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NO. 70163-1-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

KATHERINE CANNING,

Respondent,

v.

STATE OF WASHINGTON DEPARTMENT OF EMPLOYMENT

SECURITY,

Appellant

BRIEF OF RESPONDENT

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I. INTRODUCTION

At issue is the Washington State Employment Security Department (“ESD”) decision to deny Katherine Canning unemployment benefits on the basis that she engaged in misconduct when she brought candy containing marijuana to a colleague at work. An Administrative Law Judge (“ALJ”) found Ms. Canning to be eligible for unemployment benefits on the basis that she had a subjective belief her behavior was acceptable because her co-worker had a lawful prescription for medical marijuana and that she did not engage in willful or wanton disregard of her employer’s interests. The Commissioner reversed, finding that Ms. Canning engaged in misconduct and was therefore ineligible for unemployment benefits. The court below reversed this decision and found Ms. Canning eligible for benefits. The court below correctly found that Ms. Canning’s actions constituted a good faith error in judgment rather than disqualifying misconduct.

II. ASSIGNMENTS OF ERROR

- I. The Commissioner made an error of law in adopting Additional Conclusion of Law Four, which found that the employer proved misconduct by a preponderance of the evidence.

- II. The Commissioner made an error of law by removing the ALJ's Conclusion of Law Five, which found that Ms. Canning's actions amounted to a good faith error in judgment rather than misconduct.

III. STATEMENT OF THE ISSUES

- I. Did the Commissioner make an error of law in finding that Ms. Canning engaged in misconduct where the undisputed facts demonstrate that she thought her behavior was "okay," did not willfully disregard the rights of her employer, and did not deliberately disregard a standard of behavior the employer had a right to expect?
- II. Did the Commissioner make an error of law by striking the ALJ's conclusion of law that Ms. Canning's actions amounted to a good faith error in judgment rather than misconduct?
- III. Where the court below was correct in reversing the Commissioner's decision, was the court's award of attorney's fees proper?

IV. STATEMENT OF THE CASE

Ms. Canning worked as a meat cutter at PCC, a grocery store, until March 6, 2012. Certified Appeal Board Record ("CABR"), 11-12.¹ On or

¹ The Superior Court transmitted the Certified Appeal Board Record (CABR) as a stand-alone document. See Index to Clerk's Papers (CP). Because it is separately paginated

about March 2, 2012, one of Ms. Canning's colleagues, Shawn, was discussing the fact that he had obtained a prescription for medical marijuana with her supervisor, Jeffrey, the acting meat manager.² CABR, 20. Ms. Canning joined the conversation with her co-worker and supervisor. She mentioned that she had made some candy that contained marijuana as an ingredient and offered to bring it to him. *Id.* Ms. Canning testified that she said, "I should bring you this candy that I made. Because I have a lot of anxiety and I made this candy that helped me sleep....I should bring some candy in for you." *Id.* She made this statement in front of her supervisor. *Id.* As Ms. Canning testified at hearing, "Nobody at the time, including the meat manager or Shawn, said, "No, don't do that. That's against the drug and alcohol policy." CABR, 21.

Two days later, after Ms. Canning clocked off her shift, she retrieved the marijuana candy from her car and gave it Shawn. CABR, 21. Ms. Canning testified that she left the candy in her car until the end of her shift because, "I didn't want it laying around at work because, you know, somebody else might come across it or something. I realize why – you know, that shouldn't happen. So I brought it in right before I left work

from the clerk's papers, this brief cites to the appeal board record as "CABR." Citations to the Clerk's Papers are cited to as "CP."

² The record reflects that Jeffrey was the acting meat manager for the day. CABR, 30. Ms. Canning testified, and the employer did not dispute, that the primary meat manager told her that in her absence, "Jeffrey was her." *Id.*

that night.” CABR, 23. She testified that, “in retrospect, I realize that what I did was very stupid.” CABR, 20.

Ms. Canning returned to work two days later for a scheduled shift.

She testified that,

[T]he following day when I came into work and still believing – I still didn’t think I had done anything. I didn’t realize what I had done. I came in the following day to come to work and my meat manager said, “Will you meet me upstairs?” and I said, “Sure.” I went upstairs and I was suspended. And I left without saying anything because I was so shocked, first of all, and you know, I really didn’t – this was never supposed to – to be quite honest, completely candid, nobody was supposed to – it wasn’t supposed to be an issue. I didn’t think that I had done anything.

CABR, 21-22.

The day after being informed that she was suspended, Ms. Canning was fired by PCC Human Resource Director Nancy Taylor. Ms. Canning testified that,

[Ms. Taylor] said, “You are being terminated.” And I said, “But he has a prescription.” And she said, “It doesn’t matter. It is an illegal drug.” And I said – I said, you know “Could I explain?” And she said, “Take it up with the union.”

CABR, 24.

Ms. Canning was terminated for violation of the company’s drug and alcohol policy. CABR, 13. Ms. Taylor testified that when she spoke with Ms. Canning, Ms. Canning explained that she had brought the

brownies to a co-worker with a prescription for marijuana.³ CABR, 15-16. Ms. Taylor acknowledged that there was no reason to believe that Ms. Canning was under the influence of drugs or alcohol at work. CABR, 17.

