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DIVISION ONE

DEC 17 2013

NO. 70738-8

COURT OF APPEALS FOR DIVISION I

STATE OF WASHINGTON

JEFF KIRBY and PUGET SOUND SECURITY PATROL, INC.
Appellants-Petitioners,

v.

STATE OF WASHINGTON DEPARTMENT OF EMPLOYMENT SECURITY,
Respondent.

BRIEF OF APPELLANT

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I. Introduction

Claimant Sarah Black was employed as a security guard by Puget Sound Security Patrol, and was assigned to guard a client that served and hosted law enforcement. While apparently off duty, she wrote to her client and others that, when law enforcement officers are murdered in the line of duty, they get what they deserve.

When confronted, Ms. Black insisted that she had the right to say anything she wanted. Ms. Black was terminated. The department awarded unemployment benefits. The superior court called this comment "outrageous" and indefensible, but it affirmed unemployment benefits. [1]

The Initial Order (attached as **Exhibit 1**) found that Ms. Black (1) did not harm or (2) intend to harm her employer, and that (3) the writing was not work-related. However, the key findings were unsupported by the evidence and applied the wrong legal standards. First, the finding that she did not harm the employer's intangible interests is unsupported by the evidence, and the legal standard is met if she merely

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[1] The superior court asked if it was clear that she knew that one of her Facebook friends was a TPU employee, and "knowing who she was talking to, she knew or should have known it would get back," then "I think I can reverse." VRP 29. The parties submitted the attached Joint Statement of Evidence post-hearing (**Exhibit 2**). However, the superior court misunderstood the law by saying that it was not able to find facts if the ALJ was silent on a fact, VRP 29-30, so it affirmed benefits.

created the potential for such harm. It actually found that the writing had the potential to harm the employer, but it said there was not harm because the employer fired the claimant! Second, the finding that she did not intend for her client to see the posting conflicts with other findings and is unsupported by the record. Also, the correct legal standard is met if she showed carelessness or negligence to such a degree as to substantially disregard the employer's interests. This standard was not considered. Third, the finding that the writing was not work-related is erroneous, because the writing harmed or had the potential to harm her employer's intangible interests. Alternatively, the employer was prevented from cross-examining the claimant on foundation for her motivation, her opinions, and her interest in the outcome of the hearing.

Of the challenged findings, we expect the department will either concede error or choose not to brief all but one of the issues. Once the facts are consistent with the record and the law applied correctly, this court should find misconduct and reverse the decision awarding benefits. In the alternative, it should remand to cure the numerous procedural and evidentiary defects in the administrative hearing.

II. Assignments of Error

1. The Employment Security Department erred in awarding benefits to claimant Sarah Black by finding that she did not commit misconduct as defined in RCW 50.04.294.
2. The Employment Security Department erred in concluding that Ms. Black's conduct was not work-related. (Concl. 10).
3. The Employment Security Department erred in considering claimant Sarah Black's motivations for acting as she did.
4. The Employment Security Department erred in concluding that the claimant did not know the employer's rules encompassed social media and off-duty conduct.
5. The Employment Security Department's findings of fact that claimant Sarah Black did not intend her actions to be communicated to her employer's client (Finding 3, 5, 13), and did not cause harm to the employer (Finding 13, Concl. 10), and any harm was caused by the employer (Finding 13) are unsupported by the evidence.
6. The Employment Security Department deprived the petitioner of its due process right to cross-examine the claimant on issues central to the Department's adjudication of the matter, which implicates several Findings of Fact and claimant's credibility.

III. Issues Pertaining to Assignment of Error

1. Whether an employee commits disqualifying misconduct under RCW 50.04.294 when she insults or offends her employer's clients and guests, where the client is in the audience, where the employer has clearly communicated its expectations of professionalism, and where the writing harms or has the potential to harm the employer's intangible interests?
2. Whether the department erred in considering the claimant's motivations and intent in posting the offending message where motive is not relevant and the writing was negligent to such degree as to substantially disregard her employer's interests?
3. Whether the department erred in concluding that the claimant's actions were not work-related when it caused harm or possible harm to the employer's intangible interests because the writing related to the client's guests, harmed the employer's relationship with its client and law enforcement, and harmed employee morale?
4. Whether the claimant was or should have been aware that her employer's professionalism policy and state training standards apply to social media?
5. Whether the finding of fact that the claimant did not intend for the client to see the incendiary posting is material and supported when it is

undisputed that she intentionally made the posting, that she affirmatively chose who could see the posting, and that she chose to allow a client's employee to see the posting?

6. Whether firing an employee who offends a client prevents a finding of harm to the employer?
7. Whether the ALJ committed reversible error when it denied the petitioner the right to cross-examine the claimant on issues of her intent in making the incendiary posting, her knowledge and understanding of Facebook's security settings, and her interest in the outcome of the hearing?

IV. Statement of the Case

A. Security guards work closely with law enforcement.

Puget Sound Security Patrol is a local, small business providing private security. Security firms supplement law enforcement. They relieve people from anxiety and fear of lost or damaged property, injury, and other threats. The role of private security involves communicating and cooperating with law enforcement.

Because the job of a security guard overlaps with that of law enforcement, and because the nature of the job may render a security guard or her client in need of help, it is important for a security company

to have good relations with law enforcement. A security guard must form positive relationships with law enforcement, and be their eyes and ears.[2]

The Tacoma Public Utilities[3] is Puget Sound Security's client. The building occupied by Tacoma Power housed the human resources department for the city of Tacoma, which served local law enforcement. CR 52. Law enforcement frequents the site as the invited guest of Puget Sound Security's client.

Puget Sound Security extensively trains its security guards on principles of professionalism and respect to the public. CR 103. It trains and provides written rules and expectations to emphasize these principles. Its rules include being professional and courteous, avoiding insensitive or negative communications to clients' employees, avoiding impairing the relationship between Puget Sound Security and its clients, and being courteous to all client representatives, employees, visitors, customers, and the public. CR 211-216. In addition, because of the unique nature of Tacoma Power, additional ethical rules are in place for guards stationed

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[2] This is so central to the position of security guard that it is one of the six topics taught to all security guards during pre-assignment training, as well as post-assignment and refresher training. WAC 308-18-305(e)(iii). *See also* CR 302-03. Citations to the Commissioner's Record are abbreviated as "CR."

[3] Tacoma Public Utilities d/b/a Tacoma Power may be referred to as TPU, and mistakenly as in the record as TCU.

there. For example, "All words and conduct that [are] harassing, rude, discourteous, discriminatory, negative, uncalled-for, overly aggressive, abusive or unprofessional towards *anyone* is strictly prohibited at the TPU worksites." CR 208. These rules are construed in favor of accepted canons of decency and professionalism. "The sure standard of conduct to follow is [not to] say or do *anything* that would or could be perceived to violate this Ethical Directive, or which doesn't contribute positively to the TPU security mission at the particular site you are assigned." CR 209. Ms. Black was informed of and acknowledged these policies. CR 307-08 (FOF 9-11); CR 135 (acknowledging rule to be courteous and professional applied to police officers), 231.

B. Ms. Black offended her client by disparaging its guests.

On February 23, 2012, in a well-publicized tragedy, a Washington State Patrol trooper was shot and killed during a traffic stop. CR 278. In response, Ms. Black wrote the following comment, stating that the trooper deserved it:

> u kno wat, I do not give a fuck about a police officer that got shot, if they quit fuckin with ppl, ppl prolly quit shootin em all the goddamn time……karmas a bitch.

CR 306 (FOF 2).

