

**FILED**

**JAN 31 2011**

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

NO. 294404-III

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

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LOREN E. GRIFFITH,

Appellant,

vs.

STATE OF WASHINGTON,  
DEPARTMENT OF  
EMPLOYMENT SECURITY,

Respondent.

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**RESPONDENT'S BRIEF**

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## I. INTRODUCTION

A claimant is disqualified from receiving unemployment compensation when he has been discharged from employment for work-related misconduct. When an employer has a reasonable rule, an employee's violation of that rule, particularly following warnings for violating that rule, constitutes work-related misconduct.

Loren E. Griffith, who was employed as a delivery driver by United Natural Foods West, Inc. (UNFI), knew that he was required to conduct himself professionally in the course of his duties. After Griffith engaged in multiple incidents of inappropriate conduct, two of which resulted in his being banned from customers' premises, UNFI discharged Griffith. By failing to follow his employer's rules, Griffith engaged in work-related misconduct because he violated a reasonable employer policy that Griffith either knew or should have known. Because substantial evidence supports the Commissioner's findings of fact, and those findings support the conclusion that Griffith was discharged for disqualifying misconduct under the Employment Security Act, the Department respectfully requests that this Court affirm the Commissioner's decision finding Griffith ineligible for unemployment compensation.

## **II. COUNTERSTATEMENT OF THE ISSUE**

Does a claimant's inappropriate conduct towards a customer constitute disqualifying misconduct under the Employment Security Act when the claimant was well aware of the employer's conduct policies and, in the face of repeated warnings about his conduct with customers, knew or should have known that his conduct could have harmed his employer's interests, and when his discharge-precipitating conduct did in fact harm his employer's interests?

## **III. STATEMENT OF THE CASE**

Griffith was employed by UNFI as a delivery driver from July 21, 2009, through September 10, 2010. AR 10, 83 (Finding of Fact (FF) 1).<sup>1</sup> His duties included making regular deliveries to customers. AR 17. Because the work of delivery drivers necessarily involves frequent interaction with employees of UNFI's customers, UNFI requires its delivery drivers to comport themselves in an ethical and professional manner in order to represent the company well and maintain quality customer service. AR 10, 11, 25, 74-76. Griffith was provided a copy of the employer's conduct policies in a handbook and was further made aware of the policies in warnings from the employer. AR 11.

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<sup>1</sup> For ease of reference, the certified administrative record is referred to as "AR," as the Appellant has designated it his brief.

On June 10, 2007, Griffith engaged in a verbal altercation with one of UNFI's customers. AR 19, 34, 77, 84 (FF 3, 4). The customer lodged a complaint with UNFI, and upon investigating the complaint, Griffith acknowledged that his actions, body language, and responses during this incident were threatening and inappropriate. AR 19, 34, 77. Following this incident, UNFI gave Griffith a verbal warning and reminded him that as a delivery driver, it was his responsibility to represent the company in a positive light in accordance with company policies. AR 19, 77.

On May 18, 2009, UNFI gave Griffith a final warning after it received another complaint from a customer concerning another altercation. AR 19, 24, 33, 76, 84 (FF 3, 5, 6). The customer reported that Griffith was shouting, threatening to not make the delivery or drop the delivery outside, and banging on the customer's door, which resulted in damage to the door. AR 33. As a result, the customer "exiled" Griffith from its premises—he was not permitted back. AR 30, 76. As part of the final warning, UNFI informed Griffith that any further incidents of unacceptable conduct would result in corrective action up to and including termination. AR 76.

