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

NOELEE LOEFFELBEIN,

Respondent,

vs.

STATE OF WASHINGTON,
DEPARTMENT OF EMPLOYMENT SECURITY,

Appellant

APPELLANT'S OPENING BRIEF

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I. INTRODUCTION

A person is disqualified from receiving unemployment compensation when she has been discharged from employment for work-related misconduct. When an employer has a reasonable rule, an employee's violation of that rule constitutes work-related misconduct.

Noellee Loeffelbein, the manager of a Bartell Drugs store, knew that she was required to follow her employer's rules and set an example for her employees. However, during a four week period, she wrote seven to eight checks to the store totaling \$3,620 in exchange for cash, violating three separate employer policies: (1) the check acceptance policy, which allows employees to make purchases for up to only \$50 over the amount of the purchase for cash back; (2) the policy requiring employees to properly safeguard company funds; and (3) the policy requiring employees to obtain approval of the vice president of human resources for advances on their paychecks. Loeffelbein's conduct not only violated known, reasonable employer policies, but also amounted to a willful disregard of the employer's interests and of the standards of behavior the employer had the right to expect of her. Because substantial evidence supports the Commissioner's findings of fact, and those findings support the conclusion that Loeffelbein was discharged for disqualifying misconduct under the Employment Security Act, the Department respectfully requests

that this Court affirm the Commissioner's decision finding Loeffelbein ineligible for unemployment compensation.

II. ASSIGNMENT OF ERROR

The Employment Security Department (Department) assigns error to the superior court's order of reversal, Conclusion of Law III. CP 39. The superior court erred in concluding Loeffelbein's conduct did not amount to statutory misconduct disqualifying her from unemployment compensation under RCW 50.20.066 and 50.04.294. Loeffelbein committed misconduct because she violated reasonable, known company rules requiring employees to properly safeguard company funds, allowing employees to make purchases with personal checks for up to only \$50 over the amount of purchase, and requiring employees to obtain human resources approval for paycheck advances.

III. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

Washington's Employment Security Act disqualifies a person from unemployment benefits when he or she has been discharged for misconduct. The Act specifies that a violation of a company rule is per se misconduct if the rule is reasonable and the employee knew or should have known of the existence of the rule. RCW 50.04.294(2)(f). Did the Commissioner properly conclude that Loeffelbein was discharged from employment for misconduct when, in a four week period, she wrote seven

to eight checks to her employer totaling \$3,620 in exchange for cash, violating three of her employer's policies?

IV. STATEMENT OF THE CASE

Noelee Loeffelbein worked for Bartell Drugs (Employer) from November 8, 1996, until March 10, 2010, when she was discharged. Commr.'s R.¹ at 13-14. At the time she was discharged, she was the manager of the University Way store in Seattle. *Id.* at 14.

In January 2010, Loeffelbein received a performance review discussing areas where she needed to improve as a manager. *Id.* at 16, 76; 89 (Finding of Fact (FF) 2).² The Employer instructed her to improve her leadership of the store in general and develop good employee relationships by leading by example. *Id.* at 76.

Loeffelbein was discharged after it was discovered, and she admitted, that she had written a series of checks to the Employer over a one month period totaling \$3,620 in exchange for cash. *Id.* at 14-15, 73, 127; 89 (FF 3). Each check was for approximately \$500. *Id.* at 46; 103. When Loeffelbein wrote the checks, she believed that she did not have

¹ The Commissioner's Record is a Certified Record of Administrative Orders as defined by RAP 9.7(c). The Superior Court transmitted the Commissioner's Record in its entirety and did not repaginate it. Thus, rather than including a Clerk's Papers citation, this brief refers to the "Commr.'s R." according to its original pagination.

² Findings of Fact refer to those made by the administrative law judge in the Initial Order, which is at pages 88-90 of the Commissioner's Record. The Commissioner adopted the ALJ's findings of fact with modifications and additions. The Commissioner's Decision can be found at pages 103-104 of the Commissioner's Record.

policy. *Id.* at 17, 47, 128. However, she stated that because the policy says “at manager’s discretion,” she thought she could approve any amount over \$50 because she was the manager. *Id.* at 47. Loeffelbein had her second assistant or assistant manager perform the check cashing transactions for her. *Id.* at 33, 103.

