

NO. 42955-1

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

JAMES CRAVEN,

Appellant,

v.

STATE OF WASHINGTON
DEPARTMENT OF EMPLOYMENT SECURITY,

Respondent.

RESPONDENT'S BRIEF

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I. INTRODUCTION

The Commissioner of the Employment Security Department determined that Appellant, James Craven, an economic professor, was disqualified from unemployment benefits for having been suspended from work for “misconduct” under the Employment Security Act, Title 50 RCW. Despite previous warnings and discipline from his college, he repeatedly sent unprofessional, harassing, and offensive e-mails to other faculty members using the College’s e-mail system in violation of the College’s rules and expectations. When he was suspended for this conduct, he applied for unemployment benefits. Respondent, Employment Security Department, ultimately disqualified Craven from receiving unemployment benefits because his conduct met the definition of “misconduct” under the Employment Security Act. *See* RCW 50.04.294, 50.20.066.

An employee engages in disqualifying misconduct when he willfully disregards the interests of his employer or a fellow employee. An employee willfully disregards his employer’s interest when he violates a reasonable work policy of which he knows or should know. An employee also engages in disqualifying misconduct when he deliberately violates or disregards the standards of behavior which his employer has the right to expect. Substantial evidence supports the Commissioner’s

findings that Craven violated his employer's reasonable work policies and expectations of which he knew or should know and thus willfully disregarded his employer's interests and standards of behavior. These findings support the Commissioner's conclusion that Craven was suspended due to disqualifying misconduct. The Department asks this Court to affirm the Commissioner's decision denying Craven benefits.

II. ISSUES PRESENTED

Did the Commissioner properly conclude Craven engaged in disqualifying misconduct, when he repeatedly sent inappropriate e-mails to faculty members using his employer's e-mail system after repeated warnings?

III. COUNTERSTATEMENT OF THE CASE¹

In December 2009, Craven was suspended from his position as a professor of economics at Clark College for two academic quarters. AR 56; 74; 578-83; 597-98; 864 (FF 1); 867 (FF 9).² He was suspended

¹ Craven's brief cites to the administrative record regardless of whether the point in the record is reflected in a finding of fact. *See* Br. Appellant at 24-41. This Court's review is limited to determining whether the Commissioner's actual factual findings are supported by substantial evidence. RCW 34.05.570(3)(e). Thus, Craven's treatment of information not found in the factual findings as fact is improper. The Department provides this statement of the case to present the facts as found by the Commissioner, which are the basis for this Court's review.

² The certified administrative record was transmitted by the Thurston 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 and adopted by the Commissioner.

because of the instances of misconduct described in detail below: (1) prior warnings and disciplinary actions; (2) inappropriate comments against Professor Adnan Hamideh; (3) inappropriate and denigrating language used against Professor Ali Aliabadi; and (4) continued inappropriate use of the College's e-mail system to attack and denigrate faculty members. AR 52-78; 578-583; 597-598; 599-603; 865 (FF 5); 867 (FF 9).

A. Professor Craven Underwent Prior Discipline For Inappropriate Use Of Clark College's E-mail System

Craven sent an unprofessional and disrespectful e-mail on May 8, 2007. AR 72, 383, 865 (FF 2). Because of this e-mail, the College's Vice-President, Rassoul Dastmozd, gave Craven an oral warning on November 17, 2007. AR 72, 383, 865 (FF 2). Less than a year later, on June 4, 2008, Craven received a reprimand letter from Vice-President Dastmozd for exhibiting unprofessional and intimidating behavior and creating a hostile work environment. AR 73, 393-94, 865 (FF 2).

As the result of a separate incident, on July 8, 2008, Business and Technology Dean, Ted Kotsakis, sent a memo to Craven with a written reprimand for his inappropriate post to the College's electronic message board. AR 73, 440-41, 458-63, 865 (FF 2). The reprimand stated: "This reprimand is directing you to immediately refrain from the improper use of the College's message board." AR 458.

On June 29, 2008, Crave sent another “threatening, intimidating, unprofessional, and inappropriate” e-mail to adjunct faculty members that “creat[ed] a hostile work environment and also interfere[ed] with College operations.” AR 73, 464, 465-66, 865 (FF 2). Craven received a 7-day suspension on August 4, 2008, due to this e-mail. AR 73, 464, 465-66, 865 (FF 2). Craven’s College e-mail privileges were also suspended until further notice. AR 470.

Craven continued to improperly use the College’s e-mail on January 29, February 2, April 3, and April 29 of 2009. AR 73, 546-49, 559, 594-96, 865 (FF 2, 3). Vice-President Dastmozd wrote to Craven on June 17, 2009, stating his intent to impose an 8-day suspension based on these additional e-mails which contained angry and insulting language that could be viewed as intimidating or threatening to adjuncts and creating a hostile work environment. AR 73, 546-49, 559, 594-96, 865 (FF 2, 3). Dastmozd’s letter contained an outline of his previous discipline for improper use of e-mail—Craven was disciplined at least three times before the June 17, 2009, suspension letter for improper use of the College’s e-mail system. AR 546-49.

B. Professor Craven Sent Multiple, Offensive E-mails Using Clark College's E-mail System

On February 6, 2009, Craven wrote an e-mail to Professor Adnan Hamideh, a professor in the same academic division as Craven (AR 64) and four others stating, in part:

I do not know who or what you think you are, but so far you have not indicated to me that you are fit to hold a job – not even close. Kotsakis tests to see who has the guts to resist him and who does not, and that is why he wanted me out and was prepared to flat-out lie to get it done; for me that is a badge of honor.