In the words of the superior court judge, "I think as a matter of law, these remarks are despicable." VRP 5. The court went on to say that the remarks "cannot be supported in any reasonable context," and "I find that – the remarks horrific," *Id.* and "outrageous." VRP 29. The department agrees that the statement was "offensive and despicable." VRP 15.

The comment was posted on Facebook. CR 306 (FOF 4).[4] One of her Facebook friends was an employee of Tacoma Public Utilities. *Id.*; CR 135, 148, 153-54, 155. That employee forwarded the posting as a matter of some concern to the TPU Customer Services, who brought it to the attention of Puget Sound Security Patrol. CR 306 (FOF 4); CR 233, 245 (client forwarding "a statement from Facebook, from whom I believe works as a security at your facility. It is extremely concerning.") The client was also "very concerned that someone with such disregard for" life, or "respect for law enforcement officers would be employed here," CR 61, and "was horrified that [the employer] had an employee that would say things like that about police officers." CR 59-60. Ms. Black's

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[4] An excerpt of Ms. Black's cross examination at CR 135:

Q: Being courteous and professional applied not just to the client, but that client's guests?

A: Yeah.

Q: Some of TPU's guests included police officers?

A: Yes.

Q: When you made the post on Facebook, that was intentional, right?

A: Yes.

supervisor was "shocked, embarrassed and – and disgusted." CR 158. Her co-workers felt similarly. *Id.* The supervisor testified, "Everybody was shocked, but there were some that were more visibly … disgusted and embarrassed by it." CR 161.

C. Ms. Black meant what she said.

The Initial Order found that Ms. Black wrote her statement because she "thought another shooting was more important." (FOF 3). The finding relies exclusively on the claimant's testimony. When asked why she made the post in the first place, she testified, "It was my personal feeling upon reading the news that day and I was just saddened by the fact that something like that would get more attention than other things that I felt were important." CR 132. In light of all the evidence, no reasonable trier of fact could find that her motivation for the initial post was sadness about the other shooting.

Ms. Black had been stopped by law enforcement, including being cited for driving under the influence. CR 146. She did not think she should have been stopped. CR 146. She testified, "I am continually harassed by police officers all the time." CR 144.

When asked if she meant to communicate that if the police would stop acting improperly, people would stop shooting them, Ms. Black testified, "(Inaudible) if they would keep (sic) harassing people for no reason, they

would probably not get shot at so much." CR 147. She did not answer whether the comment could be read as intended. CR 148. However, she agreed that the phrase, "Karma is a bitch," was a point of emphasis. CR 147-48. Instead of basing findings on this evidence, finding three was, "She did not think it was fair that the shooting of the officer received a lot of press coverage, while the shooting of a young girl did not." (FOF 3). This finding was apparently relied upon to deny the claimant's intent to harm her employer.

Ms. Black was confronted by her supervisor. CR 306-07 (FOF 6-7). She admitted making the statement, *id.*, and already knew which of her friends forwarded the comment. CR 148, 246. The employer reminded her that company work rules require professionalism and courtesy, and that her job required a good working relationship with law enforcement. CR 308. Ms. Black expressed neither regret nor remorse for her statement. CR 158. Rather than expressing regret or remorse, rather than expressing that she did not intend to harm her employer or offend the client, she was unapologetic. CR 306 (FOF 6). She was asked by her own supervisor if she knew that her supervisor, the CEO, and the owner of the company were all retired or former police officers. CR 246. Rather than express regret or apologize, she responded that she could not be fired for her opinions. *Id.* She testified, "Q: Did you say anything with regard to your

right to post things on Facebook [to your supervisor]? A: … I said, "I have the right to say whatever I want." CR 149; *see also* CR 157 (claimant insisted on right to free speech), 158 (no assurances it would not happen again). Ms. Black was terminated.

D. The employer was prohibited from presenting its case.

The claimant applied for and was awarded unemployment benefits by the Employment Security Department. CR 187. The employer appealed to the Office of Administrative Hearings, which affirmed the decision. CR 311. The Administrative Law Judge made a number of rulings that limited the employer's ability to present its case. The Commissioner adopted the ALJ's Initial Order. CR 324-25. A correct application of the law regarding misconduct and the rules of evidence would have resulted in the denial of benefits.

1. The judge limited cross-examination.

The Administrative Law Judge prevented cross-examination of the claimant on two central issues: her state of mind about the statement, and her foundation to testify about privacy settings.

First, the ALJ prevented cross-examination on the claimant's understanding of and intention regarding her offending statement, after allowing the claimant to explain the circumstances for making the statement that included a comparison to a different news story neither

offered as evidence nor previously mentioned by the claimant. CR 142. The Initial Order adopted the uncorroborated testimony on her state of mind, which conflicted with her own testimony, the employer's testimony, and logic, while protecting the claimant from cross examination. CR 306 (FOF 3).

The ALJ found as fact that the claimant "did not think it was fair that the shooting of the officer received a lot of press coverage, while the shooting of a young girl at school did not." CR 306 (FOF 3). This finding is unsupportable. The claimant testified to having been "continually harassed" by law enforcement, and had been ticketed for a DUI. CR 144. She also agrees that she meant what she said. CR 147. The comment demonstrates animus toward law enforcement and its actions in "fuckin with ppl" and does not refer in any sense to a school shooting. It is absurd and offensive to say that the lack of media coverage about a tragic death of a child was the motivation to say that murdered police officers get what they deserve. The judge adopted the claimant's testimony about the content of the newspaper as well as her state of mind in writing the offending post and deemed it relevant,[5] but restricted cross-examination

[5] Puget Sound Security takes the position that Ms. Black's subjective purpose or intent in insulting its client is not relevant to the issue of whether she violated reasonable expectations, carelessly or negligently

regarding the statement and the exploration of the newspaper articles. This court should strike that finding.

2. The ALJ prevented the employer from testing the claimant's knowledge of Facebook privacy settings.

Over objection, the claimant was allowed to testify to her opinion that her Facebook privacy setting is currently set to "just friends." CR 131. She was asked about the posting and her privacy settings. *Id.* Ms. Black said the post was still on her Facebook account, but she could not find it. CR 136.

In Finding of Fact No. 4, the judge found that the "claimant had set her Facebook privacy level so that her blog postings were only accessible to the approximately 100 people designated as her friends on Facebook." CR 306 (FOF 4). The claimant had exclusive control, yet did not offer evidence of her privacy settings, such as a screenshot or other document, to which she has exclusive access. In her testimony, she stated her opinion in a conclusory fashion without regard to a specific time in which the privacy settings were established or specifically how. CR 131. Yet, on cross examination she was unable to answer rudimentary questions about either Facebook or the Internet that someone who could reliably inform

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harmed the employer's interests, or violated a reasonable company rule. But if it is relevant, we should have the right to cross examine her on it and have the decision maker find facts that are supported by the evidence.

the tribunal as to privacy settings and their effect would have been able to answer. CR 131; CR 136-37. She also agreed that she is not an expert on Facebook, (CR 136), and her lawyer objected that she did not have foundation to answer. *Id.*; CR 140. The ALJ cut off questions about the claimant's understanding of Facebook's privacy settings. CR 141. She was asked, CR 136-137, about privacy settings and the judge sustained an objection to foundation; she didn't know enough to answer:

> Q: ... You are not an expert about Facebook?
> A: [inaudible] No.
> Q: Let me ask you about the account settings. Facebook account settings and their policies have changed over the years, right?
> A: I do not know.
> ***
> Q: So as far as you know from the beginning of time of Facebook, they have only had one account set and privacy setting?
> Mr. Malden [attorney for Ms. Black]: Objection. No foundation. Irrelevance.
> [sustained]
> ***
> Q: You could have saved a screen shot of privacy settings?
> A: I don't know how to do that.
> ***
> Q: WWW, do you know what that stands for?
> A: No.
> ***
> Q: So when you put things on the Internet, unless there is a log-in or password or other privacy setting, it broadcasts worldwide?
>
> [objections as to calls for speculation, foundation and relevance sustained]
>
> Q: Can't you open a browser and send the entire web page as an e-mail?

