73024-0

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No. 73024-0-I

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

SARAH CHRISTNER,

Appellant,

v.

STATE OF WASHINGTON
DEPARTMENT OF EMPLOYMENT
SECURITY,

Respondent.

# RESPONDENT'S BRIEF

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## I. INTRODUCTION

This is an unemployment benefits case. Sarah Christner, a full-time front desk receptionist at a medical clinic, was discharged from employment after repeatedly taking time off on short notice despite her employer's repeated warnings that this practice created a hardship for the employer to find front-desk coverage. Although some of the requests were for medical appointments, increasingly, the requests were related to her search for other employment, which she did not initially reveal to her employer. Until she disclosed her job search activities, her employer believed that all the requests were for medical reasons and tried to accommodate those requests. When they learned that many of the requests were in fact for job interviews, and that she intended to continue to make frequent requests for time off on short notice until she found alternate employment, the employer ended Christner's employment. Substantial evidence supports the findings of fact, and the Commissioner of the Employment Security Department properly concluded that Christner's conduct amounted to a "deliberate violation[] or disregard of the standards of behavior which the employer has the right to expect of an employee," RCW 50.04.294(1)(b), disqualifying her from unemployment compensation. The Department respectfully asks the Court to affirm the Commissioner's decision.

## II. COUNTERSTATEMENT OF THE ISSUES

1. Does substantial evidence in the record support the challenged findings when Christner's own testimony supports them?

2. An employee is disqualified from unemployment benefits if she was discharged for misconduct, including "[d]eliberate violations or disregard of standards of behavior which the employer has the right to expect of an employee." RCW 50.04.294(1)(b). Did the Commissioner properly conclude that Christner's conduct amounted to statutory misconduct under this provision when she made repeated requests for time off, often with short notice; until she revealed that many of the requests were for job interviews, the employer believed all of the requests were for medical appointments; Christner was aware that the repeated requests on short notice created a hardship because the employer had issued verbal and written warnings about the challenges her requests posed; and Christner then made approximately five requests for time off in a five week period after receiving the last written warning?

3. If the misconduct definition is ambiguous, should the Court defer to the Department's interpretation?

4. Does Christner fail to raise any actual procedural errors?

## III. COUNTERSTATEMENT OF THE CASE

Sarah Christner was hired by the Washington Center for Pain Management (WCPM) as a full-time front desk receptionist at one of its clinics in November 2012. CP 96, 109, 161 (Finding of Fact (FF) 3), 162 (FF 4). WCPM has multiple clinics, and it requires a receptionist at each clinic. CP 102. If a receptionist is going to be absent on a given day, WCPM must arrange for coverage. *Id.* Christner testified that the employer had a policy that required requests for time off to be submitted in writing at least two weeks in advance. CP 132.

During her employment with WCPM, Christner made repeated requests for time off, often with short notice, which created a hardship on the employer and its staff to find front desk coverage. CP 97, 99, 102-03, 110-11, 114, 120-21, 155-56, 162 (FF 6). While some of the requests were for medical appointments, Christner later revealed that many of the requests were related to her pursuit of other employment. CP 114-15, 117, 121-25, 155, 162 (FF 5, 8). Until Christner disclosed that some of the requests were for other employment opportunities, the employer believed that all of the requests were for medical reasons. CP 106-07, 162 (FF 5).

The employer warned Christner both verbally and in writing that her frequent requests for time off were creating a hardship because it was difficult to find coverage so frequently and on short notice. CP 102-04.

Her manager often had to scramble to find another receptionist to cover Christner's shift, or the manager would fill in herself. CP 102. On September 26, 2013, the employer sent Christner a final written warning about her repeated requests for time off with short notice. CP 98-99, 117-18, 120-21, 162 (FF 5). The warning stated that it was becoming very difficult for scheduling purposes to accommodate her frequent requests for time off, especially when there is not adequate time prior to the requested leave. CP 120.

