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COURT OF APPEALS, DIVISION I
STATE OF WASHINGTON
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NO. 70163-1

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

KATHERINE CANNING,

Respondent,

v.

STATE OF WASHINGTON DEPARTMENT OF EMPLOYMENT
SECURITY,

Appellant,

REPLY BRIEF OF APPELLANT

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ORIGINAL

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I. INTRODUCTION

Respondent Katherine Canning knew or should have known of her employer's drug and alcohol free workplace policy. Nevertheless, she violated the policy when she intentionally brought marijuana candy onto her employer's premises and delivered it to her coworker, who operated potentially hazardous machinery in his work as a meat cutter. The Commissioner correctly concluded that Canning's actions constituted misconduct and that it was not reasonable for Canning to believe her actions were acceptable under company policy.

Contrary to Canning's argument, neither the Employment Security Act (Act) nor its interpretative regulation require a specific intent to violate a policy or repeated warnings for disqualifying misconduct. Under established precedent, Canning's subjective reasons for bringing marijuana-infused candy to her meat-cutting workplace are irrelevant. Under the plain statutory language of the Act, Canning committed misconduct because she intended to and did bring marijuana candy to her workplace in violation of her employer's drug and alcohol free workplace policy, of which she knew. Liberal construction does not modify the plain statutory language. This Court should affirm the Commissioner's decision.

II. ARGUMENT IN REPLY

A. **Canning Committed Misconduct Per Se When She Violated A Reasonable Company Rule Of Which She Knew Or Should Have Known**

Under the plain language of the Employment Security Act (Act), a claimant commits misconduct per se when she violates a reasonable company rule, of which she knew or should have known. RCW 50.04.294(2)(f); *Daniels v. Dep't of Emp't Sec.*, 168 Wn. App. 721, 728, 281 P.3d 310 (2012). Canning does not dispute that the employer's drug and alcohol free workplace policy was reasonable, that she knew of the rule, or that she violated the employer's policy. Instead, she contends that her violation was not "willful," and an employee commits misconduct in relation to an employer rule *only* when the employee's violation of the rule was "intentional, grossly negligent, or took place after notice or warnings." Br. of Respondent at 13-14. Canning is wrong. Her subjective motivations for bringing marijuana candy to her workplace are irrelevant in the misconduct inquiry. See *Griffith v. Dep't of Emp't Sec.*, 163 Wn. App. 1, 11, 259 P.3d 1111 (2011). Nor does the misconduct statute require prior warnings for Canning's violation of her employer's drug and alcohol free workplace policy to constitute misconduct. RCW 50.04.294(2)(f). Canning committed misconduct because she intended to and did bring marijuana candy to her employer's workplace in

violation of her employer's drug and alcohol free workplace policy, of which she knew or should have known. RCW 50.04.294(2)(f).

Canning's argument improperly adds requirements not contained in the plain language of RCW 50.04.294(2)(f). In interpreting a statute, this Court looks first to the plain language of the statute: if the plain language of the statute is unambiguous, then the Court's inquiry is at an end and the statute is to be enforced in accordance with its plain meaning. *State v. Armendariz*, 160 Wn.2d 106, 110-11, 156 P.3d 201 (2007) (citing *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003)). Here, the Act clearly states:

The following acts *are considered misconduct* because the acts signify a willful or wanton disregard of the rights, title, and interests of the employer or a fellow employee. These acts *include*, but are not limited to:

...

Violation of a company rule if the rule is reasonable and if the claimant knew or should have known of the existence of the rule[.]

RCW 50.04.294(2)(f) (emphasis added). Nothing in this statutory language requires a specific intent to violate a rule or prior warnings. The Commissioner's decision should be affirmed.

1. Misconduct does not require a specific intent to violate a company rule

Contrary to Canning's argument, the Department's interpretative regulation does not and cannot change the plain language of

RCW 50.04.294(2)(f). Under WAC 192-150-205, “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.”

