IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

DAVID B. VAIL & ASSOCIATES, Respondent, v. EMPLOYMENT SECURITY DEPARTMENT, Appellant, CHALMERS JOHNSON, Appellant.	No. 42164-0-II UNPUBLISHED OPINION

Johanson, A.C.J. — The Employment Security Department (ESD) awarded unemployment benefits to Chalmers Johnson, a former employee of David B. Vail & Associates. An administrative law judge (ALJ) and the ESD commissioner affirmed the approval of benefits. Vail now challenges the award of benefits. Vail argues substantial evidence does not support six of the commissioner's findings of fact.[1] Vail also challenges three of the commissioner's

[1] Our General Order 2010-1 requires that the party appealing an agency's final order to superior court has the responsibility for the opening and reply briefs before our court. Because Vail appealed the ESD commissioner's decision to the superior court, Vail is treated as the appellant here, even though Johnson appeals from the superior court's order.

conclusions of law. Vail argues the commissioner erred in (1) not finding statutory misconduct that would exclude Johnson from receiving unemployment benefits, (2) finding that Johnson adequately refuted Vail's allegations, and (3) not considering evidence of alleged misconduct discovered after Vail terminated Johnson. We affirm the commissioner's decision because (1) substantial evidence supports the findings of fact, (2) Johnson did not engage in statutory misconduct, (3) Johnson adequately refuted Vail's allegations, and (4) the ALJ properly excluded post termination evidence.

FACTS

I. Separation from Employment

On July 15, 2008, Chalmers Johnson began working for the David B. Vail & Associates law firm (Vail) as a full time labor and industries and personal injury attorney. In his first year of employment, Johnson helped build Vail's personal injury litigation department and felt successful in his work at Vail.

Vail's attorneys, including Johnson, were paid on a 40-hour a week basis and were discouraged from working overtime. Vail required its attorneys to record any time worked in excess of 40 hours a week. Johnson's first yearly report showed he reported between 800 and 1,000 overtime hours that year, but Vail did not pay him for these extra hours. Johnson expressed concerns about the firm's overtime policy to David B. Vail (David)[2] and Bridgette Lind, Vail's office manager, because he felt Vail violated existing wage and hour laws by failing to pay hourly

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[2] David B. Vail is the founding partner of David B. Vail & Associates. We refer to David B. Vail as "David" to avoid confusion because we refer to Vail & Associates as "Vail."

workers overtime wages.

In the spring of 2009, David called a meeting with Johnson and asked Johnson to evaluate himself as an attorney. David tape recorded Johnson's monologue and afterwards asked Johnson to file the tape with Lind for his personnel file. Later, David asked Lind to review the tape. David remembered telling Johnson on tape not to work anymore overtime hours, but when Lind reviewed the tape, she did not find that discussion on it. David concluded that Johnson must have tampered with and deleted part of the tape. Johnson denied doing so.

Also in the spring of 2009, David directed Lind to begin a surveillance of Johnson's computer and e-mails because of concerns regarding Johnson's honesty and ethics. The firm had a computer software program that allowed Lind to remotely access Johnson's computer periodically and without his knowledge.

In general, Johnson described Vail's office environment as hostile and filled with sexual content and derisive commentary about men. Johnson reported some female co-workers' conduct to Lind as sexual harassment. Lind took no action. Johnson was one of few men in the office, but he became close friends with one of the female attorneys, Martha Boden. On September 25, 2009, Johnson and Boden exchanged e-mails using their personal e-mail accounts. One of Boden's e-mails referred to an intimate relationship Johnson had years earlier in South Carolina with the ex-wife of a former client.

Lind discovered the e-mail while survelliancing Johnson's computer on September 25. Lind gave the e-mail to David. David met with Johnson and terminated him. According to Lind's notes from the meeting, David told Johnson three reasons for the termination: (1) co-workers'

reports that Johnson was going to sue Vail for improper wage policies; (2) co-workers' reports that Johnson was going to leave Vail and start his own law practice; and (3) allegations that Johnson deleted portions of the taped conversation regarding Johnson's work performance. Johnson asked if the e-mail had anything to do with the termination, and David said that it did not but that he was investigating some other allegations. Vail did not give Johnson a letter of termination or any other written explanation.

