91414-1

NO. 70738-8

SUPREME COURT

STATE OF WASHINGTON

JEFF KIRBY, and PUGET SOUND SECURITY PATROL, INC.
Appellant-Petitioner,

v.

STATE OF WASHINGTON DEPARTMENT OF EMPLOYMENT SECURITY,
Respondent.

PETITION FOR DISCRETIONARY REVIEW OF A COURT OF APPEALS DECISION

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I. IDENTITY OF PETITIONER

Petitioner is the interested employer, Puget Sound Security Patrol, Inc.

II. CITATION TO COURT OF APPEALS DECISION

The attached Court of Appeals decision was filed on December 22, 2014, and set for publication by the attached order dated February 2, 2015.

III. ISSUES PRESENTED FOR REVIEW

1. Should the Supreme Court revisit the *Nelson* test as to whether off-duty misconduct is work-related when the statute interpreted has been amended, a newly enacted statute changes the definition of misconduct, the agency entrusted with effectuating the statutory program has both promulgated a new regulation effectuating the statutes and has issued a precedential decision in an analogous case, and technology provides new context for the application of the standard to social media?

2. When, if ever, can an employer demonstrate that its work rules or expectations as to off-duty misconduct are reasonable and work-related such that violating them is in substantial disregard of the employer's interests?

3. Are the standards of a licensed profession, such as statutorily-defined unprofessional conduct, relevant to determining misconduct that disqualifies one for unemployment benefits?

IV. STATEMENT OF THE CASE

A. The claimant provided security for her client and its guests, including law enforcement.

Sarah Black, who is the claimant in this case, was a security guard. Slip Opinion at 1. She guarded the Tacoma Public Utilities building (TPU). The building held several county government offices, including human resources; so county employees, including law enforcement officers, visited the building. Guards saw law enforcement at this site. The claimant "routinely dealt with a wide range of people in the course of her duties, including police officers involved in security issues or simply going in and out of the buildings." CR 308 (FOF 12).

B. Security guards must build relationships with law enforcement.

Security guards, such as the claimant, routinely interact with law enforcement in the general course of their duties. This interaction with law enforcement is so central that it is one of the six topics taught to all security guards during pre-assignment training, as well as refresher training. WAC 308-18-305(e)(iii) (Building relationships with law enforcement); *see also* CR 302-03. The training covers conduct off the job. CR 302-03.

C. The employer's rules governed off-duty civility.

The employer, Puget Sound Security Patrol, Inc., had workplace rules governing security guards' conduct. *See e.g.*, Findings of Fact 9, 10, and 11 (e.g. requiring courtesy, professionalism, and positive relations with law enforcement). One rule prohibited "discourtesy to client

representatives" or their visitors, and cautioned that violating work rules could result in discharge. CR 215. The claimant received a copy of the employer's Ethical Conduct Requirements of All Security Officers at TPU, which required her to "practice honesty and good ethics without exception on and **off the job**[.]" CR 208 (emphasis added). Not following the rules "**at anytime by anyone assigned to TPU properties**," will not be tolerated. *Id.* (emphasis in original). She was reminded, "Good ethics are what you do when nobody is looking," and not to do something if in doubt that it is ethical. *Id.* The guidelines included the following:

> (3) All words and conduct that is harassing, rude, discourteous, discriminatory, negative, uncalled-for, overly aggressive, or unprofessional, towards anyone is *strictly* prohibited at the TPU worksites.
> ***
> (11) The sure standard of conduct to follow is not to say or do *anything* that would or could be perceived to violate this Ethical Directive, or which doesn't contribute positively to the TPU security mission at the particular site you are assigned. [CR 208-09, 307-08 (FOF 9-10).]

The claimant signed acknowledging these rules. CR 208-09. Another rule required mandatory reporting of anything that impaired her ability to perform her duties. CR 308. Other rules touch on the company image and business. CR 218.

The claimant knew the rules required courtesy to law enforcement:

> Q: Being courteous and professional applied not just to the client, but that client's guests?
> A: Yeah.
> Q: Some of TPU's guests included police officers?
> A: Yes. [CR 135]

D. The claimant offended her client by disparaging its law enforcement guests.

On February 23, 2012, in a well-publicized tragedy, a Washington State Patrol trooper was shot and killed during a traffic stop. CR 278. In response, the claimant published the following comment, stating that the trooper deserved to be murdered:

> u kno wat, I do not give a fuck about a police officer that got shot, if they quit fuckin with ppl, ppl prolly quit shootin em all the goddamn time.....karmas a bitch. [CR 306 (FOF 2).]

The comment was posted on Facebook. CR 306 (FOF 4).[1] The claimant made her post while off duty. She had set her privacy levels so that her posts were initially accessible to the approximately 100 people designated as her "friends" on Facebook.

E. Facebook friends are invited to view the profile and posts.

One of the claimant's Facebook friends was an employee of TPU. CR 306 (FOF 4); CR 135, 148, 153-54, 155. This means the claimant had to affirmatively invite (or accept the invitation of) the TPU employee as a Facebook friend.

"Of primary importance" in understanding Facebook "is the difference between a user's 'profile' (or, in the case of a business or other organization, a 'page') and a user's 'news feed.'" *See* Andy Taylor,

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[1] Facebook has 890 million daily active users. http://en.wikipedia.org/wiki/Facebook (last visited Feb. 13, 2015).

Friending and Following: Applying the Rules of Professional Conduct to Social Media, 34 U. Ark. Little Rock L. Rev. 551, 554 (2012). "The profile is described as the 'complete picture' of a user on Facebook." *Id.* "On the profile, a user has the ability to post status updates, photos, videos, and links," *id.*, and her employer and worksite. "The profile is the page on Facebook that contains all of an individual user's posts." *Id.*

F. Facebook posts are republished.

Facebook posts both reside on a user's timeline (formerly the user's "wall") and may be pushed through email or displayed through a smart phone application. The claimant's post is akin to sending an email to her entire email address book. No reasonable employer would consider one hundred emails "private" or assume they went un-forwarded to others.

Posts and updates may be republished through Facebook when "liked," commented on, or reposted. "Status updates and other content from other users' profiles appear in a user's news feed," and, "Generally speaking, a post from an individual's profile will appear in another user's news feed if that user has connected with the individual on Facebook by creating a 'friend' relationship, generally referred to as 'friending' another user." Taylor at 556. It may also post elsewhere if a "friend" of a user interacts with a third user. *Id.* In other words, assume users A and B are connected, and users B and C are connected: "If B and C interact in some way (perhaps B comments on C's status or shares C's picture on B's own profile, or perhaps C writes something on B's profile), then A might see that interaction." *Id.* While security measures have evolved over time,

people other than Facebook friends can apparently access Facebook posts, and posts may be republished.

