

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

BRIEF OF APPELLANT

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TABLE OF CONTENTS

A. INTRODUCTION 1

B. ASSIGNMENTS OF ERROR

 1. Assignments of Error..... 1-2

 2. Issues Relating to Assignments of Error..... 2

C. STATEMENT OF THE CASE..... 2-5

D. ARGUMENT

 1. Standard of Review..... 5-6

 2. The Decision of the Commissioner Improperly Expands the Definition of Misconduct in Violation of the Mandate of Liberal Construction of the Employment Security Act... 6-8

 3. The Commissioner Made An Error Of Law In Finding That The Claimant’s Conduct Constituted “Misconduct” As A Matter Of Law... 8-12

 4. The Findings Of Fact Made By The Commissioner Were Not Supported By Substantial Evidence 12-13

 i. The Administrative Record Does Not Support Additional Finding Of Fact Nos. III & IV That Mr. Griffith Violated The Policy Of His Employer. 13-14

 ii. The Administrative Record Does Not Support Additional Finding Of Fact Nos. I & II That Mr. Griffith Was Not Credible. 14-15

 5. Mr. Griffith Should Be Awarded Attorney’s Fees and Costs Pursuant to RCW 50.32.160. 15-16

E. CONCLUSION..... 16

TABLE OF AUTHORITIES

<u>Brighton v. Washington State Dep't. of Transportation</u> , 109 Wn.App. 855, 38P.3d 344 (2001), reconsideration denied.....	5
<u>Delagrave v. Employment Sec. Dept. of State of Wash.</u> , 127 Wash.App. 596, 608-609, 111 P.3d 879, 886 (2005)....	6
<u>Dep't. of Labor & Industries of State of Wash. v. Gongyin</u> , 119 Wn.App. 188, 192-93, 79 P.3d 488 (2003), review granted 151 Wn.2d 1032, 95 P.3d 351, reversed 154 Wn.2d 38, 109 P.3d 816.....	5
<u>Dermond v. E.S.D.</u> , 89 Wn.App. 128, 947 P.2d 1271 (1997)	9
<u>Goewert v. Anheuser Busch, Inc.</u> , 82 Wn.App. 753, 919 P.2d 106, review denied, 131 Wn.2d 1005, 932 P. 2d 644.....	6
<u>Hamel v. E.S.D.</u> , 93 Wn.App. 140, 966 P.2d 1282 (1998)	9
<u>Haney v. ESD</u> , 96 Wn.App. 129, 978 P.2d 543 (1999)....	9
<u>Heinmiller v. Dep't of Health</u> , 127 Wn.2d 595, 903 P.2d 1294 (1995).....	13
<u>Lawter v. Employment Sec. Dept.</u> , 73 Wn.App. 327, 869 P.2d 102 (1994).....	7
<u>Macey v. State of Washington, Employment Security Dep't.</u> , 110 Wn.2d 308, 752 P.2d 372 (1988).....	7
<u>Safeco Ins. Cos. v. Meyering</u> , 102 Wash.2d 385, 687 P.2d 195 (1984).....	6-7
<u>Shoreline Community College Dist. No. 7 v. Employment Sec. Dept.</u> , 120 Wash.2d 394, 842 P.2d 938, 945 (1992)..	7

<u>Tapper v. State of Washington Employment Security Department</u> , 122 Wn.2d 397, 858 P.2d 494 (1993).....	6, 8, 9, 12
<u>Terry v. E.S.D.</u> , 82 Wn.App. 745, 919 P.2d 111 (1996)..	12
<u>The Markam Group, Inc. v. State of Washington, Employment Security Dep't.</u> , 148 Wn.App. 555, 200 P.3d 748 (2009).....	7, 10, 11
<u>Wilson v. ESD</u> , 87 Wn.App. 197, 940 P.2d 269.....	11

Other

BLACK'S LAW DICTIONARY 1600 (6 th ed. 1990)....	9
<u>In Re Murphy</u> , Empl. Sec. Comm'r Dec. 2d 750 (1984).	12
RCW 34.05.464(4).....	12
RCW 34.05.570(3).....	12
RCW 50.01.010.....	6
RCW 50.04.294.....	1, 2, 6
RCW 50.04.294(1).....	8
RCW 50.04.294(3).....	11
RCW 50.20.060.....	7, 8, 12
RCW 50.20.066.....	8
RCW 50.32.080.....	12
RCW 50.32.160.....	13

A. INTRODUCTION

This case involves the issue of whether a single comment made in a friendly way with no offensive intent is sufficient to constitute “misconduct” that disqualifies an employee from unemployment benefits under the Unemployment Security Act. While greeting a long-term customer on his delivery route, truck driver Loren Griffith made the comment, “*How’s my favorite Jewish girl?*” He did not intend the comment to be offensive, mean-spirited or insulting. He found out weeks later that the customer was offended by the comment. In a gesture of remorse, Mr. Griffith drove back to the customer’s location in Montana to apologize to her. When she was unavailable, he decided to wait outside since he had traveled so far. The employer claims that this upset the customer. Mr. Griffith was subsequently terminated.

