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

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SUSAN R. KOPP,

Respondent,

vs.

STATE OF WASHINGTON DEPARTMENT OF EMPLOYMENT  
SECURITY,

Appellant,

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**REPLY BRIEF OF APPELLANT**

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ORIGINAL

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## I. INTRODUCTION

Respondent Susan Kopp knew or should have known of her employer's reasonable policies requiring her to immediately report all fires and unsafe conditions to a supervisor. Substantial evidence supports the Commissioner's findings that Ms. Kopp encountered a fire but failed to report it. Moreover, the employer's policies were reasonable, as they existed to protect employees from harm and to safeguard the employer's physical and economic property interests. Thus, the Commissioner correctly concluded that Ms. Kopp committed disqualifying work-related misconduct under the Employment Security Act (Act) when she failed to report the fire to her supervisor.

The Act does not require a claimant to have received warnings in order for her actions to constitute misconduct. Under the plain statutory language of the Act, Ms. Kopp committed misconduct because she violated her employer's reasonable policies which required her to immediately report all fires, regardless of their size, and all unsafe conditions to her supervisor, and she knew or should have known of her employer's policies. RCW 50.04.294(2)(f). Finally, the superior court erred in granting Ms. Kopp's motion to supplement the record with new evidence, because Ms. Kopp was obligated to present her case at her

administrative hearing, not at the superior court. This Court should affirm the Commissioner's decision.

## II. ARGUMENT IN REPLY

### A. **Substantial Evidence Supports the Commissioner's Finding That Ms. Kopp Observed a Small "Fire" and, Thus, the Commissioner Correctly Concluded That She Violated Her Employer's Policies When She Failed to Report the Unsafe Condition to Her Supervisor**

Ms. Kopp contends that substantial evidence does not support the Commissioner's finding that she observed an unsafe condition—a small fire. Response Br. at 13. Ms. Kopp asserts that the fire was, in fact, "a smolder;" thus, the Commissioner erred in concluding that she violated her employer's policy requiring her to immediately report fires and unsafe conditions to a supervisor. *Id.* She further asserts that because she believed she had extinguished the alleged "smolder," there was no unsafe condition for her to report. *Id.*

The testimony of Ms. Kopp and fellow employees and the fire department's incident report support the Commissioner's finding that what Ms. Kopp observed was a small fire, not a "smolder." Administrative Record (AR)<sup>1</sup> at 110, 121; Finding of Fact (FF) 4. According to the Kent

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<sup>1</sup> The superior court transmitted the Certified Appeal Board Record (AR) and the Supplemental Certified Appeal Board Record (SAR) as stand-alone documents. See Index to Clerk's Papers (CP). Because these documents are separately paginated from the Clerk's Papers, this brief cites to the administrative record and the supplemental administrative record as "AR" and "SAR."

Fire Department's Incident Report, the fire department responded to a "Beauty Bark Fire." SAR at 3; *see also* SAR at 5 ("E76 responded to reported bark fire."). Upon arrival at the scene, the fire department "found small smoldering bark fire next to and between several large outdoor power transformers. The fire was about 3 ft. by 3 ft. and then extended about another 3 feet in the aprox [sic] 6 inch space between the transformers." SAR at 5. Ms. Kopp testified that when she saw the hazard, she "grabbed a trash can and filled it half full with water and made numerous trips back and forth to put out the smoldering embers." AR at 39. An hour and a half later, Ms. Kopp observed that the site of the bark fire was "still smoldering." AR at 41. After the fire was reported to maintenance, the employer called the fire department and the power company, out of fear that the fire was an electric fire due to its proximity to electrical transformers. AR at 51-52, 54, 56.

Ms. Kopp does not state the difference between a "fire" and a "smolder," nor the importance of any difference.<sup>2</sup> Nor does she explain why she would not have been required to report a hazard which was so

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<sup>2</sup> According to the dictionary, a "smolder" is defined as "2 : a smoldering fire — compare BLAZE." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 2152 (2002). "Smolder," the *verb*, is defined as "[t]o burn and smoke without flame ... waste away by slow combustion <fire was ~ing in the grate>." *Id.*

unsafe that she felt compelled to extinguish it with four trash cans filled with water. AR at 39, 65. In fact, at the superior court, Ms. Kopp admitted, “[w]hether the incident was an actual fire or a smolder is not at issue. The Company is probably correct that Ms. Kopp was supposed to report even a small smolder[.]” Clerk’s Papers (CP) at 33. While the fire Ms. Kopp observed may have been small, or even smoldering, her employer’s policy expressly required her to immediately report all fires “regardless of size” to a supervisor. AR at 37, 101, 110, 121; FF 2.