Sometime during the last week of July or first week of August 2009, Griffith was making a delivery to a customer and said to one of the customer's employees, Ms. Offenbach-Rough, "How's my favorite Jewish

girl?" AR 18, 43, 50, 84 (FF 7). Offenbach-Rough was offended by the comments, and the incident was reported to UNFI on August 21, 2009. AR 28, 74. On September 2, 2009, Henry Heatherly, a UNFI transportation manager who was tasked with investigating the incident by the employer, met with Griffith. AR 29, 43. Heatherly informed Griffith of the customer's complaint. AR 28. Griffith apparently indicated that he wished he could apologize. AR 29, 44. He did not ask for permission to go apologize, but simply stated that he wanted to. AR 29, 106 (FF II). The employer suspended Griffith pending an investigation of the incident. AR 20, 84 (FF 8).

On September 6, 2009, despite his suspension, Griffith went to the customer's premises in order to apologize to the employee he offended. AR 20-21, 26, 44, 106 (FF III). He approached Offenbach-Rough where she was working behind the counter and told her that he wanted to talk to her. AR 26, 44. She told him that she had to work later than usual, and Griffith replied that he would go get something to eat, read the newspaper, and just wait for her to get off work. AR 44, 48. He parked across the street to wait for her. AR 44, 48. While there, two other employees came out of the store and asked him to leave the premises or they would call the authorities. AR 26, 75.

Later that day, Heatherly received a complaint from the customer informing him that Griffith had come to their location. AR 17, 26, 85 (FF 11). Griffith's actions compromised the investigation, and the customer "exiled" him from their premises. AR 17, 26, 75, 85 (FF 11). This was the second customer in six months to have banned Griffith from their premises. AR 26, 75. Following this final incident, UNFI discharged Griffith for violating its conduct policies. AR 26-27, 75, 85 (FF 11).

As a result of Griffith being "exiled" from customers' premises, the employer incurred additional expenses due to having to rearrange and reschedule delivery routes. AR 11, 17, 35, 107 (FF 4). Griffith's route had to be covered for three to five weeks on an overtime basis until that route could be offered for bidding. AR 35-36.

Griffith was initially granted benefits, but was then denied after the employer provided the Department with additional information. AR 58-65, 119-123. Griffith appealed the Department's decision, and an administrative law judge (ALJ) convened a hearing. The ALJ found that Griffith's conduct did not rise to the level of misconduct. AR 87 (Conclusions of Law (CL) 12, 13). The employer petitioned the Commissioner of the Department for review. AR 93-95.

The Commissioner accepted findings of fact 1-8, 11, and 12 of the ALJ, but did not adopt findings 9, 10, 13, 14, and 15. AR 106. The Commissioner also adopted conclusions of law 1-7 of the ALJ, but did not adopt conclusions 8-15. AR 107. Making an explicit credibility finding, the Commissioner further found that Griffith did not ask Heatherly for permission to go to the customer's premises to apologize to Offenbach-Rough; therefore, his supervisor did not respond to such an inquiry. AR 106 (FF 2). The Commissioner also found that by visiting Offenbach-Rough at her work location on September 6, 2009, Griffith offended her and once again violated the employer's policies. AR 106 (FF 3). The Commissioner concluded that Griffith's discharge-precipitating conduct was a willful disregard of his employer's rights, title and interests. AR 106 (CL). Therefore, Griffith's conduct amounted to misconduct under the Employment Security Act, and he was therefore ineligible to receive unemployment benefits. AR 106 (CL).

Griffith petitioned the superior court for judicial review, and the superior court affirmed the Commissioner's decision. CP 1-7, 41-45. The court concluded that Griffith "intentionally made a comment that he should have known could harm his employer, and he followed that with action that he should have known could harm his employer." CP 42. This appeal followed.

#### IV. STANDARD OF REVIEW

The standard of review is of particular relevance in this case because Griffith challenges the Commissioner's findings of fact, conclusions of law, and credibility determination. Griffith seeks judicial review of the administrative decision of the Commissioner of the Employment Security Department. Judicial review of such decisions is governed by the Washington Administrative Procedures Act (APA) pursuant to RCW 34.05.510 and RCW 50.32.120. The court of appeals sits in the same position as the superior court and applies the APA standards directly to the administrative record. *Smith v. Empl. Sec. Dep't*, 155 Wn. App. 24, 32, 226 P.3d 263 (2010). The court reviews the decision of the Commissioner, not the underlying decision of the ALJ—except to the extent the Commissioner's decision adopted any findings and conclusions of the ALJ's order. *Id.*; *Tapper v. Empl. Sec. Dep't*, 122 Wn.2d 397, 406, 858 P.2d 494 (1993).