Mr. Griffith had never been reprimanded or warned about similar comments or conduct.

B. ASSIGNMENTS OF ERROR

1. Assignments of Error

- a. The Commissioner of the Employment Security Department erred in concluding as a matter of law that the actions of the Appellant constituted “misconduct” pursuant to RCW 50.04.294.
- b. The Commissioner of the Employment Security erred in making additional Finding of Fact Nos. III & IV that Appellant “...repeatedly, in the face of warnings from his employer, violated the employer’s policies...”. (AR 106-

107) These findings of fact were not supported by substantial evidence.

- c. The Commissioner of the Employment Security erred in making additional Finding of Fact Nos. I & II that Appellant was not credible. These findings of fact were not supported by substantial evidence.

2. Issues Relating to Assignments of Error

- a. Does a single, friendly comment made by an employee with no history of similar conduct, which is later taken to be offensive, coupled with the employee's subsequent attempt to apologize, constitute "misconduct" under RCW 50.04.294?
- b. Does the fact that an employee only informed his employer of his desire to apologize to the offended customer, rather than sought express permission from the employer to do so constitute substantial evidence to discount the employee's credibility?
- c. Does a previous warning for dissimilar and unrelated conduct constitute a warning sufficient to put the employee on notice that any future comment will be a violation of the employer's policies?

C. STATEMENT OF THE CASE

Appellant, Loren Griffith, was terminated from United Natural Foods after saying to a longtime customer in a friendly tone, "*How is my favorite Jewish girl?*" and later apologizing for this comment. Mr. Griffith

worked for nine years as a truck driver for United Natural Foods delivering food products to various stores in the Northwest. (AR 10)¹ Since he delivered to the same stores for several years, Mr. Griffith developed relationships with employees at the stores. He would often engage in friendly banter when making deliveries. (AR 42) On one such occasion in late July 2009, Mr. Griffith was talking with Ms. Offenbach-Rough, a store employee he often saw while making deliveries to that customer. He had known Ms. Offenbach-Rough for at least four years and saw her on a weekly basis. They often chatted when he made his deliveries. He knew she was Jewish as they had discussed it in a respectful way before. (AR 42)

On that occasion in July, in a cordial, good-natured, and endearing manner he made the statement, "*How is my favorite Jewish girl?*" At the time, Ms. Offenbach-Rough did not say anything or appear offended. (AR 42) In fact, they continued to chat as he unloaded product. There was no indication she was upset or offended. (AR 45)

Several weeks later on August 21, 2009, a complaint was made by the store manager to Mr. Griffith's employer regarding the earlier "Jewish" comment. (AR 27, AR 74) He was placed on administrative leave pending an investigation. (AR 11) During the investigation, Mr. Griffith was told that Ms. Offenbach-Rough was offended by the Jewish comment that he made several weeks before. (AR 16) When he learned that she was offended, Mr. Griffith felt badly and informed his employer that he wanted to apologize to her. (AR 29, 42) Mr. Griffith was not told

¹ For ease of reference, the certified record of the administrative hearing below is referred to as "AR" for administrative record.

to avoid Ms. Offenbach-Rough and that he could not apologize or that doing so would violate policy. (AR 29)

Mr. Griffith later drove from Spokane to the Montana store to apologize to Ms. Offenbach-Rough. She told him she had to work late. Since Mr. Griffith had traveled to the customer he decided to wait until the end of her shift to apologize. Mr. Griffith went to get something to eat and then sat in his car and read the newspaper. (AR 44) Several store employees came to his car and stated that he needed to leave. Mr. Griffith complied and left a note on Ms. Offenbach-Rough's car apologizing for his comment before driving back home to Spokane. (AR 44) The employer received notice that Mr. Griffith had attempted to contact and apologize to Ms. Offenbach-Rough. As a result, Mr. Griffith was terminated on September 10, 2009. (AR 17) Prior to this incident in July 2009, Mr. Griffith had never been warned about any conduct with this customer, or any similar type of comments. He had been reprimanded on two other occasions in the past for unrelated conduct that involved a confrontation with a customer. (AR 19)

