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NO. 70738-8-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

JEFF KIRBY, AN INDIVIDUAL, and PUGET SOUND SECURITY PATROL, INC.,

Appellants,

vs.

STATE OF WASHINGTON DEPARTMENT OF EMPLOYMENT SECURITY,

Respondent.

RESPONDENT'S BRIEF

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I. INTRODUCTION

Appellant Puget Sound Security Patrol, Inc. ("Puget Sound Security"), discharged Sarah Black from her job as a security officer after she made an offensive statement on her private Facebook page while she was at home, off-duty. Black's statement made no reference to her work, her employer, or her employer's clients. After she was discharged, Black sought unemployment benefits, which the Employment Security Department granted.

An unemployment benefits claimant is disqualified from receiving benefits only if she was discharged for misconduct connected with her work. RCW 50.20.066(1). If the employer establishes the conduct was work-connected, it then also must prove the claimant's conduct met the statutory definition of misconduct under RCW 50.20.294. Because Black's off-duty expression of a personal opinion on her private Facebook page was not connected with her work, and Puget Sound Security failed to prove her conduct met the definition of misconduct, the Department properly determined she was not discharged for disqualifying misconduct and allowed her unemployment benefits. The Department respectfully requests that the Court affirm the Commissioner's decision allowing Black unemployment benefits.

II. COUNTERSTATEMENT OF THE ISSUES

A. Where Puget Sound Security fired Black for a private Facebook comment she made while off-site and off-duty, and the comment did not mention her job, her employer, or her employer's client, did the Commissioner correctly conclude that Black's conduct was not work-connected?

B. If a claimant's conduct is work-connected, the employer also must show that it met the definition of misconduct under RCW 50.04.294. A claimant commits misconduct under RCW 50.04.294(2)(f) if she violates a reasonable employer rule that she knew or should have known. Did Puget Sound Security fail to establish Black violated a reasonable employer rule that she knew or should have known when it did not have a social media policy, and its general policies mandating courtesy, professionalism, and the like cannot reasonably govern off-site, off-duty conduct?

C. Under RCW 50.04.294(1)(b) and (d), a claimant's conduct amounts to misconduct if she deliberately violates or disregards standards of behavior the employer has the right to expect, or if she is careless or negligent to such a degree or recurrence to show an intentional or substantial disregard of the employer's interest. Did

Puget Sound Security fail to establish Black's conduct satisfied RCW 50.04.294(1)(b) and (d) when it did not have the right to expect its employees to restrict their non-work-related, private comments, and Black could not reasonably have anticipated that her private, off-duty, non-work-related statement would affect her employer's interests such that she disregarded Puget Sound Security's interests when she made the statement?

D. Where Puget Sound Security had the burden to prove disqualifying misconduct, did the ALJ abuse her discretion in limiting the scope of its cross-examination of Black?

E. Where substantial evidence supports the Commissioner's findings of fact, should this Court uphold them on appeal?

III. STATEMENT OF THE CASE

Claimant Sarah Black worked as a security officer for Puget Sound Security Patrol, Inc., from December 2010 through February 2012. Certified Administrative Record (AR) at 127, 270, 305 (Finding of Fact (FF) 1). Black was a full-time, permanent employee, paid $10.44 per hour. AR at 49, 305-06 (FF 1). Her work assignment was the graveyard shift at the Tacoma Public Utilities (TPU) building in Tacoma, Washington. AR at 48-50, 205, 306 (FF 1). Black's duties were to maintain security surveillance of the

facility and to perform "customer service of internal and external clients." AR at 49-50, 130.

While at home and off duty, Black posted a statement on Facebook.com. AR at 133, 206, 306 (FF 2, 3). The post said, "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." AR at 143, 233, 306 (FF 2, 3). Black was responding to a news article about a state trooper who had been shot. AR at 132, 278-80, 306 (FF 3).

Black had set her Facebook privacy level so that her postings were only accessible to the approximately 100 people designated as her "friends" on the website. AR at 130-31, 235, 306 (FF 4). Members of the public and others not listed as friends could not view her Facebook page. AR at 131, 306 (FF 4). Black's post was an expression of a personal opinion that did not include any reference to her employer, to TPU, or to her job as a security officer. AR at 132, 233, 306 (FF 5). She did not intend to communicate her opinion to her employer, to TPU, or to anyone not on her list of friends. AR at 131, 133, 306 (FF 5).

One of Black's Facebook friends, however, was a TPU employee who saw the post. AR at 131-32, 155, 233, 306 (FF 4). Without telling Black that he was going to tell anyone else about it, the friend sent a copy of the post to TPU's customer service department. AR at 131, 233, 306 (FF 4,

5). TPU's customer service supervisor notified Black's supervisor, Vickie Brown, who in turn notified Puget Sound Security's chief executive officer and executive vice president for employee relations. AR at 59-60, 82-83, 233, 306 (FF 4).

Brown met with Black to discuss the Facebook posting and told her that the post had been made known to TPU. AR at 157-58, 168-69, 235, 306 (FF 6). Black 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. AR at 148-49, 157-58, 235, 306 (FF 6).

The same day, Puget Sound Security's discipline committee met and discharged Black. AR at 195, 247, 307 (FF 7). Shortly thereafter, Black applied for, and received, unemployment benefits. AR at 187-91. The Department determined that Puget Sound Security failed to establish that it had discharged Black for disqualifying misconduct because the post on her Facebook page was not related to her work as a security guard. AR at 187-88. Puget Sound Security appealed the Department's decision, and an administrative law judge (ALJ) conducted a hearing on the matter. AR at 3-183, 192-204.

At the administrative hearing, Puget Sound Security presented evidence of numerous policies and orientation documents it has in place for employees. Many of the policies are broadly worded and very general. For

example, an employee orientation statement provides that "[d]iscourtesy to client representatives, employees, visitors, customers or the public" would be grounds for disciplinary action or termination. AR at 106-07, 215, 308 (FF 11). Puget Sound Security also requires employees to "[b]e polite, professional, and courteous to everyone during your service." AR at 216, 308 (FF 11). A list of employee "Do's & Don'ts" includes, "*Always* help The Company's image," "*Never* do anything that is illegal or unethical," and "*Never* hurt The Company's business." AR at 106, 109, 218, 308 (FF 11). A document entitled "PSS General Workplace Policy" contains similar statements about the need for employees to strive for professionalism, which includes "viewing security work as an honorable, meaningful and rewarding career[.]" AR at 103-04, 211, 307-08 (FF 10).

Additionally, Puget Sound Security's ethical requirements specifically relating to the TPU worksite require security officers "to practice honesty and good ethics without exception on and off the job" by agreeing to stated guidelines. AR at 104-05, 208, 307 (FF 9). Among those guidelines are prohibitions on all "words and conduct that is harassing, rude, discourteous, discriminatory, negative, uncalled-for, overly aggressive, or unprofessional, towards anyone . . . at the TPU worksites." AR at 208, 307 (FF 9).

Puget Sound Security did not have any specific social media policies or guidelines and had not given its employees instructions with respect to communications on Facebook or other social media websites. AR at 89-90, 105, 130, 307 (FF 8). After discharging Black, Puget Sound Security told the 10 other security officers at TPU that Black 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. AR at 83, 85-86, 89, 162-63, 170, 307 (FF 8).

The ALJ concluded that Puget Sound Security did not meet its burden of proving that Black's conduct was connected with her work, as required by RCW 50.20.066(1). AR at 310 (Conclusion of Law (CL) 10). Specifically, the ALJ concluded that the circumstances did not meet the test for off-the-job conduct stated by the Washington Supreme Court in *Nelson v. Department of Employment Security*, 98 Wn.2d 370, 374, 655 P.2d 242 (1982). AR at 309-10 (CL 7, 10). In an initial order, the ALJ affirmed the Department's decision to allow benefits for Black. AR at 311.

Puget Sound Security petitioned the Department's Commissioner for review. AR at 316-21. The Commissioner[1] adopted the ALJ's findings of fact and conclusions of law and affirmed the initial order. AR at 324-26.

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[1] Decisions on petitions for Commissioner review are made by review judges in the Commissioner's review office but are treated as decisions of the Commissioner due to statutory delegation. *See* RCW 50.32.070; WAC 192-04-020(5).

Puget Sound Security appealed to King County Superior Court. Clerk's Papers (CP) at 1-15. The Honorable Michael Hayden affirmed the Commissioner's decision. CP at 68-70, 107-08. Puget Sound Security now appeals to this Court.

IV. SCOPE AND STANDARD OF REVIEW

Washington's Administrative Procedure Act (APA), chapter 34.05 RCW, governs judicial review of a final decision by the Department's Commissioner. RCW 50.32.120; RCW 34.05.510; *Verizon Nw., Inc. v. Emp't Sec. Dep't*, 164 Wn.2d 909, 915, 194 P.3d 255 (2008).

The Commissioner's decision is *prima facie* correct, and the party asserting the invalidity of an agency action—here, Puget Sound Security—bears the burden of demonstrating such invalidity. RCW 34.05.570(1)(a);RCW 50.32.150; *Anderson v. Emp't Sec. Dep't*, 135 Wn. App. 887, 893, 146 P.3d 475 (2006).

An appellate court "sits in the same position as the superior court" and reviews the Commissioner's decision, applying the APA standards "directly to the record before the agency." *Tapper v. Emp't Sec. Dep't*, 122 Wn.2d 397, 402, 858 P.2d 494 (1993); *Emps. of Intalco Aluminum Corp. v. Emp't Sec. Dep't*, 128 Wn. App. 121, 126, 114 P.3d 675 (2005) ("The appellate court reviews the findings and decisions of the commissioner, not the superior court decision or the underlying ALJ

order."). For that reason, Puget Sound Security's emphasis on the superior court proceeding is improper.

The standard of review is particularly important in this case because Puget Sound Security references evidence that it argues contradicts the Commissioner's findings of fact, asserts facts that are outside the record, and asks this Court to reweigh the evidence.[2] But on judicial review of disputed issues of fact, the APA limits the Court's review to the agency record. RCW 34.05.558. The Court's authority is to review the Commissioner's findings of fact for substantial evidence in the agency record. RCW 34.05.570 (3)(e); *William Dickson Co. v. Puget Sound Air Pollution Control Agency*, 81 Wn. App. 403, 411, 914 P.2d 750 (1996); *Tapper*, 122 Wn.2d at 403 (agency's findings of fact are critical on judicial review, as court may not substitute its judgment for that of the agency as to the facts). Evidence is substantial if it is "sufficient to persuade a rational, fair-minded person of the truth of the finding." *In re Estate of Jones*, 152 Wn.2d 1, 8, 93 P.3d 147 (2004).

In reviewing the Commissioner's factual findings, the Court must view the evidence and the reasonable inferences therefrom in the light most favorable to the party who prevailed at the administrative proceeding below—here, the Department. *William Dickson Co.*, 81 Wn. App. at 411.

[2] Puget Sound Security also makes numerous assertions without citation or reference to the record, violating RAP 10.3(a)(5) and (6).

Significantly, an appellate court may not re-weigh evidence, witness credibility, or demeanor. *W. Ports Transp., Inc. v. Emp't Sec. Dep't*, 110 Wn. App. 440, 449, 41 P.3d 510 (2002); *William Dickson Co.*, 81 Wn. App. at 411. Unchallenged factual findings are verities on appeal. *Tapper*, 122 Wn.2d at 407.

The Court reviews questions of law *de novo*. *Tapper*, 122 Wn.2d at 407. However, because the Department has expertise in interpreting and applying unemployment benefits law, the Court should accord substantial weight to the agency's decision. *Markam Group, Inc. v. Dep't of Emp't Sec.*, 148 Wn. App. 555, 561, 200 P.2d 748 (2009); *William Dickson Co.*, 81 Wn. App. at 407. Specifically in relation to misconduct, the Court has indicated that it will "give substantial weight to the commissioner's interpretation of 'misconduct,' as it is defined under the Employment Security Act because of the agency's special expertise." *Markam*, 148 Wn. App. at 561.

Whether a claimant engaged in misconduct is a mixed question of law and fact. *Griffith v. Dep't of Emp't Sec.*, 163 Wn. App. 1, 8, 259 P.3d 1111 (2011). What constitutes disqualifying misconduct is a question of law. *Haney v. Emp't Sec. Dep't*, 96 Wn. App. 129, 138-39, 978 P.2d 543 (1999).

To resolve a mixed question of law and fact, the Court must engage in a three-step analysis in which it: (1) determines whether the factual findings are supported by substantial evidence in the record; (2) makes a *de novo* determination of the law; and (3) applies the law to the applicable facts. *See Tapper*, 122 Wn.2d at 403.

