

72403-1

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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.

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STATE OF WASHINGTON
COURT OF APPEALS, DIVISION I
CLERK OF COURT
JENNIFER L. BROWN

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

A.	ASSIGNMENTS OF ERROR	6
B.	ISSUES RELATED TO ASSIGNMENTS OF ERROR	6
C.	STATEMENT OF CASE	7
D.	STANDARD OF REVIEW	13
E.	SUMMARY OF ARGUMENT	14
F.	ARGUMENT	15
	1. The Commissioner’s Findings Are Not Supported By Substantial Evidence In The Record.....	17
	2. The Commissioner Erred In Concluding That Ms. Davison Engaged In Disqualifying Misconduct When She Failed To Follow ACA’s Trust Account Policy.	21
	a. Ms. Davison’s actions were not “willful and wanton,” nor did she act with deliberate disregard for standards of behavior ACA had the right to expect.	22
	b. ACA’s trust account policy is not a “reasonable rule” as defined by the Department and the record does not support the conclusion that Ms. Davison knew about the rule.	25
	3. Ms. Davison Was Negligent Or She Made A Good Faith Error In Judgment	31
	4. Request for Attorney Fees and Costs Under RAP 18.1 ...	33
G.	CONCLUSION.....	34

TABLE OF AUTHORITIES

Cases

<i>Affordable Cabs, Inc. v. Emp't Sec. Dep't</i> , 124 Wn. App. 361, 101 P.3d 440, 443 (2004).....	13
<i>Albertson's Inc. v. Employment Sec. Dep't</i> , 102 Wn. App. 29, 36-37, 16 P.3d 153 (2000).....	23, 32, 33
<i>Anderson v. Emp't Sec. Dep't</i> , 135 Wn. App. 887, 146 P.3d 475 (2006).....	30
<i>Daniels v. Emp't Sec. Dep't</i> , 168 Wn. App. 721, 281 P.3d 310 (2012).....	14, 30, 31
<i>Delagrave v. Emp't Sec. Dep't</i> , 127 Wn. App. 596, 111 P.3d 879 (2005).....	16
<i>Gaines v. Emp't Sec. Dep't</i> , 140 Wn. App. 791, 166 P.3d 1257 (2007).....	14, 16
<i>Johnson v. Emp't Sec. Dep't</i> , 64 Wn. App. 311, 824 P.2d 505 (1992).....	16
<i>Kirby v. Emp't Sec. Dep't</i> , 179 Wn. App. 834, 320 P.3d 123 (2014).....	14, 18, 31, 32
<i>Peterson v. Emp't Sec. Dep't</i> , 42 Wn. App. 364, 711 P.2d 1071 (1985)	30
<i>Smith v. Emp't Sec. Dep't</i> , 155 Wn. App. 24, 226 P.3d 263 (2010)	30
<i>Stephens v. Emp't Sec. Dep't</i> , 123 Wn. App. 894, 98 P.3d 1284 (2004).....	14
<i>Tapper v. Emp't Sec. Dep't</i> , 122 Wn.2d 397, 858 P.2d 494 (1993).....	6, 7, 13

Statutes

RCW 34.05 6, 13

RCW 34.05.570(1)(a) 13

RCW 34.05.570(3)..... 13

RCW 34.05.570(3)(d) 22

RCW 34.05.570(3)(e) 17, 18

RCW 50.04.294(1)(a) 12, 21, 25

RCW 50.04.294(1)(b) 11, 22, 25

RCW 50.04.294(2)(f)..... 22, 25, 28

RCW 50.04.294(3)(c) 31

RCW 50.10.010 15

RCW 50.20.066 16

RCW 50.32.100 33

RCW 50.32.120 6

RCW 50.32.160 33

Rules

RAP 10.3(h) 6

RAP 18.1 33

RPC 5.3 27, 28

RPC 5.3(a)..... 28

RPC 5.3(a)(b).....	27
WAC 192-150-205(1).....	22
WAC 192-150-205(2).....	23
WAC 192-150-210(4).....	25
WAC 192-150-210(5).....	29

Treatises

3A NORMAN J. SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 74.7, at 921-23 (6th ed. 2003).....	16
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A. ASSIGNMENTS OF ERROR

Ms. Davison assigns no error to the King County Superior Court's reversal of the Commissioner's Order. However, this matter is a judicial review under the Washington Administrative Procedure Act, RCW 34.05, wherein the Court of Appeals sits in the same position as 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). Therefore, Ms. Davison herein assigns error to the findings and conclusions of the Commissioner below, and not the superior court which ruled in Ms. Davison's favor. *See* RAP 10.3(h); RCW 50.32.120 (judicial review of the Commissioner's decision is governed by the Administrative Procedure Act).