On September 14, 2009 Mr. Griffith filed for unemployment benefits based on his employment with United Natural Foods. (AR 120)

On November 13, 2009, the Employment Security Department granted benefits on the basis that there was no evidence to show the claimant engaged in willful misconduct. (AR 120)

The employer filed a timely appeal of the decision and an administrative hearing was held before Administrative Law Judge Charles Woode on February 5, 2010. The ALJ found that the employer failed to meet its burden to prove by a preponderance of the evidence that Mr. Griffith had engaged in deliberate violations of company policies. (AR 83-89)

The employer appealed the decision of the ALJ and Commissioner John M. Sells modified the decision of the hearing judge on April 9 2010. (AR 105-108) Commissioner Sells made a finding of “misconduct” based on modified findings of fact. A petition for review with the Superior Court was timely filed on April 19, 2010. (AR 107)

A hearing was held on September 10, 2010 before Judge Harold D. Clarke III. Judge Clarke issued a Memorandum Decision on September 21, 2010 upholding the Commissioner’s decision. (CP² 41-42) Findings of Fact and Conclusions of Law were entered on September 24, 2010. (CP 43-45)

Notice of appeal to this Court was timely filed on October 15, 2010. (CP 46-50)

D. ARGUMENT

1. Standard of Review

Judicial review of this matter is governed by the Washington State Administrative Procedure Act (APA), chapter 34.05 RCW. The review is *de novo* as this Court sits in the same position as the superior court, applying the APA directly to the record before the agency. *Brighton v. Washington State Dep’t. of Transportation*, 109 Wn.App. 855, 861-62, 38P.3d 344 (2001), reconsideration denied.

Following judicial review by the superior court from an administrative agency’s decision, the Court of Appeals reviews the agency decision rather than the superior court decision. *Dep’t. of Labor & Industries of State of Wash. v. Gongyin*, 119 Wn.App. 188, 192-93. 79

² For ease of reference, clerk’s papers are referred to as “CP”.

P.3d 488 (2003), review granted 151 Wn.2d 1032, 95 P.3d 351, reversed 154 Wn.2d 38, 109 P.3d 816. This Court reviews the commissioner's decision to the extent that it modifies or replaces the ALJ's findings relevant to the appeal. *Tapper v. State of Washington Employment Security Department*, 122 Wn.2d 397, 404, 858 P.2d 494 (1993).

This Court may reverse the commissioner's decision if the decision was based on an error of law, if the decision was not supported by substantial evidence, or if the decision was arbitrary or capricious. RCW 34.05.570(3); *Tapper*, 122 Wn.2d at 402.

The Commissioner's finding of fact that Mr. Griffith "...repeatedly, in the face of warnings, violated the employer's policies..." (Finding No. IV AR 107) was not supported by substantial evidence. The Commissioner also erred in finding that such conduct constituted "misconduct" pursuant to RCW 50.04.294.

2. The Decision of the Commissioner Improperly Expands the Definition of Misconduct.

The Employment Security Act [hereinafter referred to as "Act"] was established to reduce involuntary unemployment and ease the suffering caused thereby. RCW 50.01.010; *Delagrave v. Employment Sec. Dept. of State of Wash.*, 127 Wash.App. 596, 608-609, 111 P.3d 879, 886 (2005). To achieve this purpose, the Act must be liberally construed in favor of the unemployed worker. *Id.* The primary concern of this Court is to ensure that the unemployment compensation statute is interpreted consistently with the underlying policies of the Act. *Goewert v. Anheuser Busch, Inc.*, 82 Wn.App. 753, 919 P.2d 106, review denied, 131 Wn.2d 1005, 932 P. 2d 644.

Generally, unemployed workers are eligible for benefits unless they are disqualified by statute. *Safeco Ins. Cos. v. Meyering*, 102 Wash.2d 385, 389, 687 P.2d 195 (1984). A worker may be disqualified from receiving unemployment if termination results from misconduct connected with his or her work. RCW 50.20.060. *Lawter v. Employment Sec. Dept.* 73 Wn.App. 327, 331, 869 P.2d 102 (1994).

