

NO. 71025-7-I

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

SUSAN R. KOPP,

Respondent,

vs.

STATE OF WASHINGTON DEPARTMENT OF EMPLOYMENT
SECURITY,

Appellant.

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I. INTRODUCTION

Susan Kopp's employer terminated her employment after she failed to notify a supervisor of a fire on her employer's premises. In failing to report the fire, Ms. Kopp violated two of her employer's workplace safety rules, of which she was aware: (1) a policy requiring her to report all unsafe conditions to a supervisor immediately and (2) a rule requiring her to notify a supervisor immediately of all fires, regardless of size. Ms. Kopp's violations of reasonable safety rules, which were enacted to ensure the safety of employees and protect the employer's property and economic interests, signified a willful disregard of the rights and interests of her employer. Accordingly, the Commissioner correctly concluded that Ms. Kopp committed work-related misconduct and was thus disqualified from receiving unemployment benefits.

The King County Superior Court erred in reversing the Commissioner's decision. Because the Commissioner's decision is supported by substantial evidence and is free of errors of law, the Department respectfully requests that this Court reverse the superior court and affirm the Commissioner's decision denying Ms. Kopp unemployment benefits.

II. ASSIGNMENTS OF ERROR¹

1. The superior court erred in reversing the Commissioner's decision that concluded Ms. Kopp was discharged from employment for work-connected misconduct.
2. The superior court erred in concluding that Ms. Kopp committed an act of ordinary negligence in an isolated instance, or a good faith error in judgment or discretion.
3. The superior court erred in granting Ms. Kopp's motion to supplement the record with new evidence.
4. Because the superior court erred in reversing the Commissioner's decision, the superior court erred in awarding attorney fees and costs to Ms. Kopp.

III. STATEMENT OF THE ISSUES

1. Did the Commissioner correctly conclude that Ms. Kopp committed misconduct under the Employment Security Act when, in violation of her employer's reasonable safety rules, of which she was aware, she failed to notify her employer of a fire on her employer's premises?
2. Did the Commissioner correctly conclude that Ms. Kopp's conduct was not ordinary negligence in an isolated instance or a good faith error in judgment or discretion, when Ms. Kopp willfully acted in violation of workplace safety rules, jeopardizing the safety of her fellow employees and the economic and property interests of her employer?

¹ This is a judicial review under the Washington Administrative Procedure Act, Chapter 34.05 RCW, where the Court of Appeals sits in the same position of the superior court and reviews the Commissioner's decision. *Tapper v. Emp't Sec. Dep't*, 122 Wn.2d 397, 402, 858 P.2d 494 (1993). Accordingly, the Respondent, Ms. Kopp, must assign error to the Commissioner's findings and conclusions she challenges. See RAP 10.3(h); RCW 50.32.120 (judicial review of the Commissioner's decision is governed by the Administrative Procedure Act). "Assignment of error to the superior court findings and conclusions are not necessary in review of an administrative action." *Waste Mgmt. of Seattle, Inc. v. Utils. & Transp. Comm'n*, 123 Wn.2d 621, 633, 869 P.2d 1034 (1994).

3. Under the Washington Administrative Procedure Act (APA), judicial review is generally limited to the agency record. Did the superior court err in granting Ms. Kopp's motion to supplement the record with new evidence when the evidence was not before the Commissioner at the time of his decision and no basis existed under the APA for the admission of new evidence?
4. An unemployment benefits claimant is entitled to reasonable attorney fees and costs under RCW 50.32.160 only if the Commissioner's decision is modified or reversed. If this Court reverses the superior court and affirms the Commissioner's decision, should this Court also reverse the superior court's award of attorney fees and costs?

IV. STATEMENT OF FACTS

Ms. Kopp worked at Pliant Corporation as a plate shop moulder from March 1996 until she was discharged in August 2012. Administrative Record (AR)² at 81, 110, 121; Finding of Fact (FF) 1.