"It was possible for friends to convey to others what had been said in the claimant's blog." CR 306 (FOF 4). The claimant's Facebook friend who was a TPU employee forwarded the posting as a matter of some concern to the TPU Customer Services, who in turn brought it to the attention of Puget Sound Security Patrol. CR 306 (FOF 4); CR 233, 245 (client forwarding "a statement from Facebook, from whom I believe works as security at your facility. It is extremely concerning.")

G. The employer was actually harmed.

The client was "very concerned that someone with such disregard for" life, or "respect for law enforcement officers would be employed here," CR 61, and "was horrified that [the employer] had an employee that would say things like that about police officers." CR 59-60.[2] Aside from violating several, overlapping civility policies and the expectation that she would build relationships with law enforcement, the post could have triggered the mandatory reporting policy concerning fitness to serve in the role of security as the claimant no longer cared if police guests at TPU

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

were murdered. The claimant's supervisor was also "shocked, embarrassed and – and disgusted." CR 158. Co-workers felt similarly. *Id.* The supervisor testified, "Everybody was shocked, but there were some that were more visibly ... disgusted and embarrassed by it." CR 161.

The administrative agency found the employer was not harmed. On appeal, this finding was reversed. The claimant's message did harm her employer. This issue is so clear that the department conceded error, and the appellate decision agrees it was error and approves of the concession. Opinion at 13.[3] The Opinion goes on to say that the claimant's "post was contrary to [her employer's] interests," *id.* at 19, yet the decision curiously states that the claimant was not acting "in substantial disregard" of the employer's interests. *Id.* at 20. There is no analysis for this distinction.

H. The claimant meant what she said.

The claimant had been stopped by law enforcement, including being cited for driving under the influence. CR 146. She did not think she should

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[3] In the superior court's words, one of the claimant's Facebook friends could have gone to the newspaper with the quote and it could have been printed: "Employee – you know, security guard advocates murder of police officers," that she "not only condones it, she's advocating it," to "Go out and kill cops." VRP 20-21. The department argues that she would still get benefits. VRP 21. Following the Opinion also compels the award of benefits of an employee fired for advocating the murder of her client's guests by denying any work-related connection.

have been stopped. CR 146. She testified, "I am continually harassed by police officers all the time." CR 144.

When asked if she meant to communicate that people would stop shooting police if the police would stop acting improperly, the claimant testified, "[Inaudible] if they would keep (sic) harassing people for no reason, they would probably not get shot at so much." CR 147. She agreed that the phrase, "Karma is a bitch," was a point of emphasis. CR 147-48.

The claimant was confronted by her supervisor. CR 306-07 (FOF 6-7). The claimant admitted making the statement, *id.*, and already knew who forwarded the comment. CR 148, 246. The employer reminded her that company work rules require professionalism and courtesy, and that her job required a good working relationship with law enforcement. CR 308. "She showed no remorse for her actions and was extremely defensive of her right to post and say what she wanted." CR 235.

Rather than expressing regret or remorse, rather than expressing that she did not intend to harm her employer or offend the client, CR 158, the claimant was unapologetic. CR 306 (FOF 6). She was asked by her own supervisor if she knew that her supervisor, the CEO, and the owner of the company were all former police officers. CR 246. She responded that she could not be fired for her opinions. *Id.* She testified, "I said, 'I have the right to say whatever I want.'" CR 149; *see also* CR 157 (claimant insisted on right to free speech), 158 (no assurances it would not happen again). The claimant was terminated. She applied for and received unemployment benefits.

I. The claimant intended her client to receive the post.

Despite knowing the claimant's Facebook friend worked at TPU, the agency decided and the Opinion affirmed that the claimant did not intend her client or her employer should ever learn of the post. *See e.g.,* Opinion 11-12. But, the friend who worked at TPU did tell someone.

The TPU friend was offended by the claimant's post. He disagreed with her in a comment thread. Opinion at 9 (see also Comm. Record 306 (Finding of Fact 5), 154 (testimony). He did not tell the claimant that he was going to tell anyone else about it. This friend's "undisclosed intent" to forward the post was material to the decision. *See* Opinion at 9-10. Yet, his comment seems to have already republished the claimant's post and his comment to all of his own Facebook friends.

Because the client friend was so offended and disturbed by the claimant's post, he forwarded the text of it within his organization. The claimant knew who had relayed the comment when she was initially confronted by her supervisor. CR 148. Evidence of the client's reaction is substantial and uncontroverted.

V. LEGAL ARGUMENT

The *Nelson* test to decide off-duty misconduct should be revisited given changes in the law and the new context of off-duty social media. Review by the Supreme Court is appropriate, consistent with RAP 13.4(b), because the decision of the Court of Appeals is in conflict with another published appellate decision and involves issues of substantial public interest that should be determined by the Supreme Court.

A. The first element of *Nelson* is already part of proving misconduct.

The Opinion holds that the employer failed to prove the first element of the *Nelson* test. The Supreme Court first articulated a test for off-duty disqualifying misconduct in 1982. *Nelson v. Department of Employment Security*, 98 Wn.2d 370, 374-75, 655 P.2d 242 (1982) (interpreting RCW 50.20.060). The Court held that off-duty conduct may disqualify one from unemployment benefits if employee's conduct (1) had some nexus with employee's work, (2) resulted in harm to employer's interest, (3)(a) was violative of some code of behavior contracted for between employer and employee, and (3)(b) done with intent or knowledge that employer's interest would suffer. *Id.* at 375. The misconduct statute has been amended since that time, and the amendments make it easier to establish misconduct.[4]

The misconduct statute does not distinguish on-duty from off-duty; all misconduct must be work-related. RCW 50.20.060(1) (disqualifying an individual discharged "for misconduct connected with his or her work").

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[4] At the time the *Nelson* was decided, the term "misconduct" was developed through case law and more limited. *See e.g. Nelson v. Employment Security Dep't*, 31 Wn. App. 621, 626 (1982) (citations omitted), *rev'd on other grounds,* 98 Wn.2d 370 (1982). A new definition of misconduct applies to this case. *See* RCW 50.04.294 (effective January 4, 2004).

The first prong of the *Nelson* test, that the misconduct has some connection with the employee's work, is built into the statute, so it is not an additional element to be proven if the misconduct is accomplished off-duty. The appellate decision held that the employer failed to establish this element under a distinct *Nelson* version of the test. Opinion at 11. It follows the Supreme Court in *Nelson* and is in error in that regard.

B. The agency regulation informs the statutory interpretation.

In 2003, twenty-one years after *Nelson*, the statute that the *Nelson* Court interpreted was amended. In response to the 2003 legislative changes, the department promulgated a new regulation: WAC 192-150-200. The title of the new regulation refers to the same statutes interpreted by the *Nelson* Court and the new statute concerning misconduct. *Nelson*, 98 Wn.2d at 375 (citing RCW 50.20.066); *cf.* (General provisions—Misconduct and gross misconduct—RCW 50.04.294 and 50.20.066).

