

NO. 42164-0

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

DAVID B. VAIL & ASSOCIATES,

Respondent,

v.

CHALMERS JOHNSON,

Appellant,

EMPLOYMENT SECURITY DEPARTMENT,

Cross-Appellant.

BRIEF OF CROSS-APPELLANT

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I. INTRODUCTION

An unemployment benefits claimant who is separated from employment because of activity unrelated to his work has not engaged in misconduct that disqualifies him from unemployment benefits under RCW 50.20.066. The Cross-Appellant, Employment Security Department, granted the application for unemployment benefits of Appellant, Chalmers Johnson. While Mr. Johnson's employer subsequently offered additional reasons for his discharge, the reasons given at the time of the discharge did not meet the statutory definition of misconduct.

An administrative law judge ruled that the Department correctly determined Mr. Johnson's employer, Respondent David B. Vail & Associates, did not establish Mr. Johnson had engaged in disqualifying misconduct. On review, the Commissioner of the Employment Security Department affirmed, adopting the findings and conclusions entered by the administrative law judge. Because substantial evidence supports the findings of fact adopted by the Commissioner, and the conclusion that Mr. Johnson was not discharged for misconduct is free of error, the Department respectfully requests this Court affirm the Commissioner's decision allowing Mr. Johnson unemployment benefits.

II. ASSIGNMENTS OF ERROR

The Department assigns no error to the Commissioner's decision adopting and affirming the administrative law judge. However, because the Pierce County Superior Court erred in reversing the Commissioner's decision, the Department assigns error to the following aspects of the Superior Court's Order:

1. The superior court erred when it entered findings of fact IV-VIII. Clerk's Papers (CP) at 90-92.
2. The superior court erred in concluding the Commissioner's findings of fact numbers 4, 5, 6, 7, and 9 were not supported by substantial evidence. CP at 90 (Findings of Fact (FF) III), 92 (Conclusions of Law (CL) II).
3. The superior court erred in refusing to adopt Commissioner's Conclusions of Law 4, 5, and 6. CP at 92 (CL IV).
4. The superior court erred in concluding Mr. Johnson engaged in disqualifying misconduct. CP at 92 (CL IV).
5. The superior court erred in concluding Mr. Johnson's alleged statements to his co-workers were disqualifying misconduct. CP at 93 (CL V).
6. The superior court erred in concluding Mr. Johnson's post-discharge conduct was disqualifying misconduct. CP at 93 (CL V).

7. The superior court erred in reversing the Department's decision to allow Mr. Johnson benefits. CP at 93 (Order).

III. COUNTERSTATEMENT OF ISSUES ON APPEAL

1. Are the Commissioner's findings of fact 4, 5, 6, 7, and 9 supported by substantial evidence? (Issue related to assignments of error 2 and 7)
2. Did the Commissioner correctly conclude in conclusions of law 4 and 5 that Mr. Johnson was not discharged for disqualifying misconduct when he exchanged emails unrelated to his work using his personal email address? (Issue related to assignments of error 3-5, and 7)
3. Did the Commissioner, in conclusion of law 6, correctly exclude from consideration evidence discovered after Mr. Johnson was discharged? (Issue related to assignments of error 1 and 6-7)

IV. COUNTERSTATEMENT OF THE CASE¹

Chalmers Johnson began working for law firm David B. Vail & Associates (Employer) as an attorney on July 15, 2008, and was discharged on September 25, 2009. AR at 14, 108 (FF 1).² On the date he was fired, Mr. Johnson and an attorney co-worker exchanged e-mails

¹ The Employer's statement of the case cites the administrative record regardless of whether the point in the record is reflected in a finding of fact. *See* Br. of Resp't at 4-6. The Department provides this counterstatement of the case to present the facts as found by the Commissioner, which are the basis for this Court's review. *See Tapper v. Emp't Sec. Dep't*, 122 Wn.2d 397, 406, 858 P.2d 494 (1993); *Smith v. Emp't Sec. Dep't*, 155 Wn. App. 24, 32, 226 P.2d 263 (2010).

