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ASSIGNMENTS OF ERROR

1. The Commissioner erred in its June 18, 2010, Decision when it adopted the following Findings of Fact from the Administrative Law Judge's Initial Order:

Finding of Fact 4: The Commissioner erred in finding that the email was the sole reason Vail & Associates terminated Mr. Johnson. Comm. Rec., Pg. 109.

Finding of Fact 5, 6, and 7: The Commissioner erred in finding that Mr. Johnson was not informed that the email was a part of the reason for his termination and that Mr. Johnson was not informed of the fact that there was an ongoing investigation into his conduct. Comm. Rec., Pg. 109.

Finding of Fact 9: The Commissioner erred in finding that Mr. Johnson did not erase a portion of the taped conversation and that Mr. Johnson was not planning on suing Vail & Associates or planning on starting his own law firm. Comm. Rec., Pg. 109.

Finding of Fact 10: The Commissioner erred in finding that Mr. Johnson's email and his actions with respect to the former client's wife had nothing to do with Vail & Associates. Comm. Rec. Pg., 109.

2. The Commissioner erred in its June 18, 2010, Decision when it adopted the following Conclusions of Law from the Administrative Law Judge's Initial Order:

Conclusion of Law 4: The Commissioner erred in concluding that a finding of misconduct should not be based upon all of Vail & Associate's allegations, including the one dealing with pornographic material, and the Commissioner erred in concluding that the email correspondence, the relationship with the former client's wife, and the other evidence of misconduct was not sufficient to find that Mr. Johnson had engaged in misconduct.

Conclusion of Law 5: The Commissioner erred in concluding that Mr. Johnson was terminated solely as a result of the email, that there were other alternatives besides immediate termination, that

that the other allegations were based on hearsay, conclusory, and circumstantial, and that Mr. Johnson adequately refuted the other allegations.

Conclusion of Law 6: The Commissioner erred in concluding that it could not consider the allegations and evidence pertaining to the pornographic material in determining whether Mr. Johnson engaged in misconduct. The Commissioner further erred in concluding that evidence of misconduct discovered post-termination cannot be used to support the initial decision by Vail & Associates to terminate Mr. Johnson for misconduct.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Was it error for the Commissioner to adopt Findings of Fact 4-10 when there was substantial evidence presented by Vail & Associates that supported finding that:
 - (1) the email was not the sole reason for terminating Mr. Johnson;
 - (2) the discovery of the email and Vail & Associate's concerns with it were disclosed to Mr. Johnson, along with the fact that an ongoing investigation was being pursued;
 - (3) a portion of the tape was erased by Mr. Johnson;
 - (4) that Mr. Johnson had stated to co-workers that he had intended to sue Vail & Associates and was planning on starting his own law firm; and
 - (5) the email and Mr. Johnson's actions with respect to the former client's wife did involve and had the potential to impact Vail & Associates? [Assignments of Error 1]
2. Was it error for the Commissioner to adopt Conclusion of Law 4 when there is no legal basis for excluding the evidence discovered post-termination, and the evidence of the email, Mr. Johnson's relationship with a former client's wife, and the other evidence of misconduct was sufficient to find that Mr. Johnson engaged in statutory misconduct? [Assignment of Error 2]
3. Was it error for the Commissioner to adopt Conclusion of Law 5 when there was substantial evidence presented by Vail & Associates that supported its position that Mr. Johnson was not

terminated solely as a result of the email, and there were no other alternatives besides immediate termination, and the evidence presented of the misconduct pre-termination was not solely based on hearsay, conclusory, and circumstantial? [Assignment of Error 2]

4. Was it error for the Commissioner to Adopt Conclusion of Law 6 when there is no legal basis for excluding the post-termination evidence of misconduct that included the allegations and evidence pertaining to the pornographic material? [Assignment of Error 2]

STATEMENT OF THE CASE

Procedural History:

David B. Vail & Associates (“Vail & Associates”) discharged the Claimant, Mr. Chalmers Johnson (“Mr. Johnson”), from his employment position as a result of misconduct. The misconduct engaged in by Mr. Johnson was of the kind and nature that should have resulted in a denial of unemployment benefits. Instead, on November 4, 2009, the Employment Security Department (“ESD”) granted Mr. Johnson unemployment benefits. *See*, Comm. Rec., Pgs. 86-90.¹

