

NO. 71025-7-I

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

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STATE OF WASHINGTON  
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SUSAN R. KOPP,

Respondent,

Vs.

STATE OF WASHINGTON DEPARTMENT OF EMPLOYMENT  
SECURITY,

Appellant.

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**RESPONSE BRIEF OF RESPONDENT**

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## I. INTRODUCTION

On break at work, Susan Kopp observed a small area of smolder in beauty bark on her employer's property. She and another employee filled office garbage containers with water multiple times and dumped it on the smolder. Believing she had taken care of any potential problem, she went back to work without further action.

Hours later, another employee observed another beauty bark smolder near the one Ms. Kopp had put out. The fire department and utility company were called. The fire department concluded that the smolder had run its course, that no property or equipment had been damaged, and that no person had been injured. The fire department used a garden hose to apply water to the new smolder. The fire department was on site for a total of 15 minutes.

Ms. Kopp was fired by her employer, allegedly for violating her employer's rules. She sought unemployment benefits, which were granted by the Employment Security Department ("ESD"). Her employer pursued an appeal, which ultimately decided that Ms. Kopp committed disqualifying misconduct and deprived her of unemployment benefits.

Ms. Kopp urges the Court of Appeals to find that the Superior Court was correct in reversing, because the Commissioner based its

decision to deprive Susan Kopp of statutory unemployment benefits on Findings of Fact not supported by substantial evidence, and on erroneous Conclusions of Law resulting from a failure to apply RCW 50.04.294(3).

The Commissioner's decision that Ms. Kopp acted willfully and wantonly in violating employer rules rests on its conclusion that Ms. Kopp encountered a dangerous fire and intentionally failed to respond in accordance with her former employer's rules. However, there is no evidence of any kind that there was a fire, or that Ms. Kopp observed a fire. Nor is there any substantial evidence that there was a dangerous condition, or that Ms. Kopp was aware of any dangerous condition. Absent substantial evidence proving each and every one of these findings, there can be no finding that Ms. Kopp committed disqualifying misconduct under RCW 50.04.294(1) and (2).

Moreover, even if it was proven that Ms. Kopp observed fire or dangerous condition and failed to follow her former employer's rule requiring that it be reported to a supervisor, those facts do not support a finding of misconduct because Ms. Kopp's actions fall squarely within the statutory limitations to what constitutes misconduct in RCW 50.04.294(3). Since Ms. Kopp's actions were, at worst, an isolated episode of negligence or unintentional poor judgment, she did not commit disqualifying misconduct under RCW 50.04.294(3).

## **II. ASSIGNMENTS OF ERROR**

1. The Commissioner erred in concluding in its Findings of Fact that Ms. Kopp's conduct was willful and wanton disregard of the rights, title, and interests of her employer as it is not supported by a preponderance of substantial evidence.
2. The Commissioner made a legal error in not applying RCW 50.04.294 as a whole, and not reviewing whether Ms. Kopp's conduct falls under limitations laid in RCW 50.04.294(3) when in fact Ms. Kopp's conduct was inadvertence or ordinary negligence in an isolated instance or good faith error in judgment.

## **III. STATEMENT OF ISSUES**

1. Did the Commissioner err in concluding that Ms. Kopp's conduct was willful and wanton disregard of the rights, title, and interests of her employer, by a preponderance of substantial evidence?
2. Did the Commissioner err in not applying RCW 50.04.294 as a whole, and not reviewing whether Ms. Kopp's conduct falls under limitations laid in RCW 50.04.294(3) when in fact Ms. Kopp's conduct was inadvertence or ordinary negligence in an isolated instance or good faith error in judgment or discretion?

3. Did the Superior Court Judge correctly admit new evidence under the Administrative Procedure Act (APA), RCW 34.05.562?
4. Was the award of reasonable attorney's fees and costs proper under RCW 50.32.160?
5. Is Respondent entitled to reasonable attorney's fees and costs incurred for this appeal under RCW 50.32.160 and RAP 18.1?