1. Substantial evidence in the record does not support the Commissioner's determination that Ms. Davison knew about the employer's policy requiring all client funds to be placed in a trust account.
2. The Commissioner's conclusion that Ms. Davison willfully violated the employer's trust account policy and committed disqualifying misconduct was an error of law.

B. ISSUES RELATED TO ASSIGNMENTS OF ERROR

1. Whether substantial evidence supports the Commissioner's determination that Ms. Davison knew about Associated Counsel for the Accused's (ACA's) trust account policy where the evidence the Commissioner relied on shows only that an ACA employee witnessed Ms. Davison sign a checklist acknowledging receipt of the ACA employee handbook which contained a copy of ACA's trust account policy, but ACA presented no evidence that it discussed the policy with Ms. Davison or that it provided training

or supervision on the policy in her three years employed there, and the record contains undisputed evidence that another ACA employee handled funds for the client in question without a trust account and without violating the ACA policy, and Ms. Davison's duties did not involve handling client funds. (Assignment of Error 1)

2. Whether it was an error of law for the Commissioner to conclude that Ms. Davison's actions were in willful and wanton disregard of ACA's interests where Ms. Davison did not know about the policy and could not intentionally violate the policy, and the policy was not a "reasonable rule" as defined by the Employment Security Department, but rather her actions amounted to negligence or a good faith error in judgment, and she is therefore not disqualified from receiving benefits. (Assignment of Error 2)

C. STATEMENT OF CASE

Elvira Davison began her job as a forensic social worker Associated Counsel for the Accused (ACA) on December 1, 2009. CP 208. As a social worker, Ms. Davison worked with minors in criminal and dependency cases. CP 123. Her work included forensic interviewing, clinical assessment of clients, coordinating social services, and helping clients get to court and meetings with their attorneys. CP 123-24, 275.

Many of the background facts of record are un rebutted.¹ Trudy Elliot was an ACA employee and legal guardian to a seventeen-year-old client of ACA. CP 135, 143, 268. In early November 2012, Ms. Elliot and the client approached Ms. Davison while she waited for her bus at the end of the work day. CP 156. Ms. Elliot explained that the client had a

¹ Uncontested facts are verities upon appeal. *Tapper v. Emp't Sec. Dep't*, 122 Wn.2d 397, 407, 858 P.2d 494 (1993).

bank account which named Ms. Elliot as joint account holder but that Ms. Elliot planned to move out of state and was about to cease acting as the client's guardian. CP 135-36, 268. Ms. Elliot was concerned that a new guardian would not be appointed for the client for several months and she was trying to find someone to help the client manage her bank account until the court appointed a new guardian. CP 137, 268. The client could not open an individual bank account because she was a minor. CP 268. Ms. Davison agreed to help. CP 156. Ms. Elliot and the client drove Ms. Davison directly from the bus stop to the bank where the client opened a bank account, naming Ms. Davison as joint account holder. CP 135.

On several occasions the client misplaced her bank card and asked Ms. Davison to withdraw money for her. CP 156-57. Ms. Davison would withdraw money from her own bank account and deliver it to the client. CP 156, 181. Ms. Davison would then transfer the money from the client's account to her own bank account as a reimbursement. CP 177-79. Each time she gave the client money, Ms. Davison had the client sign a note indicating the amount of money and the date. CP 175. At the client's request, Ms. Davison made five transfers in this way between December 2012 and April 2013. CP 132-40.

In May 2013, the client complained to her guardians, ACA attorneys, about her bank account and ACA discovered that Ms. Davison

was a joint account holder. CP 126. ACA suspended Ms. Davison on May 15, 2013, and conducted an investigation. CP 127. ACA terminated Ms. Davison on May 31, 2013. CP 123.

The Employment Security Department (the Department) denied Ms. Davison's application for unemployment benefits, concluding that Ms. Davison engaged in work-related misconduct because she violated ACA's trust fund policy. CP 201-202. Ms. Davison timely appealed and a hearing was held on September 5, 2013, before an administrative law judge (ALJ). CP 92.

At the hearing, Julie Whitney, the Human Resources manager for ACA at the time of Ms. Davison's termination, testified that ACA terminated Ms. Davison for failure to follow ACA's trust account policy. CP 128, 130. Ms Whitney testified that ACA had a policy requiring all ACA employees to deposit funds received from or on behalf of a client into a trust account controlled by ACA. CP 128. The policy is as follows:

6.2 Trust Account

A. When Used

Any time an ACA employee receives monies from a client or on behalf of a client, the funds must be deposited in the client trust account.

B. Procedure for Use

(1) Deposit

The Controller is to receive all client funds. A trust account activity form and a receipt for the funds will be completed with a copy of the client trust activity form going to the case attorney. Personal checks must be

verified for sufficient funds prior to deposit. The case attorney will be notified immediately if the funds are found to be insufficient.