² The certified administrative record was transmitted by the Pierce County Superior Court Clerk as a separate document and it was not assigned Clerk's Papers numbers. The certified administrative record is cited herein as administrative record (AR) using the page numbers assigned by the Department's agency records center. The number in parentheses represents either specific findings of fact (FF) or conclusions of law (CL) made by the administrative law judge or the Commissioner.

using their personal e-mail addresses. AR at 27-28, 53-56, 109 (FF 3).³ The email referred to an intimate relationship Mr. Johnson had years before with the ex-wife of a former client while Mr. Johnson was employed at a different law firm in another state. AR at 28, 55, 57, 109 (FF 3, 10), 110 (CL 4). When the Employer learned of this email, a supervisor summoned Mr. Johnson to his office and terminated him. AR at 28-29, 109 (FF 5). The Employer believed that the content of the email could subject the Employer to liability. AR at 28-29, 109 (FF 4). Mr. Johnson inquired whether the email was the reason for his termination, but was told it was not. AR at 29-30, 55, 109 (FF 5).

At the time of Mr. Johnson's discharge, the Employer gave him three reasons for the discharge: (1) co-workers' reports that Mr. Johnson was going to sue the Employer; (2) co-workers' reports that Mr. Johnson was going to leave the Employer and start his own practice; and (3) Mr. Johnson's alleged erasing of parts of a taped conversation between Mr. Johnson and his supervisor regarding Mr. Johnson's work performance. AR at 25, 26-27, 31-32, 34, 43-44, 57, 91, 92, 99, 101, 109 (FF 7). After hearing the evidence, the Commissioner found that none of these allegations was true. AR at 50-53, 60-63, 77, 109 (FF 9).

³ A copy of the email was provided to the administrative law judge by the Employer prior to the administrative hearing but it was not admitted as an exhibit. AR at 7-10, 27-28, 759-762.

Prior to his discharge, Mr. Johnson had been under the Employer's scrutiny for suspicions of dishonesty and concerns about his competence. AR at 21-22, 109 (FF 2). But no decision had been made to discharge him prior to the employer's discovery of the email on September 25, 2009. AR at 76, 109 (FF 2).

After the discharge, the Employer searched Mr. Johnson's work computer and flash drive and discovered pornographic material on them. AR at 35-36, 59-60, 72, 109 (FF 8). The Employer also alleged Mr. Johnson wrongfully removed a flash drive belonging to the Employer from its office on the day of his discharge. AR at 37-38.

After Mr. Johnson was discharged, he applied for unemployment benefits. The Department granted benefits based on its initial determination that discharging Mr. Johnson due to the Employer's fear Mr. Johnson would file a lawsuit was not disqualifying misconduct under RCW 50.04.294. AR at 86-87.⁴ The Employer requested a hearing to contest the Department's determination. AR at 84. Both the Employer and Mr. Johnson appeared at and participated in the hearing. AR at 108.

⁴ The Employment Security Act requires the Department to "analyze the facts of each to determine what actually caused the employee's separation." *Safeco Ins. Co. v. Meyering*, 102 Wn.2d 385, 392-93, 687 P.2d 195 (1984) (analyzing the facts surrounding whether an employment separation was a voluntary quit or a discharge); *see also Korte v. Emp't Sec. Dep't*, 47 Wn. App. 296, 302, 734 P.2d 939 (1987) (holding that the determination of whether good cause existed for the employment separation "must be based upon existing facts as contrasted to conjecture.").

The administrative law judge (ALJ) considered the testimony and other evidence and concluded that the Employer's evidence of pornography on Mr. Johnson's computer was not relevant to a determination of misconduct because (1) it was not discovered until after Mr. Johnson's termination, and (2) Mr. Johnson therefore was not discharged because of the pornographic material on his computer. AR at 10, 58, 110 (CL 4). The ALJ found that the Employer discharged Mr. Johnson because of the September 25, 2009, email, the contents of which were not misconduct related to the Employer. AR at 27-29, 76, 110 (CL 4), 117-21. Accordingly, the ALJ affirmed the Department's decision to grant Mr. Johnson unemployment benefits.

The employer appealed the ALJ's decision to the Commissioner of the Department. In affirming the ALJ and adopting the ALJ's findings and conclusions, the Commissioner specifically noted the Employer had failed to carry its burden of showing that Mr. Johnson was discharged for committing misconduct, as that term is defined in RCW 50.04.294. AR at 133. The employer appealed to Pierce County Superior Court, which reversed the Commissioner's decision.