#### **IV. STATEMENT OF FACTS**

The Respondent, Ms. Kopp held a full-time, permanent, union position as a plate shop mounter for Pliant Corporation from March 4, 1996 until August 17, 2012. (Administrative Record (AR) at 28, 81)

On August 15, 2012, while on break from work, Ms. Kopp noticed smoldering ember just outside of the plant building at approximately 1:45 AM. (AR at 106) The area of smoldering embers was approximately 3 feet by 3 feet. (Supplemental Administrative Record ((SAR) at 4)

Upon seeing the smolder, Ms. Kopp notified a co-worker, and Ms. Kopp and a co-worker grabbed a trash can, filled it with water, and made numerous trips back and forth to put out the smoldering ember. After

pouring water in the area multiple times, Ms. Kopp saw that the ember was taken care and went back to work. (AR at 39-40, 106)

At approximately 3:15AM, another employee noticed the area between the transformers had smoldering ember and reported to the maintenance department, and the maintenance department notified the supervisor, Jim Hughes. This area was near the area that Ms. Kopp first noticed smolder, but was in a different location. The Fire Department and the power utility company were notified by the supervisor. (AR at 51)

The fire department report indicated that the incident was concluded in 15 minutes, “the mark smoldering is approximately 3 Ft by 3 Ft.”, and that “there was \$0 property loss.” It further stated that “The RP had dumped water on the area and had extinguished the initial 3 x 3 area but the space between the transformers was still smoldering ...extinguished the remaining smoldering area with a garden hose from tank water.” (SAR at 4 - 5)

The Fire Department also indicated that Jim Hughes, the supervisor reported as following: “...an employee reported smelling something burning when they arrived to work at about 1900 hours. The odor was again noticed and was much stronger when an employee took a break outside just prior to our call. He further reported that it is not uncommon for someone to take a smoke break in that general area.”

(SAR at 5) It should be noted that even though another employee reported smelling something burning at about 1900 hours to a supervisor, no action was taken by the supervisor until about 3:15AM the next day.

Jim Hughes further testified that "...so the area is probably maybe three or four inches wide – there is two transformers right next to each other. They are both on concrete slabs at about three or four inches wide, if I can remember correctly and probably three feet long. And it basically was all ash (inaudible) probably two-and-a-half, three feet of it. And then the very end edge of it where the ash met the (inaudible), it was a little bit of embers, and then along the concrete slab right up against the slab."

(emphasis added) (AR 55-56)

The employer terminated Ms. Kopp's employment two days later, alleging that Ms. Kopp violated two company policies: "Employer must report all unsafe conditions to a supervisor immediately" and "In the event of fire (regardless of size) immediately report it to your supervisor." (AR at 84, 96, 101)

Ms. Kopp filed for unemployment benefits. The Employment Security Department (ESD), initially determined that Ms. Kopp was eligible for benefits since there was no misconduct, and benefits were paid. (AR 73-74) The employer appealed, and there was an administrative hearing. (AR at 78-79) The Administrative Law Judge (ALJ) reversed

ESD's initial determination and disallowed benefits, finding misconduct. (AR at 109-113) Ms. Kopp appealed to the ESD Commissioner. The Commissioner adopted the ALJ's Findings of Fact and Conclusions of Law, and affirmed the ALJ's decision. (AR 116-122)

Ms. Kopp, then filed a Petition for Review to the King County Superior Court. (CP at 1-12) On a motion to supplement the record with two declarations of employees of Pliant Corporation, the court admitted them under RCW 34.05.562 and 34.05.566(7), finding that the court may require or permit additions to the record. (CP at 19-20). The declarations of the two employees stated their observations as follows: 1) an employee stated that she observed numerous layoffs and a few terminations. She further stated that within the year 2012, there were three layoffs and at least 4 employees terminated; 2) Another employee stated that he noticed the company's predatory behavior to terminate certain employees, due to having to pay severance pay at one week per year, and older employees were key targets. He further stated that the company reduced employment over 30% and increased working hours for the remaining employees significantly. (CP at 107-109)

The King County Superior Court reversed the ESD Commissioner's decision. The Superior Court concluded that the Commissioner made an error of law in finding misconduct. The Superior

court concluded that Ms. Kopp's conduct did not signify a willful or wanton disregard of her employer's interest. Rather, the court concluded that Ms. Kopp's acts constituted inadvertence or ordinary negligence in an isolated instance or an error of good faith judgment or discretion. (CP at 66-68) The Superior court also awarded Ms. Kopp's attorneys fees and costs, under RCW 50.32.160. (CP at 77-78) The Department next filed this appeal to this Division I of Court of Appeals. (CP at 79-88, 92-102)

## **V. STANDARD OF REVIEW**

Washington Administrative Procedure Act (APA), RCW 34.05 governs judicial review of a final decision by the Department's Commissioner.

