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COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

**No. 294404-III**

STATE OF WASHINGTON  
COURT OF APPEALS  
DIVISION NO. III

LOREN E. GRIFFITH

Appellant

-vs-

STATE OF WASHINGTON DEPARTMENT OF  
EMPLOYMENT SECURITY

Respondent

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**REPLY BRIEF OF APPELLANT**

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**A. Substantial Evidence Does Not Exist To Support The State's Contention That Mr. Griffith Violated A Known Policy After Numerous Warnings.**

The State attempts to paint a picture of Mr. Griffith as an employee who repeatedly engaged in threatening and inappropriate conduct, and despite several warnings, engaged in similar conduct one last time to warrant termination. Substantial evidence does not support this theory.

Instead, this case involves a loyal, 9-year employee who had two past incidents of verbal disagreements with a customer that were unrelated to the incident that led to his termination. The first incident occurred in June 2007. At that time, Mr. Griffith was attempting to make a delivery to a customer and a vehicle was parked in the unloading spot. Mr. Griffith motioned for the individual to move from the parking spot. The individual came out and yelled at Mr. Griffith and then drove off. Mr. Griffith admitted he yelled back, "*Get back here, you dummy.*" AR 47. Mr. Griffith was given a verbal warning. This was two years before the incident which formed the basis of his termination.

The second incident occurred in May 2009. At that time, Mr. Griffith was knocking on the backdoor of a customer's building to make a delivery. AR 45. The customer came outside and accused Mr. Griffith of banging on the door. He disagreed that he had banged on her door. They had a verbal disagreement in which the customer claimed "*Every time you*

*are here something is wrong.*” Mr. Griffith responded, “*That is a lie.*” He then contacted his supervisor to inform him of the verbal altercation, knowing the customer would complain. AR 46. Mr. Griffith received a written warning.

The employer characterized those prior incidents as violations of company policy – specifically “using abusive, intimidating language toward a customer or coworker”. CR 76. It is agreed that Mr. Griffith was on notice that further verbal altercations involving abusive or intimidating language would be grounds for termination. The reason Mr. Griffith was terminated was not for using abusive or intimidating language.

The comment made by Mr. Griffith in July 2009 – “*How is my favorite Jewish girl?*” - was not a repeated violation of this policy as it did not involve abusive or intimidating language. It was a cheerful greeting made to a long-time customer, Ms. Offenbach-Rough. Mr. Griffith saw her on a weekly basis and they always engaged in friendly conversation. AR 49, 50. At one point, she made him aware that she was Jewish. AR 50. When Mr. Griffith made the comment, there was no altercation or angry words. While the employer did not agree with the choice of words, it is undisputed that Mr. Griffith was not hostile and that he meant the customer no ill-will.

The prior incidents occurred when Mr. Griffith was arguably upset and angry with a customer and exhibited corresponding behavior. He was warned to refrain from hostility or intimidation. Substantial evidence does not exist to support the claim that Mr. Griffith had been warned of similar conduct prior to making the Jewish comment.

The State claims that the prior warnings put Mr. Griffith on sufficient notice that he should have known that the Jewish comment was a violation of the employer's policy. Under this logic, any time that an employee is warned or disciplined in any way, they are on notice that they could be terminated for a completely unrelated future event because it constitutes "repeated" acts. A repeated offense suggests similar acts, conduct or circumstances. Substantial evidence does not exist that the comment Mr. Griffith made was a repeated act.

The State incorrectly characterizes Mr. Griffith's conduct as intentional in an effort to claim it is misconduct. It is argued that he "disregarded" his employer's instructions, purposefully made an offensive comment, and returned to the customer in violation of the pending investigation. *Br. of Resp. at 13*. There is no evidence to support these claimed intentional acts.

First, the employer agreed that Mr. Griffith's comment was not made to be an insult. AR 28. Not only was it not purposefully offensive, but he did not even know that what he said was offensive, or that the customer was offended. Mr. Griffith did not make the comment or attempt to apologize knowing that he was harming the employer's interest. If Mr. Griffith intended to offend or knowingly used inappropriate language, it is illogical that he would then attempt to apologize.