Johnson left the office with his backpack that he often carried between work and home. Inside his backpack was a flash drive belonging to Vail.[3] David demanded that Johnson return the flash drive and Johnson did so the following week. Shortly after the termination, David instructed Yumi Nagasaki-Taylor, an office assistant, to search Johnson's work computer and the flash drive. Nagasaki-Taylor found pornographic material and sexually explicit e-mail messages, some of which were in Johnson's work e-mail.

II. Procedure

Johnson applied for unemployment benefits. The ESD approved Johnson's application, reasoning that (1) Vail fired Johnson because it feared that he would file a lawsuit, and (2) Vail had not established willful intent to disregard Vail's interests.

Vail appealed to an ALJ. At the administrative hearing, Johnson made an initial motion to restrict the hearing to evidence related to the three causes of termination that Vail gave Johnson. Vail, however, sought to introduce the pornography and sexually explicit e-mails as additional

[3] The parties also sometimes refer to the "flash drive" as a "data stick." We use the term "flash drive."

evidence of misconduct that it discovered after termination. The ALJ ruled that he would only consider evidence known to Vail at the time of termination to determine whether Johnson had engaged in misconduct. The ALJ found that anything discovered after the termination was not the reason for the termination and thus was not admissible to determine misconduct.

David, Lind, and Nagasaki-Taylor testified for Vail. Johnson also testified. The ALJ affirmed the ESD's decision and Vail appealed to the ESD commissioner, who affirmed the ALJ's order. Vail petitioned for judicial review from superior court, which reversed the commissioner's decision. The superior court's order stated that it need not reach a decision about whether the commissioner erroneously interpreted or applied the law in failing to consider the post-termination discovered evidence because it found sufficient other evidence of misconduct to support the termination for statutory misconduct.

ANALYSIS

I. Challenged Findings of Fact

Vail assigns error to the commissioner's findings of fact 4, 5, 6, 7, 9, and 10.[4] But Vail does not argue that substantial evidence does not support each finding. Instead, Vail argues that the commissioner should have found misconduct. Because substantial evidence supports each finding of fact, the commissioner did not err.

A. Standard of Review

The Washington Administrative Procedure Act (APA), chapter 34.05 RCW, governs

[4] The commissioner adopted all the findings and conclusions of the ALJ without restating them, so the citations that follow are to the ALJ's initial order, but we refer to them as the commissioner's findings.

judicial review of a final decision by the ESD commissioner. *Verizon Nw., Inc. v. Emp't Sec. Dep't*, 164 Wn.2d 909, 915, 194 P.3d 255 (2008). We sit in the same position as the superior court and apply the APA standards directly to the administrative record. *Verizon*, 164 Wn.2d at 915. We review the decision of the commissioner, not the ALJ's underlying decision. *Verizon*, 164 Wn.2d at 915.

We review the commissioner's findings of fact for substantial evidence in light of the whole record. RCW 34.05.570(3)(e); *King County v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 142 Wn.2d 543, 553, 14 P.3d 133 (2000); *Lee's Drywall Co. v. Dep't of Labor & Indus.*, 141 Wn. App. 859, 864, 173 P.3d 934 (2007). Substantial evidence is evidence that would persuade a fair-minded person of the truth or correctness of the matter. *Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 142 Wn.2d at 553. We neither weigh creditability of witnesses nor substitute our judgment for the agency's. *Brighton v. Dep't of Transp.*, 109 Wn. App. 855, 862, 38 P.3d 344 (2001). Our review of disputed issues of fact is limited to the agency record. RCW 34.05.558.

For the purposes of unemployment benefits, whether an employee's behavior constitutes misconduct is a mixed question of law and fact. *Tapper v. Emp't Sec. Dep't*, 122 Wn.2d 397, 402, 858 P.2d 494 (1993). Analytically, resolving a mixed question of law and fact requires establishing the relevant facts, determining the applicable law, and then applying that law to the facts. *Tapper*, 122 Wn.2d at 403. But the characterization of misconduct as a mixed question does not allow us to substitute our judgment for the agency's judgment as to the facts; instead the agency's factual findings are entitled to the same level of deference that we would accord under

any other circumstance. *Tapper*, 122 Wn.2d at 403.

B. Findings of Fact Supported by Substantial Evidence

We examine each of the challenged findings to determine whether substantial evidence supports it such that it would persuade a fair minded person of the truth or correctness of the finding.