RCW 34.05.570(3) provides in applicable part as follows.

(3) Review of agency orders in adjudicative proceedings. The court shall grant relief from an agency order in an adjudicative proceeding only if it determines that:

...

(d) The agency has erroneously interpreted or applied the law;

(e) The order is not supported by evidence that is substantial when viewed in light of the whole record before the court, which includes the agency record for judicial review, supplemented by any additional evidence received by the court under this chapter;

...”

In a judicial review under the Washington Administrative Act, the Court of Appeals sits in the same position of the superior court and reviews the Commissioner’s decision de novo. *Tapper v. Employment Sec. Dep’t.*, 122 Wn2d 397, 402, 858 P.2d 494 (1993).

In *Bowers v. Pollution Control Hearings Board*, 103 Wn.App. 587, 596, 13 P.3d 1076 (2000), the Court stated that, “With respect to issues of law under RCW 34.05.570(3)(d), we review the PCHB[agency]’s legal conclusions de novo. Substantial weight is accorded the agency’s interpretation of the law where the agency has specialized expertise in dealing with such issues, but we are not bound by the agency’s interpretation of a statute. *City of Redmond v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 136 Wash.2d 38, 46, 959 P.2d 1091 (1998).

Furthermore, the court stated that, “In reviewing challenged findings under RCW 34.05.570(3)(e), substantial evidence is a sufficient quantity of evidence to persuade a fair-minded person of the truth or correctness of the order. *Redmond*, 136 Wash.2d at 46, 959 P.2d 1091 (internal quotation and citation omitted). We neither weigh credibility nor substitute our judgment for that of the agency. *Nguyen v. Department of Health, Medical Quality Assurance Commission*, 99 Wash.App. 99, 101,

994 P.2d 216 (1999) (citing *U.S. West Communications, Inc. v. Wash. Utils. & Transp. Comm'n*, 134 Wash.2d 48, 61-62, 949 P.2d 1321 (1997)).  
*Id.* at 596.

The court reviews a mixed question of law and fact by reviewing the law portion de novo and the fact section under the substantial evidence test. *Tapper v. Employment Sec. Dep't.*, 122 Wn2d 397, 403, 858 P.2d 494 (1993).

## VI. ARGUMENT

### **A. The Commissioner erred in concluding that Ms. Kopp's conduct was willful and wanton disregard of the rights, title, and interest of her employer by a preponderance of substantial evidence.**

In RCW 50.01.010, it states the legislature's purpose in creating unemployment benefits for workers of the State of Washington. It provides that "...The legislature, therefore, declares that in its considered judgment the public good, and the general welfare of the citizens of this state require the enactment of this measure, under the police powers of the state, for the compulsory setting aside of unemployment reserves to be used for the benefit of persons unemployed through no fault of their own, and that this title shall be **liberally construed** for the purpose of reducing

involuntary unemployment and the suffering caused thereby to the minimum.” RCW 50.01.010 (emphasis added)

The ESD Commissioner erred in finding Ms. Kopp’s conduct to be misconduct under the statute. It is well-established that the operative principle behind the disqualification for misconduct is the fault of the employee. *ESD v. Tapper*, 122 Wn.2d 397, 407, 858 P.2d 494 (1993). This fault is statutorily defined as “misconduct”.

RCW 50.04.294(1)(a) defines misconduct as “willful or wanton disregard of the rights, title, and interest of the employer or a fellow employee.” WAC 192-150-205 defines “willful” and “wanton” in this context as follows:

(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.

(2) "Wanton" means malicious behavior showing extreme indifference to a risk, injury, or harm to another that is known or should have been known to you. It includes a failure to act when there is a duty to do so, knowing that injury could result.

The Superior Court was correct in concluding that Ms. Kopp's conduct did not constitute misconduct as her actions in light of all the circumstances did not have a willful or wanton state of mind.

There was no "willful" state of mind as there was no evidence that showed Ms. Kopp's conduct to be intentionally done, knowingly or deliberately violating or disregarding employer's interests. The evidence was contrary. No evidence in record showed that when the alleged misconduct occurred, Ms. Kopp knew she was violating the rights of her employer before she acted and chose deliberately to violate the employer's rights.

