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Supreme Court No.
Court of Appeals, Division I No. 69279-8-I

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

JAY NYKOL,

Appellant,

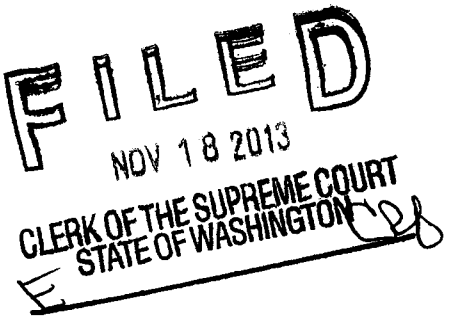
v.

EMPLOYMENT SECURITY DEPARTMENT FOR THE STATE OF WASHINGTON,

Respondents,

PETITION FOR REVIEW

King County Superior Court Case No. 11-2-32402-8KNT



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I. IDENTITY OF PETITIONER

Jay Nykol hereinafter ("Nykol").

II. CITATION TO COURT OF APPEALS DECISION

Nykol seeks review of the Court of Appeals' Order dated October 14, 2013, affirming the decision of the Commissioner of the Employment Security Department hereinafter ("ESD") denying him unemployment benefits.

III. ISSUES PRESENTED FOR REVIEW

A. Whether Nykol's driver's license issued by the Washington State Department of Licensing per RCW 46.20.385 is a "valid Washington driver's license" as required by his employer's collective bargaining agreement? Yes.

B. Whether Nykol should be deprived of his unemployment benefits by ESD, as affirmed by the Court of Appeals, based upon a finding that Nykol committed misconduct per RCW 50.04.294 when his employer refused to reasonably accommodate his disability in violation of RCW 49.60.180 by not signing a waiver of the Interlock Ignition Device as authorized by RCW 46.20.385(c)(i) and that refusal caused the employer to

incorrectly believe Nykol was no longer qualified to do his job and terminated him? No.

C. Whether the Court of Appeals' decision and the decision of the ESD should be reversed allowing Nykol to receive unemployment benefits and if so should fees and costs be awarded if successful? Yes.

IV. STATEMENT OF THE CASE

A. Procedural History

This case arises from an appeal of an administrative hearing/Commissioner's decision denying Nykol his unemployment benefits and the Court of Appeals' decision affirming the Commissioner's denial of the same.

B. Facts of the Case

Nykol worked for Boeing as a firefighter from 1988 to April 20, 2011. In September 2010, while off work on a medical leave of absence for a workplace injury, Nykol was charged with a DUI. In December 2010, as a result of his DUI charge, Nykol enrolled in an intensive outpatient alcohol assessment and treatment program and later enrolled in AA which met at least twice weekly. CP 26. Upon returning from his medical leave

of absence in January 2011, (approximately 4 months after being charged) Nykol promptly informed his supervisor of his DUI arrest; his medical alcohol treatment program; that he had been suffering from the disease of alcoholism; that he was eligible for an interlock ignition driver's (IID) license requiring him to pass a breathalyzer in order to drive. From his return in January through April, Nykol drove the Boeing vehicles without problems or incidence. He proactively informed his employer that he may need a waiver for an interlock driver's license if his regular driver's license was suspended in a court proceeding. CP 26-31. The waiver of an IID would have allowed Nykol to continue to drive Boeing vehicles without installation of an interlock ignition device on each individual vehicle. CP 22-24, CP 29. His employer informed Nykol that if he was given an ignition interlock driver's license it would not sign a waiver. CP 29, CP 65.

In April 2011 as anticipated by Boeing and Nykol, Nykol's regular driver's license was replaced by an Interlock Ignition Driver's License. Nykol formally requested a waiver of the Interlock Driving Device being placed on Boeing's vehicles as a reasonable accommodation which would have allowed him to continue to legally drive its vehicles as he had been doing since his return in January. The requests were denied and he was terminated. CP 32, CP 65.

The employer's only stated reason for terminating Nykol was the loss of his ability to operate the employer's motor vehicles. CP 60; CP 14[1]. In fact, Boeing stated that Nykol was not terminated for a violation of one of the company rules, rather he was released because it errantly believed Nykol did not meet the qualifications for being a firefighter by not having a valid driver's license. Boeing went on to state that Nykol was eligible for rehire and would not be if he were discharged for cause. CP 14-16. These statements and the fact that Nykol performed the functions of a Firefighter Driver/Operator for four months after being charged with a DUI, underscore that Boeing did not understand what a valid driver's license was and did not have a concern about Nykol's driving ability or his continued sobriety.