1. Johnson's Immediate Termination

Vail challenges finding of fact 4, which stated that Vail concluded that the allegation of the personal relationship with the ex-wife of a former client could subject the firm to liability, thus it warranted immediate termination without the need for an investigation or a lesser form of discipline. Vail argues the commissioner "erred in finding that the e[-]mail [referring to a relationship with a wife of a former client] was the sole reason" Vail terminated Johnson. Br. of Vail at 1. But the commissioner did not find that the e-mail was the "sole reason." Instead, the commissioner found the e-mail to be "the straw that broke the camel's back" for the termination. Administrative Record (AR) at 110.[5] At the hearing, David testified that the private e-mail between Boden and Johnson was the final incident on September 25 that led to Johnson's termination because he believed it could jeopardize the trust of clients and the fiduciary obligations owed to them. David also testified that while he had multiple alternatives for forms of discipline, such as suspension, he chose not to do so because of his ongoing investigation of Johnson. David's own testimony provided substantial evidence to support the commissioner's finding of fact 4.

[5] The parties cite to the administrative record as "Comm. Rec." But in keeping with this court's usual practices, we cite to the administrative record as AR.

2. E-mail Received by Johnson

Vail challenges findings of fact 5, 6, and 7. Reviewing these findings together, Vail argues the commissioner erred in finding that Johnson was not informed that the e-mail was a part of the reason for his termination and that Johnson was not informed that there was an ongoing investigation into his conduct.

a. E-mail Being One of the Reasons for Termination

Finding 5 says Johnson was summoned to David's office and terminated on the spot and, when asked whether the e-mail was one of the reasons for his termination, he was told it was not. Again, David's testimony provides substantial evidence to support finding 5. David testified: "[W]e needed to get him out of the office immediately." AR at 29. David also testified that he did not specifically discuss the e-mail with Johnson at the time of the termination because he did not want Johnson to know that they knew of the e-mail in case Johnson tried to cover for himself. Finding of fact 5 is supported by substantial evidence from David's testimony.

b. David Refused To Let Johnson Respond to Allegations

Finding of fact 6 stated that Johnson was refused an opportunity to respond to Vail's allegations and was ordered to leave the premises immediately. At the hearing, Johnson asked David, "[I]s it true that I asked whether I could ask questions and can we discuss this and that you said no." AR at 41. David responded, "I could have. I just don't have a recollection." AR at 41. Johnson testified that he wanted to talk to David at the termination meeting about the reasons for his termination but that David refused. Johnson further testified that he specifically asked David to talk about any allegations in addition to the three given at the meeting but that

David refused to discuss any additional reasons.

The testimony about the termination meeting conflicts but the ALJ weighed the witnesses' credibility and found Johnson's version more credible. We do not disturb the ALJ's credibility determination or judgment here. *Brighton*, 109 Wn. App. at 862. Substantial evidence supports this finding.

c. Termination Reasons Given by Vail

In finding of fact 7, the commissioner found that Johnson was told at the termination meeting that the three reasons for his termination were (1) co-workers' reports that Johnson had told them that he would sue Vail, (2) co-workers' reports that Johnson was planning to leave Vail and start his own practice, and (3) allegations that Johnson erased parts of the taped conversation between himself and David.

The testimony showed that Lind took notes at the termination meeting and these notes were admitted as an exhibit at the hearing. The notes provide, "Terminate you for cause. 3 basis—allegations: 1—told some people in the office that you are suing us. 2—long term representation—but made statements that you weren't staying. 3—tape of discussion—part is erased—good portion of it." AR at 101. David testified these notes were Lind's notes of the termination meeting. Johnson also testified these notes were an accurate description of the meeting. Substantial evidence supports this finding.

3. Vail's Allegations Were Unsupported

Vail challenges finding of fact 9. It states, "Claimant was not planning to sue the employer, nor start his own firm, nor did he erase parts of a taped conversation with a supervising

attorney." AR at 109. Vail did not present any actual evidence of any of these allegations. Rather, David explained at the hearing that he believed these allegations to be true but then Johnson denied them. Johnson testified that he was not planning to sue the firm, he wanted to continue working for Vail, and that he did not erase the tape.

Again, the testimony conflicts but the ALJ weighed the credibility of the parties and found Johnson more credible on this point. *Brighton*, 109 Wn. App. at 862. Substantial evidence supports this finding of fact.