(2) Withdrawal

The Controller will draw a check on a client trust account fund upon request of a case attorney as long as cash for the client has actually been received by the trust account. The case attorney must sign the client=s [sic] trust account form prior to drawing checks on the account.

CP 274.

Ms. Whitney testified that the trust account policy was in ACA's employee handbook. CP 129. She also testified that the joint account Ms. Elliot had with the client was not a trust account controlled by ACA. CP 143. She also testified that although Ms. Elliot was an ACA employee, the joint account with the client did not violate ACA's trust account policy. CP 144. ACA considered the joint account to be held in Ms. Elliot's capacity as the client's guardian and not part of her employment with ACA. CP 143-44.

Anne Dolan, ACA Controller, testified that she met with Ms. Davison on her first day of work and went through ACA's new hire checklist. CP 152-55. The checklist included the item "employee manual." CP 153. Ms. Dolan testified that some of the documents on the checklist were given to employees before she met with them. CP 154. Ms. Dolan did not go over the handbook with Ms. Davison, saying "I just document that this has been given to her..." CP 154. All of the boxes on

the checklist were checked, including “car insurance,” which Ms. Dolan checked off as verified even though Ms. Davison did not have car insurance. CP 152. Ms. Davison testified that she did not sign the checklist or receive an employee handbook. CP 161. She received a detailed job description ten months later, in September 2010. CP 275-81.

Don Madsen testified that Ms. Davison was not terminated for withdrawing funds, but only for failing to put the client’s funds in a trust account according to ACA’s policies. CP 148. “Ms. Davison withdrew the account, withdrew money in various amounts that went and gave it back to [the client]. That doesn’t matter to me. What matters is we have a personnel policy that says if you get any trust—if you get any money from a client it has to go to a trust account.” CP 148. Ms. Whitney also testified that Ms. Davison was terminated only because she violated the policy. CP 187 (“Our only interest was in the breach of policy for being in possession of client funds.”).

The ALJ found the employer’s testimony to be more persuasive in general than Ms. Davison’s. CP 285. Without referring to evidence in the record supporting the finding, the ALJ found that Ms. Davison “was given a copy of this policy when she was first hired.” CP 284. As a result, the ALJ concluded that Ms. Davison was discharged for misconduct under RCW 50.04.294(1)(b), holding that she deliberately disregarded the

employer's interests by failing to place the client's funds in a trust account. CP 285.

Ms. Davison petitioned the Commissioner of the Employment Security Department (the Commissioner) for review. CP 295-98. The Commissioner adopted the ALJ's findings of fact and conclusions of law. CP 308-09. In affirming the ALJ's decision, the Commissioner concluded that Ms. Davison was terminated for misconduct under RCW 50.04.294(1)(a), a different section of the statute than the ALJ relied on. CP 294. The Commissioner held that her conduct was "in willful and wanton disregard of the rights, title and interests of her employer" and "in violation of a reasonable employer policy, which policy was known to the claimant." CP 309.

Ms. Davison filed an appeal in superior court. CP 1. The court reversed, concluding the Commissioner's findings were not supported by substantial evidence and Ms. Davison's actions did not rise to the level of misconduct. CP 329. The court held that "the Commissioner's conclusions of law constitute an error of law in violation of the Washington Administrative Procedure Act, as Ms. Davison exhibited negligence not likely to cause harm; nor did she exhibit intentional or substantial disregard of the employer's interests." CP 330. The court

awarded Ms. Davison attorney fees. CP 330. The State filed this appeal. CP 335.

D. STANDARD OF REVIEW

Judicial review of the final administrative decision issued by the Commissioner of the Employment Security Department is governed by the Washington Administrative Procedure Act, RCW Title 34.05 (the “WAPA”). *Tapper v. Emp’t Sec. Dept.*, 122 Wn.2d 397, 402, 858 P.2d 494 (1993). The Commissioner is the final authority for the Department’s determinations on unemployment compensation. *Id.* at 404. This court sits in the same position as the superior court and directly reviews the Commissioner’s decision and the administrative record according to the standards of the WAPA. *Id.* at 402. The party challenging an agency’s action, here Ms. Davison, carries the burden of demonstrating the action was invalid. RCW 34.05.570(1)(a).

The WAPA allows the reviewing court to reverse the Commissioner’s decision if the decision is not based on substantial evidence or the decision is based on an error of law. RCW 34.05.570(3). The court may determine that substantial evidence does not support the agency’s decision if the record does not contain evidence of sufficient quantity to persuade a fair-minded, rational person of the truth or correctness of the agency order. *Affordable Cabs, Inc. v. Emp’t Sec.*

Dep't, 124 Wn. App. 361, 367, 101 P.3d 440, 443 (2004). In determining whether substantial evidence supports the Commissioner's findings of fact, the reviewing court considers the entire administrative record. *Kirby v. Emp't Sec. Dep't*, 179 Wn. App. 834, 843, 320 P.3d 123 (2014).