The text of the new regulation echoes the statutory requirement that disqualifying misconduct must be work-related (in sub-section one) and goes on to define what conduct is work-related (in sub-section two).

The regulation's definition of work-related states: "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," and, "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(2). This regulation

updates the law since *Nelson*, and combines the *Nelson* test's first (nexus) and second (harm to employer) elements.

The appellate decision applies a double standard. Sometimes it applies the regulation only to on-duty conduct and holds it is irrelevant to off-duty conduct. Opinion 17 ("The mere establishment of" element two, which is "either harm or potential to harm is insufficient to satisfy" element one "of the Nelson test."). At other times, the appellate decision applies the regulation to off-duty conduct. Opinion at 13 (applying WAC 192-150-200(2) to element two of the *Nelson* test). Nothing in the statute, the regulation, or the *Nelson* case supports this double standard.

Because the statute that the *Nelson* Court interpreted to create the test requires both on and off-duty conduct to be work-related, because the statute has been amended and a new statute defines misconduct, and because the agency charged with the unemployment program, *see* RCW 50.12.010, has promulgated a new regulation on this issue, the endurance of the *Nelson* test is an issue of public importance that this Court should review.

C. Standard of Care for Facebook

1. When are Facebook posts work-related?

The appellate Opinion determines that the Facebook post was not work-related, so the employer failed the first element of the *Nelson* test.

The administrative agency previously decided an analogous case and further designated it as a precedential decision. In the analogous case, an employee's off-duty comments on Facebook about the employer were

held to be work-related and to violate expected standards. *In re Jeremy Owens*, Empl. Sec. Comm'r Dec.2d 989 (2012). The "claimant exhibited disregard of his employer's interests and violated standards of behavior the employer had the right to expect of him," and, "It defies logic that the claimant would not have realized the damage his comments could cause to the employer's reputation." *Id.* In that case, the conduct was found to be "clearly work-connected." *Id.* Although that employee did not use privacy settings, the claimant in the instant case made her post knowing her client was a Facebook friend who had access to the post. Furthermore, the client friend commented on the post and republished it.

In a second analogous case, a sister state with a similar misconduct statute analyzed Facebook posts. In that case, a nurse employed by a hospital posted an offensive writing on her Facebook wall which was only viewable by her Facebook friends. *Guevarra v. Seton Medical Cntr, et al*; 2013 U.S. Dist. LEXIS 169849, 37 I.E.R. Cas. (BNA) 698 (ND CA December 2, 2013). Her Facebook friends included a co-worker who then reported the posting to the claimant's supervisor. The claimant was terminated and subsequently denied benefits. Other states, which are cited later, are in accord that off duty statements can be misconduct.

A sister state and our own state's agency have analyzed off-duty Facebook posts, yet the appellate decision refused to draw either an analogy or a distinction. This Court should consider whether the agency's decision to the contrary has been distinguished or was in error.

2. When is offense to be expected by a Facebook post?

Element three of the *Nelson* test concerns the claimant's knowledge that the employer's interests will suffer. The more unique and outrageous a statement, the more likely it is to be reposted or republished. This claimant said that some of the people she is paid to guard deserve to be murdered. Even if the claimant's Facebook friend knows her employer and the client she serves, even if her Facebook profile lists her employer and worksite, even if other posts establish this context, those facts are apparently immaterial if the particular Facebook post does not mention her employer, her job, or her customer. *See* Opinion at 20. This friend's "undisclosed intent" to forward the post was material to the Opinion. *See* Opinion at 9-10. The claimant, apparently, did not intend her client or her employer to ever learn of the post. *See e.g.,* Opinion 11-12. But, the friend did tell someone. He forwarded the text of the post within the client's organization. The Opinion did not mention it, but the claimant knew who had relayed the comment when she was initially confronted by her supervisor. CR 148: 12-16. In fact, the email forwarding the comment memorializes her friend's reaction to the claimant's message, which was one of horror. CR 59-60 ("horrified" and "extremely concerning"). Evidence of the client's reaction and effect on employee morale is substantial and undisputed. The Opinion effectively holds that those reactions to the post should not have been expected.

This decision's analysis contradicts *Hamel v. Employment Sec. Dep't*, 93 Wn. App. 140, 146-147, 966 P.2d 1282 (Div. II 1998). In that case, the

employee committed misconduct through gross negligence by intentionally stating something to a customer that he should have known would be interpreted as offensive. *Hamel* was determined under the 1993 misconduct statute. That statute was amended in 2003 to make establishing misconduct even easier. Likewise, the agency believes an employee posting Facebook messages should know the post will be damaging and disregards the employer's interests—even without a social media policy. *In re Jeremey Owens, supra.* This Court should revisit the *Nelson* test, given changes in the law and an apparent conflict in the appellate divisions.

Furthermore, this case implicates laws protecting against harassment. The Opinion holds that the post was not work-related because the claimant did not intend the client or employer to learn of it, despite it being directed to the client-employee. An employer could be liable to the client for harassment, yet the employer would also pay (through higher taxes) unemployment benefits to the harasser if the conduct was off-duty. The decision has untenable implications.

3. What is the standard of care when using Facebook?

The agency did not decide whether the claimant was negligent. Rather than reverse for improperly applying the law or remanding for fact-

finding,[5] the appellate court decided it for the first time on appeal. *See* Opinion at 19-20. So, even though the claimant knew she was communicating an outrageous statement to her client about the people she was employed to protect, a statement that embarrassed and harmed her employer and coworkers, the decision holds that the facts fail as a matter of law to establish that the claimant was careless. *See* Opinion at 19-20. The decision establishes a new standard of care granting wide freedom for employees to damage and embarrass their employers and to offend their clients if the offense is off-duty and the claimant does not use her employer's name in that post.

4. When can employers regulate Facebook posts?

The employer had work rules prohibiting offensive conduct, and the claimant was aware of these rules. The appellate decision disregards all of these rules and holds that the employer may regulate off-duty conduct on Facebook only if it has a policy referring specifically to "Facebook," or "social media." Opinion 10-11, 14. This contradicts the agency's view. *See In re Jeremey Owens, supra.* Yet, work rules requiring general civility may be preferable to media-specific policies. Requiring an employer to

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[5] The court may reverse an order if "the agency has erroneously interpreted or applied the law;" or "the agency has not decided all issues requiring resolution by the agency." RCW 34.05.570(3)(d), (f).

provide a media-specific policy for every existing and emerging context before finding off-duty misconduct is ill-considered.

Even if the employer issues a social media policy specific to off-duty Facebook posts that offend customers, the appellate decision leaves employers unprotected. The Opinion notes the employer argued that rules did extend off-duty in this instance because "the client whom she was assigned to protect included law enforcement and because a security guard's relationship with law enforcement is so important." Opinion at 14. The Opinion states that the employer "fails to persuasively explain how this rule is related to [the claimant's] job duties under these facts," so the appellate decision necessarily implies such a rule is unreasonable and therefore unenforceable under WAC 192-150-210(4). *See id.* In other words, even if the employer had a social media policy prohibiting offending customers and damaging the employer, that rule would be unreasonable.