A: I don't know how to do that. [CR 151]

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The claimant was asked what was at stake for her at the hearing. CR 152. The ALJ sustained an objection on relevance and implied that no questions on that area would be permitted. *Id.*

The claimant was allowed to testify as to the contents of writings without producing the writings. Producing the writings would avoid reliance on hearsay, corroborate or contradict her oral testimony, and provide additional context. For instance, the judge found that the posts did not reference the employer or her job, and that the posting was made while off-duty and at home. Regardless of whether that particular post mentioned her employment, a Facebook profile may mention one's employer and may reveal not only the employer but also the client location. Producing the postings and profile, which are in the control of the claimant and not available to the employer, would clarify whether or not the employer or job was referenced,[6] would indicate the date and

[6] The client was in the audience of her statement. When she made the statement to the TPU employee, she violated the reasonable and necessary policies established by her employer through instruction and training. *See* CR 208-225. Also, while the quotation did not mention the employer or client, the audience knew who her employer was, knew who the client was, and knew what her job was. We know this because the client-employee forwarded the post within his own employer, TPU, and TPU knew of the connection. CR 306 (FOF 4).

potentially the time of the posting, and may further indicate whether the posting was from the mobile device that the claimant admits to owning. CR 152. The ALJ prohibited cross-examination of the claimant and did not acknowledge the possibility of any negative inference from the fact that the claimant was in exclusive control of the documents and failed to produce them. The ALJ relied exclusively on self-interested hearsay to form the basis for her opinion.

E. The ALJ's findings of fact are self-contradictory and unsupported by evidence.

In Finding of Fact No. 4, the judge correctly found that "a Tacoma Public Utilities employee... was one of [Ms. Black's] Facebook friends," and that her posting was accessible to her Facebook friends. CR 306 (FOF 4). The claimant intentionally made the posting. CR 135. The claimant knew this TPU employee was one of her friends on Facebook, CR 131, 306 (FOF 4), CR 246. These facts are uncontroverted and contradict the judge's Finding of Fact No. 5 states the claimant "did not intend to communicate her opinion" to TPU. CR 306 (FOF 5). Similarly, the last sentence of Finding of Fact No. 13 states, "The claimant did not tell her coworkers, TPU employees, or anyone else about her blog post." CR 308. This finding is contradicted by Finding of Fact No. 4.

Ms. Black made her comment to a TPU employee, her client, who forwarded it within the organization. CR 306 (FOF 4). The client's organization relayed it to the employer. *Id.* This caused damage to the employer's interests. Conduct is connected with one's work if it either results in harm or creates the potential for harm to the employer's interests. WAC 192-150-200(2). Those interests may be tangible or intangible; for example, damage to the employer's reputation or a negative impact on employee morale. *Id.* Damage in this case was to the employer/client relationship and potential damage to the employer/law enforcement relationship. It also hurt morale. If the ALJ had correctly applied the law, benefits would have been denied.

F. Finding of Fact 13 and Conclusion 10 are clearly erroneous.

According to the Initial Order, the employer can only prove disqualifying misconduct by not firing the employee. The ALJ found, "There was no evidence that the employer's relationship with its client, TPU, was specifically harmed by the claimant's posting, since the employer took the immediate action of discharging the claimant." CR 308 (FOF 13). This principle is repeated in Conclusion of Law 10 (CR 310). This is inconsistent with the law and capricious circular reasoning. It is also not supported by the evidence. The statement offended the client,

hurt employee morale, and created the possibility of hurting other tangible and intangible interests.

The department argues that it is only work-related misconduct if it "affect[s] her ability to perform her job duties." VRP 17-18. That is also not the law.

Once the employer confirmed Ms. Black's actions, it acted swiftly to take corrective action. It fired the claimant for the harm she had already caused in violating the employer's reasonable standards and impairing the business relationship with the client. It was necessary to act to limit further damage to the business relationship, to the employer's reputation, to public relations with the police, and to staff morale.

Finding of Fact No. 13 goes on: "To the extent that harm occurred because employees of both companies and others learned about the blog posting,[7] any such harm was caused by the employer's actions in disclosing that information to its employees and possibly others." CR 308

[7] The ALJ consistently referred to the Facebook post as a "blog." It is not. Blogs are a personal website or web page on which an individual records opinions, links to other sites, etc. on a regular basis; Facebook is a social media site where profiles include the option of indicating one's employer. Other updates or pictures (by the person or others), "likes," "check-ins," or fellow friends may indicate who the person's employer is. To characterize the post as a blog and ignore the context of the Facebook profile and all other information in the profile is to misunderstand Facebook.

(FOF 13). This finding is not supported by the evidence. The audience of her statement included her "friend," a TPU employee, who forwarded the post to others at TPU. CR 306 (FOF 4); *see e.g.,* CR 245. TPU forwarded the comment to the employer, Puget Sound Security. *Id.* In other words, Puget Sound Security was the last party to be notified of the post. Damage to the employer and its relationship with its client was already done at this point.[8] Her supervisor testified that she was "shocked, embarrassed and – and disgusted" when she learned that Ms. Black made the statement. CR 158. The other guards felt similarly. *Id.* She testified, "Everybody was shocked, but there were some that were more visibly, you know, disgusted and embarrassed by it." CR 161. If the ALJ had correctly applied the law, benefits would have been denied.

Ms. Black reviewed and agreed to work policies[9] and rules requiring respect and professionalism, especially as it regarded Puget Sound Security's clients and their patrons. CR 208-225. Her posting on

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[8] "Q: Do you think someone could read your post in light of the context of the time as your saying the officer who got shot deserved it?" Objections to speculation and relevance sustained at CR 148.

[9] The ALJ concluded that the lack of a specific social media policy, and the subsequent instruction provided to remaining guards regarding this incident, demonstrate there was no rule in place prohibiting this conduct. This argument overlooks the fact that professionalism and courtesy extend to conduct performed in any medium, including on Facebook. It also decides that training employees on company policy using specific incidents is counterproductive.

Facebook, which may have been open to the World Wide Web, and which was undisputedly visible to a TPU employee, expressed a negative, demeaning, and disrespectful opinion of her employer's clients. In addition, building positive relationships with law enforcement is an integral part of the job of a security officer. A security guard must form positive relationships with law enforcement, and be their eyes and ears. CR 108-110.

Ms. Black's actions alienated law enforcement. Her job was to guard law enforcement as guests of her client, and to contact law enforcement in case of an emergency; her job depended on positive working relationships with police. She was bound by a reasonable agreement with her employer to refrain from harming its business, even while off-duty. Nevertheless, she deliberately disparaged her client's guests directly to her client, and Puget Sound Security had to take action to mitigate the damage. In other words, her actions had a nexus with her employment; they caused damage to her employer; and they violated her employer's policy that was in place specifically to protect its professional interest. The decision relies upon erroneous findings and conclusions.

