct because she violated her employer's reasonable drug-free workplace policy, of which she knew or should have known. In bringing marijuana candy to her meat-cutting workplace, she also disregarded a standard of behavior her employer had a right to expect of an employee. The superior court erred in concluding otherwise. This Court should reverse the superior court and affirm the Commissioner's decision.

1. **Canning violated her employer's reasonable drug-free workplace policy, about which she knew, deliberately disregarding the standards of behavior the employer had a right to expect of her.**

The Commissioner correctly concluded that Canning's conduct in bringing marijuana to her workplace constituted misconduct under RCW 50.04.294(2)(f) because her conduct violated PCC's reasonable drug-free workplace policy of which she knew or at least should have known. In violating the policy, she also deliberately disregarded the standards of behavior the employer had the right to expect of her. RCW 50.04.294(1)(b).

There is no dispute that PCC had a drug and alcohol free workplace policy that prohibited employees from possessing illegal or illicit drugs while on the company's premises. CABR at 17, 77; FF 1. A company rule is reasonable if it is related to an employee's job duties, is a normal business requirement or practice for the employee's occupation or industry, or is required by law or regulation. WAC 192-150-210(4). Here, PCC's drug-free workplace rule was reasonable, because it promoted the normal business practice of maintaining a safe, drug-free workplace. In fact, a Washington Industrial Safety and Health Act

regulation requires every Washington employer to prohibit alcohol and narcotics from the workplace.<sup>7</sup> WAC 296-800-11025.

Canning “knew or should have known about” the company rule because she was provided a copy of the rule in writing in the employee handbook. CABR at 16-17, 77; FF I; WAC 192-150-210(5) (the Department will find that an employee knew or should have known about a company rule if she was provided “an employee orientation on company rules” or “a copy or summary of the rule in writing.”). The rule states, “PCC staff are not to have alcohol, or illegal or illicit drugs in their possession while on the premises . . .” CABR at 16-17, 77; FF I. Canning violated this policy when she brought marijuana candy onto PCC’s premises and gave it to a coworker.

Canning also broke state and federal law. Marijuana continues to be a controlled substance. 21 U.S.C. § 812(c) (categorizing marijuana as a Schedule I substance); RCW 69.50.204(c)(22) (listing marijuana as a Schedule I controlled substance). At the time of the incident, Ms. Canning’s actions violated Washington’s criminal code and federal law. *See* former RCW 69.50.401 (2005) (“[I]t is unlawful for any person to . . . deliver, or possess with intent to manufacture or deliver, a controlled substance.”); former RCW 69.50.4014 (2003) (“[A]ny person found guilty

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<sup>7</sup> The rule provides an exception for industries and businesses that produce, distribute, or sell alcohol and narcotic drugs. WAC 296-800-11025.

of possession of forty grams or less of marihuana is guilty of a misdemeanor.”); 21 U.S.C. §§ 802, 812, 841(a)(1), 844(a) (it is “unlawful for any person knowingly or intentionally to possess a controlled substance unless such substance was obtained directly, or pursuant to a valid prescription or order, from a practitioner.”); *United States v. Oakland Cannabis Buyers’ Co-op*, 532 U.S. 483, 492 n.5, 121 S. Ct. 1711, 149 L. Ed. 2d 722 (2001) (Schedule I drugs, including marijuana, “cannot be dispensed under a prescription.”).<sup>8</sup>

Although Washington had decriminalized the medical use of marijuana at the time of Canning’s discharge, Washington’s medical marijuana law does not require an employer to accommodate on-site medical use of marijuana in any place of employment. RCW 69.51A.060(6) (“Employers may establish drug-free work policies. Nothing in this chapter requires an accommodation for the medical use of cannabis if an employer has a drug-free work place.”). Further, employers are not required to accommodate off-site medical marijuana use. *Roe v. Teletech Customer Care Management (Colorado) LLC*, 171 Wn.2d 736, 760, 257 P.3d 586 (2011).

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<sup>8</sup> Initiative 502, which became effective in December 2012, repealed state laws criminalizing the private possession and use of marijuana *after* Canning’s conduct in March 2012 and *after* the Commissioner’s decision in June 2012. Laws of 2013, ch. 3, § 1, 19. It thus has no effect on this case.

The Commissioner thus properly concluded that Canning violated a reasonable employer rule of which she knew or should have known when she brought marijuana candy to her workplace and delivered it to a coworker who was still at work. This was disqualifying misconduct under RCW 50.04.294(2)(f).