There was no "wanton" state of mind as there was neither an "extreme indifference to a risk, injury, or harm to another", nor there was a "failure to act when there is a duty". The evidence was contrary. Ms. Kopp actually showed great care in trying to help the company by putting out the smolder as soon as she saw it. (AR at 39-40)

**1. Ms. Kopp did not violate employer's policy as there was neither fire nor unsafe condition.**

The Commissioner by adopting ALJ's Finding of Fact (FOF) 4, found that Ms. Kopp encountered "fire". The ALJ further decided in FOF

5 that Ms. Kopp attempted to put out the “fire”, and in FOF 6, that Ms. Kopp did not report....that there was a “fire”. (AR at 110) Further, the Commissioner by adopting ALJ’s Conclusions of Law (COL) 4, found that Ms. Kopp violated employer rules by “failing to report a fire next to electrical transformers outside the work building that she attempted to put out, without success.” (AR at 111)

These Findings of Fact and Conclusions of Law are clearly not supported by substantial evidence as the testimony does not support this conclusion. The Appellant’s continued remarks to “fire” in its brief, is also mistaken as well. Ms. Kopp’s decision to apply water to the subject area was based on her observation of an isolated area of smolder, not fire. Ms. Kopp determined that any “unsafe condition” did not exist anymore as she believed the ember was put out by her efforts. (AR at 39-40; 106) While it is true that the company policy was to report all fire to the supervisor (AR at 101), the substantial evidence supports that there was in fact no fire of any size but a smolder.

In the Kent Fire Department’s Report, it states that “Bark smoldering. Is approximately 3 Ft x 3 Ft area.” The Fire department stayed at the property to resolve the incident for 15 minutes. The report further states that “RP had dumped water on the area and had extinguished the initial 3 x 3 area but the space between the transformers was still

smoldering.” (SAR at 4-5) There was absolutely no mention of any fire of any size in Ms. Kopp’s testimony, not even in the Fire Department’s report.

Even the shift supervisor, Mr. Jim Hugh, testified that he too saw that the ground was smoldering next to the concrete slab.” (AR at 51). He again testified that he observed the ground smoldering by the – in between the two transformers.” (AR at 51) Another employee, Robert Kirkland, testified that he too observed smoldering a three-inch spot by three feet. (AR 59-60) He further testified that no fire extinguishers were used. (AR at 60) Even the company supervisor and an employee testified that they observed smolder but does not mention any fire. Nowhere in anyone’s testimony did anyone testify that they personally observed any fire.

Furthermore, Ms. Kopp’s testimony suggests that in her mind, any “dangerous conditions” did not exist anymore by the time she was done making numerous trips to put out the smolder. (AR at 106) She further testified as “I grabbed a trash can and filled it half full with water and made numerous trips back and forth to put out the smoldering embers...I believed it was extinguished and I went back to work. (AR at 39, 41) Ms. Kopp concluded that any dangerous conditions did not exist, and therefore there was no violation of company policy. It was a reasonable conclusion

as the fire department report indicated that the new smolder was in a different area from the area that Ms. Kopp observed. (SAR 4-5)

**2. The employer's policy and its application of policy were unreasonable.**

The Commissioner found misconduct under RCW 50.04.294(2)(f), which provides as:

“(2) The following acts are considered misconduct because the acts signify a willful or wanton disregard of the rights, title, and interests of the employer or a fellow employee. These acts include, but are not limited to:

...

f. Violation of a company rule if the rule is reasonable and if the claimant knew or should have known of the existence of the rule; or

...”

In *Henson v. Employment Security Department*, 113 Wn.2d 374, 779 P.2d 715 (1989), the Court discussed the reasonableness of a company's policy. This decision was held before the statutory change in the definition of misconduct. However, the discussion of the reasonableness of a company's policy still applies here. In *Henson*, the employee had shown to work with odor of alcohol on his breath. After 6 warnings about the problem, the employer insisted that the employee

complete an alcohol treatment program. The employer even paid for half of the treatment cost. The employee completed 21 days of inpatient treatment using the company's medical leave policy. The program then recommended that the employee attend an after-care program including AA meetings. The employee refused to attend AA meetings. The employer then warned the employee that the failure to attend AA meetings will be a cause for termination. The employee still did not attend AA meetings. Then, the company put him on a 3-day suspension so the employee could reconsider his decision. The employee still refused to attend AA meetings and did not return to work after the 3-day suspension. The company waited a few more days, and then terminated the employment. One of the issues of this case was whether the company's policy of requiring the employee to attend AA meetings as part of alcohol abuse treatment was a reasonable company policy. *Id.* at 376.