Ms. Canning applied for unemployment benefits and explained on her initial application for benefits that, “My co-worker came to work and announced that he was certified for marijuana. I told him I would bring him some candy I made in front of the meat manager that day. No one spoke up to stop me, so I thought it was alright.” CABR, 28.

The Employment Security Department initially rejected Ms. Canning’s application for benefits. CABR, 40-44. Ms. Canning appealed the initial determination and represented herself in an administrative hearing before an ALJ. The ALJ found that Ms. Canning had a subjective belief that her behavior was acceptable because her co-worker had a lawful prescription for medical marijuana and that she did not engage in willful or wanton disregard of her employer’s interests:

In applying the law to the facts of the case herein, the undersigned concludes the claimant’s behavior as set forth in the above findings does not display a willful and wanton disregard for the interests of the employer. Although a very close call, it appears the claimant did not intend to harm the employer and thought it was okay because the co-worker had a prescription...To be clear, this decision does not in any way question the employer’s right to discharge the

³ The record contains references to both marijuana candy and marijuana brownies. While Ms. Canning actually brought homemade candy containing marijuana to work, Ms. Taylor apparently believed that Ms. Canning had brought brownies.

claimant nor the wisdom of doing so; only that because it appears the claimant's actions were not willful or wanton, and because the claimant apparently believed the co-worker's prescription made it acceptable under the law and company policy for the co-worker to be in possession...

CABR, 61, Conclusion of Law No. 5.

The employer appealed on the basis that Ms. Canning's behavior violated a company rule. CABR, 67. The Commissioner reversed the ALJ and found Ms. Canning ineligible for benefits. CABR, 75-80. In her decision, the Commissioner adopted all the ALJ's findings of fact and made one additional factual finding regarding the existence of PCC's drug and alcohol finding. CABR, 77. The Commissioner adopted all of the ALJ's legal conclusions except for number five, cited above, and adopted additional legal conclusions finding that Ms. Canning's actions violated a reasonable company rule and therefore constituted misconduct. CABR, 77-78.

Ms. Canning appealed the Department's determination of ineligibility to the King County Superior Court. CP, 1-8. The court below reversed, finding that the Commissioner made an error of law in determining that Ms. Canning's actions constituted misconduct rather than a good faith error in judgment. CP, 45-46. Because the court below reversed the Commissioner's decision, it awarded attorney's fees and costs. CP, 101-2.

At the administrative hearing, Ms. Canning made the following closing statement:

No one knows better than I what a costly mistake I made. I didn't realize I was doing something that would get me fired or I never would have done it.

...

Two days prior to the incident I was told in an open shop discussion between the meat manager that day and another co-worker that the co-worker had become certified for marijuana. I am an avid baker and I responded that I should bring him some candy that I made.

At no time did anyone caution me that I would be disciplined and should not do so. The policy states that I was fired for a willful disregard of my employer's drug policy. I would never have intentionally broken the rule when I was trying so desperately to hold onto my job, so much that it made me physically ill.

I'm a 55-year-old woman who has worked in the meat department for 12 years. I have been looking for work for six weeks and I have not been successful since I have to divulge that I have now been fired. I might add, it is the first time in my life I have been fired.

My union has my name on a list of meat cutters looking for work, but I have had no response. I contacted my previous employer who informed me that they are no longer hiring journeyman meat cutters and instead are hiring apprentices at less than half my salary and reduced benefits.

I no longer have health coverage or any income despite the fact that I have been actively going WorkSource for help finding a job.

I made a mistake that I have already paid a very high price. I realize that if I could find a job and earn ten times my weekly benefit amount that I could reapply for

unemployment, but as the weeks go by and I haven't had any response, that doesn't seem too feasible.

WorkSource thinks I am a good candidate for retraining or self-employment, but that will be impossible without an income and approval of unemployment benefits.

I am a law-abiding citizen. I have never been arrested or had any trouble with the law. I am the main income earner in my family. I need a paycheck and I have already gone for such a long time without one that it has been very difficult.

This experience has been such an emotional and financial drain and I hope that you will be able to help me (inaudible) do this. That's all.

CABR, 30-32.

Ms. Canning has been truthful and unwavering in her explanation for bringing the candy to work. In hindsight, she recognizes that it was stupid, but the evidence in the record makes clear that she had a good faith belief at the time that her actions were not misconduct.

V. ARGUMENT

A. STANDARD OF REVIEW

The Washington Administrative Procedure Act (APA), chapter 34.05 RCW, governs judicial review of a final decision by the Department commissioner. *Verizon NW, Inc. v. Emp't Sec. Dep't*, 164 Wn.2d 909, 915, 194 P.3d 255, 259-60 (2008). The APA allows a reviewing court to reverse if, among other things, the commissioner based her decision on an error of law, if substantial evidence does not support the decision, or if the

decision was arbitrary or capricious. RCW 34.05.570(1)(a); *Anderson v. Emp't Sec. Dep't*, 135 Wn. App. 887, 893, 146 P.3d 475, 478 (2006).