V. ARGUMENT

The Employment Security Act (the Act) was enacted to provide compensation to individuals who are "involuntarily" unemployed "through no fault of their own." RCW 50.01.010; *Tapper*, 122 Wn.2d at 409. The operative principle behind the disqualification for misconduct is the fault of the employee. *Tapper*, 122 Wn.2d at 409. Accordingly, a discharged worker is eligible for unemployment compensation unless she was discharged for "misconduct connected with his or her work." RCW 50.20.066(1); *Tapper*, 122 Wn.2d at 399. The burden is on the employer to show by a preponderance of the evidence that the claimant was discharged for disqualifying misconduct. *Nelson v. Emp't Sec. Dep't*, 98 Wn.2d 370, 374-75, 655 P.2d 242 (1982); *In re Pluma Verner*, Emp't Sec. Comm'r Dec.2d 617 (1980).[3]

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[3] Under RCW 50.32.095, the Commissioner may designate certain Commissioners' decisions as precedent, which serve as persuasive authority for this Court. *Martini v. Emp't Sec. Dep't*, 98 Wn. App. 791, 795, 990 P.2d 981 (2000). Copies of the Commissioners' decisions cited in this brief are attached for the Court's convenience.

Puget Sound Security failed to establish that it discharged Black for disqualifying misconduct for two reasons. First, Black's conduct—posting an offensive statement on her private Facebook page, while at home and off duty—was not sufficiently "connected with" her work to constitute disqualifying misconduct under the Act. *See* RCW 50.20.066(1); AR at 310 (CL 10). Second, even if Black's conduct was work-connected, Puget Sound Security did not prove that Black's conduct met the statutory definition of "misconduct" under RCW 50.04.294.

Significantly, the question before the Court is not whether Black should have been terminated from her job; the question is whether the Commissioner properly concluded that, having been fired, Black was eligible to receive unemployment benefits under the Employment Security Act. *See Tapper*, 122 Wn.2d at 412; *Johnson v. Emp't Sec. Dep't*, 64 Wn. App. 311, 314-15, 824 P.2d 505 (1992). The Commissioner properly determined Black was eligible for benefits. The Court should affirm the Commissioner's decision.

A. The Commissioner Correctly Concluded That Black's Private Facebook Post Was Not Connected With Her Work

An individual will be disqualified from benefits if she has been discharged from employment "for misconduct *connected with his or her work*[.]." RCW 50.20.066(1) (emphasis added); WAC 192-150-200(1) ("The action or behavior that resulted in [the individual's] discharge or

suspension from employment must be connected with [her] work to constitute misconduct."). Accordingly, before determining whether a claimant's conduct amounted to statutory misconduct, the employer must first establish the claimant's conduct was work-connected.

The Supreme Court has adopted a three-part rule that an employer must meet to establish that an employee's off-duty conduct was connected with her work. *Nelson v. Department of Employment Security*, 98 Wn.2d 370, 375, 655 P.2d 242 (1982).[4] In *Nelson*, Court held that an 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 employer and employee, and (b) done with intent or knowledge that the employer's interest would suffer.

Id. at 375. The court rejected the Court of Appeals' broader version of part (3)(a) of the test, which said that the conduct must be "violative of some code of behavior *impliedly* contracted for between the employer and employee." *Id.* at 374. The court explained that if "certain conduct would

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[4] Although the *Nelson* decision predated the legislature's adoption of a statutory definition of misconduct, the disqualification statute has required a claimant to have been discharged for "misconduct connected with his [or her] work" since the initial passage of the Unemployment Compensation Act. Laws of 1937, ch. 162, § 5(b). In 1993, the legislature adopted a statutory definition of "misconduct," which now appears in RCW 50.04.293 and applies to claims before January 4, 2004. In 2003, the legislature redefined misconduct in greater detail. RCW 50.04.294. *Nelson* continues to be applicable, however, because it addresses whether a claimant's conduct is "connected with his or her work." *Nelson*, 98 Wn.2d at 372, 374-75.

go to the nexus of the employee's work and would result in harm to an employer's interest, it is reasonable to require this conduct must be the subject of a contractual agreement between employer and employee." *Id.* If not a formal written contract between the parties, the agreement must be "reasonable rules and regulations of the employer of which the employee has knowledge and is expected to follow." *Id.* Thus, in order for an employee's off-duty conduct to be connected with her work, the conduct must be governed explicitly by a known contractual agreement or reasonable employer rule.

In *Nelson*, the employer discharged the claimant from her job as a cashier after she pleaded guilty to shoplifting, a crime that she had committed after working hours and not on her employer's premises. *Id.* at 371-72. Like Puget Sound Security, the employer argued the claimant's conduct was work-connected because it raised concerns about the claimant's trustworthiness in handling cash and a fear that the conviction would affect her relationship with other employees. *Id.* at 371-72. Finding an employer must prove each element of the work-connected test, the court concluded that the claimant was entitled to benefits because there was no evidence her conduct "in fact violated any rules or regulations of the employer or a code of behavior agreed to between the employer and the employee." *Id.* at 375.

Here, Puget Sound Security failed to prove that Black's conduct met all of the elements of the *Nelson* test: it did not establish that Black's conduct had some nexus with her work; that the conduct violated a code of behavior Puget Sound Security had contracted with her; or that she acted with intent or knowledge that Puget Sound Security's interest would suffer. *Nelson*, 98 Wn.2d at 375. The Court should affirm.

1. Black's Facebook Post, Made at Home and While Off-Duty, Did Not Have a Nexus With Her Work as a Security Officer

Black's off-duty speech—a private post on Facebook—was not connected with her work as a security officer and did not meet the *Nelson* rule. The time and location of the conduct that led to the employee's discharge is central to the analysis of whether the conduct was connected with the employee's work. *Macey v. Dep't of Emp't Sec.*, 110 Wn.2d 308, 314, 752 P.2d 372 (1988).[5] Additionally, in considering whether an employee's conduct is connected with work, "the inquiry should be what is the effect of the employee's conduct upon his work performance in particular and upon the work force in general." *Id.* at 319.

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[5] Though a portion of the court's decision in *Macey* has been superseded by RCW 50.04.293 and RCW 50.04.294, *supra* note 4, the Legislature has kept in place the requirement in RCW 50.20.066 that disqualifying misconduct must be connected with the individual's work. Thus, the analysis in *Macey* relating to work-connectedness remains pertinent authority for this Court.

As the Commissioner properly found, Black posted the statement at home, while off duty. AR 133, 235, 306 (FF 3, 5). She made the statement on her private Facebook page, to which only approximately 100 people designated as "friends" had access. AR 130-31, 235, 306 (FF 4). Black's private statement did not include any reference to Puget Sound Security, to TPU, or to her job as a security officer. AR at 133, 233, 306 (FF 5), 308 (CL 10).[6] The content of the post was an expression of her personal opinion about a matter that was outside the scope of her work. Puget Sound Security argues that Black's speech was connected with her work because the content of the speech was related to law enforcement. Br. Appellant at 28. But even if law enforcement officers occasionally visited the TPU building for human resource purposes, this is a tenuous connection to Black's work at best, especially when she worked the graveyard shift, when the human resources department was likely closed. AR at 49-50.

Black's statement also did not affect her ability to perform her job duties. *Macey*, 110 Wn.2d at 319. According to Black and her supervisor's testimony, Black's duties were to maintain security surveillance of the facility and to perform "customer service of internal and external clients." AR at 49-50, 130. The evidence at the administrative hearing showed, and

[6] All of this is substantial evidence supporting the Commissioner's finding that Black "did not intend to communicate her opinion to her employer, to [TPU], or to anyone not on her list of friends." AR at 306 (FF 5).

the Commissioner found as fact, that Black "had not had any problems dealing with or communicating with law enforcement officers or anyone else in the course of her work." AR at 133, 155, 236-48, 308 (FF 12).

Black's posting of the Facebook message also had no effect upon Puget Sound Security's work force. *Macey*, 110 Wn.2d at 319. As the Commissioner appropriately found, there was no evidence that Black told her coworkers about the post, but Puget Sound Security disclosed it to other employees. AR at 82-86, 89, 130-31, 162-63, 170, 307 (FF 8), 308 (FF 13). Black's supervisor testified that none of the employees knew about Black's post until the supervisor told them about it. AR at 162-63, 170. Therefore the action or behavior that resulted in Black's discharge—her action of making a post on Facebook—did not itself have an effect upon the work force. *See* WAC 192-150-200(1) (focus is on "action or behavior that resulted in your discharge"); *Macey*, 110 Wn.2d at 319 (inquiry is on effect of employee's conduct upon work performance and work force in general).

Puget Sound Security did not establish that a reasonable person would find Black's private Facebook post to have a nexus with her work as a security guard. *Nelson*, 98 Wn.2d at 374-75.

2. The Potential for Harm to Puget Sound Security, Without More, is Insufficient to Establish That Black's Conduct was Connected With Her Work

The second element of the rule adopted in *Nelson* is whether a reasonable person would find the employee's conduct "resulted in harm to the employer's interest." *Id.* at 375. By rule, the Department has refined this aspect of the test for work-connectedness to include the potential for harm. WAC 192-150-200(2). The rule provides, in relevant part:

> (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.

WAC 192-150-200(1), (2).

In the present case, because the Commissioner concluded that "the offensive content of the message had the potential to harm the employer's relationship with its client," AR at 310 (CL 10), the Department acknowledges that Puget Sound Security established the second portion of the *Nelson* rule.[7]

[7] The Department acknowledges that the first sentence of Finding of Fact 13 is not supported by the record, nor does the rule require actual harm. AR at 308 (FF 13).

Puget Sound Security incorrectly construes the law, however, and asks the Court to conclude that any off-duty conduct by an employee that creates the potential for harm to the employer is work-connected misconduct. Br. Appellant at 29-31. While a finding of harm or the potential for harm is a necessary element to establish work-connectedness, an employer must still prove the rest of the *Nelson* elements when a claimant is discharged for off-duty conduct: that the employee's conduct "had some nexus with the employee's work" and that the conduct in fact was violative of a reasonable code of behavior contracted for between employer and employee and done with intent or knowledge that the employer's interest would suffer. *Nelson*, 98 Wn.2d at 374-75; *see also* RCW 50.20.066(1); WAC 192-150-200(1). Harm is only one aspect of the *Nelson* analysis for off-duty conduct.[8]

3. Black's Conduct Did Not Meet the Third *Nelson* Element

a. Black's Conduct Did Not Violate a Reasonable Code of Behavior Contracted for Between Her and Her Employer

The circumstances here also do not meet the *Nelson* test because Black's conduct was not "in fact conduct which was violative of some code

[8] The Department's Commissioner continues to rely on and apply the *Nelson* test in analyzing whether off-duty conduct is work-connected. *See, e.g., In re Jeanette Kost*, Emp't Sec. Comm'r Dec.2d 987 (2012); *In re Edward Brooks*, Emp't Sec. Comm'r Dec.2d 967 (2011). The court gives substantial weight to the Department's interpretation and application of the Employment Security Act. *Markam*, 148 Wn. App. at 561.

of behavior contracted for between employer and employee." *Nelson*, 98 Wn.2d at 375. To prove this, an employer must show the conduct was the subject of a contractual agreement or of "reasonable rules and regulations of the employer of which the employee has knowledge and is expected to follow." *Id.*

First, Puget Sound Security did not prove that Black violated any reasonable code of behavior that it had contracted with her. Significantly, Puget Sound Security "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." AR at 307 (FF 8); *see also* AR at 65-66, 89-90, 105, 130. Puget Sound Security has not challenged this finding, so it is a verity on appeal. *Tapper*, 122 Wn.2d at 407.

Second, even if there were some contractual agreement or rules and regulations governing Black's off-duty conduct, they could not reasonably be understood to prohibit the conduct in which Black engaged. Puget Sound Security presented evidence of numerous policies and orientation documents it has for employees. *See, e.g.*, AR at 103-10 (employer's representative's testimony about training policies and procedures); AR at 208-18 (copies of policy and orientation documents). But these policies are written in broad and general terms, such as requiring

employees to be courteous, professional, and helpful, and to act ethically. *See* AR at 208-18, 307-08 (FF 9-11). By their terms, some of the policies limit their scope to on-duty or on-worksite conduct, but others purport to apply at all times. *See, e.g.*, AR at 208 (mentions conduct "on and off the job," but also prohibits certain words and conduct "at the TPU worksites").