The court's review is limited to the agency record. RCW 34.05.558. The Commissioner's decision is considered prima facie correct, and the burden of demonstrating its invalidity is on the appellant. RCW 50.32.150; RCW 34.05.570(1)(a). The court should grant relief “only if it determines that a person seeking judicial relief has been

substantially prejudiced by the action complained of.”  
RCW 34.05.570(1)(d).

**A. Review of Factual Matters**

Judicial review of disputed issues of fact must be limited to the agency record. RCW 34.05.558. The court must uphold an agency’s findings of fact if they are supported by substantial evidence. *Wm. Dickson Co. v. Puget Sound Air Pollution Control Agency*, 81 Wn. App. 403, 411, 914 P.2d 750, 755 (1996). Substantial evidence is evidence that is “sufficient to persuade a rational, fair-minded person of the truth of the finding.” *In re Estate of Jones*, 152 Wn.2d 1, 8, 93 P.3d 147 (2004). Evidence may be substantial enough to support a factual finding even if the evidence is conflicting and could lead to other reasonable interpretations. *Fred Hutchinson Cancer Research Ctr. v. Holman*, 107 Wn.2d 693, 713, 732 P.2d 974 (1987). The reviewing court should “view the evidence and the reasonable inferences therefrom in the light most favorable to the party that prevailed” at the administrative proceeding below. *Tapper v. Empl. Sec. Dep’t*, 122 Wn.2d 397, 407, 858 P.2d 494 (1993). Unchallenged findings are verities on appeal. RAP 10.3(g); *Tapper*, 122 Wn.2d at 407.

The court may not substitute its judgment for that of the agency on the credibility of the witnesses or the weight to be given to conflicting

evidence. *Smith*, 155 Wn. App. at 35; *Davis v. Dep't of Labor & Indus.*, 94 Wn.2d 119, 124, 615 P.2d 1279 (1980). The Commissioner “is authorized to make his own independent determinations based on the record and has the ability and right to modify or to replace an ALJ’s findings, including findings of witness credibility.” *Smith*, 155 Wn. App. at 36 n.2.

**B. Review of Questions of Law**

Questions of law are subject to de novo review. *Tapper*, 122 Wn.2d at 403. However, where an agency has expertise in a particular area, the court should accord substantial weight to the agency’s decision. *Wm. Dickson Co.*, 81 Wn. App. at 407; *Markam Group, Inc. v. State Dep't of Empl. Sec.*, 148 Wn. App. 555, 561, 200 P.3d 748 (2009).

**C. Mixed Questions of Law and Fact**

Whether a claimant was discharged for work-connected misconduct is a mixed question of law and fact. When reviewing a mixed question of law and fact, the court must make a three-step analysis. *Tapper*, 122 Wn.2d at 403. First, the court determines which factual findings below are supported by substantial evidence. *Id.* Second, the court makes a de novo determination of the correct law, and third, it applies the law to the facts. *Id.* As with review of pure issues of fact, the court does not reweigh credibility or demeanor evidence when reviewing factual inferences made by the Commissioner before interpreting the law.

*Wm. Dickson Co.*, 81 Wn. App. at 411. In addition, the court is not free to substitute its judgment of the facts for that of the agency. *Tapper*, 122 Wn.2d at 403.

## V. ARGUMENT

This Court should affirm the Commissioner's decision because substantial evidence supports the findings of fact, and there are no errors of law. The Commissioner properly concluded that Griffith's actions met the definition of disqualifying misconduct set forth in RCW 50.04.294(1).