Findings of fact are reviewed for substantial evidence in the record to support them. *Smith v. Emp't Sec. Dep't*, 155 Wn. App. 24, 32, 226 P.3d 263, 266 (2010). Substantial evidence is that evidence which “would persuade a fair-minded person of the truth or correctness of the matter.” *Id.* at 33.

Legal conclusions are reviewed for errors of law. *Griffith v. Emp't Sec. Dep't*, 163 Wn. App. 1, 6, 259 P.3d 1111, 1113 (2011). In applying the error of law standard, the court gives “substantial weight” to the Commissioner’s interpretation of the law but may substitute its judgment for that of the Commissioner. *Id.* at 6-7. *See also Henson v. Emp't Sec. Dep't*, 113 Wn. 2d 374, 377, 779 P.2d 715, 717 (1989) (quoting *Franklin Cy. Sheriff's Office v. Sellers*, 97 Wn. 2d 317, 325, 646 P.2d 113, 117 (1982), *cert. denied*, 459 U.S. 1106, 103 S.Ct. 730, 74 L.Ed.2d 954 (1983)). Under this standard, the court exercises its inherent and statutory authority to make a *de novo* review independent of the Commissioner’s decision. *Daily Herald Co. v. Dept. of Employment Security*, 91 Wn.2d 559, 561, 588 P.2d 1155, 1159 (1979).

Whether an employee’s behavior constitutes misconduct, rendering her ineligible for unemployment benefits, is a mixed question of law and

fact. *Tapper v. State Employment Sec. Dept.*, 122 Wn.2d 397, 402-3, 858 P.2d 494, 498(1993). The process of applying the law to the facts is a question of law subject to de novo review. *Daniels v. State, Dept. of Employment Sec.*, 168 Wn. App. 721, 727-28, 281 P.3d 310, 313 (2012).

B. THE ALJ AND THE LOWER COURT CORRECTLY DETERMINED THAT MS. CANNING DID NOT COMMIT MISCONDUCT BECAUSE SHE DID NOT ACT WITH THE REQUISITE INTENT.

1. MS. CANNING'S ACTIONS DO NOT RISE TO THE LEVEL OF DISQUALIFYING MISCONDUCT UNDER RCW 50.04.294(2)(F) BECAUSE THEY WERE NOT WILLFUL OR WANTON.

The Commissioner found that Ms. Canning's conduct constituted misconduct because it "constituted a willful violation of a company rule...."⁴ CABR, 78. This determination was error as a matter of law. The Employment Security Act ("ESA") defines "misconduct" in pertinent part as follows:

(1) "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;

* * *

(2) The following acts are considered misconduct because the acts signify a willful or wanton disregard of the rights, title, and

⁴ The Commissioner appears to have inadvertently cited to RCW 50.04.294(1)(f), which does not exist. However, as the Court below noted, and counsel for the Department conceded, this appears to have been a typographical error and it is clear that the Commissioner was in fact referring to RCW 50.04.294(2)(f).

interests of the employer or a fellow employee. These acts include, but are not limited to:

* * *

(f) 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; . . .

(3) "Misconduct" Does not include:

(a) Inefficiency, unsatisfactory conduct, or failure to perform well as the result of inability or incapacity;

(b) Inadvertence or ordinary negligence in isolated instances; or

(c) Good faith errors in judgment or discretion.

RCW 50.04.294 (emphasis added). Thus, under the Act, certain types of conduct are misconduct per se, while other types of conduct are specifically excluded from the statutory definition of misconduct.⁵

The Legislature made amendments to the definition of misconduct, effective in 2003, by providing specific examples of conduct it considered

⁵ An employer's decision to discharge an employee is distinct from the Employment Security Department's decision to grant or deny unemployment benefits. The distinction between the two decisions, one about discharge, the other about misconduct disqualifying a claimant from benefits, has been insisted upon by our Supreme Court:

The question of discharge is independent of the question of misconduct... Boeing may or may not have been justified, as a matter of employment law or good business judgment, in terminating [the claimant], but those questions are not before the court. [The claimant's] supervisor may or may not have handled the problems with [the claimant] as sensitively or capably as another supervisor might have, but that question is also not before the court. *The only issue in this case is whether the facts surrounding the discharge, as found by the Commissioner, meet the test for misconduct*"

Tapper, 122 Wn.2d at 412 (1993) (emphasis added).

to be misconduct per se.⁶ Laws of 2003, 2nd Spec. Sess., ch. 4, sec. 6. However, the Legislature was explicit in preserving an intent requirement in the new per se examples of misconduct: “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.” RCW 50.04.294(2) (emphasis added). Additionally, most of the per se examples of misconduct created by the statute are actions which would necessarily involve a willful disregard of the employer’s interests, such as insubordination (RCW 50.04.294(2)(a)) or dishonesty (RWC 50.04.294(2)(c)). In short, just as when misconduct was first defined by statute in 1993, it is clear that after the 2003 amendments to the Act, the element of “willful or wanton disregard” remains a central component of the definition of “misconduct” under RCW 50.04.294(2).