Canning may argue, as she did at the superior court, that PCC should have given her a warning before terminating her. CP at 18. But there is no language in the Act or the relevant administrative code requiring Canning's employer to warn her that her conduct violated company policy before terminating her. In contrast, other types of misconduct per se require an employer to give warnings before terminating the employee. See RCW 50.04.294(2)(c) (misconduct includes repeated inexcusable tardiness *following warnings* by the employer). This Court must presume the legislature "says what it means and means what it says." *State v. Costich*, 152 Wn.2d 463, 470, 98 P.3d 795 (2004). If the legislature had intended for misconduct under RCW 50.04.294(2)(f) to occur only if the employee violated a company rule after receiving a warning, the legislature would have written a warning requirement in the statute. See *Costich*, 152 Wn.2d at 470 ("The plain meaning of the statute is derived not only from the statute at hand, but also 'all that the Legislature has said in the . . . related statutes which

disclose legislative intent about the provision in question.” (quoting *Dep’t of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 11, 43 P.3d 4 (2002))).

Nevertheless, the drug and alcohol free workplace policy explicitly warned Canning that violating the policy would result in termination: “violation of [the] policy *will result in termination* of employment.” CABR at 17, 77; FF I (emphasis added). She therefore received the warning she has argued was required, and that warning was that violations would not be tolerated.

Canning may also argue, as she did at the superior court, that her actions did not constitute misconduct because her actions were not willful or wanton. CP at 16-20. But there is no requirement that an employee intentionally violate the rights of the employer in order for her act to constitute misconduct. *Griffith*, 163 Wn. App. at 9-10. Rather, in order for an employee’s act to constitute misconduct, the employee need only act intentionally. *Id.* at 9-11.

In *Griffith*, the court concluded that an employee committed misconduct when he acted intentionally and, consequently, harmed his employer. *Id.* at 11. The employee made an inappropriate comment to a customer that resulted in a customer complaint and then returned to the customer’s premises when he was suspended pending an investigation. *Id.*

at 5. The store called the employer and asked that the employee be banned from its premises. *Id.* The employer subsequently terminated the employee. *Id.*

The court of appeals rejected the employee's argument that he did not commit misconduct because he did not deliberately violate his employer's rights, concluding that whether the employee understood he was behaving offensively was ultimately "irrelevant." *Id.* at 10. Rather, the court held the employee committed misconduct because he engaged in intentional conduct that resulted in harm to his employer. *Id.* at 11.

*Hamel v. Employment Security Dep't*, 93 Wn. App. 140, 143-44, 966 P.2d 1282 (1998), is also instructive on this point.<sup>9</sup> In *Hamel*, the court concluded an employee committed misconduct when he violated the employer's policy prohibiting sexual harassment by making an offensive comment to a customer. 93 Wn. App. at 143-44. The court rejected the employee's contention that he did not know his conduct was inconsistent with his employer's interest in preventing sexual harassment. *Id.* at 147.

The court emphasized that the employee *intentionally* made the comments. *Id.* Because he intended to make the statement that he should

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<sup>9</sup> *Hamel* was decided under a previous version of the misconduct statute. See *Hamel*, 93 Wn. App. at 145. In 2003, the legislature amended the Act, changing the definition of misconduct and adding the examples of misconduct per se that are present in the current version of the statute. Laws of 2003, 2nd Spec. Sess., ch. 4, § 6. *Hamel* is still helpful, however, in interpreting what conduct constitutes a "willful disregard" of the employer's interest.

have known could harm his employer, his actions constituted misconduct, not simple negligence. *Id.*

Here, Canning believed that her actions were okay because her coworker had a prescription, *see* CABR at 60; FF 8; however, as the court articulated in *Griffith*, it is ultimately irrelevant whether an employee believes her actions are acceptable. Here, Canning's actions constituted misconduct because she intentionally brought marijuana to work, violating a drug policy that she knew or should have known existed. She intentionally acted in violation of the employer's policy and in disregard of the standards of behavior the employer was entitled to expect of her. RCW 50.04.294(1)(b).

Further, like the employee in *Hamel*, who unreasonably believed his actions were acceptable, it was unreasonable for Canning to believe her actions were consistent with PCC policy. As the Commissioner noted and as discussed above, at the time, Canning's actions violated the criminal code. A reasonable person would understand that Canning's actions could harm her employer's interests.

