

NO. 49688-7

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

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TINA BEACH,

Respondent,

v.

STATE OF WASHINGTON,  
EMPLOYMENT SECURITY DEPARTMENT,

Appellant.

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**RESPONSE BRIEF OF APPELLANT  
EMPLOYMENT SECURITY DEPARTMENT**

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## **I. INTRODUCTION**

During her employment as a safety compliance and risk manager, Tina Beach made multiple unauthorized purchases on her employer's credit card. The purchases ranged from a smartphone application for her fiancé to personal airline tickets. At a work-related conference, the employer discovered that Ms. Beach spent hundreds of dollars in company funds on an unauthorized seminar at the conference and extra tickets to conference events. Given Ms. Beach's pattern of misappropriating funds, the employer terminated Ms. Beach's employment that day.

Ms. Beach's pattern of behavior amounts to statutory misconduct under the Employment Security Act and thus disqualifies her from unemployment benefits. Her conduct was not a good faith error in judgment, but rather a series of intentional choices to use her employer's credit card for personal use and unauthorized charges. The Employment Security Department respectfully asks the Court to reverse the superior court's order and reinstate the Commissioner's decision denying unemployment benefits.

## **II. STATEMENT OF THE ISSUES**

1. Does substantial evidence support the findings that Ms. Beach's employer terminated her because of purchases she made on the employer's company credit card, and that such purchases were unauthorized?

2. Did Ms. Beach commit work-connected misconduct under RCW 50.04.294(1)(a), (2)(f), or (1)(b) when she intentionally charged multiple personal and unauthorized expenses to her employer's company credit card?

### **III. STATEMENT OF THE CASE**

Tina Beach was employed with Sander Resources, LLC, as a safety compliance and risk manager from July 2014 to March 2015. Certified Administrative Record (AR) at 143, 733 (Finding of Fact (FF) 2). Her job duties required her to travel frequently and work remotely. AR at 214-15, 733 (FF 3). The employer issued her a company card. AR at 213, 734 (FF 5). Though the employer did not have a written policy on use of the company card, AR at 150, Ms. Beach's supervisor emphasized during team meetings that employees may not put extraneous and unauthorized expenses on the company card. AR at 150, 313; *see* AR at 734 (FF 5-6). Ms. Beach knew of the employer's policy. AR at 150, 734 (FF 6).

There was a delay of some months in getting a company card issued to Ms. Beach. AR at 213-14. During that time, Ms. Beach put some company expenses on her personal card, and the employer reimbursed her. AR at 193, 215, 733-34 (FF 3-4). But the employer typically purchased

more expensive items for her during this time—such as airline tickets and hotels. AR at 215.

The employer had a protocol for reimbursing expenses fronted by employees. AR at 163, 193, 209; *see* AR at 734 (FF 4). Employees were to submit complete expense reports to an online program at the end of each month. AR at 211-12, 219-20, 734 (FF 4-5). Sometimes Ms. Beach added items to her online expense reports after the employer reviewed them. AR at 212, 216, 734 (FF 4). In other cases, Ms. Beach's expense reports could not be reconciled with the receipts she provided to the company. AR at 195, 326, 314; *see* 733-34 (FF 3-5). Because Ms. Beach failed to timely report or document some expenses, she carried some work-related charges on her personal card. AR at 211-12.

Once Ms. Beach received the company card, she took it upon herself to recoup some of this money from the employer's funds. In December 2014, Ms. Beach used the company card to purchase a \$134.90 smartphone application called "Spymaster Pro" as a gift for her fiancé. AR at 157, 177, 191, 207, 734 (FF 6). She did not ask permission for the purchase. Instead, she asked her employer, after the fact, to take the \$134.90 out of the money the company owed to her in reimbursements. AR at 177, 207. The employer agreed to do so. AR at 177, 196, 734 (FF 5).

In January 2015, Ms. Beach charged the company card for a personal trip to Biloxi, Mississippi, to visit her sister, at a cost of \$355.22. AR at 196-98; *see* AR at 734 (FF 7). The flight was for personal reasons and not related to her employer's business. AR at 178; *see* AR at 734 (FF 5). Ms. Beach later wrote a check to her employer to cover the cost of the flight segment. AR at 196. This was the only check Ms. Beach wrote to reimburse her employer. AR at 196, 734 (FF 5).

That same month, Ms. Beach used the company credit card to purchase airfare for a weekend trip to Las Vegas to attend a basketball tournament. AR at 194, 250; *see* AR at 734 (FF 7). Although she argued Las Vegas was a stopover on the way to a work conference in Orlando, the trip to Las Vegas was entirely personal. If she had not been traveling to Orlando for work, she would have personally purchased air fare to Las Vegas, because she had been planning the Las Vegas trip for nearly a year. *See* AR at 250, 734 (FF 5, 7).

The employer grew concerned about Ms. Beach's expenses. On February 9, the employer reminded Ms. Beach of its policy for using the company card. AR at 313. Ms. Sander warned Ms. Beach that unauthorized expenses and inappropriate use of company funds were unacceptable and should not be continued. AR at 313; *see* AR at 734 (FF 6).

The next day, Ms. Beach charged the employer's card for a round-trip ticket from Denver to Billings to attend a court date for a personal matter in Billings. AR at 186-87, 300; *see* AR at 734 (FF 5, 7). This trip occurred in the interim between working in Austin and working in Seattle. AR at 186, 188. Although she believed that flying to Billings was cheaper than flying back to her home in Pasco, Ms. Beach did not seek advance permission to make the purchase and did not provide information to her employer to document any price difference. AR at 162-63, 167. Though Ms. Beach paid for the segment from Denver to Seattle, her flight from Billings back to Denver was extraneous. *See* AR 188.

