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COURT OF APPEALS
DIVISION I
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NO. 72463-1

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

ELVIRA DAVISON,

Respondent,

v.

WASHINGTON STATE DEPARTMENT OF EMPLOYMENT
SECURITY,

Appellant.

REPLY BRIEF OF APPELLANT

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I. INTRODUCTION

Respondent Elvira Davison knew or should have known of her employer's policy that all client funds must be placed in a trust account, but violated the policy. Her employer, Associated Counsel for the Accused (ACA), discharged Davison when it learned of the violation. Though Davison tries to argue otherwise, this case turns on a credibility determination. The fact-finder at the administrative level found Davison's testimony and evidence less credible than that of her former employer. In responding to the Employment Security Department's opening brief, Davison overlooks the evidence of record that supports the only factual finding she challenges. She also ignores or implausibly interprets the plain language of RCW 50.04.294, which defines "misconduct" under the Employment Security Act. ACA terminated Davison her for conduct that amounted to misconduct. For these reasons, the Department's Commissioner properly concluded that Davison was disqualified from receiving unemployment benefits. The Court should reverse the superior court's decision and affirm the decision of the Commissioner.

II. ARGUMENT IN REPLY

A. Davison Asserts an Incorrect Standard of Review

Davison mischaracterizes the decision in *Tapper v. Employment Security Department*, 122 Wn.2d 397, 858 P.2d 494 (1993), and the

standard of review under the Washington Administrative Procedure Act, chapter 34.05 RCW. Davison's statement of the case and argument rely heavily on asserted "background facts of record" that she asks the court to consider because "[u]ncontested facts are verities on appeal," citing *Tapper*, 122 Wn.2d at 407. Br. of Respondent at 7. However, the Supreme Court in *Tapper* concluded that it would treat the Commissioner's *findings of fact* as verities because the claimant did not challenge them on appeal. *Tapper*, 122 Wn.2d at 407. Many of the "background facts" Davison asserts in her brief have been drawn from the self-serving testimony and evidence she presented at the administrative hearing, even though the administrative law judge and Commissioner expressly found Davison's evidence less credible than that presented by ACA. Clerk's Papers (CP) at 285 (Conclusion of Law (CL) 2), 308-09. The Court should not consider as "uncontested facts" any evidence in the record that is not reflected in, or consistent with, the Commissioner's factual findings. *See Tapper*, 122 Wn.2d at 403, 406-07; *William Dickson Co. v. Puget Sound Air Pollution Control Agency*, 81 Wn. App. 403, 411, 914 P.2d 750 (1996) (appellate court gives deference to factual decisions below and views evidence and reasonable inferences therefrom in the light most favorable to the party who prevailed below).

Additionally, in *Tapper*, the Washington Supreme Court made clear that the Commissioner's findings of fact are the facts relevant on appeal and the facts to which the Court applies the law. *Tapper*, 122 Wn.2d at 403, 406-07. More specifically, the Court stated:

Analytically, resolving a mixed question of law and fact requires establishing the relevant facts, determining the applicable law, and then applying that law to the facts. The characterization of "misconduct" as a mixed question of law and fact does not mean that we are free to substitute our judgment for that of the agency as to the facts; instead, the factual findings of the agency are entitled to the same level of deference which would be accorded under any other circumstance. The process of applying the law to the facts, however, is a question of law and is subject to de novo review. *The findings of fact made by the agency below are therefore critical to our resolution of the question of whether Tapper engaged in misconduct connected with her work.*

Id. at 403 (emphasis added). In performing the misconduct analysis, therefore, the Court explained that it would determine the law "to be applied to the facts found by the Commissioner." *Id.*

In Davison's case, as in *Tapper*, the Court should apply the law to the facts found by the Commissioner. *See also* RCW 34.05.570(3)(e) (a court "shall grant relief from an agency order in an adjudicative proceeding only if it determines that . . . [t]he order is not supported by evidence that is substantial when viewed in light of the whole record before the court" (emphasis added)). Though the court may overturn

factual findings that are not supported by substantial evidence under RCW 34.05.570(3)(e), the record in this case contains substantial evidence to support the Commissioner's findings, as further explained below.

B. Substantial Evidence Supports the Commissioner's Factual Finding that Davison Received a Copy of the Trust Account Policy

Davison raises an express challenge to only one finding of fact. The Court should treat the remaining unchallenged findings as verities on appeal. *Tapper*, 122 Wn.2d at 407.

Davison asserts that the record contains insufficient evidence to support the factual finding that "claimant was given a copy of [the trust account] policy when she was first hired." Br. of Respondent at 17-18 (citing CP at 284 (Finding of Fact (FF) 3)). Davison's argument ignores the testimony of record.