The Department does not dispute that the content of Black's Facebook post was offensive. But to the extent Puget Sound Security seeks to impose its rules requiring courtesy and professionalism upon Black's private, off-duty conduct, the rules are not reasonable. A company rule is reasonable if it is related to the claimant's job duties or is a normal business requirement or practice of the occupation or industry. WAC 192-150-210(4); *Nelson*, 98 Wn.2d at 374 (quoting *Giese v. Emp't Div.*, 27 Or. App. 929, 935, 557 P.2d 1354 (1976)). Requiring an employee to adhere to the standards of being "courteous" and "professional" at all times, including while she is at home and not acting within the scope of her employment, is not related to the job duties of an hourly security guard. Puget Sound Security did not present evidence that any such rule was a normal business requirement or practice in the security industry. WAC 192-150-210(4). Applied to the specific facts of this case, it is not reasonable for Puget Sound Security to attempt to

regulate and restrict its employees' off-duty Facebook activity that has no connection to their work. Puget Sound Security failed to satisfy its burden.

b. Black's Conduct Was Not Done With Intent or Knowledge That Puget Sound Security's Interest Would Suffer

Finally, Puget Sound Security failed to establish that Black's conduct "was in fact . . . done with intent or knowledge that the employer's interest would suffer." *Nelson*, 98 Wn.2d at 375. The Commissioner appropriately found that Black "did not intend to communicate her opinion to her employer, to [TPU], or to anyone not on her list of friends." AR at 306 (FF 5). Black's testimony supports this finding. AR at 130-31, 133, 156.

Puget Sound Security challenges the finding that Black made the statement in response "to a news article about a State Patrol Officer who had been shot." AR at 306 (FF 3). But Black testified that she made the post because of her "personal feelings upon reading the news that day" and that she was "saddened" that the news would get more attention than the story of "a little girl who went to school and got shot." AR at 132. She further stated that she did not intend to cause any harm or embarrassment to her employer with the post. AR at 133. Though Puget Sound Security may not have found Black's testimony credible, the

Commissioner adopted it in his findings of fact, and the Court may not reweigh credibility determinations on appeal. *William Dickson Co.*, 81 Wn. App. at 411.

Additionally, Black's Facebook privacy settings were set so that only friends could see her posts, and she believed her post "had absolutely nothing to do with my job." AR at 131, 133. The post did not mention or reference Black's work, Puget Sound Security, or TPU. AR at 233, 306 (FF 5). Although one of Black's private Facebook friends was a TPU employee, she had no reason to know he would report her statement to TPU and that TPU would, in turn, report it to Puget Sound Security. AR 131, 155-56, 306 (FF 4, 5). She could not reasonably have known that her private, off-duty statement not related to her employment would somehow jeopardize the relationship between TPU and Puget Sound Security. Accordingly, her conduct was not done with intent or knowledge that Puget Sound Security's interests might suffer. *Nelson*, 98 Wn.2d at 375.

The cases cited by Puget Sound Security to argue that Black's intent in making the Facebook post is irrelevant are inapposite because they did not address the question of whether off-duty conduct was work-connected. *Griffith v. Dep't of Emp't Sec.*, 163 Wn. App. 1, 259 P.3d 1111 (2011) (employee's offensive comments made to customer while performing deliveries was misconduct); *Hamel v. Emp't Sec. Dep't*, 93

Wn. App. 140, 966 P.2d 1282 (1998) (waiter's inappropriate comments made to coworkers and customers while at work was misconduct). Instead, they address whether on-duty conduct met the statutory definition of misconduct. Whether the employees' conduct was work-connected was not at issue in those cases. *See Griffith*, 163 Wn. App. 1; *Hamel*, 93 Wn. App. 140. In contrast, *Nelson* addresses whether a claimant's off-duty conduct is connected with her work, and the Supreme Court specifically requires that a claimant's conduct be done with "intent or knowledge that the employer's interests would suffer" for it to be work-connected. *Nelson*, 98 Wn.2d at 375.

The Commissioner correctly concluded that Puget Sound Security did not establish, by a preponderance of evidence, that a reasonable person would find that Black's post was "done with intent or knowledge that the employer's interest would suffer." *Nelson*, 98 Wn.2d at 375.

As the Commissioner stated, the Department "does not question the employer's right to discharge the claimant, nor the wisdom of that act." AR 310 (CL 11); *see Tapper*, 122 Wn.2d at 412 (an employer's decision to discharge an employee is distinct from the Department's decision to grant or deny unemployment benefits). But because Black's private, off-duty Facebook statement was conduct that was not connected with her work, the Commissioner correctly concluded that she was not

disqualified from receiving benefits under RCW 50.20.066(1). The Court should affirm.

B. The Commissioner Correctly Concluded That Puget Sound Security Did Not Establish That Black's Actions Met the Statutory Definition of Misconduct

Because Black's conduct was not connected with her work, she is not disqualified from receiving unemployment benefits under RCW 50.20.066(1), and the Court does not need to address whether her conduct amounted to misconduct under RCW 50.04.294. However, even if the Court reaches this inquiry, Black is still eligible for benefits because her conduct did not amount to statutory misconduct under the Act.

Misconduct is defined as:

> (a) Willful or wanton disregard of the rights, title, and interests of the employer or a fellow employee;
>
> (b) Deliberate violations or disregard of standards of behavior which the employer has the right to expect of an employee;
>
> (c) Carelessness or negligence that causes or would likely cause serious bodily harm to the employer or a fellow employee; or
>
> (d) Carelessness or negligence of such degree or recurrence to show an intentional or substantial disregard of the employer's interest.

RCW 50.04.294(1).

The statute also identifies numerous acts as *per se* misconduct. RCW 50.04.294(2); *Daniels v. Dep't of Emp't Sec.*, 168 Wn. App. 721, 728, 281 P.3d 310 (2012) ("Certain types of conduct are misconduct per se."). These acts are deemed misconduct "because the acts signify a willful or wanton disregard of the rights, title, and interests of the employer or a fellow employee." RCW 50.04.294(2).

Puget Sound Security argues that Black's Facebook post violated a known company rule, was in deliberate disregard of a standard of behavior which her employer had a right to expect, and was in careless disregard of Puget Sound Security's interest. Br. Appellant at 26-29; RCW 50.04.294(1)(b), (1)(d), (2)(f).The Court should not be persuaded by these arguments.

1. Black Was Not Discharged for Violating a Known, Reasonable Company Rule

One type of *per se* misconduct is a "[v]iolation of a company rule if the rule is reasonable and if the claimant knew or should have known of the existence of the rule." RCW 50.04.294(2)(f). "A company rule is reasonable if it is related to [the claimant's] job duties, is a normal business requirement or practice for [the claimant's] occupation or industry, or is required by law or regulation." WAC 192-150-210(4).

As discussed above, Puget Sound Security did not have any social media policies or guidelines in place at the time of Black's Facebook post. AR at 65, 89-90, 105, 130, 307 (FF 8). To the extent Puget Sound Security asserts that its rules requiring professionalism, courtesy, and respect govern employees' off-duty, off-site conduct, they are not reasonable. Therefore, Black did not violate a reasonable company rule that she knew or should have known. RCW 50.04.294(2)(f).

Puget Sound Security insists that these rules were reasonable because Black was "assigned to protect . . . law enforcement" and because of an important relationship between security officers and law enforcement. Br. Appellant at 28. But these factors were not included in the Commissioner's findings of fact, nor does Puget Sound Security point to evidence in the record supporting these propositions. This Court may not substitute its judgment of the facts for that of the agency and must limit its review to the agency record. RCW 34.05.570(3)(e); RCW 34.05.558; *Tapper*, 122 Wn.2d at 403. And, in the absence of a finding on a factual issue, the court must presume that the party with the burden of proof failed to sustain their burden on that issue. *State v. Armenta*, 134 Wn.2d 1, 14, 948 P.2d 1280 (1997). Moreover, Puget Sound Security has failed to show how it is reasonable to regulate the off-duty speech of an hourly security guard.

2. Black Did Not Deliberately Violate or Disregard a Standard of Behavior Which Puget Sound Security Has the Right to Expect of an Employee

Puget Sound Security argues that Black's private speech was a deliberate violation or disregard of a standard of behavior that the employer had the right to expect of her. Br. Appellant at 28; RCW 50.04.294(1)(b). Puget Sound Security certainly had a right to expect and require courteous, professional behavior of its employees at the worksite. *See, e.g.*, *Hamel*, 93 Wn. App. 140. But for the reasons discussed above, Puget Sound Security had no reasonable right to expect Black to restrict her own expression of personal opinions, in a private forum, when off duty. Similarly, the record does not support the conclusion that Black *deliberately* disregarded any standard of the Puget Sound Security's.

The Commissioner recently addressed this aspect of the definition of misconduct in *In re Jeremy Owens*, Emp't Sec. Comm'r Dec.2d 989 (2012). Owens worked at a camera repair shop and believed that a coworker had damaged his personal camera at the workplace. *Id.* (FF I). Owens reported the damage to his employer, but the employer was unable to verify Owens's accusations and informed Owens that the shop's insurance would not cover the damage. *Id.* (FF I-II). Owens expressed his frustration with the situation on his Facebook page. *Id.* (FF III). He expressly complained about his boss and the accused coworker and made

disparaging comments about the work ethic of the shop's employees, which he attributed to the employer. *Id.* (FF III). Another employee saw Owens's Facebook posts and informed the employer. *Id.* (FF IV). In contrast to Black's privacy settings here, Owens's posts were not limited to a private audience of Facebook "friends," and the employer was able to access and read the posts and responses. *Id.* The employer discharged Owens.

Recognizing that an employer at least "has the right to expect that employees will not make public disparaging comments regarding the employer or the employer's business, whether on or off duty," the Commissioner concluded that Owens violated or disregarded a standard of behavior which the employer had the right to expect of its employees. *Id.* (CL I-III). In sum, the Commissioner concluded that Owens "used a public forum to discredit his employer and the employer's staff," so misconduct was established. *Id.* (CL III-IV).

In contrast here, Black did not make public disparaging comments about her employer or the employer's business. Her Facebook posts were restricted to her friends and she did not mention or reference her employer, her employer's client(s), or any coworkers. Unlike the employer in *Owens*, Puget Sound Security did not establish any particular

standard of behavior that it had the right to expect of its employees, whether on or off duty. Puget Sound Security did not establish misconduct in this regard.

3. Black's Conduct Did Not Constitute Carelessness of Such Degree or Recurrence to Show an Intentional or Substantial Disregard of the Puget Sound Security's Interest

To establish misconduct under RCW 50.04.294(1)(d), an employer must prove the claimant's conduct constituted "[c]arelessness or negligence of such degree or recurrence to show an intentional or substantial disregard of the employer's interest." RCW 50.04.294(1)(d). "Carelessness" and "negligence" mean failure to exercise the care that a reasonably prudent person usually exercises. WAC 192-150-205(3).

Puget Sound Security does not explain how Black's Facebook post was of "such degree or recurrence to show an intentional or substantial disregard" of its interest. Puget Sound Security simply asserts that Black's conduct was misconduct under RCW 50.04.294(1)(d) because she was careless, caused embarrassment and damage, and did not show remorse when confronted. Br. Appellant at 29. But a reasonably prudent person would not assume that a private Facebook post expressing a personal opinion, without mentioning or referencing her employer, coworkers, or the employer's client, would have any possible effect on her employer's

interest. While Black may not have exercised care in making the statement generally, Puget Sound Security did not show that she considered, then disregarded, Puget Sound Security's interest when choosing her words. In fact, Black testified that she believed her statement "had absolutely nothing to do with my job." AR at 131, 133.

Black's conduct did not amount to statutory misconduct under the Act. The Court should affirm.

C. The ALJ Did Not Deprive Puget Sound Security of Due Process in Sustaining Objections That Limited the Scope of Its Cross-Examination

Puget Sound Security argues that the ALJ committed reversible error in limiting the scope of its cross-examination of Black. Br. Appellant at 11-16, 37-38. The Commissioner correctly concluded that there was no error in this regard. AR at 316-17, 324.

While cross-examination is an integral part of both criminal and civil proceedings, its availability is not unlimited. *Baxter v. Jones*, 34 Wn. App. 1, 3-4, 658 P.2d 1274 (1983). As the Court of Appeals has recognized:

> Cross examination is, however, limited by other factors; it must pertain to matters within the scope of the direct examination and matters affecting the credibility of the witness. ER 611(b). It may be curtailed where the relevance of the evidence is outweighed by the danger of undue delay, waste of time or needless presentation of

> cumulative evidence. ER 403. Further, the court has discretion to exercise reasonable control over the mode and order of interrogating witnesses to avoid needless consumption of time. ER 611(a)(2).

Id.

Decisions regarding the scope of cross-examination are left to the sound discretion of the trial court. *Falk v. Keene Corp.*, 53 Wn. App. 238, 250, 767 P.2d 576, *aff'd*, 113 Wn.2d 645, 782 P.2d 974 (1989). A trial court abuses its discretion when its decision is unreasonable or based on untenable grounds. *Id.* at 247 (citing *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971)).