AR 497, 866 (FF 6).

Two days later, on February 8, 2009, Craven again wrote to Hamideh and four others, stating:

You do not even qualify as an amateur in this job...(you will never in your life know the economics I know but I did not challenge your teaching Econon [sic] 101 with your MBA) . . . Well I'm sure your sabbatical is in the bag now as a real "team player" for Kotsakis and the Administration
.....

AR 496, 866 (FF 6).

On March 18, 2009, Craven sent an e-mail to Marcia Roi, Kimberly Sullivan, the Association of Higher Education (AHE) Adjunct e-mail distribution list, and the AHE Faculty e-mail distribution list, stating in part:

For the life of me I cannot figure what Professor “Chemical Ali”³ (who was told to ignore all my emails when he first came here) could have done. But just as in the case of Nazi Germany, you can also add to the list of those responsible for these abuses, all those faculty and staff who are spineless, two-faced and opportunistic and willing to trade away their own rights and those of others to protect their sweet gigs, little turfs and programs, etc.

AR 504-05; 866-67 (FF 7). College staff and Vice-President Dastmozd brought this email to Dean Kotsakis’ attention. AR 69-70, 157.

A month later, on April 20, 2009, Craven sent another e-mail to Hamideh and six others stating, in part:

There is no question whatsoever as to when my Division Chair term started and is to end. Those who continue to deny it are liars, and those who continue to act upon what they themselves have called known lies and misrepresentation are what? What would you call such persons? Fit to be called “colleagues”, “educators”, “leaders” – of anything? And for any kind of educators to be undermining their own contracts and seniority rights, as well as the rights of students to the best qualified teachers we have available and for whom they had signed up reminds me of those Palestinians covertly working in the occupied territories building illegal settlements on the historical lands of their families for invading settlers.

AR 502, 503, 866 (FF 6). Craven sent these e-mails because he was displeased with Hamideh’s election as Chair of the Economics Department during a period when Craven was absent on medical leave. AR 496-97, 502-03, 866 (FF 6). Hamideh brought these e-mails to Dean

³ This is a reference to Professor Ali Aliabadi. *See* AR 59, 504.

Kotsakis' attention and filed an official complaint against Craven. AR 64; 502; 520; 866 (FF 6).

On April 27, 2009, Craven sent an e-mail to the AHE faculty and AHE adjunct e-mail lists stating, in part:

Here, I believe, we have the "High Noon" phenomenon/metaphor and the "townspeople" who very quietly, covertly and in some cases spinelessly and opportunistically, cheered on the Sheriff while covertly making alliances and playing it safe with the invading thugs. [. . .] because this Administration, like all bullies, go after the weak, the isolated, the marginalized and demonized and/or they go after the ones they fear the most using the spineless to front for them and keep the fingerprints of their patrons off their dirty work. [. . .] So I was genuinely worried that not having more names would further undercut Marcia whose own guts, despite our differences, I respect as much as I have contempt for the spineless and petit-bourgeois, especially the ones that talk and sound so "radical" – the lowest of the low.

[. . .]

This happened before with Initiatives 601 and 602 that threatened cutbacks and layoffs initially. Union membership went up, the entrepreneurial [sic] types jockeyed for close proximity and face-time with the administrators, supposed friends betrayed supposed friends, and GI Joe's did a booming business on kneepads and chapstick.

AR 508, 511-512, 529, 867 (FF 8). Professor Reed reported this e-mail to the College. AR 511, 517.

C. Clark College Had Policies In Place Against Use Of Its E-mail System To Send Offensive Material

The College has an Employee Computer Resources policy, the intent of which is to "provide an atmosphere that encourages access to

knowledge and the sharing of information.” AR 601. The Computing Resources Policy specifically prohibits the use of the College’s computing resources to “send, receive, or display information including text, images, or voice that is sexually explicit or constitutes discrimination or harassment.” AR 603. Article III F.1 of Clark College’s Policies and Procedures prohibits and defines sexual harassment as follows:

Sexual harassment is a form of sex discrimination that involves the inappropriate introduction of sexual activities or comments that demean or otherwise diminish one’s self-worth on the basis of gender into the work or learning situation.

AR 599.

Article VI A.4 and 5 of Clark College’s Policies and Procedures discuss the need for faculty members to exercise appropriate restraint, show respect for the opinions of others, and treat others with “respect and with sensitivity to the impact of words and opinions.” AR 600. Further, the Faculty Job Description⁴ at Clark College requires faculty members to “[d]emonstrate respect for others” and “effectively use computer applications for instruction and communication where appropriate. AR 600.

⁴ See RCW 28B.50.855: “The appointing authority shall provide each faculty member, immediately upon employment, with a written agreement which delineates the terms of employment including all conditions and responsibilities attached thereto.”

D. The Commissioner Determined Craven Engaged In Disqualifying Misconduct

Clark College suspended Craven for the winter and spring quarters of 2010 for his conduct described above. AR 597-98; 864 (FF 1). Craven applied for unemployment benefits. The Department issued an initial determination granting benefits to Craven, finding that he was qualified for benefits because there was a significant delay between the misconduct and the imposition of discipline.⁵ AR 300-04. The employer appealed this determination to the Office of Administrative Hearings (OAH). AR 305-08.