Pliant Corporation had a policy that required all employees to "report all unsafe conditions to a supervisor immediately." AR at 36, 96, 98, 110, 121; FF 2. The employer also had a policy that stated, "In the event of a fire (regardless of size) immediately report it to your supervisor." AR at 37, 101, 110, 121; FF 2; see also AR at 96 ("Employees shall observe the plant fire protection rules."). Ms. Kopp

² 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."

completed training on these policies, including training on the use of a fire extinguisher. AR at 12-13, 33-34, 36-37, 85-86, 92, 98, 102, 110, 121; FF 3. Ms. Kopp also received a copy of the employer's safety rules, acknowledged that the rules had been explained to her, and signed acknowledgements that she had received, understood, and agreed to comply with the employer's policies. AR at 12-13, 33-34, 36-37, 85-86, 92, 98, 102, 110, 121; FF 3.

On August 15, 2012, at about 1:40 a.m., Ms. Kopp left her work area and went to her car for a break. AR at 38, 40, 106. On her return, Ms. Kopp observed a small fire outside her work building, between electrical transformers. AR at 38-39, 51, 110, 121; FF 4. Ms. Kopp attempted to put the fire out on her own with a trash container filled with water instead of a fire extinguisher. AR at 39, 110, 121; FF 5. She made "numerous trips" to the site of the fire but was ultimately unsuccessful in extinguishing the fire. AR at 39, 41, 110, 121; Supplemental Administrative Record (SAR) at 3-5; FF 5. Ms. Kopp returned to work without reporting to her supervisor that there was a fire or that she had attempted to extinguish the fire. AR at 40-41, 110, 121; FF 6.

At approximately 3:20 a.m., Mr. Kopp took another break and learned that the fire was not extinguished. AR at 41. Another employee reported the fire to the maintenance department, who then reported it to

the appropriate supervisor. AR at 42, 51. Ms. Kopp was not involved in reporting the fire. AR at 42. Fearing an electrical fire, the supervisor called the fire department and the power utility company. AR at 51-52, 57, 110, 121; SAR 5; FF 7. The employer discovered Ms. Kopp's violations of the company safety policies and discharged Ms. Kopp. AR at 103-04.

Subsequently, Ms. Kopp applied for unemployment benefits. AR at 107, 109. The Department initially determined Ms. Kopp was eligible for benefits, and the employer appealed. AR at 73-79. Upon appeal to the Office of Administrative Hearings (OAH), the Administrative Law Judge (ALJ) determined that in violating reasonable and known company rules, Ms. Kopp had committed disqualifying misconduct. AR at 110-11.

Ms. Kopp then appealed the ALJ's decision to the Commissioner. AR at 116-117. The Commissioner reviewed the entire record and adopted the ALJ's findings of fact and conclusions of law. AR at 121. The Commissioner affirmed the denial of unemployment benefits and determined that Ms. Kopp's "precipitating conduct has been shown, by a preponderance of substantial evidence of record" to establish misconduct. *Id.*

Ms. Kopp appealed the Commissioner's decision to the King County Superior Court. Clerk's Papers (CP) at 1-12. Ms. Kopp filed a

motion to supplement the record with evidence that was not part of the agency record, declarations of two employees of Pliant Corporation. CP at 103-09. One declaration discussed the employer's layoffs and terminations in the years 2012 and 2013 and speculated, "In Susan Kopp's case the punishment of being terminated does not seem to fit the Infraction[.]" CP at 108. The second declaration "outline[d] the adverse working circumstances during the period Sue Kopp was fired" and alleged that the employer used "predatory behavior to terminate certain employees." CP at 109. The Department opposed the motion; however, the superior court issued an order supplementing the record with the two declarations. CP at 13-18.

The superior court then reversed the Commissioner's decision. CP at 66-68. Despite finding that the Commissioner's findings of fact were supported by substantial evidence, the superior court concluded that the Commissioner made an error of law in determining that Ms. Kopp's actions constituted misconduct. CP at 67. The superior court concluded that Ms. Kopp's conduct did not signify a willful or wanton disregard of her employer's interest; rather, her acts constituted ordinary negligence or an error of judgment. CP at 67. The superior court also awarded Ms. Kopp attorney fees and costs. CP at 77-78. The Department now appeals. CP at 79-88, 92-102.