In the present case, the ALJ appropriately limited Puget Sound Security's cross-examination of Black. The burden was on Puget Sound Security to show that it discharged Black for disqualifying misconduct. *Nelson*, 98 Wn.2d at 374-75; *In re Verner*, Emp't Sec. Comm'r Dec. 617. Additionally, the conduct at issue in any misconduct case is the action or behavior that resulted in the employee's discharge. WAC 192-150-200(1); *Safeco Ins. Cos. v. Meyering*, 102 Wn.2d 385, 392-93, 687 P.2d 195 (1984) (the Act "requires that the Department analyze the facts of each case to determine what actually caused the employee's separation").

Here, the action or behavior that resulted in Black's discharge was her private Facebook post, which was made known to Puget Sound

Security through its customer service contact at TPU after one of Black's Facebook friends copied it into an email to TPU. AR at 23-24, 131, 194 95, 233, 306-07 (FF 4-7). Puget Sound Security presented no evidence to show that Black's private speech had otherwise been made public or known to anyone outside of Black's Facebook friends.

In cross-examining Black, however, counsel for Puget Sound Security asked questions about her knowledge of the history of Facebook's privacy settings, the meaning of "www," and the general distribution of internet postings. AR at 136-40. Black's attorney objected, citing lack of foundation and irrelevance. AR at 136-37, 140. The ALJ sustained the objections, explaining that she had "not heard any evidence from the Employer that the information on – from this posting was publicized or came to anybody's eyes other than through apparently when a person who was a friend on Facebook brought it to the attention of the client who brought it to the attention of the Employer." AR at 140-41; *see also* AR at 136-38. Given that there was no evidence of the post being available online beyond Black's Facebook friends, the ALJ explained, "there is no basis for this broad, somewhat academic discussion of the functioning of the Internet, as far as I can tell." AR at 141. The ALJ then asked counsel to re-focus the questioning on the basis of Puget Sound Security's decision to discharge Black. *Id.*

Because Puget Sound Security had the burden to establish that it had discharged Black for disqualifying misconduct, and the only conduct at issue was the conduct for which Puget Sound Security actually fired Black, the ALJ exercised appropriate discretion in sustaining the objections made to the scope of Puget Sound Security's cross-examination of Black about the nature of internet privacy. AR at 136-38, 140-41; *see Nelson*, 98 Wn.2d at 374-75 (employer's burden to establish misconduct); WAC 192-150-200(1) (conduct at issue is "The action or behavior that resulted in your discharge . . . ."). Puget Sound Security has not shown that the ALJ abused her discretion.

Additionally, Puget Sound Security argues that the ALJ deprived it of due process by limiting the scope of its cross-examination of Black regarding her potential bias. Puget Sound Security's counsel asked Black what was at stake for her in the hearing, and Black's counsel objected on grounds of "irrelevance." AR at 152. The ALJ sustained the objection, stating, "The hearing is about access to eligibility for benefits. That's a given." *Id.* Puget Sound Security's counsel responded, "Nothing further" and asked no additional questions. *Id.*

Though Puget Sound Security argues that it was precluded from cross-examining Black on a legitimate issue when the ALJ sustained this objection, the record shows that the ALJ was already aware of Black's

interest in the outcome of the hearing. For that reason, the ALJ was within her discretion to conclude that any relevance of further discussing Black's interest was outweighed by the potential for wasting time or needless presentation of cumulative evidence. *See* ER 403. Additionally, given the ALJ's clear understanding of the circumstances, nothing precluded Puget Sound Security's counsel from arguing about Black's credibility and potential bias to the tribunal in closing argument. Puget Sound Security has not shown any error.

Finally, even if the ALJ erred in sustaining objections to the scope of Black's cross-examination, Puget Sound Security has not argued how it was prejudiced by the rulings. A trial court's improper limitation of cross-examination will not require reversal if no prejudice results from the error. *Falk*, 53 Wn. App. at 249.

VI. CONCLUSION

Black made an offensive statement on her private Facebook page while she was off-site and off-duty. The statement did not involve her job, Puget Sound Security, coworkers, or clients. Because Black's conduct was not connected with her work, she is not disqualified from receiving unemployment benefits. Even if her conduct was work-connected, it did not meet the statutory definition of misconduct. For the foregoing

reasons, the Department respectfully requests that this Court affirm the Commissioner's decision.

RESPECTFULLY SUBMITTED this 14th day of February, 2014.

ROBERT W. FERGUSON
Attorney General

April Benson Bishop

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Assistant Attorney General
Attorneys for Respondent

PROOF OF SERVICE

I, Judy St. John, certify that I caused a copy of Respondent's Brief with Attachments: In Re Edward L. Brooks, In Re Jeanette E Kost, In Re Jeremy Owens and In Re Pluma Verner to be served on all parties or their counsel of record as follows:

Email on February 14, 2014 per agreement

and US Postage Pre-Paid to be mailed February 18, 2014

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Hand Delivered February 14, 2014

Court of Appeals Division 1
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Seattle, WA 98101-4170

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

DATED this 14th day of February, 2014, at Seattle, Washington.

Judy St. John
Legal Assistant

Empl. Sec. Comm'r Dec.2d 967 (WA), 2011 WL 8129802

Commissioner of the Employment Security Department.

State of Washington.

IN RE: EDWARD L. BROOKS

Case No. 967
Review No. 2011-0925
Docket No. 02-2011-04477
April 8, 2011

DECISION OF COMMISSIONER

***1 On February 24, 2011, WASHINGTON STATE DEPARTMENT OF VETERANS AFFAIRS, d/b/a VETERAN'S HOME BUSINESS MANAGER, by and through Michael Sanchez, WVH, HR Manager, petitioned the Commissioner for review of an Initial Order issued by the Office of Administrative Hearings on February 16, 2011. Pursuant to chapter 192-04 WAC this matter has been delegated by the Commissioner to the Commissioner's Review Office. Having reviewed the entire record and having given due regard to the findings of the administrative law judge pursuant to RCW 34.05.464(4), we do not adopt the Office of Administrative Hearings' Findings of Fact or Conclusions of Law, but instead enter the following.**

FINDINGS OF FACT

I

Claimant was employed by the interested employer, Washington State Department of Veteran Affairs ("WDVA"), during two distinct periods of time: From October 1, 1991 through April 1995, and from February 1996 through December 8, 2010, on which date he was discharged by WDVA. At the time of separation, claimant was a laundry worker, full-time, paid $13.94 per hour, and a member of the Washington Federation of State Employees.

II

Having considered all factors relevant to credibility, we find the testimony of the employer's witnesses to be credible, and the testimony of claimant to be not credible. *See* Conclusion of Law No. I, below.

III

Claimant has a long and troubling history of on-duty and off-duty misbehavior, including, but not limited to, convictions for assault and drug-related crimes, suspension of his certified nursing assistant license, and abuse of vulnerable adults. *See* Exhibit 28 and related exhibits referred to therein.

IV

During both of his terms of employment with WDVA, claimant worked at its nursing home for veterans in Retsil, Washington. The residents of the nursing home are vulnerable adults. WDVA is therefore governed by strict regulations and guidelines promulgated by Department of Social and Health Services ("DSHS") for the purpose of protecting the vulnerable adult residents.

V

At all relevant times, WDVA's code of conduct required that all employees, including claimant, "[r]efrain from any illegal conduct." For reasons discussed in the conclusions of law below, WDVA's code of conduct made no distinction between on-duty and off-duty illegal activities, and prohibited both. The code of conduct further provided that "[w]hen an employee is uncertain whether an activity would be considered illegal, he or she should seek guidance from his or her immediate supervisor or the compliance officer." *See* Exhibit 31.

VI

Prior to his discharge, claimant most recently received and read the code of conduct on April 1, 2009. *See* Exhibit 33. At that time, he acknowledged in writing that "I have been informed of the reporting procedure applicable to potential violations of federal law, state law, the compliance program, and the WDVA's code of conduct . . ." and that "I realize committing a violation or failing to report a potential violation may result in disciplinary action." *Id.*

VII

*2 Article 28, Section 28.3 of the applicable collective bargaining agreement between claimant's union and WDVA provided in relevant part that "[t]he off-duty activities of an employee will not be grounds for disciplinary action *unless said activities . . . are detrimental to* the employee's work performance *or the program of the agency.*" *See* Exhibit 36 (emphasis supplied).

VIII

On or about April 9, 2007, claimant was convicted of possession of marijuana. His conduct resulting in this conviction occurred off-duty.

IX

On March 19, 2010, claimant was arrested for possession with intent to distribute cocaine, possession of marijuana, and resisting arrest. *See* Statement of Probable Cause in Exhibit 14, pp. 4-5; Exhibit 15, p. 2, containing claimant's stipulation to facts in Exhibit 14. The conduct giving rise to claimant's arrest occurred off-duty at Kelvin G's Tropic Blast and Tiki Bar in Bremerton, late that evening. The facts to which claimant stipulated included making a deal with undercover police to sell them cocaine and, in the process of being arrested, physically resisting, being tazed twice by uniformed police officers, still resisting, and then trying to flee. *Id.*

X

According to claimant's testimony, he was released by law enforcement authorities on March 20, 2010, pursuant to an "understanding" that he would have an unspecified period of time to consider becoming a "narc" rather than being prosecuted; that he decided not to be a "narc"; that he expected nothing more would happen; and that he had no further contact with law enforcement authorities until his re-arrest at work, described in the following finding of fact. We find claimant's testimony to be inherently unworthy of belief, in accordance with Finding of Fact No. II, above, and Conclusion of Law No. I, below.

XI

As a direct result of claimant's criminal conduct on March 19, 2010, law enforcement officers from Naval Criminal Investigation Service, Bremerton Police Department, and Kitsap County Sheriff's Office, dressed in SWAT gear, re-arrested claimant on the premises of WDVA's Retsil nursing home, in full view of everyone at the premises, including the vulnerable adult residents. Claimant's witness, Mr. King, credibly testified that "everybody in the building knew about it." Claimant's testimony to the effect that his re-arrest at work was unexpected and arbitrary is not credible. It is more probable than not that claimant's re-arrest at work was pursuant to a warrant issued for violations of the conditions of his release following the initial arrest on March 19, 2010.

XII

On June 11, 2011, claimant was charged in an information with possession of a controlled substance, *i.e.* cocaine, in violation of the Uniform Controlled Substances Act, specifically RCW 69.50.4013 and 69.50.206(b)(4), a class C felony. *See* Exhibit 14, p. 1. On that same day claimant admitted guilt to the offense charged. *See* Exhibit 15, p. 1. He was then diverted to the drug court. *See* Exhibit 15.

XIII

*3 As required by the WDVA's policy, claimant filled out a background authorization form on June 30, 2010, which required him to disclose any criminal convictions. *See* Exhibit 16. He disclosed a December 2005 conviction for assault 4, as well as his recent felony violation. Claimant, however, failed to disclose his 2007 conviction for, among other criminal offenses, possession of marijuana. Claimant testified, in substance, that he did not list this conviction because his supervisor said it did not matter. His supervisor testified that he gave claimant no instructions and, in fact, was not present when claimant filled out the form. In accordance with Finding of Fact No. II, above, and Conclusion of Law No. I, below, we find that claimant's testimony is not credible, that he was not following any purported instructions by his supervisor, and that he intentionally failed to disclose his 2007 conviction.

XIV

On or about July 16, 2010, WDVA received the results of claimant's background check from DSHS Background Check Central Unit. *See* Exhibit 18. WDVA learned for the first time that claimant had been convicted of possession of marijuana in 2007.

XV

On December 8, 2010, following a thorough investigation, WDVA discharged claimant pursuant to its policies and governing law on the ground that he was unfit to continue employment at its facility for vulnerable adults. *See* Exhibits 9 and 28.

XVI

During the weeks at issue, claimant was actively seeking work by making at least three job search contacts per week, was physically and otherwise able to work, and was available for work by rearranging his required community service under the drug court program to weekend days.

ISSUES PRESENTED

I

Was claimant discharged for work-connected misconduct within the meaning of RCW 50.20.066(1) as more particularly defined in RCW 50.04.294?

II

Was claimant able to, available for, and actively seeking work during the weeks at issue as required by RCW 50.20.010(1)(c)?

CONCLUSIONS OF LAW

I

Although the testimony of claimant and the employer's witnesses conflicted on a number of material factual matters, the administrative law judge entered no findings or conclusions concerning credibility. We have the ultimate adjudicative responsibility to make our own "independent determinations based on the record and [have] the ability and right to modify or replace an [administrative law judge's] findings, *including findings based on witness credibility.*" Smith v. Employment Sec. Dep't, 155 Wn. App. 24, 35 n. 2, 226 P.3d 263 (2010) (*citing* RCW 34.05.464(4) and Regan v. Department of Licensing, 130 Wn. App. 39, 59, 121 P.3d 731 (2005)) (emphasis supplied); *see also* Tapper v. Employment Sec. Dep't, 122 Wn.2d 397, 404-406, 858 P.2d 494 (1993); In re Chandler, Empl. Sec. Comm'r Dec.2d 954 (2010). Having reviewed the entire record including the digital audio recording of the telephonic hearing, and having considered all factors relevant to credibility including demeanor as detectable by telephone (*i.e.* hesitancy, responsiveness, and the like), logical persuasiveness, inherent plausibility, and the totality of the circumstances, we have found and hereby conclude that the employer's testimony was credible and that claimant's testimony was not. *See* Finding of Fact No. II.