Following this warning, Christner requested time off on approximately five separate occasions in a five-week period. CP 97, 103, 124-25, 162 (FF 7). On October 10, 2013, Christner requested October 23, 2013, off from work to participate in an "oral board" for a job opportunity with the Snohomish Department of Corrections, though at the time, she did not disclose the reason for the request. CP 114-16, 162 (FF 8). When she had not received a response from her employer by October 18, Christner sent a follow-up email to her supervisor to renew the request. It was in this email that she disclosed that she "had been requesting time off for personal matters regarding appointments for other employment." CP 114-15, 132, 155, 162 (FF 9). Christner had applied for several different positions with the Snohomish Department of Corrections, and there were many boards and exams for each position. CP 122, 155. She further indicated that she would

need to continue to request time off on short notice to participate in the various stages of the hiring process with the Department of Corrections. CP 105, 155. Following this email, the employer requested Christner to submit her resignation, explaining they needed a reliable, full-time front desk receptionist. CP 155-56, 162 (FF 10). Christner submitted a letter of resignation, which became effective November 1. CP 127, 153, 155, 162 (FF 11).

Christner applied for unemployment benefits, which the Department initially allowed. CP 139-40, 161 (FF 1). The employer appealed the allowance of benefits, and an administrative law judge (ALJ) convened an evidentiary hearing. CP 71, 161 (FF 2). The Notice of Hearing stated that the purpose of the hearing was to determine whether Christner "was discharged from employment for misconduct pursuant to RCW 50.20.066, or voluntarily quit without good cause pursuant to RCW 50.20.050." CP 183. Following the hearing, the ALJ issued an initial order finding that "the employer was the moving party" in the job separation and, therefore, Christner was discharged from employment and did not voluntarily quit. CP 163 (Conclusion of Law (CL) 5). The ALJ further concluded that Christner was discharged for disqualifying misconduct because of her frequent and continued requests for time off, despite knowing that such requests created a hardship on the employer. CP 164 (CL 11).

Christner petitioned the Commissioner of the Department for review of the ALJ's decision. CP 172-75. The Commissioner adopted the ALJ's findings and conclusions, concluding that Christner's conduct amounted to misconduct under RCW 50.04.294(1)(b), and affirmed the ALJ's order. CP 178-79. Christner petitioned for judicial review in the Snohomish County Superior Court, which affirmed the Commissioner's decision. CP 6-8. This appeal followed.

## IV. SCOPE AND STANDARD OF REVIEW

The Court's "limited review of an agency decision is governed by the Administrative Procedure Act (APA), chapter 34.05 RCW." *Campbell v. Emp't Sec. Dep't*, 180 Wn.2d 566, 571, 326 P.3d 713 (2014); RCW 50.32.120. This Court sits in the same position as the superior court and applies the APA standards directly to the administrative record. *Courtney v. Emp't Sec. Dep't*, 171 Wn. App. 655, 660, 287 P.3d 596 (2012). The Commissioner's decision is prima facie correct. RCW 34.05.570(1)(a); *Anderson v. Emp't Sec. Dep't*, 135 Wn. App. 887, 893, 146 P.3d 475 (2006). Christner has the burden of demonstrating the invalidity of the Department's decision. RCW 34.05.570(1)(a). The Court may grant relief only if "it determines that a person seeking judicial relief has been substantially prejudiced by the action complained of." RCW 34.05.570(1)(d).

The Court undertakes the limited task of reviewing the Commissioner's findings to determine, based solely on the evidence in the administrative record, whether substantial evidence supports those findings. RCW 34.05.558; *William Dickson Co. v. Puget Sound Air Pollution Control Agency*, 81 Wn. App. 403, 411, 914 P.2d 750 (1996). Unchallenged factual findings are verities on appeal. *Tapper v. Emp't Sec. Dep't*, 122 Wn.2d 397, 407, 858 P.2d 494 (1993).

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). The reviewing court is to "view the evidence and the reasonable inferences therefrom in the light most favorable to the party who prevailed" at the administrative proceeding below and may not reweigh evidence or witness credibility. *Wm. Dickson Co.*, 81 Wn. App. at 411.

The Court then determines de novo whether the Commissioner correctly applied the law to those factual findings. *Tapper*, 122 Wn.2d at 407. However, because the Department has expertise in interpreting and applying unemployment benefits law, the Court should afford substantial weight to the agency's interpretation of the law. *Courtney*, 171 Wn. App. at 660.