The mandate of liberal construction requires courts to view with caution any construction that would narrow the coverage of the unemployment compensation laws. *Shoreline Community College Dist. No. 7 v. Employment Sec. Dept.*, 120 Wash.2d 394, 406, 842 P.2d 938, 945 (1992). In this case, the Commissioner made a finding of misconduct disqualifying Mr. Griffith from benefits based on the well-intentioned greeting, “*How’s my favorite Jewish girl*” and subsequent effort to apologize.

This interpretation fundamentally alters and improperly expands the definition of “misconduct” to include non-intentional conduct without prior warning. An employee is only guilty of misconduct when his or her own behavior is such that the “unemployment is in effect voluntary”. *Macey v. State of Washington, Employment Security Dep’t.*, 110 Wn.2d 308, 316, 752 P.2d 372 (1988); See also *The Markam Group, Inc. v. State of Washington, Employment Security Dep’t.*, 148 Wn.App. 555, 558, 200 P.3d 748 (2009). Extending the definition to include Appellant’s conduct in this matter would signal that an employee can be disqualified from benefits for a single negligent comment regardless of intent or purpose, and despite no history of similar conduct or warnings. After this Commissioner’s ruling, an employee who makes a comment, even a friendly comment, that *unknowingly* offends someone will be disqualified from benefits.

Such disqualification was not the intent of the Act. It improperly limits unemployment coverage in the State of Washington and intrudes upon the liberal construction and purpose of the Act.

3. The Commissioner Made An Error Of Law In Finding That The Claimant's Conduct Constituted "Misconduct" As A Matter Of Law.

The Commissioner improperly found that the claimant's conduct was "in willful and wanton disregard of the rights, title, and interests of his employer" which constituted disqualifying misconduct³. (AR 113)

Under the Act, an employee who is discharged due to "misconduct" is disqualified from receiving unemployment benefits. RCW 50.20.066. It is well-established that the guiding principle behind the disqualification from unemployment benefits based on misconduct is the *fault* of the employee. *Tapper v. E.S.D.*, 122 Wash.2d 397, 409, 858 P.2d 494 (1993).

RCW 50.04.294(1) lists four categories of conduct which constitute misconduct.⁴ The applicable sections involve a willful or deliberate action on the part of the claimant. Willful misconduct

³ It is unclear which provision of the statute the commissioner determined that the claimant violated since he quoted the language from RCW 50.04.294(1)(a), but attributed that language incorrectly to RCW 50.04.294(1)(b) which states, "Deliberate violations or disregard of standards of behavior which the employer has the right to expect of an employee."

⁴ "Misconduct" includes, but is not limited to, the following conduct by a claimant:

- (a) **Willful** or wanton disregard of the rights, title and interests of the employer or a fellow employee;
- (b) **Deliberate** violations or disregard of standards of behavior which the employer has the right to expect of an employee;
- (c) Carelessness or negligence that causes or would likely cause serious bodily harm to the employer or a fellow employee;

“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. E.S.D.*, 93 Wn.App. 140, 144-47, 966 P.2d 1282 (1998).

Cases interpreting the definition of “misconduct” where the employee was disqualified from benefits involve blatant, deliberate acts which harm the employer’s business. *Dermond v. E.S.D.*, 89 Wn.App. 128, 947 P.2d 1271 (1997) (employee ignored multiple employer’s warnings and refused to discuss the issue with the supervisor); *Haney v. ESD*, 96 Wn.App. 129, 978 P.2d 543 (1999) (employee initiated hostile confrontations with other employees after several warnings); *Tapper*, 122 Wash.2d 397 (employee suspended for insubordination and then refused to follow mandatory work goals when she returned); *Hamel*, 93 Wn.App. 140 (waiter engaged in multiple incidents of sexual harassment after repeated warnings). There is no evidence that Mr. Griffith **deliberately** violated an employer rule or **intentionally** disregarded the employer’s interest.

In *Hamel*, an employee was terminated after three separate incidents when he made inappropriate comments. *Id.* at 143 (On one occasion, the employee said to a co-worker, “*Well, she can’t do that if you buck her off.*”) After the first comment, the employee was warned that the comment was unacceptable and that further similar behavior would result in termination. The employee then made similar inappropriate comments to customers and was fired. The court held that the employee’s conduct constituted misconduct as he had been warned

(d) Carelessness or negligence of such degree or recurrence to show an **intentional** or substantial disregard of the employer’s interest. (emphasis added)

and should have known that subsequent behavior would harm the employer's interest. *Id.* at 147. Mr. Griffith was never warned for similar conduct. This is not a case of an employee ignoring employer warnings and making obvious offensive comments that would clearly constitute harassment.