II

***4 The provisions of the WDVA's code of conduct and the provisions of the collective bargaining agreement are both consistent with WAC 388-97-1820(2)(c)(ii), as most recently amended to be effective on January 29, 2010, which prohibits WDVA from employing at its facility in question any individual who has committed a crime in violation of the Uniform Controlled Substances Act within the past five years.**

III

Citing Nelson v. Employment Sec. Dep't, 98 Wn.2d 370, 665 P.2d 242 (1982), the administrative law judge concluded that claimant was not discharged for misconduct on the theory that his criminal conduct was not work-connected. We disagree with this theory and the administrative law judge's conclusions for the reasons stated below.

IV

RCW 50.20.066(1) states that for misconduct to be disqualifying it must be "connected" with claimant's work.

V

In Nelson, the claimant, a cashier, pleaded guilty to off-duty shoplifting. No employer rules prohibited such off-duty conduct. The Supreme Court held that on the facts of that case, including the lack of any employer rule prohibiting the off-duty conduct for which claimant was discharged, work-connected misconduct had not been established. *See* Nelson, 98 Wn.2d at 375. In contrast, in the case before us, claimant agreed to reasonable employer policies and rules prohibiting off-duty illegal activities. The employer rules were especially reasonable in light of the fact that claimant worked at a facility in which he had access to vulnerable adults. The court in Nelson explicitly recognized that off-duty misconduct

may be *work-connected* if it violates a rule of conduct reasonably related to the employer's business. *Id.* at 373-74. Here, claimant violated the employer rules prohibiting off-duty criminal conduct. Those rules were reasonably related to the employer's business of providing a safe and secure living environment for vulnerable adult residents.

VI

Shortly after the Supreme Court's decision in Nelson, we applied the decision in a case on all fours with the case presently before us. *See* In Re Weber, Empl. Sec. Comm'r Dec.2d 729 (1983). In Weber, the claimant, a state employee, was convicted of off-duty theft. Pursuant to WAC 356-04-010(6), the claimant was prohibited from committing, and was therefore subject to discipline for, off-duty crimes involving moral turpitude. We reasoned that the claimant's off-duty criminal conduct was disqualifying *work-connected* misconduct under the Nelson test, stating that:
In some circumstances, a certain type of conduct may be bargained for between an employer and an employee. In such circumstances, an employee's activity which is inconsistent with that conduct has a nexus with the employee's work.

In the instant case, it is evident from a reading of WAC 356-04-010(6) that [claimant], as a condition of his employment, was to conduct himself in a certain manner. It follows that any conduct on his part in violation of that regulation would be "connected with his work" . . . .

*5 As to the third part of the Nelson test, [claimant's] conduct was violative of WAC 356-34-010(6), which was a code of behavior contracted for between the agency and its employees. Finally, we conclude that any reasonable person would know that the agency's interests would suffer if that code of conduct were violated.

The same reasoning applies here. Claimant committed conduct specifically prohibited by WAC 388-97-1820(2)(c)(ii) and in so doing he committed work-connected misconduct. Any reasonable person in claimant's position would know that WDVA's interests in maintaining a safe and secure environment for its vulnerable adult residents would suffer if the code of conduct was violated.

VII

Moreover, claimant's off-duty conduct in this case led to the direct consequences connected with his work. Specifically, his off-duty conduct resulted in his sensational and disruptive arrest on the employer's premises, by law enforcement officers clad in SWAT gear, in full view of everyone at the facility, including WDVA's vulnerable adult residents. This buttresses the work-connected nature of claimant's conduct.

VIII

In short, we hold that all elements of the Nelson test are satisfied in this case and that claimant was discharged for work-connected misconduct within the meaning of RCW 50.20.066(1) as more particularly defined in RCW 50.04.294(1)(a) and (b).

IX

Finally, claimant's failure to disclose his 2007 conviction for possession of marijuana on his background authorization form was an act of dishonesty constituting misconduct within the meaning of RCW 50.20.066(1) as more particularly defined in RCW 50.04.294(1)(a) and (2)(c).

X

During the weeks at issue, claimant was able to, available for, and actively seeking work as required by RCW 50.20.010(1)(c).

Now, therefore,

IT IS HEREBY ORDERED that the Initial Order issued by the Office of Administrative Hearings on February 16, 2011, is REVERSED on the issue of job separation. Claimant is disqualified pursuant to RCW 50.20.066(1) beginning December 5, 2010, and thereafter for ten calendar weeks and until he has obtained bona fide work in employment covered by this title and earned wages in that employment equal to ten times his or her weekly benefit amount. The Initial Order is AFFIRMED on the issue of availability. Claimant was able to, available for, and actively seeking work during the weeks at issue as required by RCW 50.20.010(1)(c). *Employer:* If you pay taxes on your payroll and are a base year employer for this claimant, or become one in the future, your experience rating account will not be charged for any benefits paid on this claim or future claims based on wages you paid to this individual, unless this decision is set aside on appeal. *See* RCW 50.29.021.

DATED at Olympia, Washington, April 8, 2011. [a1]

Steven L. Hock
Chief Review Judge Commissioner's Review Office

RECONSIDERATION

*6 Pursuant to RCW 34.05.470 and WAC 192-04-190 you have ten (10) days from the mailing and/or delivery date of this decision/order, whichever is earlier, to file a petition for reconsideration. No matter will be reconsidered unless it clearly appears from the face of the petition for reconsideration and the arguments in support thereof that (a) there is obvious material, clerical error in the decision/order or (b) the petitioner, through no fault of his or her own, has been denied a reasonable opportunity to present argument or respond to argument pursuant WAC 192-04-170. Any request for reconsideration shall be deemed to be denied if the Commissioner's Review Office takes no action within twenty days from the date the petition for reconsideration is filed. A petition for reconsideration together with any argument in support thereof should be filed by mailing or delivering it directly to the Commissioner's Review Office, Employment Security Department, 212 Maple Park Drive, Post Office Box 9555, Olympia, Washington 98507-9555, and to all other parties of record and their representatives. The filing of a petition for reconsideration is not a prerequisite for filing a judicial appeal.

JUDICIAL APPEAL

If you are a party aggrieved by the attached Commissioner's decision/order, your attention is directed to RCW 34.05.510 through RCW 34.05.598, which provide that further appeal may be taken to the superior court within thirty (30) days from the date of mailing as shown on the attached decision/order. If no such judicial appeal is filed, the attached decision/order will become final.

If you choose to file a judicial appeal, you must both:
a. Timely file your judicial appeal directly with the superior court of the county of your residence or Thurston County. If you are not a Washington state resident, you must file your judicial appeal with the superior court of Thurston County. See RCW 34.05.514. (The Department does not furnish judicial appeal forms.) AND

b. Serve a copy of your judicial appeal by mail or personal service within the 30-day judicial appeal period on the Commissioner of the Employment Security Department, the Office of the Attorney General and all parties of record.

The copy of your judicial appeal you serve on the Commissioner of the Employment Security Department should be served on or mailed to: Commissioner, Employment Security Department, Attention: Agency Records Center Manager, 212 Maple Park, Post Office Box 9555, Olympia, WA 98507-9555. To properly serve by mail, the copy of your judicial appeal must be received by the Employment Security Department on or before the 30th day of the appeal period. See RCW 34.05.542(4) and WAC 192-04-210. The copy of your judicial appeal you serve on the Office of the Attorney General should be served on or mailed to the Office of the Attorney General, Licensing and Administrative Law Division, 1125 Washington Street SE, Post Office Box 40110, Olympia, WA 98504-0110.

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Footnotes

a1 **Copies of this decision were mailed to all interested parties on this date.**

Empl. Sec. Comm'r Dec.2d 967 (WA), 2011 WL 8129802

End of Document

Empl. Sec. Comm'r Dec.2d 987 (WA), 2012 WL 8441417

Commissioner of the Employment Security Department.

State of Washington.

IN RE: JEANETTE E. KOST

Case No. 987
Review No. 2012-2414
Docket No. 04-2012-08861
October 5, 2012

DECISION OF COMMISSIONER

*1 On June 4, 2012, WINCO HOLDINGS, INC., by and through Tiffany R. Hendriksen, Client Specialist of PeopleSystems, petitioned the Commissioner for review of an Initial Order issued by the Office of Administrative Hearings on May 3, 2012. On June 14, 2012, the claimant's reply was received by the Commissioners' Review Office. Pursuant to chapter 192-04 WAC this matter has been delegated by the Commissioner to the Commissioner's Review Office. Having reviewed the entire record and having given due regard to the findings of the administrative law judge pursuant to RCW 34.05.464(4), we do not adopt the Office of Hearings' findings of fact or conclusions of law. We instead enter the following.

SUMMARY STATEMENT OF THE CASE AND DISPOSITION

The Employment Security Department issued a Determination Notice, ruling that claimant was not disqualified from benefits under RCW 50.20.066(1). The employer appealed to the Office of Administrative Hearings, and the administrative law judge's Initial Order held that claimant was not disqualified for work-connected misconduct under RCW 50.20.066(1) because, even though claimant violated a reasonable employer policy, her on-the-job conduct did not cause harm to the employer. We reverse the Initial Order, holding that harm to the employer is not an element of on-the-job misconduct under RCW 50.20.294, and that the elements of on-the-job misconduct are established by a preponderance of the evidence. Claimant is therefore disqualified from receipt of benefits pursuant to RCW 50.20.066(1). The facts of the case do not involve off-the-job misconduct, and this decision therefore expresses no opinion on what role, if any, employer harm plays in establishing off-the-job misconduct.

FINDINGS OF FACT

I

Claimant was employed at the employer's grocery store as a non-union cashier from January 2009 through February 6, 2012. At the time of her discharge from employment, claimant worked part-time and was paid $10.45 per hour.

II

Claimant's adult son was employed at the same store for an unspecified period of time, including February 2012, when the incidents involving claimant took place.

III

The employer reduced claimant's son's hours on an unspecified date. When claimant began her shift on February 4, 2012 she was upset about reduction of her son's hours. Specifically, claimant was upset because, in her view, the resulting pay reduction

would require her son to move out of his apartment, live with claimant, and impact her financially. Claimant considered it her responsibility to support her adult son financially.

IV

At the beginning of claimant's February 4, 2012, shift, she spoke with her son and then to her supervisor. Claimant asked the supervisor for permission to take the day off. The supervisor declined because the store was too busy. Claimant told the supervisor that she was upset about reduction of her son's hours, that her son was "being treated like shit," and that she intended to speak with the store's assistant manager and/or manager about her son's hours.

V

*2 While still on duty, claimant entered the assistant store manager's office. The assistant store manager was working on his computer with his back to her and asked the reason for her visit. The assistant store manager frequently "multi-tasked" by simultaneously working on his computer while discussing business matters with employees. Claimant, however, thought the assistant store manager was being disrespectful. She asked that he give her his full attention, and he did so by turning around to face her.

VI

Claimant began to talk about reduction of her son's hours. As the discussion progressed claimant apparently felt that the assistant store manager was not adequately addressing her concerns. The assistant store manager did nothing to provoke claimant during the discussion. However, claimant became increasingly aggressive and loud to the point she was yelling at the assistant store manager. The meeting culminated in claimant shouting at the assistant store manager that "if it smells like shit, it's shit" and that the assistant store manager should "grow some balls." Claimant voiced these obscenities at such a volume that the bakery manager, who was working in another office, heard claimant shouting them. Before the assistant store manager could respond, claimant ended the conversation by "storming out" of his office.

VII

Shortly after departing the assistant store manager's office, and while remaining on duty, claimant met with the store manager. From the outset of this meeting claimant was visibly upset. Claimant expressed her concerns about reduction of her son's hours, and stated her views that her adult son would have to move in with her, resulting in adverse financial consequences. The store manager remarked that, regardless of finances, he would not let his adult son move back in with him under similar circumstances, and related an anecdote about a fifty-year-old male drug addict whose parents continued to assist him financially. Claimant apparently felt the store manager intended to insult her. She began using the term "bullshit" regarding reduction of her son's hours, stated that "if he [claimant's son] is a piece of shit just fire him," and asked the store manager "why not fucking fire him?" After the meeting ended, claimant worked the remainder of her shift.

VIII

The employer's written policy prohibited "altercations, fighting, or *acts of disrespect toward* customers, fellow employees or *management*; any act of intimidation and/or any threat of violence or act of violence of any kind." *See* Exhibit 25, ¶ XVI(3) (emphasis supplied). The policy also provided that violations would be "sufficient cause for disciplinary action, up to and including termination." Claimant received the policy when she was hired and knew its contents.