The determination of whether an employee's behavior constitutes work-related misconduct is a mixed question of law and fact. *Stephens v. Emp't Sec. Dep't*, 123 Wn. App. 894, 903, 98 P.3d 1284 (2004). While the reviewing court accords deference to the Department's interpretation of employment law, it is "ultimately for the court to determine the purpose and meaning of the statutes, even when the court's interpretation is contrary to that of the agency." *Gaines v. Emp't Sec. Dep't*, 140 Wn. App. 791, 796, 166 P.3d 1257 (2007). The process of applying the law to the facts of the case is subject to *de novo* review. *Daniels v. Emp't Sec. Dep't*, 168 Wn. App. 721, 728, 281 P.3d 310 (2012).

E. SUMMARY OF ARGUMENT

Ms. Davison was terminated for failing to follow ACA's policy of placing all client funds in a trust account controlled by ACA. The Commissioner determined that Ms. Davison knew about ACA's policy and concluded that she willfully and wantonly disregarded the policy.

Substantial evidence does not support the Commissioner's determination that Ms. Davison knew about the policy. Evidence in the

record is not sufficient to show that Ms. Davison actually received the employee handbook. There is no evidence in the record that ACA ever mentioned the policy to Ms. Davison, let alone provided her with training on how to handle client funds. Significantly, the employer testified that another ACA employee who also held a joint account with the client was not required to follow the policy. Ms. Elliott, a trusted co-worker, showed Ms. Davison what to do. Ms. Davison never intended to violate any rule.

Further, the Commissioner's conclusion that Ms. Davison willfully disregarded ACA's policy is an error of law. The record does not support the conclusion that Ms. Davison acted intentionally or maliciously.

The policy was not a "reasonable rule" as defined by the Department. Ms. Davison did not know about the policy, it was not related to her work, and the Commissioner's conclusion that she acted in willful and wanton disregard of ACA's interests is an error of law. Rather, her failure to follow the policy was a good faith error in judgment or ordinary negligence and she is entitled to unemployment benefits.

F. ARGUMENT

The Washington State Legislature specifically sets forth that the Employment Security Act ("the Act") is to be interpreted liberally. RCW 50.10.010. The legislature emphasized the importance of liberal construction by stating in the preamble of the Act that "this title shall be

liberally construed for the purpose of reducing involuntary unemployment and the suffering caused thereby to the minimum." *Id.* Washington courts have adopted the reasoning that:

Unemployment compensation statutes were enacted for the purpose of relieving the harsh economic, social and personal consequences resulting from unemployment. If these statutes are to accomplish their purpose, they must be given a liberal interpretation.

Gaines v. Emp't Sec. Dep't, 140 Wn. App. 790, 798, 166 P.3d 1257 (2007) (quoting 3A NORMAN J. SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 74.7, at 921-23 (6th ed. 2003)). Accordingly, the Act must be liberally construed in favor of the unemployed worker. *Delagrave v. Emp't Sec. Dep't*, 127 Wn. App. 596, 608-609, 111 P.3d 879 (2005).

Under the Act, a worker may be disqualified from receiving unemployment compensation if termination resulted from misconduct connected to his or her work. RCW 50.20.066. Nevertheless, conduct that justifies termination does not necessarily disqualify the employee from unemployment compensation. *Johnson v. Emp't Sec. Dep't*, 64 Wn. App. 311, 314-15, 824 P.2d 505 (1992).

1. The Commissioner's Findings Are Not Supported By Substantial Evidence In The Record

The record does not support the Commissioner's determination that at the time of her alleged misconduct, Ms. Davison knew about ACA's policy requiring all employees to deposit all client funds in a trust account. When a party contends an agency decision is not supported by substantial evidence, the court reviews the entire agency record. RCW 34.05.570(3)(e). This court may reverse the Commissioner's decision if it determines that the decision is not supported by substantial evidence in the record. *Id.*

Ms. Davison is not challenging the Commissioner's credibility findings or asking this court to re-weigh evidence in the record. Considering at the record as a whole, Ms. Davison contends that the evidence the Commissioner relied on was not of sufficient quantity to persuade a fair-minded, rational person that the Commissioner's findings were correct.

The Commissioner states that "[r]esolution of this matter turns upon credibility findings made by the administrative law judge." CP 308. The ALJ reached a legal conclusion that the employer's testimony was more persuasive. CP 285. Ms. Davison does not ask the Court to disturb those credibility findings – she is not alleging that any witness testified

untruthfully. Rather, Ms. Davison asserts that the evidence in the record, including the employer's testimony, is not sufficient to support the factual finding that "claimant was given a copy of [the trust account policy] when she was first hired." CP 284.