Canning intentionally possessed marijuana, a drug that was illegal, while on PCC's premises. Her actions, which violated a reasonable company rule of which she should have known, constituted misconduct because they signified a willful disregard of the rights, title, and interests

of her employer, who had made its interest in a safe and drug free workplace known through its drug and alcohol free workplace policy. RCW 50.04.294(1)(a), (2). Canning's actions also signified a willful disregard of the rights, title, and interests of her fellow employee. *Id.* In delivering the marijuana candy to her coworker, Canning jeopardized her coworker's employment and caused her coworker to be in violation of PCC's drug and alcohol policy as well. She also endangered the safety of her coworkers.

In sum, the Commissioner correctly concluded that Canning's actions constituted disqualifying misconduct under RCW 50.04.294(2)(f) and RCW 50.04.294(1)(b).

2. **Even if Canning's conduct was not willful, it still constituted misconduct because it showed substantial disregard of her employer's interest in ensuring a safe and drug-free workplace.**

The Commissioner concluded that Canning committed misconduct on two separate grounds: (1) she violated a reasonable company policy of which she knew or should have known and (2) she disregarded a standard of behavior which her employer had the right to expect of an employee. CABR at 78; RCW 50.04.294(1)(b), (2)(f). In addition to the factors the Commissioner concluded the employer established, misconduct also includes "[c]arelessness or negligence of such degree or recurrence to

show an intentional or substantial disregard of the employer's interest.” RCW 50.04.294(1)(d). This Court may affirm the Commissioner's decision on any basis established by the pleadings and supported by the record. *See Pacific Land Partners, LLC v. Dep't of Ecology*, 150 Wn. App. 740, 753, 208 P.3d 586 (2009).

PCC had a legitimate and substantial interest in a safe and drug-free workplace and a right to expect its employees to behave in a manner that is lawful and consistent with this interest. Here, Canning and her coworkers worked as meat cutters and operated machinery that could be hazardous if used improperly. CABR at 36. The candy, which Canning made to help her sleep, CABR at 20, had the potential to affect her coworker's alertness as he operated the machines. Canning's actions posed a real threat to workplace safety. She thus exhibited carelessness of such degree to show an intentional disregard of her employer's interest in a safe and drug-free workplace.

**B. Canning's conduct did not constitute a good faith error in judgment.**

The Act has exceptions to the definition of misconduct, including “[g]ood faith errors in judgment or discretion.” RCW 50.04.294(3)(c). The superior court concluded that Canning's conduct constituted a good

faith error in judgment and thus did not constitute misconduct. CP at 45-46. The superior court was incorrect and should be reversed.

First, the good faith error in judgment exception does not apply here, where Canning's conduct constituted misconduct per se. The legislature determined that an employee commits misconduct when she violates a reasonable company rule of which she knew or should have known. RCW 50.04.294(2)(f). Because such conduct constitutes misconduct, it cannot, logically, also constitute action that is not misconduct, a good faith error in judgment.

Second, an employee can make a good faith error in judgment or discretion only in instances where the employee is permitted to exercise discretion. Here, Canning was not permitted to exercise her judgment on whether to bring marijuana to her workplace. Her employer's drug-free workplace policy expressly prohibited her from possessing illegal or illicit drugs while on her employer's premises. CABR at 17, 77; FF I.

Furthermore, Canning could not reasonably interpret her employer's drug-free workplace policy to allow an exception here, where her coworker had a medical marijuana license. PCC's drug and alcohol free workplace policy contains a specific exception that allows employees to purchase beer or wine for consumption *off-premises* for a company-sponsored event. CABR at 17. This exception permits employees to

purchase alcohol, an item sold lawfully by the employer, for lawful off-premises consumption at a company-sponsored event. The express inclusion of this exception in the policy implies exclusion of other unstated exceptions. *See State v. Delgado*, 148 Wn.2d 723, 729, 63 P.3d 792 (2003) (“to express one thing in a statute implies the exclusion of the other.”). It was unreasonable for Canning to interpret this exception as also allowing employees to bring an *illegal* substance *onto* the employer’s premises.

Further, as discussed above, the law does not require accommodation for employees who use medical marijuana. *See* RCW 69.51A.060(6); *Roe*, 171 Wn.2d at 760. Even if it did, Canning herself did not have a medical marijuana license. It was illegal for her to bring marijuana candy to her workplace and give it to her coworker, who was still at work. Canning should have known that her employer’s policy clearly prohibited her actions.