After the administrative hearing,⁶ the Administrative Law Judge (ALJ) issued an Initial Order reversing the Department's initial determination and denying Craven benefits by concluding Craven was suspended for disqualifying misconduct. AR 864-70. Craven petitioned the Commissioner⁷ for review of the Initial Order. AR 872-79. The

⁵ The e-mail exchanges occurred from February 2009 through April 2009 but Craven did not serve his suspension until January 2010. AR 60. The time lapse between the conduct and the suspension was because Craven was out on medical from January 5, 2009, through March 23, 2009, and the College did not conduct its disciplinary proceedings until after he returned and the proceedings could be scheduled. AR 60, 74; 95, 97, 496, 499, 578, 597.

⁶ The OAH hearing was originally scheduled on February 25, 2010, but was rescheduled to June 28, 2012. AR 2-31; 298; 361-62.

⁷ The final agency determination is rendered by a review judge from the Commissioner's Review Office. For the sake of simplicity, the review judge is referred to throughout this brief as the Commissioner because the Commissioner of Employment Security has delegated his authority to make a final agency decision in these matters to the Commissioner's Review Office. See WAC 192-04-020(5).

Commissioner upheld the Initial Order and adopted the ALJ's findings and conclusions. AR 882-83. Thurston County Superior Court later affirmed the Commissioner's Decision.

IV. STANDARD OF REVIEW

Craven seeks judicial review of the Commissioner's decision. Judicial review of such decisions is controlled by Washington's Administrative Procedure Act. RCW 50.32.120; RCW 34.05.510. 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. *Id.*; *Tapper v. Emp't Sec. Dep't*, 122 Wn.2d 397, 406, 858 P.2d 494 (1993).

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 (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).

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. 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.

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). 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).

Whether the Commissioner properly decided Craven was 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 deference; and (3) apply the law to the applicable facts. *Tapper*, 122 Wn.2d at 403. Accordingly, with respect to the question of whether Craven 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.

On appeal, it is Craven's burden to establish that the Commissioner's decision, which is considered prima facie correct, was in error. RAP 10.3(g) and (h); RCW 34.05.570(1)(a); RCW 50.32.150; *Smith*, 155 Wn. App. at 32. Craven must therefore show that the Commissioner's conclusion that he was discharged for misconduct was incorrect. Craven does not specifically challenge any finding of fact as required by RAP 10.3(g) and (h) and the Commissioner's findings are therefore verities on appeal. If Craven challenges any finding by inference, he must demonstrate that the finding is not supported by substantial evidence.

V. ARGUMENT

Craven engaged in disqualifying misconduct and was properly disqualified from benefits. He used the College's e-mail system to attack Professor Hamideh in a manner that was personally and professionally insulting, intentionally using the image of a Palestinian collaborator to insult Hamideh. AR 502. Craven referred in another email to Professor Aliabadi, whom he had never met, as "Chemical Ali", the nickname of a former Iraqi general who was responsible for the murder of thousands of Kurds by poison gas. AR 500, 505. He called fellow faculty members "spineless" and "opportunistic" and implied that instructors would perform oral sex on administrators for favorable treatment. AR 508. This conduct willfully disregarded his employer's interests and deliberately disregarded his employer's standards of behavior. *See* RCW 50.04.294(1)(a), (b). Because Craven was suspended due to misconduct, he must repay the benefits wrongly paid to him.

Craven now attempts to excuse his behavior by making broad assertions about due process and free speech. The Court should not be persuaded by these arguments. First, if Craven wishes to challenge the procedures used in imposing his suspension, this appeal is not the proper forum for doing so. The issue before the Court is a narrow one—whether Craven's conduct constitutes disqualifying misconduct under the

Employment Security Act. Second, he provides no legal authority or analysis to support his due process and free speech claims. Third, these arguments are without merit.

A. Craven Does Not Challenge Any Of The Findings Of Fact And They Are Verities On Appeal

Craven does not specifically assign error to any of the facts found by the ALJ or the Commissioner. He does not assign error to the Commissioner's findings that he authored the offending e-mails, the findings regarding his prior discipline against him, or the findings regarding the College's policies and expectations. AR 865-69 (FF 2-3, 5-9; CL 3) *See* RAP 10.3(g) and (h). Because these findings are unchallenged, they are verities on appeal and are otherwise supported by substantial evidence. *Tapper*, 122 Wn.2d at 407. Even if Craven's assignments of error can be interpreted as assigning error to the factual findings, the findings are supported by substantial evidence, and should be upheld. *See* RCW 34.05.570(3)(e).

Findings of Fact 2 and 3 address the prior disciplinary actions Craven underwent for his improper use of College e-mail. AR 864-65 (FF 2, 3). As discussed above, letters and memoranda setting forth the previous discipline are all part of the agency record. AR 458, 464, 465-66, 470, 491. While Craven may disagree with the imposition of the prior

discipline, the letters and the witness testimony about them are substantial evidence of the prior discipline and the reason for the discipline.

The College's policies were also part of the record. AR 395-96, 599, 603, 600. Craven neither disputes the existence of these policies or his knowledge of them. Neither does he dispute their reasonableness. Craven never denied their applicability except to argue that the College should not monitor e-mails sent out over an e-mail list used for communication by union members (the AHE e-mail distribution lists). Therefore, the existence of the policies and their reasonableness are verities on appeal. *See Tapper*, 122 Wn.2d at 407.

The e-mails precipitating the suspension were also submitted as part of the record. AR 496-97, 502-03, 504-05, 508, 511-512, 529. Craven never denied his authorship or the fact that he sent the e-mails to faculty members and the AHE e-mail list. Rather than denying the misconduct, Craven seems to argue that the discipline did not occur as a result of his misconduct, but because the College is prejudiced against him for various reasons. Br. of Appellant at 6-7, 9. Craven cites to multiple extraneous facts and documents which are outside the administrative

record to support his position.⁸ Facts and documents outside the record are beyond the scope of this Court's review powers. RCW 34.05.558.