Loeffelbein was also aware of two additional employer policies. The Employee Guide instructed that failure to properly safeguard company funds could result in immediate termination. Commr.’s R. at 16, 78; 89 (FF 4). Additionally, if an employee wants to get an advance on his or her paycheck, the Employer requires approval from the vice president of human resources (VP of HR); managers may not approve an advance on a paycheck. Commr.’s R. at 26-28; 89 (FF 4). Because of the timing of the check writing—just days before payday—and because Loeffelbein believed she lacked sufficient funds until the checks were to be processed, the Employer believed Loeffelbein exceeded her authority as a manager by essentially providing herself with an advance on her paycheck and avoiding HR approval. *Id.* at 28; 89 (FF 4).

Loeffelbein tried to excuse her conduct by stating that when she was an assistant manager, she saw other store managers cash checks for other employees, and that as manager, she had cashed checks for other employees as well. Commr.’s R. at 32, 48. However, she could not recall

anyone ever cashing a check for more than \$100. *Id.* at 48; 89 (FF 4), 104. Loeffelbein's checks were all for approximately \$500. *Id.* at 46; 103.

After being discharged, Loeffelbein applied for unemployment compensation, and the Department denied her claim, finding that she was discharged for work-connected misconduct. Commr.'s R. at 60-64. Loeffelbein appealed the decision, and an administrative law judge (ALJ) convened an administrative hearing. *Id.* at 67. Following the hearing, the ALJ issued an initial order, setting aside the Department's determination, concluding that statutory misconduct had not been established. *Id.* at 88-91.

The Employer petitioned the Commissioner of the Department to review the ALJ's order. *Id.* at 96-97. In a final agency decision, the Commissioner adopted the ALJ's findings of fact with modifications but concluded that Loeffelbein was discharged for disqualifying misconduct because she violated a reasonable company rule and her conduct was in willful disregard of the standards of behavior the Employer had a right to expect. *Id.* at 103-04. The Commissioner explicitly found Loeffelbein's excuses to be not probable or reasonable. *Id.* at 104. Loeffelbein was aware of the check cashing policy, and she could not remember ever having processed a check for another employee for more than \$100. *Id.* at 48; 89 (FF 4), 104. The Commissioner found it was not reasonable for

Loeffelbein “to believe that as manager, she could approve her own checks for amounts over the employer’s limit and have her subordinates complete the transactions.” *Id.* at 104.

Loeffelbein appealed the Commissioner’s decision to superior court. Although the superior court found that there was substantial evidence in the record to support all of the Commissioner’s findings of fact, the court concluded Loeffelbein’s conduct did not amount to statutory misconduct and reversed the Department’s final order. CP 38-40 This appeal by the Department followed.

V. STANDARD OF REVIEW

The Administrative Procedures Act (APA), chapter 34.05 RCW, governs this appeal from the superior court order that reversed the Commissioner’s decision. *Tapper v. Emp’t Sec. Dep’t*, 122 Wn.2d 397, 402, 858 P.2d 494 (1993). This Court “sits in the same position as the superior court” and reviews the Commissioner’s final decision, applying the APA standards “directly to the record before the agency.” *Tapper*, 122 Wn.2d at 402; *Emps. of Intalco Aluminum Corp. v. Emp’t Sec. Dep’t*, 128 Wn. App. 121, 126, 114 P.3d 675 (2005) (“The appellate court reviews the findings and decisions of the commissioner, not the superior court decision or the underlying ALJ order.”); RCW 34.05.558. This is of particular importance in this case because the Commissioner reversed the

ALJ's order, and the superior court reversed the Commissioner's decision. It is the Commissioner's final decision that is reviewed by this Court.

The APA directs the Court to affirm the Commissioner's decision if supported by substantial evidence and in accord with the law. RCW 34.05.570(3). The Commissioner's decision "shall be *prima facie* correct, and the burden of proof shall be upon the party attacking [the decision]." RCW 50.32.150; see *Eggert v. Emp't Sec. Dep't*, 16 Wn. App. 811, 813, 558 P.2d 1368 (1976) (judicial review is "further limited by RCW 50.32.150"). Loeffelbein therefore must show that the Commissioner's conclusion that she was discharged for misconduct was incorrect.