IX

Prior to the February 4, 2012, incidents described above, claimant had not been warned or disciplined by the employer for similar conduct.

X

*3 The employer discharged claimant on February 6, 2012 for violating the policy by her on-the-job disrespectful conduct on February 4, 2012.

XI

Claimant admitted at the hearing that her conduct toward the assistant store manager and store manager was not justified (in her word "allowed") by the fact that she was emotionally upset at the time.

XII

On Friday, February 15, 2012, claimant began preparation for and underwent carpal tunnel syndrome surgery. She was recuperating and unable to work until she was released by her physician on Friday, March 30, 2012. Thereafter, during the benefit weeks ending Saturday, April 7, 2012 through the date of hearing on May 3, 2012, claimant actively sought work by making at least three job search contacts, was physically and otherwise able to work, had transportation, and was otherwise available for work.

ISSUES PRESENTED

I

Is claimant disqualified from benefits pursuant to RCW 50.20.066(1) for misconduct as more particularly defined in RCW 50.04.294?

II

Specifically, is harm to the employer a necessary element for the employer to prove on-the-job misconduct?

III

Is claimant eligible for benefits during the weeks at issue under RCW 50.20.010(1)(c)?

CONCLUSIONS OF LAW

I

The findings in this decision state more specifically the facts of record as accurately summarized in more general terms by the administrative law judge, but the two are substantially the same. On these facts the administrative law judge concluded that disqualifying misconduct was not established because the employer had not proved it was "harmed" by claimant's conduct. *See* unadopted Conclusion of Law No. 5. That ruling is erroneous as a matter of law for the reasons discussed below.

II

Since 1937 Washington law has required that a claimant's behavior be work-connected to constitute disqualifying misconduct. *See* Laws of 1937, ch. 62, § 5(b). Although RCW 50.20.066 and its predecessor statutes have been amended multiple times in

ways not relevant to this decision, the requirement that the conduct be work-connected has always been in place and remains intact today. *See* Laws of 1939, ch. 214, § 3; Laws of 1941, ch. 253, § 3; Laws of 1943, ch. 127, § 3; Laws of 1945, ch. 35, § 74; Laws of 1947, ch. 215, § 16; Laws of 1949, ch. 214, § 13; Laws of 1951, ch. 215, § 13; Laws of 1953, 1st ex.s. ch. 8, § 9; RCW 50.20.060 (1970); RCW 50.20.060 (1977); RCW 50.20.060 (1982); RCW 50.20.060 (1993); RCW 50.20.060 (2000); RCW 50.20.060 (2003); RCW 50.20.060 (2006). Washington law also has long recognized a distinction between on-the-job and off-the-job misconduct. *Compare* Nelson v. Employment Sec. Dep't, 98 Wn.2d 370, 655 P.2d 242 (1982) *with* Macey v. Employment Sec. Dep't 110 Wn.2d 308, 752 P.2d 372 (1988). However, prior to the legislature's 1993 enactment of RCW 50.04.293, the predecessor statute of today's RCW 50.04.294, the Washington Employment Security Act did not define the term misconduct, nor did it contain language requiring a showing that the employer was "harmed" by the claimant's on-the-job or off-the-job misconduct. This left open a number of legal questions which were addressed in judicial decisions and in precedential Decisions of Commissioner, including whether proof of harm to the employer was required to establish misconduct. In general, the Commissioner and the courts followed the definition of misconduct originally articulated by the Wisconsin Supreme Court in Boynton Cab Co. v. Neubeck, 237 Wis. 249, 296 N.W. 636 (1941), with some modifications. *See, e.g.*, Durham v. Employment Sec. Dep't, 31 Wn. App. 675, 644 P.2d 154 (1982); In re Zucker, Empl. Sec. Comm'r Dec.2d 743 (1983).

III

*4 In 1982, the Washington Supreme Court analyzed the relationship between off-the-job misconduct and employer harm. Nelson, *supra*. That case involved the issue of what was required to establish that off-the-job misconduct was connected with the claimant's work within the meaning of the then-applicable version of the misconduct statute, RCW 50.20.060, one of the predecessor statutes of today's RCW 50.20.066. The Supreme Court held that to establish off-the-job conduct was connected with the claimant's work, and hence potentially disqualifying misconduct, the employer was required to prove by a preponderance of the evidence that the claimant'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. *Id.* at 375-76. The Supreme Court did not and could not address the role of employer harm in on-the-job misconduct cases, since the facts of the case involved only off-the-job conduct. The Nelson test was developed solely to determine the adequacy of proof of misconduct in cases involving an employee's conduct off-the-job and outside the scope of employment. *See* Franz v. Employment Sec. Dep't, 43 Wash. App. 753, 758, 719 P.2d 597 (1985). In other words, the Nelson test was used only for conduct occurring while off-duty and off the employer's premises.

IV

In 1988, six years after Nelson and five years before the enactment of RCW 50.04.293, the Washington Supreme Court further addressed the definition of misconduct, including the relationship between misconduct and employer harm in on-the-job misconduct cases. Macey, *supra*. The Supreme Court expressly recognized that the purpose of the Nelson test, including the requirement of employer harm, was to determine whether off-the-job, off-premises conduct was work-connected. *Id.* at 314-315. The Supreme Court held that disqualification for on-the-job misconduct required that (1) the rule must be reasonable under the circumstances of the employment; (2) the conduct of the employee must be connected with the work; and (3) the conduct of the employee must in fact violate the rule. *Id.* at 319. Despite a dissent arguing that employer "harm" should be required, the majority of the Supreme Court imposed no such requirement to establish that on-the-job conduct was work-connected or for any other purpose. *Compare* Dore, J. and Utter, J., dissenting, *with* majority opinion.

V

One year after Macey, the Washington Supreme Court reinforced the distinction between that case and Nelson. *See* Henson v. Employment Sec. Dep't, 113 Wn.2d 374, 378, 779 P.2d 715 (1989) (the Macey test was applicable to on-the-job conduct, and the Nelson test was applicable to off-the-job conduct); *see also* Harvey v. Employment Sec. Dep't, 53 Wn. App. 333, 338, 766 P.2d 460 (1998) (unlike the Nelson test, the Macey test for on-the-job misconduct did not require proof of harm to the employer),

VI

*5 In 1993, the Washington Supreme Court added one other element to the Macey test, specifically, that the employee's on-the-job violation must be intentional, grossly negligent, or continue to take place after notice and warning. *See* Tapper v. Employment Sec. Dep't, 122 Wn.2d 397, 409, 858 P.2d 494 (1993). In other words, the employee's on-the-job conduct cannot be characterized as mere incompetence, inefficiency, erroneous judgment, or ordinary negligence. *Id.*

VII

Against this backdrop, in 1993 the legislature spoke for the first time concerning the requirement of employer harm when it defined "misconduct" as "an employee's act or failure to act in willful disregard of his or her employer's interest where the effect of the employee's act or failure to act is to *harm the employer's business.*" RCW 50.04.293 (emphasis supplied). This definition drew no distinction between the requirement of employer harm in on-the-job and off-the-job misconduct cases. While this predecessor statute was in effect, several lower court decisions addressed the employer harm requirement, and for the most part they required proof of same in both on-the-job and off-the-job conduct cases. *See, e.g.*, Haney v. Employment Sec. Dep't, 96 Wn. App 129, 978 P.2d 543 (1999); Hamel v. Employment Sec. Dep't, 93 Wn. App. 140, 966 P.2d 1282 (1999); Anderson v. Employment Sec. Dep't, 135 Wn. App. 887, 143 P.3d 475 (2006).

VIII

In 2003, the legislature made significant changes to the statutory scheme concerning misconduct with the enactment of RCW 50.20.066. RCW 50.20.066(1) retained the requirement that misconduct be work-connected. However, the legislature also enacted RCW 50.04.294, adding a detailed definition of misconduct applicable to claims with an effective date on or after January 4, 2004. Significantly, in contrast to RCW 50.04.293, the amended statute omitted any reference to employer "harm" with one limited exception discussed below. RCW 50.04.294(1) now defines misconduct to include, but not be limited to, four categories of behavior. Two categories are potentially applicable to the case before us. Subsection (1)(a) includes in the definition of misconduct willful or wanton disregard of the interests of the employer or a fellow employee. Subsection (1)(b) includes in the definition of miscondcut deliberate violations or disregard of standards of behavior which the employer has the right to expect of an employee. RCW 50.04.294(2) goes on to include in the definition of misconduct seven subtypes of conduct signifying willful or wanton disregard of the interests of the employer within the meaning of subsection (1)(a). One of the subtypes of misconduct described in RCW 50.04.294(2) is potentially applicable to the case before us. Subsection (2)(f) includes in the definition of misconduct violations of a company rule if the rule is reasonable and if the claimant knew or should have known of the existence of the rule. Finally, RCW 50.04.294(3) excludes categories of conduct from the definition of misconduct, three of which are potentially applicable to this case. Subsection (3)(a) excludes from the definition of misconduct inefficiency, unsatisfactory conduct, or failure to perform well as a result of inability or incapacity. Subsection (3)(b) excludes from the definition of misconduct inadvertence or ordinary negligence in isolated instances. Subsection (3)(c) excludes from the definition of misconduct good faith errors in judgment or discretion.

IX

*6 Significantly, RCW 50.04.294, in contrast to the express employer harm requirement in on-the-job misconduct found in the predecessor statute, RCW 50.04.293, contains only one limited reference to employer "harm." The reference is found in one of the seven subtypes of misconduct described in subsection (2). Subsection (2)(g) includes in the definition of misconduct "violations of law by the claimant while acting within the scope of employment that substantially affect the claimant's job performance *or that substantially harm the employer's ability to do business.*" RCW 50.04.294(2)(g) (emphasis supplied). The remaining provisions of the definition of misconduct make no mention of employer "harm." Even subsection (2)(g) does not require the employer to prove harm in order to establish that subtype of misconduct in on-the-job cases. It merely makes employer harm an alternative means of proving that subtype. On its face, RCW 50.04.294 does not include employer harm

as a required element to establish on-the-job misconduct. The plain language of the statute is reinforced by settled principles of statutory construction.

X

The goal of statutory interpretation is to ascertain and carry out legislative intent. *See* Tesoro Refining & Marketing Co. v. Department of Revenue, 164 Wn.2d 310, 317, 190 P.3d 28 (2008). To this end, statutes should be construed in accordance with the plain meaning of their language. *See* Burns v. City of Seattle, 161 Wn.2d 129, 140, 164 P.3d 475 (2007). In determining the plain meaning of a statute it is helpful to compare the statute to predecessor statutes on the same subject to identify any significant changes. *See* Amburn v. Daly, 81 Wn.2d 241, 246, 501 P.2d 178 (1972) (in placing a judicial construction upon a legislative enactment, the entire sequence of all statutes relating to the same subject matter should be considered); *see also* State v. Roy, 126 Wn. App. 124, 128, 107 P.3d 750 (2005) (when the legislature amends a statute and makes a material change in the wording, there is a presumption the legislature meant to change the law). RCW 50.04.293, the predecessor statute to today's RCW 50.04.294, contained an express, unequivocal requirement of proof of "harm" to the employer in on-the-job misconduct cases. The legislature subsequently chose to omit any such requirement in RCW 50.04.294 . This is a strong indicator that the legislature did not intend to impose such a requirement for claims effective on or after January 4, 2004.

XI

A statute should also be construed to harmonize and give effect to all of its provisions and words. *See* City of Seattle v. Fontanilla, 128 Wn.2d 492, 498, 909 P.2d 1294 (1996). Interpretations which render provisions or words of a statute superfluous should be avoided. *See* Davis v. Department of Licensing, 137 Wn.2d 957, 963, 977 P.2d 554 (1999). In addition, when the legislature uses different words within the same statute, the courts recognize that a different meaning is intended. *See* Densley v. Department of Retirement Sys., 162 Wn.2d 210, 219, 173 P.3d 885 (2007). Some might argue that the references to the employer's "interests" in the introductory clause of section (2) and in subsections (1)(a) and (1)(d) of RCW 50.04.294 imply a requirement of proof of employer harm to establish on-the-job misconduct. However, this notion is inconsistent with the overall structure and language of the statute and the above rules of statutory interpretation. For example, if the reference to employer interests in the introductory clause of subsection (2) implies a requirement of employer harm, the reference renders superfluous the specific reference to employer harm in subsection (2)(g). The legislature could not have intended the references to employer "interests" and employer "harm" to be interchangeable. The reference to employer "interests" in the introductory clause of subsection (2) cannot be interpreted as meaning or implying the same thing as employer "harm." To assure consistent meaning of the same words as used in the statute, the references to employer "interests" in subsections (1)(a) and (1)(d) of the statute likewise cannot be interpreted to mean or imply employer "harm."

