IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

LOREN E. GRIFFITH,	)	**No. 29440-4-III**
	)	
Appellant,	)	
	)	
v.	)	
	)	**Division Three**
STATE OF WASHINGTON DEPARTMENT OF EMPLOYMENT SECURITY,	)	
	)	
Respondent.	)	**UNPUBLISHED OPINION**

Korsmo, J. — Loren Griffith appeals the determination that he committed "misconduct" that disqualified him from receiving unemployment benefits. We affirm that determination.

FACTS

In 2000, Mr. Griffith began working as a delivery driver for United Natural Foods West, Inc. (employer) in Spokane. In 2007, he was disciplined for engaging in a verbal altercation with a customer. The employer warned Mr. Griffith that he was responsible

for representing the company in a positive light. In May 2009, he was disciplined for shouting at and threatening to stop delivery to a customer. That customer banned Mr. Griffith from its premises. The employer issued a final warning and informed him that further unacceptable conduct could result in termination. Commissioner's Record (CR) at 76.

In late July 2009, Mr. Griffith commented to an employee of a customer he regularly delivered to in Montana: "How is my favorite Jewish girl?" The customer complained and Mr. Griffith was suspended pending an investigation. During the investigation, Mr. Griffith indicated that he wished to apologize to the woman who had complained. His employer did not respond to this statement. Mr. Griffith then traveled from Spokane to the customer's store in Montana and sought to apologize. The customer told him she was busy and could not talk. Mr. Griffith told her he would wait outside. While he was waiting, other employees of the store came and told him to leave or they would call the authorities. He put a note on the woman's car and departed. The store subsequently called the employer and asked that Mr. Griffith be banned from its premises. The employer then terminated his employment.

Mr. Griffith applied for unemployment benefits. The Department of Employment Security (DES) initially granted benefits, but denied the claim after the employer supplied

additional information. Mr. Griffith appealed, and an administrative law judge (ALJ) found that he was eligible for benefits. The employer petitioned the Commissioner of DES for review. The Commissioner reversed the ALJ. He adopted some of the ALJ's findings of fact while rejecting others. Mr. Griffith petitioned the superior court for review. In a memorandum decision, the court affirmed the Commissioner. This appeal followed.

ANALYSIS

Mr. Griffith challenges four of the Commissioner's factual determinations, as well as the conclusion that his actions constituted misconduct. We will first discuss his factual challenges before review of his legal argument.

Standard of Review

Judicial review of employment benefits decisions is governed by Washington's Administrative Procedure Act (APA), chapter 34.05 RCW. *Smith v. Emp't Sec. Dep't*, 155 Wn. App. 24, 32, 226 P.3d 263 (2010). This court sits in the same position as the superior court and applies APA standards to the administrative record. *Id.* The Commissioner's decision is considered *prima facie* correct. *Id.* The burden is on the party seeking to modify the ruling to demonstrate its invalidity. *Id.* (citing RCW 34.05.570(1)(a)). The court reviews the Commissioner's ruling rather than the

underlying ALJ decision, except to the extent that the Commissioner adopts the ALJ's findings of fact. *Tapper v. Emp't Sec. Dep't*, 122 Wn.2d 397, 405-406, 858 P.2d 494 (1993) (recognizing that this standard is "somewhat at odds with the ordinary practice of appellate review," but deferring to the legislature's direction in RCW 34.05.464(4)).

The Commissioner's findings of fact are reviewed for substantial evidence in the administrative record to support them. *Smith*, 155 Wn. App. at 32. Substantial evidence is that evidence which "would persuade a fair-minded person of the truth or correctness of the matter." *Id.* at 33. Unchallenged findings of fact are generally verities on appeal. *Id.*

This court reviews the Commissioner's legal conclusions for errors of law. *Verizon Nw., Inc. v. Emp't Sec. Dep't*, 164 Wn.2d 909, 915, 194 P.3d 255 (2008). The court may substitute its view of the law for the Commissioner's, but it gives "substantial weight" to the Commissioner's interpretation due to the agency's special expertise. *Id.*

Factual Findings

Mr. Griffith challenges the Commissioner's four Additional Findings of Fact. Clerk's Papers (CP) at 5-6. In Finding of Fact II, the Commissioner found that Mr. Griffith was not credible because he claimed to have asked permission to apologize and that the employer declined to tell him he could not apologize. CP at 5. This finding is

not supported by the record.[1] Nowhere in the record does Mr. Griffith claim that he sought permission from his employer to apologize, nor did he ever argue that he sought permission. The record shows that Mr. Griffith informed his employer that he would "like to apologize" or that he "wished he could apologize" and that the employer did not inform Mr. Griffith that this was not acceptable. CR at 29, 44. While reasonable inferences are to be drawn in favor of the prevailing party before the Commissioner, the Commissioner's inference that Mr. Griffith misrepresented his actions during the investigation is not such an inference. *See William Dickson Co. v. Puget Sound Air Pollution Control Agency*, 81 Wn. App. 403, 411, 914 P.2d 750 (1996). The finding is erroneous.