G. Conclusion of Law No. 10 is not supported by the record.

Conclusion of Law 10 contains additional errors. This paragraph states, "There is no evidence of a nexus between the claimant's blog post

and her work." CR 310. The evidence is that law enforcement officers used the TPU building for their human resources department, that law enforcement officers were the target of the offending comment, and that the post was made visible to at least one TPU employee who knew the claimant/speaker was an employee of Puget Sound Security assigned to TPU. CR 52. Also, security guards posted at TPU must call law enforcement in the course of their duties, in case of emergency. The client relies on the security guard to do so, and the security guard may also rely on law enforcement for her own safety. The employer therefore necessarily requires that its employees maintain positive relations with law enforcement, because failure to do so could put the client's security at risk.

It is not a requirement of the law, as the judge erroneously states, that the communication refer "to her employer, to TPU, to her job, or to her position as a security officer," if all of that information is known to the audience or if the communication damages the employer. CR 306 (FOF 5). In cases such as this, context is important.

Whether a statement is so offensive as to constitute misconduct is largely dependent on the context in which the statement is made, and on the knowledge available to the audience. In this case, the communication was intentionally made, and knowingly visible to an employee of TPU. That employee knew that law enforcement personnel both used its facility

for administrative tasks, and were relied upon by the facility in case of emergency. Indeed, it was an essential function of Ms. Black's job to contact law enforcement for assistance in case of emergency. Ms. Black's post would tend to jeopardize the security of the company whose security is Ms. Black's responsibility. In the superior court's words, one of her Facebook friends could have gone to the newspaper with the quote and it could have been printed: "Employee – you know, security guard advocates murder of police officers," that she "not only condones it, she's advocating it," to "Go out and kill cops." VRP 20-21. The department argues that she would still get benefits. VRP 21. This is a violation of the employer's reasonable expectations of its employees and of its rules and policies in effect.

Conclusion of Law 10 goes on to state, "The fact that the employer deemed it necessary to tell the claimant's coworkers after she was discharged that nothing they said on Facebook should be considered private shows that this was not a rule or construction that had been contracted for with employees prior to her discharge." CR 310. The evidence is that the employer relayed the offending comment to its other guards assigned at TPU as a lesson in interpreting its rules of professionalism and the importance of its client relations and working relationship with law enforcement. *See* CR 88-89. The finding of fact

suggests a lack of understanding about how an employer may properly train its employees and is out of touch with community standards; it is arbitrary and capricious.

Conclusion of Law 10 concludes by stating, "The employer made numerous arguments for why the claimant's behavior impliedly violated its [*sic*] general policies, but implied behavior is not the standard that must be applied." CR 310. The rule prohibited unprofessionalism and discourtesy, especially in the context of this client. Ms. Black's conduct was contrary to the rules and policies requiring professionalism and courtesy and insulting to TPU and her fellow employees. The law on violating company rules only requires that the rule is reasonable, the employee knew or should have known about the rule, and she broke it. In this case, the law supports finding that she was unprofessional and discourteous in a way that violated workplace rules and harmed or created the possibility of harm to the employer's tangible or intangible interests. The law was misapplied, and the order should be reversed.

V. Argument

A. Standard of Review

Appellate review is pursuant to Washington's Administrative Procedure Act. *See* RCW 50.32.120; RCW 34.05.510. The court considers the entire agency record. RCW 34.05.558.

This court reviews the Commissioner's findings of fact for substantial evidence in the administrative record to support them. *Smith v. Employment Security Department*, 155 Wn. App. 24, 32 (2010). Substantial evidence is that evidence which "would persuade a fair-minded person of the truth or correctness of the matter." *Id.* at 33.

In reviewing the agency's conclusions of law, the court is not bound by the agency's interpretation. *Tassoni v. Department of Retirement Systems*, 108 Wn. App. 77, 84, 29 P.3d 63 (2001). The court reviews determination of the correct law *de novo*. *Henson v. Employment Security Department*, 113 Wn.2d at 377.

A reviewing court should reverse an agency decision when the administrative decision is based on an error of law, or the decision is arbitrary and capricious. RCW 34.05.570(3); *Tapper v. Employment Security Department*, 122 Wn.2d 397, 402 (1993). In understanding whether Black's actions were misconduct, the Court should remember the policy for the Employment Security Act. The Act employs "the insurance principle of sharing the risks" of unemployment between the employer and employee, and funds should be used "for the benefit of persons unemployed **through no fault of their own**[.]" RCW 50.01.010 (emphasis added). This fault principle preserves the use of the state's

resources for "innocent" workers, who are involuntarily unemployed and more deserving. *Tapper*, 122 Wn.2d, 409.

B. The ALJ committed legal error.

1. Misconduct is defined by statute.

Claimants are disqualified from benefits if they are discharged for misconduct connected with their work. RCW 50.20.066(1). Misconduct includes violation of a reasonable company rule, the deliberate disregard of standards of behavior which the employer has the right to expect of an employee, and carelessness of such degree to show an intentional or substantial disregard of the employer's interest. RCW 50.04.294(1)(b) and (d), and (2)(f).

Misconduct must be connected with a claimant's work to disqualify her from benefits. WAC 192-150-200(1).[10] It need not occur in the scope of employment, except in specific examples, e.g. RCW 50.04.294(2)(g) (violating law in course of employment). The action needs only result in harm or create the potential for harm to the employer's

[10] WAC 192-150-200 reads as follows: "(1) The action or behavior that resulted in your discharge or suspension from employment must be connected with your work to constitute misconduct or gross misconduct. (2) For purposes of this section, the action or behavior is connected with your work if it results in harm or creates the potential for harm to your employer's interests. This harm may be tangible, such as damage to equipment or property, or intangible, such as damage to your employer's reputation or a negative impact on staff morale."

interests to be work-related. WAC 192-150-200(2); see also *Wright v. Commonwealth*, 404 A.2d 792 (Pa. Commw. Ct. 1979) (expressing views in public forum is misconduct if adversely affects the employer's interests). It is also unprofessional misconduct for a licensed security guard to create an unreasonable risk of harm or damage to another through incompetence, negligence, or malpractice. RCW 18.170.170 (incorporating RCW 18.235.130(4)). Disregard of standards of behavior which the employer has a right to expect of an employee should qualify as unprofessional misconduct. RCW 50.04.294(1)(b).

Under Washington law, conduct is **connected with one's work if it creates the potential for harm to the employer's interests**. WAC 192-150-200(2). The fact that vulgar or profane language is overheard by a customer supports the denial of benefits. 76 Am.Jur.2d, Unemployment Compensation §85 (citing *Stahl v. Florida*, 502 So.2d 78 (Fla. App. 1987); *Pimley v. Value*, 974 P.2d 78 (Idaho, 1999)).

2. The Department erred in determining that Ms. Black did not commit misconduct.

In Conclusion of Law 10, the order states that Ms. Black is not disqualified from benefits. However, she committed disqualifying misconduct under RCW 50.04.294.

Ms. Black violated a company rule requiring courtesy, and the policies requiring positive relationships with law enforcement. She disregarded the standard of behavior reasonably expected of a security guard who works with a client related to law enforcement, and who must rely on law enforcement periodically through her job to secure the facility. Finally, her Facebook post, admittedly visible to the TPU employee, was in such careless disregard of PSSP's interest that it caused embarrassment and damage to the business relationship. The statute does not require that such carelessness occur while on duty, only that it was in substantial disregard of the employer's interest. *See infra.* That is the case here. Ms. Black and the department insist that she had the right to say anything –even if it harms or offends the employer, her co-workers, her client, or her client's visitors.