The issue of whether Mr. Griffith asked for permission or not to return to the customer to apologize is irrelevant to whether he engaged in misconduct. When Mr. Griffith announced to his employer that he would like to apologize, if such a request was inappropriate, surely the employer would have said so. The State argues that a reasonable person would understand that attempts to apologize were inappropriate. Mr. Griffith testified that he wanted to fix the wrong he had caused. He did not do so in the face of a directive not to, or even a discussion that doing so was inappropriate. Whether or not he asked permission is irrelevant to whether such conduct was intended to harm his employer's interest. Substantial evidence does not exist to support the claim that returning to the customer's location to apologize was inappropriate and constituted misconduct.

If anything, both the comment and subsequent apology were an effort to follow company policy to maintain quality customer service and represent the company in a positive manner. He did not act in a willful manner to ignore company policy or an employer directive.

**B. Mr. Griffith's Conduct Was Not Willful, Deliberate Or Intentional, But Merely Negligence.**

To make a finding that Mr. Griffith's comment constituted misconduct, the State needs to show intentional conduct or carelessness to such a degree to constitute intentional disregard. The facts in this case do not support such a finding. An employer can terminate an employee, but Mr. Griffith's conduct does not rise to the level of misconduct.

Not every employee who is terminated engages in misconduct disqualifying them from unemployment benefits. Misconduct is the exception. The purpose of the exclusion is to ensure that anyone who engages in intentional or willful behavior with the intent of harming the employer does not collect unemployment compensation. The analysis and determination hinges on the employee's intent. *Tapper v. E.S.D.*, 122 Wash.2d 397, 409, 858 P.2d 494 (1993). Under the State's reasoning, any time an employee engages in behavior the employer did not like, the employee's intent is irrelevant. Intent may not be relevant for purposes of

termination, but it is critical when evaluating misconduct. Under the State's logic, misconduct exists even if the employee did not know he was violating a policy.

The State argues that Mr. Griffith's conduct could be characterized as misconduct under either RCW 50.04.294(1)(a) or (1)(b). *Br. of Resp. at 17-18*. Those provisions involve "deliberate" or "willful" behavior. It is undisputed that Mr. Griffith's comment was not intended to be offensive or violate a company rule. It was not deliberate or willful. To be considered misconduct, the employee must have "voluntarily disregarded the employer's interest." *Hamel v. E.S.D.*, 93 Wn.App. 140, 146, 966 P.2d 1282 (1998).

Cases which have found intentional and willful conduct by an employee include forceful physical contact with another employee (*Keenan v. Employment Sec. Dept.*, 81 Wash.App. 391, 914 P.2d 1191 (1996)), multiple hostile confrontations with other employees (*Haney v. Employment Sec. Dept.*, 96 Wash.App. 129, 978 P.2d 543 (1999)), intentional violation of an employer directive to notify a supervisor of any telecommunication problem (*Dermond v. Employment Sec. Dept.*, 89 Wash.App. 128, 947 P.2d 1271 (1997)), and secretly recording conversations of employees and supervisors (*Smith v. Employment Sec. Dept.*, 155 Wash.App. 24, 226 P.3d 263 (2010)). These cases all involve

intentional acts in disregard of the employer's interest, and not a casual comment that lacked demeaning or derogatory context. Mr. Griffith did not state something so outrageous that any reasonable person would believe the comment to be offensive. This was not an ethnic slur.

The term "willful misconduct" means more than mere negligence. It "contemplates the intentional doing of something with knowledge that it is likely to result in serious injuries, or with reckless disregard of its probable consequences." BLACK'S LAW DICTIONARY 1600 (6th ed.1990); *Hamel v. Employment Sec. Dept.*, 93 Wash.App. 140, 146, 966 P.2d 1282 (1998).

This was not a pattern of conduct. Since substantial evidence does not support the claim that Mr. Griffith had been warned previously about making offensive comments, the question before this court is whether making a Jewish comment, one time, constitutes misconduct. Mr. Griffith had no idea that commenting about someone being Jewish was offensive, or that in doing so he was violating an employer rule.