The Employment Security Act (the Act) was enacted to provide compensation to individuals who are "involuntarily" unemployed "through no fault of their own." RCW 50.01.010; *Tapper*, 122 Wn.2d at 408. If a claimant is to qualify for benefits, the reason for the unemployment must be external and apart from the claimant. *Cowles Publ'g Co. v. Empl't Sec. Dep't*, 15 Wn. App. 590, 593, 550 P.2d 712, 715 (1976). Accordingly, a claimant is disqualified from receiving benefits if he has been discharged for misconduct connected with his work. RCW 50.20.066(1); WAC 192-150-200(1).

In determining the presence or absence of misconduct, the court should decide whether the claimant's unemployment is essentially voluntary because of the claimant's behavior. *Galvin v. Empl. Sec. Dep't*, 87 Wn. App. 634, 643, 942 P.2d 1040 (1997). The misconduct

disqualification rests on the policy that it is unfair to require an employer to compensate employees who engage in conduct harmful to their interests. *Tapper*, 122 Wn.2d at 409. The initial burden is on the employer to show that the claimant was discharged for disqualifying misconduct. *Nelson v. Dep't of Empl. Sec.*, 98 Wn.2d 370, 374-75, 655 P.2d 242 (1982). On appeal, it is the appellant's burden to establish that the Commissioner's decision was in error. RCW 34.05.570(1)(a); *Smith*, 155 Wn. App. at 32.

**A. Substantial evidence supports the Commissioner's findings of fact.**

Under the APA, the officer reviewing the initial order issued by the ALJ exercises all the decision-making power had he or she presided over the hearing. RCW 34.05.464(4). "The Commissioner has the power to make his or her own findings of fact and in the process set aside or modify the findings of the ALJ." *Tapper*, 122 Wn.2d at 404. Thus, this court reviews only those findings of the ALJ that the Commissioner adopted and, conversely, does not review findings of the ALJ that the Commissioner did not adopt. *Id.* at 406. Rather, this Court considers whether the findings entered by the Commissioner are supported by substantial evidence. *Id.*; RCW 34.05.464(4).

Griffith does not challenge the Commissioner's findings that he received two conduct-related warnings prior to his discharge; that he said, "How's my favorite Jewish girl" to a customer's employee; that the comment apparently offended her and a complaint was lodged; that his employer suspended him pending an investigation into the incident; that he returned to the customer's premises while he was suspended; or that while waiting in his car for Offenbach-Rough to get off work, other employees of the customer told him to leave the premises or authorities would be called. Accordingly, these findings are verities.

**1. Substantial evidence supports the Commissioner's finding that Griffith violated his employer's policies following warnings about his conduct.**

As discussed, Griffith's duties involved frequent interaction with UNFI's customers. Accordingly, UNFI requires its delivery drivers to comport themselves in an ethical and professional manner in order to represent the company well and maintain quality customer service. AR 10, 11, 25, 74-76. Griffith not only was provided a copy of the employer's conduct policies in a handbook, but he further was made aware of the employer's conduct requirements through prior warnings about his behavior. AR 11, 19, 32, 76, 77. Specifically, those prior warnings advised Griffith that his past conduct, including his "attitude, comments and professionalism . . . were inconsistent with UNFI company policies in

procedures,” AR 76, and that it was his “responsibility to represent the company in a positive manner in conjunction with . . . company policies.” AR 77. Thus Griffith was on heightened notice of the employer’s conduct policies and that he needed to be careful with his words and body language when interacting with customers; yet he disregarded these instructions, made a comment that offended a customer’s employee, and then returned to the employee’s work site while he was suspended pending the investigation. AR 20-21, 26, 28, 44, 75, 84 (FF 7, 8), 106 (FF III). The evidence in the record, therefore, supports the Commissioner’s findings that Griffith violated the employer’s policies in the face of warnings from his employer. AR 107 (FF 3, 4). Substantial evidence further supports the Commissioner’s finding that Griffith’s conduct led to his “exile” from certain customer locations and that the employer incurred additional expenses as a result. AR 84 (FF 5), 85 (FF 11), 107 (FF IV).