The Commissioner’s own legal interpretation of the statute from the administrative decision in this case makes clear that the agency itself reads the per se examples of misconduct under RCW 50.04.294(2) to include a “willful” intent requirement, consistent with the above analysis. The Commissioner concluded that, “claimant’s conduct constituted a **willful** violation of a company rule.” CABR, 78, Additional Conclusion

⁶ For a discussion of the legislative history of the definition of misconduct in Washington prior to and following its statutory definition in 1993, see *Galvin v. Employment Security Department*, 87 Wn. App. 634, 641-643 (1997), *rev. denied*, 134 Wn.2d 1004 (1998).

of Law IV (emphasis added). While the agency's legal conclusions are reviewed for errors of law, courts give "substantial weight" to the Commissioner's interpretation of the statute. *Griffith*, 163 Wn. App. at 6-7. Here, the Commissioner herself has determined that for violation of a company rule to be misconduct, the violation must be "willful."

The Department's own regulations provide further guidance as to behavior that demonstrates a "willful disregard": "'Willful' means intentional behavior done deliberately or knowingly, *where you are aware that you are violating or disregarding the rights of your employer.*" WAC 192-150-205 (emphasis added). While the Department argued in its brief that "there is no requirement that an employee intentionally violate the rights of the employer in order for her act to constitute misconduct, the employee need only act intentionally," the Department's own regulations make clear that this is not the case. Appellant's Brief at 16. Instead, per the Department's definition of "willful," willful violation of a company rule constitutes misconduct only where the employee's actions were intentional, and where the employee appreciated the fact that her actions disregarded her employer's rights.

Washington cases, both before and after the 2003 amendments, have consistently observed that disqualifying misconduct must involve

willful intent.⁷ For instance, in a decision issued after the 2003 amendments to the definition of misconduct under the ESA, the Washington Court of Appeals recognized that, “to constitute ‘disqualifying misconduct,’ an employee’s conduct must be both willful and harmful to the employer.” *Barker v. Employment Sec. Dept. of State of Wash.*, 127 Wn. App. 588, 593, 112 P.3d 536, 539 (2005).

An employee acts with “willful disregard” in relation to a work-related rule only where violation of the rule was intentional, grossly negligent, or took place after notice or warnings. *Liebbrand v. Employment Security Department*, 107 Wn. App. 411, 425, 27 P.3d 1186, 1193 (2001); *Galvin v. Employment Security Department*, 87 Wn. App. 634, 643, 942 P.2d 1040, 1044 (1997), *rev. denied*, 134 Wn.2d 1004 (1998). *See also Daniels*, 168 Wn. App. at 730-31 (analyzing whether misconduct occurred by determining whether violation of a company rule demonstrated willfulness).

Thus, violation of a work-related rule in and of itself, without the requisite willful or wanton state of mind, does not constitute misconduct.

⁷ The Department may argue, as it did before the lower court, that cases decided pre-2003 are irrelevant given the 2003 amendments to the definition of misconduct. However, as described above, under both the pre- and post-amended versions of the statute, the “willful or wanton disregard” element remains central to the definition of misconduct. Thus, to the extent pre-2003 cases analyze whether a claimant’s actions demonstrated a willful or wanton disregard, those cases are still instructive in determining whether RCW 50.04.294(2) has been violated. The Department appears to acknowledge as much in its appellate brief and relies upon pre-amendment cases itself. Appellant’s Brief at 17, FN 9.

See Darneille v. Dep't of Employment Sec., 49 Wn. App. 575, 744 P.2d 1091 (1987) (holding that determinative question in misconduct inquiry is whether employee intended to disobey employer's rules or orders); *Willard v. Employment Sec. Dept.*, 10 Wn. App. 437, 444–45, 517 P.2d 973, 978 (1974) (holding that failure to comply with a rule is not misconduct if the employee had no intent to disobey the rule or order); *Gibson v. Employment Security Department*, 52 Wn. App. 211, 219-220, 758 P.2d 547, 219-20 (1988) (the court of appeals reversed a commissioner's order denying benefits based on misconduct of claimants who violated an employer rule, reasoning that the employees' conduct did not involve "knowing disobedience of direct orders," but rather an "error[] of judgment in isolated circumstances.").

Even multiple violations of an employer rule or policy may not be grounds for finding misconduct under the statute where the employee did not act willfully. For instance, an employee, who on two different occasions, violated a company policy that stated an employee could not leave a worksite without notifying the employer was found to qualify for benefits in *Ciskie v. Employment Security Department*, 35 Wn. App. 72, 664 P.2d 1318 (1983). In reversing the ESD and the Superior Court that had affirmed the ESD, the Court of Appeals in *Ciskie* concluded that the employee's "deviation from the proper notification procedure was not

sufficiently culpable to constitute a willful or wanton disregard of his employer's interests." *Id.* at 77.⁸

Willful or wanton disregard may be demonstrated where violation of a company rule involved violations that occurred after numerous warnings. For instance, a recent Court of Appeals decision held that, "Given the numerous previous warnings about being on time and in uniform, Daniels' conduct was plainly willful." *Daniels*, 168 Wn. App. at 730-31. The *Daniels* decision only reinforces that violation of a rule is not itself sufficient to find misconduct, but instead must demonstrate a willful or wanton disregard of the employer's interests.