Because adequate support exists in the record for the Department's findings of fact, and because Craven has not assigned error to any of the findings, the Department's findings of fact should be upheld.

B. Craven Is Disqualified From Unemployment Benefits Under The Statutory Definitions Of Misconduct And The Policy Underlying The Act

The Employment Security Act was enacted to provide compensation to individuals who are "involuntarily" unemployed "through no fault of their own." RCW 50.01.010; *Tapper*, 122 Wn.2d at 408. The Act requires that the reason for the unemployment be *external and apart* from the claimant: "Where any fault of unemployment lies with the claimant, the claimant is disqualified from receipt of unemployment benefits." *Cowles Publ'g Co. v. Dep't of Emp't Sec.*, 15 Wn. App. 590, 593, 550 P.2d 712, 715 (1976). In keeping with this policy, a claimant is disqualified from receiving unemployment benefits when he has been

⁸For example, Craven refers the Court to a brief written by Lisa Lewiston which, the Department assumes, based on Craven's assertion, was filed in his arbitration proceeding with Clark College. Craven includes the text of her brief in footnote 7. Br. of Appellant at 42-50. There is no basis for this Court to consider Craven's footnote as (1) Ms. Lewiston does not represent Craven in the current proceeding and (2) the arbitration proceeding and the issues it addressed are not before this Court for review. In addition, Craven makes general assertions about the conduct of the Department's attorney and Thurston County Superior Court Judge Christine Pomeroy during the superior court proceeding below. Br. of Appellant at 3-4, 12-13, 16, 22-23. Such an assertion has no bearing on this Court's review of the Commissioner's decision and should be disregarded.

discharged from his job for work-connected misconduct.

RCW 50.20.066(1).

Under the Act, misconduct includes, but is not limited to:

- (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;...

RCW 50.04.294(1)(a), (b).

The Act goes on to provide illustrative per se examples of employee acts that are considered misconduct because they “signify a willful or wanton disregard of the rights, title, and interests of the employer or a fellow employee.” *See* RCW 50.04.294(2)(a)-(g). The Act explicitly states that the per se acts of misconduct include “[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); *see also* WAC 192-150-210(4) (“[a] company rule is reasonable if it is related to your job duties, is a normal business requirement or practice for your occupation or industry, or is required by law or regulation.”).

Here, the Commissioner concluded Craven’s actions were “willful and inappropriate under the overall rules of both the college policies and the union contract” and that Craven was suspended for misconduct under RCW 50.04.294(1)(b). AR at 868 (CL 3). While the Commissioner did

not specifically cite RCW 50.04.294(1)(a), the Commissioner's conclusion incorporates the standards set forth in that statute and Craven's violation of his employer's policies is a per se act of misconduct. *See Tapper*, 122 Wn.2d at 406 ("When findings of fact are not explicitly delineated, or where those findings are buried or hidden within conclusions of law, it is within the prerogative of an appellate court to exercise its own authority in determining what facts have actually been found below."). Further, questions of law are subject to de novo review. *Tapper*, 122 Wn.2d at 403; *Wash. Fed'n of State Emp. v. Dep't of Gen. Admin.*, 152 Wn. App. 368, 384, 216 P.3d 1061 (2009) (court can affirm on any basis supported by the record).

Craven's conduct that led to his discharge falls within the definition of disqualifying misconduct, including statutory per se examples of misconduct. The Commissioner thus correctly denied him benefits.

1. Craven engaged in misconduct by violating his employer's policies regarding professionalism and proper use of computing resources

The Commissioner correctly concluded Craven engaged in misconduct by violating his employer's reasonable policies of which he knew or should have known. AR 868 (CL 3); RCW 50.04.294(1)(a), (2)(f). While the Commissioner did not specifically cite to RCW

50.04.294(1)(a) or (2)(f), the Commissioner in Conclusion of Law 3 referred to these statutory provisions by stating “the claimant’s actions were willful and inappropriate under the overall rules of both the college polices and the union contract.” AR 868 (CL 3).

The current definition of misconduct was enacted in 2003. The category of misconduct set forth in RCW 50.04.294(1)(a) (willful or wanton disregard of the interests of the employer or a fellow employee) matches in large measure the pre-2003 definition of misconduct. *See* RCW 50.04.293 (with respect to claims having an effective date before January 4, 2004, misconduct “means 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”); *Wilson v. Emp’t Sec. Dept.*, 87 Wn. App. 197, 201, 940 P.2d 269 (1997) (“misconduct” was, in part, “an employee’s act or failure to act in willful disregard of his or her employer’s interest”). Cases interpreting the matching portion of the prior definition are therefore instructive.⁹

The prior misconduct cases held that an employee “willful[ly] disregard[ed]” an employer’s interests when he “voluntarily disregard[ed]

⁹ When reviewing claims under a new statute, courts should look to prior judicial decisions on the subject, to the extent that these decisions do not conflict with the new standards. *See Green Mountain School Dist. No. 103 v. Durkee*, 56 Wn.2d 154, 351 P.2d 525 (1960) (New legislation is presumed to be in line with prior judicial decisions absent an indication that the legislature intended to completely overrule prior case law.)

the employer's interest"; his "specific motivations for doing so" were "not relevant." *E.g., Hamel v. Emp't Sec. Dept.*, 93 Wn. App. 140, 146, 966 P.2d 1282 (1998), *review denied*, 137 Wn.2d 1036 (1999). Furthermore, under both the prior definition and case law interpreting RCW 50.04.294(1)(a), "it is sufficient [for misconduct purposes] that an employee intentionally perform an act in willful disregard for its probable consequences." *Smith*, 155 Wn. App. at 37 (citing *Hamel*, 93 Wn. App. at 146-47); *see also* WAC 192-150-205(1) ("'Willful' means intentional behavior done deliberately or knowingly, where you are aware that you are violating or disregarding the rights of your employer or a co-worker.").