In a recent case, this Court made clear that the employer must still show that the claimant's acts were intentional in order to equal misconduct:

RCW 50.04.294(1)(a) provides that an employee commits misconduct when his or her conduct is a "[w]illful or wanton disregard of the rights, title, and interests of the employer." "'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). And "'[w]anton' means 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). Markam must, then, show that Ms. Monroe's acts were intentional to prove that she committed misconduct.

The Markam Group, Inc. v. State of Washington, Employment Security Dep't., 148 Wn.App. 555, 562-63, 200 P.3d 748 (2009).

There is no evidence that Mr. Griffith intentionally or deliberately violated the rights of his employer. There is no evidence that Mr. Griffith displayed extreme reckless or malicious behavior. Instead, his actions were an error in judgment.

The statute specifically excludes unintentional or negligent conduct as misconduct precluding benefits. "Inability, inefficiency, and ordinary negligence are excluded from the definition of misconduct

because they are generally behaviors society does not consider to be the ‘fault’ of the employee.” *Tapper*, 122 Wn.2d at 411.

In addition to requiring intent, RCW 50.04.294(3) expressly excludes certain acts that are not misconduct. These include:

- a. efficiency, unsatisfactory conduct, or failure to perform well as the result of inability or incapacity;
- b. Inadvertence or ordinary negligence isolated instances, or
- c. Good faith errors in judgment or discretion.

“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.” *Wilson v. ESD*, 87 Wn.App. 197, at 203, 940 P.2d 269. In *Wilson*, the court found that the conduct of an employee who failed to log in loose diamonds and lost a diamond on two occasions was mere negligence and 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.*

The actions of Mr. Griffith simply do not rise to the level of “misconduct” as defined by statute and relevant case law. Even if an employee’s actions justify discharge from employment, that does not mean there was sufficient grounds to establish statutory misconduct and disqualify the employee from unemployment benefits. *Id.*

There is no evidence in the record that Mr. Griffith acted with a deliberate intent to violate his employer’s policy or in willful disregard of its interest. The record demonstrates that at worst, Mr. Griffith used poor judgment. While the comment may have been in bad taste, and the decision to go to apologize to Ms. Offenbach-Rough may have been

viewed by his employer as a bad choice, that conduct does not rise to the level of intentional misconduct under the statute.

4. The Findings Of Fact Made By The Commissioner Were Not Supported By Substantial Evidence.

Under RCW 50.32.080, the Commissioner has the authority to review ALJ decisions and is the final authority for determinations of unemployment compensation. The Commissioner is a “reviewing officer” for purposes of RCW 34.05.464(4). *Tapper*, 122 Wn.2d at 404. As a reviewing officer with “all the decision-making power” that the ALJ had, he has the power to make his own findings of fact. RCW 34.05.464(4); *Tapper*, 122 Wn.2d at 404.

Although a Commissioner is empowered to make credibility decisions, he must give due regard to the ALJ’s opportunity to observe the witnesses. RCW 34.05.464(4). In evaluating conflicting stories, the Commissioner “should not simply consider the testimony and demeanor of the conflicting witnesses; rather we should look to the totality of the circumstances presented and the logical persuasiveness of the respective positions in light of the total circumstances.” *In Re Murphy*, Empl. Sec. Comm’r Dec. 2d 750 (1984).

The determination of what constitutes misconduct pursuant to RCW 50.20.060 is a mixed question of law and fact. *Tapper*, 858 P.2d at 402. In analyzing this question, the first step is to identify the factual basis for the determination of misconduct and then determine whether there is substantial evidence to support those factual findings. *Id.* at 403.

Relief is granted from an agency order if it is not supported “by evidence that is substantial when viewed in light of the whole record before the court.” RCW 34.05.570(3); *Terry v. E.S.D.*, 82 Wn.App.

745, 919 P.2d 111 (1996). “Substantial evidence is evidence in sufficient quantum to persuade a fair-minded person of the truth of the declared premises.” *Heinmiller v. Dep’t of Health*, 127 Wn.2d 595, 607, 903 P.2d 1294 (1995).

The administrative record in this case does not support the additional findings of fact entered by Commissioner Sells relating to Mr. Griffith’s credibility.

i. The Administrative Record Does Not Support Additional Finding Of Fact Nos. III & IV That Mr. Griffith Violated The Policy Of His Employer.