Thereafter, Vail & Associates timely appealed the decision, and an Administrative Law Judge heard the matter and issued an Initial Order on September 25, 2010, denying Vail & Associate’s appeal and granting Mr. Johnson unemployment benefits. *See*, Comm. Rec., Pgs. 108-113. Following a timely filed Petition for Review by Vail & Associates, the Commissioner of the ESD adopted the Findings of Fact and Conclusions of Law of the Administrative Law Judge and affirmed the Office of the

¹ Unless otherwise noted, the citations to the record are to the Commissioner’s Record (“Comm. Rec.”) that was filed in the Superior Court and designated in the Designation of Clerk’s Papers.

Administrative Hearing's decision allowing Mr. Johnson to receive unemployment benefits and refused, among other things, to consider evidence discovered by Vail & Associates post-termination. *See*, Comm. Rec., Pgs. 132-135.

Vail & Associates timely filed a Petition for Review to the Pierce County Superior Court. Following briefing and oral argument, the Pierce County Superior Court reversed the Commissioner's decision on March 21, 2011. *See*, Findings of Fact and Conclusions of Law and Order. Mr. Johnson has appealed the decision of the Pierce County Superior Court. Pursuant to General Order 2010-1, Vail & Associates is filing the opening brief because it was the one that appealed the Commissioner's decision to the Pierce County Superior Court.

Factual History:

Vail & Associates is a law firm located in Tacoma, Washington, practicing primarily in the areas of workers compensation, social security, and personal injury matters. *See*, Comm. Rec., Pgs. 10-11. From July 15, 2008, to September 25, 2009, Vail & Associates employed Mr. Johnson as a trial attorney. *Id.* Various concerns arose regarding Mr. Johnson's job performance, *see*, Comm. Rec., Pgs. 12-13, including his honesty with representations he made to Vail & Associates. *Id.* at Pgs. 14-15, 16-17. In fact, Vail & Associates' supervising attorney, with Mr. Johnson's permission, had recorded a conversation between themselves regarding

Mr. Johnson's job performance. *Id.* Following the recording of the conversation, Vail & Associates discovered that Mr. Johnson had erased the portions of the tape that were most damaging to him. *Id.* at Pgs. 27-28.

After the discovery of Mr. Johnson's intentional decision to destroy property of Vail & Associates, it also discovered that Mr. Johnson had a relationship with the ex-wife of a former client of his that was clearly improper. *See, Comm. Rec., Pgs. 23-26.* It was also discovered that Mr. Johnson had been discussing with his co-workers allegations he had against Vail & Associates that he was not being properly compensated and was informing his co-workers that he was contemplating suing Vail & Associates. *Id.* at Pgs. 30-31. As a result of these revelations, and the fact that the Mr. Johnson had been dishonest and that he had been having discussions with co-workers that promoted poor morale, Vail & Associates terminated Mr. Johnson for misconduct.

On the same day of his termination but for which he was paid for, Mr. Johnson took a flash drive that belonged to Vail & Associates and only returned it upon demand by Vail & Associates. *See, Comm. Rec., Pgs. 33-35.* Mr. Johnson had intentionally damaged property of Vail & Associates and had been dishonest. He then took the flash drive and attempted to remove and/or hide the inappropriate emails and images he had on the flash drive. Mr. Johnson's actions could not be tolerated by a

law firm that aims to and is required to provide the highest ethical standards to its clients. *Id.* at Pgs. 66-69.

Following the termination of Mr. Johnson, Vail & Associates discovered a large amount of pornography that had been downloaded to Mr. Johnson's work computer and explicit email messages that he had sent to third-parties using his work computer. *See*, Comm. Rec., Pgs. 54-55, 162-382, 410-574, and 792-927. Mr. Johnson had clearly been dishonest with Vail & Associates in respect to what he was doing with his time spent at work, and he clearly violated standards of behavior that Vail & Associates had a reasonable expectation that Mr. Johnson would have complied with.

Vail & Associates terminated Mr. Johnson for misconduct based on his relationship with the former client's ex-wife, his decision to erase portions of the taped conversation, his dishonesty, and his claims against Vail & Associates that he professed to his co-workers. And, the discovery of Mr. Johnson's downloading of pornography and emailing of explicit messages to third-parties from his work computer would have been misconduct resulting in his termination had it been discovered prior to his actual termination from Vail & Associates.