A. Review of Factual Matters

Judicial review of disputed issues of fact must be limited to the agency record. RCW 34.05.558. The Court must uphold an agency's findings of fact if they are supported by substantial evidence. *Wm. Dickson Co. v. Puget Sound Air Pollution Control Agency*, 81 Wn. App. 403, 411, 914 P.2d 750, 755 (1996). Substantial evidence is evidence that 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). Evidence may be substantial enough to support a factual finding even if the evidence is conflicting and could lead to other reasonable

interpretations. *Fred Hutchinson Cancer Research Ctr. v. Holman*, 107 Wn.2d 693, 713, 732 P.2d 974 (1987). The reviewing court should view “the evidence and the reasonable inferences therefrom in the light most favorable to the party that prevailed” at the administrative proceeding below. *State ex rel. Lige & Wm. B. Dickson Co. v. Pierce County*, 65 Wn. App. 614, 618, 829 P.2d 217 (1992). Unchallenged findings are verities on appeal. RAP 10.3(g); *Tapper*, 122 Wn.2d at 407.

The Court may not substitute its judgment for that of the agency on the credibility of the witnesses or the weight to be given to conflicting evidence. *Smith v. Emp’t Sec. Dep’t*, 155 Wn. App. 24, 35, 226 P.3d 263 (2010); *Davis v. Dep’t of Labor & Indus.*, 94 Wn.2d 119, 124, 615 P.2d 1279 (1980). “The Commissioner has the power to make his or her own findings of fact and in the process set aside or modify the findings of the ALJ.” *Tapper*, 122 Wn.2d at 404; *Smith*, 155 Wn. App. at 36 n.2 (Commissioner “is authorized to make his own independent determinations based on the record and has the ability and right to modify or to replace an ALJ’s findings, including findings of witness credibility”); RCW 34.05.464(4).

B. Review of Questions of Law

Questions of law are subject to de novo review. *Tapper*, 122 Wn.2d at 403. However, where an agency has expertise in a particular

area, the court should accord substantial weight to the agency's interpretation. *Verizon NW, Inc. v. Wash. Emp't Sec. Dep't*, 164 Wn.2d 909, 915, 194 P.3d 255 (2008).

C. Mixed Questions of Law and Fact

Whether a claimant was discharged for work-connected misconduct is a mixed question of law and fact. When reviewing a mixed question of law and fact, the Court must make a three-step analysis. *Tapper*, 122 Wn.2d at 403. First, the Court determines which factual findings below are supported by substantial evidence. *Id.* Second, the Court makes a de novo determination of the correct law, and third, it applies the law to the facts. *Id.* As with review of pure issues of fact, the Court does not reweigh credibility or demeanor evidence when reviewing factual inferences made by the Commissioner before interpreting the law. *Wm. Dickson Co.*, 81 Wn. App. at 411. In addition, the Court is not free to substitute its judgment of the facts for that of the agency. *Tapper*, 122 Wn.2d at 403.

VI. ARGUMENT

This Court should affirm the Commissioner's decision because substantial evidence supports the findings of fact, and there are no errors of law. Loeffelbein violated three known, reasonable employer policies and disregarded the Employer's interests and standards of behavior it had

the right to expect of Loeffelbein. The Commissioner properly concluded that Loeffelbein's actions met the definition of disqualifying misconduct set forth in RCW 50.04.294(1) and (2).

The Employment Security Act (the Act) was enacted to provide compensation to individuals who are "involuntarily" unemployed "through no fault of their own." RCW 50.01.010; *Tapper*, 122 Wn.2d at 408. For a claimant to qualify for benefits, the reason for the unemployment must 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, 715 (1976). Accordingly, a claimant is disqualified from receiving benefits if he or she has been discharged for misconduct connected with his or her work. RCW 50.20.066(1); WAC 192-150-200(1).