First, ACA's controller, Anne Dolan, testified directly that she gave Davison a copy of the employee handbook:

[Davison's counsel]: Uh, on Page 18, again, uh, there is an 'X' on employee manual. Did she sign in your presence an acknowledgment of that?

MS. DOLAN: I – *when I give her the employee manual, I checked it off* and then I had her sign it at the end of the, uh, in-processing that I have[,] that she has received it and that we have gone over all of these things.

[Counsel]: And –

MS. DOLAN: Some of this did not pertain to her, but I just let her know that these are things that I do discuss with employees.

[Counsel]: So you had her sign the employee manual; is that correct?

MS. DOLAN: I had her sign that she received the employee manual.

[Counsel]: All right. And where did she sign that she received the employee manual?

MS. DOLAN: On Page 18, there.

CP at 153 (emphasis added); CP at 217 (copy of checklist). The administrative law judge and Commissioner found the testimony of ACA's representatives to be more credible than that of Davison, who claimed she had not received the handbook. CP at 161, 285 (CL 2).

In addition to Dolan's testimony that she had "give[n] [Davison] the employee manual," the record contains ample circumstantial evidence that Davison received the manual that contained the trust account policy. Dolan testified that she witnessed Davison sign the checklist for in-processing, and explained her usual process for in-processing an employee: "And as we go over each item or give them whatever it is that I need to give them, I checked it off. And then when I'm through I ask them to sign it to verify that they have reviewed everything" on the list. CP at 151-52; *see also* CP at 154. Julie Whitney, as a former human

resources manager of ACA's, testified that Davison "signed the checklist for in-processing, which includes, um, that the employment manual, the employee handbook was received as well." CP at 128-29; *see also* CP at 140-41. Finally, a copy of the checklist for in-processing about which both Dolan and Whitney had testified was admitted as an exhibit in the administrative record. CP at 217.

As a civil matter, the standard of proof before the Commissioner was a preponderance of evidence. *See Bonneville v. Pierce Cnty.*, 148 Wn. App. 500, 517, 202 P.3d 309 (2008) ("courts generally apply the preponderance standard in all civil matters"); CP at 285 (CL 2). And on judicial review, significantly, the 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—here, the Department. *William Dickson Co.*, 81 Wn. App. at 411 (emphasis added); *see also* Tapper, 122 Wn.2d at 403 (court gives deference to agency's factual findings).

Here, ACA presented evidence that Davison received a copy of ACA's trust account policy. The administrative law judge and Commissioner found this evidence credible and concluded that more likely than not based on this evidence, Davison received a copy of the policy. CP at 284 (FF 3), 285 (CL 2). Viewing the evidence and reasonable

inferences therefrom in the light most favorable to the Department, the Court should conclude that substantial evidence in the record supports the Commissioner's factual finding that Davison received a copy of ACA's trust account policy.

C. Davison Was Discharged for Disqualifying Misconduct Under the Employment Security Act

1. Davison violated a reasonable company rule of which she knew or should have known under RCW 50.04.294(2)(f)

An individual commits misconduct *per se* if he or she commits 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.” RCW 50.04.294(2)(f) (emphasis added); *Daniels v. Dep’t of Emp’t Sec.*, 168 Wn. App. 721, 728, 281 P.3d 310 (2012).

Davison argues that she did not commit misconduct because she “was not aware of the [trust account] policy, so could not know her actions violated it.” Br. of Respondent on at 22. But Davison “was given a copy of this policy when she was first hired.” CP at 128-29, 140-41, 151-54, 217, 284 (FF 3). Because she was given a copy of the policy, under the law, Davison knew or should have known about the policy. WAC 192-150-210(5) (Department will find that a claimant knew or should have known about a company rule if provided a copy or summary of the rule in

writing). “Misconduct” is established under RCW 50.04.294(2)(f) if the claimant “knew or should have known” of the rule’s existence.

Davison next argues that ACA’s policy was not reasonable, for a variety of reasons: “because it was not related to Ms. Davison’s job duties as a social worker,” because “handling client funds was not a normal part of her job,” because ACA did not provide adequate training, and because she was not bound by the Rules of Professional Conduct (“If she was to be held to these standards, it was up to ACA to inform her of the rules and supervise her adequately.”). Br. of Respondent at 25-30. Each of these arguments ignores the plain language of WAC 192-150-210(4), which provides that a rule is reasonable in any of three alternatives: “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) (emphasis added). As explained in the Department’s opening brief, ACA’s trust account policy was reasonable because it is a normal business requirement or practice for the legal field and is required by law or regulation. Contrary to Davison’s argument, the Department does not take the position that Davison “was bound by the Rules of Professional Conduct,” Br. of Respondent at 27, but rather that it was reasonable for ACA, a law office, to have an employee policy consistent with and required by those rules.