This evidence supported Vail & Associates' termination of Mr. Johnson for misconduct.

ARGUMENT

A. STANDARD OF REVIEW

The Washington Administrative Procedure Act (“APA”), RCW 34.05, governs judicial review of a final decision by the Employment Security Department’s (“ESD”) Commissioner. *Smith v. Employment Security Dept.*, 155 Wn. App. 24, 32, 226 P.3d 263 (2010). In reviewing the ESD Commissioner’s decision, the Court may reverse the decision on an error of law, if substantial evidence does not support the decision, or if the decision was arbitrary or capricious. *Id.*, citing RCW 34.05.570(3)(d), (e), (i). The burden of establishing invalidity of the agency action is on the party asserting invalidity. *Id.* Under the APA, the Court of Appeals “sits in the same position as the superior court” on review of the agency action. *Tapper v. Employment Sec. Dept.*, 122 Wn.2d 397, 402, 858 P.2d 494 (1993).

Questions of law, unlike questions of fact, are subject to de novo review. RCW 34.05.570(3)(d); *Tapper*, 122 Wn.2d at 403. Whether an employee's behavior constituted "misconduct" is a mixed question of law and fact. *Tapper*, 122 Wn.2d at 402 (A statutory definition of “misconduct” did not exist when the court decided *Tapper*. The legislature has since adopted a definition of “misconduct.” See, *The Markam Group, Inc. v. Employment Security Dept.*, 148 Wn. App. 555, 561-562, 200 P.3d 748

(2009)). When the issue involves a mixed question of law and fact, the reviewing court must: (1) apply the substantial evidence standard to establish the relevant facts; (2) make a de novo determination of the correct law; and (3) apply the law to the facts. *Tapper*, 122 Wn.2d at 403.

B. SUBSTANTIAL EVIDENCE ESTABLISHED THAT MR. JOHNSON HAD ENGAGED IN MISCONDUCT

In reviewing the Commissioner's decision, the Court must look at the Commissioner's findings of fact for substantial evidence in light of the whole record. *Smith*, 155 Wn. App. at 32, *citing*, RCW 34.05.570(3)(e). "Substantial evidence" is evidence that would persuade a fair-minded person of the truth or correctness of the matter. *Id.* at 32-33. As stated, whether an employee's behavior constitutes misconduct, warranting termination, is a mixed question of law and fact. *Id.*

Here, the Commissioner improperly determined that there was substantial evidence to uphold the Office of Administrative Hearing's decision to award benefits to Mr. Johnson. At the hearing, Vail & Associates presented five (5) basic reasons for why Mr. Johnson should not be entitled to unemployment benefits, which were as follows: (1) he engaged in an improper relationship with his former client's ex-wife; (2) he was dishonest; (3) he provoked poor morale in the workplace; (4) he wrongfully took a flash drive that was property of Vail & Associates; and

(5) he wrongfully used Vail & Associates' computers to download pornographic materials and email inappropriate correspondence to third-parties.

Any of these reasons constituted misconduct that justified Mr. Johnson's termination, and the denial of his unemployment benefits. Misconduct is "an employee's act or failure to act in willful disregard of his or her employer's interest where the effect of the employee's act or failure to act is to harm the employer's business." *See*, RCW 50.04.293.

Under RCW 50.04.294, "Misconduct" also 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;
- (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.

(2) The following acts 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. These acts include, but are not limited to:

- (a) Insubordination showing a deliberate, willful, or purposeful refusal to follow the reasonable directions or instructions of the employer;
- (b) Repeated inexcusable tardiness following warnings by the employer;

(c) Dishonesty related to employment, including but not limited to deliberate falsification of company records, theft, deliberate deception, or lying;

(d) Repeated and inexcusable absences, including absences for which the employee was able to give advance notice and failed to do so;

(e) Deliberate acts that are illegal, provoke violence or violation of laws, or violate the collective bargaining agreement. However, an employee who engages in lawful union activity may not be disqualified due to misconduct;

(f) 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; or

(g) Violations of law by the claimant while acting within the scope of employment that substantially affect the claimant's job performance or that substantially harm the employer's ability to do business.