In March 2015, during a work-related excavation safety conference in Orlando, the employer discovered several other unauthorized purchases that Ms. Beach made. She enrolled in a leadership seminar at the conference, entitled "Contagious Leadership—How to Be a Better Boss and Build a Team," which cost the company \$205. AR at 153, 269.<sup>1</sup> Ms. Beach did not seek permission to attend this seminar, she did not have a leadership role in the company, and she ultimately did not even attend the seminar. AR at 152, 153; *see* AR at 734 (FF 7). She charged extra tickets to the company for a "casino night" and the closing reception dinner at the

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<sup>1</sup> The OAH order describes the seminar as a "Courageous Leadership" seminar. AR at 734 (FF 7). However, the confirmation email from Infrastructure Resources calls it a "Contagious Leadership" seminar. AR at 269.

conference, totaling \$320. *See* AR at 269 (showing subtotals of \$220 and \$100 for special event tickets), 734 (FF 7). Ms. Beach never reimbursed her employer for these costs. AR at 152. Upon discovering that Ms. Beach had spent hundreds of dollars on conference events, the employer discharged her. AR at 211, 217, 221, 734 (FF 9).

Ms. Beach applied for unemployment benefits. The Department denied her claim, finding she was “discharged for the unauthorized use of the company credit card.” AR at 231. She appealed, and the Office of Administrative Hearings (OAH) held an administrative hearing. After the hearing, ALJ Goodwin reversed the initial determination, concluding that Ms. Beach’s failure to attend 50 percent of a safety conference did not amount to misconduct. AR at 703 (Conclusion of Law (CL) 8). The employer sought review from the Department’s Commissioner, arguing that ALJ Goodwin had not considered the reasons provided by the employer for discharging Ms. Beach because the initial order did not answer the issue of whether Ms. Beach was discharged for misuse of funds. *Id.* The Commissioner remanded for a trial de novo. AR at 730.

Thereafter, OAH held a new hearing before ALJ Pierce. *See* AR at 124-227. *See* AR 229-481. The documentary evidence admitted at the first hearing is the same as that admitted at the second hearing. *Compare* AR 48-56 *with* AR at 139-42 (ALJ Goodwin and ALJ Pierce’s descriptions of

the exhibits, admitting all submitted). ALJ Pierce issued an initial order affirming the initial determination denying benefits. AR at 733-37.

Ms. Beach petitioned the Commissioner for review. AR at 747-51. The Commissioner affirmed ALJ Pierce's order, adopting her findings of fact<sup>2</sup> and conclusions of law. AR at 761. The Commissioner held that Ms. Beach's conduct constituted a willful disregard of the rights, title, and interests of her employer, RCW 50.04.294(1)(a); a violation of a reasonable employer rule of which Ms. Beach knew or should have known, RCW 50.04.294(2)(f); and deliberate disregard of standards of behavior which an employer has a right to expect of an employee, RCW 50.04.294(1)(b). AR at 761.

Ms. Beach appealed to the Thurston County Superior Court, where the Court reversed the Commissioner's decision. *See* CP 53-56. The Department appealed, CP 53-54, and submits this response brief in accordance with this Court's General order 2010-1.

#### **IV. STANDARD AND SCOPE OF REVIEW**

Judicial review of the Commissioner's decision is governed by the Washington Administrative Procedure Act (APA) pursuant to RCW 34.05.570 and RCW 50.32.120. This Court sits in the same position as the superior court and applies the APA standards directly to the agency

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<sup>2</sup> The Commissioner corrected Finding of Fact 1 to reflect the proper date of the Department's initial determination as April 29, 2015.

decision and record. *Courtney v. Emp't Sec. Dep't*, 171 Wn. App. 655, 660, 287 P.3d 596 (2012); RCW 34.05.558. The Court reviews the decision of the Commissioner, not the underlying decision of the ALJ—except to the extent the Commissioner's decision adopted any findings and conclusions of the ALJ's order. *Tapper v. Emp't Sec. Dep't*, 122 Wn.2d 397, 406, 858 P.2d 494 (1993). The Commissioner's decision is considered *prima facie* correct, and the party challenging the decision, Ms. Beach, has the burden of demonstrating its invalidity. RCW 34.05.570(1)(a); *Darkenwald v. Emp't Sec. Dep't*, 183 Wn.2d 237, 244, 350 P.3d 647 (2015).

This Court undertakes the limited task of reviewing the findings of fact for substantial evidence. RCW 34.05.570(3)(e); *William Dickson Co. v. Puget Sound Air Control Agency*, 81 Wn. App. 403, 411, 914 P.2d 750 (1996). Substantial evidence is that which 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). In reviewing the record for substantial evidence, the Court must do no more than search for the presence of evidence. *Dep't of Licensing v. Sheeks*, 47 Wn. App. 65, 69, 734 P.2d 24 (1987). Evidence may be substantial even if conflicting or susceptible to other reasonable interpretations. See *Fred Hutchinson Cancer Research Ctr. v. Holman*, 107 Wn.2d 693, 713-14, 732 P.2d 974

(1987). The presence of conflicting evidence does not defeat the presence of substantial evidence in support of a Commissioner's finding. *See Cummings v. Dep't of Licensing*, 189 Wn. App. 1, 14, 355 P.3d 1155 (2015). This Court may not reweigh evidence or re-determine credibility. *William Dickson Co.*, 81 Wn. App. at 411. Any unchallenged findings are "treated as verities on appeal." *Darkenwald*, 183 Wn.2d at 244.