The appellant generally may not raise issues on appeal that she did not raise below before the agency, RCW 34.05.554(1), nor arguments not supported by citation to authority. *Darkenwald v. Emp't Sec. Dep't*, 183 Wn.2d 237, 248-49, 350 P.3d 647 (2015) ("'[I]ssues not supported by argument and citation to authority will not be considered on appeal.'") (quoting *State v. Farmer*, 116 Wn.2d 414, 432, 805 P.2d 200 (1991)).[1]

## V. ARGUMENT

The Court should affirm the Commissioner's decision denying Christner unemployment benefits because substantial evidence supports the challenged findings, and the Commissioner properly concluded Christner's discharge-precipitating conduct amounted to misconduct under the Employment Security Act. Moreover, the statutory definition of misconduct the Department applied is a subject where the Commissioner's expertise warrants deference, both because of expertise in administering the Employment Security Act and to best ensure consistency among thousands of decisions. Finally, the alleged procedural errors—raised for the first time in this Court—are neither supported by legal authority nor

[1] In the Standard of Review section of her brief, Christner also cites as grounds for reversal of the Commissioner's decision RCW 34.05.570(3)(h) (the order is inconsistent with a rule of the agency) and (i) (the order is arbitrary and capricious). Appellant's Opening Br. at 20. However, except for a vague reference to arbitrary and capricious action at page 46 of the Appellant's Opening Brief, she makes no argument that the Commissioner's decision should be reversed on these bases. Therefore, the Court should not consider these grounds. *Darkenwald*, 183 Wn.3d 248.

rise to the level of legal error. The Court should affirm the Commissioner's decision.

The Employment Security Act, Title 50 RCW, 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 408. The Act requires that the reason for the unemployment be external and apart from the claimant. *Cowles Publ'g Co. v. Emp't Sec. Dep't*, 15 Wn. App. 590, 593, 550 P.2d 712 (1976). Accordingly, a claimant is disqualified from receiving unemployment benefits if she has been discharged from her job for work-connected misconduct.[2] RCW 50.20.066(1). The initial 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).

Misconduct includes:

> (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;

[2] Christner does not dispute that she was discharged, Appellant's Opening Br. at 28, and makes no argument that her conduct was not work-connected. *See* Opening Br.

(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 certain conduct 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."). None of those apply directly here.[3]

In this case, the Commissioner correctly concluded that Christner committed misconduct under RCW 50.04.294(1)(b), as Christner deliberately violated or disregarded standards of behavior the employer had the right to expect of her as its employee.

**A. Substantial Evidence Supports the Challenged Findings**

Christner challenges three findings: that after September 26, 2013, until her last day on November 1, she requested time off on approximately five occasions (Finding of Fact 7); that the employer gave Christner a "final warning" (Finding of Fact 5); and that the employer had a policy requiring two weeks' notice for time off requests. Substantial evidence in

[3] While the ALJ listed RCW 50.04.294(1)(a) and RCW 50.04.294(2)(f) as grounds for finding misconduct, CP 163 (CL 7, 8), she did not explicitly apply either of those provisions to the facts. CP 164. The Decision of Commissioner clarifies that Christner's conduct amounted to misconduct under RCW 50.04.294(1)(b). CP 178.

the record supports the first two findings, and the third is not a finding the Commissioner made.

In the Assignments of Error—but not elsewhere in her brief, Christner challenges the finding that after September 26, 2013, she requested time off on approximately five separate occasions in a five-week period. Appellant's Opening Br. 3-4; CP 162 (FF 7). The Court should not entertain the challenge. *DeHeer v. Seattle Post-Intelligencer*, 60 Wn.2d 122, 126, 372 P.2d 193 (1962) (the court "will not consider an assignment of error where there is no argument in the brief in support thereof"). Nevertheless, Christner's own testimony supports this finding. At the administrative hearing, the ALJ asked, "[H]ow many times would you say, during that period, September 26th, when you received a final warning up through the date of your separation November 1st, did you request time off that was -- what the employer would consider not adequate? In other words, it wasn't two weeks?" CP 124. Christner answered, "I'd say five or six." *Id*; CP 125. Thus substantial evidence supports this finding.

Christner also challenges the finding that the employer gave her a "final warning" about repeatedly requesting time off.[4] Appellant's

[4] The challenged finding states, in relevant part, "On September 26, 2013, the claimant received a final warning for repeatedly requesting time off on short or no notice." CP 162 (FF 5).