We believe the other three challenged findings are supported by the record, but will not discuss them at any length. Whether or not Mr. Griffith was credible (findings of fact I and II) and how the store employee and the employer responded to the Montana incidents (findings of fact III and IV), simply are not a material issue in this appeal. The parties agree on the essential facts of Mr. Griffith's past behavior and what transpired in Montana; they are not in question. The true essence of Mr. Griffith's challenge to these findings is found in his legal argument, which we address next.[2]

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[1] This finding appears to be a correction of the equally erroneous ALJ finding of Fact 9 that Mr. Griffith asked permission to apologize. *See* CR at 84.

Legal Conclusion

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.

Unemployed workers are generally eligible for benefits, absent a statutory disqualification. *Safeco Ins. Cos. v. Meyering*, 102 Wn.2d 385, 388-389, 687 P.2d 195 (1984). 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 (1992).

Employees who are terminated for "misconduct" are ineligible to receive unemployment benefits. RCW 50.20.060. Misconduct is defined as, but not limited to:

> (a) Willful or wanton disregard of the rights, title, and interests of the employer or a fellow employee;
>
> (b) Deliberate violations or disregard of standards of behavior which the employer has the right to expect of an employee;
>
> (c) Carelessness or negligence that causes or would likely cause serious bodily harm to the employer or a fellow employee; or
>
> (d) Carelessness or negligence of such degree or recurrence to show an intentional or substantial disregard of the employer's interest.

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[2] Although finding of fact II is erroneous, it also is immaterial for the reasons discussed above. Thus, it is not a basis for granting relief.

RCW 50.04.294(1).

Our appellate courts have held that an employee acts with willful disregard of an employer's interest when the employee is:

> (1) . . . aware of his employer's interest; (2) knows or should have known that certain conduct jeopardizes that interest; but (3) nonetheless intentionally performs the act, willfully disregarding its probable consequences.

Hamel v. Emp't Sec. Dep't, 93 Wn. App. 140, 146-147, 966 P.2d 1282 (1998), *review denied*, 137 Wn.2d 1036 (1999). Among the acts which may constitute misconduct is "[v]iolation of a company rule if the rule is reasonable and if the claimant knew or should have known of the existence of the rule." RCW 50.04.294(2)(f). The existence of misconduct is a mixed issue of fact and law. *Markham Group, Inc. v. Dep't of Emp't Sec.*, 148 Wn. App. 555, 561, 200 P.3d 748 (2009).

RCW 50.04.294(3) excludes the following acts from the definition of misconduct:

> (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.

The parties disagree about whether or not Mr. Griffith's actions in making the offending comment and his subsequent apology constituted misconduct. DES relies on *Hamel.* There the court upheld a Commissioner's ruling that sexually inappropriate

remarks made by a restaurant worker to a customer constituted misconduct because a reasonable person would know that these comments would harm the employer's interest. *Hamel*, 93 Wn. App. at 147.

In contrast, Mr. Griffith cites *Markham* for the proposition that the acts that constitute misconduct must intentionally or deliberately violate the rights of the employer. In *Markham*, an employee was terminated for making a series of mistakes in her job as a paralegal. 148 Wn. App. at 563. The court held that the employee did not intentionally do a poor job, but was merely unable to perform to the employer's standards. Therefore, she was eligible for benefits. *Id.* at 563-564.

This case is closer to *Hamel* than to *Markham*. In *Markham*, the essence of the court's holding is that inability to perform work is not misconduct, no matter how many mistakes were made. The statute excludes inability to perform the job from the definition of misconduct. *Id*. at 564 (citing RCW 50.04.294(3)(a)). *Markham* does not apply here. Mr. Griffith engaged in intentional conduct by commenting to the customer and in visiting her store while he was suspended. Whether he understood that he was behaving in an offensive manner is irrelevant. He intentionally behaved in a manner that offended the customer and led to his banishment from the location.

The facts here make this case much closer to *Hamel*. 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. 93 Wn. App. at 142-143. He later made another statement that offended a customer and apologized for his action. He was fired. *Id*. at 143. This court determined that he engaged in disqualifying misconduct as he was aware of and violated the company's policy. *Id*. at 147-148. The court also expressly rejected an argument that misconduct required an intent to harm the employer's interest. *Id*. at 146.

As in *Hamel*, Mr. Griffith harmed his employer's interest by offending a customer and getting himself banned from a second delivery location. His argument that the recent offense was of a different character than his first two incidents misses the point that all three incidents harmed the employer's interests. There is no requirement that a pattern of disqualifying misconduct be identical. To rule otherwise would essentially penalize an employer for applying progressive discipline. 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. The fact that he did not perceive his Montana actions to be as egregious as the first two incidents is of no moment.

He acted intentionally, if also mistakenly, and harmed his employer. He thus

committed misconduct. The Commissioner is affirmed.[3]

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

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Korsmo, J.

WE CONCUR:

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Kulik, C.J.

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Siddoway, J.

[3] Because he did not prevail, Mr. Griffith is not entitled to attorney fees. RCW 50.32.160.