The Court reviews questions of law *de novo*, giving substantial weight to the agency's interpretation of the statutes it administers. *Smith v. Emp't Sec. Dep't*, 155 Wn. App. 24, 32, 226 P.3d 263 (2010). Whether a claimant committed statutory misconduct is a mixed question of law and fact. *Griffith v. Dep't of Emp't Sec.*, 163 Wn. App. 1, 9, 259 P.3d 1111 (2011). To resolve a mixed question of law and fact, the Court engages in a three-step analysis in which it: (1) determines whether the Commissioner's factual findings are supported by substantial evidence; (2) makes a *de novo* determination of the law; and (3) applies the law to the facts. *Tapper*, 122 Wn.2d at 403. A court is not free to substitute its judgment for the agency's as to the facts. *Id.* The process of applying the law to the facts is a question of law, subject to *de novo* review. *Id.*

## V. ARGUMENT

Substantial evidence supports the Commissioner's finding that Ms. Beach misused the employer's credit card by making unauthorized

charges. Applying the law to those facts, the Commissioner correctly concluded that Ms. Beach willfully disregarded the employer's rights and interests, violated a reasonable employer rule that she knew or should have known, and deliberately disregarded standards of behavior which the employer had a right to expect of its employee. RCW 50.04.294(1)(a), (2)(f), (1)(b). This disqualifies her from receiving unemployment benefits. RCW 50.20.066(1). The Court should affirm the Commissioner.

**A. The Court Should Review Only the October 9, 2015, De Novo Hearing and Exhibits Admitted Therein**

This Court reviews the final Commissioner's decision, which adopted the findings and conclusions of ALJ Pierce's October 9 Initial Order. AR at 761, 733-37. When a Commissioner adopts the findings of an ALJ, the Court reviews the underlying findings supporting the ALJ's decision. *DeFelice v. Emp't Sec. Dep't*, 187 Wn. App. 779, 787, 351 P.3d 197 (2015). The findings of fact contained in the Commissioner's order were "based exclusively on the evidence of record in the adjudicative proceeding and on matters officially noticed in that proceeding." RCW 34.05.461(4). Because the October 9 Initial Order was based on the hearing *de novo* this Court should review only the testimony and exhibits admitted at that hearing.

In this case, the Commissioner's decision being appealed from reviewed and adopted only the findings in the October 9 Initial Order, based on ALJ Pierce's *de novo* hearing and the documentary evidence admitted therein. *See* AR at 761. Therefore, judicial review of that order is limited to the findings in the October 9 Initial Order and the hearing record upon which those findings were based. *See* AR 124–227, 229-481, 733–37. Ms. Beach did not appeal the earlier decision of the Commissioner remanding her case for a hearing *de novo*. That decision is not before this Court.

Nevertheless, Ms. Beach now attempts to use the testimony from the first administrative hearing to impeach the employer's credibility. *See* Resp't's Opening Br. 24-28. But the time for credibility determinations has passed. Ms. Beach had ample opportunity at the second administrative hearing to confront the employer's witness with any purported prior inconsistent statement, including prior statements made under oath at the first administrative hearing. *See* RCW 34.05.452(2) (Washington Rules of Evidence applicable to administrative hearings); Evidence Rule 613. After the second administrative hearing, the ALJ ultimately gave more weight to the employer's evidence and the Commissioner adopted the ALJ's findings. AR at 761. This Court must decline to reweigh the evidence. *Smith*, 155 Wn. App. at 35-36.

**B. Substantial Evidence Supports the Findings that the Employer Terminated Ms. Beach for Misusing the Employer's Credit Card and that Such Purchases were Unauthorized**

The Commissioner found that Ms. Beach made unauthorized and personal purchases on the company credit card (FF 5, 6, 7), that she failed to adequately account for personal expenses (FF 5), and that the employer discharged her for misusing the company credit card (FF 9). *See* Resp't's Opening Br. 11 (challenging only subsets of findings of fact 5 and 7).<sup>3</sup> Substantial evidence in the record supports those findings. Ms. Beach does not challenge the finding that she used her employer's credit card for personal expenses. Resp't's Opening Br. at 4; *see* AR at 734 (FF 5), 736 (CL 9). Neither does she challenge the finding that her actions were intentional in making those charges. AR at 736 (CL 9). Therefore, these findings must be treated as verities. *Darkenwald*, 183 Wn.2d at 244.

Substantial evidence supports the findings that Ms. Beach purchased personal and unauthorized items on the company credit card. AR at 734 (FF 5, 7). The record contains credit card statements showing Ms. Beach's charges to the employer's card. AR at 300-04, 328-33. The documents show the charges for a Spymaster Pro on December 6 (AR at

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<sup>3</sup> Ms. Beach explicitly challenges the findings that she failed to adequately account for personal expenses (FF 5), and that she made unauthorized charges (FF 7). Although Ms. Beach does not explicitly assign error to the finding that she was discharged for misusing the company credit card (FF 9), she clearly takes issue with that finding throughout her brief. *See* Resp't's Opening Br. 16-17, 20, 24-28.

304), a \$1510 charge for “Paypal Infrastruct” on December 19 (AR at 302), airfare to Las Vegas on January 24 (AR at 300), airfare to Gulfport-Biloxi International Airport (GPT) on January 28 (AR at 300), and airfare Billings<sup>4</sup> on February 10 (AR at 300). Ms. Sander testified that the credit card statements submitted to the Department are statements of the charges made on the card issued to Ms. Beach. AR at 147. In a letter to a Department fact-finder, Ms. Beach acknowledged purchasing the airfare to Las Vegas. AR at 250. At the hearing, she testified that she did use the company card to purchase the Spymaster, (AR at 177), the personal flight to Biloxi (AR at 178-79), the Contagious Leadership seminar (AR at 182), and the flight to Billings (AR at 190).