Opening Br. at 3, 38-40; CP 162 (FF 5). She argues it was not a "warning" that was "sufficient to put someone on notice that there [sic] job is lawfully in jeopardy." Appellant's Opening Br. at 39. First, "final" can mean "relating to or occurring at the end or conclusion: LAST, TERMINATING." *Webster's Third New International Dictionary* 851 (2002). Christner herself characterized the September 26 email as a "written warning" and stated it was the last warning she received from the employer about her absences before she was asked to resign. CP 117-18. Additionally, Sarah Bundy, Christner's supervisor, testified that prior to asking for Christner's resignation, she had given Christner "verbal and written warnings" and "was making it very clear that these accommodations were becoming very, very difficult[.]" CP 99; *see also* AR at 97-98, 102, 104-05. Although Bundy could not recall the specific date or content of the last warning she gave Christner,[5] Christner testified that the final written warning she received from Bundy was the September 26 email. CP 117-18. Christner later read the email into the record:

> "Hi, Chris. I realize you have some health conditions currently and are needing to go to the doctor often; however, this is becoming very difficult with scheduling, especially when there is not adequate time given prior to the request. I will approve the time off request for this Monday; um,

[5] Bundy did not have a copy of the exhibits in front of her when testifying and had not had an opportunity to review the exhibits, as she was apparently on vacation at the time of the hearing. AR at 14-15. The employer had two other witnesses present who had reviewed the exhibits. AR at 14-15, 33-36.

> however, I do request that you provide a doctor's note that suggests a number of future doctor appointments anticipated. In addition, if you can schedule doctor appointments without missing work, that would be greatly appreciated and is preferable. Please let me know if you have any questions." AR at 45.[6]

Even if the September 26 email was not the *last* warning, both Bundy and Christner's testimony makes clear that Bundy's September 26 email was not the first conversation they had had about leave requests on short notice. CP at 97-99, 102, 104-05, 114, 120-21, 125-27.

Second, as explained more thoroughly below, the law does not require, as Christner suggests, that an employer warn an employee of potential consequences in order to show that an employee has been discharged for disqualifying misconduct. Because substantial evidence supports the factual finding that on September 26, 2013, the claimant received a final warning for repeatedly requesting time off on short or no notice, this Court should uphold the finding. CP 162 (FF 5); RCW 34.05.570(3)(e).

Christner's argument that there is not sufficient evidence in the record to support a finding that the employer had a policy requiring two weeks' notice for time off requests is misplaced because there is no factual

[6] Christner testified that she uses the first name "Chris." AR at 17.

finding that the employer had such a policy.[7] Appellant's Opening Br. at 31-33. Rather, the Commissioner found that Christner made many requests for time off, often with short notice; that until October 18, the employer believed all of the requests were for medical appointments; that the repeated requests on short notice created a hardship because the employer frequently had to scramble to find coverage;f and that the employer warned Christner of the challenges her requests posed. CP 87 (FF 5, 6), 89 (CL 11). Substantial evidence does support these findings.

In sum, viewing the record in the light most favorable to the Decision of the Commissioner, the evidence shows that Christner made multiple requests for time off, some for medical reasons, some for securing other employment; until October 18, the employer believed all of the requests were for medical reasons; Christner knew these requests created a hardship for the employer, but continued to make frequent requests on short notice, sometimes under false pretenses, and increasingly for employment appointments; after the "final warning" on September 26, Christner made five requests in a five-week period; and when the

[7] For the same reasons, Christner's argument that a rule requiring two weeks' notice for time off with no exceptions is not reasonable is misplaced. Appellant's Opening Br. at 34-35. Not only is there no finding about such a policy, the Commissioner did not conclude that Christner was disqualified under RCW 50.04.294(2)(f), which makes violation of a reasonable company rule about which the claimant knew disqualifying misconduct. Christner was disqualified for violating a standard of behavior the employer had the right to expect. RCW 50.05.274(1)(b); CP 178.

employer discovered that many of the requests were to pursue other employment opportunities and not medical appointments, as they had believed, and that she would continue to make such short-notice requests to pursue other jobs, they ended her employment. The Court should not reweigh the evidence or competing inferences on appeal. *Wm. Dickson Co.*, 81 Wn. App. at 411.

### B. The Commissioner Properly Concluded Christner Was Discharged for Disqualifying Misconduct Under RCW 50.04.294(1)(b)

Based on the factual findings, the Commissioner properly concluded that Christner was discharged from work for disqualifying misconduct. CP 103-04; RCW 50.20.066(1). "[T]he determination of whether a particular employee's behavior constitutes 'misconduct connected with his or her work' is a mixed question of law and fact, in that it requires the application of legal precepts (the definition of 'misconduct connected with his or her work') to factual circumstances (the details of the employee's discharge)." *Tapper*, 122 Wn.2d at 402. As the Commissioner found, Christner committed "[d]eliberate violations or disregard of standards of behavior which the employer has the right to expect of an employee." RCW 50.04.294(1)(b); CP 178.