See, RCW 50.04.294(1) and (2). "Willful" means intentional behavior done deliberately or knowingly, where you are aware that you are violating or disregarding the rights of your employer. WAC 192-150-205(1). And, "Flagrant" means conspicuously bad or offensive behavior showing contemptuous disregard for the law, mortality, or the rights of others. This blatant behavior must be so obviously inconsistent with what is right or proper that it can neither escape notice nor be condoned. WAC 192-150-205(6).

The behavior cannot be characterized as mere incompetence, inefficiency, erroneous judgment, or ordinary negligence." *See, Galvin v. Employment Security Dep't*, 87 Wn. App. 634, 641-642, 942 P.2d 1040

(1997). In *Galvin*, the employee deliberately disobeyed her employer's policies relating to obtaining approval for time off despite knowing of the policies and having been warned to comply with them. *Id.* at 645-647.

Because her actions were deliberate and in violation of a company policy that she was aware of, the *Galvin* court determined that the employee had engaged in misconduct and was not entitled to unemployment benefits.

Id.

Likewise, Mr. Johnson deliberately chose to engage in conduct that constituted misconduct. His conduct was in violation of written policies that Vail & Associates had in place, and it was in violation of standards of behavior that Mr. Johnson should have reasonably known Vail & Associates would have expected him to comply with. The actions Mr. Johnson engaged do not constitute simply incompetence, inefficiency, erroneous judgment, or ordinary negligence. His actions were deliberate, and put Vail & Associates at risk of injury to their business and did injure their business by lowering staff morale.

1. **An Improper Relationship between Mr. Johnson and the Ex-Wife of His Former Client Constituted Misconduct.**

The problems with Mr. Johnson started when Vail & Associates became concerned with his job performance and honesty. As a result of Vail & Associates' concerns, it had been periodically reviewing Mr.

Johnson's work computer. On the date of Mr. Johnson's termination, Vail & Associates became aware of an email between Mr. Johnson and a third-party wherein the email stated that Mr. Johnson was having a sexual relationship with the ex-wife of a former client of Mr. Johnson's. *See*, Comm. Rec., Pg. 670. Based on this email, and other concerns that Vail & Associates had with Mr. Johnson, which will be discussed below, Vail & Associates made the decision to terminate him the same day it received this email. *See, Id.*, Pgs. 28-29. The Commissioner's Finding of Fact No. 4, *see*, Comm. Rec., Pg. 109, is incorrect in that that the email was not the sole reason Vail & Associates terminated Mr. Johnson.

During the hearing, Mr. Johnson admitted that the allegations contained in the email were true. *Id.*, Pg. 55. However, he stated that the relationship was not with the ex-wife of a former client of Vail & Associates, but it was with the ex-wife of a former client of Mr. Johnson's when he had his own practice. Either way, it was an inappropriate relationship. By continuing a relationship with a former client's ex-wife, Mr. Johnson was showing an intentional or substantial disregard of Vail & Associates' interests in maintaining a law office of integrity and high ethical standards. The ramifications of such a relationship becoming known to Vail & Associates' employees, their clients, and the public would have been harmful to Vail & Associates.

Attorneys have higher ethical standards to maintain than many other professionals. Even if the relationship the Mr. Johnson admitted to having was not a violation of the Rules of Professional Conduct, one can imagine the ill repute that Vail & Associates would have experienced had it become known that one of its attorneys was having or had an intimate relationship with a former client's ex-wife, whether it was a client of Vail & Associates or not. Having such a relationship was misconduct on the part of Mr. Johnson under RCW 50.04.294(1)(a) and (d), and there was substantial evidence of this misconduct.

Finding of Fact No. 10, *see*, Comm. Rec., Pg. 109, is incorrect in that it concluded that the Mr. Johnson's conduct had nothing to do with Vail & Associates and did not impact it. The Finding of Fact also incorrectly states that the relationship ended years ago. The Claimant admitted that it was ongoing. He stated that, "And even after I came to Washington I would occasionally get text messages from her . . . and she wanted to come up to Seattle and maybe meet me up here." *See, Id.*, at Pg. 55, Lines 12-20.