V. STANDARD OF REVIEW

Washington's Administrative Procedure Act (APA), chapter 34.05 RCW, governs judicial review of a final decision by the Department's Commissioner. RCW 34.05.510; RCW 50.32.120; *Rasmussen v. Dep't of Emp't Sec.*, 98 Wn.2d 846, 849, 658 P.2d 1240 (1983). Although this is an appeal from the superior court's order reversing the Commissioner's decision, this Court "sits in the same position as the superior court" and reviews the Commissioner's decision, applying the APA standards "directly to the record before the agency." *Tapper v. Emp't Sec. Dep't*, 122 Wn.2d 397, 402, 858 P.2d 494 (1993); *see also* RCW 34.05.558; *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. . .").

In this appeal, the Commissioner's decision is *prima facie* correct, and the burden is on Ms. Kopp to establish its invalidity. *See* RCW 34.05.570(1)(a); *Smith v. Emp't Sec. Dep't*, 155 Wn. App. 24, 32, 226 P.3d 263 (2010). Under the APA, a reviewing court may reverse the Commissioner's decision only if, among other things, the decision is not supported by substantial evidence or is based on an error of law. RCW 34.05.570(3).

A. Review Of Findings Of Fact

This Court reviews the Commissioner's findings of fact for substantial evidence. *Smith*, 155 Wn. App. at 32. Substantial evidence is evidence that would persuade a fair-minded person of the finding's truth. *Id.* at 32-33. 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, 713-14, 732 P.2d 974 (1987).

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. *William Dickson Co. v. Puget Sound Air Pollution Control Agency*, 81 Wn. App. 403, 411, 914 P.2d 750 (1996). The court cannot substitute its judgment on witness credibility or the weight to be given conflicting evidence. *Smith*, 155 Wn. App. at 35; *W. Ports Transp., Inc. v. Emp't Sec. Dep't*, 110 Wn. App. 440, 449, 41 P.3d 510 (2002). Unchallenged findings are verities on appeal. *Tapper*, 122 Wn.2d at 407.

B. Review Of Questions Of Law

Questions of law are reviewed under the error of law standard and are subject to de novo review. *See Shaw v. Emp't Sec. Dep't*, 46 Wn. App. 610, 613, 731 P.2d 1121 (1987); *Ciskie v. Emp't Sec. Dep't*, 35 Wn.

App. 72, 74, 664 P.2d 1318 (1983). While review is de novo, courts have consistently accorded a heightened degree of deference to the Commissioner's interpretation of employment security law in view of the Department's expertise in administering the law. *See Safeco Ins. Cos. v. Meyering*, 102 Wn.2d 385, 391, 687 P.2d 195 (1984).

C. Review Of Mixed Questions Of Law and Fact

Whether an employee's actions constitute misconduct is a mixed question of law and fact. *Griffith v. Dep't of Emp't Sec.*, 163 Wn. App. 1, 9, 259 P.3d 1111 (2011). This Court must: (1) determine whether substantial evidence supports the Commissioner's factual findings, (2) make a *de novo* determination of the correct law, and (3) apply the law to the applicable facts. *Tapper*, 122 Wn.2d at 403.

VI. ARGUMENT

The Commissioner's decision is supported by substantial evidence and is free of errors of law. The Commissioner correctly concluded, based on the evidence before him, that Ms. Kopp committed misconduct when she failed to report a fire on her employer's premises to a supervisor. In failing to report the fire, Ms. Kopp intentionally acted in violation of her employer's rules requiring her to report all unsafe conditions and all fires, regardless of size, immediately to a supervisor.

Ms. Kopp's actions did not constitute ordinary negligence in an isolated instance or a good faith error in judgment. Here, Ms. Kopp acted willfully, not negligently, because she knew of her employer's rights, knew that her conduct would violate those rights, and nevertheless intentionally acted in a manner that disregarded her employer's rights. Moreover, given the clear language of her employer's safety rules, Ms. Kopp had no authority to exercise judgment under these circumstances. The company rules unambiguously required her to report all fires and unsafe conditions to a supervisor immediately.