Under the regulation, willfulness does not require a specific intent to violate a rule or to harm the employer. Rather, an employee acts willfully when they know of their employer’s or co-worker’s rights, know or should know that certain conduct would violate those rights, and nevertheless acts intentionally in a manner that disregards their employer’s or co-worker’s rights. *Hamel v. Emp’t Sec. Dep’t*, 93 Wn. App. 140, 146-47, 966 P.2d 1282 (1998). Further, a more specific provision interpreting RCW 50.04.294(2)(f) states:

[Y]ou knew or should have known about a company rule if you were provided an employee 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 co-workers, and the rule is conveyed or posted in a language that can be understood by you.

WAC 192-150-210(5).

Canning unpersuasively attempts to distinguish this case from *Hamel* and *Griffith*, 163 Wn. App. 1, arguing that in those cases, the claimants “were both terminated after several violations and repeated warnings, making the willful nature of their actions plainly apparent and

undeniable.” Br. of Respondent at 18. But in *Hamel*, the court expressly disagreed with appellate decisions that held a rule violation must be intentional, grossly negligent, or continue to take place after notice or warnings in order for the rule violation to constitute misconduct. 93 Wn. App. at 148.

Instead, the court in *Hamel* reasoned that an employee acts with willful disregard when he is aware of his employer’s interest; knows or should have known that certain conduct jeopardizes that interest; but nonetheless intentionally performs the act, willfully disregarding its probable consequences. *Id.* at 146-47. Similarly, in *Griffith*, the employee committed misconduct because he intentionally behaved in a manner that offended a customer, which led to his banishment from his customer’s location. *Griffith*, 163 Wn. App. at 10. “Whether he understood that he was behaving in an offense manner [was] irrelevant.” *Id.* Under the standard set forth in *Hamel* and *Griffith*, Canning committed misconduct because she was aware of her employer’s interest in a drug and alcohol free workplace, as expressed in its policy; knew or should have known that bringing marijuana candy to work jeopardized that interest; but nonetheless intentionally brought marijuana candy to the workplace, willfully disregarding the probable consequences of her actions. Whether she understood she was violating her employer’s policy is irrelevant.

To support her argument, Canning relies on court decisions issued under a pre-2003 amendment to the statute that defines misconduct.¹ Br. of Respondent at 14-15; Laws of 2003, 2nd Spec. Sess., ch. 4, § 6. When reviewing claims under a new statute, courts should look to prior judicial decisions on the subject only to the extent that these decisions do not conflict with the new standards. *See generally Clark v. Payne*, 61 Wn. App. 189, 194, 810 P.2d 931 (1991); *Neil F. Lampson Equip. Rental & Sales, Inc. v. W. Pasco Water Sys., Inc.*, 68 Wn.2d 172, 175-76, 412 P.2d 106 (1966) (noting that new legislation is presumed to be in line with prior judicial decisions absent an indication that the Legislature intended to completely overrule prior case law). However, to the extent that prior cases conflict with the clear legislative intent of a new statute, they will be overruled. *See generally Clark*, 61 Wn. App. at 194; *Neil F. Lampson Equip. Rental & Sales, Inc.*, 68 Wn.2d at 175-76.

For example, Canning relies on *Willard v. Employment Security Dep't*, 10 Wn. App. 437, 517 P.2d 973 (1974). Br. of Respondent at 15. However, that case involved employees who refused to obey an employer's reasonable order. *Willard*, 10 Wn. App. at 446-47. Under the current version of the Act, such acts would likely constitute a different

¹ In 2003, the legislature amended the Act, changing the definition of misconduct and adding the examples of misconduct per se that are present in the current version of the statute. Laws of 2003, 2nd Spec. Sess., ch. 4, § 6.

example of misconduct per se, insubordination under RCW 50.04.294(2)(a). Under RCW 50.04.294(2)(a), misconduct per se includes “[i]nsubordination showing a deliberate, willful, or purposeful refusal to follow the reasonable directions or instructions of the employer.”