Among per se examples of misconduct is "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." RCW 50.04.294(2)(f). Regulations provide that a "company rule is reasonable if it is related to your job duties, is a normal business requirement or practice for your occupation or industry ...." WAC 192-150-210(4). An employee knew or should have known about a company rule if she was "provided an employee orientation on company rules, ... [was] provided a copy or summary of the

rule in writing, or the rule is posted in an area that is normally frequented by [the employee] and the rule is conveyed or posted in a language that can be understood" by the employee. WAC 192-150-210(5). Ms. Black knew about the rule requiring professionalism, courtesy, and respect. She had been provided with written copies of it, and it was reasonably related to her job duties because the client whom she was assigned to protect included law enforcement and because a security guard's relationship with law enforcement is so important. Nevertheless, she violated the rule by unapologetically disparaging law enforcement – and her employer's clientele – in a manner calculated to communicate the comment to an employee of the client. This contravenes the employer's rules and expectations, and establishes misconduct as a matter of law. The ALJ's contrary conclusion is in error.

Misconduct also occurs when an employee disregards the standard of conduct that an employer may reasonably expect of her. RCW 50.04.294(1)(b). Ms. Black made a statement offending her employer's client and insulting its guests. Her audience included a TPU employee. Her employer expects professionalism and courtesy and trained her on that. Ms. Black harmed her employer's interest and committed misconduct.

Finally, Ms. Black's Facebook post, admittedly visible to the TPU employee, was in such careless disregard to PSSP's interest that it caused embarrassment and damage to the business relationship. The statute does not require that such carelessness occur while on duty, only that it shows a substantial disregard of the employer's interest. RCW 50.04.294(1)(d). When confronted, Ms. Black stood firm that she had the right to say anything –even if it damaged the employer, her co-workers, her client, or her client's visitors. Ms. Black committed misconduct.

3. The Department erred in finding insufficient nexus.

Conclusion of Law 10 states that there was insufficient nexus between the Facebook post and Ms. Black's job because it did not mention the employer, and while it had "the potential to harm the employer," it did not *specifically* harm Puget Sound Security. CR 310.

This is contrary to Washington law. Conduct is connected with one's work if it "results in harm or **creates the potential for harm** to the employer's interests." WAC 192-150-200(2) (emphasis added).
Ms. Black's conduct undisputedly created the potential for harm. The conclusion that there was insufficient nexus despite this potential to harm is clearly erroneous.

An employee commits misconduct if she acts in deliberate disregard of the standards of behavior that her employer has a right to

expect of her. This applies to behavior both on and off the job, depending on the nature of the behavior and the context of the acts. *Nelson v. Emp't Security Dept.*, 98 Wn.2d 370, 373 (1982).

In *Nelson*, the employee was fired for shoplifting. Nelson did not steal from her employer or her employer's customer; Nelson's shoplifting was off-duty and did not harm her employer. The court adopted a three part test to demonstrate whether off-duty activities constitute job-related misconduct: off-duty conduct is misconduct if it "(1) had some nexus with the employee's work; (2) resulted in some harm to the employer's interest; and (3) was in fact conduct which was (a) violative of some code of behavior contracted for between employer and employee, and (b) done with intent or knowledge that the employer's interest would suffer." *Id.* at 375. The *Nelson* court found an insufficient nexus.

Ms. Black's conduct satisfies the *Nelson* elements. Her comment disparaged law enforcement and she was responsible for the security of law enforcement while on the job site. She works as a security guard, and must interact with and depend on law enforcement as part of her work. She published the comment in the presence of a client. Her conduct had a nexus with her work. It damaged or had the potential to damage PSSP's relationship with its client, harming its interest. And it violated the employer's expectations that she would behave decently and

professionally at all times, particularly as it regards TPU, and she knew or should have known that her comment would damage her employer's interests. Her misconduct was job-related.

Finally, the court's conclusion that any harm to the employer was undone by Puget Sound Security's "immediate action of discharging the claimant" is inconsistent with the law. Harm to the employer can be tangible or intangible, and even the *potential* for harm is enough to characterize action as misconduct. WAC 192-150-200(2). "Specific harm" need not be shown. "[T]o establish that an employee's conduct had the effect of causing harm to the employer's business, actual detriment to the employer's operations must be objectively demonstrated. Each case must be examined on its own facts." *Dermond v. Employment Sec. Dep't*, 89 Wn. App. 128, 135-136 (1997). Here, the harm to Puget Sound Security was more than imaginary or theoretical. The client raised its concern about Puget Sound Security's employment of Ms. Black directly with the employer, expressing disapproval that it should have hired someone whose opinions are so opposed to the client's mission. Ms. Black's post disrupted Puget Sound Security's working relationship with TPU and with the police, and affected the morale of the officers. CR 108. It forced Puget Sound Security to immediately terminate Ms. Black

to repair the damage and stop the bleeding. Ms. Black's conduct harmed the employer; she committed misconduct.

4. The Department erred in requiring specific intent to harm.

Conclusion of Law 10 states that Ms. Black "did not intend to send the message to her employers or to others." In addition to being unsupported by the record, this is legally erroneous. The law governing employment benefits does not require a specific intent to harm. Ms. Black offended her client, which harmed her employer. The act causing the offense was intentional (i.e., the posting on Facebook), and the client's access to it was known to Ms. Black. The intent element is satisfied.

In *Griffith v. State Dept. of Emp't Security*, 163 Wn. App. 1 (2011), the claimant was discharged after making a disparaging comment about the ethnicity of a customer. The court found that he was disqualified because he "engaged in intentional conduct by commenting to the customer ... Whether he understood that he was behaving in an offensive manner is irrelevant. He intentionally behaved in a manner that offended the customer." *Id.* at 10. Because he acted intentionally, and because his actions harmed the employer, he was disqualified.

In *Hamel v. Emp't Sec. Dept.*, 93 Wn. App. 140 (1998), the claimant was discharged for making off-color and sexist remarks to co-workers and to customers. The court found that he committed

misconduct, and was disqualified for benefits, because he (1) intended to make the remarks at issue, and (2) should reasonably have understood that the remarks would be harmful to the employer's interests. Id. at 144. Subjective intent as motivation is irrelevant.

This case is like *Griffith* and *Hamel*. Ms. Black's conduct was intentional, regardless of whether she intended its actual consequences. Her conduct damaged her employer's reputation with its client, and harmed or had the potential to harm its business.

The department erred by requiring a showing of intent to harm. Washington law states that a claimant's intent is irrelevant to the analysis of whether employment misconduct occurred. Ms. Black intentionally made a statement and published it to a client of her employer, and defended her decision to do so. Her action was deliberate. Furthermore, given the context of the warnings and rules made known to her by her employer, a reasonable person would have understood that making those remarks in a forum accessible to a client of the employer would or could harm the employer's interests. Whatever Ms. Black's intentions may have been, the intentional nature and the harm to the employer compel the conclusion that this was misconduct.

It is expected that Ms. Black will argue that she did not intend to harm the employer by posting her statement on Facebook, and that the

apparent absence of information indicating a relationship with Puget Sound Security establishes that this was not work-related misconduct. This was the viewpoint adopted by the department in Conclusion of Law 10 (CR 310). However, an employee's motivation is not relevant. *Hamel*, 93 Wn. App. at 146. The law decides whether the action is employment-related by determining whether it actually or potentially harms the tangible or intangible interests of the employer. WAC 192-150-200(2). The intent element is satisfied, and misconduct is established.

Finally, even if this court agrees with the ALJ that Ms. Black "did not intend to communicate her opinion to her employer, to [TPU], or to anyone not on her list of friends," Ms. Black's actions still constitute misconduct. (FOF 5). Ms. Black intended to communicate her opinion via Facebook. Whether she intended to communicate it specifically to the employee of TPU is irrelevant, as that employee had access to the Facebook post, the natural and probable consequences were that he saw the post, and he forwarded its content with the client. In other words, Ms. Black communicated her offensive opinion to TPU. If this was not intentional, it was at a minimum careless or negligent to a degree demonstrating substantial disregard of the rights and title of her employer. *See* RCW 50.04.294(1)(d).