This Court should also reject Ms. Kopp’s argument that she was not required to report the “unsafe condition” because she thought she had extinguished it. Response Br. at 10-11. The Commissioner did not enter a finding of fact that Ms. Kopp thought she had extinguished the fire, and this Court’s role is to determine whether the Commissioner’s actual findings of fact are supported by substantial evidence. RCW 34.05.570(3). Nevertheless, the employer’s policy required Ms. Kopp to “report all unsafe conditions to a supervisor immediately.” AR at 36, 96, 98, 110, 121; FF 2. The employer’s policy does not contain an exception that excuses employees from reporting unsafe conditions they have attempted to manage on their own. Rather, it explicitly directed Ms. Kopp to report *all* unsafe conditions to a supervisor.

In fact, because Ms. Kopp failed to report the fire to a supervisor, it was still not extinguished more than an hour after she first noticed the unsafe condition.<sup>3</sup> AR at 41. By requiring employees to report unsafe conditions to supervisors, the employer ensured that it would learn of all unsafe conditions and could then take action to prevent such incidents from recurring in the future. *See* AR at 41 (Employer’s representative asked Ms. Kopp, “[D]on’t you believe that we would need to know how to prevent that from happening in the future, not knowing what really caused it?”). Substantial evidence supports the Commissioner’s finding that Ms. Kopp observed a fire and thus violated her employer’s policies when she failed to immediately report the fire, an unsafe condition that she was unsuccessful in extinguishing, to her supervisor.

**B. The Employer’s Policy, Which Required Employees to Report All Fires and Unsafe Conditions to a Supervisor Immediately, Was Reasonable**

A company rule is “reasonable” if it is “related to your job duties, is a normal business requirement or practice for your occupation or

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<sup>3</sup> Ms. Kopp does not challenge the Commissioner’s finding that she “was unsuccessful in extinguishing the fire” and thus it is a verity on appeal. *Tapper v. Emp’t Sec. Dep’t*, 122 Wn.2d 397, 407, 858 P.2d 494 (1993); AR at 110, 121; FF 6. She briefly asserts that “the new smolder was in a different area from the area that Ms. Kopp observed,” but otherwise presents no argument on this point. Response Br. at 15.

To the extent this statement constitutes a challenge to finding of fact 6, this Court should determine that the Commissioner’s finding is supported by substantial evidence. Ms. Kopp testified that when she took her next break, two fellow employees “showed me where it was still smoldering.” AR at 41. Ms. Kopp then testified that she told the employees that she had previously been outside and tried to extinguish it. AR at 42.

industry, or is required by law or regulation.” WAC 192-150-210(4). A Washington Industrial Safety and Health Act regulation requires every Washington employer to “[e]stablish, supervise, and enforce rules that lead to a safe and healthy work environment that are effective in practice.” WAC 296-800-11035. The employer enacted safety rules to protect employees from harm and to maintain the employer’s physical and economic property interests. *See* AR at 88, 93. The rules that required Ms. Kopp to immediately report all fires and unsafe conditions to a supervisor were reasonable.

Ms. Kopp agrees that the employer’s safety policies were reasonable workplace policies. Response Br. at 17. She contends, however, that her employer’s policies were not reasonable because “[t]erminating an employee for incident of a mistake is not a reasonable company policy.” *Id.* at 19. Ms. Kopp relies on *Henson v. Employment Security Department*, 113 Wn.2d 374, 779 P.2d 715 (1989), to support her contention. Response Br. at 15-19.

In *Henson*, after an employee showed up for work smelling of alcohol, the employer required him to complete an alcohol treatment program as a condition of his continued employment. *Henson*, 113 Wn.2d at 376. The employee agreed, but when he later refused to complete the aftercare portion of the treatment program, the employer discharged him.