The Court held that the company's rule was reasonable under the circumstances because the employer's chosen course of action was reasonable. The company, instead of terminating the employment immediately, had the employee take 21 days off of work for the treatment program. The employer also helped pay for the treatment cost. It was reasonable for the employer to expect the employee to complete the entire treatment program. *Id.* At 379. The Court further stated that "When

Henson refused to complete the program; the risk that he would come to work with alcohol on his breath was substantially increased. It was reasonable for the employer to require Henson's promise to cooperate with NTC's recommendations before allowing Henson to return to work, just as it was reasonable in the first place for the employer not to wait until a customer complained before insisting Henson get reliable, professional treatment.” *Id* at 380. The Court further held that “Given the reasonable solution chosen for Henson’s continued employment, the reasonable interests of the employer in the completion of the program and Henson’s initial agreement to enroll in the program, the employer’s rule was sufficiently reasonable.” *Id.* At 380.

Here, Ms. Kopp was terminated for violating the company policy that requires employees to “report all unsafe conditions to a supervisor immediately”, and “in the event of fire (regardless of size) immediately report it to your supervisor.” (AR at 84, 96, 101) The ALJ decided that these policies are reasonable, as they are intended to protect individuals from harm and protect the employer’s physical and economic property interests.

Comparing this case to *Henson*, the company policy that requires employees to report unsafe conditions and events of fire to a supervisor is very likely a reasonable company policy; just as in *Henson*, the company

policy was to not have employees show up at work with alcohol on the person's breath. However, any similarity stops there. What is drastically different from Ms. Kopp's termination from Mr. Henson's termination is that in *Henson's* case, the company policy attempted to correct his behavior by recommending a corrective behavior and giving multiple warnings before termination. The Court in *Henson*, stated that "the employer's **chosen course of action** was also reasonable." (emphasis added) *Henson v. Employment Security Department*, 113 Wn.2d 374, 379, 779 P.2d 715 (1989). In *Henson*, the company gave multiple warning before suggesting 21 days of alcohol treatment for the employee. Then, the company paid for half of the treatment cost. When the employee failed to follow through the treatment, the company again gave a warning that the failure will be the cause for termination. Then, the company gave a 3-day suspension. Then, the company waited a few more days before the final remedy of termination.

What happened in Ms. Kopp's case is drastically different and unreasonable. After the incident of Ms. Kopp trying to put out the smolder on her own, the company informed her to not show up for work the next day. Then, the company terminated Ms. Kopp's employment two days after the incident. (AR at 105) Here, the company's policy of terminating an employee for one incident of an obvious mistake is

certainly not reasonable. That is what's drastically different from the *Henson* case. Terminating an employee for one incident of a mistake is not a reasonable company policy, given the reasoning of the *Henson* case.

Furthermore, per Mr. Rilvesan's declaration, it stated that the company used this tactic by "using predatory behavior to terminate certain employees, due to having to pay severance pay at one week per year, older employees were key targets, many did get fired or took voluntary layoffs." It further stated that the company was financially struggling and laid off 30% of its workforce, and 50% of the salary people, all during the same period Ms. Kopp was fired. (CP at 109)

In Ms. Lane's declaration, it stated that three layoffs occurred in 2012 alone, each time 20 -30 employee, and at least 4 employees were terminated in 2012 alone. It states that the punishment of being terminated does not seem to fit the infraction. (CP at 108)

In another words, the company policy of terminating an employee for one incident of violation is not reasonable under the circumstances. These two declarations are circumstantial evidences to support that the company was trying to protect its financial interests by terminating and downsizing employees because of its financial difficulty, but had nothing to do with Ms. Kopp's supposed violations of company policy.

The record demonstrates there is another hint that the company acted unreasonably in Ms. Kopp's case. The company policy indicates that repeated violations are necessary for termination as stated in the policy 6.8.1 "Employee shall not engage in willful, deliberate or continued violation of or disregard of safety rules." (AR at 96) The Company, in drafting the policy, probably intended to distinguish willful, deliberate, or continued violations from one incident of mistake or poor judgment. Ms. Kopp certainly did not act willfully, or deliberately, nor continued to violate company policy. Ms. Kopp upon discovering smoldering bark, tried to put it out to protect the company's interests. Ms. Kopp's action does not signify a willful or wanton disregard of the rights, title, and interests of the employer or a fellow employee as the statute defines in RCW 50.04.294(2).