5. The Department erred in concluding that the social-media policy was not known to Ms. Black.

In Conclusion of Law 10, the Department stated that "the fact that the employer deemed it necessary to tell the claimant's co-workers after she was discharged that nothing they said on Facebook should be considered private shows that this was not a rule that had been contracted for with employees prior to her discharge." CR 310. In other words, the department adopted Ms. Black's defense that she was unaware that her actions contravened her employer's policy, despite the impact her actions could have on her employer's business.

In *Smith v. Emp't Sec. Dep't.*, 155 Wn. App. 24 (2010), a county employee was discharged for surreptitiously recording conversations with the public. The claimant offered as a defense that he was unaware of any policy against such nonconsensual recordings. *Id.* at 35. The court upheld the denial of benefits because his conduct could "impact a citizen's willingness to discuss issues with a county employee, thereby adversely impacting the county's interest in serving its constituents, as well as exposing the county to litigation and liability." *Id.* at 36. The claimant intentionally acted in willful disregard of the natural and probable consequences of that action, and committed misconduct.

Regardless of whether she understood that the professionalism and courtesy policies encompassed social media, Ms. Black intentionally posted an opinion to her Facebook page, the natural and probable consequences of which were to alienate the client, harm the employer's relationship with the client, and impact her relationship with law enforcement. The natural and probable consequences of those actions were that the employee would see the opinion and forward it to the client. The nature of the opinion would or could damage the employer's interests. Ms. Black committed misconduct.

C. Findings of Fact are unsupported and indefensible.

Finding of Fact 13 is erroneous and misstates the law,[11] articulating in it a new, higher standard. It excuses Ms. Black's conduct because "[t]here was no evidence that the employer's relationship with its client, TPU, was specifically harmed by the claimant's posting," and that the employer mitigated any harm by firing the claimant. CR 308 (FOF 13).

The fact that TPU forwarded the comment to Puget Sound Security is evidence that the client, TPU, thought the comment was important. This

[11] Conclusions of law erroneously labeled findings of fact are reviewed as conclusions of law and findings of fact erroneously labeled as conclusions of law are reviewed as findings of fact. *Willener v. Sweeting*, 107 Wn.2d 388, 394 (1986).

important comment can only be interpreted one way: it damaged the relationship. The evidence shows that when the coworkers learned about the comment, their morale was impacted and they were embarrassed. The misconduct was work-related.

Similarly, as noted above, Finding of Fact 4, which undisputedly states that a TPU employee who was one of Ms. Black's Facebook friends was permitted access to the offending post, and had been selected and approved as a friend by Ms. Black, contradicts Findings 5 (Ms. Black did not intend to communicate her opinion to TPU) and 13 (the harm to the Puget Sound Security-TPU relationship was caused primarily by Puget Sound Security). Because Findings of Fact 5 and 13 conflict with the evidence and other findings, they should be disregarded.

D. Puget Sound Security was denied its due process.

The administrative law judge's limits on cross examination prejudiced the employer. A witness's interest in the outcome may lead her to "slant, unconsciously or otherwise, his testimony in favor of or against a party," and it is a proper basis on which to impeach. *See e.g., United States v. Abel*, 469 U.S. 45, 52, 105 S.Ct. 465, 83 L.Ed.2d 450 (1984). The right to cross-examine a witness, even in civil cases, is part of a fair trial and required by due process. *Baxter v. Jones*, 34 Wn. App. 1, 3 (1983). Preclusion of all cross-examination on a legitimate issue calls into

question the fact-finding process. *Id.* (citing *State v. York*, 28 Wn. App. 33 (1980)). By limiting the employer's cross-examination of the sole fact witness for the claimant on matters later deemed central to the fact-finder's decision (i.e., Facebook privacy settings and her intent with regard to the school tragedy), *see* FOF 3 (CR 206) and FOF 4, the tribunal committed reversible error.

VI. Conclusion

Claimant Black intentionally made an outrageous statement to TPU. She offended her client by saying her client's guests, law enforcement, deserve to get murdered. Ms. Black's client raised the statement as a concern to her employer. Because she jeopardized the business relationship, offended the client and co-workers, and because she was indignant about it, she was terminated.

This court should reverse the department's decision. In the alternative, because the department relied on facts on which it prevented cross-examination, the court could remand for additional proceedings.

Respectfully submitted this 17th day of December, 2013.

ROCKE | LAW GROUP, PLLC

Aaron V. Rocke, WSBA #31525
Attorney for Appellants

Declaration of Service

I caused a copy of the foregoing Appellant's Opening Brief to be served on the following in the manner indicated below:

Via Email to

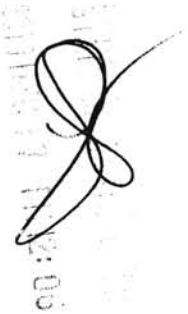
Nigel S. Malden
Nigel S. Malden Law, PLLC
711 Court A, Suite 114
Tacoma, WA 98402

on today's date.

I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct to the best of my belief.

SIGNED this 16th day of December, 2013, at Seattle, Washington.

Sarah Borsic, Legal Assistant



Declaration of Service

I caused a copy of the foregoing Appellant's Opening Brief to be served on the following in the manner indicated below:

Via hand delivery to

April Benson Bishop
Attorney General's Office
800 5th Avenue, Suite 2000
Seattle, WA 98104

on today's date.

I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct to the best of my belief.

SIGNED this 16 day of December, 2013, at Seattle, Washington.

Aaron V. Rocke, WSBA #31525

STATE OF WASHINGTON
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE EMPLOYMENT SECURITY DEPARTMENT

IN THE MATTER OF:

Sarah E. Black

Claimant

DOCKET NO: 01-2012-11212

INITIAL ORDER

ID: [redacted] **BYE:** 02/23/2013 **UIO:** 770

Hearing: This matter came before Administrative Law Judge Valerie A. Carlson on July 06, 2012, July 19, 2012, and August 22, 2012, at Tacoma, Washington, after due and proper notice to all interested parties.

Persons Present: the claimant, Sarah E. Black; the claimant representative, Nigel Malden, Nigel S. Malden Law, PLLC ; the employer-appellant, Puget Sound Security, represented by Vickie Brown and William Cottringer; and the employer representative, Aaron Rocke, Rocke Law Group, PLLC.

Exhibits: Pages 1 - 87 from the Exhibits Packet submitted by the Department were admitted into evidence. Additional pages 88 - 115 and 142 - 143 submitted by the employer were admitted into evidence. Pages 116 - 141 submitted by the employer were not admitted.

STATEMENT OF THE CASE:

The employer filed an appeal on March 26, 2012, from a Decision of the Employment Security Department dated March 16, 2012. At issue in the appeal is whether the claimant was discharged from employment for misconduct pursuant to RCW 50.20.066, or voluntarily quit without good cause pursuant to RCW 50.20.050. Also at issue is whether the claimant was able to, available for, and actively seeking work during the weeks at issue.

Having fully considered the entire record, the undersigned Administrative Law Judge enters the following Findings of Fact, Conclusions of Law and Initial Order:

FINDINGS OF FACT:

1. The claimant worked as a Security Officer for Puget Sound Security from December 30, 2010, through February 28, 2012. This was a full-time, permanent, nonunion position that paid

$10.44 per hour. She was assigned to work at the Tacoma Public Utilities (TPU) building in Tacoma, Washington.