The Opinion effectively holds that an employer is unable in this circumstance to prohibit damage done by an employee through social media, even if it issues a social media policy. This is contrary to well-settled law.[6] Furthermore, employers who may be issuing rules concerning

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[6] A company rule is reasonable if it bears a reasonable relationship to the employer's interests. *See* WAC 192-150-210(4). The "true test in such a case, as to whether the rule was reasonable, was one that proceeded from

social media, such as the Seattle Police Department,[7] will find themselves similarly unprotected when those rules are found to be not work-related. This is an issue of public importance that the Court should clarify.

The Opinion holds that employees who cause "embarrassment and damage," *id.* at 20, and act "contrary to [her employer's] interests," *id.* at 19, will nevertheless get employer-funded benefits because the employer will fail to establish that the conduct was in substantial disregard to the employer's interests. *Id.* at 20. The decision lends neither analysis nor discussion to the issue of what distinguishes harm to the employer's interest from substantial disregard to the employer's interests.

The freedom of and restrictions on employees who use Facebook and other social media, and the employer's interest in safeguarding its goodwill, are issues of public importance that should be decided by the Court.

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the time of the adoption of the rule and had as object of its query the investigation of whether a violation was likely to harm the employer's business interests, while a test would be faulty that consisted in the fortuitous circumstance alone as to whether the violation of the rule resulted in actual harm to the employer's interests." 18 A.L.R.6th 195 (citing *Gregory v. Anderson*, 14 Wis. 2d 130, 109 N.W.2d 675, 89 A.L.R.2d 1081 (1961)); *see also* WAC 192-150-210(4).

[7] http://www.seattle.gov/police-manual/title-5---employee-conduct/5125---social-media (last checked March 3, 2015).

D. A licensee's professional standards are relevant to determining disqualifying misconduct.

The employer argues that professional standards may establish either (1) misconduct by "disregard of standards of behavior which the employer has the right to expect of an employee," under RCW 50.04.294(1)(b), (2) misconduct by failing the standard of care for negligence under RCW 50.04.294(1)(d), or (3) a code of behavior under element (3)(a) of the *Nelson* test. The Opinion, however, holds that unprofessional conduct of a licensee "is not helpful" to the question of whether a claimant commits misconduct. Slip Opinion at 19. By analogy, the Rules of Professional Conduct or Judicial Canons would be unhelpful in determining whether off-duty breaches by lawyers or judges were misconduct. This was an issue of first impression and decided without analysis. This Court should review the issue.

E. Future Cases

The Opinion will be cited to support, if not compel, the award of employer-paid benefits in cases about off-duty statements or conduct:

- an off-duty employee posts on Facebook, "My boss is making an excuse for another employee damaging my equipment and that guy gets away with it scott free," so that "I am fucking furious about this";[8]

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[8] *In re Jeremy Owens*, Emp. Sec. Comm'r Dec.2d 989 (2012) (finding off-duty Facebook posts were work-related misconduct).

- an employee who posts on Facebook, "Thanks to the effin heifer who royally effed up my schedule," and hopes her supervisor "Burn[s] in hell you effed up spawn of Satan";[9]
- a licensed practical nurse at a retirement home threatens the daughter of a resident by saying, "You would not want your mother treated bad[ly] or hurt, would you?";[10]
- or a principal of a residential treatment facility for at-risk boys is overheard at a dinner party asking for some weed, implying that one employee killed another, and making derogatory remarks about another employee.[11]

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[9] *Guevarra v. Seton Medical Cntr, et al*; 2013 U.S. Dist. LEXIS 169849 (ND CA December 2, 2013) (finding off-duty Facebook posts were work-related misconduct).

[10] *Johnson v. Mississippi Empl. Sec. Comm'n*, 761 So.2d 861 (2000) (finding off-duty statement to patient's daughter was work-related misconduct).

[11] *Elser v. Unemployment Comp. Bd.*, 967 A.2d 1064 (2009) (finding off-duty statements inside his own home were work-related misconduct).

VI. CONCLUSION

The Supreme Court should accept review to determine the issues of public importance and resolve conflict with another published decision.

Respectfully submitted this ___ day of March, 2015.

Orrick, Herrington & Sutcliffe, LLP

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VI. CONCLUSION

The Supreme Court should accept review to determine the issues of public importance and resolve conflict with another published decision.

Respectfully submitted this 4 day of March, 2015.

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Declaration of Service

I caused a copy of the foregoing Petition for Discretionary Review to be served on the following in the manner indicated below:

Via Email to

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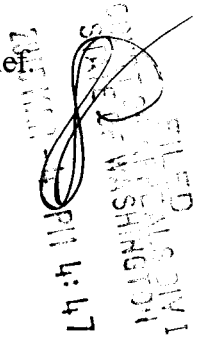
Seattle, WA 98104

on today's date.

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

SIGNED this 4th day of March, 2015, at Seattle, Washington.



Sarah Borsic, Legal Assistant

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISIONE ONE

JEFF KIRBY and PUGET SOUND SECURITY PATROL, INC., Appellants, v. WASHINGTON STATE DEPARTMENT OF EMPLOYMENT SECURITY, Respondent.	No. 70738-8-I ORDER GRANTING MOTION TO PUBLISH OPINION

Respondent, Washington State Department of Employment Security, has moved for publication of the opinion filed in this case on December 22, 2014. The panel hearing the case has called for an answer from Appellants, Jeff Kirby and Puget Sound Security Patrol. The court having considered the motion and Appellants' answer, has determined that the motion for publication should be granted. This court hereby

ORDERS that the motion for publication is granted.

Dated this 2nd day of February 2015.

FOR THE PANEL:

Cox, J.

Judge

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

JEFF KIRBY and PUGET SOUND SECURITY PATROL, INC.,	)	No. 70738-8-I
Appellants,	)	DIVISION ONE
v.	)	
WASHINGTON STATE DEPARTMENT OF EMPLOYMENT SECURITY,	)	UNPUBLISHED
Respondent.	)	FILED: December 22, 2014

Cox, J. — An employee who is discharged for "misconduct connected with his or her work" is disqualified from receiving unemployment compensation benefits.[1] The Commissioner of the Employment Security Department affirmed the award to Sarah Black of unemployment compensation benefits following her discharge by Puget Sound Security Patrol (PSSP) for a post she made on Facebook. The superior court affirmed. Because PSSP fails in its burden to show that the Commissioner's action was invalid, we affirm.