*Id.* The Court concluded that the employer’s chosen course of action—requiring the employee to follow the recommendation of experts and complete a treatment program—was reasonable. *Id.* at 378-79.

Kopp argues that because the employer here discharged her after one incident of failing to report a fire, its *termination* policy is not reasonable compared to the employer’s conduct in *Henson*. Response Br. at 19. But the policy in question here is the one requiring employees to report fires and unsafe conditions, not whether there was a progressive discipline policy. Moreover, while the *Henson* court found that the employer’s chosen course of action was reasonable, it also noted that the employer “could have fired Henson for coming to work with the odor of alcohol.” *Id.* at 379. The employer’s course of action *after* Ms. Kopp committed disqualifying misconduct under the Act is not relevant to the misconduct inquiry.<sup>4</sup>

More importantly, as Ms. Kopp points out, *Henson* was decided before the current statutory definition of misconduct, which now sets forth

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<sup>4</sup> Accordingly, the declarations, which are cited by Ms. Kopp, are ultimately irrelevant. Response Br. at 19-20. Moreover, as discussed in the opening brief and below, the superior court improperly granted Ms. Kopp’s motion to supplement the record with new evidence—declarations from former coworkers of Ms. Kopp who opined that it was unfair for the employer to terminate Ms. Kopp for her actions. *See* CP at 108-109.

specific types of actions that constitute misconduct per se.<sup>5</sup> See *Daniels v. Dep't of Emp't Sec.*, 168 Wn. App. 721, 731, 281 P.3d 310 (2012); Response Br. at 15. The current version of 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” constitutes misconduct. RCW 50.04.294(2)(f). The statute does not require the employer to attempt “to correct [the employee’s] behavior by recommending corrective behavior and giving multiple warnings before termination.” Response Br. at 18; see *Griffith v. Dep't of Emp't Sec.*, 163 Wn. App. 1, 10-11, 259 P.3d 1111 (2011) (although claimant had multiple incidents of misconduct, “[t]he employer could have discharged Mr. Griffith for misconduct on either of the first two occasions.”).

In arguing that the employer acted unreasonably when it terminated Ms. Kopp after a single rule violation, Ms. Kopp asks this Court to read a progressive discipline requirement into the misconduct statute. Response Br. at 18-19. However, under the plain language of the Act, a warning is not required in order for an employee’s actions to amount to misconduct. RCW 50.04.294(2)(f); see also *State v. Costich*, 152 Wn.2d 463, 470, 98 P.3d 795 (2004) (“The plain meaning of the

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<sup>5</sup> In 2003, the legislature amended the Act, changing the definition of misconduct and adding the examples of misconduct per se that are present in the current version of the statute. Laws of 2003, 2nd Spec. Sess., ch. 4, § 6.

statute is derived not only from the statute at hand, but also ‘all that the Legislature has said in the . . . related statutes which disclose legislative intent about the provision in question.’” (quoting *Dep’t of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 11, 43 P.3d 4 (2002))). If the legislature had intended for an employee to receive a warning before her rule violation amounted to misconduct under RCW 50.04.294(2)(f), the legislature would have written a warning requirement in the statute. In fact, it did just that in RCW 50.04.294(2)(b), which states that in order for tardiness to amount to misconduct, the tardiness must be repeated and followed by warnings by the employer.

Nevertheless, Ms. Kopp was on notice that a single violation of the employer’s safety rules would be taken seriously by the employer and could potentially result in her termination. The employer’s General Safety Rules state:

Berry Plastics Corporation requires that employees comply with all applicable safety rules to prevent accidents to themselves, to their co-workers, and to the public. The following procedures must be followed, without exception. Violation of Safety Rules may be cause for immediate dismissal. A range of penalties varying from verbal or written cautionary notice to immediate discharge will be administered for each rule, depending upon the seriousness of the offense.

AR at 93. Thus, Ms. Kopp received a warning that a violation of the safety rules could lead to her termination. She failed to report a fire,

placing her coworkers and her employer's property in jeopardy. The employer determined Ms. Kopp committed a serious violation of its policies and consequently discharged her for her statutory misconduct.