The employer submitted into evidence an email dated December 19, 2014, which correlates with the \$1510 “Paypal Infrastruct” charge on the employer’s credit statement. AR at 269, 302. Ms. Beach testified, referring to page 41 of the exhibits (page 269 of the record), that the confirmation email reflects the order she made using the employer’s credit card. AR at 165. The email confirms registration was “received by Infrastructure Resources, LLC” for a “2015 CGA 811 Excavation Safety

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<sup>4</sup> Ms. Beach argues that she was in Billings for a conference on behalf of the company on September 15-18, 2014. The September trip is not at issue. The employer’s exhibits and cross-examination were concerned with Ms. Beach’s trip to Billings in mid-February 2015. AR at 185 -90. The charge on the employer’s card appears February 10. AR at 300. Note that there were two charges for the same trip, but one set was credited back, according to Ms. Sander’s testimony. AR at 162.

Conference and Expo.” AR at 269. The confirmation shows two casino night tickets at \$110 each, two closing reception tickets at \$50 each, and the “Contagious Leadership” seminar at \$205, purchased under Ms. Beach’s name. *Id.* The charge for the registration, seminar, and extra events totaled \$1510. *Id.* This cost appears on the employer’s credit statement for December 19 as a payment to “Paypal Infrastruct.” AR at 302.

Importantly, Ms. Beach concedes that she made several of the purchases at issue. *See* Resp’t’s Opening Br. 4 (Ms. Beach would “sometimes” put personal expenses on the company credit card); *id.* at 15 (“Ms. Beach purchased as [sic] Spymaster for \$134.90 on the company credit card for her fiancé”); *id.* at 17 (“Ms. Beach used the company credit card for this expense” referring to her flight from Billings); *id.* at 18 (taking the position that Ms. Beach correctly made the purchase shown on page 269 of the record, the \$1510 charged to her employer’s card for conference events). Of the \$1510 charged, only the \$985 registration package was authorized. AR at 152-54, 269; *see* AR at 734 (FF 7).

Substantial evidence also supports the finding that Ms. Beach’s purchases were unauthorized. AR at 734 (FF 5-6), 736 (CL 9). Ms. Sander testified that Ms. Beach did not seek permission to attend the Contagious Leadership Seminar or to purchase the extra tickets to “casino night” or a

dinner at the Orlando conference. AR at 153-155. Ms. Beach testified that her trip to Billings via Denver was not for company business. AR at 187. Ms. Sander testified that Ms. Beach did not clear the trip through her by showing her why flying through Billings would cost the company less money. AR at 167. Ms. Beach testified that the trip to Biloxi was not business-related and that she did not purchase the Spymaster for the benefit of the business. AR at 178, 191. She testified she did not ask permission to purchase the Spymaster before doing so. AR at 207. She represented to a Department fact-finder that her trip to Las Vegas was for a basketball tournament—not for business purposes. AR at 300. The employer testified that other miscellaneous airline charges made by Ms. Beach were not authorized and had no legitimate business purpose. AR at 151. None of the purchases at issue were authorized.

Finally, substantial evidence supports the finding that the reason for discharge was Ms. Beach's misuse of funds. AR at 734 (FF 9). Ms. Beach's supervisor testified, "Ms. Beach misused corporate funds. And the only extension upon that I would say is that it was numerous times." AR at 217. Ms. Sander testified that she discovered the charges for the Billings trip, the Las Vegas trip, the leadership seminar, extra tickets to conference events, and unexplained travel extras within the last 30 days of Ms. Beach's employment. AR at 221, 327. Moreover, in a statement the

employer prepared for the Department after Ms. Beach applied for benefits, the employer explained that it had fired Ms. Beach because she “was attending an out-of-state conference on the date that she was terminated. While at the conference Ms. Beach used \$425<sup>5</sup> of company funds to purchase tickets to two separate events at the conference that she subsequently did not attend,” explaining that these included a seminar irrelevant to her job duties and extra tickets to a networking event. AR at 264 (citing to page 269 of the record, the confirmation of a \$1510 purchase for the conference registration and extra tickets). The employer also spent several paragraphs detailing the other unauthorized charges Ms. Beach made on the company card. AR at 266-67. The statement further cited Ms. Beach’s charges for airfare to Las Vegas, airline charges that she did not account for, and mobile phone tracking software (ostensibly the Spymaster). AR at 266-67. There is ample evidence in the record to support the finding that the employer terminated her for misuse of the company card.

Ms. Beach makes four factual contentions: that she did not purchase the extra conference tickets, that her purchases were actually

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<sup>5</sup> The conference confirmation email shows an order under Ms. Beach’s name for two casino night tickets at \$110 each and a seminar registration at \$205, totaling \$425. AR at 269. The employer also testified that she purchased closing reception dinner tickets without authorization. AR at 154, 269. The conference confirmation email shows two closing reception tickets ordered under Ms. Beach’s name at \$50 each. This totaled \$525 in unauthorized conference events.

authorized, that her employer discharged her for some reason other than her misuse of company funds, and that she adequately accounted for personal purchases (AR 734 (FF 5)). Resp't's Opening Br. 11, 16-18. However, these are the same arguments she made at the administrative level. AR at 248-50. These factual disputes were considered by the finder of fact, who applied the preponderance of the evidence standard and found it was more likely than not that Ms. Beach repeatedly made unauthorized charges on the company credit card and that is why the employer discharged her. AR at 734 (FF 5-7, 9). Ms. Beach's arguments amount to an invitation to reweigh the evidence and reevaluate the credibility of witnesses, which the Court may not do on appeal. *Sheeks*, 47 Wn. App. at 69.