The material facts are established by the findings of fact. Black worked as a full-time, permanent, nonunion security officer for PSSP from December 2010 to February 2012. She worked the graveyard shift at the Tacoma Public Utilities (TPU) building. In the course of her duties, Black routinely interacted with a wide range of people, including police officers.

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[1] RCW 50.20.066(1).

In February 2012, Black "posted" the following message on Facebook:

> u kno wat, I do not give a f[***] about a police officer that got shot, if they quit fu[*]kin wit ppl, ppl prolly quit shootin em all the goddamn time.....karmas a bitch[2]

"Generally speaking, a post from an individual's profile will appear in another user's news feed if that user has connected with the individual on Facebook by creating a 'friend' relationship, generally referred to as 'friending' another user."[3] The words "post," "friend," and "friending" used in this context merely refer to individuals communicating with those listed on a social networking website and does not, necessarily, imply any more significant relationship between those individuals.

Black posted this message on Facebook while she was at home, not on duty. She had set her Facebook privacy level so that her posts were only accessible to the approximately 100 people designated as her "friends" on Facebook. Members of the public and others not listed as "friends" could not view her posts.

One of Black's Facebook "friends," a TPU employee, disagreed with the post but did not tell Black that he was going to tell anyone else about it. He sent a copy of the message to TPU's customer service department who then notified Black's supervisor. Black's supervisor notified PSSP's CEO and Executive Vice President for Employee Relations.

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[2] Administrative Record at 306.

[3] Andy Taylor, Friending and Following: Applying the Rules of Professional Conduct to Social Media, 34 U. ARK. LITTLE ROCK L. REV. 551, 556 (2012).

When confronted, Black told her supervisor that she had the right to express an opinion when she was not at work and that her Facebook settings were private. PSSP did not then have any specific social media policies or guidelines with respect to Facebook or other social media sites. And the company had not given Black or other employees instructions regarding communications on such channels of communication. PSSP discharged Black.

Black applied for, and received, unemployment compensation benefits. The Employment Security Department determined that there was no disqualifying misconduct by Black.

PSSP appealed, and an administrative law judge (ALJ) entered an order affirming the Department's decision. PSSP petitioned the Department's Commissioner for review. The Commissioner adopted the ALJ's findings of fact and conclusions of law and affirmed the initial order.

PSSP appealed to King County Superior Court. The court affirmed the Commissioner's decision and denied PSSP's motion for reconsideration.

PSSP appeals.

DISQUALIFYING MISCONDUCT

PSSP argues that the Commissioner erred in concluding that Black did not commit disqualifying misconduct. We hold that PSSP fails in its burden to show that the Commissioner's action was invalid.

The Employment Security Act exists to provide compensation to individuals who are involuntarily unemployed "through no fault of their own."[4] An

[4] RCW 50.01.010.

individual is disqualified from receiving unemployment benefits if he or she is discharged "for misconduct connected with his or her work."[5]

Judicial review of a decision made by the Commissioner of the Employment Security Department is governed by the Washington Administrative Procedure Act (WAPA).[6] This court sits in the same position as the superior court and applies the standards of WAPA directly to the administrative record before the agency.[7] This court reviews the Commissioner's decision.[8]

The Commissioner's decision is prima facie correct.[9] The party challenging the agency's action bears the burden of demonstrating its invalidity.[10] Relief from an agency decision is granted if the reviewing court determines that the Commissioner erroneously interpreted or applied the law, the order is not supported by substantial evidence, or the order is arbitrary or capricious.[11]

This court reviews findings of fact to determine whether they are supported by substantial evidence.[12] An appellate court views the evidence and

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[5] RCW 50.20.066(1).

[6] Tapper v. Emp't Sec. Dep't, 122 Wn.2d 397, 402, 858 P.2d 494 (1993).

[7] Id.

[8] Verizon Nw., Inc. v. Emp't Sec. Dep't, 164 Wn.2d 909, 915, 194 P.3d 255 (2008).

[9] RCW 50.32.150.

[10] Id.; RCW 34.05.570(1)(a).

[11] RCW 34.05.570(3)(d), (e), (i).

[12] Barker v. Emp't Sec. Dep't, 127 Wn. App. 588, 592, 112 P.3d 536 (2005).

reasonable inferences therefrom in the light most favorable to the party who prevailed at the administrative proceeding below.[13] Unchallenged findings are verities on appeal.[14]

The application of law to the facts is a question of law that this court reviews de novo.[15] This court gives substantial weight to the agency's interpretation of the statutes it administers.[16]

Whether a claimant engaged in misconduct connected with work is a mixed question of law and fact.[17] Accordingly, this court determines the law independently and then applies the law to the facts as found by the agency.[18]

Work-Connected

PSSP argues that the Commissioner erred when it concluded that Black's conduct was not connected to work. We disagree.

Whether off-duty conduct is work-connected for purposes of qualifying for unemployment compensation benefits was first addressed by the supreme court

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[13] William Dickson Co. v. Puget Sound Air Pollution Control Agency, 81 Wn. App. 403, 411, 914 P.2d 750 (1996).

[14] Fuller v. Emp't Sec. Dep't, 52 Wn. App. 603, 605, 762 P.2d 367 (1988).

[15] Terry v. Emp't Sec. Dep't, 82 Wn. App. 745, 748-49, 919 P.2d 111 (1996).

[16] Smith v. Emp't Sec. Dep't, 155 Wn. App. 24, 32, 226 P.3d 263 (2010).

[17] Tapper, 122 Wn.2d at 402.

[18] Hamel v. Emp't Sec. Dep't, 93 Wn. App. 140, 145, 966 P.2d 1282 (1998), review denied, 137 Wn.2d 1036 (1999).

in Nelson v. Department of Employment Security.[19] There, the claimant was a cashier for a publishing company.[20] She notified her supervisor that she recently had been arrested for shoplifting.[21] The crime occurred off her employer's premises and after working hours.[22] Nothing during her appearance in court or at the time of her arrest identified her employer.[23] She pled guilty to the charge and the court imposed a $50 fine, a 10-day suspended jail sentence, and a 3-month deferred sentence.[24]

Her employer discharged her based on concern about her trustworthiness in handling cash and a fear her conviction would adversely affect her relationship with other employees of the publishing company.[25] The court noted that she did not contest the propriety of her discharge.[26]

The supreme court concluded that the claimant in Nelson was entitled to unemployment compensation benefits.[27] In doing so, the supreme court adopted

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[19] 98 Wn.2d 370, 372, 655 P.2d 242 (1982).

[20] Id. at 371.

[21] Id.

[22] Id.

[23] Id.

[24] Id.

[25] Id. at 371-72.

[26] Id. at 372.