**2. Substantial evidence supports the Commissioner’s finding that Griffith did not ask his employer for permission to go apologize to the customer.**

Substantial evidence also supports the Commissioner’s finding that Griffith did not ask his employer for permission to return to Offenbach-Rough’s work site to apologize. AR 106 (FF II). Griffith seems not to disagree with the Commissioner that he never asked for permission to go apologize to Offenbach-Rough. Br. of Appellant at 14. He does,

however, assert that the record demonstrates he “told his employer that he intended to apologize to Ms. Offenbach-Rough.” *Id.* It does not. Responding to the question, “And did you tell him that you’d like to apologize to her?” Griffith said yes. AR 44. And Griffith’s supervisor testified, “I believe Mr. Griffith stated that he wished that he could apologize.” AR 29. Thus, the evidence establishes that Griffith simply stated that he *would like* to apologize, not that he intended to travel to Montana in order to do so while he was suspended. AR 29, 44. While it is true that he was not told that he could not apologize, Griffith did not ask for permission. AR 29, 44, 106 (FF 1). Just because the employer did not explicitly instruct Griffith not to return to the customer’s premises does not mean that it was appropriate for Griffith to do so while he was suspended pending UNFI’s investigation into the incident. AR 20. A reasonable person under the circumstances would understand that while on suspension, it would be inappropriate to go to Offenbach-Rough’s workplace in Montana to apologize, wait for her there for potentially hours, and then leave a note on the windshield of her car after being asked to leave or the customer would call the authorities. AR 20-21, 26, 44, 48, 75, 84 (FF 8), 106 (FF III). Substantial evidence thus supports the Commissioner’s finding that Griffith did not ask for permission to return to the customer’s premises to apologize.

The Court should defer to the Commissioner's general credibility finding. The Commissioner exercises all the decision-making power he or she would have had if he or she had presided over the hearing. RCW 34.05.464(4). Although the Commissioner must give "due regard" to the ALJ's opportunity to observe the witnesses, *id.*, this "does not require a reviewing officer to defer to an ALJ's credibility determination." *Smith*, 155 Wn. App. at 36 n.2 (citing *Regan v. Dep't of Licensing*, 130 Wn. App. 39, 59, 121 P.3d 731 (2005)). Rather, the Commissioner is authorized to make his or her own findings of witness credibility. *Id.*

Even if the court does not accept the Commissioner's finding of fact II, which found that Griffith never asked his supervisor for permission to go apologize to Offenbach-Rough, that should not change the court's analysis of this case. Griffith concedes that he did not explicitly ask his supervisor for such permission. Commr.'s R. at 44; Br. of Appellant at 14. Therefore, the Commissioner's finding is not in dispute, and the specific credibility finding in finding of fact II is not material to the court's misconduct analysis.

**B. The Commissioner properly concluded that Griffith's conduct amounted to disqualifying misconduct under the Act.**

As discussed, a person who has been discharged from employment for misconduct is ineligible to receive unemployment benefits.

RCW 50.20.066(1). Griffith's conduct, in the face of repeated warnings, rose to the level of disqualifying misconduct.

Under the Act, misconduct includes, but is not limited to:

- (a) Willful or wanton disregard of the rights, title, and interests of the employer or 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; or
- (d) Carelessness or negligence of such degree or recurrence to show an intentional or substantial disregard of the employer's interest.