4. Personal Relationship with Ex-Wife of a Former Client Had No Connection with Johnson's Employment at Vail

Vail challenges finding of fact 10 stating that Johnson's relationship with a former client's ex-wife while Johnson was living and practicing in another state years earlier "had no relationship whatsoever with this employer." AR at 109. Again, David and Johnson's testimonies conflict but the ALJ found Johnson more credible. David testified that Johnson's prior relationship could potentially harm Vail, but David had no proof that the relationship had anything to do with Vail. David testified that at the time of Johnson's termination, he did not know to whom the e-mail was referring.

Johnson testified that indeed the relationship did not have anything to do with Vail. Johnson explained that the relationship occurred while Johnson lived in South Carolina more than six years earlier and had nothing to do with any of Vail's clients or any current client of his while he had his own firm. The ALJ found Johnson's testimony credible. Johnson's testimony provides substantial evidence to support this finding.

II. Challenged Conclusions of Law

Vail assigns error to the commissioner's conclusions of law 4, 5, and 6. Vail argues the commissioner erred in concluding that (1) there was not enough evidence to find that Johnson engaged in statutory misconduct, (2) Johnson adequately refuted Vail's allegations, and (3) evidence of misconduct discovered post-termination could not be used to support the initial decision by Vail to terminate Johnson for misconduct. We disagree.

A. Standard of Review

The question before us is not whether Johnson should have or could have been terminated; the question is whether he should be disqualified from receiving unemployment benefits. *Johnson v. Emp't Sec. Dep't*, 64 Wn. App. 311, 314-315, 824 P.2d 505 (1992). When examining whether an employee's actions are disqualifying misconduct under the Employment Security Act, we view the question as a mixed question of law and fact. *Haney v. Emp't Sec. Dep't.* 96 Wn. App. 129, 138, 978 P.2d 543 (1999). What constitutes disqualifying misconduct is a question of law. *Haney*, 96 Wn. App. 138-39.

We review questions of law de novo, giving substantial weight to the agency's interpretation of the statutes it administers. *Everett Concrete Prods., Inc. v. Dep't of Labor & Indus.*, 109 Wn.2d 819, 823, 748 P.2d 1112 (1988); *Smith v. Emp't Sec. Dep't*, 155 Wn. App. 24, 32, 226 P.3d 263 (2010). We consider a commissioner's decision to be prima facie correct and the "burden of demonstrating the invalidity of agency action is on the party asserting invalidity," here Vail. RCW 34.05.570(1)(a); *Anderson v. Emp't Sec. Dep't*, 135 Wn. App. 887, 893, 146 P.3d 475 (2006). We may reverse the commissioner's decision if the commissioner based his 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(3)(d), (e), (i). We accord substantial weight to the agency's legal interpretation if it falls within the agency's expertise in a special area of law. *Jefferson County v. Seattle Yacht Club*, 73 Wn. App. 576, 588, 870 P.2d 987, *review denied*, 124 Wn.2d 1029 (1994).

B. Analysis

We examine each of the challenged conclusions to determine if Vail met its burden of demonstrating invalidity of agency action.

1. Statutory Misconduct

Vail challenges conclusion of law 4 which states that Johnson's relationship with the ex-wife of a former client cannot be considered misconduct because it was not related to Vail and was not an ethical violation while Johnson worked for Vail. Nonetheless, Vail argues there was enough evidence for the commissioner to find statutory misconduct. Vail argues: (1) an improper relationship between Johnson and the ex-wife of his former client constituted misconduct, (2) Johnson's dishonesty constituted misconduct, (3) Johnson's provocation of poor morale in the workplace constituted misconduct, (4) Johnson's decision to take the flash drive constituted misconduct, and (5) Johnson's downloading of pornographic material and his sending of explicit e-mails from his work computer constituted misconduct. Vail provides no legal argument as to why the commissioner's conclusion is incorrect, but instead it simply reargues the facts.