Additionally, though Davison argues that the trust account policy was not related to her job duties, the findings reflect that she was employed to provide social work services to clients of a law office. CP at 284 (FF 2-4). It is foreseeable that she could be asked to assist with handling a client's money. ACA's trust account policy provides explicit direction to employees as to what to do when they receive money "from a client or on behalf of a client." CP at 215. Davison failed to follow the reasonable policy.

Though Davison asks the Court to distinguish her case from other appellate decisions in which employees acknowledged their employers' rules and policies in some way, Br. of Respondent at 29-30, the Court should apply the plain language of RCW 50.04.294(2)(f) and WAC 192-150-210(4) and (5), and conclude that Davison committed misconduct. Where substantial evidence supports the finding that Davison received a copy of the relevant policy, she should not be excused from being aware of it because of her apparent failure to read the policy.

2. **Davison's conduct constituted "[d]eliberate violations or disregard of standards of behavior which the employer has the right to expect of an employee" or a "[w]illful or wanton disregard of the . . . interests of the employer" under RCW 50.04.294(1)(a), (b)**

In addition to the *per se* violation of a company rule, Davison's conduct constituted misconduct as defined in RCW 50.04.294(1)(b):

“Deliberate violations or disregard of standards of behavior which the employer has the right to expect of an employee”; or RCW 50.04.294(1)(a): “[w]illful or wanton disregard of the rights, title, and interests of the employer[.]”

Davison argues that ACA did not have the right to expect her to adhere to its trust account policy. But the findings of fact establish that ACA gave Davison a copy of its trust account policy, and an employer should have the right to expect its employees to be aware of and follow its express policies. Additionally, it is reasonable for a law office to expect its social workers to maintain appropriate professional and personal boundaries with clients, particularly when those clients are minors. Finally, even if Davison opened the checking account with the underage client at the request of a fellow ACA employee who was the minor client’s guardian, as she alleges, ACA had a right to expect Davison to abide by standards of behavior it had specified in its employee manual as well as those generally applicable to social workers.

Davison contends that the evidence does not show that she acted willfully or knowingly, and that her conduct is more appropriately characterized as ordinary negligence. Br. of Respondent at 23-25, 31. The court’s decision in *Hamel v. Employment Security Department*, 93 Wn. App. 140, 966 P.2d 1282 (1998), is instructive. The employer in that

case discharged the claimant based upon three incidents where he made inappropriate comments to coworkers or customers, in violation of the employer's sexual harassment policy. *Id.* at 143. The employer gave the claimant written warnings after the first two incidents. *Id.* at 142-43. The court, analyzing whether the claimant acted "in willful disregard of his or her employer's interest" under RCW 50.04.293, which is comparable to the current "[w]illful or wanton disregard of the rights, title, and interests of the employer" standard in RCW 50.04.294(1)(a), stated:

an employee acts with willful disregard 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.

Hamel, 93 Wn. App. at 146-47 (emphasis added). The court noted that "the employee must have voluntarily disregarded the employer's interest," but "[h]is specific motivations for doing so . . . are not relevant." *Id.* at 146. Significantly, the court applied the objective "should have known" standard to determine "willful disregard" and assumed that the claimant knew what a "reasonable person" would have known. *Id.* at 147.

In *Hamel*, the claimant did not dispute that he intended to make the statement at issue; "[t]hus, the evidence here that Hamel intentionally made comments that he should have known could harm his employer is sufficient to show that his actions rose above simple negligence." *Id.*; *see*

also *Smith v. Emp't Sec. Dep't*, 155 Wn. App. 24, 37, 226 P.3d 263 (2010) (citing *Hamel*, 93 Wn. App. at 146-47) (“it is sufficient that Smith intentionally performed an act in willful disregard for its probable consequences”). Finally, in *Hamel*, the court held that while an employer’s previous warnings to avoid certain behavior “may provide strong evidence of the employee’s knowledge that the conduct is inconsistent with the employer’s interest,” the court rejected the argument that the employer must show that the conduct occurred after warnings. *Hamel*, 93 Wn. App. at 147-48.