RCW 50.04.294(1). The Act goes on to provide illustrative examples of behavior that constitutes misconduct. Notably, the Act explicitly states that 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" is to be considered misconduct because it "signifies a willful or wanton disregard of the rights, title, and interests of the employer." RCW 50.04.294(2)(f). An employee knew or should have known about a company rule if he was provided an employee orientation on company rules or was provided a copy or summary of the rule in writing. WAC 192-150-210(5); *see also Smith*, 155 Wn. App. at 34.

Additionally, an employee's act or behavior is connected with his or her work if that act or behavior results in harm or creates the potential for harm to the employer's interests. WAC 192-150-200(2). In determining whether an employee's work-related misconduct was harmful, "harm" may be tangible, such as damage to equipment or property, or intangible, such as damage to the employer's reputation or a negative impact on staff morale. WAC 192-150-200(2). An employee's voluntary refusal to follow an employer's reasonable instructions directly impacts that employee's work performance and the general work force. *Harvey v. Empl. Sec. Dep't*, 53 Wn. App. 333, 339, 766 P.2d 460 (1988). The employee's specific motivations for refusing the employer's instruction, however, are not relevant. *Hamel v. Empl. Sec. Dep't*, 93 Wn. App. 140, 146, 966 P.2d 1282 (1998), *review denied*, 137 Wn.2d 1036, 980 P.3d 1283 (1999).

1. **Griffith's conduct amounted to a willful disregard of UNFI's interests, a deliberate violation or disregard of the standards of behavior UNFI had the right to expect, and a violation of a reasonable company rule known by Griffith.**

Here, the Commissioner concluded that Griffith's discharge-precipitating conduct was a willful or wanton disregard of the rights, title and interests of his employer. RCW 50.04.294(1)(a); AR 107. Although the Commissioner cited RCW 50.04.294(1)(b) rather than (1)(a), this

Court could also conclude that Griffith's conduct was in deliberate disregard of standards of behavior that the employer had a right to expect under subsection (1)(b). Griffith was well aware of the employer's conduct policies and was on notice that his behavior had been in violation of those policies. Rather than taking extra care to represent UNFI in a professional manner so as not to jeopardize its business, Griffith made an inappropriate comment to a customer less than three months after receiving a final warning about his conduct. AR 50, 76, 77. Then, after learning that his comment offended the customer and that he was on suspension pending an investigation into the incident, he returned to the customer's premises. AR 20-21. In doing so, Griffith willfully disregarded UNFI's interest in maintaining strong, professional relationships with its customers and, as a result, was "exiled" from the customer's premises. AR 17, 26, 75.

Griffith cites *Hamel* to support his case, and the Department agrees that *Hamel* is applicable. Br. of Appellant at 9-10. In that case, *Hamel*, a server at Red Robin who was familiar with Red Robin's strict policy prohibiting sexual harassment, was discharged after the third incident of making inappropriate comments to customers or fellow employees following two warnings from the employer. *Hamel*, 93 Wn. App. at 142-43. The third and final comment was directed toward a young female

customer who was dining with her softball coach. *Id.* at 143. After the coach scolded the girl for pulling up her jacket and thrusting out her chest to show the team emblem on her shirt, Hamel said, “Well, that’s okay, it’s probably hormones that go up and down.” *Id.* Realizing his comment may have been offensive, Hamel apologized. *Id.* Hamel was terminated.

Hamel contended that he did not know that his conduct was inconsistent with his employer’s interest. *Id.* at 147. However, finding that Hamel’s conduct amounted to misconduct under the Act, the court held that while an employee must voluntarily disregard the employer’s interest in order to satisfy misconduct, “his specific motivations for doing so, however, are not relevant.” *Id.* at 146. The court further held that an employee acts with willful disregard of his employer’s interests “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.” *Id.* at 146-47. Applying the “should have known” standard, the court concluded that in the face of repeated warnings, a reasonable person would have known that his conduct would jeopardize his employer’s interest. *Id.* Hamel’s conduct, therefore, was disqualifying misconduct. *Id.*