V. STANDARD OF REVIEW

This Court reviews the Commissioner's decision, not the superior court's order. Judicial review is governed by the Administrative

Procedure Act (APA), RCW 34.05. RCW 34.05.510; RCW 50.32.120; *W. Ports Transp., Inc. v. Emp't Sec. Dep't*, 110 Wn. App. 440, 449, 41 P.3d 510, 515 (2002). The court of appeals sits in the same position as the superior court and applies the APA standards directly to the administrative record. *Smith v. Emp't Sec. Dep't*, 155 Wn. App. 24, 32, 226 P.2d 263 (2010). The court reviews the decision of the Commissioner, not the superior court order or underlying decision of the ALJ except to the extent the Commissioner's decision adopted any findings and conclusions of the ALJ's order. *Id.*; *Tapper v. Emp't Sec. Dep't*, 122 Wn.2d 397, 406, 858 P.2d 494 (1993). As noted above, in this case the Commissioner explicitly adopted the ALJ's findings of fact and conclusions of law. AR 133.

The Commissioner's decision is considered prima facie correct and the burden of proving otherwise rests upon the person attacking its validity. RCW 50.32.150; RCW 34.05.570(1)(a); *Smith*, 155 Wn. App. at 32. In this case, that burden falls on the Employer.

A. Review of factual matters

Judicial review of disputed issues of fact must be limited to the agency record. RCW 34.05.558. Unchallenged findings of fact are verities on appeal. RAP 10.3(g); *Tapper*, 122 Wn.2d at 407. The court must uphold an agency's findings of fact if they are supported by substantial evidence. *Wm. Dickson Co. v. Puget Sound Air Pollution*

Control Agency, 81 Wn. App. 403, 411, 914 P.2d 750, 755 (1996). Substantial evidence is evidence that is “sufficient to persuade a rational, fair-minded person of the truth of the finding.” *In re Estate of Jones*, 152 Wn.2d 1, 8, 93 P.3d 147 (2004); *Heinmiller v. Dep’t of Health*, 127 Wn.2d 595, 670, 903 P.2d 433 (1995). If there are sufficient facts in that record from which a reasonable person could make the same finding as the agency, the court should uphold the finding, even if the court would make a different finding based on its reading of the record. *Callegod v. Wash. State Patrol*, 84 Wn. App. 663, 676 n.9, 929 P.2d 510 (1997); *see also Fred Hutchinson Cancer Research Ctr. v. Holman*, 107 Wn.2d 693, 713, 732 P.2d 974 (1987) (evidence may be substantial enough to support a factual finding even if the evidence is conflicting and could lead to other reasonable interpretations).

The reviewing court is to “view the evidence and the reasonable inferences therefrom in the light most favorable to the party that prevailed” at the administrative proceeding below. *Tapper*, 122 Wn.2d at 407; *accord City of Univ. Place v. McGuire*, 144 Wn.2d 640, 652, 30 P.3d 453 (2001). The court may not substitute its judgment for that of the agency on the credibility of witnesses or the weight to be given to conflicting evidence. *Smith*, 155 Wn. App. at 35; *Davis v. Dep’t of Labor & Indus.*, 94 Wn.2d 119, 124, 615 P.2d 1979 (1980); *see also McGuire*,

144 Wn.2d at 652 (reviewing court accepts fact-finders determinations of witness credibility and weight to be given to reasonable but competing inferences).

B. Review of questions of law

Questions of law are subject to de novo review. *Tapper*, 122 Wn.2d at 403. However, courts grant substantial weight to an agency's interpretation of an ambiguous statute the agency administers, unless the agency's interpretation conflicts with the statute. *Pub. Util. Dist. 1 v. Dep't of Ecology*, 146 Wn.2d 778, 790, 51 P.3d 744 (2002); *King Cnty. v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 142 Wn.2d 543, 553, 14 P.3d 133 (2000). This is especially true where, as here, the agency has expertise in a particular area. *Markam Group, Inc. v. Dep't of Emp't Sec.*, 148 Wn. App. 555, 561, 200 P.2d 748 (2009) (giving substantial weight to Commissioner's interpretation of "misconduct" as defined in RCW 50.04.294 because of agency's special expertise); *Wm. Dickson Co.*, 81 Wn. App. at 407.