The "reasonable company rule" per se example of misconduct is consistent with case law interpreting the prior definition of misconduct. *See Leibbrand v. Emp't Sec. Dep't*, 107 Wn. App. 411, 425, 27 P.3d 1186 (2001) (employee "willfully disregarded his employer's interest" by missing several days of work without required approval after warnings); *Galvin v. Emp't Sec. Dep't*, 87 Wn. App. 634, 645-647, 942 P.2d 1040 (1997), *review denied*, 134 Wn.2d 1004, 953 P.2d 95 (1998) (employee "willfully disregarded employer's interest" by taking a vacation without required approval after warnings). In order to constitute misconduct under the prior definition, where an employer rule violation was involved, the employee's violation of the employer's rule had to be "intentional, grossly

negligent, or continue to take place after notice or warnings.” *Leibbrand*, 107 Wn. App. at 425; *Galvin*, 87 Wn. App. at 643 (emphasis added).

Interpreting the prior definition of misconduct, *Galvin* is particularly instructive. There the employer had a 48-hour advance approval requirement for vacations. *Galvin*, 87 Wn. App. at 637. The approval requirement was repeatedly, clearly, and personally communicated to Galvin, the employee, both verbally and in writing. *Id.* at 638. She was also told the requirement was a condition of her continued employment. *Id.* Despite those communications, Galvin failed to obtain 48-hour advance approval for a vacation. *Id.* In affirming the Commissioner’s decision that Galvin willfully disregarded her employer’s interests, the Court recognized that Galvin’s “absence [without advanced approval] was entirely within her control. Her conduct was in direct violation of a reasonable rule connected with her work, was intentional, and took place after numerous warnings.” *Id.* at 645-47 (emphasis added).

Griffith is also instructive. A delivery driver was discharged after he repeatedly engaged with customers in an inappropriate manner despite warnings and discipline. *Griffith v. Emp’t. Sec. Dep’t*, 163 Wn. App. 1, 4, 259 P.3d 1111 (2011). In affirming the Commissioner’s decision that Griffith committed disqualifying misconduct, the Court noted Griffith was terminated for a series of improper actions and that the Commissioner did

not err in looking at the entirety of the conduct. *Id.* at 8. Whether Griffith understood he was behaving in an offensive manner was irrelevant to whether he willfully disregarded his employer's interests since he intentionally behaved in manner that offended a customer. *Id.* at 10.

Here, Craven engaged in disqualifying misconduct by willfully disregarding his employer's and colleague's interests in violation of reasonable employer policies. The College prohibited use of its computing resources to "send, receive, or display information including text, images, or voice that is sexually explicit or constitutes discrimination or harassment." AR 603. It was also the College's policy that faculty members to exercise appropriate restraint, show respect for the opinions of others, and treat others with "respect and with sensitivity to the impact of words and opinions." AR 600. The Faculty Job Description at Clark College requires faculty members to "[d]emonstrate respect for others" and "effectively use computer applications for instruction and communication where appropriate." AR 600.

The College's rules are reasonable since they relate to an employee's job duties and are a normal business requirement. *See* WAC 192-150-210(4) ("A company rule is reasonable if it is related to your job duties, is a normal business requirement or practice for your occupation or industry, or is required by law or regulation."). Moreover, Craven does

not dispute he knew about the College's rules and he had actual notice of the rules since his past violations of the rules had subjected him to disciplinary actions. AR 546-547; *see* WAC 192-150-210(5) (the Department will find an employee knew or should have known about a company rule if, among other factors, he was provided a copy or summary of the rule in writing). For example, in Vice-President Dastmozd's August 4, 2008, letter imposing a 7-day suspension, Dastmozd reminded Craven that his position as professor at Clark College carries the obligation to be respectful and professional in his conduct and referred to Article VI A.4 and 5 of Clark College's Policies and Procedures. AR 466. And in his June 17, 2009, letter imposing an 8-day suspension, Dastmozd reminded Craven that he had been advised on numerous occasions and through progressive discipline to conduct himself in a professional manner, treat others with respect, and follow college policies and procedures regarding the use of email. AR 547.

Despite those warnings, Craven violated these reasonable work rules in willful disregard of the College's and his colleagues' interests. Craven's March 18 e-mail used the epithet "Chemical Ali" to refer to one of his fellow professors. Professor Aliabadi objected to this language as mocking his ethnicity. AR 504. Craven analogized the behavior of the staff and administration of the College to that of collaborators in Nazi

Germany, a highly offensive hyperbole, and called faculty and staff “spineless, two-faced and opportunistic.” AR 504-05. His April 27 e-mail analogized faculty at the College to spineless, opportunistic townspeople, calling them “the lowest of the low.” AR 508. He then compared the faculty to GI Joes performing sexual acts for their superiors in return for favors. *Id.*

Craven’s inappropriate conduct in sending those e-mails with harassing and discriminatory languages violated the Employee Computing Resources Policy. AR 603. His reference to “kneepads and chapstick” constituted sexual harassment under Article III F.1 of the College’s policies. AR 599 (“Sexual harassment is a form of sex discrimination that involves the inappropriate introduction of sexual activities [. . .] into the work or learning situation.”). His conduct also demonstrated a lack of appropriate restraint, respect and sensitivity in violation of Article VI A.4 and 5 of Clark College’s Policies and Procedures. AR 600. By sending these e-mails, Craven failed to “demonstrate respect for” his colleagues and inappropriately used computer applications in violation of the Faculty Job Description. AR 600.