The State warns the Court that Ms. Davison's argument amounts to a reweighing of the evidence. Appellant's Brief at 18-19. The State is effectively asking the Court to change the standard of review. In essence it claims that any evaluation of the facts contained in the record is an improper re-weighing, rather than a review for substantial evidence. Ms. Davison asks the Court to do nothing more than perform the review described by the WAPA. RCW 34.05.570(3)(e). The facts raised by Ms. Davison are not "additional," or merely "her version of events." Appellant's Brief at 18-19. They are evidence, contained in the record, which the Court must evaluate in its entirety to determine whether the Commissioner's findings were sufficiently supported. RCW 34.05.570(3)(e); *Kirby*, 179 Wn. App. at 843.

Most of the facts of this case are undisputed. Ms. Davison testified that she opened a joint account with the client, and ACA did not contest that she did so at the request of Ms. Elliot and the client. Ms. Davison does not dispute the Commissioner's finding that ACA had a policy requiring all employees to deposit client funds in a trust account. CP 284.

However, she disputes the Commissioner's finding that she knew about the policy, because that conclusion is not supported by substantial evidence.

The State asserts that the testimony of two witnesses supports this finding. Appellant's Brief at 15. It does not.

Ms. Whitney testified that the new employee checklist had Ms. Davison's signature on it, asserting that this proves she received the policy contained in the employee handbook. CP 140. But Ms. Whitney was not present when Ms. Dolan met with Ms. Davison. CP 142. She did not witness Ms. Dolan give Ms. Davison the handbook, nor did she see that the handbook Ms. Davison allegedly received had a copy of the policy in it. CP 142. The only fact she could possibly be a witness to is that the completed checklist was in Ms. Davison's file. Ms. Whitney's testimony is not sufficient to show that Ms. Davison received a copy of the trust account policy.

Ms. Dolan's testimony is similarly insufficient to show that Ms. Davison knew about the policy. She did not testify that she gave Ms. Davison a copy of the handbook on her first day of work with ACA, but only that Ms. Davison signed the checklist. CP 151-52. Ms. Dolan testified generally to her use of the checklist with new employees. CP 151.

Dolan: This is a list of everything that I go over when I in-process 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 that's on the – that's on that list.

Id. While Ms. Dolan testified that she had Ms. Davison sign the checklist, she did not clearly testify that she actually gave her a copy of the employee handbook. CP 153-54. When asked if she gave all of the documents mentioned on the checklist to Ms. Davison during the meeting, Ms. Dolan stated “some of these documents are given to the employees prior to in-processing with me and I just document that this has been given to her...” *Id.* This evidence is not sufficient to prove that Ms. Davison received a copy of the handbook.

Considering the record as a whole, the evidence presented does not establish that Ms. Davison knew about the policy, either by receiving a copy of it or through any other kind of discussion or training. Neither Ms. Dolan nor Ms. Whitney testified that anyone at ACA went over the contents of the handbook with Ms. Davison or discussed any of ACA's policies with her on her first day of work or at any time during her employment, or that she ever had cause to handle client funds as a part of her job.

Significantly, Ms. Whitney testified that although Ms. Elliot was also an ACA employee, she was not subject to the trust account policy. CP 143-44. ACA considered her relationship with the client to be outside the employment relationship because she was a guardian. CP 143-44. Ms. Elliot had the same type of joint account with the client that she asked Ms. Davison to open. CP 135, 181-82.

Ms. Davison was not assigned to work with the client by ACA, but she nevertheless wanted to help her co-worker and a minor in need. CP 156-57, 160-61. Substantial evidence does not indicate that Ms. Davison received a copy of the handbook, or that she had any other way of knowing about the trust account policy. Considering the entire agency record, a fair-minded and rational person could not be persuaded that the Commissioner's factual findings are correct and therefore the findings are not supported by substantial evidence in the record.

2. The Commissioner Erred In Concluding That Ms. Davison Engaged In Disqualifying Misconduct When She Failed To Follow ACA's Trust Account Policy

The Commissioner concluded that Ms. Davison acted in "willful and wanton disregard of the rights, title and interests of her employer" under RCW 50.04.294(1)(a), and adopted the legal conclusions of the ALJ, including that Ms. Davison acted with "deliberate... disregard of standards of behavior which the employer has the right to expect of an

employee” under RCW 50.04.294(1)(b). CP 285, 309. The Commissioner further held that “specifically, said conduct was in violation of a reasonable employer policy, which policy was known to the claimant. RCW 50.04.294(2)(f).” CP 309. In so finding, the Commissioner erroneously applied the law and the Court may grant Ms. Davison relief. RCW 34.05.570(3)(d).