### 1. Christner disregarded the standards of behavior her employer had the right to expect.

As discussed, substantial evidence supports the findings that Christner made many requests for time off, often with short notice; that until October 18, the employer believed all of the requests were for medical appointments; that Christner was aware that the repeated requests on short notice created a hardship because the employer frequently had to scramble to find coverage; and that, after verbal and written warnings about the challenges her requests posed, Christner made approximately five requests for time off in a five week period. These findings, in turn, support the conclusion that Christner deliberately disregarded the standards of behavior the employer had the right to expect. RCW 50.04.294(1)(b); CP 103.

The employer had the right to expect Christner to fulfill her job duties as a full-time receptionist without making five to six requests for time off in a five week period. The employer made this standard known through both verbal and written warnings, informing her of their need for sufficient notice and of the difficulty in accommodating her requests. CP 99, 104, 111, 120, 87 (FF 5), 89 (CL 11). Yet she continued to make frequent requests and indicated she would continue to do so until she found other, preferable employment. CP 105, 110, 124-25, 87 (FF 7), 89

(CL 11). Christner's October 18 email establishes that she was aware that it had become "increasingly difficult to accommodate as many time off requests as I have requested in such short notice." CP 155. Yet she continued to make the requests. This shows that she deliberately disregarded this known standard. An employee acts with willful disregard when she "(1) is aware of his employer's interest; (2) knows or should have known that certain conduct jeopardizes that interest; but (3) nonetheless intentionally performs the act, willfully disregarding its probable consequences." *Hamel v. Emp't Sec. Dep't*, 93 Wn. App. 140, 146-47, 966 P.2d 1282 (1998).

Employers also have a right to expect that its employees will not request time off under false pretenses. Although Christner never explicitly stated she had a medical appointment when she did not, until October 18, the employer believed that all of Christner's requests for time off were for medical reasons. CP 106, 162 (FF 5). Sometimes she said the reason was for a doctor's appointment (and she did often provide doctor's notes for those), but other times she was more vague, claiming an "emergency situation." CP 106-07. Even on Thursday, October 17, Christner was not upfront about the reasons for several of her requests. She stated that she had "a very important matter to attend to next Wednesday," which would have been October 23, the day of the oral board. CP 114. It was not until

the next day that she revealed that while many of her requests had been for medical appointments, "[m]ore recently, however, I have been requesting time off for personal matters regarding appointments for other employment." CP 155. When the employer had believed the requests were for medical appointments, it did its best to accommodate the requests. It was not until they learned that the more recent, frequent requests were to pursue other employment, and that Christner would continue to request time off on short notice for reasons other than medical need, that they ended her employment. CP 108, 155-56.

Christner, aware of her employer's standards and that her conduct jeopardized her employer's interest, deliberately violated or disregarded those known standards. *Hamel*, 93 Wn. App. at 146-47. The Court should conclude that Christner's conduct constituted misconduct under RCW 50.04.294(1)(b).

**2. If the misconduct statute is ambiguous, the Court should defer to the agency's interpretation.**

The Commissioner properly applied the plain language of RCW 50.04.294(1)(b) and concluded that Christner disregarded the standards of behavior WCPM had the right to expect of her. But even if the language of RCW 50.04.294(1)(b) is ambiguous, the Court should defer to the Department's interpretation here because it has "expertise and

insight gained from administering" the Employment Security Act. *Silverstreak, Inc. v. Dep't of Labor and Indus.*, 159 Wn.2d 868, 885, 154 P.3d 891 (2007). "Where an agency is charged with administering a special field of law and endowed with quasi-judicial functions, such as the Department of Employment Security, because of the agency's expertise in that field, its construction of words should be accorded substantial weight." *Safeco Ins. Companies v. Meyering*, 102 Wn.2d 385, 391, 687 P.2d 195 (1984). This principle is particularly important because it contributes to statewide uniformity in the employment benefits program for thousands of employees and employers.