Under the Employment Security Act (Act), Title 50 RCW, a discharged worker who commits "misconduct connected with his or her work" cannot receive unemployment compensation benefits. RCW 50.20.066(1); *Tapper*, 122 Wn.2d at 399. Misconduct is defined in

RCW 50.04.294.[6] The misconduct must be connected with the claimant's work and result in harm or create the potential for harm to the employer's interests. WAC 192-150-200(1)-(2). The 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). Misconduct does not include inadvertence or ordinary negligence in isolated instances, good faith errors in judgment, inefficiency, unsatisfactory conduct, or failure to perform well as the result of inability or incapacity. RCW 50.04.294(3). The Act requires that the ESD analyze the facts of each case to determine what actually caused the employee's separation and use the cause of termination to determine whether unemployment benefits will be given. *Safeco Ins. Cos. v. Meyering*, 102 Wn.2d 385, 392-93, 687 P.2d 195 (1984) (analyzing the facts surrounding whether an employment separation was a voluntary quit or a discharge).

The ALJ analyzed the facts and found that "the straw that broke the camel's back" for the termination was the e-mail from the co-worker. AR at 110. The ALJ also found the reasons Vail gave Johnson at the termination meeting were additional causes for Johnson's termination. Vail told Johnson at the termination meeting that he was being terminated because of co-workers' reports that Johnson said that he would sue Vail, co-workers' reports that Johnson was planning to leave Vail and start his own practice, and allegations that Johnson erased parts of the taped

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[6] Misconduct includes: (1) willful or wanton disregard of the rights, title, and interests of the employer or a fellow employee; (2) deliberate violations or disregards of standards of behavior which the employer has the right to expect of an employee; (3) carelessness or negligence that causes or would likely cause serious bodily harm to the employer or a fellow employee; or (4) 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).

conversation between him and Vail. The ALJ determined that none of these causes of termination were disqualifying misconduct for the purposes of unemployment benefits. RCW 50.04.294. Vail does not supply any contrary legal authority.

Vail had the burden to demonstrate invalidity of the agency action in granting Johnson benefits, but fails to do so. RCW 34.05.570(1)(a); *Anderson*, 135 Wn. App. at 893. Because we give substantial weight to an agency's decision and can defer to the agency's expertise, we do so here. *Everett Concrete Prods., Inc.*, 109 Wn.2d at 823; *Seattle Yacht Club*, 73 Wn. App. at 588.

2. Johnson Refuted Vail's Allegations

Vail challenges conclusion of law 5. It states:

> The evidence clearly shows that claimant was discharged for that reason and would not have been discharged . . . . had it not been for that e[-]mail. The employer definitely could have suspended the claimant pending an investigation however they did not do that and discharged the claimant on the spot. Other allegations leveled against the claimant are hearsay, conclusiory [sic] and circumstantial. The claimant refuted the employer's hearsay evidence.

AR at 110-11.

Vail argues there were no alternatives besides immediate termination and the pre-termination misconduct evidence was not based solely on hearsay, conclusory, and circumstantial evidence. But Vail does not explain why the commissioner erred or why there were no alternatives besides immediate termination, and it does not present any evidence that is not hearsay, conclusory, or circumstantial. David testified that he did have multiple alternatives for forms of discipline, such as suspension, but that he chose not to do so and instead elected for immediate termination. That is a decision he chose to make. The commissioner was correct in

concluding that David could have chosen another route. Also, Johnson's testimony refuted Vail's hearsay evidence. Johnson testified that he was not planning to sue the firm, that he wanted to continue working for Vail, and that he did not erase the tape. Johnson also testified that the relationship mentioned in the e-mail had nothing to do with Vail. The ALJ found that Johnson refuted Vail's allegations by providing credible testimony on these points. Thus, substantial evidence supports this conclusion.

3. Evidence Discovered Posttermination

Vail challenges conclusion of law 6. It states, in pertinent part, that the allegations pertaining to evidence found after termination cannot be considered in determining the existence of misconduct because misconduct is determined based on the facts as known and as conveyed to the claimant at the time of termination.

Vail argues an error of law and that the commissioner erred by excluding the evidence discovered post-termination because there is nothing in Title 50 RCW or chapter 192-150 WAC that prohibits its consideration in support of the initial termination. But as we stated, RCW 50.20.066(1) provides that the discharged worker must commit misconduct *connected with his or her work* to be denied unemployment benefits. RCW 50.20.066(1) (emphasis added); WAC 192-150-200(1); *Tapper*, 122 Wn.2d at 399. Also, RCW 50.36.030[7] makes it a misdemeanor for an employer to give the ESD a different reason for a termination than it gave the employee when the ESD is deciding whether to grant unemployment benefits. This means that Vail cannot give the

[7] RCW 50.36.030 was amended in 2010 to include gender neutral language (Laws of 2010, ch. 8, § 13040).