V. ARGUMENT

A. Standard of Review

Nykol seeks review of the administrative decision based upon RCW 34.05.570(d) and (e). Subsection (d) allows for review if the agency **erroneously interpreted or applied the law** while subsection (e) allows

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[1] Despite acknowledging that Nykol possessed an interlock ignition license (IIL), CP 16-18 lines 19-1; page 48 section 3, the employer erroneously asserted that Nykol did not have a valid Washington State driver's license. See CP 10 Finding of Facts 5 and 7.

for review if the **order is not supported by evidence that is** substantial when viewed in light of the whole record before the court, **which includes the agency record for judicial review, supplemented by any additional evidence received by the court under this chapter.**[2]

B. Employer terminated Nykol because it claimed Nykol did not have a valid driver's license when he did.

Nykol was not terminated for violating any employer rule CP 60; CP 14-15, lines 17-2; rather, his employer terminated him because his employer erroneously determined he did not have a valid driver's license as required by its collective bargaining agreement. CP 60; CP 16. However, the fact remains that Nykol had a valid driver's license and his employer simply refused to sign an IID waiver per RCW 46.20.385(c)(i) which would have allowed him to utilize his valid interlock ignition license and drive for his employer. CP 17, lines 12-15; CP 10 (Finding of Fact 7).

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[2] An agency's application of the law to a particular set of facts is subject to **de novo** review. *Tapper v. Employment Sec. Dep't,* 122 Wn.2d 397, 403, 858 P.2d 494 (1993) (citing *Henson v Employment Sec. Dep't,*113 Wn.2d 374, 377, 779 P.2d 715 (1989) ("With mixed questions of law and fact, the court determines the correct law independent of the agency's decision and then applies it to the facts as found by the agency.") *Johnson v. Dep't of Employment Sec.*, 112 Wn.2d 172, 175, 769 P.2d 305 (1989) "The factual findings of the agency are entitled to the same level of deference which would be accorded under any other circumstance." *Tapper v. Employment Sec. Dep't,* 122 Wn.2d at 403, 858 P.2d 494 (1993). Nykol has the burden of demonstrating the invalidity of agency action. RCW 34.05.570.

> **The installation of an ignition interlock device is not necessary on vehicles owned, leased, or rented by a person's employer** and on those vehicles whose care and/or maintenance is the temporary responsibility of the employer, and driven at the direction of a person's employer as a requirement of employment during working hours. **The person must provide the department with a declaration pursuant to RCW 9A.72.085 from his or her employer stating that the person's employment requires the person to operate a vehicle owned by the employer or other persons during working hours.** RCW 46.20.385(c)(1).

C. Nykol did not engage in misconduct.

The Court of Appeals' opinion improperly decided that Nykol's temporary loss of his regular driver's license constituted "per se" misconduct as defined by RCW 50.04.294(2)(f) which 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: a (4) 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."

To reach that conclusion, the Court of Appeals and the Commissioner improperly determined (1) the license issued per RCW 46.20.385(c)(1) was not a valid driver's license and (2) that the employer's

failure to reasonably accommodate Nykol's disability was both (a) foreseeable and (b) the proximate legal cause of his inability to drive for his employer.

1. Nykol's license was valid per RCW 46.20.385(c)(1)

The pertinent portion of the employer's collective bargaining agreement ("CBA") states "Employees shall attain and maintain...**a valid Washington State Driver's License**." CP 60.