Griffith, 163 Wn. App. 1, cited by the employer for the proposition that misconduct may be established by mere violation of a rule so long as the actions are volitional, does not mandate a contrary result. There, the Court of Appeals Division III held that the claimant's actions *did* constitute misconduct, emphasizing his escalating pattern of inappropriate

⁸ Other cases also required egregious, often repeated, conduct. *See e.g. Haney v. ESD*, 96 Wn. App. 129, 978 P.2d 543 (1999)(Employee's consistent "ongoing" negative attitude, verbal and written criticisms of fellow employees, hostile confrontation with a fellow employee, followed by a written warning letter to the claimant to which she responded with an insulting letter to management, supported a finding of misconduct); *Dermond v. ESD*, 89 Wn. App. 128, 947 P.2d 1271 (1997) (claimant committed misconduct when left work early and worked at home for two days without permission; upon return she was given a written warning stating that violating performance expectations would result in termination. Claimant then refused to acknowledge the wrongness of her actions or to discuss them.).

behavior, which placed the case squarely within the control of an earlier decision involving a similar pattern of misconduct.

Mr. Griffith strenuously argues that his attempt to apologize was not “misconduct and should not disqualify him from unemployment benefits. We believe he was terminated for a series of improper actions and that the Commissioner did not err in looking at the entirety of the conduct.

...

The facts here make this case much closer to *Hamel* [*v. Emp't Sec. Dep't*, 93 Wn. App. 140 (1998)] [than *Markem Group Inc. v. Dep't of Emp't Sec.*, 148 Wn. App. 555, 200 P.3d 748 (2009)]. There, the employee was aware of his employer's policy against sexual harassment; he had twice been reprimanded for remarks that violated the policy and warned that another incident would lead to termination... He later made another statement that offended a customer and apologized for his action. He was fired. This court determined that he engaged in disqualifying misconduct as he was aware of and violated the company's policy.... The court also expressly rejected an argument that misconduct required an intent to harm the employer's interests.

Id. at 10 (internal citations omitted). Notably, however, the *Hamel* decision upon which the *Griffith* court relied was decided in 1998, *before* the Department enacted WAC 192-150-205 in 2004, explicitly providing that a willful violation *does* require that an employee be “aware that you are violating or disregarding the rights of your employer or a co-worker.” *Hamel* and *Griffith* are thus inconsistent with the Department's definition of willfulness and should not be relied upon in this case.

Moreover, even if *Hamel* and *Griffith* could be reconciled with the requirement that a willful violation involve a knowing disregard of the employer's interests, both cases are entirely distinguishable from the facts in this case. While Ms. Canning was terminated for a single, isolated incident, which as discussed in more detail below was a good faith error in judgment, the claimants in *Hamel* and *Griffith* were both terminated after several violations and repeated warnings, making the willful nature of their actions plainly apparent and undeniable. In *Griffith*, the court observed that, "The employer could have discharged Mr. Griffith for misconduct on either of the first two occasions. He was essentially on 'probation' at the time he harmed the employer's interests again." *Griffith*, 163 Wn. App. at 10-11.

Here, Ms. Canning's actions plainly did not involve willful violation of a company rule. Ms. Canning's conduct involved a lone incident; there was no evidence introduced to suggest that, as in *Hamel* and *Griffith*, her actions involved repeated misconduct. Moreover, Ms. Canning's actions leave no room for doubt that she genuinely did not possess a *willful* intent to harm her employer's interests. Most tellingly, Ms. Canning announced that she planned to bring the marijuana candy to her co-worker in front of her acting supervisor. CABR, 20. This behavior

is completely inconsistent with an employee who appreciates that her conduct is incongruent with company policy.

Ms. Canning believed it was “okay” to bring the candy to work due to her supervisor’s silence when she announced her plan to do so. Significantly, the Commissioner adopted the ALJ’s finding that Ms. Canning thought her actions were “okay.” CABR, 60, Finding of Fact 8. As Ms. Canning explained, “I didn’t realize I was doing something that would get me fired or I never would have done it,” and “I never would have intentionally broken the rule when I was trying desperately to hold onto my job...” CABR, 32, 33. These facts do not evince a willful or wanton disregard of Ms. Canning’s employer’s interests. While the conduct may have been sufficient to justify the discharge itself, it was not sufficient to deny her benefits.

Finally, while the agency’s interpretation of “misconduct” under RCW 50.04.294(2)(b) as containing an intent requirement is entitled to “substantial weight” by this Court, the Commissioner’s application of that standard to the facts in this case is not. *Griffith*, 163 Wn. App. at 6-7. Rather, that process is to be reviewed by this court *de novo*. Given the fact that the Commissioner adopted the ALJ’s finding that Ms. Canning believed her actions were “okay,” and given that there is no evidence in the record that Ms. Canning acted with an appreciation that her actions

would be harmful to her employer's interests, the Commissioner erred in applying the law to the facts. The Commissioner's conclusion that Ms. Canning committed misconduct should be reversed.