Ms. Davison’s failure to place the client’s funds in a trust account according to ACA’s policy was not a “willful and wanton” act. She was not aware of the policy, so could not know her actions violated it, and therefore she did could not act intentionally or maliciously. Further, the policy is not a “reasonable rule” as defined by the Department. Instead, Ms. Davison’s actions were negligent or a good faith error in judgment. The Commissioner’s conclusion that Ms. Davison engaged in disqualifying misconduct is an error of law.

a. Ms. Davison’s actions were not “willful and wanton,” nor did she act with deliberate disregard for standards of behavior ACA had the right to expect

The Department defines "willful" as “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). "Wanton" is defined as “malicious behavior showing extreme indifference to a risk, injury, or harm to another that is known or should

have been known to you. It includes a failure to act when there is a duty to do so, knowing that injury could result.” WAC 192-150-205(2). Ms. Davison’s actions do not rise to the level of “willful and wanton disregard” of ACA’s interests or standards of behavior. An employee acts with “willful or wanton disregard” when he or she (1) is aware of the 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. *Albertson’s Inc. v. Employment Sec. Dep’t*, 102 Wn. App. 29, 36-37, 16 P.3d 153 (2000) (emphasis added).

To have committed misconduct, evidence in the record would have to show that Ms. Davison did so with the knowledge of, and intent to disregard ACA’s trust account policy. *Id.* She does not dispute that she opened an account for a minor client, only that she received notice, training, or supervision on the policy – factual support that would be necessary to form intent or knowledge under the Act. There is no such evidence in the record. The only finding the Commissioner made which established her knowledge of the policy, and thus capacity to form any intent to violate it, was the poorly-supported finding that Ms. Davison was given a copy of the trust account policy when she was first hired. CP 284. The only evidence supporting this finding was Ms. Davison’s signature on

the employee check list indicating that she received ACA's handbook at the time of hire. *See supra*. This is insufficient to establish willfulness or deliberate disregard.

Likewise, the Commissioner's conclusion that Ms. Davison acted in a "wanton" manner as defined by the Department is not supported by the record. Nothing in the record suggests she acted in a malicious manner showing "extreme indifference" to ACA's interests. The employer's testimony consistently showed that Ms. Davison was terminated for failing to follow the policy. Ms. Whitney and Mr. Madsen both testified that they were concerned only with the breach of policy. CP 148, 187. She could not act with "extreme indifference" to a policy she did not know existed.

Finally, the Commissioner's adoption of the conclusion that Ms. Davison acted with deliberate disregard for standards of behavior ACA had the right to expect from her is erroneous. The State argues ACA's strong interest in adhering to the Rules of Professional Conduct regarding trust accounts, and argues that ACA had the right to expect her to adhere to those standards. Appellant's Brief at 25. But ACA did not establish standards of behavior regarding client funds when it failed to train Ms. Davison on its policy, failed to educate her about its importance, and was

unaware that another ACA employee was also not following it. *See* CP 144.²

Ms. Davison did not act willfully, wantonly, or with deliberate disregard for ACA's interests. She did not commit misconduct pursuant to RCW 50.04.294(1)(a) or RCW 50.04.294(1)(b) and the Court should therefore not disqualify her from benefits on those grounds.

b. ACA's trust account policy is not a "reasonable rule" as defined by the Department and the record does not support the conclusion that Ms. Davison knew about the rule

The Commissioner concluded that Ms. Davison violated a "reasonable employer policy, which policy was known to the claimant." CP 309. A violation of a company rule is considered "willful or wanton disregard" of an employer's interests "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 Department has determined that "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).

² "MR. MAHONEY: And in terms of Ms. Elliott transferring duties of managing the funds of, uh, Ms. Mahey to Ms. Davison was that something that ACA management were aware of?

MS. WHITNEY: Uh, no, we were not aware of this account until the allegations were brought by the client." CP 144.

ACA's trust account policy was not "reasonable" as defined by the Department because it was not related to Ms. Davison's job duties as a social worker. Ms. Davison received a copy of her job description, which gives a detailed outline of her job functions and expectations. CP 169, 172-73, 188. The document does not mention trust accounts or handling client funds. CP 275-81. There is no evidence that Ms. Davison ever received money from or on behalf of any client pursuant to her ACA duties, so she would have had no opportunity to open a trust account or deposit money in one. With respect to withdrawing client funds, the policy refers to the handling of funds by an ACA attorney. CP 274. But Ms. Davison did not normally handle funds for clients as an attorney would.