In addition to willful or intentional acts, misconduct includes violation of a reasonable company rule if the claimant knew or should have known of the existence of the rule. RCW 50.04.294(2)(f). The State claims that Mr. Griffith should have known the comment was inappropriate. Unlike *Hamel* and *Smith* in which the court found that the

employee should have known the conduct would jeopardize the employer's interest, Mr. Griffith could not have known that his comment would jeopardize the employer's interest.

In *Hamel*, the employee was discharged after the **third incident** for making inappropriate comments after two warnings for similar statements. *Hamel*, 93 Wash.App. 140. All three comments were similar in content, context and demeanor. Clearly, that employee was on notice and warned not to make related comments. There, the employee had been warned previously and was discharged after making a third similar comment. *Id.* at 149.

In *Smith*, an employee was terminated after it was revealed that he was surreptitiously recording co-workers and members of the public. *Smith*, 155 Wash.App. 24. The employee knowingly engaged in secretive behavior which demonstrated he knew it was improper. That is not the case here. Mr. Griffith did not disregard an employer warning or the interests of his employer. He had no idea the comment he made was offensive. He had not been warned for similar conduct to be on notice that such a comment was offensive. A single comment made in a friendly manner is not disqualifying misconduct.

The State claims that Mr. Griffith should have known that his comment was inappropriate due to the repeated warnings. The State's

argument is misplaced since Mr. Griffith was never warned about the conduct. The *Hamel* court addressed this specific issue and stated,

We note that if the Commissioner had relied solely upon the fact that Red Robin had given Hamel repeated warnings, this would not satisfy the willful misconduct standard. **To hold otherwise would allow the Department to avoid the ‘willful disregard’ requirement in the case of an employee who acted incompetently or negligently after warnings against repeating such behavior.**

*Hamel*, 93 Wash.App. at 147 (emphasis added).

Misconduct demands more than the facts in this case. The Commissioner erred in determining that Mr. Griffith’s conduct constituted misconduct that was a “willful and wanton disregard of the employer’s interest”. The purpose behind disqualifying misconduct is to prevent employees who engage in multiple incidents or egregious conduct from getting benefits. It is not to deny benefits to someone who makes a single misguided comment in an attempt to be friendly.

The statute requires more than mere negligence to find misconduct and specifically excludes inadvertence, ordinary negligence, and good faith error in judgment from the definition of misconduct. RCW 50.04.294(3). Adding “Jewish” into his friendly greeting was an error in judgment.

The State argues that the *Markham* case stands for the proposition that RCW 50.04.294(3) only excludes employees from misconduct if the employee's mistake or negligence is the result of inadequate skills. RCW 50.04.294(3) includes more than poor performance and expressly lists inadvertence and error in discretion. The facts in *Wilson* demonstrate that a simple mistake or error in judgment does not rise to the level of misconduct. *Wilson v. Employment Security Dept.*, 187 Wash. App. 187, 940 P.2d 269 (1997). In *Wilson*, the court found that an employee who failed to log in loose diamonds and lost a diamond on two occasions was merely negligent and his actions did not rise to the level of misconduct. *Id.* There was no indication of a deliberate decision by the employee to act in defiance of the employer's policy. *Id.* at 203 "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.*

### **C. Conclusion**

The purpose of the Employment Security Act is not to disqualify individuals from receiving benefits after making a mistake. Mr. Griffith did not intend to offend his customer or harm his employer's interests. His conduct does not rise to the level of misconduct under the law. Based on

the facts and argument as set forth above, Appellant requests that this Court reverse the order of the Commissioner.

DATED this 15<sup>th</sup> day of February, 2011.

Respectfully submitted:

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STATE OF WASHINGTON, COURT OF APPEALS, DIVISION III

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CERTIFICATE OF MAILING

The undersigned certifies that on February 16, 2011, I mailed a copy of the Reply Brief of Appellant to Leah Harris, Assistant Attorney General, at 800 Fifth Ave., Ste. 2000, Seattle, WA 98104, by regular mail, postage prepaid.

Dated: 2/16/2011



Michele A. Robbins