Findings of Fact Nos. 5, 6, and 7, *see*, Comm. Rec., Pg. 109, are incorrect because Vail & Associates did not tell Mr. Johnson that the email was not one of the reasons for the termination. Instead, he was told that Vail & Associates had an ongoing investigation with respect to Mr.

Johnson's conduct. *See, Id.*, at Pg. 29, Lines 10-15. In addition, except for the email, Vail & Associates did not refuse to let Mr. Johnson respond to the allegations. *Id.*, at Pgs. 30-36. And, besides the reasons listed in Finding of Fact No. 7, Mr. Johnson was also told there was an ongoing investigation regarding the Claimant's conduct and that the Claimant had been dishonest with respect to his employment with Vail & Associates. *Id.*, at Pg. 29, Lines 11-15, and Pg. 31, Lines 2-4.

2. Mr. Johnson's Dishonesty Constituted Misconduct.

One of the other reasons for Mr. Johnson's termination was that he was dishonest to Vail & Associates. His dishonesty was related to his employment with Vail & Associates because Mr. Johnson falsified company records. At the hearing, the testimony showed that Vail & Associates had a meeting with Mr. Johnson to review concerns it had with his job performance. *See, Comm. Rec.*, Pg. 27. With the permission of Mr. Johnson, the meeting was tape recorded in order to be placed in Mr. Johnson's personnel file. One of the main issues addressed in the meeting was Mr. Johnson's alleged overtime hours that he had accrued.

However, after the meeting was recorded, and the tape given to Mr. Johnson to be placed in his personnel file, Vail & Associates discovered that portions of the tape had been erased. *Id.*, at Pgs. 28-29. From the transcription of the tape, *see, Id.*, at Pgs. 102-106 of the

Administrative Record, it is apparent that the tape simply ended. Mr. Johnson denied erasing the tape, but there was no other plausible explanation for why significant portions of it were missing. Mr. Johnson's testimony was also inconsistent as to when he dated the envelope containing the tape and when he had access to the tape. *Id.*, at Pgs. 62-63. According to Mr. Johnson, he may have not sealed the envelope until a month or more after the recording was made, *Id.*, at Pg. 62, Lines 10-23, which was inconsistent with his original statement that he sealed it after the tape was made by Vail & Associates. *Id.*, at Pg. 61, Lines 2-14.

Even the Administrative Law Judge noted in his decision that he did not think Mr. Johnson was the most credible witness. *Id.*, at Pg. 111, Conclusion of Law No. 6. Under RCW 50.04.294(2)(c), misconduct includes dishonesty related to the claimant's employment, including deliberate falsification of company records. Vail & Associates provided substantial evidence that Mr. Johnson had falsified company records by erasing portions of the taped conversation. This was one of the bases for terminating Mr. Johnson and should have been sufficient evidence with or without the other evidence of misconduct to deny Mr. Johnson his unemployment benefits.

3. **Mr. Johnson's Provocation of Poor Morale in the Workplace Constituted Misconduct.**

While the Claimant denied stating that he had plans to sue Vail & Associates, he had conversations with other co-workers about how he was going to sue Vail & Associates because he was allegedly not being compensated properly. At the hearing, Mr. Vail summed-up the impact on Vail & Associates when he stated the following:

He said he wasn't. But that's immaterial, whether he was planning on suing the firm or not. The point is that he was telling people in the office which destroys morale. This is not the type of thing that can be corrected. This is a guy that has a pattern of dishonesty, ethics and problems that led me to say, "Hey, look, I can't keep him anymore."

See, Comm. Rec., Pg. 35, Lines 7-11. Mr. Johnson's actions in making threats of filing a suit against Vail & Associates to other co-workers destroys morale. This was deliberate on the part of Mr. Johnson, and Vail & Associates had every expectation that an employee, an especially an attorney such as Mr. Johnson, would not engage in such behavior.

Under RCW 50.04.294(1)(b), Mr. Johnson's actions constituted misconduct, and he was not entitled to unemployment benefits as a result of such conduct. The Commissioner's Finding of Fact No. 9, *see*, Comm. Rec., Pg. 109, was incorrect. There was substantial evidence to support a finding that Mr. Johnson had informed his co-workers that he was going to sue Vail & Associates and start his own firm. Whether he actually

intended to do this does not matter. Moreover, there was substantial evidence to support a finding that Mr. Johnson erased portions of the tape.