In determining the presence or absence of misconduct, the Court should decide whether the claimant's unemployment is essentially voluntary because of the claimant's behavior. *Galvin v. Emp't Sec. Dep't*, 87 Wn. App. 634, 643, 942 P.2d 1040 (1997). The misconduct disqualification rests on the policy that it is unfair to require an employer to compensate employees who engage in conduct harmful to their interests. *Tapper*, 122 Wn.2d at 409. The initial burden is on the employer to show that the employee was discharged for disqualifying misconduct. *Nelson v. Dep't of Emp't Sec.*, 98 Wn.2d 370, 374-75, 655

P.2d 242 (1982). On appeal, it is the employee's burden to establish that the Commissioner's decision was in error. RCW 34.05.570(1)(a); *Smith*, 155 Wn. App. at 32.

A. Substantial Evidence Supports the Commissioner's Findings that Loeffelbein Cashed Checks in Violation of the Reasonable Employer Policies, of Which She Was Aware

The Commissioner found, and Loeffelbein admitted below, that Loeffelbein was discharged for writing a series of checks to the Employer in exchange for cash in January and February 2010. Commr.'s R. at 14-15, 73, 127; FF 3. The Commissioner found Loeffelbein's conduct violated reasonable employer policies. Commr.'s R. at 103-104. Substantial evidence supports these findings.

When Loeffelbein was discharged in March 2010, she made a written statement to the Employer admitting she had written seven or eight checks to the store over the previous two months in exchange for cash. Commr.'s R. at 74, 127 (more legible copy). The checks amounted to \$3,620. *Id.* Loeffelbein did not challenge this statement in any way at the administrative hearing below. She further testified that the checks she cashed for herself were for \$500. *Id.* at 46. Although the Employer provided documentary evidence of only five checks cashed for \$500, Commr.'s R. at 80-85, Loeffelbein did not provide any testimony refuting her prior admission or the Employer's assertion that there were seven or

eight checks totaling \$3,620. Therefore, there is substantial evidence in the record to support the Commissioner's finding that in January and February 2010, Loeffelbein wrote a series of checks to the Employer in exchange for cash for a total of \$3,620. *Id.* at 89 (FF 3), 103.

Substantial evidence further supports the Commissioner's finding that Loeffelbein's conduct violated three Employer policies: (1) the check acceptance policy, which allows employees to make purchases for up to \$50 over the amount of the purchase; (2) the policy requiring employees to properly safeguard company funds; and (3) the policy requiring employees to obtain approval of the VP of HR for advances on their paychecks. *Commr.'s R.* at 103-104.

The Employer's representative testified that the company's policies allowed employees to make purchases with personal checks for up to \$50 over the amount of the purchase. *Commr.'s R.* at 26, 28, 30. Specifically, the policy states:

10.9.3 Personal Check Acceptance Policy

When making purchases at any of our stores, you may make payment by personal checks.

The following types of checks, written by employee associates, will be accepted:

1. Personal checks made payable to the Bartell Drug company [sic] for the purchase of the merchandise.

2. Checks written for up to \$50.00 over the amount of purchase (At manager's discretion).

Id. at 27-28, 30; CP 25. The Employer's representative also testified that it is a violation of company policy to fail to properly safeguard company funds. Commr.'s R. at 16, 78. Loeffelbein did not dispute these facts. She simply argued that since the check acceptance policy said "at manager's discretion," she thought the policy allowed managers to approve amounts over \$50, and since she was the store manager, she thought she could approve cashing her own checks for \$500—ten times the amount allowed. *Id.* at 47.

Loeffelbein's conduct violated the check acceptance policy for two reasons. First, the check acceptance policy allows employees to get *up to* \$50 cash back when making *purchases* with personal checks. Commr.'s R. at 27-30; CP 25. None of the checks Loeffelbein cashed with her Employer during the relevant one-month period were for purchases: she simply deposited checks in the register and removed the cash. Second, the policy clearly establishes the maximum amount over the amount of a purchase an employee may write a check: \$50. *Id.* Although the policy parenthetically states "at manager's discretion," it is clear that it gives managers the discretion to approve amounts *up to* \$50 over the amount of

the purchase for their employees. Commr.'s R. at 28, 30; CP 25. The discretion is whether to approve the transaction or not.