C. Review of mixed questions of law and fact

Whether the Commissioner properly decided Mr. Johnson was not discharged for misconduct raises a mixed question of law and fact because it involves the meaning of "misconduct" as applied to the facts found in this case. When reviewing mixed questions of law and fact, the court

must (1) determine which factual findings are supported by substantial evidence; (2) make a de novo determination of the correct law, affording the agency's interpretation appropriate deference⁵; and (3) apply the law to the applicable facts. *Tapper*, 122 Wn.2d at 403.

As with review of pure issues of fact, the court does not reweigh credibility or demeanor evidence when reviewing factual inferences made by the Commissioner before interpreting the law. *Wm. Dickson Co.*, 81 Wn. App. at 411. In addition, the court is not free to substitute its judgment of the facts for that of the agency. *Tapper*, 122 Wn.2d at 403. Accordingly, with respect to the question of whether Mr. Johnson was discharged for disqualifying misconduct, the Court reviews factual findings to assess whether they are supported by substantial evidence in the record and then applies the law de novo to the facts as found by the Commissioner.

VI. ARGUMENT

Mr. Johnson was discharged from his employment—but not for disqualifying misconduct as defined in the Employment Security Act. *See* RCW 50.20.066, RCW 50.04.294. The Commissioner therefore properly determined Mr. Johnson was eligible for benefits. None of the reasons asserted by the Employer for Mr. Johnson's discharge support a contrary

⁵ *See Markam Group*, 148 Wn. App. at 561.

conclusion—each of those reasons either is not supported by substantial evidence in the record, or is based on events or information the Employer discovered after the discharge. Rather, as the Commissioner properly found, Mr. Johnson was discharged because of the contents of an email Mr. Johnson sent between private email addresses, and neither the act of sending the email nor the information in the email was “misconduct” under RCW 50.04.294.

A. The statutory definition of “misconduct” requires that an employer’s reason for firing an employee show the employee’s disregard of the employer’s interest.

An individual discharged from employment qualifies for unemployment benefits unless he was discharged for *work-connected misconduct* (among other reasons that do not apply to the present case).

RCW 50.20.066(1); WAC 192-150-200. Misconduct under RCW 50.20.066 is defined in RCW 50.04.294(1):

“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;
- (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.

The Act provides examples of behavior that constitutes misconduct: willful or wanton disregard of the rights, title, and interests of the employer, or a fellow employee:

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.

RCW 50.04.294(2).

Misconduct does not include “(a) Inefficiency, unsatisfactory conduct, or failure to perform well as the 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); *see also Macey v. Emp’t Sec. Dep’t*, 110 Wn.2d 308, 318, 752 P.2d 372 (1988) (“[g]iven the mandate of liberal construction [in RCW 50.01.010], we conclude that unsatisfactory job performance, whether stemming from inability to perform, errors of judgment, or ordinary negligence, does not constitute misconduct.”).

The employer has the initial burden to show, by a preponderance of the evidence, that the discharge was the result of misconduct on the part of the employee. RCW 50.20.066; *Nelson v. Dep’t of Emp’t Sec.*, 98 Wn.2d 370, 374-75, 655 P.2d 242 (1982). A preponderance of the evidence is that which produces the strongest impression, has the greater weight, and is more convincing than the evidence against which it is offered. WAC 192-100-065, *Yamamoto v. Puget Sound Lumber Co.*, 84 Wn. 411, 417, 146 P. 681 (1915); *Lawter v. Emp’t Sec. Dep’t*, 73 Wn. App. 327, 332, 869 P.2d 102 (1994) (“Substantial evidence is evidence in sufficient quantum to persuade a fair-minded person that the declared premise is true.”). On appeal, it is the appellant’s burden to establish that

the Commissioner's decision was in error. RCW 34.05.570(1)(a); *Smith v.* 155 Wn. App. at 32.