There is absolutely nothing in the record or as a matter of law to indicate that Nykol's driver's license was not a "valid Washington State driver's license" or that it was somehow restricted[3]. To interpret the license issued by our state as somehow being "invalid" would run contrary to established case law.[4] Courts are to give words in a contract their ordinary, usual, and popular meaning unless the entirety of the agreement clearly demonstrates a contrary intent. *Universal/Land Constr. Co. v. City of Spokane*, 49 Wn. App. 634, 637, 745 P.2d 53 (1987). We do not interpret

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[3] Restricted licenses are set forth in RCW 46.20.394 which limit among other things the use and time when a vehicle can be driven. However, there were no such limitations on Nykol. CP 25-27

[4] The Court of Appeals erroneously defined a valid driver's license to be "a license that allows a person to drive in Washington unrestricted and unfettered, with no special conditions." See Opinion page 5. That logic could undermine the ability for all disabled persons to lawfully operate a motor vehicle pursuant to RCW 46.20.041.

what was intended to be written but what was written. *J.W. Seavey Hop Corp. of Portland v. Pollock,* 20 Wn.2d 337, 348-49, 147 P.2d 310 (1944), *cited with approval in Berg*, 115 Wn.2d 657, 669, 801 P.2d 222 (1990). A collective bargaining agreement is a contract and should be interpreted as such. Accordingly, "[c]ollective bargaining agreements are governed by the ordinary rules of contract law." *Barclay v City of Spokane,* 83 Wn.2d 698, 700, 521 P.2d 937 (1974); *Atkinson v. Thrift Super Mkts. Inc.,* 56 Wn.2d 592, 354 P.2d 709 (1960). Courts are controlled by the objective manifestation of intent as expressed in the writing." *Barclay* at 700, 521 P.2d 937 (1974); *Jacoby v. Grays Harbor Chair & Mfg. Co.,* 77 Wn.2d 911, 468 P.2d 666 (1970). Accordingly, a license issued pursuant to RCW 46.20.385 must be a valid driver's license pursuant to the CBA.

2. It was not foreseeable that Nykol's employer would fail to accommodate his disability.

An employer must reasonably accommodate the sensory, mental, or physical limitations of a disabled employee. *Frisino v Seattle Sch. Dist.*, 160 Wn. App. 765; 249 P.3d 1044, (Div 1, 2011); *Pulcino v Fed. Ex.,* 141 Wn.2d 629; 9 P.3d 787, (2000)(overruled on other grounds); *Snyder v. Medical Serv. Corp,* 98 Wn. App. 315, 988 P.2d 1023 (1999) (citing *Doe v. Boeing Co.,* 121 Wn.2d 8, 16, 18, 846 P.2d 531

(1993)). Alcoholism is a disability as defined by RCW 49.60.040(7)(a) and defined by the American Medical Association (AMA) as "a primary, chronic disease with genetic, psychosocial, and environmental factors influencing its development and manifestations." The AMA also sets forth the following policies:

H-30.995 Alcoholism as a Disability

1. The AMA believes it is important for professionals and laymen alike to recognize that **alcoholism is in and of itself a disabling and handicapping condition.** CP 24, 29 & 30.

"Disability" is defined by:

> **The presence of a sensory, mental, or physical <u>impairment</u> that**:
>
> (i) Is medically cognizable or diagnosable; **or**
> (ii) Exists as a record or history; or
> (iii) Is perceived to exist whether or not it exists in fact.
>
> (b) **A disability exists whether it is temporary or permanent**, common or uncommon, mitigated or unmitigated, or whether or not it limits the ability to work generally or work at a particular job or whether or not it limits any other activity within the scope of this chapter.
>
> (c) For purposes of this definition, **"impairment" includes**, but is not limited to:

(i) **Any physiological disorder**, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: Neurological, musculoskeletal, special sense organs, respiratory, including speech organs, cardiovascular, reproductive, digestive, genitor-urinary, hemic and lymphatic, skin, and endocrine; or

(ii) **Any mental, developmental, traumatic, or psychological disorder**, including but not limited to cognitive limitation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

(d) Only for the purposes of qualifying for reasonable accommodation in employment, an impairment must be known or shown through an interactive process to exist in fact and:

(i) The impairment must have a substantially limiting effect upon the individual's ability to perform his or her job, the individual's ability to apply or be considered for a job, or the individual's access to equal benefits, privileges, or terms or conditions of employment; or ... RCW 49.60.040(7)(a).