Specifically, Ms. Beach claims that because the purchases at issue were made several weeks before she was terminated, they were not the cause of her termination. Resp't's Opening Br. 16-17, 20. But the employer explained that "the Florida trip was the first opportunity that Ms. Sander had to question Ms. Beach regarding Ms. Beach's continued misuse of her company-issued credit card . . . . Had Ms. Beach been unable to satisfactorily explain the reason for her apparent disregard of company policy concerning the use of funds, she would have been terminated during the trip to Florida." AR at 309, 664.

Ms. Beach also urges the Court to search the record of the first hearing to impeach the employer's testimony on the cause of her termination. Resp't's Opening Br. 24-28. But, as already discussed, the Court's role is not to reevaluate the employer's credibility or to search the record for contrary evidence. Even if the Court were to search the entire 800 pages of the administrative record, including the testimony from the first hearing, there is still substantial evidence in the record to support the challenged findings.

Broadening the Court's review to include the initial hearing does not negate the existence of substantial evidence in the record. *See Sheeks*, 47 Wn. App. at 69 (the Court must do no more than search for the presence of evidence). Any conflicting evidence in the initial hearing would not negate the presence of substantial evidence in the record as a whole. *Cummings*, 189 Wn. App. at 14. And the documentary evidence submitted in both hearings was the same. *Compare* AR 48-56 *with* AR at 139-42. The employer's testimony and submissions at both hearings support the finding that Ms. Beach was terminated for misuse of the company card. AR at 261-62, 264, 266, 616-17, 619, 621.

Ms. Sander testified at the first hearing that she terminated Ms. Beach because she "wasted company funds," which was an "issue[] that we had brought to Ms. Beach's attention prior to that date." AR at 73; *see*

AR at 85 (directing Judge Goodwin to review the exhibit on AR 682, the employer's list of charges for extra conference tickets, the unauthorized seminar, personal trip to Billings, and miscellaneous unauthorized airline charges). Ms. Sander further explained that Ms. Beach "left without using the tickets. That's one issue. Second issue was that she bought a multitude of tickets without permission." AR at 75-76; *see* AR at 78 (Ms. Sander's testimony pointing to Ms. Beach's \$1510 conference purchase of multiple tickets, and averring that Ms. Beach had not received permission for those tickets); AR at 83-84 (Ms. Sander's testimony that Ms. Beach misused the company's money by spending it on tickets, not using them, and "never had permission to do [that] in the first place"); AR at 86 (Ms. Sander's testimony that Ms. Beach paid for the tickets on the employer's credit card). The employer has consistently maintained that it discharged Ms. Beach for her misuse of funds.

Finally, Ms. Beach argues that she adequately accounted for personal expenses she put on the employer's credit card. Resp't's Opening Br. 11; *see* AR 734 (FF 5). But this is not the case. Ms. Beach testified that she wrote only one check to reimburse the employer for her trip to Biloxi. AR at 195-96. The only other personal purchase she accounted for was the Spymaster. AR at 177. The employer testified that Ms. Beach did not reimburse the company for the Billings trip, flight to Las Vegas,

Contagious Leadership, or extra conference event tickets. AR at 152. Even if she had reimbursed the company, Ms. Beach's misappropriation of the employer's funds cannot be cured by replacing them after the fact. The unauthorized charges are misconduct in themselves, as explained below.

In sum, the statements submitted to the Department along with the employer's testimony at the second administrative hearing provide substantial evidence to support the findings that Ms. Beach made numerous unauthorized, personal purchases on the company credit card and that the employer terminated Ms. Beach due to her misuse of company funds. The Court should reject Ms. Beach's invitation to substitute her version of the facts and modify the Commissioner's findings.

**C. The Commissioner Properly Concluded That Ms. Beach's Conduct Amounted to Disqualifying Misconduct Under the Employment Security Act**

The Employment Security Act (Act) provides compensation to individuals who are unemployed "through no fault of their own." RCW 50.01.010; *Tapper*, 122 Wn.2d at 408. For a claimant to qualify for benefits, the reason for the unemployment must be external and apart from the claimant. *Cowles Publ'g Co. v. Emp't Sec. Dep't*, 15 Wn. App. 590, 593, 550 P.2d 712 (1976). Accordingly, a claimant is disqualified from receiving benefits if he or she has been discharged for misconduct

connected with his or her work. RCW 50.20.066(1); WAC 192-150-200(1).

The misconduct disqualification rests on the policy that it is unfair to require employers to compensate employees who engage in conduct harmful to their interests. *Tapper*, 122 Wn.2d at 409. The initial burden is on the employer to show that the employee was discharged for disqualifying misconduct. *Nelson v. Dep't of Emp't Sec.*, 98 Wn.2d 370, 374-75, 655 P.2d 242 (1982). On appeal, it is the employee's burden to establish that the Commissioner's decision was in error. RCW 34.05.570(1)(a); *Smith*, 155 Wn. App. at 32. Ms. Beach has not met that burden.

Based on the factual findings, the Commissioner properly concluded that Ms. Beach's misuse of corporate funds amounted to misconduct. 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 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 employer; or
- (d) Carelessness or negligence of such degree or recurrence to show an intentional or substantial disregard of the employer's interest.

RCW 50.04.294(1). The statute also identifies seven specific acts that are misconduct per se. RCW 50.04.294(2); *Daniels v. Dep't of Emp't Sec.*, 168 Wn. App. 721, 728, 281 P.3d 310 (2012) (“Certain types of conduct are misconduct per se.”). These 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).