4. **Mr. Johnson's Decision to take the Flash Drive Constituted Misconduct.**

After Mr. Johnson was verbally terminated, but on the very same day, Mr. Johnson removed a flash drive from his work computer and failed to return it to Vail & Associates until five (5) days after Vail & Associates demanded its return. *See*, Comm. Rec., Pgs. 36-38. The flash drive belonged to Vail & Associates, and Mr. Johnson had absolutely no right to remove it and keep it. *Id.*, at Pg. 70, Lines 19-24, Pg. 71, Lines 1-8. His decision to take the flash drive after he was terminated constituted "Gross Misconduct" under RCW 50.04.294(4).

This portion of the statute states that, "Gross Misconduct" means a criminal act in connection with an individual's work for which the individual has been convicted in a criminal court, or has admitted committing, or conduct connected with the individual's work that demonstrates a flagrant and wanton disregard of and for the rights, title, or interest of the employer or a fellow employee." RCW 50.04.294(4) (Emphasis Added). Mr. Johnson's actions in removing the flash drive, failing to return it, and removing information off of the flash drive, *see*,

Id., at Pg. 71-73, demonstrated a flagrant and wanton disregard of and for the rights, title, or interest of Vail & Associates.

5. **Mr. Johnson's Downloading of Pornographic Material and His Sending of Explicit Emails from His Work Computer Constituted Misconduct.**

Mr. Johnson's actions in downloading pornographic material, and his sending of explicit emails to third-parties from his work computer constituted misconduct. The evidence was undisputed that he had downloaded pornographic material to the flash drive that was the property of Vail & Associates. *See*, Comm. Rec., Pgs. 59-60; 71-75. It is also undisputed that he was emailing explicit messages to third-parties using his work, email address and during work.

For an example of the inappropriate messages Mr. Johnson was sending, one only has to review Page 208 of the Comm. Rec., which contains an April 8, 2009, email from Chalmers@davidbvail.com to Yourcarolinagirl@live.com. On its face, this type of message is inappropriate for an attorney to send to a third-party from the attorney's employer's email address. *See also, Id.*, at Pg. 59, Lines 13-20. The Comm. Rec. contains numerous examples of inappropriate email correspondences from Mr. Johnson to third-parties and inappropriate pornographic pictures. *See, e.g., Id.*, at Pgs, 165-382, 410-575, and 792-927.

If the email messages or the flash drive had fallen into the hands of a third-party, this would have been detrimental to the reputation and good will of Vail & Associates. And, if other employees had viewed the pictures or email messages, the employees could have been easily offended by the material. In fact, when the flash drive was returned to Vail & Associates, the employee who reviewed the flash drive was offended. *See, Id.*, at Pg. 74, Lines 16-25, and Pg. 75, Line 1. Moreover, it was against a well-known, written policy of Vail & Associates to only use work computers for matters related to work. *See, Id.*, at Pg. 38, Lines 15-19, Pgs. 385-408, which is in the Employee Handbook, and specifically Pg. 397 of the Handbook. Even if it had not been written down, it would still be reasonable to expect an attorney employed by a law firm not to engage in such conduct.

Mr. Johnson's actions as described above constituted misconduct under RCW 50.04.294(1)(a), (1)(b), (1)(d), (2)(f), and (2)(g). Mr. Johnson was flagrantly disregarding the interests of Vail & Associates. Even the Administrative Law Judge admitted that he believed Mr. Johnson's actions constituted misconduct. In reference to the pornography and inappropriate emails, he stated, "Yeah, I do. And, again, if this was uncovered before the termination and was the reason for the termination Mr. Johnson would have – we probably wouldn't have been here today. He would have been

disqualified by the Employment Security Department. And, if not, I would have definitely disqualified him. So I'm not questioning the Employer in that regard." *See, Id.*, at Pg. 38, Line, 25, and Pg. 39, Lines 1-5. Mr. Johnson's actions were disqualifying misconduct, plain and simple.

In sum, there was substantial evidence under any of the five (5) reasons stated above for finding that Mr. Johnson engaged in disqualifying misconduct related to his employment with Vail & Associates. It was error for the Commissioner to uphold the Administrative Law Judge's decision that Vail & Associates had not carried its burden in proving by a preponderance of the evidence that Mr. Johnson had engaged in disqualifying misconduct.