Like the claimant in *Galvin*, Craven violated the College’s reasonable policies after numerous warnings. On at least three occasions between 2007 and 2009, the Vice-President of the University or Dean

Kotsakis reminded Craven of the e-mail and conduct policies in writing. AR 393-94, 440-41, 458, 464, 465-66, 546-49, 559, 594-96, 865 (FF 2, 3). He was specifically and repeatedly informed that continued violations of the policies would result in his discipline. *Id.* Despite those warnings, Craven continued to engage in the same type of inappropriate e-mail exchanges about which he had been warned. Craven's actions were entirely within his control. His conduct was in violation of his College's policies and took place after numerous warnings. Accordingly, his conduct constituted misconduct under RCW 50.04.294(1)(a) and (2)(f).

2. Craven engaged in disqualifying misconduct by disregarding his employer's standards of behavior

In addition to willfully disregarding the College's interest through violating its reasonable work policies, Craven's conduct also constituted misconduct under RCW 50.04.294(1)(b) as his conduct violated or disregarded the standards of behavior which his employer had the right to expect of him. The College had the right to expect Craven to maintain professional and courteous discourse with other faculty members. This is especially true because Craven had been repeatedly warned about and had received progressive discipline for his failure to treat others in a manner appropriate to an academic environment.

Craven violated the College's reasonably expected standards of behavior when, using churlish, uncivil language, Craven accused Professor Hamideh of being unqualified to hold his position and ignorant in his field, without any articulable basis for doing so. AR 496-97, 502-03. His conduct was disrespectful and harassing. Moreover, Craven inappropriately analogized Hamideh's behavior to those Palestinians who help Israeli settlers build in the occupied territories, when he knew Hamideh's cultural background and that such an analogy would be extremely offensive to Hamideh. AR 502-03. His conduct could be considered an expression of discrimination. After enduring this string of Craven's threatening, intimidating e-mails, Hamideh was compelled to ask Dean Kotsakis to intervene. AR at 502. Hamideh felt his integrity and birthright had been attacked. AR at 502.

Craven also violated the Colleges' standard of behavior when he referred to a fellow professor as "Chemical Ali", compared the College's staff and administration to Nazi collaborators, and called faculty and staff "spineless, two-faced, and opportunistic." AR 504-05, 508. He violated the College's policy by using sexual innuendo to imply faculty were performing sexual acts for their superiors in return for favors. AR 508. Faculty and staff were sufficiently shocked and distressed by these e-mails to report them to the College's administration. AR 69-70, 157, 511, 517.

All of Craven’s comments showed his disregard of what the College expects of its faculty—encouraging access to knowledge and the sharing of information, exercising appropriate restraint, respecting the opinions of others, and being sensitive to the impact of words and opinions. AR 600-01. Craven’s failure to comply with what the College reasonably expected of him is misconduct under RCW 50.04.294(1)(b).

The Commissioner correctly concluded Craven was discharged for disqualifying misconduct and properly denied him benefits. AR 868 (CL 3).

C. The Propriety Of The Procedures Used In Imposing Craven’s Suspension Is Not An Issue Before This Court¹⁰

Craven’s submissions to this Court have largely challenged the procedures used in imposing his suspension and whether they complied with his union contract. However, that is not the issue before the Court. Rather, the issue is a narrow one—whether Craven’s conduct constitutes disqualifying misconduct under the Employment Security Act.

The agreement governing Craven’s employment with the union is part of the agency record. AR 320-351. Under that agreement, the

¹⁰ Craven also makes claims regarding his “whistleblower status” and the conduct of the superior court judge and the Department’s counsel during the superior court proceeding. But these claims, like his first amendment claims, are not within the scope of this case, are not supported by the citation of the record or legal authority, and otherwise lack merit. *See Smith*, 155 Wn. App. at 41 (Holding that in an appeal of the denial of unemployment benefits, whether a county terminated its employee in retaliation for his whistleblowing activities is not an issue properly before the Court of Appeals.).

College has the right to discipline a faculty member for cause. AR 323; *see Mills v. W. Wash. Univ.*, 150 Wn. App. 260, 271-72, 208 P.3d 13 (2009), *rev'd on other grounds*, 170 Wn.2d 903 (2011) (“It is well established that non-probationary public employees may be discharged under a ‘for cause’ standard, and this this standard is sufficiently definite to satisfy due process, even as applied in the context of discipline related to free speech.”). The agreement sets forth a progressive discipline policy. AR 323. Craven asserts that the College did not comply with the agreement thereby violating his due process rights. Br. of Appellant at 7-8.

The ALJ specifically found Craven received sufficient and appropriate chances to respond to the disciplinary action prior to its imposition. AR 868 (FF 10). This finding is supported by substantial evidence. Dean Kotsakis explained the steps the College took in investigating Craven’s conduct and the meetings the College had with Craven and his union representative. AR 74-75; 94-97; 147-51.