The Commissioner correctly concluded that Ms. Beach’s conduct amounted to a willful or wanton disregard of the rights, title, and interests of her employer, RCW 50.04.294(1)(a); a violation of a reasonable company rule that she knew or should have known, RCW 50.04.294(2)(f); and a deliberate disregard of standards of behavior which an employer has the right to expect of an employee, RCW 50.04.294(1)(b). AR at 761.

**1. Ms. Beach’s personal and unauthorized purchases with the company credit card constitute willful disregard of her employer’s rights, title, and interests under RCW 50.04.294(1)(a)**

As discussed above, substantial evidence supports the findings that Ms. Beach made numerous unauthorized purchases on the company credit card and failed to adequately account for these personal expenses. These findings support the conclusion that Ms. Beach willfully disregarded her employer’s rights and interests. *See* RCW 50.04.294(1)(a); AR at 761.

An employee acts with willful disregard when she is (1) aware of her employer's interest, (2) knew or should have known that certain conduct jeopardizes that interest, and (3) nonetheless intentionally performs the act, willfully disregarding its probable consequences. *Hamel v. Emp't Sec. Dep't*, 93 Wn. App. 140, 146-47, 966 P.2d 1282 (1998).<sup>6</sup>

“[I]t 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.”). Intent to harm the employer is not required. *Hamel*, 93 Wn. App. at 146; *Griffith*, 163 Wn. App. at 10.

In general, employers have an interest in their employees not using company funds for personal expenses. At a minimum, they have the right

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<sup>6</sup>*Hamel* was decided under a previous version of the misconduct statute. *See Hamel*, 93 Wn. App. at 145. However, the category of misconduct set forth in RCW 50.04.294(1)(a) matches in large measure the pre-2003 law defining misconduct. *See* RCW 50.04.293 (“With respect to claims that have 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 . . .”). Cases interpreting the meaning of “willful disregard” of an employer’s interest in the prior definition are therefore instructive as to the meaning of RCW 50.04.294(1)(a). 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).

to expect employees will seek advance authorization for such purchases. They also have a valid interest in having their employees follow the appropriate steps to get reimbursed when necessary, rather than use the company card to pay themselves back.

Here, Ms. Beach knew of her employer's interest in cutting costs, accounting for expenses, and having its funds spent only on business-related purchases. AR at 738 (FF 5, 6, 8). The Commissioner found that "the employer had discussions with the claimant about cutting expenses, and also about reconciling the expenses charged." AR at 738 (FF 6). These findings are based on Ms. Sander's testimony that she communicated to her team on numerous occasions that "we were going to be careful with every dime we spent," and that extraneous expenses are not appropriate. AR at 150. She also testified that she made it clear to the team that "they needed to restrain their spending, so that we could pass savings along to our clients. That if our clients were going through difficult times, we would as well." *Id.* The employer's supplemental statement explained that Ms. Sander warned the team and Ms. Beach personally that "unauthorized expenses and inappropriate use of company funds . . . were unacceptable and not to be continued." AR at 313. Thus Ms. Beach was aware of her employer's interest and knew that her conduct in charging personal and

unauthorized expenses on the company card would jeopardize that interest. *Hamel*, 93 Wn. App. at 146-47; WAC 192-150-205(1).

Nevertheless, she intentionally made unauthorized and personal purchases on the company credit card. AR at 734 (FF 5), 736 (CL 9). The Commissioner found, and Ms. Beach does not contest, that her “actions were not the result of negligence or inadvertence, but were intentional.” AR at 736 (CL 9); *see e.g.* AR at 165 (in reference to the conference confirmation totaling \$1510, “I did order that”), 188-90 (in reference to her trip to Billings, describing her intention in charging the company for the flights from to Billings and back to Denver, and paying personally only for the flight from Denver to Seattle), 182 (“I did sign up for Contagious Leadership on the 19th”), 198 (Ms. Beach’s testimony describing that she booked a flight to Biloxi in the same transaction as a business flight to Austin on the company card), 207 (Ms. Beach’s testimony that she did not seek prior approval to purchase the Spymaster), 300 (“I purposely purchased my airline ticket from Portland to Las Vegas for March 6th”).

Ms. Beach also knew that the purchases at issue were personal or otherwise unauthorized. *See* AR at 153 (Ms. Sander’s testimony that Ms. Beach did not seek permission to attend the contagious leadership seminar), 154-55 (Ms. Sander’s testimony that Ms. Beach never asked

permission to purchase the extra conference tickets), 177 (Ms. Beach's testimony that Spymaster was a Christmas gift), 178 (describing her flight to Biloxi as "a personal flight . . . to visit my sister in the Air Force"), 186 (Ms. Beach's testimony that she purchased the trip to Billings because she believed she needed to be in court), 194 (Ms. Beach's testimony that her trip to Las Vegas was for "vacation"), 250 (Ms. Beach's statement that she had been planning to attend the basketball tournament in Las Vegas for nearly a year).

Ms. Beach willfully disregarded her employer's interests. Ms. Beach knew of her employer's interest in cutting costs and limiting company funds to company expenses but nevertheless intentionally spent hundreds of dollars on personal and unauthorized charges. The Commissioner correctly concluded she committed misconduct under RCW 50.04.294(1)(a).

**2. Ms. Beach violated a reasonable company policy of which she was aware when she made unauthorized purchases on the company credit card**

The Commissioner also correctly concluded that Ms. Beach violated a reasonable company rule of which she knew or should have known. AR at 761. Violation of a reasonable and known company rule is misconduct *per se*. RCW 50.04.294(2)(f); *Daniels*, 168 Wn. App. at 728.