ESD reasons for termination other than the reasons it gave Johnson.

Yet Vail compels us to analogize unemployment benefits to an employee's right to back pay wages and front pay in discrimination claims, citing *McKennon v. Nashville Banner Publ'g Co.*, 513 U.S. 352, 115 S. Ct. 879 (1995). In discrimination cases, an employee's misconduct discovered after termination can be taken into account to limit any back pay award to be calculated from the date of the discharge to the date new information was discovered. Vail argues that Washington courts have adopted *McKennon*'s rules in *Goehle v. Fred Hutchinson Cancer Research Ctr.*, 100 Wn. App. 609, 621, 1 P.3d 579, *review denied*, 142 Wn.2d 1010 (2000). But these cases are not unemployment benefits cases.

And the purposes of discrimination awards do not parallel unemployment benefits and we do not find Vail's analogy persuasive. The purpose of discrimination awards is to ensure the elimination and prevention of discrimination and to erase its effects by providing compensation for the victims of discrimination. *Marine Power & Equip. Co. v. Human Rights Comm'n Hearing Tribunal*, 39 Wn. App. 609, 618, 694 P.2d 697 (1985). On the other hand, unemployment benefits are meant to preserve the health, morals, and welfare of the state and to lighten the burden of unemployment, "which now so often falls with crushing force upon the unemployed worker and his or her family." RCW 50.01.010.[8] We liberally construe the unemployment benefits act. *Becker v. Emp't Sec. Dep't*, 63 Wn. App. 673, 677, 821 P.2d 81 (1991).

We also give substantial weight to an agency's decision and can defer to the agency's

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[8] RCW 50.01.010 was amended in 2010 to include gender neutral language (Laws of 2010, ch. 8, § 13001).

expertise on questions regarding the laws it administers. *Everett Concrete Prods., Inc.*, 109 Wn.2d at 823; *Seattle Yacht Club*, 73 Wn. App. at 588. We do so here. The ALJ explained that settled law proscribes that the agency only consider evidence known to the employer at the time of termination in deciding whether the employee engaged in disqualifying misconduct. Thus, the ALJ found that anything discovered after the termination cannot be the reason for the termination and thus is not admissible to determine misconduct for the purposes of unemployment benefits ("If it was uncovered after the termination and it was not a reason for the termination it is not admissible and it [is] not considered in determining misconduct."). AR at 10. If an employer does not know of an employer's wrongful actions prior to termination, those actions are not connected with the employer's work as is required under RCW 50.20.066(1) to be disqualifying misconduct.[9] Vail does not cite any contrary legal authority.

Vail had the burden to demonstrate the invalidity of the agency action and failed to do so. RCW 34.05.570(1)(a); *Anderson*, 135 Wn. App. at 893. We find no error.[10]

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[9] As the ALJ noted, when an employee has committed a crime such as theft that is not discovered until after termination, then the result is different, but that is not the case here..

[10] Vail also argues that (1) although it did not discover the e-mail and pornography until after Johnson's termination, David believed that Johnson was engaged in bad behavior prior to the termination but could not tell Johnson of his suspicions at the time of termination because he did not want Johnson to delete everything or cover for himself; (2) public policy provides that employees like Johnson should not be rewarded for deceiving their employers and should not be allowed to take away resources from employees that actually deserve unemployment benefits; (3) even if there was no connection between the initial termination of Johnson, and the subsequently discovered evidence, an exception should be adopted where the after-acquired evidence would have resulted in the employee's termination for misconduct; and (4) the pornography and sexually explicit e-mails were not unrelated to the reasons for termination because Vail believed Johnson had been dishonest and was not conducting himself in a professional manner. Vail does not provide legal authority to support these assertions; therefore, we decline to consider Vail's unsupported arguments. RAP 10.3(a)(6); *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d

ATTORNEY FEES

Vail requests reasonable costs and attorney fees under RAP 14.3. Vail is not entitled to costs because Vail is not a prevailing party entitled to costs under RAP 14.2. Vail is not entitled to attorney fees.

801, 809, 828 P.2d 549 (1992).

We affirm the commissioner's decision, thereby reversing the superior court.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Johanson, A.C.J.

We concur:

Quinn-Brintnall, J.

Penoyar, J.