**C. Ms. Kopp's Actions Did Not Constitute Inadvertence or Ordinary Negligence in an Isolated Instance, or a Good Faith Error in Judgment or Discretion**

Ms. Kopp contends that her actions amounted to inadvertence or ordinary negligence in an isolated instance, or a good faith error in judgment, because she did not intend to violate her employer's policies, and she not did have a history of repeated violations of her employer's policies. Response Br. at 22, 24, 26.

First, misconduct does not require that an employee act with a specific intent to violate the employer's policies. Rather, "[o]ur appellate courts have held that an employee acts with willful disregard of an employer's interest when the employee '(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 consequences.'" *Kirby v. Dep't of Emp't Sec.*, \_\_ Wn.2d \_\_, 320 P.3d 123, 127 (2014). Ms. Kopp was aware of her employer's interest in a safe workplace, as expressed through its rules requiring her to immediately report all fires and unsafe conditions to a supervisor. She acknowledged in writing that she had received her employer's safety rules

and had received, understood, and agreed to comply with her employer's policies. AR at 12-13, 33-34, 36-37, 85-86, 92, 98, 102, 110; FF 3. Nevertheless, Ms. Kopp saw a small fire outside of her employer's premises, when she did not have permission to be outside, and then intentionally did not report the fire to a supervisor, willfully disregarding the probable consequences of her actions.<sup>6</sup> AR at 38, 40-41.

As discussed in the opening brief, in *Wilson v. Employment Security Department*, 87 Wn. App. 197, 202-03, 940 P.2d 269 (1997), an employee's actions constituted negligence, not misconduct, because the employee's actions did not amount to a violation of a specific company policy. Opening Br. at 19-20. In contrast, Ms. Kopp's actions did not amount to negligence or a good faith error in judgment because her employer's policies explicitly required her to immediately report the fire to a supervisor, leaving her no room to exercise discretion or judgment. She acted willfully when she intentionally acted in violation of the employer's safety policies of which she knew or should have known.

Ms. Kopp contends that because she did not have repeated incidents of rule violations, her actions "were at most inadvertence or

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<sup>6</sup> Ms. Kopp contends for the first time on appeal that it "skipped her mind to inform her supervisor." Response Br. at 25. But there is no testimony in the record to support this assertion. Ms. Kopp saw the fire on two separate occasions and never reported the fire, and her work was "right next to" her supervisor's office. AR at 40-42. Importantly, she did not have permission to be outside when she saw the fire for the first time. AR at 38.

ordinary negligence in one isolated incident.” Response Br. at 26. As discussed above, there is no requirement that a rule violation be repeated and follow warnings to constitute misconduct. Moreover, the liberal construction rule does not authorize courts to interpret the statute defining misconduct inconsistent with its plain statutory language. *See Harris v. Dep’t of Labor & Indus.*, 120 Wn.2d 461, 474, 843 P.2d 1056 (1993) (liberal construction rule does not apply to unambiguous terms in statutes).

Ms. Kopp’s failure to immediately report the fire to her supervisor in violation of her employer’s policies constituted misconduct under the plain language of the Act. Her actions did not constitute inadvertence or ordinary negligence in an isolated instance or a good faith error in judgment under RCW 50.04.294(3).

**D. The Declarations Were Not Needed to Decide Disputed Issues Regarding Material Facts in a Proceeding Not Required to Be Determined on the Agency Record**

The new evidence submitted by Ms. Kopp to the superior court did not fall under one of the exceptions to the rule that judicial review is limited to the administrative record listed in RCW 34.05.562(1). Thus, the superior court erred in granting Ms. Kopp’s motion to supplement the record with new evidence, and this Court should not consider the new evidence in this appeal.

The proceeding was required to be determined on the agency record. *See* RCW 34.05.562(1)(c). Under RCW 34.05.476(3), “Except to

the extent that this chapter or another statute provides otherwise, the agency record constitutes the exclusive basis for agency action in adjudicative proceedings under this chapter and for judicial review of adjudicative proceedings.”<sup>7</sup>

Moreover, the declarations submitted by Ms. Kopp at the superior court had not been subject to fact-finding inquiry and, thus, were not properly before the superior court, which sat in its appellate capacity. RCW 34.05.570. In *US West Communications*, our Supreme Court concluded that the superior court properly struck declarations submitted to the superior court, after the Commission had issued a final order. *US West Commc'ns, Inc. v. Wash. Utils. & Transp. Comm'n*, 134 Wn.2d 48, 72-73, 949 P.2d 1321 (1997). The Court reasoned that the declarations did not include “any evidence which relates to the validity of the Commission’s action at the time it was taken,” and the “conflicting declarations have not been subject to any fact-finding inquiry and should not be before this Court.” *Id.* at 73.