The employer had a policy that the company credit card should be used for only authorized business purchases. AR at 215, 266-67, 313, 761, 734 (FF 5). Ms. Sander told the team and Ms. Beach individually that the company card should be used only for authorized business purchases. AR at 313.

Mr. Beach knew about the employer's policy. Prior to her discharge, the employer had questioned unauthorized purchases made by Ms. Beach and reminded her of the policy. AR at 150, 313. Although this policy was not written, Ms. Sander expressed it several times during meetings which included Ms. Beach. AR at 150. And "there is no requirement in the ESA or the Department's regulations that a company rule be written or contained in a handbook for its violation to constitute misconduct." *Daniels*, 168 Wn. App. at 729.<sup>7</sup>

The policy also was reasonable. "A company rule is reasonable if it is related to your job duties, is a normal business requirement or practice

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<sup>7</sup> The Department does have a rule, WAC 192-150-210(5), stating that "The department will find that you knew or should have known about a company rule if you were provided an employee orientation on company rules, you were provided a copy or summary of the rule in writing, or the rule is posted in an area that is normally frequented by you and your co-workers . . . ." The regulation became effective in 2005, well before the Court's decision in *Daniels* in 2012. The *Daniels* Court is correct that no statute or regulation requires the employer's policy to be written. WAC 192-150-210 is a constructive notice regulation listing some situations in which the Department will find that an employee should have known of a company rule. The regulation does not preclude the Department from determining that an employee had actual notice of a policy, where, as here, the employer puts on evidence of that it advised and warned the employee about an unwritten rule.

for your occupation or industry, or is required by law or regulation.” WAC 192-150-210(4) It is reasonable to require employees to make only business-related, authorized purchases on company credit cards. Ms. Beach violated her employer’s reasonable policy when she unilaterally charged her employer’s card for personal expenses, unauthorized travel, and unauthorized event tickets. Her violation of the rule is misconduct per se. *See Daniels*, 168 Wn. App. at 728.

**3. Ms. Beach’s personal and unauthorized use of the company credit card constituted deliberate disregard of standards of behavior an employer has the right to expect of an employee under RCW 50.04.294(1)(b)**

Misconduct also includes deliberate violations or disregard of standards of behavior which the employer has the right to expect of an employee. RCW 50.04.294(1)(b). “Disregard” as used in RCW 50.04.294(1)(b) is undefined by statute or regulation. In the absence of a statutory definition, courts may give a term its plain and ordinary meaning by reference to a standard dictionary. *Tenino Aerie v. Grand Aerie*, 148 Wn.2d 224, 239, 59 P.3d 655 (2002). A standard English dictionary definition defines “disregard” as: “**1a:** to treat without fitting respect or attention . . . **b:** to treat as unworthy of regard or notice . . . **2:** to give no thought to: pay no attention to . . . ” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY UNABRIDGED 655 (1993). Here, Ms. Beach

ignored or failed to respect the standard of behavior that the employer had a right to expect of her.

Employers have a right to expect that their employees will use a company-issued credit card for company-related expenses only and refrain from charging personal expenses to the business. Ms. Beach disregarded this right when she charged multiple personal expenses, treating the card as an extension of her personal credit. AR 304 (Spymaster Pro), 300 (airfare to vacation in Las Vegas, airfare for personal trip to and from Billings, airfare to Biloxi (GPT) to see her sister), 734 (FF 5–6).

Employers also have a right to expect that their employees will document expenses incurred. Ms. Beach violated this standard of behavior when she failed to document to her employer whether it was indeed less expensive for her to fly through Billings rather than return home to Pasco between business meetings. AR at 163, 167, 734 (FF 7).

And employers also have a right to expect their employees will seek approval before making large expenditures. Ms. Beach acted in disregard of this right when she did not seek prior approval for hundreds of dollars' worth of event tickets and personal purchases. AR 152–155, 266, 300–04. The employer entrusted her with company funds. She converted them to her own use and spent them on extraneous items. She disregarded standards of behavior her employer had a right to expect.

The fact that Ms. Beach later reimbursed her employer for the flight to Biloxi and reconciled the spymaster charge with funds due to her is inapposite. *See* Resp't's Opening Br. 4.<sup>8</sup> An employee does not have the discretion to use an employer's funds for personal use in the first place. For example, the Commissioner previously ruled that an employee deliberately disregarded the standards of behavior which the employer had the right to expect when the employee cashed her own checks in the employer's register as a paycheck advance, intending that the employer would later cash her check and be repaid. *See Loeffelbein v. Dep't of Emp't Sec.*, No. 68537-6-I, 2013 WL 3946348 at \*2 (Wash. Ct. App. July 29, 2013) (unpublished) (affirming the Commissioner's decision on the ground that the claimant also violated a company policy in advancing herself money from the till).<sup>9</sup> When employees take money entrusted to their care by their employer, it violates a universal standard employers have a right to expect of their employees—whether or not they intend to pay it back.

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<sup>8</sup> Although Ms. Beach contends that she would reimburse the company by writing a check “whenever” she incurred a personal expense, she testified that she only wrote one check to cover the cost of the flight to Biloxi. AR at 178, 195-96.

<sup>9</sup> As an unpublished decision, *Loeffelbein* has no precedential value, is not binding on any court, and is cited only for such persuasive value as the court deems appropriate. GR 14.1.

**4. Ms. Beach's actions were not "good faith errors in judgment"**

Ms. Beach's conduct did not, as she suggests, amount to "good faith errors in judgment or discretion," one of the statutory exceptions to misconduct. RCW 50.04.294(3)(c); Resp't's Opening Br. 22-23. The superior court erred in concluding it did.