The Commissioner found that Mr. Griffith “*repeatedly, in the face of warnings from his employer, violated the employer’s policies relating to abusive and offensive conduct towards customers.*” (AR 107) This finding is solely premised on the prior warning Mr. Griffith received when he and a customer had a confrontation in May 2009 regarding the claim that Mr. Griffith was allegedly banging on the door to make a delivery. (AR 45) That incident was dissimilar to the conduct in July 2009 that led to Mr. Griffith’s termination.

The record is clear that the “Jewish” comment Mr. Griffith made in July 2009 was an isolated mistake and not a pattern of conduct. There is no evidence that his conduct was meant to be offensive or abusive. (AR 42, 29) There is no evidence that Mr. Griffith acted inappropriately when he went to apologize to Ms. Offenbach-Rough (she did not testify at the hearing). Unlike the May 2009 incident which Mr. Griffith described as a “confrontation”, the comment he made in July was a “jovial” comment meant to be endearing. (AR 42) Mr.

Griffith had never made a similar comment, had not been warned about such comments, and it was not a repeated violation of a company policy. (AR 47)

Mr. Griffith made an unintentional mistake. He was remorseful when he learned that the customer was offended. His comment was not abusive, hostile, or meant to be offensive. The isolated incident occurred on one occasion without prior warnings and with no intent to violate the employer's policy. Substantial evidence does not exist in the record to support the factual finding that Mr. Griffith had been repeatedly warned about policy violations.

ii. The Administrative Record Does Not Support Additional Finding Of Fact Nos. I & II That Mr. Griffith Was Not Credible.

The Commissioner made a finding of fact that Mr. Griffith was not credible based solely on the fact that he failed to ask for permission from his employer to apologize to Ms. Offenbach-Rough. (AR 106) The evidence demonstrates that Mr. Griffith told his employer that he intended to apologize to Ms. Offenbach-Rough. (AR 44, 29, 102). The Commissioner held that against Mr. Griffith. Since he never requested permission, the Commissioner felt he lacked credibility by making his intent known, but not asking permission. (AR 106). This minor discrepancy is not a sufficient basis for the finding that Mr. Griffith lacked credibility.

The employer testified (and the investigation notes confirm) that Mr. Griffith stated he would like to apologize and the employer did not instruct or warn him to refrain from doing so. (AR 29, 102) The employer was on notice of Mr. Griffith's intent and if such conduct was not

permissible, Mr. Griffith should have been instructed not to go. The issue is not whether Mr. Griffith asked or not, the issue is that the employer made no statement to him that an apology was inappropriate or a violation of company policy.

The record is replete with statements by Mr. Griffith that were confirmed by the employer and show his sincerity. He admitted to making the comment, "*How is my favorite Jewish girl?*" He testified that he meant no ill will, but intended the comment as a greeting. The employer witness testified that he did not consider the statement to be threatening or abusive. (AR 29) The ALJ, who was in the best position to assess credibility and ask clarifying questions, found Mr. Griffith to be truthful and believable. (AR 87) Once Mr. Griffith found out that his comment offended Ms. Offenbach-Rough, he took responsibility for the comment and acted as any reasonable person would and made the effort to apologize for his actions. The Commissioner's finding to the contrary is not supported by any evidence in this case.

5. Mr. Griffith Should Be Awarded Attorney's Fees and Costs Pursuant to RCW 50.32.160.

Mr. Griffith respectfully requests an award of his reasonable attorney fees and costs in this matter pursuant to RCW 50.32.160. That statute provides that if the court overturns or modifies the Commissioner's decision on appeal, the claimant is entitled to reasonable attorney fees and costs.

In the event that Mr. Griffith prevails, the decision would overturn or modify the Commissioner's decision and he is entitled to an award of attorney fees on appeal.

E. 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 16th day of December, 2010.

Respectfully submitted:

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SUPERIOR COURT OF WASHINGTON, SPOKANE COUNTY

LOREN E. GRIFFITH

Appellant,

vs.

STATE OF WASHINGTON
DEPARTMENT OF EMPLOYMENT
SECURITY

Respondent.

No. 294404

CERTIFICATE OF MAILING

The undersigned certifies that on December 16, 2010 I mailed a copy of the Brief of Appellant to Leah Harris, Assistant Attorney General, at 800 Fifth Ave., Ste. 2000, Seattle, WA 98104, by regular mail, postage prepaid.

Dated: 12/16/2010



Michele A. Robbins