2. The employer discharged the claimant because she had posted "very vulgar, inflamitory, and violence-provoking words on Facebook on or about 2-23-12, without any remorse about adverse impact on the TPU client, other security officers, or our business relationship." *Exhibits*, p. 20. The message stated:

> u kno wat, I do not give a fuck about a police officer that got shot, if they quit fuckin wit ppl, ppl prolly quit shootin em all the goddamn time.....karmas a bitch

Exhibits, p. 47.

3. The claimant posted the message from home, when she was not on duty. She was responding to a news article about a State Patrol Officer who had been shot. She did not think it was fair that the shooting of the officer received a lot of press coverage, while the shooting of a young girl at school did not.

4. The claimant had set her Facebook privacy level so that her blog postings were only accessible to the approximately 100 people designated as her friends on Facebook. Members of the public and others not listed as friends could not view her blog. However, it was possible for friends to convey to others what had been said in the claimant's blog discussion. That occurred here, when a Tacoma Public Utilities employee, who was one of her Facebook friends, sent a copy of the message to TPU's Customer Services Department. On February 23, 2012, TPU's Customer Service Supervisor notified the claimant's supervisor at Puget Sound Security. The supervisor notified the employer's CEO and the Executive Vice President for Employee Relations.

5. The claimant's blog message was an expression of a personal opinion that did not include any reference to her employer, to Tacoma Public Utilities, or to her job as a security officer. She did not intend to communicate her opinion to her employer, to TCU, or to anyone not on her list of friends. The person who reported her message to TCU had disagreed with the claimant in a blog posting but had not told the claimant that he was going to tell anyone else about it.

6. The claimant's supervisor met with the claimant before she left her graveyard shift on February 28, 2012. She told the claimant that her Facebook posting had been made known to the employer's client, TPU. The claimant said that she had the right to express an opinion when she was not at work and that the settings on her Facebook page were private. The supervisor acknowledged that the claimant had a right to her opinion, but said that her action of posting it on Facebook showed signs of a lack of empathy and low emotional intelligence and was more damaging to her future that posting nude photos would have been. The supervisor said a decision would be made by the employer, and the claimant asked that she

be told before her next shift if she was going to be fired.

7. On February 28, 2012, the employer's discipline committee met and decided that the claimant should be discharged. The committee considered prior discipline given to the claimant for not wearing a correct uniform (the wrong color of socks or no tie), for texting while on duty, for eating a meal outside of the guard house, and for going into another building for water and snacks after being instructed not to do so. The claimant had not been discharged at the time of these earlier incidents, and would not have been discharged for them on February 28, 2012. The employer notified the claimant of her discharge on February 28, 2012.

8. The employer did not have any specific social media policies or guidelines and had not given the claimant and other employees instructions with respect to communications on Facebook or similar channels of communication. After the claimant had been discharged, the employer told the ten other Security Officers at TPU that she had been discharged, showed them her Facebook posting, and cautioned them that anything they posted on Facebook would not be considered private, no matter what the privacy settings were.

9. The claimant had received a copy of the employer's Ethical Conduct Requirements of All Security Officers at Tacoma Public Utilities, which required Security Officers assigned to TPU to "practice honesty and good ethics without exception on and off the job by agreeing to the following guidelines:

> (3) All words and conduct that is harassing, rude, discourteous, discriminatory, negative, uncalled-for, overly aggressive, or unprofessional, towards anyone is *strictly* prohibited at the TPU worksites.
>
> (4) All TPU Security Officers must avoid any intent or appearance of unethical or compromising practice in all relationships, actions, and communications at the TPU worksites.
>
> (11) The sure standard of conduct to follow is not to say or do *anything* that would or could be perceived to violate this Ethical Directive, or which doesn't contribute positively to the TPU mission at the particular site you are assigned.

Exhibits, pp. 22 - 23.

10. The employer's General Workplace Policy described the ideal workplace that employees were to strive to achieve as made up of the following four elements: professionalism. Customer service, teamwork, and freedom from adverse conditions. The policy describes Professionalism as:

> All employees following a strict code of ethics and displaying unquestionable

> honesty and integrity consistently; viewing security work as an honorable, meaningful and rewarding career; and being committed to continuous improvement in applying the *Three A's–Appearance, Attitude and Action*–to achieve diligent productivity in professional security performance with pride and enthusiasm and getting results. In summary, everyone gives the job a best effort. This also includes misusing company or client equipment in any manner.

Exhibits, p. 25

11. In its new employee orientation, the employer emphasized professionalism in interpersonal communications and public relations. The PSS Employee Orientation Statement lists numerous grounds for termination, one of which is "discourtesy to client representatives, employees, visitors, customers, or the public." Exhibits, p. 29. *The New Officer Orientation* General Orders–All Job Sites require officers to "be polite, professional, and courteous to everyone during your service. Exhibits, p. 30. A list of Do's and Don't's for PSS Employees included: "Always help The Company's image," "Never do anything that is illegal or unethical," and "Never hurt The Company's business." *Exhibits*, p. 32.

12. The claimant routinely dealt with a wide range of people in the course of her duties, including police officers involved in security issues or simply going in and out of the buildings, TCU employees and customers, employees and customers of other tenants in the buildings, her co-workers with Puget Sound Security, and members of the public. She had not had any problems dealing with or communicating with law enforcement officers or anyone else in the course of her work. The employer had not counseled or disciplined for failing to be courteous, polite, or respectful to any of these individuals.

13. There was no evidence that the employer's relationship with its client, TPU, was specifically harmed by the claimant's posting, since the employer took the immediate action of discharging the claimant. To the extent that harm occurred because employees of both companies and others learned about the blot posting, any such harm was caused by the employer's actions in disclosing that information to its employees and possibly others. The claimant did not tell her co-workers, TPU employees, or anyone else about her blog post.

14. There is no evidence upon which to redetermine the claimant's eligibility under the availability statute RCW 50.20.010(1)(c), during the weeks at issue.

CONCLUSIONS OF LAW:

1. The record in this case establishes that the employer discharged the claimant. The provisions of RCW 50.04.294, RCW 50.20.066, WAC 192-150-085, WAC 192-150-200, WAC 192-150-205, and WAC 192-150-210 apply.

2. According to RCW 50.04.294(1), misconduct includes, but is not limited to, a willful or

wanton disregard of the rights, title, and interests of the employer or a fellow employee; deliberate violations or disregard of standards of behavior which the employer has the right to expect of an employee; carelessness or negligence that causes or would likely cause serious bodily harm to the employer or a fellow employee; or carelessness or negligence of such degree or recurrence to show an intentional or substantial disregard of the employer's interest.

3. According to RCW 50.04.294(2)(a)-(g), examples of a willful and wanton disregard of the interests of the employer or a fellow employee are: insubordination, repeated and inexcusable tardiness after warnings, dishonesty related to employment, repeated and inexcusable absences, deliberate and illegal acts, deliberate acts that provoke violence or a violation of the law or collective bargaining agreement, violation of reasonable company rules, and violations of the law while acting within the scope of employment.

4. Because the employer discharged the claimant for violating its rules or policies, RCW 50.04.294(2)(f) applies. Under RCW 50.04.294(2)(f), misconduct is established if an employee violates a reasonable company rule that the employee knew, or should have known existed. A company rule is deemed reasonable if it is related to the employee's job duties, is a normal business requirement or practice for the employees's occupation or industry, or is required by law or regulation. WAC 1921-150-210 (4).

5. Under the regulations, one can conclude that an employee knew or should have known about a company rule if the employer provided an employee orientation on company rules, provided a copy or summary of the rules in writing to the employee, or posted the rules in an area that is normally frequented by the employee and his or her co-workers, and the rules are conveyed or posted in a language that can be understood by the employee. WAC 1921-150-210 (5).