Like the employee in *Hamel*, although Griffith may not have intended to harm UNFI, he intentionally made an admittedly inappropriate comment to a customer. Griffith's conduct was in willful disregard of UNFI's interests in maintaining successful relationships with its customers when, following two warnings about his conduct, he made an inappropriate comment to a customer's employee then returned to the customer's work site despite his suspension. Just as the employee in *Hamel*—where, despite the fact that he recognized his comment was offensive and apologized, his conduct was nevertheless deemed misconduct—in the face of repeated warnings, Griffith should have known that his conduct would jeopardize UNFI's interests. *Hamel*, 93 Wn. App. at 143, 147; *see also Smith*, 155 Wn. App. at 37 (“[T]he Commissioner was not required to find that Smith intended to harm his employer's reputation; it is sufficient that Smith intentionally performed an act in willful disregard for its probable consequences.”). Griffith's conduct, therefore, amounted to disqualifying misconduct.

Griffith argues that because his discharge-precipitating conduct was not identical to the conduct for which he had been warned previously, his comments and conduct were merely an error in judgment. Br. of Appellant at 13. First, no case holds that a claimant's discharge-precipitating conduct must be *identical* to prior policy-violating conduct in

order to amount to misconduct. Second, each of the incidents for which Griffith received warnings and was ultimately discharged involved a violation of the UNFI's requirement that its delivery drivers act courteously and professionally when interacting with customers. Each incident involved Griffith's inappropriate and unprofessional behavior towards a customer. Griffith was well aware of UNFI's conduct requirements, as discussed above, and he failed to comport himself in accordance with those requirements, despite being warned that a further incident could result in discharge.

**2. Griffith's conduct was not the result of an inability to perform to his employer's standards or mere inadvertence or incompetence.**

As discussed above, Griffith repeatedly violated his employer's reasonable rule after multiple warnings, thereby demonstrating willful disregard of the employer's interest. His conduct was not the result of an inability to perform to the employer's standards, and thus his behavior does not meet the exception to misconduct provided in RCW 50.04.294(3).

In his brief, Griffith cites *Markam v. State Dep't of Empl. Sec.*, 148 Wn. App. 555, 200 P.3d 748 (2009), for the proposition that a claimant's actions must be intentional in order to amount to misconduct. Br. of Appellant at 10. In that case, an employee was discharged primarily

because, as the Commissioner found, “she lacked the skills that were necessary to properly perform her job.” *Markam*, 148 Wn. App. at 563. Because she did not have the appropriate skills her job required, the employee made several mistakes. *Id.* at 563-64. The employee’s mistakes were not intentionally made. Rather, the employee tried to perform to the employer’s standards but was unable to do so. *Id.* The Commissioner concluded that her conduct did not amount to misconduct, and the court of appeals agreed. *Id.* at 564. The court concluded that the mistakes she made were simply the result of “[i]nefficiency, unsatisfactory conduct, or failure to perform well as the result of inability or incapacity.” *Id.* (quoting RCW 50.04.294(3)).

Unlike the claimant’s conduct in *Markam*, Griffith’s conduct was not the result of his simply lacking the skills necessary to perform his job properly. Griffith committed an intentional act that he knew or should have known could harm his employer’s interests.<sup>2</sup> *Hamel*, 93 Wn. App. at 146-47. Under *Hamel*, Griffith’s conduct amounted to disqualifying misconduct.