[27] Id. at 375.

a three part test in order to establish misconduct connected with an employee's work.[28] Specifically, the employer must show by a preponderance of the evidence that a reasonable person would find the employee's conduct: "(1) had some nexus with the employee's work; (2) resulted in some harm to the employer's interest; and (3) was in fact conduct which was (a) violative of some code of behavior contracted for between employer and employee, and (b) done with intent or knowledge that the employer's interest would suffer."[29]

For the third element, the court held that the conduct cannot be impliedly contracted between employer and employee. Rather, it "must be the subject of a contractual agreement between employer and employee" though it need not be a formal written contract.[30] It "may be reasonable rules and regulations of the employer of which the employee has knowledge and is expected to follow."[31] In so holding, the court expressly rejected as far too broad this court's formulation of the rule, prior to review by the supreme court in that case, that violation of a code of behavior ***impliedly*** contracted was sufficient.[32] Rather, it at least requires a reasonable rule or regulation known to the employee.[33]

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[28] Id. at 373-75.

[29] Id. at 375.

[30] Id. at 374.

[31] Id.

[32] Id.

[33] Id.

Importantly, the question before this court is not whether Black should have been terminated from her job. Rather, the question is whether the Commissioner properly concluded that Black was eligible to receive unemployment compensation benefits under the Employment Security Act.[34]

As counsel for the Department conceded during oral argument at the superior court when asked whether Black's post was defensible:

> [DEPARTMENT COUNSEL]: No, Your Honor. ***And I agree, it was offensive and despicable.*** The problem is, it wasn't sufficiently connected with her work to constitute misconduct that should disqualify her from receiving unemployment benefits. And as Your Honor has correctly indicated, ***the question isn't: Did this employer have the right to fire her? Absolutely, they did.*** The question is: Did they fire her for misconduct as it's defined by the Employment Security Act such that she should not get unemployment benefits? And the statute for misconduct says you're disqualified if you're discharged for misconduct that's connected with your work. And that's also what it says in the Department's regulations.[35]

Here, adopted findings of fact 3, 4, 5, and 8 establish the factual basis to determine whether Black's post was work-connected.

In finding of fact 3, the Commissioner found, in relevant part, that "[Black] posted the message from home, when she was not on duty."[36] PSSP challenges this finding, but it is supported by substantial evidence. Black testified that she was at home and not at work when she made the post.[37]

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[34] 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).

[35] Report of Proceedings (June 25, 2013) at 16 (emphasis added).

[36] Administrative Record at 306.

[37] Id. at 133, see also 235.

In finding of fact 4, the Commissioner found, in relevant part, that Black "had set her Facebook privacy level so that her . . . postings were only accessible to the approximately 100 people designated as her friends on Facebook. Members of the public and others not listed as friends could not view her [post]."[38] PSSP does not challenge this finding, and thus, it is a verity on appeal.

In finding of fact 5, the Commissioner found, in relevant part:

> [Black's] message was an expression of a personal opinion that did not include any reference to [PSSP], to [TPU], or to her job as a security officer. She did not intend to communicate her opinion to [PSSP], to [TPU], or to anyone not on her list of friends. The person who reported her message to [TPU] had disagreed with [Black] in a blog posting but had not told [Black] that he was going to tell anyone else about it.[39]

PSSP challenges this finding, but it, too, is supported by substantial evidence. Black testified that she made the post because it was her "personal feelings upon reading the news that day."[40] She further testified, "I didn't say anything about work or co-workers or clients or the company. My post had absolutely nothing to do with my job."[41] Additionally, she testified that she did not intend to cause any harm or embarrassment to PSSP. And she testified that she did not expect that the post would be known to PSSP. Moreover, the privacy

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[38] Id. at 306.

[39] Id.

[40] Id. at 132.

[41] Id. at 133.

settings on Facebook and the undisclosed intent of one of the limited "friends" to forward the post, with which he disagreed, amply support this finding.

In finding of fact 8, the Commissioner found, in relevant part: "[PSSP] did not have any specific social media policies or guidelines and had not given [Black] and other employees instructions with respect to communications on Facebook or similar channels of communication."[42] PSSP does not challenge this finding, and thus, it is also a verity on appeal.

Based on the above findings, the Commissioner affirmed Conclusion 10 of the ALJ's order, which stated in relevant part:

> 10. Based on the above findings and pursuant to the above referenced authority, [PSSP] has not met its burden of proof with respect to misconduct. ***There is no evidence of a nexus between [Black's] blog post and her work***. It was sent from her home when she was not at work. It made no reference to [PSSP], to TPU, to her job, or to her position as a security officer. . . . [Black] sent the message only to the individuals who were within the privacy settings she had established in Facebook. She did not intend to send the message to [PSSP] or to others. Further, none of [PSSP's] general policies, rules, or instructions addressed social media communications in any way, and the policies, rules, and instructions that were in place were very general and for the most part specifically govern conduct at the workplace or on the job. . . . ***[Black's] actions therefore do not violate a code of behavior contracted for between [PSSP] and [Black].*** [PSSP] made numerous arguments for why [Black's] behavior impliedly violated their general policies, but implied behavior is not the standard that must be applied. Accordingly, [Black] is not subject to disqualification under RCW 50.20.066.[43]

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[42] Id. at 307.

[43] Id. at 310 (emphasis added).

First, consistent with the directive of Nelson, the Commissioner properly concluded that there was "no evidence of a nexus between [Black's] [post] and her work."[44] The Commissioner affirmed the factual determination of the ALJ that the post was made while Black was at home and not on duty, and the post made no reference to PSSP, to TPU, or to Black's job or to her position of a security officer. Further, Black made the post on her private Facebook page, which was accessible only to her "friends." Consequently, PSSP fails to establish that the first Nelson element is met—that the conduct had some nexus with Black's work.

Second, again consistent with Nelson, the Commissioner properly concluded that Black did "not violate a code of behavior contracted for between [PSSP] and [Black]."[45] The Commissioner affirmed the factual determination of the ALJ that there was no policy of the company that dealt with posts on Facebook or other social media sites. And the company did not direct its employees in any respect with respect to communication using these media until after Black's discharge. Thus, PSSP fails to establish that the first requirement of the third Nelson element is met—that the conduct was "violative of some code of behavior contracted for between employer and employee."[46]

Further, the Commissioner also properly concluded that Black "did not intend to send the message to [PSSP] or to others."[47] In fact, the Commissioner

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[44] Id.

[45] Id.

[46] See Nelson, 98 Wn.2d at 375.

[47] Administrative Record at 310.

expressly found that Black "did not intend to communicate her opinion to [PSSP], to [TPU], or to anyone not on her list of friends" and that Black's post was "an expression of personal opinion."[48] Accordingly, PSSP also fails to establish that the other requirement of the third Nelson element is met—that the conduct was "done with intent or knowledge that the employer's interest would suffer."[49]

In sum, PSSP failed to establish the first and third required Nelson elements. The Commissioner, whose decision is prima facie correct, properly concluded that that Black's post on Facebook was not work-connected.

PSSP makes several arguments that Black's conduct was work-connected. None are persuasive.