In addition, the superior court erred in supplementing the record with new evidence when there was no basis for doing so under the APA. And because the declarations in question were not before the Commissioner, whose review was limited to the agency record, they could not have formed the basis of any error of law on which the superior court could have reversed.

This Court should reverse the superior court's orders supplementing the record with new evidence, reversing the Commissioner's decision, and awarding attorney fees and costs to Ms. Kopp, and affirm the Commissioner's decision denying Ms. Kopp unemployment benefits.

A. The Commissioner Correctly Concluded That Ms. Kopp Committed Work-Related Misconduct When She Intentionally Acted In Violation Of Reasonable Workplace Safety Rules, Of Which She Was Aware

The purpose of the Employment Security Act is to assist persons who are “involuntarily” unemployed “through no fault of their own.” RCW 50.01.010; *Tapper*, 122 Wn.2d at 407. “It is well-established that the operative principle behind the disqualification for misconduct is the *fault* of the employee.” *Tapper*, 122 Wn.2d at 409. In order for Ms. Kopp to receive benefits, the Act requires that “the reason for [her] unemployment be external and separate from” her. *Cowles Publ’g Co. v. Emp’t Sec. Dep’t*, 15 Wn. App. 590, 593, 550 P.2d 712 (1976). Accordingly, Ms. Kopp is disqualified from receiving benefits if she was discharged for work-related misconduct. *See* RCW 50.20.066.

“Misconduct” includes, *but is not limited to*, “[w]illful or wanton disregard of the rights, title, and interests of the employer or a fellow employee.” RCW 50.04.294(1)(a). The statute lists seven specific acts that are considered misconduct “because the acts signify a willful or wanton disregard of the rights, title, and interests of the employer or a fellow employee.” RCW 50.04.294(2). These acts constitute misconduct *per se*. *Daniels v. Dep’t of Emp’t Sec.*, 168 Wn. App. 721, 728, 281 P.3d 310 (2012). Relevant here is that misconduct includes “[v]iolation of a

company rule if the rule is reasonable and if the claimant knew or should have known of the existence of the rule.” RCW 50.04.294(2)(f). The Commissioner correctly applied the law to the facts to conclude Ms. Kopp committed misconduct and is thus disqualified from receiving unemployment benefits.

The burden is initially on the employer to show that the employee was discharged for disqualifying work-related misconduct. *See Nelson v. Dep’t of Emp’t Sec.*, 98 Wn.2d 370, 374-75, 655 P.2d 242 (1982). On appeal, however, the burden is on the party asserting the invalidity of agency action—here, Ms. Kopp—to establish that the Commissioner’s decision was in error. RCW 34.05.570(1)(a); *Smith*, 155 Wn. App. at 32.

An employee’s conduct is connected with her work if it results in harm or creates the potential for harm to her employer’s interests. *See* WAC 192-150-200(2). “This harm may be tangible, such as damage to equipment or property, or intangible, such as damage to [her] employer’s reputation or a negative impact on staff morale.” WAC 192-150-200(2). Ms. Kopp’s conduct was work-related, because it created the potential for harm to her fellow employees’ physical safety and to her employer’s economic and property interests.

1. Substantial evidence supports the Commissioner's findings that Ms. Kopp failed to immediately report a fire on her employer's premises to a supervisor in violation of reasonable and known employer rules

The Commissioner found that Ms. Kopp was discharged after she failed to report a fire on her employer's premises to her supervisor. AR 110, 121; FF 4, 5, 6. The Commissioner determined that Ms. Kopp's actions violated reasonable employer safety rules, of which Ms. Kopp was aware. AR at 111, 121; Conclusion of Law (CL) 4. Substantial evidence supports the Commissioner's findings.