This Court need not address whether the disciplinary proceeding complied with the terms of the agreement, because the only issue before the Court is whether Craven’s conduct disqualified him from unemployment benefits. *See Tapper*, 122 Wn.2d at 412 (“The question of discharge is independent of the question of misconduct...[The employer]

may or may not have been justified, as a matter of employment law or good business judgment, in terminating Tapper, but those questions are not before the Court...The only issue in this case is whether the facts surrounding the discharge, as found by the Commissioner, meet the test for misconduct.”).

If Craven wished to challenge compliance with the agreement or the propriety of his sanction, the appeal procedure identified in the agreement is the appropriate avenue.¹¹ AR 323-25, 340-44. Using a challenge to the denial of his unemployment benefits is not the proper method to contest the specific procedures used to impose the discipline.

D. Craven’s Claims This His E-mails Were Protected Speech Lack Merit

Craven repeatedly asserts that the e-mails that led to his suspension were protected under principles of academic freedom and the right to free speech. Br. of Appellant at 6, 14. RCW 34.05.570(3)(a) provides that the court shall grant relief from an agency order in an adjudicative proceeding only if it determines that “[t]he order, or the statute or rule on which the order is based, is in violation of constitutional provisions on its face or as applied.” Craven fails to explain or analyze how either the Commissioner’s order or the misconduct statute violates a

¹¹ As Craven acknowledges in his brief, Craven, represented by his union, and Clark College engaged in arbitration under the grievance procedure. Petr’s Brief at 10-12.

constitutional provision. Whether Clark College violated Craven's rights in imposing his suspension from the College was not before the Commissioner and is not before this Court—Craven has other avenues to seek recourse against his employer for any alleged constitutional violation. In any event, as explained below, Craven's argument is without merit.

Academic freedom is not one of the enumerated rights in the First Amendment but it is a special concern of the First Amendment. *Mills v. W. Wash. Univ.*, 150 Wn. App. 260, 273, 208 P.3d 13 (2009), *rev'd on other grounds*, 170 Wn.2d 903 (2011) (citation omitted). However, "it does not follow that because academic freedom is inextricably related to the educational process it is implicated in every employment decision of an educational institution...Academic freedom is not a license for ... activities which are internally destructive to the proper function of the university or disruptive to the education process." *Id.* (citation omitted).

A public employee does not give up his First Amendment right to speak freely by virtue of government employment. *Pickering v. Bd. of Ed. of Twp. High Sch. Dist. 205*, 391 U.S. 563, 572, 88 S. Ct. 1731 (1968). But, a public employee who claims that his employer's action against him is based on his exercise of First Amendment rights must first establish that the speech in question is entitled to constitutional protection. *Wilson v. State*, 84 Wn. App. 332, 340, 929 P.2d 448 (1996) (citation omitted).

Here, Craven's e-mails were clearly not entitled to constitutional protection since they were not a matter of public concern. *Connick v. Myers*, 461 U.S. 138, 146-48, 103 S. Ct. 1684 (1983) (In order to have First Amendment protection, a public employee must first establish that his speech deals with a matter of public concern, i.e. political, social, or other concern to the community.). Craven's e-mails addressed an internal audience, dealt with his individual disputes and grievances and expressed personal opinions or beliefs. Craven's behavior in harassing, intimidating, denigrating and verbally abusing his faculty colleagues, which took time away from the tasks of faculty and the Dean, and disrupted morale and efficiency within the work place, is clearly not protected by the First Amendment. *See Mills*, 150 Wn. App. at 274 (Professor verbally abusing colleagues with discriminatory and sexual innuendo and harassing and demeaning students outside the classroom were not protected by academic freedom or the First Amendment). Clark College was entitled to discipline Professor Craven for his inappropriate and abusive e-mail messages. Because the conduct that led to the discipline was misconduct under the Employment Security Act, Craven was properly denied benefits.

Craven also asserts his e-mails sent to the AHE distributions lists cannot be used to suspend him because they were protected union activity or speech. Br. of Appellant at 6, 14. However, as the ALJ found, the e-

mail system and the distribution lists are provided on the school's servers for use by the union for communication between members and were not private and confidential e-mail exchanges. AR 865 (FF 4). If Professor Craven contends that the two-quarter suspension was based upon his participation in protected union activity, the proper forum and remedy is found in an unfair labor practice action under RCW 28B.52.073.

As Dean Kotsakis testified, the College does not monitor communication between faculty using the AHE e-mail distribution list to enforce these guidelines unless there has been a complaint of misuse or unlawful conduct. AR 147. Nothing in the record demonstrates Craven had any reasonable expectation his e-mail messages were private or confidential within the AHE. Similarly, there is nothing in the record to demonstrate Craven was engaging in protected collective bargaining activities in any of the e-mails that led to his suspension.^{12,13} Using the AHE e-mail distribution list, provided on the College's server for use by the union for communication between members, does not make it a private and confidential e-mail exchange. Further, even though the AHE e-mail

¹² The law governing the collective bargaining rights of community college faculty is contained in Chapter 28B.52 RCW. It is an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed by Chapter 28B.52 RCW. RCW 28B.52.073(1)(a). RCW 28B.52.073 protects faculty members engaged in union activities, but only when the activity takes place in the context of collective bargaining.

¹³ The text of Craven's March 18, 2009, and April 27, 2009, e-mails make clear he was not acting on behalf of the AHE to communicate with other members. AR 504, 508. Craven was promoting his own agenda, not advocating an AHE position.

distribution list was set up for the faculty to communicate, that did not grant Craven a privilege to threaten or intimidate his colleagues.