First, PSSP claims that the Commissioner erred in finding insufficient nexus, because "[c]onduct is connected with one's work if it 'results in harm or creates the potential for harm to [PSSP's] interest.'"[50] For this, it relies on WAC 192-150-200(2). But in doing so, it misreads and misapplies both Nelson and this administrative regulation. Under Nelson, the first of several elements of the test to determine whether conduct is work-connected is that there be "some nexus with the employee's work."[51] The second, separate element is that the

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[48] Id. at 306.

[49] See Nelson, 98 Wn.2d at 375.

[50] Brief of Appellant at 29 (emphasis omitted) (quoting WAC 192-150-200(2)).

[51] Nelson, 98 Wn.2d at 375.

conduct "resulted in some harm to the employer's interest."[52] PSSP impermissibly merges these separate elements—nexus and harm—in its argument.

PSSP also relies on the same administrative regulation to argue that harm to the employer can include the potential for harm. Thus, it argues that it was an error of law to require evidence of "specific harm." With this argument, PSSP refers to a portion of Conclusion 10 where the Commissioner concluded, "While the offensive content of the [post] had the potential to harm [PSSP's] relationship with it's [sic] client, there is no evidence of specific harm here as [PSSP] immediately discharged [Black]."[53]

As the Department correctly concedes, this portion of Conclusion 10 was erroneous. WAC 192-150-200(2) provides that "the action or behavior is connected with [a person's] work if it results in harm ***or creates the potential for harm*** to [the] employer's interests."[54] And here, as the Commissioner properly concluded, there was the potential for harm to PSSP. Thus, the second Nelson element—harm to the employer—is satisfied. Nevertheless, this error is not material, because it relates only to the second Nelson element. And as already discussed, PSSP fails to establish both the first and third Nelson elements.

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[52] Id.

[53] Administrative Record at 310.

[54] (Emphasis added.)

Next, PSSP argues that Black "violated a company rule requiring courtesy, and the policies requiring positive relationships with law enforcement."[55] And it asserts that Black "knew about the rule requiring professionalism, courtesy, and respect."[56] In support, it points to policies detailing TPU's ethical conduct requirements, general workplace policy, and TPU's policies about professionalism. But PSSP fails to explain how the rule requiring "professionalism, courtesy, and respect" reasonably extends to off-duty, off-site, social media posts. As already discussed, implied behavior is not the standard.

PSSP relies on WAC 192-150-210(4), which states that "[a] company rule is reasonable if it is related to [the person's] job duties, is a normal business requirement or practice for [the] occupation or industry, or is required by law or regulation."[57] And it argues that the rule requiring professionalism, courtesy and respect "reasonably related to [Black's] job duties because the client whom she was assigned to protect included law enforcement and because a security guard's relationship with law enforcement is so important."[58] But the Commissioner did not make any findings to support this assertion, and PSSP fails to persuasively explain how this rule is related to Black's job duties under these facts.

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[55] Brief of Appellant at 27.

[56] Id. at 28.

[57] WAC 192-150-210(4).

[58] Brief of Appellant at 28.

PSSP also argues that the following portion of Conclusion 10 is arbitrary and capricious: "The fact that [PSSP] deemed it necessary to tell [Black's] co-workers after she was discharged that nothing they said on Facebook should be considered private shows that this was not a rule or instruction that had been contracted for with employees prior to her discharge."[59] But even if we were to disregard this portion of the court's conclusion, it does not materially affect the outcome, because as just discussed, PSSP still fails to show that Black violated an existing code of behavior or a reasonable rule. Likewise, it is clear that if such a policy did not exist, Black could not have known of it. PSSP's suggestions to the contrary are wholly unpersuasive and we reject them.

PSSP next argues that the "law governing employment benefits does not require a specific intent to harm."[60] PSSP is again wrong. Nelson remains the focus of our examination. And the third element to show that the conduct is work-connected is that the conduct is "done ***with intent or knowledge that the employer's interest would suffer.***"[61] Thus, the plain words of the element refute this argument.

PSSP relies on Griffith v. State Department of Employment Security and Hamel v. Employment Security Department to support this argument.[62] But

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[59] Reply Brief of Appellant at 12 (citing Administrative Record at 310).

[60] Brief of Appellant at 32.

[61] Nelson, 98 Wn.2d at 375 (emphasis added).

[62] Brief of Appellant at 32 (citing Griffith v. Emp't Sec. Dep't, 163 Wn. App. 1, 259 P.3d 1111 (2011); Hamel, 93 Wn. App. 140).

PSSP's reliance on these cases is misplaced. Neither of these cases conducted an analysis of work-connected misconduct under Nelson. And the third Nelson element requires the employer to show that the employee's conduct was "done with intent or knowledge that the employer's interest would suffer."[63] Thus, while specific intent to harm may not be relevant to the statutory definitions of misconduct, it is relevant under Nelson.

PSSP also argues that findings of fact 4 and 5 conflict. It alleges that the fact that one of Black's Facebook friends, a TPU employee, saw the post, contradicts the fact that Black did not intend to communicate her opinion to TPU. But these findings do not necessarily conflict. Black could intend to communicate the post to her Facebook friends and not intend for her Facebook friends to communicate the post to TPU. The fact that one of her Facebook friends was a TPU employee does not mean Black intended for that friend to communicate the post to his employer.

Finally, for the first time in its reply brief, PSSP argues that the Department's regulation, WAC 192-150-200, "replaces or refines the Nelson test." This argument is untenable.

WAC 192-150-200(2) provides that an action or behavior is connected with work "if it results in harm or creates the potential for harm to [the] employer's interests." Thus, PSSP appears to argue that the first and third Nelson elements are no longer part of the test. This reading is unpersuasive.

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[63] Nelson, 98 Wn.2d at 375.

As the Department correctly argued at oral argument of this case, the three elements of Nelson remain the law. The mere establishment of either harm or potential for harm is insufficient to satisfy the other two elements of the Nelson test. Any other reading conflicts with Nelson, which remains the law of this state.

To summarize, because PSSP failed to establish the first and third Nelson elements, the Commissioner properly concluded that Black's conduct was not work-connected. Based on this threshold determination, the question of whether the Facebook post constituted statutory misconduct is not material to the outcome.

Misconduct

PSSP next argues in its briefing that the Commissioner erred when it concluded that Black did not commit misconduct. It contends that Black committed statutory misconduct under RCW 50.04.294. But at oral argument, PSSP appeared to concede that misconduct would not be material to the outcome of this case if it failed to establish that the conduct here was work-connected. Nevertheless, we reach the issue of misconduct to be clear and complete in this case.

RCW 50.04.294(1) provides a non-exhaustive list of "misconduct":

> (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 fellow employee; or

> (d) Carelessness or negligence of such degree or recurrence to show an intentional or substantial disregard of the employer's interest.