In reviewing the Commissioner's application of RCW 50.04.294 de novo, this Court should hold that the company policy and its chosen course of action were not reasonable under the circumstances, and the Commissioner's Findings of Fact and Conclusions of Law that there was "fire" and "unsafe conditions" was not supported by substantial evidence.

**B. The Commissioner erred in not reviewing Ms. Kopp's conduct under RCW 50.04.294(3) when in fact her conduct was at most inadvertence or ordinary negligence in an isolated instance or good faith error in judgment or discretion.**

Neither ALJ nor the Commissioner applied RCW 50.04.294(3) to Ms. Kopp's case. RCW 50.01.010 requires RCW 50.04.294 to be liberally construed to reduce involuntary unemployment.

RCW 50.04.294(3) provides:

- (3) "Misconduct" does not include:
  - (a) Inefficiency, unsatisfactory conduct, or failure to perform well as the result of inability or incapacity;
  - (b) Inadvertence or ordinary negligence in isolated instances; or
  - (c) Good faith errors in judgment or discretion.

The key term "misconduct" has been defined in *Willard v. Employment Sec. Dep't*, 10 Wash.App. 437, 444, 517 P.2d 973 (1974), quoting *Boynton Cab Co. v. Neubeck*, 237 Wis. 249, 259, 296 N.W. 636, 640 (1941), as: "(T)he intended meaning of the term "misconduct," ... is limited to conduct evidencing such willful or wanton disregard of an employer's interests as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee, or in carelessness or negligence of such degree or recurrence as

to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to his employer. On the other hand mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good-faith errors in judgment or discretion are not to be deemed "misconduct" within the meaning of the statute." This case was decided before the statutory change in RCW 50.24.294 in that the statute now defines "misconduct" more specifically. However, the same language from this court is used in the new statute, laying out specific limitations to what constitutes misconduct. RCW 50.04.294 emphasizes "willful or wanton disregard of the rights, title, and interests of the employer or a fellow employee." It ensures through RCW 50.04.294(3) that "misconduct does not include good faith error in judgment or discretion" or "inadvertence or ordinary negligence in isolated instances."

**1. Ms. Kopp's conduct was at most a good faith error of judgment or discretion under RCW 50.04.294(3)(c).**

In *Wilson v. Employment Security Department*, 87 Wn. App. 197, 940 P.2d 269 (1997), a jewelry store manager lost a loose diamond two times by not logging in the diamonds immediately and putting them in a safe. The Court held that in those incidents, "Behavior that is mere

incompetence, inefficiency, erroneous judgment, or ordinary negligence does not constitute misconduct for purposes of denying unemployment compensation.” *Id.* at 202, quoting *Tapper v. Employment Security Department*, 122 Wash.2d at 409, 858 P.2d 494 (1993). The Court further held that “judging Wilson's conduct under these principles, we find no misconduct. There is no evidence in the record to show that Wilson acted with a deliberate intent to violate his employer's policy or in willful disregard of his employer's interest.” *Id.* at 202. The court emphasized that there was no willful disregard of the employer’s interests.

Here, Ms. Kopp admitted in her testimony that “It was a poor decision, I admit, by not notifying the supervisor.” (AR at 41) She further testified that “I grabbed a trash can and filled it half full with water and made numerous trips back and forth to put out the smoldering embers... I thought it [fire extinguisher] would be an overkill... I believed it was extinguished and I went back to work.” (AR at 39-40)

The cause of the smolder was undetermined but the shift supervisor suspected the cause to be a cigarette butt. (AR at 62; SAR at 5) This was certainly not caused by Ms. Kopp. She testified that “I worked in this industry for over 30 years and I have a clean record. I made a poor decision by not reporting this to the supervisor and if I would have thought I was jeopardizing my job, I would have.” (AR at 68) Ms. Kopp further

stated in her statement to the Employment Security Department that “At no time did I feel my life or anyone else’s or the facility was in jeopardy... I did not imagine that I was jeopardizing my job. Granted I made poor decisions by not using a fire extinguisher or reporting the incident immediately but I do not feel that termination should have been the end result.” (AR at 106)

In liberally construing the definition of “misconduct” for Ms. Kopp, substantial evidence supports that her action did not amount to misconduct, but rather a good faith error in judgment, the only fair and reasonable conclusion. Also, knowing that there were no repeated violations nor willful or wanton disregard for the employer’s interests, the substantial evidence supports that this was at most a good faith error in judgment by Ms. Kopp.