XII

*7 It is entirely plausible the legislature determined that in on-the-job misconduct cases, harm to the employer is inherent in the various categories and subtypes of misconduct embodied in RCW 50.04.294, obviating any need for proof, findings, or conclusions concerning employer harm. It is equally plausible that the legislature determined the references to employer "interests" in subsections (1)(a) and (1)(d) of RCW 50.20.294 would assure the reasonableness of the employer's rule, without requiring a showing of employer harm. Regardless, interfering with the legislature's policy decisions as expressed in plain language, for whatever reason, is inappropriate.

XIII

Only two judicial authorities discussed employer harm in the context of RCW 50.04.294. *See* Smith v. Employment Sec. Dep't, 155 Wn. App. 24, 226 P.3d 263 (2010); Griffith v. Employment Sec. Dep't, 163 Wn. App. 1, 259 P.3d 494 (2011). These two decisions are of little or no guidance in deciding the case before us.

XIV

The claimant in Smith argued that misconduct was not established because he did not intend to harm the employer's interest. The Court of Appeals held that intent to harm the interests of the employer is not required by RCW 50.04.294. However, the Court of Appeals' decision contains *dicta* which, regardless of intent, might be interpreted as meaning that harm to the employer is required by RCW 50.04.294. Smith, 155 Wn. App. at 36-37. *Dicta* is a statement in a court's decision which is not necessary to the decision of a case. *See* State ex rel. Lemon v. Langlie, 45 Wn.2d 82, 89, 273 P.2d 464 (1954); Pierson v. Hernandez, 149 Wn. App. 297, 305, 202 P.3d 1014 (2009) (statements in a case that do not relate to an issue before the court and are unnecessary to decide the case constitute *obiter dictum*, and need not be followed). The *dicta* in Smith it is of little or no guidance in deciding the case before us.

XV

In Griffith the employer discharged the employee for off-the-job conduct outside the scope of employment. Griffith, 163 Wn. App. at 5. In discussing whether the employee had committed disqualifying misconduct as defined by RCW 50.04.294, the court mentioned harm to the employer. *Id.* at 9-10. The case before us involves only on-the-job conduct. Griffith is therefore of no guidance. In addition, the Griffith court did not analyze the significant changes to RCW 50.04.294, enacted in 2003, and relied on Hamel, *supra*, an on-the-job, on-premises case.

XVI

The above conclusions lead to the ultimate conclusion that RCW 50.04.294 does not impose a requirement of proof of harm to the employer in on-the-job misconduct cases. To the extent that any previously published Decisions of Commissioner might be interpreted to require a showing of harm to the employer in order to establish on-the-job misconduct, those decisions are overruled on that point. It must be stressed that the facts of the case before us involve only on-the-job conduct by claimant. For that reason, addressing in this decision whether proof of employer harm is required in off-the-job misconduct cases is unnecessary and would be ill-advised.

XVII

***8** On the facts set forth in the above findings, claimant's February 4, 2012, on-the-job behavior in this case constitutes misconduct under RCW 50.20.066(1) and 50.04.294 in two separate and distinct respects.

XVIII

Claimant's conduct in the case before us was work-connected because it occurred on-the-job and on-premises. Claimant knew that she was upset. She also knew that she was not controlling her use of obscenities concerning reduction of her son's hours, as evident from her preliminary conversation with her supervisor. Nonetheless, claimant intentionally went to the assistant store manager's office and proceeded to shout obscenities at him. She then intentionally went to meet with the store manager and uttered obscenities at him. In relevant part, the employer's written rule reasonably prohibited "acts of disrespect towards ... management." Claimant received and knew the rule. She violated it. The fact that claimant was upset does not render her conduct unintentional or mitigate her serious misbehavior on-the-job. Claimant's conduct went far beyond inadvertence or ordinary negligence within the meaning of RCW 50.04.294(3)(b) or poor judgment within the meaning of RCW 50.04.294(3)(c). The preponderance of the evidence therefore establishes misconduct within the meaning of RCW 50.04.294(1)(a) and (2)(f).

XIX

The employer reasonably has the right to expect its employees not to shout or utter obscenities at members of management Claimant nonetheless intentionally violated this standard of decent behavior by her on-the-job conduct. Again, the fact that

claimant was upset does not render her conduct unintentional or mitigate her serious misbehavior on-the-job. Again, claimant's conduct went far beyond inadvertence or ordinary negligence within the meaning of RCW 50.04.294(3)(b) or poor judgment within the meaning of RCW 50.04.294(3)(c). As such, the preponderance of the evidence also establishes misconduct within the meaning of RCW 50.04.294(1)(b). Claimant is therefore disqualified from receipt of benefits pursuant to RCW 50.20.066(1).

XX

Pursuant to RCW 50.20.066(5), claimant is required to repay all benefits she has received due to her disqualification for misconduct. The matter will be remanded to the Department for calculation of the amount of the overpayment.

XXI

As found above, claimant's surgery and recuperation rendered her unable to work during the benefit weeks ending February 18 through March 31, 2012. Claimant is therefore ineligible for benefits during those weeks pursuant to RCW 50.20.010(1)(c). During the benefit weeks ending April 7 through April 28, 2012, claimant actively sought work by making at least three job search contacts, was physically and otherwise able to work, had transportation, and was otherwise available for work. Claimant therefore is not ineligible for benefits pursuant to RCW 50.20.010(1)(c) during those benefit weeks.

Accordingly,

IT IS HEREBY ORDERED that the Initial Order issued by the Office of Administrative Hearings on May 3, 2012, is REVERSED on the issue of job separation. Claimant is disqualified from benefits pursuant to RCW 50.20.066(1) beginning February 5, 2012 and thereafter for ten calendar weeks and until she has obtained bona fide work in covered employment and earned wages in that employment equal to ten times her weekly benefit amount. The Initial Order is MODIFIED on the issue of availability. Claimant is ineligble during each of the benefit weeks ending February 18 through March 31, 2012 under RCW 50.20.010(1)(c). Claimant is not ineligible during the remaining weeks at issue under RCW 50.20.010(1)(c). Pursuant to RCW 50.20.066(5) claimant is liable to repay all benefits paid to her. This matter is REMANDED to the Department for the purpose of calculating the amount of overpayment. *Employer:* If you pay taxes on your payroll and are a base year employer for this claimant, or become one in the future, your experience rating account will not be charged for any benefits paid on this claim or future claims based on wages you paid to this individual, unless this decision is set aside on appeal. *See* RCW 50.29.021.

DATED at Olympia, Washington, October 5, 2012. [a1]

*9 Steven L. Hock
Chief Review Judge Commissioner's Review Office

RECONSIDERATION

Pursuant to RCW 34.05.470 and WAC 192-04-190 you have ten (10) days from the mailing and/or delivery date of this decision/order, whichever is earlier, to file a petition for reconsideration. No matter will be reconsidered unless it clearly appears from the face of the petition for reconsideration and the arguments in support thereof that (a) there is obvious material, clerical error in the decision/order or (b) the petitioner, through no fault of his or her own, has been denied a reasonable opportunity to present argument or respond to argument pursuant WAC 192-04-170. Any request for reconsideration shall be deemed to be denied if the Commissioner's Review Office takes no action within twenty days from the date the petition for reconsideration is filed. A petition for reconsideration together with any argument in support thereof should be filed by mailing or delivering it directly to the Commissioner's Review Office, Employment Security Department, 212 Maple Park Drive, Post Office Box 9555, Olympia, Washington 98507-9555, and to all other parties of record and their representatives. The filing of a petition for reconsideration is not a prerequisite for filing a judicial appeal.

JUDICIAL APPEAL

If you are a party aggrieved by the attached Commissioner's decision/order, your attention is directed to RCW 34.05.510 through RCW 34.05.598, which provide that further appeal may be taken to the superior court within thirty (30) days from the date of mailing as shown on the attached decision/order. If no such judicial appeal is filed, the attached decision/order will become final.

If you choose to file a judicial appeal, you must both:
a. Timely file your judicial appeal directly with the superior court of the county of your residence or Thurston County. If you are not a Washington state resident, you must file your judicial appeal with the superior court of Thurston County. *See* RCW 34.05.514. (The Department does not furnish judicial appeal forms.) AND

b. Serve a copy of your judicial appeal by mail or personal service within the 30-day judicial appeal period on the Commissioner of the Employment Security Department, the Office of the Attorney General and all parties of record.

The copy of your judicial appeal you serve on the Commissioner of the Employment Security Department should be served on or mailed to: Commissioner, Employment Security Department, Attention: Agency Records Center Manager, 212 Maple Park, Post Office Box 9555, Olympia, WA 98507-9555. To properly serve by mail, the copy of your judicial appeal must be received by the Employment Security Department on or before the 30th day of the appeal period. *See* RCW 34.05.542(4) and WAC 192-04-210. The copy of your judicial appeal you serve on the Office of the Attorney General should be served on or mailed to the Office of the Attorney General, Licensing and Administrative Law Division, 1125 Washington Street SE, Post Office Box 40110, Olympia, WA 98504-0110.

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Footnotes

a1 Copies of this decision were mailed to all interested parties on this date.

Empl. Sec. Comm'r Dec.2d 987 (WA), 2012 WL 8441417

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Empl. Sec. Comm'r Dec.2d 989 (WA), 2012 WL 8441419

Commissioner of the Employment Security Department.

State of Washington.

IN RE: JEREMY OWENS

Case No. 989
Review No. 2012-4627
Docket No. 04-2012-19366
December 28, 2012

DECISION OF COMMISSIONER

***1** On November 23, 2012, CAMERATECHS, by and through William Jones, petitioned the Commissioner for review of an Initial Order issued by the Office of Administrative Hearings on October 26, 2012. Pursuant to chapter 192-04 WAC this matter has been delegated by the Commissioner to the Commissioner's Review Office. Having reviewed the entire record and having given due regard to the findings of the administrative law judge pursuant to RCW 34.05.464(4), we do not adopt the Office of Administrative Hearings' findings of fact or conclusions of law, but instead enter the following.

FINDINGS OF FACT

I

The claimant worked at the interested employer's camera repair shop (Cameratechs) as a sales assistant from December 2005 to July 7, 2012. On July 6, 2012, the claimant reported to the employer that his camera had been damaged at the workplace and that he (the claimant) believed a coworker had caused the damage. The employer examined the claimant's camera, as well as the claimant's camera case, and also questioned the claimant's coworkers but could not verify that the claimant's accusations had merit.

II

The claimant's accusations notwithstanding, nobody - including the claimant - had witnessed the coworker (or anyone else) damaging the claimant's camera. The claimant asked whether the damage would be covered by the employer's insurance. Given the employer's deductible, insurance would not cover the damage, and the claimant was so informed. Moreover, the employer could find no verification that the camera had been damaged at the employer's shop.

III

Convinced the coworker had damaged his camera, the claimant was not satisfied with the employer's response. On his Facebook page, the claimant posted frustration that his employer had not held the coworker accountable: "My boss is making an excuse for another employee damaging my equipment and that guy gets to get away with it scott free. I am fucking furious about this." Exhibit 20. The claimant made disparaging comments about the work ethic of employees at the employer's shop, which he attributed to the employer: "All the new guys at Cameratechs are slouches - don't want to work, and avoid responsibility. It's also the nurtured culture there." *Id.* The claimant also raised questions regarding the employer's insurance coverage (or lack thereof). Exhibit 20. The claimant's statements generated numerous responses, including the following: "You should be fucking furious"; "Punch him in the f'n neck"; "If the damage to your property happened at work then their insurance should pay for it." *Id.*

IV

Another employee saw the claimant's negative Facebook posts and informed the employer. The employer correctly understood the claimant's posts/interactions were not restricted to a private audience of Facebook "friends" and thus were available for anyone to read. The employer (though not the claimant's Facebook friend) was able to access and read the claimant's Facebook comments and responses. Having done so, the employer was concerned there could be a significant negative impact on the employer's reputation and, in turn, the employer's business. Consequently, the claimant was discharged.

V

*2 During the weeks at issue, the claimant was able to work, was available for work, and actively sought work as directed by the Department.

ISSUES PRESENTED

I

Is claimant disqualified from benefits pursuant to RCW 50.20.066(1) for misconduct as more particularly defined in RCW 50.04.294?

II

Is claimant eligible for benefits during the weeks at issue under RCW 50.20.010(1)(c)?

CONCLUSIONS OF LAW

I

Under the Employment Security Act, an indefinite period of disqualification is imposed during which unemployment benefits are denied when a claimant was discharged for work-connected misconduct. RCW 50.20.066. Misconduct is established by willful or wanton disregard of an employer's interest or the interest of a coworker. RCW 50.04.294(1)(a). Likewise, misconduct is established by violation or disregard for standards of behavior the employer has the right to expect of employees. RCW 50.04.294(2)(b).