Here, Davison’s receipt of ACA’s trust account policy is evidence that she was aware of ACA’s interest in handling client funds appropriately. Applying the reasonable person standard as in *Hamel*, Davison should have known that personally handling the funds of, and opening a joint checking account with, a client of her employer’s could harm her employer. Finally, the evidence shows that Davison acted voluntarily and intentionally when she opened the joint checking account and made withdrawals from that account. Thus, as in *Hamel*, Davison acted in willful disregard of her employer’s interest: she intentionally took actions that she should have known could harm her employer, which is sufficient to show that her actions rose above simple negligence. See *Hamel*, 93 Wn. App. at 147; *Smith*, 155 Wn. App. at 37.

3. Davison’s conduct was not exempt from misconduct under RCW 50.04.294(3)

Davison’s argument that her conduct was exempt from misconduct under RCW 50.04.294(3) relies on facts that were not made part of the Commissioner’s factual findings. As previously stated, the Commissioner’s findings of fact are the facts relevant on appeal, not the testimony that Davison alleges was “unrebutted” below. RCW 34.05.570(3)(e); *Tapper*, 122 Wn.2d at 403, 406-07. The factual findings establish that Davison committed misconduct as defined in RCW 50.04.294(1)(a), (1)(b), and (2)(f).¹

Significantly, Davison ignores the plain language of RCW 50.04.294(3)(b), which exempts from misconduct “[i]nadvertence or ordinary negligence *in isolated instances*.” (Emphasis added.) Davison’s decisions to first open a joint checking account with her employer’s client, and then repeatedly transfer the client’s funds into her own personal checking account, cannot be said to have constituted a single isolated instance. Moreover, as explained above, Davison’s actions were voluntary and intentional and neither “inadvertent” nor the result of “ordinary negligence.” See RCW 50.04.294(2)(b); *Hamel*, 93 Wn. App. at 146-47 (rejecting claimant’s argument that there must be evidence of “intent to

¹ To affirm the Commissioner’s decision, the Court need only conclude that Davison’s conduct amounted to misconduct as defined in any one of the provisions in RCW 50.04.294(1) or (2). See Opening Br. of Appellant at 24 n.5.

harm” to establish willful disregard of employer’s interests, but rather that employee must have acted voluntarily).

Kirby v. Department of Employment Security, 179 Wn. App. 834, 320 P.3d 123 (2014), and *Albertson’s, Inc. v. Employment Security Department*, 102 Wn. App. 29, 15 P.3d 153 (2000), do not support Davison’s arguments. In *Kirby*, a fact-intensive case, the court concluded that an employer failed to establish that its former employee committed “[i]nsubordination showing a deliberate, willful, or purposeful refusal to follow the reasonable directions or instructions of the employer.” *Kirby*, 179 Wn. App. at 837, 846, 850. The employer failed to show that it had given reasonable directions to the employee and that the employee’s failure to follow them was deliberate, willful, or purposeful; the employee’s conduct was due to a break in communication attributable to the employer. *Id.* at 837, 846-50.

Here, unlike *Kirby*, the statutory basis for Davison’s 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). As shown in the Department’s opening brief and above, Davison committed misconduct under the plain language of this *per se* provision, which was not at issue in *Kirby*. Further, based on the findings entered, the Commissioner appropriately concluded that

Davison's conduct constituted "[d]eliberate violations or disregard of standards of behavior which the employer has the right to expect of an employee" or a "[w]illful or wanton disregard of the rights, title, and interest of the employer[.]" RCW 50.04.294(1)(a), (b). ACA gave Davison a copy of its clear and reasonable policy; there was no "break in communication" attributable to the employer, as there was in *Kirby*.

In *Albertson's*, the court upheld the Commissioner's conclusion that an employer failed to establish misconduct for an alleged policy violation relating to sales of out-of-date meat. *Albertson's*, 102 Wn. App. at 42. The policies appeared to permit the practice for which the employee was terminated where authorized by a manager, and managers routinely authorized the conduct. *Id.* at 38-39, 41-42. Because "Albertson's written corporate policies were at best unclear, and were inconsistent with company practice," the Commissioner "did not err in refusing to fault the employee for engaging in a common practice encouraged and authorized by the manager." *Albertson's*, 102 Wn. App. at 42.

In the present case, in contrast to *Albertson's*, the trust account policy that Davison violated was clear: all client funds were required to be placed in a trust account. CP at 215, 284 (FF 3). Moreover, unlike the situation in *Albertson's*, the factual findings here do not demonstrate that

the trust account policy was inconsistent with ACA's company practice or that Davison's conduct was "encouraged and authorized" by the employer.