2. MS. CANNING'S ACTIONS ALSO DO NOT CONSTITUTE MISCONDUCT UNDER RCW 50.04.294(1)(B) BECAUSE THAT PRONG ALSO CONTAINS AN INTENT ELEMENT NOT PRESENT IN THIS CASE.

The Commissioner also found that Ms. Canning's conduct constituted a disregard of standards of behavior the employer had a right to expect. CABR, 78. The ESA further defines "misconduct" in pertinent part as follows:

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

(b) Deliberate violations or disregard of standards of behavior which the employer has the right to expect of an employee;

RCW 50.04.294(1)(b). Just as RCW 50.04.294(2) requires that an employee act with a particular intent, RCW 50.04.294(1)(b) requires that an employee act *deliberately*.

For the same reasons Ms. Canning's actions do not show a willful intent to violate a company rule, they also do not show a *deliberate* disregard. Regardless of which prong of the statute one relies upon, there is no evidence that Ms. Canning acted with a state of mind that evinced a deliberate or willful intent. She therefore cannot be found to have

committed misconduct and the Commissioner's finding to the contrary should be reversed.

C. AT MOST, MS. CANNING MADE A "GOOD FAITH ERROR IN JUDGMENT," WHICH IS NOT MISCONDUCT UNDER THE LAW.

1. CONDUCT WHICH CONSTITUTES A GOOD FAITH ERROR IN JUDGMENT IS SPECIFICALLY EXCLUDED FROM THE DEFINITION OF MISCONDUCT.

As described above, the Employment Security Act enumerates three categories of conduct that are not misconduct:

(3) "Misconduct" Does not include:

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

RCW 50.04.294(3) (emphasis added).

An employee's conduct may *only* be a good faith error in judgment or misconduct – not both. The statute begins with a broad definition of misconduct and then goes on to set out examples of what *is* considered misconduct and what is not misconduct. Thus, by definition, Ms. Canning's actions must be one or the other. The ALJ correctly found that Ms. Canning held a subjective belief that her actions were "okay" and that

she therefore made a good faith error in judgment within the meaning of the statute. CABR, 60-61, Conclusion of Law No. 5.

At least one Washington case has addressed the difference between misconduct and a good faith error in judgment in the context of violation of a company rule. In *Wilson v. Employment Security Department*, 87 Wn. App. 197, 940 P.2d 269 (1997), an employee on two different occasions caused the employer substantial losses: on one occasion he did not log in a diamond, that the diamond store in which he worked, had received and as a result the store lost a \$900 diamond; on the second occasion, he put a \$490 diamond in a plastic bag on his desk and subsequently threw the bag away. While the Court of Appeals held this was sufficient to justify a discharge, it was not sufficient misbehavior to constitute "misconduct" under the Employment Security Act so as to deny him unemployment benefits:

There is no evidence in the record to show that Wilson acted with *a deliberate intent to violate his employer's policy or in willful disregard of his employer's interest*. There is no evidence that Wilson acted out of *an intent to cause his employer harm*. Rather, the only intent on Wilson's part shown by the record is, simply put, *an intent to do what he did*, namely to delay logging in five loose diamonds on one occasion and to delay putting another loose diamond into the safe. These acts were, by Wilson's own admission, in violation of the employer's policy. However, at most they amounted to negligence, incompetence, or an exercise of poor judgment. This is not enough to constitute misconduct under RCW 50.04.293.

...

We find nothing in the record to show that Wilson made a *deliberate decision to act in defiance of the policy*. Rather, it appears that Wilson fully intended to comply with the policy, but simply failed to do so in time to prevent the losses.

Wilson, 87 Wn. App. at 202-203 (emphasis added). Thus, consistent with the above analysis of the requisite level of intent for violation of a rule to be considered “willful,” *Wilson* demonstrates that where an employee does not act with a willful intent, violation of a company rule may instead be classified as a good faith error in judgment.

Significantly, when the Legislature amended the definition of “misconduct” to provide per se examples, it *did not* alter the definition of “good faith error in judgment.” This decision to leave intact this definition reflects the Legislature’s intent for that provision to continue to be construed as it had been prior to the amendment of the statute. *See State v. Ervin*, 169 Wn.2d 815, 239 P.3d 354 (2010). In *Ervin*, the Washington Supreme Court observed that prior interpretations of a statutory definition were presumed to be good law where the Legislature had subsequently amended the statute but left intact the contested definition:

We presume the legislature is familiar with judicial interpretations of statutes and, absent an indication it intended to overrule a particular interpretation, amendments are presumed to be consistent with previous

judicial decisions. In *Nichols*, a 2004 case, the Court of Appeals based its holding on an interpretation of the phrase “in the community.” ... The Court of Appeals squarely rejected the argument that presence in jail precludes a person from being “in the community” for purposes of the washout provisions. From the time that *Nichols* was decided, the Legislature has amended RCW 9.94A.525 six times...but has in no way altered the “in the community” language interpreted by *Nichols*. This legislative acquiescence in the *Nichols* interpretation of the term strongly favors Ervin’s interpretation of the statute.

Id. at 825-26 (internal citations omitted).