2. **Alternatively, Ms. Kopp’s conduct was inadvertence or ordinary negligence in isolated instances under RCW 50.04.294(3)(b).**

WAC 192-150-205 again provides guidance to determining whether conduct was willful or wanton disregard of employer’s interests or an inadvertence or ordinary negligence in isolated instances. It provides that “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”; and that “wanton” means “malicious behavior showing extreme indifference to a risk, injury, or harm to another that is known or should have been known to you. It includes a failure to act when there is a duty to do so, knowing that injury could result.”

If Ms. Kopp failed to act upon seeing the smolder and ignored the situation entirely, then, she would agree that it was a willful or wanton disregard for the rights, title, and interests of employer. However, that was not the case here. Ms. Kopp tried very hard to take care of the situation with a co-worker, but skipped her mind to inform her supervisor. She went back and forth several times from the building to the site to try to put out the smolder. Her actions were far from malicious behavior showing extreme indifference or deliberately or knowingly disregarding the employer’s interests.

The Appellant cites *Griffith v. Department of Employment Security*, 163 Wn.App. 1, 259 P.3d 1111 (2011), to argue that whether the employee understood he was behaving offensively was ultimately irrelevant. This *Griffith* case was decided in the Court of Appeals for Division 3 and is not authoritative in this court. However, the case itself may be helpful to this court to determine the definition of misconduct. The court in *Griffith* stated that “We believe he 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. In *Griffith*, the court determined that “Mr. Griffith harmed his employer's interest by offending a customer and getting himself banned from a second delivery location” *Id.* At 10. The facts behind *Griffith* are far different from Ms. Kopp’s facts. Mr. Griffith had a previous warning about his behavior towards a customer, and the incident that resulted in termination was a third known incident towards a customer. The court then decided that Mr. Griffith should have known that his behavior was harming the employer’s interests. In Ms. Kopp’s situation, there were no repeated incidents, and her action does not rise to the level of Mr. Griffith’s action where the court determined there was intentional behavior in his repeated offences. Certainly, Ms. Kopp’s actions were at most inadvertence or ordinary negligence in one isolated incident.

3. **RCW 50.04.294(2) lists specific acts that constitute misconduct, but the exceptions laid in RCW 50.04.294(3) should still apply.**

The Appellant argues that the limiting provisions of RCW 50.04.294(3) do not apply here. However, the statute does not so provide, nor does it even so imply. No where in RCW 50.04.294 indicate that exceptions laid in RCW 50.04.294(3) does not apply to misconducts listed in subsection (2). The Respondent seems to state that misconducts listed

in subsection (2) are “misconducts per se” and therefore exceptions do not apply. Respondent cites *Daniels v. Employment Security Department*, 168 Wn.App. 721, 281 P.3d 310 (2012). In *Daniels*, Mr. Daniels was terminated for repeated tardiness and showing up to work without uniform in violation of company policy. The court stated that “certain types of conduct are misconduct per se. Among these are " [r]epeated inexcusable tardiness following warnings by the employer; " and " [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." However, the court immediately cites the statute RCW 50.04.294(3) in the footnote, where it states “Misconduct does not include " (a) Inefficiency, unsatisfactory conduct, or failure to perform well as the result of inability or incapacity; (b) Inadvertence or ordinary negligence in isolated instances; or (c) Good faith errors in judgment or discretion." RCW 50.04.294(3). Thus, the *Daniels* Court concluded that in all cases, the limitations laid in subsection (3) do apply, even for those “per se”, subsection (2) cases.

**C. The Superior Court correctly admitted new evidence under RCW 34.05.562, as it relates to the validity of the agency action at the time, and is essential to decide the disputed issue of material facts in adjudication.**

RCW 34.05.562 governs the standard to allow new evidence, and it states as follows:

- (1) The court may receive evidence in addition to that contained in the agency record for judicial review, only if it relates to the validity of the agency action at the time it was taken and is needed to decide disputed issues regarding:
  - (a) Improper constitution as a decision-making body or grounds for disqualification of those taking the agency action;
  - (b) Unlawfulness of procedure or of decision-making process; or
  - (c) Material facts in rule making, brief adjudications, or other proceedings not required to be determined on the agency record.

RCW 34.05.566(7) further provides that. “(7) The court may require or permit subsequent corrections or additions to the record.”