II

Certainly, the employer has a vested interest in maintaining a productive business, which is premised in significant part on maintaining a positive reputation in the community. To that end, the employer relies on employees to speak well of the employer and fellow employees. At the least, the employer has the right to expect that employees will not make public disparaging comments regarding the employer or the employer's business, whether on or off duty.

III

The claimant exhibited disregard for his employer's interest and violated standards of behavior the employer had the right to expect of him, when he made negative Facebook statements about his employer, which sparked interest and likewise negative responses. Indeed, to characterize the claimant's statements as negative would be an understatement: The employer is in the business of repairing cameras; yet, the claimant stated his camera had been damaged at the employer's shop by a fellow employee, who refused to accept responsibility for the damage. The claimant explicitly faulted the employer (which he referenced by name) for failing to hold the fellow employee accountable and raised questions regarding the employer's

insurance coverage. (Given the responses, there is no doubt that questions were raised.) Adding insult to injury, the claimant asserted employees at the employer's shop were slouches, who avoided responsibility, an attitude he stated was nurtured there. It defies logic that the claimant would not have realized the damage his comments could cause to the employer's reputation.

IV

There are no mitigating circumstances. The claimant's off-duty barrage of angry accusations was clearly work-connected and was not voiced in private conversation. The use of Facebook did not render the claimant's posts private. Use of a social networking site cannot be equated with private conversation, particularly when the claimant evidently had selected and/or maintained minimal, if any, privacy settings. Excuses notwithstanding, it was the claimant's responsibility to choose/restrict his audience and to ensure his privacy settings remained current. By failing to adequately do so, the claimant effectively allowed anyone to read and share his posts about his employer. Moreover, evidence does not establish the claimant's accusations had merit. Although the claimant believed his coworker had damaged his camera, there is not substantiating evidence. More significantly, although the claimant was not satisfied with the employer's response, evidence does not establish the employer failed to conduct a reasonable and unbiased investigation, much less condoned poor work ethic or encouraged employees to shirk responsibility. In sum, the claimant used a public forum to discredit his employer and the employer's staff. Misconduct has been established.

V

*3 The claimant met the availability requirements of RCW 50.20.010(1)(c) for the weeks at issue.

Now, therefore,

IT IS HEREBY ORDERED that the October 26, 2012, Initial Order of the Office of Administrative Hearings is SET ASIDE on the issue of job separation. Claimant is disqualified pursuant to RCW 50.20.066(1) beginning July 1, 2012 and thereafter for ten calendar weeks and until he has obtained bona fide work in employment covered by this title and earned wages in that employment equal to ten times his weekly benefit amount. The Initial Order is AFFIRMED on the issue of availability. Claimant is not ineligible during the weeks at issue pursuant to RCW 50.20.010(1)(c). *Employer:* If you pay taxes on your payroll and are a base year employer for this claimant, or become one in the future, your experience rating account will not be charged for any benefits paid on this claim or future claims based on wages you paid to this individual, unless this decision is set aside on appeal. *See* RCW 50.29.021.

Dated at Olympia, Washington, December 28, 2012. [a1]

Annette Womac
Review Judge Commissioner's Review Office

RECONSIDERATION

Pursuant to RCW 34.05.470 and WAC 192-04-190 you have ten (10) days from the mailing and/or delivery date of this decision/order, whichever is earlier, to file a petition for reconsideration. No matter will be reconsidered unless it clearly appears from the face of the petition for reconsideration and the arguments in support thereof that (a) there is obvious material, clerical error in the decision/order or (b) the petitioner, through no fault of his or her own, has been denied a reasonable opportunity to present argument or respond to argument pursuant WAC 192-04-170. Any request for reconsideration shall be deemed to be denied if the Commissioner's Review Office takes no action within twenty days from the date the petition for reconsideration is filed. A petition for reconsideration together with any argument in support thereof should be filed by mailing or delivering it directly to the Commissioner's Review Office, Employment Security Department, 212 Maple Park Drive, Post Office Box 9555, Olympia, Washington 98507-9555, and to all other parties of record and their representatives. The filing of a petition for reconsideration is not a prerequisite for filing a judicial appeal.

JUDICIAL APPEAL

If you are a party aggrieved by the attached Commissioner's decision/order, your attention is directed to RCW 34.05.510 through RCW 34.05.598, which provide that further appeal may be taken to the superior court within thirty (30) days from the date of mailing as shown on the attached decision/order. If no such judicial appeal is filed, the attached decision/order will become final.

If you choose to file a judicial appeal, you must both:

*4 a. Timely file your judicial appeal directly with the superior court of the county of your residence or Thurston County. If you are not a Washington state resident, you must file your judicial appeal with the superior court of Thurston County. *See* RCW 34.05.514. (The Department does not furnish judicial appeal forms.) AND

b. Serve a copy of your judicial appeal by mail or personal service within the 30-day judicial appeal period on the Commissioner of the Employment Security Department, the Office of the Attorney General and all parties of record.

The copy of your judicial appeal you serve on the Commissioner of the Employment Security Department should be served on or mailed to: Commissioner, Employment Security Department, Attention: Agency Records Center Manager, 212 Maple Park, Post Office Box 9555, Olympia, WA 98507-9555. To properly serve by mail, the copy of your judicial appeal must be received by the Employment Security Department on or before the 30th day of the appeal period. *See* RCW 34.05.542(4) and WAC 192-04-210. The copy of your judicial appeal you serve on the Office of the Attorney General should be served on or mailed to the Office of the Attorney General, Licensing and Administrative Law Division, 1125 Washington Street SE, Post Office Box 40110, Olympia, WA 98504-0110.

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Footnotes

a1 Copies of this decision were mailed to all interested parties on this date.

Empl. Sec. Comm'r Dec.2d 989 (WA), 2012 WL 8441419

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Empl. Sec. Comm'r Dec.2d 617 (WA), 1980 WL 344295

Commissioner of the Employment Security Department

State of Washington

IN RE PLUMA VERNER

June 13, 1980
Case No.
617
Review No.
35501
Docket No.
9-14041

DECISION OF COMMISSIONER

*1 PASCO SCHOOL DISTRICT NO. 1, the former and interested employer of the claimant above named, by and through THE GIBBENS COMPANY, INC., having duly petitioned the Commissioner for a review of a decision of an Appeal Tribunal entered in this matter on the 4th day of February, 1980, and the undersigned, having carefully reviewed the entire record, thereby being fully advised in the premises, does hereby enter the following.

FINDINGS OF FACT

I

Sometime prior to March 7, 1979, petitioner hired the claimant, Pluma Verner, who was a program enrollee under the Comprehensive Employment and Training Act. The claimant was assigned to work as a janitor at a school operated by petitioner. On April 2, 1979, the claimant became a regular employee and member of petitioner's janitorial staff, at a salary of $872 per month. Acting through its supervisor of building services, petitioner discharged the claimant effective November 5, 1979, for insubordination. The claimant applied for and was allowed unemployment compensation beginning with the calendar week ending January 19, 1980, whereupon petitioner appealed.

II

The claimant failed to appear at the hearing of petitioner's appeal, and so did the supervisor of building services who had discharged the claimant. The supervisor's secretary appeared and testified in respect to the claimant's alleged insubordination. Her knowledge of the matter was not derived from her observation of or primary contact with the claimant, but from her activity as message center and surrogate in the office of the supervisor, and from correspondence addressed to the claimant which she had prepared at the direction of the supervisor.

III

According to the evidence adduced by the secretary, the circumstances of the claimant's discharge were as follows:

The supervisor of building services had a work rule, which he published among the janitors, requiring each janitor to notify the principal at the school where he or she worked, and also the supervisor of building services, whenever such janitor was to be absent from work. The claimant was absent from work March 7 through March 12, and failed to notify the supervisor of

building services. On March 13 the supervisor warned the claimant about this behavior, and on March 15 he dictated a note of confirmation, which the secretary prepared and mailed to the claimant, reserving a copy for the office file (exhibit #8). The supervisor warned the claimant that if the claimant exhibited such behavior again it would mean immediate dismissal; and further, that "all personnel that are absent are to call this office every day they are gone".

IV

The claimant was absent July 1, 1979, and several days thereafter. He was discharged on July 9 for failure to call in as directed. Following the discharge, the supervisor learned that the claimant had been absent because of illness, so he rehired the claimant effective July 31, after having issued another written warning which was prepared and forwarded to the claimant by the secretary (exhibit #9). The claimant last worked for petitioner on October 30, 1979. He requested, and was granted, permission to be absent on October 31. He was absent on November 1 and November 2, but failed to notify the supervisor that he would not be reporting for work on those days. On November 2, he contacted the principal at the school where he was assigned to work. The principal was without authority to grant him a leave of absence, and advised him to contact his supervisor. When the claimant returned to work on November 5, the supervisor discharged him. This action was confirmed by a letter prepared and forwarded to the claimant by the secretary, dated November 6, 1979 (exhibit #10).

*2 From the foregoing Findings of Fact, the undersigned frames the following:

ISSUE

Is the claimant subject to disqualification from benefits pursuant to the provisions of RCW 50.20.060?

From the Issue as framed, the undersigned draws the following:

CONCLUSIONS

RCW 50.20.060 provides, in substance, that an individual shall be disqualified from benefits for an indefinite period beginning with the first day of the calendar week in which he or she has been discharged or suspended for misconduct connected with his or her work. The Wisconsin Supreme Court, in the case of Boynton Cab Company v. Neubeck, 237 Wis. 249, 296 N.W. 636 (1941) has set forth the following definition of the term "misconduct", which has been approved by the Washington Court in the case of Willard v. E.S.D., 10 Wn.App. 437, 517 P.2d 973 (1974), as follows:

". . . the intended meaning of the term 'misconduct' as used in sec. 108.04 (4) (a), Stats., is limited to conduct evincing such wilful or wanton disregard of the 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 incapability, inadvertencies or ordinary negligence in isolated instances, or good faith errors in judgment or discretion are not deemed 'misconduct' within the meaning of the statute."

The burden of establishing misconduct is upon the party alleging its existence, and the required quantum of proof is a preponderance of the evidence. In re Leninger, Comm Dec. (2nd) 213 (1976). Hearsay evidence is admissible as proof of misconduct, subject to the proviso in WAC 192-09-135 that: " . . . no decision or findings of fact shall be based exclusively upon hearsay evidence unless such hearsay evidence would be considered admissible under the rules of evidence for superior courts in the state of Washington."

We come now to consider the circumstances of the claimant's discharge, and the evidence of record in respect thereto. The principal actors who would have first hand knowledge of the motivation for and manner of the claimant's discharge, the claimant

and his supervisor, did not appear at the hearing. Preponderant in the record is the hearsay testimony of a secretary who, as a part of her duties, prepared all the documents by which the discharge was effected; together with such evidence as is contained in the documents, this being also hearsay. The weight of all this hearsay evidence is that the claimant was discharged after a third infraction of a reasonable work rule requiring him to notify his supervisor whenever he was to be absent from work; and that the claimant had been previously warned that another infraction of the rule would result in his discharge. The violation of a work rule on attendance, or on the reporting of attendance, is misconduct if it occurs under circumstances evidencing a disregard of the employer's interests. In re Munson, Comm. Dec. 985 (1973); In re Leslie, Comm. Dec. (2nd) 190 (1976). It follows that if the hearsay evidence which preponderates in the record may be used as the sole basis for facts found and conclusions drawn with respect to this matter, misconduct may be established.

*3 Under RCW 5.45.020, a business record is "competent evidence if the custodian or other qualified witness testifies to its identity and mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event, and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission." It is abundantly established in the record that the letters exhibited therein which set forth the basis of the claimant's discharge were written and mailed, and copies filed by the secretary, at the direction of petitioner's supervisor, at or near the time of the events therein described, and in the regular course of petitioner's business. The undersigned concludes that the secretary's testimony as to the genesis of this documentary evidence is such as would justify its admission as evidence in a Superior Court of this state; and that the nature and weight of this evidence is sufficient to establish that the claimant was discharged for misconduct. As the claimant was discharged for misconduct, it follows that he was subject to disqualification from benefits pursuant to RCW 50.20.060, and that any benefits which have been paid to him pursuant to this claim are therefore an overpayment. Accordingly,

IT IS HEREBY ORDERED that the Decision of the Appeal Tribunal entered in this matter on the 4th day of February, 1980, shall be SET ASIDE. The claimant is disqualified from benefits pursuant to RCW 50.20.060 beginning November 4, 1979, and until he has obtained work and earned wages of not less than his suspended weekly benefit amount in each of five calendar weeks. The benefits which have been paid to the claimant pursuant to this claim are an overpayment pursuant to RCW 50.20.190.

DATED at Olympia, Washington, JUN 13 1980

Robert E. Jackson
Commissioner's Delegate

Empl. Sec. Comm'r Dec.2d 617 (WA), 1980 WL 344295

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