In its appellate capacity, the superior court’s role was to determine whether the Commissioner’s findings of fact were supported by substantial evidence and whether the Commissioner’s decision was free from errors of law. RCW 34.05.570(3). Since the declarations were not

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<sup>7</sup> At the superior court, Ms. Kopp incorrectly asserted that the judicial review was a review of a brief adjudication under RCW 34.05.482 through RCW 34.05.494. CP at 103-09. She was mistaken. Ms. Kopp had a full evidentiary hearing with the right of cross-examination under RCW 50.32.040. *See also* WAC 192-04-110 (“Any interested party, or his or her legally authorized representative, shall have the right to give testimony and to examine and cross-examine any other interested party and/or witnesses with respect to facts material and relevant to the issues involved.”).

before the Commissioner, the Commissioner could not have erred by failing to consider evidence that was not before him.

Finally, *Rios v. Washington Department of Labor and Industries*, 145 Wn.2d 483, 39 P.3d 961 (2002), on which Kopp relies, is not instructive. Response Br. at 29. The issue in *Rios* related to rule making, and if new evidence “relates to the validity of the agency action at the time it was taken and is needed to decide disputed issues regarding ... [m]aterial facts in rule making,” then RCW 34.05.562(1) permits the court to receive the evidence in addition to that contained in the agency record for judicial review. Here, the matter was an adjudicative proceeding, not a rule making proceeding. Nor did it constitute another type of proceeding that was not required to be determined on the agency record. RCW 34.05.562(1)(c).

All the evidence Ms. Kopp sought to admit was available at the time of the administrative hearing; thus, allowing the new evidence essentially permitted Ms. Kopp an opportunity to retry her case.<sup>8</sup> See *Motley-Motley, Inc. v. Pollution Control Hearings Bd.*, 127 Wn. App. 62, 77, 110 P.3d 812 (2005) (“Motley was obligated to present its case to the [Pollution Control Hearings Board] and not to the superior court.”). The superior court erred in granting Ms. Kopp’s motion to supplement the

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<sup>8</sup> As stated in the opening brief, the superior court admitted the declarations but ultimately did not consider them in reaching its decision. See CP at 67; Opening Br. at 22.

record with new evidence. This Court should decline to consider the new evidence in this appeal.

**E. This Court Should Not Award Ms. Kopp Attorney Fees and Costs**

Under the Act, a claimant may recover reasonable attorney fees and costs from the unemployment compensation administration fund only when an appellate court reverses or modifies the Commissioner's decision. RCW 50.32.160; *Markam Group, Inc., P.S. v. Dep't of Emp't Sec.*, 148 Wn. App. 555, 565, 200 P.3d 748 (2009). Because the Court should affirm the Commissioner's decision, Ms. Kopp should not be entitled to attorney fees at the superior or appellate court levels.

**III. CONCLUSION**

For the reasons stated above and in the Department's opening brief, the Department asks the Court to reverse the superior court's decision, including the attorney fees and costs award, and reinstate the Commissioner's decision denying Ms. Kopp unemployment benefits.

RESPECTFULLY SUBMITTED this 21<sup>st</sup> day of April 2014.

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**PROOF OF SERVICE**

I, Roxanne Immel, 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 21st day of April 2014, I caused to be served a copy of **Reply Brief of Appellant** on the Respondent of record on the below stated date as follows:

US mail, postage prepaid and email

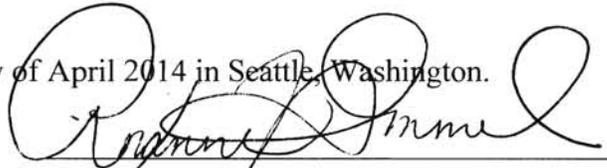
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I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON that the foregoing is true and correct.

Dated this 21st day of April 2014 in Seattle, Washington.



Roxanne Immel, Legal Assistant