While it is a normal business practice for lawyers in a law firm to maintain trust accounts, ACA failed to provide any training to Ms. Davison regarding its heightened requirements as a law firm. Moreover, it is notable that ACA presented no evidence that anyone noticed that the client had apparent access to non-trust funds that were not being held in trust or disbursed by the Controller, even though her guardians following Ms. Elliott's departure were ACA attorneys. CP 137. Even if she did receive a copy of the handbook and even if the handbook contained a copy of the policy, it is unlikely that Ms. Davison would understand that the

policy applied to her because handling client funds was not a normal part of her job. There is no evidence this was a trust fund.

The State argues that because Ms. Davison worked for ACA, she was bound by the Rules of Professional Conduct (the “RPCs”), making the policy a “reasonable rule” for her occupation. Appellant’s Brief at 20. But the RPCs were related to Ms. Davison’s job duties as a social worker only insofar as the RPCs create an affirmative duty *for attorneys* to supervise their staff and ensure compliance. RPC 5.3(a)(b). Nothing in the record suggests that Ms. Davison ever received a copy of the RPCs, that she was ever given any training on the RPCs, or that ACA ever mentioned the RPCs during Ms. Davison’s employment. RPC 5.3 requires attorneys to supervise non-attorney employees. ACA did not meet its obligation to supervise by placing the policy in a handbook without any discussion or training. If she was to be held to these standards, it was up to ACA to inform her of the rules and supervise her adequately.

While an attorney is required to study the RPCs in order to be licensed and maintain a license and would be expected to understand the requirement to maintain a trust account, a part time social worker with no training on the issue should not be held to the same standard. Law firm staff are accountable to supervision by a firm’s attorneys but hold no

independent duty to the firm's clients pursuant to the RPCs. RPC 5.3(a). It is not a reasonable policy for ACA to bind legal staff to the RPCs independent of attorney supervision. It was the duty of ACA's attorneys to track the funds of juvenile clients in light of their guardianship status, advise clients of their legal rights with respect to those funds, and ensure that ACA's legal staff carried out tasks on behalf of the law firm in compliance with the attorneys' advice and the RPCs. There is no evidence in the record that ACA provided Ms. Davison with the necessary training and supervision to meet these standards.

The State argues that "to conclude that a law office's trust account rule should apply to some, but not all staff, would be illogical and would disregard the Rules of Professional Conduct. *See* RPC 5.3." Appellant's Brief at 22. Ms. Whitney testified that Ms. Elliot, an ACA employee and guardian of the client, was not required to keep the client's funds in a trust account maintained by ACA. CP 144-45. Clearly ACA applied the rule to some employees but not others.

Because trust accounts were not a normal part of her job duties as a social worker and she was not trained or supervised on the issue of ACA's obligations as a law firm, the Commissioner erred in holding the policy was a "reasonable rule" under RCW 50.04.294(2)(f).

The commissioner's conclusion that Ms. Davison knew of the existence of ACA's trust account policy was in error. Under WAC 192-150-210(5):

The department will find that you knew or should have known about a company rule if you were provided an orientation on company rules, you were provided a copy or summary of the rule in writing, or the rule is posted in an area that is normally frequented by you and your coworkers, and the rule is conveyed or posted in a language that can be understood by you.

The State argues that under the plain language of WAC 192-150-210(5), Ms. Davison knew or should have known about the policy simply because she received it. Appellant's Brief at 22. As discussed above, evidence in the record is not sufficient to establish that Ms. Davison received a copy of the trust account policy. If she received it, it was buried in a handbook she received three years earlier, and contradicted by her co-worker's conduct in picking her to set up the account to assist the minor. The Commissioner's determination that she knew about the policy is an error.

Ms. Davison's case can be distinguished from other Washington unemployment cases where employees were discharged for misconduct. Invariably, the employees in those cases acknowledged that they were explicitly informed of the policy they were discharged for violating, either through training or in writing, they often received notice or warnings of

the violations, or they expressed resistance to their employer's interests after being informed of the policy. See *Daniels v. Emp't Sec. Dep't*, 168 Wn. App. at 724 (finding that the claimant was discharged for misconduct and denied benefits properly where he received an employee handbook and training, he was aware of the policies and his violations of them); *Smith v. Emp't Sec. Dep't*, 155 Wn. App. 24, 29-31, 226 P.3d 263 (2010) (affirming the Commissioner's decision to deny unemployment benefits for misconduct where the claimant knew about a workplace policy that had been reinforced through training seminars); *Anderson v. Emp't Sec. Dep't*, 135 Wn. App. 887, 890-92, 146 P.3d 475 (2006) (holding that employment benefits were properly denied to the claimant where he intentionally deceived the employer by withholding disclosure of his relationship with a bidding contractor and did so for personal gain); *Peterson v. Emp't Sec. Dep't*, 42 Wn. App. 364, 365-67, 711 P.2d 1071 (1985) (finding misconduct where the claimant had a series of policy violations within a five-week period and knowingly disregarded the employer's interests).