Although the Commissioner seems to have found that an employee *could* cash a check for over \$50 with a manager's approval, the rule is clear on its face that it is the transaction itself that the manager may approve. CP 25. Nevertheless, Loeffelbein did not obtain a manager's approval for her transactions. She explained that since the policy said, "at manager's discretion," she thought she could approve her own checks for well over the \$50 threshold because she was a manager. Comm.r's R. at 47-48. The Commissioner properly considered the policy itself and Loeffelbein's explanation and found it unreasonable for Loeffelbein to believe that, as manager, she could approve her own checks for amounts over the Employer's limit and have her subordinates complete the transactions. *Id.* at 104. This Court should not second-guess the Commissioner's view of the evidence, even if a contrary view is possible. *See, e.g., Lige & Wm. B. Dickson*, 65 Wn. App. at 618. Substantial evidence thus supports the Commissioner's finding that Loeffelbein's conduct violated the Employer's check acceptance policy.

Loeffelbein's conduct also violated the Employer's policy requiring employees to properly safeguard company funds. When Loeffelbein wrote and cashed the checks, and later when she was

interviewed by her Employer about the transactions, she believed that she did not have sufficient funds in her account to cover the checks. Commr.'s R. at 23, 26, 34, 127; 89 (FF 4). Although it turned out she did have sufficient funds at the time she wrote the checks, and all of the checks cleared the bank, Loeffelbein failed to properly safeguard company funds by writing checks to the company for which she believed she had insufficient funds. Commr.'s R. at 25, 33. Her belief at the time she wrote the checks was that she lacked sufficient funds to cover them.

The Employer's representative also testified that employees may only get advances on their paychecks with the approval of the VP of HR. Commr.'s R. at 26-28; 89 (FF 4). Again, Loeffelbein did not dispute that this policy existed. She simply asserted that she did not think of her conduct as getting advances on her paychecks. *Id.* at 48.

Loeffelbein's conduct also violated the Employer's paycheck-advance policy. Based on the timing of at least some of the checks and Loeffelbein's contemporaneous belief she would not have sufficient funds to cover the checks until payday, she obtained advances on her paychecks without seeking the approval of the VP of HR. One of the Employer's representatives testified that the check cashing occurred two to three days before pay day. Commr.'s R. at 15. The Employer's representative also testified that Loeffelbein told him during the investigation that at the time

she wrote the checks, there was insufficient money in her account, but that she knew it was close enough to pay day that the checks would clear the bank. *Id.* at 23. Loeffelbein did not dispute that she told this to her Employer. In fact, she admitted that the timing of the check cashing shortly before payday was to ensure that the checks would clear. *Id.* at 52. Accordingly, the Commissioner did not err in finding Loeffelbein's conduct amounted to obtaining an advance on her pay checks, which was prohibited without the approval of the VP of HR. Because Loeffelbein did not seek that approval, her conduct violated the Employer's policy.

B. The Commissioner Correctly Concluded that Cashing Seven to Eight Checks Totaling \$3,620 Within a One-Month Period Amounted to Disqualifying Misconduct Under RCW 50.04.294

As discussed, a person who has been discharged from employment for misconduct is ineligible to receive unemployment benefits. RCW 50.20.066(1). Loeffelbein's violations of her Employer's known, reasonable policies amounted to disqualifying misconduct under the Employment Security Act.

Under the Act, misconduct includes, but is not limited to:

- (a) Willful or wanton disregard of the rights, title, and interests of the employer or fellow employee;
- (b) Deliberate violations or disregard of standards of behavior which the employer has the right to expect of an employee;

(c) Carelessness or negligence that causes or would likely cause serious bodily harm to the employer or a fellow employer; 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 Act goes on to provide illustrative examples of behavior that constitutes misconduct. Notably, the Act explicitly states that 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” is to be considered misconduct because it “signifies a willful or wanton disregard of the rights, title, and interests of the employer.” RCW 50.04.294(2)(f). An employee knew or should have known about a company rule if she was provided an employee orientation on company rules or was provided a copy or summary of the rule in writing. WAC 192-150-210(5); *see also Smith*, 155 Wn. App. at 34.