Under the plain language of the Act, Canning committed misconduct when she violated her employer’s reasonable drug and alcohol free workplace policy, of which she knew or should have known. Certified Appeal Board Record (CABR)² at 16, 77; Finding of Fact (FF) I; *see also Smith v. Emp’t Sec. Dep’t*, 155 Wn. App. 24, 226 P.3d 263 (2010) (employee should have known of existence of rule against recording without consent when claimant attended a training seminar addressing the employer’s rule). Her actions signified a willful or wanton disregard of the rights, title, and interests of her employer and her coworkers. In implementing this reasonable policy, the employer made known to its employees that the employer had an interest in a safe, drug and alcohol free workplace. Nevertheless, Canning intentionally acted in a manner that disregarded her employer’s and fellow employees’ interests when she brought marijuana candy onto her employer’s premises.

² The superior court transmitted the Certified Appeal Board Record (CABR) as a stand-alone document. See Index to Clerk’s Paper’s (CP). Because it is separately paginated from the clerk’s papers, this brief cites to the appeal board record as “CABR.”

2. A single violation of a reasonable employer rule amounts to misconduct under the Act

Canning also incorrectly suggests that multiple violations or previous warnings are required for a claimant's conduct to amount to misconduct.³ Br. of Respondent at 16. Her reliance on *Daniels*, 168 Wn. App. 721, is misplaced. Br. of Respondent at 16. In *Daniels*, the Court analyzed whether the claimant committed misconduct per se for repeated inexcusable tardiness following warnings by the employer *and* for a violation of a reasonable company rule of which he knew or should have known. *Daniels*, 168 Wn. App. at 728-32.

In contrast to the violations here, *Daniels* involved repeated inexcusable tardiness following warnings from the employer. But in order for tardiness to amount to misconduct, the Act specifically requires tardiness to be repeated and follow warnings by the employer. RCW 50.04.294(2)(b).⁴ The Department's regulation clarifies that the employer must have warned the claimant at least twice. WAC 192-150-210(1). In contrast, the Act has no such requirement that a violation of a reasonable company rule be "repeated" to amount to misconduct, RCW

³ Though Canning concedes, as she must, that "[i]t is certainly true that a warning need not precede an employee's actions for misconduct to be found." Br. of Respondent at 27 n.10.

⁴ Unexcused absences must also be "repeated" in order to amount to misconduct. RCW 50.04.294(2)(d).

50.04.294(2)(f), and this Court must presume the legislature “says what it means and means what it says.” *State v. Costich*, 152 Wn.2d 463, 470, 98 P.3d 795 (2004).

Furthermore, in *Griffith*, the court did not determine the claimant had committed misconduct because he had harmed his employer’s interests on three separate occasions. 163 Wn. App. at 4-5. The court acknowledged that the employer “could have discharged Mr. Griffith *for misconduct on either of the first two occasions.*” 163 Wn. App. at 10-11 (emphasis added).

Although *Canning* points to the liberal construction rule, liberal construction does not authorize courts to interpret the statute inconsistent with its plain statutory language. *See Harris v. Dep’t of Labor & Indus.*, 120 Wn.2d 461, 474, 843 P.2d 1056 (1993) (liberal construction rule does not apply to unambiguous terms in statutes). Nor does liberal construction apply to “questions of fact.” *Ehman v. Dep’t of Labor & Indus.*, 33 Wn.2d 584, 595, 206 P.2d 787 (1949); *Hastings v. Dep’t of Labor & Indus.*, 24 Wn.2d 1, 13, 163 P.2d 142 (1945). Where inexcusable tardiness and absences must be repeated to amount to misconduct, but company rule violations must not, *Canning*’s single instance of bringing an illegal drug onto her employer’s premises in violation of the employer’s policy constituted misconduct under the plain language of the Act.

B. Canning Committed Misconduct When She Brought Marijuana Candy Onto Her Employer's Premises, Deliberately Disregarding Standards Of Behavior Which Her Employer Had A Right To Expect Of Her

Canning also contends that her actions do not amount to a deliberate disregard of standards of behavior which her employer had a right to expect of her as an employee. Br. of Respondent at 20. As discussed, the employer had a serious interest in maintaining a safe, drug and alcohol free workplace, and it made this interest known through its policy prohibiting employees from possessing illegal drugs and alcohol while on the employer's premises. Nevertheless, Canning disregarded the employer's policy when she deliberately brought marijuana candy onto her employer's workplace and delivered it to a coworker who was still working his shift as a meat cutter. Canning's conduct constituted misconduct under RCW 50.04.294(1)(b).⁵