Canning’s belief is not made reasonable by the mere silence of the acting meat manager, who did not dissuade her from bringing the marijuana candy to work. FF 5, CABR 60. At the administrative hearing, Canning testified that she suggested bringing marijuana candy into work for her coworker, and “nobody at that time, including the meat manager or [the other coworker], said, ‘No, don’t do that. That’s against the drug and

alcohol policy.” CABR at 20-21. The acting meat manager did not encourage, implicitly authorize, or expressly approve of her actions, nor did he state that her actions would not constitute a violation of the company’s drug and alcohol free workplace policy. Canning suggested committing an act that was both illegal and explicitly prohibited by company policy. It is unreasonable to interpret the acting meat manager’s silence as tacit approval of Canning’s actions.

A similar scenario existed in *Griffith*. In that case, the employee informed his employer that he would like to apologize to a customer who had complained about the employee’s behavior. *Griffith*, 163 Wn. App. at 4. The employer did not inform the employee that this was not acceptable. *Id.* at 7. Nevertheless, the employee was terminated after he returned to the customer’s store and sought to apologize, leading to his banishment from the location. *Id.* at 5. Although the employee in *Griffith* was terminated for a series of improper actions, the final action being his return to the store to apologize, the court considered the employee’s act of returning to the store to apologize to be misconduct. *Id.* at 10-11. The court reached this conclusion despite the fact that the employer *did not respond* when the employee informed the employer that he wished to apologize to the customer who had complained. *Id.* at 7.

This case is distinguishable from *In re Griswold*, 102 Wn. App. 29, 15 P.3d 153 (2000). In *Griswold*, the employer terminated the employee for purchasing past pull-date meat at a marked down price; the employer argued that several written policies prohibited employee purchases of past pull-date meat. 102 Wn. App. at 37. The court noted that the corporate policies were “at best unclear” and were inconsistent with company practice. *Id.* at 42. Because the employee engaged in a common practice encouraged and authorized by the manager, and the written directives appeared to authorize a manager to permit her conduct, the court concluded that the employee did not commit misconduct. *Id.* at 42. In contrast, here the policy expressly and unambiguously prohibited Canning’s conduct, and the acting meat manager neither encouraged nor authorized Canning’s actions. Although the acting meat manager did not respond to Canning’s suggestion that she bring marijuana candy to work, his silence did not override the company’s clearly established drug and alcohol policy.

In sum, Canning’s actions are not exempt from being considered disqualifying misconduct under RCW 50.04.294(3)(c).

**C. Canning should only receive attorney fees and costs if the Commissioner's decision is reversed or modified.**

Canning is entitled to reasonable attorney fees and costs only if this Court ultimately modifies or reverses the Commissioner's decision. RCW 50.32.160. As shown above, this Court should reverse the superior court's decision and affirm the Commissioner's decision. Thus, this Court should also reverse the superior court's award of attorney fees and costs to Canning.

**VII. CONCLUSION**

The Commissioner correctly concluded that Canning was discharged for misconduct and thus disqualified from receiving unemployment benefits. The Department asks the Court to reverse the superior court's decision, including the attorney fees and cost award, and affirm the Commissioner's decision denying Canning unemployment benefits.

RESPECTFULLY SUBMITTED this 11<sup>th</sup> day of June 2013.

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**PROOF OF SERVICE**

I, Roxanne Immel, declare as follows:

1. That I am a citizen of the United States of America, a resident of the State of Washington, over the age of eighteen (18) years, and not a party to the above-entitled action.

2. That on the 11th day of June 2013, I caused to be served a copy of **Amended Brief of Appellant** on the Respondent of record on the below stated date as follows:

ABC Legal messenger

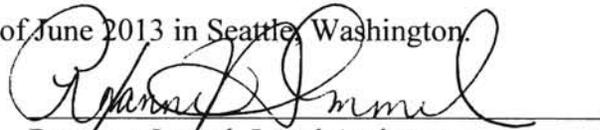
DANIELLE FRANCO-MALONE  
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Filed with

RICHARD JOHNSON, CLERK  
COURT OF APPEALS, DIVISION I  
ONE UNION SQUARE  
600 UNIVERSITY STREET  
SEATTLE, WA 98101-1176

I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON that the foregoing is true and correct.

Dated this 11th day of June 2013 in Seattle, Washington.

  
Roxanne Immel, Legal Assistant