Ms. Kopp's employer had two reasonable safety rules that required her to report the fire immediately to a supervisor. One rule required all employees to "report all unsafe conditions to a supervisor immediately." AR at 36, 96, 98, 110, 121; FF 2. The second rule stated, "In the event of a fire (*regardless of size*) immediately report it to your supervisor." AR at 36-37, 96, 101, 110, 121; FF 2 (emphasis added). A company rule is reasonable if "it is related to your job duties, is a normal business requirement or practice for your occupation or industry, or is required by law or regulation." WAC 192-150-210(4). Indeed, the employer's policies were reasonable because they were intended to protect individuals from harm and protect the employer's physical and economic property interests. See AR at 88 ("Rules and standards of conduct are necessary in

order that our privileges, health, safety, personal property, and workmanship shall not be abused or impaired by a thoughtless few.”); AR at 93 (“Berry Plastics Corporation requires that employees comply with all applicable safety rules to prevent accidents to themselves, to their coworkers, and to the public.”).

The record also demonstrates that Ms. Kopp knew of her employer’s safety rules since she had completed training on her employer’s safety policies and received a copy of the rules. AR at 12-13, 33-34, 85-86, 92, 96, 102, 110, 121; FF 3; *see* WAC 192-150-210(5) (The Department will find that an employee knew or should have known about a company rule if the employee was provided an employee orientation on company rules, or provided a copy or summary of the rule in writing). At the administrative hearing, Ms. Kopp acknowledged that the safety rules were work rules that she had “signed off” on and agreed to follow. AR at 37.

Nevertheless, Ms. Kopp violated the safety rules when she failed to report immediately to a supervisor that there was a fire, or that she had attempted to extinguish the fire. AR at 40-41, 110, 121; FF 6. The Commissioner correctly determined that Ms. Kopp violated reasonable and known company rules requiring her to report the fire immediately to a supervisor. AR at 111, 121; CL 4.

2. The Commissioner correctly concluded that Ms. Kopp's intentional actions, which violated reasonable and known company rules, constituted disqualifying misconduct

As discussed above, under the Act, violation of a reasonable, known company rule is misconduct per se because it signifies a “willful or wanton disregard of the rights, title, and interests of the employer or fellow employee.” RCW 50.04.294(2)(f). Because Ms. Kopp violated a reasonable, known company rule, the Commissioner correctly concluded she committed misconduct per se under the Act.

Ms. Kopp's conduct also constituted misconduct under RCW 50.04.294(1)(a), which more generally includes a willful or wanton disregard of the rights, title, and interests of the employer or a fellow employee. “Willful” means “intentional behavior done deliberately or knowingly, where you are aware that you are violating or disregarding the rights of your employer or a co-worker.” WAC 192-150-205(1).

Ms. Kopp acted with willful disregard of her employer's interests because she was aware of her employer's interest in maintaining a safe workplace; knew or should have known that failing to report a fire jeopardized that interest, but nevertheless intentionally engaged in the conduct, willfully disregarding its probable consequences. *See Hamel v. Emp't Sec. Dep't*, 93 Wn. App. 140, 146-47, 966 P.2d 1282 (1998).³

³ *Hamel* was decided prior to 2003, the year 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. 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 generally Clark v. Payne*, 61 Wn. App. 189, 194, 810 P.2d 931 (1991); *Neil F.*

Whether an employee acts with an “intent to harm” her employer’s interest is irrelevant to the misconduct inquiry. *See Hamel*, 93 Wn. App. at 146; *see also Pacquing v. Emp’t Sec. Dep’t*, 41 Wn. App. 866, 869, 707 P.2d 150 (1985) (court rejected claimant’s argument which asked the court to “focus on the purity of his motives and the sympathy of his situation, and thus would have [the court] brush lightly over the potentially serious consequences of what he did.”). Rather, in order for Ms. Kopp’s conduct to constitute misconduct, she need only have intentionally performed the act in willful disregard for its probable consequences. *See Griffith*, 163 Wn. App. at 9-11; *Smith*, 155 Wn. App. at 37.

In *Griffith*, the court concluded an employee committed misconduct when he acted intentionally and harmed his employer as a result. *Id.* at 11. The employee made an inappropriate comment to a customer that resulted in a customer complaint, was subsequently suspended from work, and then returned to the customer’s premises during his suspension to apologize. *Id.* at 5. The customer called the employer and asked that the employee be banned from its premises, and the employer subsequently terminated the employee. *Id.*

The court held the employee committed misconduct because he intentionally behaved in a manner that resulted in harm to his employer.