Here, the Commissioner's decision should be affirmed because the Employer failed to carry its burden of proving that it discharged Mr. Johnson for disqualifying misconduct under RCW 50.20.066 and RCW 50.04.294. The Commissioner correctly concluded, based on substantial evidence, that Mr. Johnson's discharge stemming from a private email exchange was not based on conduct that met the statutory definition of misconduct and, as a result, did not disqualify Mr. Johnson from receiving unemployment benefits. AR at 110 (CL 4).

B. Mr. Johnson's private email exchange was not "misconduct" under RCW 50.04.294.

It is undisputed that Mr. Johnson had an intimate relationship with the ex-wife of a former client at another law firm in another state. AR at 27-28, 53-56, 109 (FF 3). The Commissioner found that it was an email discussing this relationship that ultimately led to Mr. Johnson's discharge. AR at 110 (CL 4, 5). What is disputed is whether the Commissioner properly found the email was the reason for Mr. Johnson's discharge and whether the Commissioner properly concluded the email was not "misconduct" that disqualified Mr. Johnson from benefits.

1. Substantial evidence supports the Commissioner's finding that Mr. Johnson was discharged because of the email.

The Commissioner found, and the record supports, that the reason for Mr. Johnson's discharge was the Employer's discovery of the email mentioning Mr. Johnson's relationship with the ex-wife of a former client. AR at 110 (CL 4, 5).⁶ Substantial evidence supports the Commissioner's finding that Mr. Johnson would not have been discharged but for the email.

The Employer found out about the email on September 25, 2009, and on that same day fired Mr. Johnson. AR at 28-29, 109 (FF 3, 5). While the Employer had an ongoing investigation of Mr. Johnson, the investigation had not yet resulted in a decision to discharge Mr. Johnson. AR at 30. Rather, the Employer's representative testified the email was the final straw resulting in Mr. Johnson's discharge. AR at 28-29, 76.

The Employer contends Mr. Johnson committed other misconduct that justified the discharge—that he provoked poor morale in the workplace, threatened to leave the firm and sue the firm, and was

⁶ While labeled a conclusion of law, the statements in Conclusion of Law 4 and 5 are correctly considered findings of fact and should be reviewed as such. As a general matter, if a statement is that the evidence shows the occurrence or existence of something, then it is a finding of fact, but if the statement derives from a process of legal reasoning about the facts in evidence, it is a conclusion of law. *See State v. Niedergang*, 43 Wn. App. 656, 658–59, 719 P.2d 576 (1986). In any event, a court will review a mislabeled finding or conclusion for what it is, in accordance with the proper standard of review. *See Willener v. Sweeting*, 107 Wn.2d 388, 394, 730 P.2d 45 (1986) (appellate court reviews erroneously designated findings and conclusions for what they are).

dishonest when he erased portions of a taped conversation between Mr. Johnson and his supervisor regarding Mr. Johnson's work performance. Br. of Resp't at 8-9, 14-17. As shown below, these contentions are not supported by substantial evidence in the record, and the Commissioner correctly adopted the ALJ's finding that those allegations were hearsay, conclusory, and circumstantial, and adequately refuted by evidence in the record. AR at 11-11 (CL 5). The Employer also asserts Mr. Johnson wrongfully took a flash drive when he left employment and used the employer's computers to download pornographic materials and for personal emails. Br. of Resp't at 8-9, 17-20. The Employer did not discover that conduct until after Mr. Johnson was discharged, and so it could not have been the basis of the discharge, as the Commissioner correctly concluded. AR at 111 (CL 6).

2. The Commissioner properly concluded the email did not disqualify Mr. Johnson from benefits.

The Employer asserts that Mr. Johnson's email showed intentional or substantial disregard of its interest in maintaining a law office of integrity and high ethical standards pursuant to RCW 50.04.294(1)(a) and (d). Br. of Resp't at 12. The sending of the email itself was an error in judgment, but not "misconduct."