C. Canning's Actions Constitute Misconduct, Not A Good Faith Error In Judgment

Canning's actions did not constitute a good faith error in judgment under RCW 50.04.294(3)(c). The Commissioner correctly concluded that it was not reasonable for Canning to believe it was acceptable under company policy for her to bring marijuana onto her employer's premises

⁵ Under RCW 50.04.294(1)(b), misconduct includes "[d]eliberate violations or disregard of standards of behavior which the employer has the right to expect of an employee."

and give it to a coworker because the coworker stated he had a prescription. CABR at 78; Conclusion of Law (CL) VI.

Canning relies on *Wilson v. Employment Security Dep't*, 87 Wn. App. 197, 940 P.2d 269 (1997), as support for her argument that her actions constituted a good faith error in judgment, not misconduct. Br. of Respondent at 22-23. Her reliance on *Wilson* is misplaced.

Wilson, unlike this case, did not involve a violation of an employer policy. In *Wilson*, the claimant, who managed a jewelry store, was discharged after two separate incidents resulting in the loss of two diamonds. *Wilson*, 87 Wn. App. at 198–99. In the first incident, the claimant failed to log five loose diamonds into his stock and failed to perform a daily diamond count and, consequently, lost a diamond. *Id.* at 198. In the second incident, the claimant was given a loose diamond in a clear plastic bag and later accidentally threw away the bag containing the diamond. *Id.* at 199. The court concluded that the claimant's conduct did not constitute misconduct because the employee's actions only "amounted to negligence, incompetence, or an exercise of poor judgment." *Id.* at 202.

In reaching its conclusion, the court relied on the fact that the claimant did not violate a specific company policy. *Id.* at 203. The employer did not have a rule or policy requiring that a loose diamond be logged or placed in the safe within a specific time after an employee

received it. *Id.* The court reasoned, “Had such a policy existed and [the claimant] deliberately chosen not to act within the time specified because, for example, he disputed the necessity of so acting, then a finding of misconduct under the statute would be easier to make.” *Id.* The court also noted that “[a]ctions 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.* (emphasis added).

Therefore, even under the prior definition of misconduct, had there been a policy requiring Wilson to log loose diamonds or promptly place them in the safe, the court likely would have found his conduct to be misconduct. Here, the employer did have a policy that expressly prohibited employees from possessing illegal or illicit drugs on the employer’s premises. Canning acted in defiance of this specific policy when she brought marijuana candy onto her employer’s premises. Even the *Wilson* court likely would have concluded her actions constituted statutory misconduct.

Finally, Canning contends that whether she made a good faith error in judgment turns on credibility determinations, which the Administrative Law Judge (ALJ) was in the best decision to resolve. Br. of Respondent at 28. Canning points to the ALJ’s conclusion that Canning’s behavior was not willful because she subjectively believed her actions were “okay”

under company policy. CABR at 61; CL 5. Here, the appellate court reviews the Commissioner's decision, not the underlying ALJ order, and the Commissioner did not adopt the ALJ's Conclusion of Law Number 5.⁶ See *Employees of Intalco Aluminum Corp. v. Emp't Sec. Dep't*, 128 Wn. App. 121, 126, 114 P.3d 675 (2005).

The Commissioner has "all the decision-making power" and is the final fact-finding authority. RCW 34.05.464(4); *Tapper v. Emp't Sec. Dep't*, 122 Wn.2d 397, 406, 858 P.2d 494 (1993). Both the ALJ and the Commissioner listen to the witnesses telephonically or by recording. RCW 34.05.464(4) does not require a reviewing officer to defer to an ALJ's credibility determinations. *Smith*, 155 Wn. App. at 35 n.2. "Rather, a reviewing officer 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." *Id.* This Court must give deference to the Commissioner's, not the ALJ's credibility determinations.