C. THE COMMISSIONER ERRED IN NOT CONSIDERING THE EVIDENCE OF MISCONDUCT DISCOVERED POST-TERMINATION

As explained above, following the termination of Mr. Johnson, Vail & Associates reviewed the contents of his work computer and the flash drive. In doing so, it discovered a large amount of explicit, pornographic material that Mr. Johnson had downloaded to view and store. It also discovered multiple, inappropriate and, often times, sexually explicit email correspondences. In his decision, the Administrative Law Judge acknowledged the seriousness of the actions of Mr. Johnson in

removing the flash drive, the downloading and viewing of pornographic material, and the email messages, but he refused to consider the evidence in making his decision. He reasoned that this evidence was not used as a basis for terminating Mr. Johnson, so it could not be used as a basis for denying him unemployment benefits. The Commissioner adopted the reasoning of the Administrative Law Judge.

This decision was incorrect and was an error of law because there is nothing in RCW 59.04 et al, RCW 50.02 et al. or WAC 192-150 et al. that prohibits the consideration of evidence discovered post-termination to support the initial termination of Mr. Johnson for misconduct. RCW 50.20.066 provides that, “With respect to claims that have an effective date on or after January 4, 2004: (1) An individual shall be disqualified from benefits beginning with the first day of the calendar week in which he or she has been discharged or suspended for misconduct connected with his or her work . . .” Even if it is misconduct unrelated to the initial misconduct used to support the basis for termination, nothing in this section of RCW 50.20 or any other section states that evidence of misconduct discovered post-termination cannot be used to support the initial termination.

In this case, the misconduct was not unrelated, given that Vail & Associates believed that Mr. Johnson had been dishonest and was not

conducting himself in a professional manner, engaging in activities that negatively impacted staff moral, and the discovery of the pornographic materials and inappropriate email messages substantiated this belief, along with the Claimant's decision to take the flash drive. Even assuming it was unrelated, the Commissioner's decision was still incorrect, because it would result in the Employment Security Department and employers supporting the payment of benefits to workers that should not be entitled to them.

At the time of termination, Vail & Associates believed Mr. Johnson had engaged in disqualifying misconduct. While the Administrative Law Judge believed the misconduct that Vail & Associates based its termination on was not supported by a preponderance of the evidence, the Administrative Law Judge did believe the post-termination finding that Mr. Johnson had been engaged in misconduct by taking the flash drive and by downloading pornographic material and emailing explicit messages would have justified a denial of unemployment benefits.

Under WAC 192-50-200(1), it states that, "The action or behavior that resulted in your discharge or suspension from employment must be connected with your work to constitute misconduct or gross misconduct." The action or behavior is connected with the claimant's work if it results in harm or creates the potential for harm to the claimant's employer's

interests. *See*, WAC 192-50-200(2). “The harm may be . . . intangible, such as damage to your employer’s reputation or a negative impact on staff morale.” *Id.* In this case, Mr. Johnson was discharged for misconduct that harmed and created the potential for harm to Vail & Associates. Simply because evidence of the misconduct included misconduct discovered post-termination that further supported the initial decision to terminate Mr. Johnson should not be a reason to exclude the evidence as irrelevant.

While Vail & Associates was not aware of Mr. Johnson’s prolific use of its computer system and email address to download, send and receive sexually explicit, inappropriate, emails and pornography, there is no reason that this evidence cannot be used to support Vail & Associates’ position that the termination was for statutory misconduct. Taking the Commissioner’s decision to its illogical conclusion would mean that an employer could never introduce evidence discovered post-termination to support the denial of unemployment benefits. An employee should not be entitled to unemployment benefits solely because some of the evidence of the employee’s statutory misconduct is discovered after the employee is terminated. This would reward the employees who deceive their employers and take much needed resources away from employees that actually deserve unemployment benefits.

Here, the Commissioner's position even makes less sense because the initial termination was for misconduct related to Mr. Johnson's work. When the initial decision was made to terminate Mr. Johnson for misconduct, pre and post-termination of misconduct can be used to support the termination. Based on the evidence it had, Vail & Associates justifiably terminated Mr. Johnson for misconduct. Clearly, the evidence discovered post-termination is admissible to support Vail & Associates' initial decision to terminate Mr. Johnson for misconduct. Nothing in the RCWs or the WACs preclude the admissibility of such evidence.