RCW 50.04.294(1)(a) provides that an employee's "willful or wanton disregard of the rights, title, and interests of the employer or a

fellow employee” disqualifies the employee from unemployment benefits. “An employee acts with ‘willful disregard when he [or she] (1) is aware of his [or her] employer’s interest; (2) knows or should have known that certain conduct jeopardizes that interest; but (3) nonetheless intentionally performs the act, willfully disregarding its probable consequences.’” *Leibbrand v. Emp’t Sec. Dep’t*, 107 Wn. App. 411, 425, 27 P.3d 1186 (2001) (quoting *Haney v. Emp’t Sec. Dep’t*, 96 Wn. App. 129, 139, 978 P.2d 543 (1999) (quoting *Hamel v. Emp’t Sec. Dep’t*, 93 Wn. App. 140, 146–47, 966 P.2d 1282 (1998))) (alterations in original). In determining whether an employee’s actions were “willful” under the statute, the focus is not on whether the employee intended to harm the employer. *Hamel*, 93 Wn. App. at 146. Instead, willful actions are those done deliberately or knowingly, where the employee is aware that he is disregarding the employer’s interest. *See* WAC 192-150-205(1).

Similarly, RCW 50.04.294(1)(d) provides that “carelessness or negligence of such degree or recurrence to show an intentional or substantial disregard of the employer's interest” disqualifies the employee from unemployment benefits. “Carelessness” and “negligence” are defined by regulation to mean “failure to exercise the care that a reasonably prudent person usually exercises.” WAC 192-150-205(3).

Here, there arguably are two “acts” at issue: the email Mr. Johnson sent to a coworker, and the conduct discussed in the email. The record does not indicate that Mr. Johnson shared the information in the email with any other person inside the firm, or with any person outside the firm. The conduct referenced in the email probably would constitute “misconduct” under RCW 50.04.294(1) had it occurred while Mr. Johnson was in the hire of David B. Vail & Associates. However, nothing in RCW 50.04.294 references conduct that occurred while in past employment; because the statute focuses on the interest of the present employer, it is difficult to see any way in which Mr. Johnson’s past conduct at another law firm in another state could have been intended to harm this Employer or disregarded this Employer’s interests. *Hamel*, 93 Wn. App. at 146. Simply put, conduct that occurred in the past while the employee was in different employment is not with the statutory definition of “misconduct” that disqualifies a terminated employee from benefits under RCW 50.04.294 and RCW 50.20.066.

The relevant act that occurred while Mr. Johnson worked for this Employer was the sending of a private email to another employee at the other employee’s private email address. The Employer failed to demonstrate at the administrative hearing how this email exchange between two adults using non-work email addresses was in disregard of

the Employer's interests. While the email justifiably may have alarmed the Employer, the record is devoid of evidence that Mr. Johnson communicated that information to anyone else outside the firm or that he intended anyone other than the email recipient to receive the information. AR at 56. The evidence does not demonstrate that Mr. Johnson disregarded his employer's interest by sending the email from a private email address to a private email address. AR at 56. While Mr. Johnson's judgment or discretion certainly can be questioned, his error in that respect does not constitute "misconduct." See RCW 50.04.294(3). Absent a showing of disregard of the employer's interest, the Employer failed to meet the definition of misconduct in RCW 50.04.294(1).

As emphasized by the Commissioner, the email "cannot be considered misconduct as far as this termination is concerned because it was not related to this employer and ... was not an ethical violation while claimant worked for this employer." AR at 110 (CL 4). The plain text of the misconduct statute provides that a claimant is disqualified from benefits if he has been discharged for misconduct "connected with his or her work." RCW 50.20.066. This requirement is further described by regulation: "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.” WAC 192-150-200(1) (emphasis added).

The Department does not question the Employer’s decision to discharge an employee under such circumstances. *See Tapper*, 122 Wn.2d at 412 (noting that an employer’s decision to discharge an employee is distinct from the Department’s decision to grant or deny unemployment benefits). The Employer was certainly free to do so. But the question here is not whether he should have been discharged, but whether the reason for discharging him falls within the statutory definition of “misconduct” so that he is disqualified from receiving unemployment benefits. *See Johnson v. Emp’t Sec. Dep’t*, 64 Wn. App. 311, 314-15, 824 P.2d 505 (1992) (holding that conduct that justifies an employee’s discharge does not necessarily disqualify that employee from unemployment benefits under the Act). The Employer failed to prove Mr. Johnson disregarded the Employer’s interest and the Commissioner’s decision should be affirmed.

C. The record contains substantial evidence supporting the Commissioner’s finding that Mr. Johnson did not erase a taped conversation and therefore did not support finding misconduct under RCW 50.04.294.