6. WAC 192-150-200(1) and (2), provide that the action or behavior must be connected with the claimant's work and result in harm or create the potential for harm to the employer's interests. This harm may be tangible, such as damage to equipment or property, or intangible, such as damage to the employer's reputation or a negative impact on staff morale.

7. Where off-the-job conduct is the basis for the alleged misconduct, the employer must show by a preponderance of the evidence that a reasonable person would find the employee's conduct: (1) had some nexus with the employee's work; (2) resulted in some harm to the employer's interest; and (3) was in fact conduct which was (a) violative of some code of behavior contracted for between the employer and employee, and (b) done with the intent or knowledge that the employer's interest would suffer. *Nelson v. Dep't of Employment Security*, 98 Wn.2d 370, 374, 655 P.2d 242 (1982). In adopting this test, the State Supreme Court rejected the Court of Appeals' broader version of (3)(a) which said "violative of some code of behavior impliedly contracted for between the employer and employee." The Supreme Court found that the word "impliedly made the test "far too broad" and instead required the conduct to "be the subject of a contractual agreement between the employer and

employee." *Id.*

8. Misconduct does not include inadvertence or ordinary negligence in isolated instances, good faith errors in judgment, inefficiency, unsatisfactory conduct, or failure to perform well as the result of inability or incapacity. See RCW 50.04.294(3).

9. The burden of establishing work-related misconduct is on the employer. Misconduct must be established by a preponderance of the evidence. *In re Murphy*, Empl. Sec. Comm'r Dec. 2d 750 (1984). A preponderance of the evidence is that evidence which, when fairly considered, produces the stronger impression, has the greater weight, and is the more convincing as to its truth when weighed against the evidence in opposition thereto. *Yamamoto v. Puget Sound Lbr. Co.*, 84 Wash. 411, 146 Pac. 861 (1915).

10. Based on the above findings and pursuant to the above referenced authority, the employer has not met its burden of proof with respect to misconduct. There is no evidence of a nexus between the claimant's blog post and her work. It was sent from her home when she was not at work. It made no reference to her employer, to TPU, to her job, or to her position as a security officer. While the offensive content of the message had the potential to harm the employer's relationship with it's client, there is no evidence of specific harm here as the employer immediately discharged the claimant. To the extent that harm occurred due to the broader disclosure of the content of the blog to employees of both companies and possibly others, that disclosure was performed by the employer, not the claimant. The claimant sent the message only to the individuals who were within the privacy settings she had established in Facebook. She did not intend to send the message to her employer or to others. Further, none of the employer's general policies, rules, or instructions addressed social media communications in any way, and the policies, rules, and instructions that were in place were very general and for the most part specifically govern conduct at the workplace or on the job. The fact that the employer deemed it necessary to tell the claimant's co-workers after she was discharged that nothing they said on Facebook should be considered private shows that this was not a rule or instruction that had been contracted for with employees prior to her discharge. The claimant's actions therefore do not violate a code of behavior contracted for between the employer and the claimant. The employer made numerous arguments for why the claimant's behavior impliedly violated their general policies, but implied behavior is not the standard that must be applied. Accordingly, the claimant is not subject to disqualification under RCW 50.20.066.

11. This decision does not question the employer's right to discharge claimant, nor the wisdom of that act. It is decided only that the evidence presented will not support a denial of benefits under the statute.

12. RCW 50.20.010(1)(c) requires each claimant to be able and willing to work, available for, and actively seeking work. There is no evidence upon which to redetermine the claimant's eligibility under the availability statute RCW 50.20.010(1)(c), during the weeks at issue.

Now therefore it is ORDERED:

The Decision of the Employment Security Department under appeal is **AFFIRMED**.

The claimant was not discharged due to misconduct and is therefore not subject to disqualification pursuant to RCW 50.20.066(1).

There is no evidence upon which to redetermine the claimant's eligibility under the availability statute, RCW 50.20.010(1)(c) during the weeks at issue.

Employer: If you are a base year employer for this claimant, or become one in the future, your experience rating account will be charged for any benefits paid on this claim or future claims based on past wages you paid to this individual. If you are a local government or reimbursable employer, you will be directly liable for any benefits paid. Benefit charges or liability will accrue unless this decision is set aside on appeal. See RCW 50.29.021. If you pay taxes on your payroll, any charges for this claim could be used to calculate your future tax rates.

Notice to Claimant: Your former employer has the right to appeal this decision. If this decision is reversed because it is found you committed misconduct connected with your work, all benefits paid as a result of this decision will be an overpayment. State law says you will not be eligible for waiver of the overpayment, nor can the department accept an offer of compromise (repayment of less than the total amount paid to you). The benefits must be repaid even if the overpayment was not your fault. See RCW 50.20.066(5).

Dated and Mailed on August 31, 2012 at Olympia, Washington.

Val Carlson

Valerie A. Carlson
Administrative Law Judge
Office of Administrative Hearings
949 Market Street, Suite 500
Tacoma, WA 98402

Certificate of Service

I certify that I mailed a copy of this order to the within-named interested parties at their respective addresses postage prepaid on the date stated herein.

PETITION FOR REVIEW RIGHTS

This Order is final unless a written Petition for Review is addressed and mailed to:

Agency Records Center
PO Box 9555
Olympia, Washington 98507-9555

and postmarked on or before **October 1, 2012**. All argument in support of the Petition for Review must be attached to and submitted with the Petition for Review. The Petition for Review, including attachments, may not exceed five (5) pages. Any pages in excess of five (5) pages will not be considered and will be returned to the petitioner. *The docket number from the Initial Order of the Office of Administrative Hearings must be included on the Petition for Review.* Do not file your Petition for Review by Facsimile (FAX). Do not mail your Petition to any location other than the Agency Records Center.

VAC:VAC

Mailed to the following:

Sarah E Black 2043 217th Street Ct E Spanaway, WA 98387-7500	Claimant
Nigel S. Malden Law, PLLC 711 Court A, Suite 114 Tacoma, WA 98402	Claimant Representative
Puget Sound Security c/o Rocke Law Group, PLLC 601 Union Street, Ste 4200 Seattle, WA 98101	Employer Representative

Hon. Michael Hayden
Hearing Noted for June 25, 2013

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

JEFF KIRBY, , et al., Petitioners, vs. STATE OF WASHINGTON DEPARTMENT OF EMPLOYMENT SECURITY, Respondent.	No. 12-2-37206-3 JOINT STATEMENT OF EVIDENCE

The court heard oral argument on June 25, 2013. The court asked for citations to the record on the issue of whether the claimant knew the Facebook "friend" was a TPU employee. The parties draw the court's attention to the attached excerpts from the record:

Sara Black Testimony

CR 131 Mrs. Black adjusted her account settings so her "friends" can see, (lines 13-17) and the person who reported her was a friend. (lines 18-21).

CR 141:23-142:6 I know it was a friend who sent the e-mail because I have seen the e-mail.

CR 148:12-16 [when talking to her supervisor,] I said "I know who made you guys aware of it."

CR 153:1-154: Q:[W]e see an e-mail from castroj80@hotmail.com; is that right? A. Yes. Q. And do you know who that is? A: Yes. Q: That was the friend that reported you to your employer; is that right? [pg. 154] A: Yes...

CR 154: Q: Your employer always had information as to who that person was, didn't they? A: Yes.

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CR 155:12-16 Q: Was [the person whose e-mail address was castroj80] an employee of Tacoma Public Utilities? A: Yes.

DATED: this 28 day of June, 2013

ROBERT W. FERGUSON
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