Before the Superior Court, the Employment Security Department ("ESD") argued that it would burden the ESD in having to evaluate evidence that the employer discovers post-termination. However, this argument is incorrect because there are already time periods in which the employer has to provide the evidence to the ESD to support its position that the former employee engaged in misconduct. If the employer fails to produce the evidence timely, then it would be precluded from later attempting to include it. However, when an employee is terminated for misconduct, an employer should not be precluded from offering evidence to support the termination for misconduct solely on the basis that it was discovered post-termination. And, as the Administrative Law Judge

explicitly stated, in this case, the post-termination evidence is sufficient to support a denial of Mr. Johnson's unemployment benefits.

Finally, RCW 50.04.294(4) states that, "Gross Misconduct" means a criminal act in connection with an individual's work for which the individual has been convicted in a criminal court, or has admitted committing, or conduct connected with the individual's work that demonstrates a flagrant and wanton disregard of and for the rights, title, or interest of the employer or a fellow employee." (Emphasis Added). Even a cursory review of the emails that Mr. Johnson was sending and receiving from third-parties through his work email address demonstrates his complete disregard for Vail & Associates' legitimate interest in promoting a safe workplace and maintaining its good standing and reputation with its clients and the public, not to mention the legal community.

CONCLUSION

Substantial evidence supported a finding that Mr. Johnson engaged in disqualifying misconduct under RCW 34.05.570, and it was error not to consider the post-termination findings of misconduct to support the initial termination for misconduct. Findings of Fact Nos. 4-7, and 9-10, *see*, Comm. Rec., Pg. 109, and Conclusions of Law Nos. 4-6, *see, Id.* at Pg. 109-111, were in error. Vail & Associates would respectfully request that the Court set aside the Commissioner's Findings of Fact and Conclusions

of Law and find that Mr. Johnson engaged in disqualifying misconduct and is not entitled to unemployment benefits.

Vail & Associates also request its reasonable costs and attorney fees under RAP 14.3.

DATED this 3rd day of October, 2011.

DAVIES PEARSON, P.C.



PETER T. PETRICH, WSB #8316
CHRISTOPHER J. MARSTON, WSB #30571
Attorneys for Petitioner/Respondent David B. Vail
& Associates

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NO. 42164-0-II
COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

DAVID B. VAIL & ASSOCIATES,
Petitioner/Respondent.
v.
EMPLOYMENT SECURITY DEPARTMENT, and CHALMERS JOHNSON
Cross-Respondents/Appellants,

CERTIFICATE OF SERVICE OF BRIEF OF
PETITIONER/RESPONDENT DAVID B. VAIL & ASSOCIATES

Peter T. Petrich, WSB #8316
Christopher J. Marston, WSB #30571
DAVIES PEARSON, P.C.
920 Fawcett Ave.
Tacoma, WA 98402
253-620-1500

CERTIFICATE OF SERVICE

1
2 STATE OF WASHINGTON)
3 County of Pierce) ss.
4)

5 SHANNA SWALESON, being first duly sworn on oath, deposes and says:

6 That on the 3rd day of October, 2011, I delivered a true and correct copy of the brief of
7 petitioner/respondent David B. Vail & Associates to Legal Messengers, Inc. for delivery to
8 the following attorneys of record as well as by e-mail also listed below:

9 Robert McKenna
10 Dionne Padilla-Huddleston
11 Assistant Attorney General
12 P.O. Box 40110
13 Olympia, WA 98504-0110
14 dionnep@atg.wa.gov

15 and by First Class Mail, postage prepaid and hand delivery by Christopher Marston to:

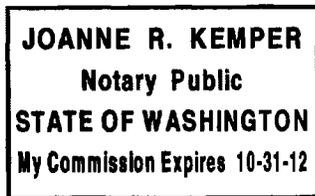
16 Chalmers C. Johnson
17 523 South G Street, Apt. 402
18 Tacoma, WA 98405

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SHANNA SWALESON

SIGNED AND SWORN to before me this 3rd day of October, 2011 by Shanna Swaleson.




Print Name: Joanne R. Kemper
NOTARY PUBLIC in and for the State
of Washington. My commission
expires: 10/31/2012