While Mr. Johnson was employed by this Employer, his supervisor requested he prepare and present an oral self-evaluation. AR at 20, 52-53.

This evaluation was recorded and transcribed by the Employer. AR at 31, 102-106. When Mr. Johnson was discharged, one of the reasons the Employer gave was that Mr. Johnson erased a portion of this recording. AR at 31-33, 101. The Employer asserts that this allegation established misconduct because it demonstrated Mr. Johnson's dishonesty related to employment under RCW 50.04.294(2)(c). Br. of Resp't at 14-15. However, after hearing testimony and reviewing evidence, the Commissioner properly found Mr. Johnson did not erase portions of the tape and therefore that could not be the basis to disqualify him from benefits. AR at 109 (FF 9), 111 (CL 5).

Substantial evidence supports the Commissioner's finding that Mr. Johnson did not erase the recording. The ALJ heard testimony from the Employer and Mr. Johnson. AR at 31-33, 42-45, 52-53, 60-63, 66-67. The Employer's representative asserted Mr. Johnson erased the tape because part of it was missing when the Employer's office manager listened to the recording. AR at 32. However, the Employer representative never testified that he listened to the tape himself and the office manager did not testify. In contrast, Mr. Johnson testified that after he presented his oral evaluation, he placed the recording in his personnel file under seal and did not erase any portion of it. AR at 53, 60-61; *see* 110-11 (CL 5). Substantial evidence therefore supports the

Commissioner's finding that Mr. Johnson did not erase the taped conversation. AR at 109 (FF 9), 111 (CL 5).⁷

Whether Mr. Johnson or the Employer's representative was more credible on this point was for the trier of fact to resolve. *See Davis*, 94 Wn.2d at 124. Here, the ALJ considered the conflicting testimony, evaluated the credibility of witnesses, and weighed the persuasiveness of the evidence to determine that Mr. Johnson refuted the Employer's evidence. AR at 111 (CL 5). Finding Mr. Johnson's testimony based on his knowledge more credible than the Employer's hearsay testimony of the office manager's experience is consistent with APA requirements. *See RCW 34.05.461(4)*. In adopting the ALJ's finding and conclusions, the Commissioner therefore properly determined the employer's allegation was based on hearsay, was conclusory and circumstantial and could not support a conclusion Mr. Johnson engaged in disqualifying misconduct. AR at 111 (CL 5).

D. The record contains substantial evidence supporting the Commissioner's finding that Mr. Johnson did not make statements affecting workplace morale that the Employer attributed to him.

When the Employer fired Mr. Johnson, one of the reasons it gave him was that he had told co-workers he was planning on suing the

⁷ The record contains no independent evidence as to whether the tape had been erased, had malfunctioned, or was faulty in some respect.

Employer and intended to start his own firm. AR at 101, 109 (FF 7). The Employer argues that these alleged statements established misconduct because they provoked poor workplace morale and were deliberate violations or disregard of standards of behavior which the employer has the right to expect under RCW 50.04.294(1)(b). Br. of Resp't at 16-17. However, based on the parties' testimony, the Commissioner found Mr. Johnson did not plan on suing the firm or starting his own firm and he did not tell his co-workers he was planning on suing the firm or starting his own firm and therefore those reasons could not form the basis to disqualify him from benefits. AR at 109 (FF 9), 111 (CL 5).

Substantial evidence supports the Commissioner's findings that Mr. Johnson neither intended to sue the Employer or start his own firm nor did he tell his co-workers this. The ALJ heard conflicting testimony from the Employer and Mr. Johnson regarding whether Mr. Johnson was planning on suing the Employer. AR at 34-35, 50-51. The Employer's representative testified that others in the office were reporting to him that Mr. Johnson was going to sue the firm. AR at 34-35. Mr. Johnson testified to the contrary—that while he thought the Employer may be violating overtime and sexual harassment laws and expressed this concern to the office manager, he had no intention of suing the employer. AR at 50-51.