Lampson Equip. Rental & Sales, Inc. v. W. Pasco Water Sys., Inc., 68 Wn.2d 172, 175-76, 412 P.2d 106 (1966) (noting that 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).

Id. at 11. Whether the employee understood he was behaving offensively was ultimately “irrelevant.” *Id.* at 10.

Likewise, in *Hamel*, the court found that an employee had committed disqualifying misconduct when the employee intentionally made a comment that violated the employer’s written policy prohibiting sexual harassment. 93 Wn. App. at 142-43, 147. The employee asserted that he did not know his conduct was inconsistent with the employer’s interest in preventing sexual harassment. *Id.* at 147. Applying the “should have known” standard, the court concluded that the employee willfully disregarded his employer’s interests because he intentionally made comments that he “should have known” could harm his employer. *Id.*

Here Ms. Kopp acknowledged that she knew of her employer’s rules requiring her to report the fire to a supervisor immediately. Nevertheless, like the employees in *Hamel* and *Griffith*, she acted intentionally in a manner that violated two of her employer’s safety rules. In doing so, she jeopardized her employer’s strong interests in its employees’ safety and in its economic and physical property. Whether Ms. Kopp acted with an intent to harm her employer is not relevant. *See Hamel*, 93 Wn. App. at 146. Ms. Kopp’s violation of her company’s reasonable safety rules, of which she was aware, constituted both misconduct per se and a willful disregard of her employer’s interests. *See* RCW 50.04.294(1)(a), (2)(f).

B. Ms. Kopp's Willful Conduct Did Not Constitute Inadvertence Or Ordinary Negligence In Isolated Instances, Or A Good Faith Error In Judgment Or Discretion

Under the Act, misconduct does not include “[i]nadvertence or ordinary negligence in isolated instances” or “[g]ood faith errors in judgment or discretion.” RCW 50.04.294(3)(b), (c). The superior court erred in concluding that Ms. Kopp’s conduct constituted ordinary negligence or a good faith error in judgment.

First, Ms. Kopp’s conduct did not constitute inadvertence or an act of ordinary negligence in an isolated instance. As discussed above, Ms. Kopp’s actions signified a *willful* disregard of the rights, title, and interests of her employer. In *Hamel*, the court concluded that because the employee intentionally made comments that he should have known could harm his employer, “the evidence ... is sufficient to show that his actions rose above simple negligence.” 93 Wn. App. at 147. Like the employee in *Hamel*, Ms. Kopp’s actions did not constitute negligence because she intentionally acted in a manner that violated known safety rules.

Here, Ms. Kopp did not make a mistake or act accidentally. Her conduct did not amount to negligence. She intentionally did not report the fire and, in doing so, expressly violated her employer’s safety rules, of which she was aware. She received training on the safety rules and signed a written acknowledgment agreeing to comply with the rules. AR at 12-

13, 33-34, 36-37, 85-86, 92, 98, 102, 110, 121; FF 3. Nevertheless, after observing and unsuccessfully attempting to extinguish a fire on her employer's premises, she did not report the fire to a supervisor. AR at 40-42, 110, 121; FF 6. The safety rules existed, in part, to protect employees from serious bodily injury. AR at 93 ("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."). Ms. Kopp failed to report the fire to a supervisor immediately; as a result, more than an hour after she first noticed the unsafe condition, the fire was still not extinguished. AR at 41.

This case is distinguishable from *Wilson v. Employment Security Department*, 87 Wn. App. 197, 940 P.2d 269 (1997), a case in which the court of appeals determined that an employee's actions constituted negligence, not disqualifying misconduct. In *Wilson*, a jewelry store employee failed to log loose diamonds and also failed to perform a daily diamond count and, as a result, lost a diamond. *Id.* at 199. In a second incident, the employee cleared his desk of plastic bags and in doing so, accidentally threw away a clear plastic bag containing a diamond. *Id.* The Court held that the employee did not commit misconduct; rather, his actions constituted negligence, incompetence, or an exercise of poor judgment. *Id.* at 202.