Here, the Legislature is presumed to have understood that courts had interpreted the “good faith error in judgment” exclusion to apply to conduct that did not evince the requisite intent requirement. The Legislature’s decision to retain this definition, while amending other portions of the statute, demonstrates that it intended for courts to continue to apply the good faith error in judgment exclusion in the same manner as before the 2003 amendments adding per se examples of misconduct.

2. MS. CANNING’S ACTIONS MORE CLOSELY RESEMBLE A GOOD FAITH ERROR IN JUDGMENT THAN MISCONDUCT.

Here, the ALJ found that Ms. Canning’s actions amounted to a good faith error in judgment because she believed that her actions did not violate PCC’s drug and alcohol policy. CABR, 3-4, Finding of Fact 8, Conclusion of Law 5. This finding was reasonable considering all the circumstances and is supported by substantial evidence in the record. Ms.

Canning's explanation of the facts leading up to her termination on her initial application for benefits demonstrates a subjectively held, good faith belief that her actions were not misconduct: "My co-worker came to work and announced that he was certified for marijuana. I told him I would bring him some candy I made in front of the meat manager that day. No one spoke up to stop me, so I thought it was alright." CABR, 28.

The Commissioner adopted all of the ALJ's findings of fact which supported the ALJ's legal conclusion that Ms. Canning made a good faith error in judgment, including a finding that Ms. Canning's supervisor for the day was present when she told her co-worker that she would bring him candy now that he had certification for medical marijuana, and that her supervisor did nothing to dissuade her. CABR, 60. The Commissioner also adopted the ALJ's finding that "The claimant concedes that in retrospect, her actions were stupid, but at the time she thought it was okay because the co-worker had a prescription." Findings of Fact No. 8; CABR, 60.

Ms. Canning's belief that her actions were acceptable was reasonable and held in good faith. PCC's policy states: "staff are not to have alcohol or any illegal and/or illicit drugs in their possession while on the premises." CABR, 77. As the ALJ found, Ms. Canning "believed the co-worker's prescription made it acceptable under the law and company

policy for the co-worker to be in possession [of the candy].” Conclusion of Law No. 5; CABR, 61. While this may have been a poor choice, it does not rise to the level of statutory misconduct. Ms. Canning’s good faith error in judgment was based in part on the fact that PCC’s policy makes an exception and permits employees to possess alcohol to be consumed off the premises. CABR, 17. It was not unreasonable for Ms. Canning to believe that the candy, which was to be consumed off company premises by a person with a lawful prescription, would be treated in the same manner.⁹

Further, Ms. Canning’s subjectively held understanding is even more reasonable considering that she expressed her intent to bring the candy in front of a supervisor and the supervisor did not warn her that this behavior would violate the policy – creating an appearance of tacit approval. As discussed above, prior warnings are relevant to determining whether the violation of a company rule was willful. *See Daniels*, 168 Wn. App. at 726 (“Given the prior warnings, the claimant’s course of

⁹ This Court can take judicial notice of the rapidly-changing societal attitude in the State of Washington towards the use of marijuana and products, such as candy, that might contain marijuana. *See, e.g.*, Washington Initiative Measure No. 502 (2012). While it is clear that the employers are not precluded from forbidding its use or presence at the workplace, it is also clear that as opposed to rules prohibiting acts that are *malum in se*, including the possession of unlawful drugs, bringing marijuana candy to the workplace is at most *malum in prohibitum*, and PCC’s rule prohibiting such an act is therefore not the type of requirement that every reasonable worker would assume must exist. In light of this changing societal landscape, there is no basis for this Court to conclude that Canning’s belief that her actions were acceptable was objectively unreasonable.

action...cannot be attributed to an isolated incident of mistake or poor judgment.”); *Tapper*, 122 Wn.2d at 409 (holding that violations must be intentional, grossly negligent, or continue to take place after notice or warnings to constitute misconduct); *Leibbrand*, 107 Wn. App. at 426 (holding that prior warnings of policy and subsequent violation showed willful disregard). This reflects the principle discussed above that an employee must understand her actions to be in violation of a rule in order for a violation to constitute misconduct.¹⁰ Far from being warned against bringing the candy to work, her supervisor’s silence indicated to Ms. Canning that her proposed actions would be acceptable and would not violate the company’s rule.

Considering all the circumstances, the ALJ correctly found that Ms. Canning’s actions amount to a reasonable good faith error in judgment and do not qualify as misconduct under the statute. *Franz v. Employment Sec. Dept.*, 43 Wn. App. 753, 759, 719 P.2d 597, 601 (1986) (holding that reasonableness of the employer’s order or rule and the

¹⁰ The Department appears to suggest that Canning’s argument amounts to an attempt to insert a requirement of prior warnings into the definition of misconduct under RCW 50.04.294(2)(f). That is not the case. It is certainly true that a warning need not precede an employee’s actions for misconduct to be found. However, in this particular case, given all the circumstances, the lack of a warning, and the tacit approval undermine the Department’s argument that Ms. Canning acted willfully and instead support a finding that she instead made a good faith error in judgment.

reasonableness of the employee's response to that order or rule evaluated in light of all the surrounding circumstances).

3. WHETHER MS. CANNING'S ACTIONS CONSTITUTE A GOOD FAITH ERROR IN JUDGMENT OR MISCONDUCT IS A CREDIBILITY DETERMINATION BEST MADE BY THE ALJ.