The Employer did not present any testimony regarding whether Mr. Johnson planned on starting his own firm. However, Mr. Johnson did testify that he had no intention of doing so. AR at 51-52. While he did have one conversation with a paralegal regarding the paralegal's desire to work for Mr. Johnson *if* he ever started his own firm, Mr. Johnson did not state that he intended to start his own firm. AR at 52. To the contrary, he believed he was on track to build his career with the Employer. AR at 51-52. For example, Mr. Johnson testified as follows:

So I thought I was doing well, and I really expected to get a raise and continue there. I had just given my car to my paralegal and got an apartment near the law firm so I could start walking to work every day. I had re-organized my finances in case I didn't get a raise so I could continue on there. I was planning to stay."

AR at 52.

Substantial evidence supported the Commissioner's finding that Mr. Johnson had no plans to sue the Employer or start his own firm. AR at 109 (FF 9). As noted above, questions of credibility are for the trier of fact to resolve. Here, the ALJ found—and the Commissioner adopted the finding—that Mr. Johnson was more credible on this point and that the Employer could not meet its burden to establish misconduct based on unsubstantiated allegations regarding Mr. Johnson's intent to sue and start his own firm. AR at 109 (FF 9), 111 (CL 5).

E. The Employer cannot use information discovered after terminating Mr. Johnson to establish disqualifying misconduct.

The ALJ and Commissioner properly declined to consider evidence of misconduct the Employer discovered after Mr. Johnson's discharge. As WAC 192-150-200(1) explains, the act that purportedly constitutes misconduct must actually have been the act that resulted in discharge. Thus, the relevant "misconduct" must have been the reason for the discharge, not other reasons discovered later that could have justified the discharge. The Employer cannot credibly claim that Mr. Johnson was discharged for conduct that the Employer did not discover until after his discharge.

An employer cannot use a post-discharge discovery to argue the employee was discharged for misconduct and should therefore be denied unemployment benefits. Indeed, the Act requires an employer to give the Department the same reason for the separation that it gave the claimant. *See* RCW 50.36.030.⁸

In adopting the ALJ's finding and conclusions, the Commissioner refused to consider any evidence of pornographic materials found on

⁸ RCW 50.36.030 makes it a misdemeanor for an employer to give the Department a different reason for a discharge than it gave the employee who claims a right to unemployment benefits. The statute thus presupposes that some justification for discharge must exist at the time of discharge and effectively disallows an employer to use post-discharge reasons as justification for having discharged an employee.

Mr. Johnson's computer or flash drive since the Employer did not examine the contents of the computer or flash drive until after Mr. Johnson had been discharged. AR at 109 (FF 8), 111 (CL 6). The pornography could not have been the reason for his discharge. AR at 109 (FF 8), 111 (CL 6). Similarly, while the Employer presented testimony that Mr. Johnson removed a flash drive from the workplace on the day he was discharged, this alleged conduct occurred only after Mr. Johnson had been fired and could not have been the reason for his discharge. AR at 35-38. The Commissioner properly excluded this conduct when determining whether Mr. Johnson engaged in disqualifying misconduct. AR at 10. Conduct the Employer discovered after Mr. Johnson's termination cannot be used, after the fact, to justify his termination.

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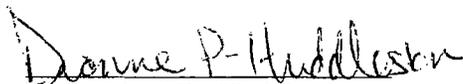
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VII. CONCLUSION

The burden was on the employer to demonstrate Mr. Johnson engaged in misconduct that disqualified him from unemployment benefits under RCW 50.20.066 and RCW 50.04.294. For the foregoing reasons, the Commissioner properly concluded the employer did not meet this burden. The Department respectfully asks the Court to affirm the Commissioner's decision.

RESPECTFULLY SUBMITTED this 1st day of November, 2011.

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NO. 42164-0

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

DAVID B. VAIL & ASSOCIATES,

Respondent,

v.

CHALMERS JOHNSON,

Appellant,

EMPLOYMENT SECURITY
DEPARTMENT,

Cross-Appellant,

CERTIFICATE OF
SERVICE

I, Rain Dineen, certify that I caused a copy of **Brief of Cross-Appellant** to be served on all parties or their counsel of record via electronic mail and US Mail via Consolidated Mail Service on the date below to:

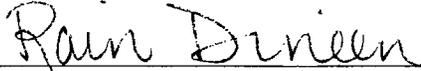
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