In reaching its conclusion, the *Wilson* court emphasized that the employee's actions did not constitute a violation of a specific company policy. *Id.* at 203. The Court reasoned, "Had such a policy existed and Wilson chosen not to act within the time specified because, for example, he disputed the necessity of so acting, then a finding of misconduct under the statute would be easier to make." *Id.* at 203. Although the employer had a policy requiring loose diamonds to be placed in the safe "within an unspecified time after receipt," the employee "fully intended to comply with the policy, but simply failed to do so in time to prevent the losses." *Id.* The court reasoned, "Actions or failures to act that are simply negligent, *and not in defiance of a specific policy*, do not constitute misconduct in the absence of a history of repetition after warnings." *Id.* (emphasis added).

Unlike the employee in *Wilson*, Ms. Kopp violated specific company rules. Her conduct cannot be characterized as a mistake or accident, like the conduct in *Wilson*. Ms. Kopp never reported the fire to a supervisor, and the record does not show that she intended to comply with the policies but simply failed to do so in time. She thus committed disqualifying misconduct.

In addition, Ms. Kopp's actions did not constitute a good faith error in judgment or discretion, because she was not permitted to exercise

her judgment on whether to comply with her employer's safety rules. Logically, an employee can make a good faith error in judgment or discretion only in instances where the employee is permitted to exercise discretion. The employer's safety rules expressly required Ms. Kopp to report all fires "regardless of size" and all unsafe conditions to a supervisor immediately. AR at 36-37, 96, 101, 110, 121; FF 2. Here, where the rules unambiguously required Ms. Kopp to report fires to a supervisor, and Ms. Kopp intentionally acted in violation of those clear rules, Ms. Kopp's actions cannot be characterized as an error in judgment made in good faith. In sum, the Commissioner correctly determined that Ms. Kopp's actions did not constitute negligence in isolated instances or a good faith error in judgment or discretion.

C. The Superior Court Erred In Granting Ms. Kopp's Motion To Supplement The Record With Declarations That Did Not Relate To A Material Fact In A Proceeding Not Required To Be Determined On The Agency Record Or Otherwise Meet The Requirements For Supplementing The Agency Record

Ms. Kopp argued that the superior court had a basis to supplement the record with the declarations of fellow employees because the new evidence related to the validity of the agency action at the time it was taken and was needed to decide disputed issues regarding material facts in rule making, brief adjudications, or other proceedings not required to be

determined on the agency record under RCW 34.05.562(1).⁴ CP at 104-05. The superior court admitted the declarations but ultimately did not consider them in reaching its decision. *See* CP at 67 (superior court found the Commissioner's findings of fact were supported by substantial evidence and did not enter additional findings). Nevertheless, the superior court erred in supplementing the record with new evidence because Ms. Kopp failed to establish that the declarations related to a material fact in a proceeding not required to be determined on the agency record. RCW 34.05.562(1)(c). Moreover, the declarations were not part of the agency record and thus were never considered by the Commissioner. This Court should not consider the new evidence in this appeal.

This Court reviews the superior court's decision to admit or refuse evidence for a manifest abuse of discretion. *Okamoto v. Emp't Sec. Dep't*, 107 Wn. App. 490, 494-95, 27 P.3d 1203 (2001). The superior court abuses its discretion when its exercise of discretion is manifestly unreasonable or based on untenable grounds or reasons. *Okamoto*, 107 Wn. App. at 495.

“[I]n administrative proceedings the facts are established at the administrative hearing and the superior court acts as an appellate court.” *U.S. W. Commc'ns, Inc. v. Wash. Utils. & Transp. Comm'n*, 134 Wn.2d

⁴ Ms. Kopp did not ask the superior court to remand the matter to the Department for additional fact-finding pursuant to RCW 34.05.562(2). CP at 103-09.

48, 72, 949 P.2d 1321 (1997). “If the admission of new evidence at the superior court level was not highly limited, the superior court would become a tribunal of original, rather than appellate, jurisdiction and the purpose behind the administrative hearing would be squandered.” *Motley-Motley, Inc. v. Pollution Control Hearings Bd.*, 127 Wn. App. 62, 76, 110 P.3d 812 (2005). Accordingly, judicial review of an agency action is generally confined to the agency record. RCW 34.05.558.