Whether or not Ms. Canning made a good faith error in judgment turns on credibility determinations which the ALJ was in the best position to resolve. RCW 34.05.464, pertaining to agency review of initial orders, provides that in reviewing findings of fact contained in an initial order, a reviewing officer "shall give due regard to the presiding officer's opportunity to observe the witness." RCW 34.05.461(3) provides that findings by the presiding officer "based substantially on credibility of evidence or demeanor of witnesses shall be so identified." The Washington APA thus makes clear that the presiding officer's credibility determinations must be given "due regard." This is consistent with Washington case law holding that findings of the presiding officer, who is in the best position to observe the witness, are entitled to deference. *See Bajocich v. Employment Security Dep't*, 48 Wn. App. 45, 47-48, 739 P.2d 1155, 1156 (1987) ("The hearing officer, having been able to hear the testimony and observe the witnesses, is in the best position to weigh the testimony and make findings as to its credibility.").

Whether a belief is held in “good faith” is inherently a credibility determination, as it by definition depends on whether an individual held a subjective belief. The presiding officer in this case made clear that her conclusion that Ms. Canning made a good faith error in judgment was based upon credibility determinations. Conclusion of Law Number Five stated that the presiding officer concluded that Ms. Canning’s behavior “does not display a willful and wanton disregard for the interests of the employer.” Conclusion of Law No. 5; CABR, 61. The presiding officer observed that it was a “very close call,” but that the subjective state of mind of the claimant was that she believed her behavior to be “okay.” *Id.* The ALJ further concluded that Ms. Canning “believed the co-workers prescription made it acceptable under the law and company policy.” *Id.* These are all credibility determinations to which the reviewing officer was bound to give “due regard.” The Commissioner made an error of law in reversing the ALJ’s finding that Ms. Canning’s conduct amounted to a good faith error in judgment rather than misconduct.

D. TO THE EXTENT THIS CASE PRESENTS A CLOSE CALL, THE STATUTE INSTRUCTS THAT IT IS TO BE LIBERALLY CONSTRUED TO ADVANCE THE GOAL OF REDUCING THE SUFFERING CAUSED BY INVOLUNTARY UNEMPLOYMENT.

The ESA is to be “liberally construed for the purpose of reducing involuntary unemployment and the suffering caused thereby to the

minimum.” RCW 50.01.010. Construction of the benefits statute which “would narrow the coverage of the unemployment compensation laws” is viewed “with caution.” *Shoreline Comm. College Dist. No. 7 v. Emp’t Sec. Dep’t*, 120 Wn.2d 394, 406, 842 P.2d 938, 945 (1992). The “paramount concern” of the court, while giving substantial weight to the agency’s interpretation of words and construction of statutes, is to ensure that the statute is interpreted consistently with the underlying policies. See *Overton v. Economic Assistance Auth.*, 96 Wn.2d 552, 555, 637 P.2d 652, 654 (1981).

The statute thus creates a broad safety net, ensuring that when employees find themselves out of a job, they are not faced with abject poverty. This safety net provides broad coverage, ensuring a minimal level of aid to all employees, except where an employee has acted with such culpability that the Legislature has deemed that in addition to losing their job and their income, they should be punished by taking away this safety net.

Ms. Canning’s behavior in this case does not rise to such a level and it would be inconsistent with the statute’s legislative intent to disqualify her from benefits. To the extent this Court believes there is a question as to whether Ms. Canning’s behavior falls within the definition of misconduct or the definition of a good faith error in judgment, the

statute instructs that the Court should err on the side of finding eligibility for benefits. *Shoreline Comm. College Dist. No.*, 120 Wn.2d at 406.

E. THE JUDGE'S AWARD OF ATTORNEY'S FEES WAS PROPER.

Under the Employment Security Act, reasonable attorney fees and costs should be awarded where an appellate court reverses or modifies the decision of the commissioner. RCW 50.32.160. *See also Markam Group, Inc., P.S. v. State Dept. of Employment Sec.*, 148 Wn. App. 555, 565, 200 P.3d 748, 752 (2009); *Johnson v. Employment Sec. Dept. of State of Wash.*, 112 Wn.2d 172, 180, 769 P.2d 305, 308 (1989). The superior court reversed the Commissioner's decision and awarded claimant reasonable attorney's fees. CP, 108-9. Should this court affirm the court below or otherwise modify the Commissioner's decision, the superior court's award of attorney's fees should not be disturbed. Additionally, claimant should be awarded reasonable fees and costs necessitated in responding to this appeal, pursuant to Rule of Appellate Procedure 18.1.

VI. CONCLUSION

For the foregoing reasons, this Court should affirm the trial court's decision below, thereby reversing the Commissioner's decision and finding Ms. Canning eligible for benefits.

RESPECTFULLY SUBMITTED this 10th day of July, 2013.



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CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of July, 2013, I caused the foregoing Brief of Respondnet to be filed with the Clerk of the Court for the Court of Appeals – Division I via legal messenger and a true and correct copy of the same to be delivered via legal messenger to:

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