E. Craven Fails To Demonstrate The Administrative Law Judge Was Biased And There Is No Evidence Of Witness Perjury

Craven generally asserts that the ALJ exhibited bias towards him based on the ALJ's allegedly abusive judicial temperament, conduct, and tone of speech and that the ALJ intimidated and constrained his witnesses during the administrative hearing. Br. of Appellant at 14, 35-36. However, he fails to demonstrate bias. To the contrary, the record demonstrates the ALJ properly conducted the hearing.

The ALJ has broad authority in conducting the hearing. *See, e.g.*, WAC 10-08-200 (authority of the presiding officer). In order to prevail under the appearance of fairness doctrine, Craven has the burden of providing evidence of the ALJ's actual or potential bias. *In re the Marriage of Tina M. Wallace*, 111 Wn. App. 697, 706, 45 P.3d 1131 (2002) (citations omitted). Prejudice is not presumed. *Id.* "The test is whether a reasonably prudent and disinterested observer would conclude [that the [driver]] obtained a fair, impartial, and neutral trial." *Id.* (citation omitted). So long as a party is given adequate notice and an opportunity to be heard and any alleged procedural irregularities do not undermine the fundamental fairness of the proceedings, the courts will not disturb the

administrative decision. *Sherman v. State*, 128 Wn.2d 164, 184, 905 P.2d 355 (1995).

Craven fails to prove the ALJ's bias. He does not cite to any portion of the record in support of his assertion. There is no indication that Craven's opportunity to obtain a fair, impartial, and neutral hearing was prejudiced. He had the opportunity to be heard. He called his own witnesses, cross-examined the employer's witnesses, and testified on his own behalf. Craven fails to establish the ALJ did anything except handle the hearing fairly. Thus, the Court should not disturb the administrative decision.

Craven also asserts without reference to the record or citation to legal authority, that the College's witnesses committed perjury during the OAH proceeding. But his claim essentially asks this Court to re-weigh evidence in his favor, which this Court may not do. *See Scheeler v. Dep't of Empl't Sec.*, 122 Wn. App. 484, 490-91, 93 P.3d 965 (2004) ("It is the ALJ's role to weigh the evidence and assess credibility, and we will not disturb his credibility determinations on appeal."); *W. Ports Transp., Inc. v. Empl't Sec. Dep't of State of Wash.*, 110 Wn. App. 440, 449, 41 P.3d 510 (2002) ("The court will not substitute its judgment on witnesses' credibility or the weight to be given conflicting evidence.").

Dean Kotsakis' sworn testimony, which the fact-finder (ALJ and the Commissioner) believed, is competent and sufficient evidence to support the finding that Craven was suspended due to his repeated abuse of the his colleagues and the College's e-mail system. Craven shows no basis for this Court to consider his wholly unsupported and conclusory allegations.

F. Because Craven Was Suspended Due To Misconduct, He Must Repay All Benefits Paid To Him

The Commissioner concluded Craven was suspended due to disqualifying misconduct under RCW 50.20.066. AR 869. Consequently, he was not entitled to receive unemployment benefits. To the extent Craven received benefits in error, he was not entitled to those benefits and is liable for the repayment of the amount overpaid, unless the Commissioner waives the overpayment pursuant to RCW 50.20.190(2). RCW 50.20.190(1). The amount of Craven's overpayment was remanded to the Commissioner. AR 869.

The Commissioner may waive an overpayment or entertain offers to reduce the overpayment amount under certain circumstances. *See* RCW 50.20.190(2) and RCW 50.24.020. However, all benefits paid in error based on RCW 50.20.066 are recoverable, notwithstanding RCW 50.20.190 or 50.24.020 or any other provisions of Title 50. RCW

50.20.066(5). Thus, because Craven was disqualified pursuant to RCW 50.20.066, he is required to repay all benefits paid to him in error. He is not entitled to a waiver or to make an offer in compromise to the Department.

G. Craven, A Non-attorney, Is Not Entitled To Attorney's Fees.

Craven asserts in his brief that he is entitled to attorney's fees and costs. Br. of Appellant at 52. The section of the Employment Security Act relating to attorney fees provides, in part:

It shall be unlawful for *any attorney* engaged in any appeal to the courts on behalf of an individual involving the individual's . . . claim for benefits to charge or receive any fee therein in excess of a reasonable fee to be fixed by the superior court in respect to the services performed in connection with the appeal taken thereto and to be fixed by the supreme court or the court of appeals in the event of appellate review, and if the decision of the commissioner shall be reversed or modified, such fee and the costs shall be payable out of the unemployment compensation administration fund.

RCW 50.32.160 (emphasis added). Craven affirmatively stated in his brief that he is not a licensed attorney, but only attorneys are entitled to fees under RCW 50.32.160. Br. of Appellant at 41. Consequently, Craven is not entitled to any amount of attorney's fees in the event he prevails on this appeal.

VI. CONCLUSION

For the foregoing reasons, the Commissioner correctly concluded Craven was discharged from his employment for disqualifying misconduct and properly denied him unemployment benefits pursuant to RCW 50.20.066. The Department requests that the Court affirm the Commissioner's decision.

RESPECTFULLY SUBMITTED this 7th day of November,
2012.

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PROOF OF SERVICE

I, Dan Marvin, certify that I caused a copy of **Respondent's Brief** to be served on all parties or their counsel of record via email and US Mail Postage Prepaid via Consolidated Mail Service on the date below to:

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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 7th day of November, 2012.



DAN MARVIN, Legal Assistant

WASHINGTON STATE ATTORNEY GENERAL

November 07, 2012 - 4:11 PM

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