The Court should afford substantial weight to the Commissioner's interpretation of "misconduct" and what is meant by "disregard of standards of behavior which the employer has the right to expect of an employee." *Markam Group, Inc., P.S. v. Dep't of Emp't Sec.*, 148 Wn. App. 555, 561, 200 P.3d 748 (2009); RCW 50.04.294(1)(b). Christner seeks to rely on the Employment Security Act's mandate for liberal construction. *See* Appellant's Opening Br. at 26-28. But the Department is to construe the Act "for the purpose of reducing involuntary unemployment." RCW 50.01.010. That is not a mandate to construe the Act in all claimants' favor. The disqualification provisions of the Act "are based upon the fault principle and are predicated on the individual

worker's action, in a sense his or her blameworthiness." *Safeco*, 102 Wn.2d at 391-92 (declining to award benefits despite "legislatively expressed policy of liberal construction"). Accordingly, "in order for a claimant to be eligible for benefits, the act requires that the reason for the unemployment be external and apart from the claimant." *Id.* (citing *Cowles Publ'g Co. v. Emp't Sec. Dep't*, 15 Wn. App. 590, 593, 550 P.2d 712 (1976)).

Here, the reasons for Christner's unemployment are not "external and apart" from her. *Id.* She made increasingly frequent requests for time off on short notice to pursue other jobs, did so contrary to warnings, and informed her employer that she would continue to do so until she was hired elsewhere. CP 105, 155. In short, Christner was at fault for the job separation. The employer should not have to bear the burden of Christner's time-consuming job search activities, by entertaining frequent requests for time off on short notice and scrambling to find coverage, or through benefit charges to its experience rating account, in turn impacting its tax liabilities. Liberal construction cannot override the disqualification provisions for misconduct. The Court should affirm.

### 3. RCW 50.04.294(1)(b), which applies here, does not require the employer to have issued warnings prior to discharge.

Christner inappropriately asserts that RCW 50.04.294(2)(b), which makes "[r]epeated inexcusable tardiness following warnings by the employer" misconduct per se, requires warnings by the employer before the conduct can be considered misconduct. Appellant's Opening Br. at 39. While she is correct on the law's requirement, this is of no consequence because the Commissioner did not find Christner was disqualified under that provision; the Commissioner found Christner was disqualified under RCW 50.04.294(1)(b), for disregarding the standards of behavior the employer had the right to expect. CP 178. Outside of the specific misconduct provision concerning inexcusable tardiness, there is nothing in the Employment Security Act that requires an employer to put an employee on notice that his or her job is in jeopardy before a job separation can be adjudicated as a discharge for misconduct. Christner does not point to any contrary authority.

Further, because subsection (2)(b) requires proof of warnings from the employer, the Legislature knew how to include a requirement that an employer give warnings, but did not do so for "[d]eliberate violations or disregard of standards of behavior which the employer has the right to expect of an employee." RCW 50.04.294(1)(b). To express one thing in a statute

implies the exclusion of the other. *State v. Delgado*, 148 Wn.2d 723, 728-29, 63 P.3d 792 (2003). The Court should therefore presume that the absence of a warnings requirement under RCW 50.04.294(1)(b) is intentional, and no specific warning is required. *See id.*; RCW 50.04.294(1)(b).

**4. By accommodating Christner's requests and allowing her to remain employed for two weeks, the employer did not condone her conduct or waive any arguments.**

Citing *In re Griswold*, 102 Wn. App. 29, 32, 15 P.3d 153 (2000), Christner argues that by making every effort to accommodate Christner's frequent requests for time off, the employer "absolved" Christner of any misconduct. Appellant's Opening Br. at 38. She is mistaken.

In *Griswold*, the court found that a grocery store meat wrapper who was fired for purchasing outdated meat at a marked down price had not committed disqualifying misconduct. *Griswold*, 102 Wn. App. at 31-32. But there, the employer's policy seemed to permit purchases of past pull-date meat, the store managers routinely authorized such purchases to boost their monthly sales totals, and the employee received no warnings about her conduct. *Id.* at 33, 38. In fact, the employee believed she was following established practices. *Id.* at 33. In contrast here, Christner received ample warning that her frequent requests for time off on short notice created a hardship on her employer, yet she continued to engage in

the practice. The employer should not be penalized for trying to accommodate Christner's requests, especially when it believed all of them were for medical appointments.