The statute does not define the term "good faith errors in judgment or discretion." When a statute does not define a term, a court looks to the ordinary dictionary meaning. *Tenino Aerie*, 148 Wn.2d at 239. Webster's Third New International Dictionary defines "error" as "an act that through ignorance, deficiency, or accident departs from or fails to achieve what should be done . . . <an ~ of judgment>." WEBSTER'S THIRD 777.

For example, the claimant in *Kirby v. Department of Employment Security* committed a good faith error in judgment when she acted out of confusion and apprehension. 179 Wn. App. 834, 850, 320 P.3d 123 (2014). In that case, the claimant was asked by the company CEO to write a written report on the spot about some suspicious incidents. *Kirby*, 179 Wn. App. at 840, 848. Unbeknownst to the CEO, the claimant had already prepared reports for her immediate supervisor, which had not been forwarded to the CEO. *Id.* at 840. She refused to write a second report for the CEO. *Id.* at 840-41. The Court ruled that the claimant made a good

faith error because she was legitimately confused by the break in communication between her immediate supervisor and the CEO. *Id.* at 847. She did not know that the CEO was unaware she had documented the incidents earlier. *Id.* So by refusing to write the report a second time, she was not aware that she was disregarding the interests of her employer. *Id.*

By arguing that her personal and unauthorized purchases were “errors” in judgment or discretion, Ms. Beach asserts that she made each of the purchases “through ignorance, deficiency, or accident.” WEBSTER’S THIRD 777. But her assertion is inconsistent with the facts. She intentionally made personal purchases on the company credit card for the Spymaster and the flights to Biloxi, Las Vegas, and Billings. She knew that she had not obtained authorization from her employer to spend hundreds of dollars on a seminar and event tickets for the Orlando conference, and she did so despite the employer’s expressed interest in cutting costs. Unlike the claimant in *Kirby*, Ms. Beach was not confused. *See Kirby*, 179 Wn. App. at 847. These purchases were not made through ignorance or accident. They were knowing and deliberate actions. AR at 736 (CL 9). It cannot be a “good faith error in judgment or discretion” to convert company funds to one’s personal use.

In addition to the fact that Ms. Beach’s conduct cannot be considered an “error,” it was also not a good faith error in “judgment or

discretion” specifically. Logically, an employee can make a good faith error in judgment or discretion only in instances where the employee is permitted to exercise discretion. Here, Ms. Beach, like any employee entrusted with a company card, had a clear fiduciary duty with respect to the card. The scope of the card’s use was limited to authorized business expenses. AR at 215, 266-67, 313, 734 (FF 5). Ms. Beach did not have the authority to use the card for her own personal travel and gift purchases. *See* AR at 146-47, 157, 207. And she did not have the authority to charge the card for extra conference tickets and a seminar. AR at 153-55. She used her employer’s credit card as if it were her own, which is not a good faith error in judgment or discretion. The superior court erred in ruling otherwise.

**5. The Employer’s reimbursement policy is not relevant to whether Ms. Beach misused the employer’s credit card**

The employer terminated Ms. Beach for misuse of company funds. AR at 734 (FF 9). The relevant questions of fact and law on review are whether substantial evidence supports the findings that she made personal and unauthorized charges on the employer’s credit card, and whether those actions amount to misconduct under the Employment Security Act.

Nevertheless, Ms. Beach argues that she “did not intentionally violate her employer’s policy relating to reimbursements,” and that the

policy for submitting her expense reports was unclear. Resp't's Opening Br. 2, 15. But Ms. Beach was not terminated for submitting untimely or disorganized reimbursement requests. She was terminated for putting personal and unauthorized expenses on the employer's card, instead of her own. AR at 734 (FF 5-7, 9).

Ms. Beach apparently believed that she could avail herself of the employer's credit line because she used her own credit card to pay for some work-related expenses. She admits:

When Ms. Beach incurred a business cost, she would charge it on the company card and sometimes pay with her personal credit card. Conversely, when Ms. Beach incurred a personal cost, she would charge those costs on her personal credit card and sometimes on the company credit card.

Resp't's Opening Br. 4 (emphasis added) (internal record cites omitted). This is unreasonable for two reasons. First, the Commissioner found that the employer had a simple system for reporting and reimbursement of expenses—report them on a form by the end of the month. Ms. Beach used that system and was reimbursed through it. AR at 195, 208, 211-12, 734 (FF 4). Second, it is unreasonable for an employee to believe she can convert corporate funds to her personal use to cover expenditures she made on her own card. The proper avenue is a reimbursement request. AR at 734 (FF 4). Ms. Beach's assertion that there were miscommunications

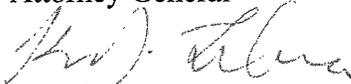
surrounding her request for reimbursement, or that reimbursement procedures were unclear, is irrelevant and in any event, it did not give her carte blanche to misappropriate corporate funds.

## VI. CONCLUSION

The Commissioner properly concluded that the employer discharged Ms. Beach for statutory misconduct. Ms. Beach disregarded her employer's interests and reasonable standards of behavior and violated a known rule when she used the employer's credit card to purchase personal and unauthorized items. This pattern of misappropriation does not constitute a good faith error in judgment or discretion. This Court should reverse the superior court and affirm the Commissioner's decision.

RESPECTFULLY SUBMITTED this 3<sup>rd</sup> day of March, 2017.

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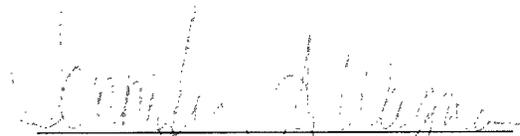
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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 30<sup>th</sup> day of March, 2017, at Olympia, Washington.

  
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