Griffith also cites *Wilson v. Empl. Sec. Dep’t*, 87 Wn. App. 197, 940 P.2d 269 (1997), to argue that his conduct did not amount to

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<sup>2</sup> And the evidence shows that Griffith’s conduct did in fact harm his employer as UNFI was forced to rearrange and reschedule delivery routes and cover Griffith’s route on an overtime basis for three to five weeks as a result of his being “exiled” from the customer’s premises. AR 11, 17, 35, 107 (FF 4).

misconduct under the Act. Quoting *Wilson*, he states, “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.” Br. of Appellant at 11; *Wilson*, 87 Wn. App. at 203. In the present case, the Commissioner found that Griffith’s conduct *was* in defiance of a specific policy, and, as discussed above, substantial evidence supports that finding. Moreover, Griffith’s conduct was a part of “a history of repetition after warnings.” *Wilson*, 87 Wn. App. at 203. Griffith’s conduct was a part of a pattern of offensive interactions with UNFI’s customers, two of which resulted in Griffith being banned from customers’ premises. As such, Griffith’s conduct amounted to disqualifying misconduct under the Act. RCW 50.04.294(1). The Commissioner’s decision, therefore, should be affirmed.

**3. Griffith’s conduct also amounted to carelessness or negligence to such a degree or recurrence to show an intentional disregard of UNFI’s interests.**

In applying the law to the established facts, this Court could also conclude that Griffith’s conduct amounted to carelessness or negligence to such a degree or recurrence to show an intentional disregard of the employer’s interests. RCW 50.04.294(1)(d). This Court may apply the law de novo to facts supported by substantial evidence. *Tapper*, 122 Wn.2d at 403. Given the employer’s policies and repeated warnings,

Griffith knew or should have known that he needed to be careful with his language and conduct with customers. Thus, in addition to Griffith's conduct violating a company rule he knew or should have known, his repeated inappropriate behavior, in the face of warnings from UNFI, amounted to recurring careless conduct such that it demonstrated an intentional disregard of UNFI's interests. *See Smith*, 155 Wn. App. at 36. Therefore, the Commissioner's decision should be affirmed.

**C. The Court should not award attorney fees unless it reverses or modifies the Commissioner's decision.**

Reasonable attorney fees in connection with judicial review may be recovered and paid from the unemployment administration fund "if the decision of the commissioner shall be reversed or modified." RCW 50.32.160. Accordingly, Griffith is only entitled to an award of attorney fees if this Court reverses or modifies the Commissioner's Decision.

## **VI. CONCLUSION**

Griffith's discharge-precipitating misconduct was his having returned to Montana, while on suspension, to apologize to a customer he offended, which resulted in his being "exiled" from a customer's premises for the second time in six months. The Commissioner properly concluded that this conduct was work-connected misconduct as it was a willful

disregard of his employer's interests, a deliberate disregard of the standards of behavior the employer had a right to expect, a violation of a reasonable company rule Griffith knew or should have known, and carelessness or negligence of such a degree or recurrence to show a substantial disregard of the employer's interests. RCW 50.04.294(1)(a), (b), (c), (2)(f). This was the third instance of inappropriate and unprofessional behavior, and the second instance that resulted in actual harm to his employer's business interests. Accordingly, the Department respectfully requests that this Court affirm the Commissioner's decision disqualifying Griffith from unemployment compensation.

RESPECTFULLY SUBMITTED this 20th day of January, 2011.

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**COURT OF APPEALS FOR DIVISION III  
STATE OF WASHINGTON**

LOREN E. GRIFFITH,

Appellant,

vs.

STATE OF WASHINGTON  
DEPARTMENT OF  
EMPLOYMENT SECURITY,

Respondent.

DECLARATION OF  
SERVICE BY  
MAILING

2011 JAN 28 PM 4:39

I, ROXANNE IMMEL, declare as follows:

1. That I am a citizen of the United States of America, a resident of the State of Washington, over the age of eighteen (18) years, and not a party to the above-entitled action.

2. That on the 28 day of January 2011, I caused to be served by mailing a true and correct copy of Respondent's Brief, with proper postage affixed thereto to:

GENEVIEVE MANN  
316 W BOONE AVE, STE 380  
SPOKANE, WA 99201-2346

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

Dated this 20 day of January 2011 in Seattle,  
Washington.

A handwritten signature in cursive script, appearing to read "Robert J. Hummel", written over a horizontal line.