The employer also did not waive any arguments by allowing Christner to work for an additional two weeks after asking for her resignation. *See* Appellant's Opening Br. at 40-41. First, Christner cites no authority that in order to find a discharge was for misconduct, the termination must be effective immediately. *Id.* The Court should decline to consider the argument. *DeHeer*, 60 Wn.2d at 126 (where no authority is cited, the court may assume counsel found none after a diligent search); *Darkenwald*, 350 P.3d at 652 ("'[I]ssues not supported by argument and citation to authority will not be considered on appeal.'") (quoting *Farmer*, 116 Wn.2d at 432). Second, the employer apparently was under the mistaken impression that by asking Christner to resign, the job separation would be determined to be a voluntary quit. While this is not the case, and the Commissioner correctly determined the employer was the moving party in the job separation, again, the employer should not be penalized for keeping Christner employed.

Christner also suggests that because of this misunderstanding, and because the employer did not allege misconduct, it did not meet its burden of proving misconduct. Appellant's Opening Br. at 29. However, it was

for the Commissioner to determine how the job separation occurred and whether Christner's conduct amounted to statutory misconduct.[8] *Safeco*, 102 Wn.2d at 393 ("The act requires that the Department analyze the facts of each case to determine what actually caused the employee's separation."). The employer's misunderstanding of the law is not a determination of what the law is. And there is no support for Christner's apparent suggestion that evidence may be found to support only the party who offered it. Appellant's Opening Br. at 29, 31-32. Nothing in law precludes the Commissioner from having determined that the evidence, including Christner's testimony, satisfied the employer's burden of proving misconduct.

**5. The statutory exceptions to misconduct do not apply.**

Christner's conduct did not, as she suggests, amount to a "failure to perform well as the result of inability or incapacity," one of the statutory exceptions to misconduct. RCW 50.04.294(3)(a); *see* Appellant's Opening Br. at 41-42. First, the Commissioner did not find that Christner was discharged due to medical issues, which would tend to suggest incapacity. Rather, Christner was discharged for making frequent requests for time off on short notice, often under false pretenses, when she was aware that this created a hardship on the employer. Frequent

[8] The Commissioner specifically stated in the final order that hearings before the Office of Administrative Hearings are de novo. CR 103.

absences on short notice to pursue other employment is not an inability to perform well. Second, Christner cites no case suggesting these facts amount to an inability to perform well. *Id.*; *DeHeer*, 60 Wn.2d at 126. The exception does not apply.

### C. There Were No Reversal Procedural Errors

For the first time in this Court, Christner alleges four procedural irregularities that are not legal errors, let alone reversible errors. Because she did not raise them in the superior court below, the Court can decline to reach them. RAP 2.5(a); *Darkenwald*, 183 Wn.2d at 245 n.3.

First, the absence of a citation to the statutory definition of misconduct on the Notice of Hearing did not deprive Christner of due process. CP 182-83; Appellant's Opening Br. at 43-44. Due process requires notice and an opportunity to be heard. *Soundgarden v. Eikenberry,* 123 Wash.2d 750, 768, 871 P.2d 1050 (1994). Christner received both. The hearing notice identified the issues to be considered at the administrative hearing: whether "[t]he claimant was discharged from employment for misconduct pursuant to RCW 50.20.066, or voluntarily quit without good cause pursuant to RCW 50.20.050." CP 183. While it identified the misconduct disqualification statute, RCW 50.20.066, it did not include the definition of misconduct under RCW 50.04.294. *Id.*

Christner cites no authority for the proposition that in the civil administrative context, hearing notices must include statutory definitions. *See* Appellant's Opening Br. at 44. The Washington Supreme Court has held that even in the criminal context, an information need not include definitions of the essential elements of the crime charged. *State v. Johnson*, 180 Wn.2d 295, 302, 325 P.3d 135 (2014). This is despite the fact that the accused have the constitutional right to know the charges against them. *Id.* at 300 (citing U.S. Const. amend. VI; Wash. Const. art. 1, §22). In the civil administrative context, the "APA requires that parties be put on notice of the issues to be litigated." *McDaniel v. Dep't of Soc. and Health Servs.*, 51 Wn. App. 893, 898, 756 P.2d 143 (1988). Here, the Notice of Hearing put Christner on notice that misconduct was an issue to be litigated. CP 183. Where a criminal charging document is not required to include definitions of essential elements, the Notice of Hearing was not required to include the definition of misconduct. The notice was sufficient.