Additionally, an employee's act or behavior is connected with his or her work if that act or behavior results in harm or creates the potential for harm to the employer's interests. WAC 192-150-200(2). In determining whether an employee's work-related misconduct was harmful, “harm” may be tangible, such as damage to equipment or property, or intangible, such as damage to the employer's reputation or a negative impact on staff morale. *Id.*

The current definition of misconduct was enacted in 2003. The category of misconduct set forth in RCW 50.04.294(1)(a) matches in large measure the pre-2003 law defining misconduct. *See, e.g., Wilson v. Emp't Sec. Dept.*, 87 Wn. App. 197, 201, 940 P.2d 269 (1997) (recognizing that “misconduct” was, in part, “an employee’s act or failure to act in willful disregard of his or her employer’s interest.”). Cases interpreting the matching portion of the prior definition are therefore instructive.⁴ Those cases held that an employee “willful[ly] disregard[ed]” an employer’s interests when he “voluntarily disregard[ed] the employer’s interest;” his “specific motivations for doing so” were “not relevant.” *E.g., Hamel v. Emp’t Sec. Dept.*, 93 Wn. App. 140, 146, 966 P.2d 1282 (1998), *review denied*, 137 Wn.2d 1036 (1999). Furthermore, under both the prior definition and case law interpreting RCW 50.04.294(1)(a), “it is sufficient [for misconduct purposes] that an employee intentionally perform an act in willful disregard for its probable consequences.” *Smith*, 155 Wn. App. at 37 (citing *Hamel*, 93 Wn. App. at 146-47); *see also* WAC 192-150-205(1) (“‘Willful’ means intentional behavior done deliberately or knowingly,

⁴ When reviewing claims under a new statute, courts should look to prior judicial decisions on the subject, to the extent that these decisions do not conflict with the new standards. *See Green Mountain School Dist. No. 103 v. Durkee*, 56 Wn.2d 154, 351 P.2d 525 (1960) (new legislation is presumed to be in line with prior judicial decisions absent an indication that the legislature intended to completely overrule prior case law).

where you are aware that you are violating or disregarding the rights of your employer or a co-worker.”).

Here, the Commissioner correctly concluded that Loeffelbein’s conduct amounted to a willful disregard of the standards of behavior the Employer had a right to expect. Commr.’s R. at 103-04; RCW 50.04.294(1)(b). It also amounted to a willful disregard of her Employer’s interests and violations of reasonable company rules known by Loeffelbein. RCW 50.04.294(1)(a), (2)(f). By cashing seven to eight checks totaling \$3,620 over a period of less than one month, and having her subordinates perform the transactions, Loeffelbein willfully disregarded Bartell’s check acceptance policy and its interest in having its managers abide by the rules and set an example for their employees. RCW 50.04.294(1)(a). Bartell Drugs had the right to expect that Loeffelbein, as a manager, would not abuse her authority by asking her subordinates to cash \$500 checks for her. RCW 50.04.294(1)(b). They also had the right to expect her, as manager, to set a better example for her employees. Commr.’s R. at 16-17 (“[S]he was a store manager, so she was expected to not only follow the policy but set the example for others.”). And, shown above, Loeffelbein’s conduct violated up to three company rules, of which Loeffelbein knew. RCW 50.04.294(2)(f).

Loeffelbein has argued that she in fact had sufficient funds and had overdraft protection, so there was no risk of harming the Employer. She also asserted at the hearing that she did not think she was violating her Employer's policies. Commr.'s R. at 47-48. Her arguments fail for several reasons. First, an employee's conduct may amount to misconduct by creating the *potential* for harm to the employer's interests. WAC 192-150-200(2). And that harm need not be financially tangible; it may be intangible, such as damage to the employer's reputation or a negative impact on staff morale. *Id.* Moreover, while an employee must act intentionally to satisfy misconduct, whether she understood she was behaving in a manner that violated an employer's policies is irrelevant. *Griffith v. Dep't of Emp't Sec.*, 163 Wn. App. 1, 10, 259 P.3d 1111 (2011).⁵

Griffith and *Hamel* illustrate why Loeffelbein's subjective understanding as to whether her conduct violated the Employer's policies is immaterial to the inquiry of disqualifying misconduct. In *Griffith*, the employee made an offensive comment to a customer and was discharged after returning to the customer's worksite seeking to apologize despite being suspended pending an investigation. *Id.* at 5. *Griffith* argued that he did not think the comment or returning to the worksite would offend the

⁵ *Griffith* interprets the current definition of misconduct.

customer or harm the employer's interests. *Id.* at 9. In concluding Griffith's conduct amounted to misconduct under the Act, the court stated, "whether he understood that he was behaving in an offensive manner is irrelevant. He intentionally behaved in a manner that offended the customer and led to his banishment from the location." *Id.* at 10.