Subsection (2) provides that certain acts are misconduct per se, because they "signify a willful or wanton disregard of the rights, title, and interests of the employer or a fellow employee."[64] Among those is (2)(f), which 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."[65]

PSSP only places in issue in its briefing on appeal subsections (1)(b), (1)(d), and (2)(f) of the above statute.

RCW 50.04.294(1)(b)

First, PSSP argues that Black's conduct met the statutory definition of misconduct under subsection (1)(b). Under this subsection, misconduct may include "[d]eliberate violations or disregard of standards of behavior which the employer has the right to expect of an employee."[66]

As the Department points out, PSSP has a right to expect professionalism and courtesy at the workplace. But PSSP does not explain why it has a right to expect these standards of behavior when the employee is off-site and off-duty. And PSSP fails to provide any support for this argument. Accordingly, it fails to show misconduct under this subsection.

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[64] RCW 50.04.294(2).

[65] RCW 50.04.294(2)(f).

[66] RCW 50.04.294(1)(b).

PSSP cites RCW 18.170.170 and RCW 18.235.130(4), which provide examples of "unprofessional conduct." PSSP cites to one subsection in particular, which states that "[i]ncompetence, negligence, or malpractice that results in harm or damage to another or that creates an unreasonable risk of harm or damage to another" constitutes unprofessional conduct.[67] But it is not clear how these statutes, which provide examples of "unprofessional conduct," relate to the inquiry before this court, whether the conduct was unprofessional ***misconduct***. More importantly, PSSP fails to explain how Black's conduct was deliberate or created an "unreasonable risk of harm or damage to another." For these reasons, reliance on these statutes is not helpful.

RCW 50.04.294(1)(d)

Second, PSSP argues that Black's conduct met the statutory definition of misconduct under subsection (1)(d). Under this subsection, misconduct may include "[c]arelessness or negligence of such degree or recurrence to show an intentional or substantial disregard of the employer's interest."[68] "'Carelessness' and 'negligence' mean failure to exercise the care that a reasonably prudent person usually exercises."[69] These are not established on this record.

While Black's post was contrary to PSSP's interests, PSSP fails to articulate how it was an "intentional or substantial disregard" of its interests. In

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[67] RCW 18.235.130(4).

[68] RCW 50.04.294(1)(d).

[69] WAC 192-150-205(3).

fact, the Commissioner found that Black "did not intend to communicate her opinion to [PSSP], to [TPU] or to anyone not on her list of friends."[70]

Further, as the court also found, Black had set her Facebook privacy level so that her post was accessible only to the approximately 100 people designated as her friends. Members of the public and others could not view the post. And Black did not refer to her employer, to TPU, or to her job as a security officer. PSSP fails to explain how, in light of these facts, Black did not exercise the care that a reasonably prudent person exercises.

PSSP points out that Black's post was visible to a TPU employee and argues that the post "caused embarrassment and damage to the business relationship."[71] But even if the post caused embarrassment and damage, PSSP fails to establish that Black's conduct was intentional or in substantial disregard to PSSP's interests. Thus, PSSP also fails to show misconduct under this subsection.

RCW 50.04.294(2)(f)

Third, PSSP argues that Black's conduct met the statutory definition of misconduct under subsection (2)(f). Under this subsection, misconduct may include "[v]iolation of a company rule if the rule is reasonable and if the claimant knew or should have known of the existence of the rule."[72]

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[70] Administrative Record at 306.

[71] Brief of Appellant at 29.

[72] RCW 50.04.294(2)(f).

Black did not commit disqualifying misconduct under this subsection for the same reasons that the court properly concluded that the third Nelson element was not met. Specifically, unchallenged finding of fact 8 establishes that Black did not violate any company rule related to social media posts. Further, PSSP fails to show how the policies and rules requiring professionalism, courtesy, and respect reasonably extend to off-site, off-duty social media posts.

In sum, PSSP fails to show that Black committed misconduct.

PSSP relies on Smith v. Employment Security Department.[73] It appears to argue that Black can commit misconduct in ways other than by violating a specific policy. In Smith, Division Two concluded that even if there had not been substantial evidence that David Smith was aware of the county policy that he violated to support misconduct under (2)(f), he nonetheless committed misconduct under (1)(d). We note that PSSP fails to establish misconduct under any statutory subsections relevant to this case. Thus, this case is not helpful.

In its reply brief, PSSP asserts for the first time that other jurisdictions have denied benefits in similar circumstances.[74] We do not generally address arguments raised for the first time in a reply brief.[75] And PSSP fails to articulate why we should do so in this case. In any event, extra-jurisdictional cases are not

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[73] Brief of Appellant at 35-36 (citing Smith, 155 Wn. App. at 35-36).

[74] Reply Brief of Appellant at 6-7 (citing Guevarra v. Seton Med. Ctr., 2013 WL 6235352 (N.D. Cal. 2013)).

[75] Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992)).

helpful to the inquiry before this court—whether Black's conduct meets Washington's statutory definition of misconduct.

EVIDENTIARY RULING

PSSP argues that it was deprived of its due process right to cross-examine Black. We hold there was no abuse of discretion in the evidentiary ruling limiting the scope of cross-examination.

PSSP fails to provide any authority to support the proposition that this evidentiary decision rises to the constitutional magnitude of due process. In the absence of such authority we assume there is none.

Decisions regarding the scope of cross-examination are normally evidentiary rulings left to the sound discretion of the trial court.[76] A trial court abuses its discretion when its decision is unreasonable or based on untenable grounds.[77]

Here, the Commissioner properly concluded that the ALJ properly sustained objections, based on relevancy on cross-examination questions about the history of Facebook's privacy settings and the dissemination of information on the Internet. The ALJ noted that Black testified that her Facebook privacy settings were limited to her friends and there was no evidence that the information came to anyone's attention other than through one of Black's Facebook friends. Accordingly, the ALJ stated, there was "no basis for this

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[76] Falk v. Keene Corp., 53 Wn. App. 238, 247, 767 P.2d 576 (1989).

[77] Id.

broad, somewhat academic discussion of the functioning of the Internet."[78] For the reasons identified by the ALJ, this was a proper exercise of discretion. Arguments to the contrary have no basis.

PSSP relies on Baxter v. Jones.[79] But in Baxter, the court terminated the trial and gave a ruling before the cross examination had been completed.[80] It is easily distinguishable from this case, where the court properly sustained objections to a broad line of questioning during cross-examination, which exceeded the scope of direct examination. Thus, reliance on Baxter is misplaced.

We affirm the superior court's decision affirming the Commissioner's decision and denying PSSP's motion for reconsideration.

Cox, J.

WE CONCUR:

Leach, J.

Ian, J.

[78] Administrative Record at 141.

[79] Brief of Appellant at 37-38 (citing Baxter v. Jones, 34 Wn. App. 1, 3, 658 P.2d 1274 (1983)).

[80] Baxter, 34 Wn. App. at 3.