The sole case Christner cites to support her due process argument concerning the hearing notice is inapposite because the facts are so different. *See* Appellant's Opening Br. at 44 (citing *Pal v. Dep't of Soc. & Health Servs.*, 185 Wn. App. 775, 785, 342 P.3d 1190 (2015)). In *Pal*, the notice informed the respondent she had 30 days to request a hearing, but

the regulation the notice cited did not inform her that the deadline ended at 5:00 pm on the due date. When she failed to file her request by 5:00 pm, the request was dismissed. *Pal*, 185 Wn. App. at 779-80. Here, RCW 50.04.294 does not affect a claimant's hearing request deadline. It is a definitional statute which did not need to be included.

Second, it was not error to not allow Christner to "cross examine" the employer's witness, Controller, Steve Bromberg, when he offered no substantive testimony on the job separation, the ALJ indicated she would not consider what little testimony he offered, and Christner did not ask to question him. CP 110; *see* Appellant's Opening br. at 45. After the CEO, Jae Lee, testified, and Christner declined to cross examine him, CP 111, the ALJ asked Bromberg if he had anything to add. CP 111-12. Bromberg began to testify that he had a phone call with the Department and then received the notice that Christner would be eligible for benefits, but the ALJ immediately interrupted him, stating she would not take testimony about events that occurred after the job separation. CP 112. She then asked, "So you weren't involved in her separation, correct?" *Id.* Bromberg replied, "Correct." *Id.* And that concluded his testimony. *Id.* Christner did not then request to question him. *Id.* Accordingly, there was nothing of substance for Christner to cross examine Bromberg about, and

what little was offered had no bearing on the job separation and was not considered by the ALJ. There was no error.

Third, again without citing to any legal authority, Christner alleges the employer's failure to produce "two items of documentary evidence" was reversible error. Appellant's Opening Br. at 45. She is wrong. Despite referring to "two items of documentary evidence," Christner identifies only the employer's leave request policy and not a second piece of evidence. *Id.* As to the leave request policy, the ALJ and Commissioner made no specific findings regarding the employer's leave request policy, and the Commissioner did not conclude she violated a reasonable employer policy under RCW 50.04.294(2)(f). *See* CP 161-62, 178. So the absence of documentary support for the policy is of no consequence. Even if there were such findings, testimony is evidence on which the trier of fact is entitled to rely, RCW 34.05.452(1), and there is no requirement that a policy be written. *Daniels v. Emp't Sec. Dep't*, 168 Wn. App. 721, 729, 281 P.3d 310 (2012). Christner cites no case holding that evidence must be documentary. *DeHeer*, 60 Wn.2d at 126. There is none. Moreover, it was Christner who offered the evidence of the policy, and she did not then and does not now dispute the document's authenticity. CP 132. Any suggestion that a court can only consider

evidence offered by the party with the evidentiary burden should be rejected. *See* Appellant's Opening Br. at 31-32.

Finally, Christner makes vague references to the Commissioner having "received documents that were not properly admitted." Appellant's Opening Br. at 46. Without a citation to the record where this is alleged to have occurred or any specific identification of what documents she refers to, it is unclear what evidence she now finds objectionable and to be grounds for reversal. The Court should decline to entertain this argument.

The alleged procedural irregularities were not prejudicial legal errors. The Court should affirm.

**D. The Court Should Deny Attorney Fees**

Christner is entitled to reasonable attorney fees and costs only if this Court ultimately modifies or reverses the Commissioner's decision. *See* RCW 50.32.160. Because this Court should affirm the Commissioner's decision, it also should deny Christner's request for fees and costs.

## VI. CONCLUSION

Viewing the record in the light most favorable to the Department, the Commissioner properly concluded that Christner disregarded the standards of behavior her employer had the right to expect. The Department respectfully asks the Court to affirm the Commissioner's decision disqualifying Christner from unemployment benefits and deny her request for attorney fees.

RESPECTFULLY SUBMITTED this 17th day of August, 2015.

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**PROOF OF SERVICE**

I, Katie Moceri, hereby state and declare as follows:

1. That I am a citizen of the United States of America, a resident of the State of Washington, over the age of eighteen (18) years, and not a party to the above-entitled action.

2. That on the 17th day of August 2015, I caused to be served by mailing a true and correct copy of RESPONDENT'S BRIEF, with proper postage affixed thereto to:

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Filed via US Mail:

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I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON that the foregoing is true and correct.

DATED this 17th day of August 2015, in Seattle, Washington.

Katie Moceri, Legal Assistant