Even if the Court were to consider the facts surrounding the client's former guardian Trudy Elliott, as Davison urges, ACA presented testimony from Whitney that ACA was unaware of the client's financial situation or Elliott's involvement in it prior to the complaint it received against Davison. CP at 143. Further, Whitney testified, "it was a different situation with Trudy Elliott in that she was the court-appointed . . . guardian," and Elliott "in regards to this client was not acting as an employee to the client. She was acting as a guardian and different laws apply." CP at 143. Thus, Davison cannot show that she was merely engaging in a common practice encouraged and authorized by ACA. *See Albertson's*, 102 Wn. App. at 42.²

D. The Liberal Construction Directed in RCW 50.01.010 Does Not Entitle Davison to Relief

Davison asks the Court to grant her relief because the Employment Security Act, title 50 RCW ("the Act"), "is to be interpreted liberally." Br. of Respondent at 15. The Legislature has directed the Department and the courts to liberally construe the Act "for the purpose of reducing involuntary unemployment," not to liberally construe the Act in all

² Moreover, *Albertson's* was decided before the legislature enacted the current statutory definition of misconduct in 2004, which added the *per se* provisions that appear in RCW 50.04.294(2). *See Albertson's*, 102 Wn. App. at 36 (applying RCW 50.04.293).

claimants' favor. RCW 50.01.010. The disqualification provisions of the Act "are based upon the fault principle and are predicated on the individual worker's action, in a sense his or her blameworthiness." *Safeco Ins. Cos. v. Meyering*, 102 Wn.2d 385, 391-92, 687 P.2d 195 (1984) (declining to award benefits despite "legislatively expressed policy of liberal construction"). Accordingly, "in order for a claimant to be eligible for benefits, the act requires that the reason for the unemployment be external and apart from the claimant." *Id.* (citing *Cowles Publ'g Co. v. Emp't Sec. Dep't*, 15 Wn. App. 590, 593, 550 P.2d 712 (1976)).

Where, as here, the reasons for Davison's unemployment were the direct result of her voluntary actions, and those actions constituted misconduct as defined by RCW 50.04.294, there is no basis for liberal construction in Davison's favor.

Further, liberal construction does not apply to questions of fact. *See* RCW 50.01.010 ("*this title shall be liberally construed for the purpose of reducing involuntary unemployment*" (emphasis added)). The standard of review under the Administrative Procedure Act requires courts to defer to the agency's factual findings and to view the evidence and reasonable inferences therefrom in the light most favorable to the Department, as the party who prevailed below. *See William Dickson Co.*, 81 Wn. App. at 411; *Tapper*, 122 Wn.2d at 403. It is the provisions of the Employment Security

Act where consistent with its purposes, and not the facts of a case, that are to be liberally construed. *See Campbell v. Emp't Sec. Dep't*, 180 Wn.2d 566, 572, 326 P.3d 713 (2014) (“We are bound to give unemployment compensation *statutes* a liberal construction.” (emphasis added)); *Ehman v. Dep't of Labor & Indus.*, 33 Wn.2d 584, 595, 206 P.2d 787 (1949) (interpreting similar provision in Industrial Insurance Act).

Moreover, the Court should not apply the liberal construction provision in RCW 50.01.010 to unambiguous statutes or rules. *See Rasmussen v. Emp't Sec. Dep't*, 98 Wn.2d 846, 852, 658 P.2d 1240 (1983) (declining to adopt a liberal interpretation of a statute that would “effectively undercut” its plain language); *Davis v. Dep't of Licensing*, 137 Wn.2d 957, 963-64, 977 P.2d 554 (court does not construe an unambiguous statute, where plain words do not require construction). Here, the Commissioner applied the unambiguous provisions of RCW 50.04.294 and concluded, correctly, that Davison’s conduct amounted to misconduct as defined in RCW 50.04.294(1)(a), (1)(b), and (2)(f).

E. Davison is Not Entitled to Attorney Fees and Costs on Appeal

Davison is entitled to reasonable attorney fees and costs only if this Court ultimately modifies or reverses the Commissioner’s decision. *See* RCW 50.32.160. Because Davison should not prevail on appeal, she is

not entitled to attorney fees on appeal under RAP 18.1. If the Court reverses or modifies the Commissioner's decision, the Department reserves the right to present argument regarding the reasonableness of attorney fees granted.

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 Davison unemployment benefits.

RESPECTFULLY SUBMITTED this 27th day of February, 2015.

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PROOF OF SERVICE

I, Judy St. John, 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 27th day of February, 2015, I caused to be served a copy of **Reply Brief of Appellant** on the Respondent of record on the below date as follows:

Email per Agreement,
Denise Diskin
Steven Teller
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Original filed via ABC Legal Messenger
Court of Appeals, Division 1
600 University St.
Seattle, WA 98101-4170

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

Dated this 27th day of February 2015 in Seattle,
Washington



Judy St. John, Legal Assistant