The Commissioner's conclusion that Ms. Davison acted in willful and wanton disregard of ACA's policy is an error of law. The policy was not a "reasonable rule" as defined by the Department and Ms. Davison did not know about the rule.

3. Ms. Davison Was Negligent Or She Made A Good Faith Error In Judgment

Ms. Davison's failure to follow ACA's trust account policy does not rise to the level of misconduct, but rather was a result of negligence or a good faith error in judgment. Under RCW 50.04.294(3)(c), "misconduct" does not include inadvertence or ordinary negligence in isolated instances or good faith errors in judgment or discretion.

Ms. Davison opened the joint account in an effort to assist her co-worker and the client. CP 156-57, 160-61. She was unaware of the trust account policy and knew that Ms. Elliot had the same type of joint account with the client. CP 181-82. While she may have been negligent in failing to seek guidance from a supervisor on whether she should help Ms. Elliot and the client, her actions do not rise to the level of misconduct. *Contrast with Daniels v. Employment Sec. Dep't*, 168 Wn. App. 721, 726 & 731 (2012) (finding that a series of prior warnings and acknowledgment of the employer's practices make the employee's violations of those policies misconduct rather than isolated incidents of mistake or poor judgment).

In this way, her actions are similar to the employee in *Kirby v. Employment Security Department*, 179 Wn. App. 834 (2014). There, unemployment benefits were granted to an employee who was terminated for failing to produce a requested report because of an "information gap"

and “apprehension and confusion,” rather than an intent to harm the employer. *Kirby*, 179 Wn. App. at 845. The court concluded that “a showing of misconduct must be established by evidence that the employee was aware that he or she was disregarding the employer’s rights.” *Id.* at 847.

Similarly, in *Albertson’s, Inc. v. Emp’t Sec. Dep’t*, 102 Wn. App. 29, 41, 15 P.3d 153 (2000), an employee received copies of several policies prohibiting employees from selling out-of-date meat, but also observed other employees doing so. The court determined that “even if corporate policy were clear ... [the employee’s] violation of the policy would be willful misconduct only if she knew her violation jeopardized her employer’s interests.” *Id.* While the employer pointed out its interest in avoiding liability to customers should out-of-date meat be sold, the court found that the record failed to establish that the employee had any way of knowing of that interest. *Id.* at 41-42 (“Albertson’s does not explain why an employee observing the frequency of these authorized purchases should conclude the company’s interests were violated by a practice which benefited the company’s sales figures.”). Likewise, even if Ms. Davison received the trust account policy, she observed another employee violating it, and received no training which might connect the policy to ACA’s required duties to its clients. Therefore, she had no way

of knowing her actions in opening the joint account violated ACA's interests. The court should conclude that Ms. Davison's actions, while in error, do not rise to the level of misconduct.

4. Request for Attorney Fees and Costs Under RAP 18.1

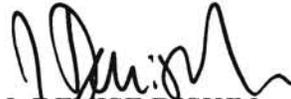
Under RCW 50.32.160 and RCW 50.32.100, if Ms. Davison prevails in this court, she is entitled to reasonable attorney fees and costs. “[I]f the decision of the commissioner shall be reversed or modified, such fee and costs shall be payable.” RCW 50.32.160. The fee shall be reasonable, and fixed “by the supreme court or the court of appeals in the event of appellate review.” *Id.* See also *Albertson's, Inc.*, 102 Wn. App. at 47 (“The language of the statute ... casts a broad net.”). Ms. Davison asks this court to award reasonable fees in accordance with RAP 18.1.

G. CONCLUSION

Ms. Davison requests that this court affirm the decision of the superior court reversing the Commissioner's decision denying benefits based on misconduct. The Commissioner's finding that Ms. Davison knew about ACA's trust account policy was not based on substantial evidence in the record and the conclusion that Ms. Davison engaged in disqualifying misconduct was an error of law.

RESPECTFULLY SUBMITTED this 30th day of December, 2014.

TELLER & ASSOCIATES, PLLC



J. DENISE DISKIN
WSBA #41425
Attorney for Respondent

CERTIFICATE OF SERVICE

I hereby declare under penalty of perjury under the laws of the State of Washington that on December 30, 2014, I caused to be served by hand delivery a true and correct copy of the foregoing pleading upon counsel of record at the addresses stated below:

Attorney General of Washington
ATTN: AAG April Benson
Licensing and Administrative Law Division
800 Fifth Avenue, Suite 2000
Seattle, WA 98104
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And caused to be filed a true and correct copy of the foregoing pleading upon the court:

Court of Appeals, Division I
600 University Street
Seattle, WA 98101-4170



J. Denise Diskin

2014 DEC 30 11:4:23
COURT OF APPEALS
DIVISION I