In *Hamel*, a server at Red Robin who was familiar with Red Robin's strict policy prohibiting sexual harassment was discharged after the third incident of making inappropriate comments to customers or fellow employees following two warnings from the employer. *Id.* at 142-43. Hamel did not intend for the third comment he made to be offensive, and when he realized it may have been offensive, he apologized. *Id.* at 143. Hamel contended that he did not know that his conduct was inconsistent with his employer's interest. *Id.* at 147.

The court held that an employee acts with willful disregard of his employer's interests "when he (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." *Id.* at 146-47. Applying the "should have known" standard, the court concluded that in the face of repeated warnings, a reasonable person would have known that his conduct would

jeopardize his employer's interest. *Id.* Hamel's conduct, therefore, was disqualifying misconduct. *Id.*⁶

Like the employees' subjective understanding in *Griffith* and *Hamel*, the fact that Loeffelbein did not perceive her own actions to be rule violations is of no consequence. *Griffith*, 163 Wn. App. at 11; *Hamel*, 93 Wn. App. at 146. Loeffelbein acted intentionally, her intentional conduct violated her Employer's policies, of which she was aware, and it created harm or potential harm to the Employer's interests. WAC 192-150-200(2). Her specific motivations or subjective belief are not relevant. *See Hamel*, 93 Wn. App. at 146.

Like the employee in *Hamel*, Loeffelbein may not have intended to harm Bartell Drugs. But she nevertheless willfully disregarded the Employer's interests in safeguarding its funds and in its managers leading by example when she cashed \$3,620 in checks with the Employer in less than one month and had her subordinates perform the transactions. Being aware of the Employer's policies, having never cashed a check or been aware of another cashing a check for over \$100, and having already been disciplined for failing to set an appropriate example for the employees she managed, Loeffelbein should have known that her conduct was in disregard of her Employer's interests and policies. *Hamel*, 93 Wn. App. at

⁶ *Hamel* interprets the prior definition of misconduct, RCW 50.04.293.

146-47. And she should have known that cashing checks for which she believed she would not have sufficient funds until pay day was akin to getting an advance on her pay check without the required approval from the VP of HR. Loeffelbein's conduct, therefore, amounted to disqualifying conduct, and the Court should thus affirm the Commissioner's decision.

VII. CONCLUSION

In cashing seven to eight checks with her Employer totaling \$3,620 in less than one month, Loeffelbein violated three reasonable employer rules, willfully disregarded her Employer's interests, and deliberately disregarded the standards of behavior the Employer had the right to expect of her. Her conduct amounted to disqualifying misconduct under the Employment Security Act. Accordingly, the Department respectfully requests that the Court reverse the superior court's order and affirm the Commissioner's decision.

RESPECTFULLY SUBMITTED this 7th day of June, 2012.

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Attorneys for Appellant

PROOF OF SERVICE

I, ROXANNE IMMEL, hereby state and declare as follows:

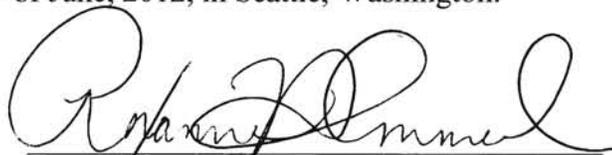
1. That I am a citizen of the United States of America, a resident of the State of Washington, over the age of eighteen (18) years, and not a party to the above-entitled action.

2. That on the 7th day of June, 2012, I caused to be served a true and correct copy of APPELLANT'S OPENING BRIEF, by U.S. Mail, postage prepaid to:

NOELEE LOEFFELBEIN
6535 11TH AVE NW
SEATTLE, WA 98117

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

DATED this 7th day of June, 2012, in Seattle, Washington.


Roxanne Immel, Legal Assistant