The appellate court may receive additional evidence only under very limited circumstances.

The court may receive evidence in addition to that contained in the agency record for judicial review, *only* if it relates to the validity of the agency action at the time it was taken and is needed to decide disputed issues regarding:

- (a) improper constitution as a decision-making body or grounds for disqualification of those taking the agency action;
- (b) unlawfulness of procedure or of decision-making process; or
- (c) material facts in rule making, brief adjudications, or other proceedings not required to be determined on the agency record.

RCW 34.05.562(1) (emphasis added).

The superior court admitted the declarations under RCW 34.05.562(1)(c), finding they related to material facts in a proceeding not required to be determined on the agency record. *See* CP at 19. This was an error. The agency record constituted the sole basis for the Commissioner’s decision. RCW 34.05.461(4) (“Findings of fact shall

be based exclusively on the evidence of record in the adjudicative proceeding and on matters officially noticed in that proceeding.”); *see also* 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.”); *see also* AR at 121 (Commissioner reviewed entire record and then issued his decision). Here, RCW 34.05.562(1)(c) does not apply.

Ms. Kopp had a full and fair opportunity to present her case at her administrative hearing. She could have called the declarants as witnesses at the hearing, where they would have been amenable to inquiry by the ALJ or the other parties, but she chose not to do so. Because this case came before the superior court on a petition for judicial review of an administrative order and the superior court reviewed the Commissioner’s order to determine whether it was supported by substantial evidence and free of errors of law, the new evidence was not appropriately before the superior court. *See Okamoto*, 107 Wn. App. at 495 (superior court did not abuse its discretion when it declined to supplement record with transcripts because the new evidence was not before the commissioner and thus could not have formed a basis of any error of law on which the superior court could have reversed).

The superior court also erred in concluding that the evidence was admissible under a separate provision of the APA, RCW 34.05.566(7). CP at 19. “The court may require or permit subsequent corrections or

additions to the record.” RCW 34.05.566(7). RCW 34.05.566(7) merely gives the court authority to allow parties to add documents to the record that were admitted at the administrative proceeding but were not included in the transmission of agency records to the court. As discussed above, RCW 34.05.562 sets forth the limited basis on which a court may supplement the agency record with new evidence. The superior court erred in supplementing the record with the declarations, and thus this Court should not consider the declarations in this appeal.

D. Ms. Kopp Should Only Receive Attorney Fees and Costs If The Commissioner’s Decision Is Reversed Or Modified

Ms. Kopp is entitled to reasonable attorney fees and costs if this Court ultimately modifies or reverses the Commissioner’s decision. *See* RCW 50.32.160. As shown above, this Court should reverse the superior court’s decision and affirm the Commissioner’s decision. Thus, this Court should also reverse the superior court’s award of attorney fees and costs to Ms. Kopp.

VII. CONCLUSION

The Commissioner correctly concluded that Ms. Kopp was discharged for statutory misconduct and thus disqualified from receiving unemployment benefits. The Commissioner’s decision is supported by substantial evidence and is free of errors of law. The Department asks the Court to reverse the superior court’s decision, including the order

supplementing the record with new evidence and the attorney fees and costs award, and affirm the Commissioner's decision denying Ms. Kopp unemployment benefits.

RESPECTFULLY SUBMITTED this 26th day of November, 2013.

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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 26th day of November 2013, I caused to be served a copy of **Opening Brief of Appellant** on the Respondent of record on the below stated date as follows:

US mail, postage prepaid and email

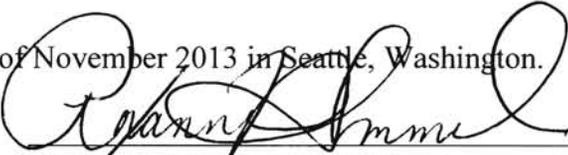
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Filed with

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COURT OF APPEALS, DIVISION I
ONE UNION SQUARE
600 UNIVERSITY STREET
SEATTLE, WA 98101-1176

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

Dated this 26th day of November 2013 in Seattle, Washington.


Roxanne Immel, Legal Assistant