More importantly, whether Canning believed her actions were acceptable under her employer's policy is not critical to the issue of whether Canning committed misconduct. Instead, whether Canning

⁶ The Commissioner did adopt the ALJ's finding that "at the time [Canning] though[t] it was okay because the co-worker had a prescription." CABR at 60, 77; FF 8. However, the Commissioner ultimately concluded that Canning's subjective belief was not reasonable. CABR at 78; CL VI.

committed misconduct turns on whether her belief that she acted in compliance with her employer's rule was reasonable. See RCW 50.04.294(2)(f) (employee commits misconduct when she violates a company rule if the rule is reasonable and if the claimant knew *or should have known* of the existence of the rule).

Courts assume that employees know what a "reasonable person" would have known. See *Hamel*, 93 Wn. App. at 147 (employee's actions rose above simple negligence and constituted disqualifying misconduct when employee intentionally made comments that a "reasonable person" would have known could harm his employer). The Commissioner correctly concluded Canning's belief that it was acceptable under company policy to bring marijuana onto the employer's property and give it to a coworker was not reasonable. At the time, her actions violated the criminal code, the employer's drug and alcohol free workplace policy expressly prohibited her actions, and the acting meat manager did not approve of Canning's actions. See Amended Br. of Appellant at 13-14, 21-23.

Canning contends that it was reasonable to believe the coworker's prescription made it acceptable under the law and company policy for the coworker to be in possession of the candy at work. Br. of Respondent at 25-26. Notably, she fails to address her own possession of the marijuana

candy in her workplace, which at the time, clearly violated state and federal law and company policy. See Br. of Appellant at 13-14, 21-22.

Canning also asks the Court to take judicial notice of the changing social attitudes in the State of Washington toward the use of marijuana. Br. of Respondent at 26, n.9. But Initiative 502, which became effective in December 2012, repealed state laws criminalizing the private possession and use of marijuana *after* Canning's conduct in March 2012 and *after* the Commissioner's decision in June 2012. Laws of 2013, ch. 3, § 1, 19. Thus, contrary to Canning's assertion, the employer's rule prohibiting the possession of marijuana *is* the type of requirement that every reasonable worker would assume must exist.

Furthermore, as discussed in the Amended Brief of Appellant, the acting meat manager's silence did not constitute tacit approval of Canning's action. See Amended Br. of Appellant at 22-23. The acting meat manager did not encourage, authorize, or approve of her actions. It is unreasonable to interpret his silence, in the face of her prohibited and illegal proposal, as approval of Canning's actions.

In sum, the Commissioner correctly concluded that her actions constituted misconduct and not a good faith error in judgment.

D. This Court Should Not Award Canning Attorney Fees And Costs

Canning requests attorney fees and costs necessitated in responding to this appeal. Br. of Respondent at 31. She is not entitled to an attorney fees award.

Under the Employment Security Act, a claimant may recover reasonable attorney fees and costs from the unemployment compensation administration fund only when an appellate court reverses or modifies the Commissioner's decision. RCW 50.32.160; *Markam Group, Inc., P.S. v. Dep't of Emp't Sec.*, 148 Wn. App. 555, 565, 200 P.3d 748 (2009). Because the Court should affirm the Commissioner's decision, Canning should not be entitled to attorney fees at the superior or appellate court levels.

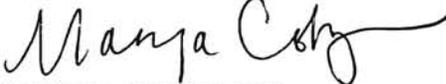
III. CONCLUSION

For the reasons stated above and in the Department's opening brief, the Department asks the Court to reverse the superior court's

decision, including the attorney fees and costs award, and reinstate the Commissioner's decision denying Canning unemployment benefits.

RESPECTFULLY SUBMITTED this 3rd day of August, 2013.

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PROOF OF SERVICE

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 9th day of August 2013, I caused to be served a copy of **Reply Brief of Appellant** on the Respondent of record on the below stated date as follows:

ABC Legal messenger

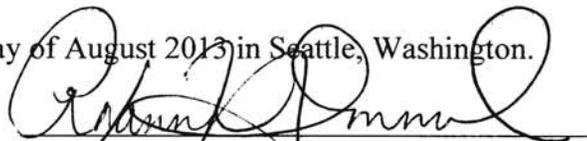
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I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON that the foregoing is true and correct.

Dated this 9th day of August 2013 in Seattle, Washington.


Roxanne Immel, Legal Assistant