In *U S West communications, Inc. v. Washington Utilities and Transportation Commission*, 134 Wn.2d 48, 73, 949 P.2d 1321 (1997), the court applied RCW 34.05.562 in its reasoning. In this case, the court was reviewing certain standards imposed by the state agency. The Court granted the motion to strike a declaration from the record as “All the alleged events described in Mr. Easton's declaration took place in March and April 1996, after the Commission records in the depreciation case and in the rate case were closed. The declarations do not include any evidence which relates to the validity of the Commission's action at the time it was

taken.” *Id.* at 73. The decision was based on the fact that the additional evidence related to events that occurred after the agency action and therefore was not relevant to the agency’s action at the time.

In *Rios v. Washington Department of Labor and Industries*, 145 Wn.2d 483, 39 P.3d 961 (2002), this court also interpreted RCW 34.05.562 in supplementing the record with additional evidence. Here at issue in this case was whether the Court of Appeals properly concluded that the Washington Department of Labor and Industries (the Department) had violated a statutory duty to promulgate a rule requiring mandatory blood testing for agricultural pesticide handlers. *Id.* At 486. The Court stated that “...RCW 34.05.514, states how and when the agency is to respond, and states that the court may hear evidence, pursuant to RCW 34.05.562, on material issues of fact.” *Id.* at 514-15. (emphasis added)

Here, the additional evidence shows the Employer’s motive in terminating Ms. Kopp instead of other sanctions or suspensions because the Employer was already laying people off to downsize the company’s workforce. The Employer’s actions in 2012 are very relevant to the circumstances behind Ms. Kopp’s termination in 2012. Termination financially benefits the Company rather than layoffs. As in *US West Communication*, the additional evidence is related to the Company’s action and motive at the time of the termination, and therefore the

Superior Court was correct in admitting additional witnesses' declarations into records.

Additionally, just as in *Rios*, this Court should hear new evidence because it is relating to the material issues of fact. The material issue of fact is whether the Company policy and its implementation against Ms. Kopp were reasonable. In reviewing the Company's policy's reasonableness, it is essential to hear the circumstances around the Company's policies, and its motive in applying certain policy on certain targeted employees.

**D. The award of reasonable attorney's fees and costs was proper under RCW 50.32.160.**

RCW 50.32.160 provides that "It shall be unlawful for any attorney engaged in any appeal to the courts on behalf of an individual involving the individual's application for initial determination, or claim for waiting period credit, or 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..."

As the Superior Court correctly reversed the decision of the Commissioner, finding error of law, the statute allows for Ms. Kopp to be paid reasonable attorney's fees and costs, for the services performed in connection with the appeal taken hereto. Therefore, the award of judgment for costs and reasonable attorney's fees were proper.

**E. Respondent requests for reasonable attorney's fees and expenses under RAP 18.1(b) and RCW 50.32.160.**

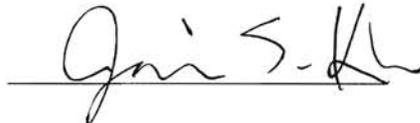
Pursuant to RAP 18.1 and RCW 50.32.160 as previously discussed, Ms. Kopp requests that, should she prevail, the appellate court award her reasonable attorney's fees and costs incurred on this appeal.

**VII. CONCLUSION**

For the foregoing reasons, the Respondent, Susan Kopp respectfully requests that this Court confirm the Superior Court's decision, setting aside the Commissioner's decision, resulting in allowance of rightful unemployment benefits for Respondent.

Respectfully submitted on 2/14/14.

Hawkes Law Firm, P.S.



Jamie S. Kim WSBA #34983  
Attorney for Respondent

**DECLARATION OF SERVICE**

I, Jamie S. Kim, declare as follows:

1. That I am a citizen of the Unites State of America, a resident of the State of Washington, over the age of eighteen (18) years, and not a party to the above-entitled action.
2. That on the 14<sup>th</sup> day of February, 2014, I caused to be served a copy of Respondent Brief on the Appellant of record on the below stated date as follows:

US mail, postage prepaid and email

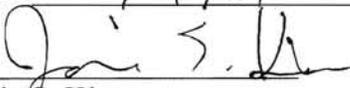
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One Union Square  
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Seattle, WA 98101-1176

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated 2/14/14 at Shoreline, Washington.

  
\_\_\_\_\_  
Jamie S. Kim