Based upon the definition of a disability as set forth above, alcoholism is a disability and must be viewed as any other disease or condition subject to analysis as a disability under RCW 49.60.180.[5]

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[5] The Court of Appeals' opinion suggests that Nykol could not prove that he was suffering from alcoholism based on his own testimony (see Opinion page 6) however, in an administrative proceeding, such testimony, even if hearsay, is admissible. *See* RCW 34.05.452(1) and RCW 34.05.461(4)

Here, it cannot be contested that Nykol's alcoholism was a disability as defined above. It was diagnosed and is a physiological or psychological condition.

a. SINCE NYKOL HAD A DISABILITY BOEING WAS REQUIRED TO REASONABLY ACCOMMODATE IT

A reasonable accommodation must allow the employee to work in the environment and perform the essential functions of his job. *Griffith v. Boise Cascade, Inc.*, 111 Wn. App. 436, 442, 45 P.3d 589 (2002). To accommodate, **the employer must affirmatively take steps to help the disabled employee continue working at the existing position** ... *Id.*

Here, despite its legal obligations under RCW 49.60.180(2) Boeing refused to accommodate Nykol's disability and took no affirmative steps to accommodate him. And, specifically, it refused to sign a waiver of his IID.[6]

i. Reasonable Accommodation

The employer could have and should have signed a waiver such that an interlock ignition device (IID) would not be

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[6] Moreover, it has never asserted that accommodating him would pose an undue hardship. This is because a simple accommodation i.e, waiver was available.

required on its vehicles allowing Nykol to operate its vehicles for work using his Washington State Interlock Driver's License. (This would be wholly consistent with Finding of Fact 7 which stated "If the employer executed a waiver permitting the claimant to drive without installation of an interlock device on the work vehicle the claimant would drive, he would be permitted, by law, to drive the company vehicles.") CP 65.

ii. Numerous Safeguards

Nykol had been driving for Boeing as part of his regular job duties without incident for four months after his DUI and prior to his receiving a valid IID license in April. Nevertheless, he provided Boeing with numerous safeguards to be more than reasonably assured that, by signing the IID waiver, it would not place persons or property at an unreasonable risk of injury due to Nykol's prior DUI and prior alcohol use when:

(1) the employer could reasonably rely upon the electronic interlock ignition device (breathalyzer) installed on Nykol's personal vehicle to ensure that he did not come to work under the influence because Nykol had to pass the breathalyzer in order to start and then drive his vehicle to his employer's work site each work day CP 20, lines 5-19;

(2) Nykol's state-calibrated breathalyzer/IID located in his car would have been on his employer's premises for testing at any time during the day to ensure that Nykol was not using alcohol and not under its influence while employed CP 20, lines 15-19;

(3) The employer could also reasonably rely upon its own breathalyzer services to ensure that Nykol was not using alcohol and not under the influence while employed CP 19, lines 11-12;

(4) The employer could have reasonably relied upon its own security personnel to visually inspect/search Nykol and his vehicle, (operated by the electronic interlock ignition device) to ensure that Nykol was not using alcohol and not under its influence while employed CP 30, lines 15-21;[7]

(5) The employer could and should follow its own policy of Mandatory Rehabilitation. CP 61 (Exhibit 9 p. 2).

Here, the employer simply refused to reasonably accommodate Nykol and for the reasons stated above its refusal was an unlawful failure to accommodate him. The employer was given numerous safeguards

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[7] Any one of the breathalyzer options was available to the employer. It had every opportunity to ensure Nykol was not posing an unreasonable risk to persons or property.

such that signing the IID waiver was not an unreasonable accommodation.[8]

D. Proximate Cause

The employer's failure to sign the IID waiver was the proximate cause of Nykol being unable to operate the employer's vehicle. Had it found or concluded otherwise, Nykol could not have "willfully disregarded the probable consequences" i.e., loss of ability to drive because he would not have and should not have lost the ability to operate his employer's vehicle as held in Conclusion of Law 10. CP 65.

1. Since Nykol's disability was not accommodated as required by law, the employer and not Nykol, was the proximate cause of his inability to operate the employer's vehicles.

Proximate cause can be divided into two elements: cause in **fact** and **legal** cause. *Michaels v CH2M Hill, Inc.*, 171 Wn.2d 587 (2011); *Schooley v. Pinch's Deli Mkt., Inc.,* 134 Wn.2d 468, 478, 951 P.2d 749 (1998). "'Cause in fact' refers to the actual 'but for' cause of the

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[8] The ultimate finding that the employer acted illegally is immaterial to the determination of whether Nykol's conduct was misconduct. Rather, it is sufficient to find that the employer had a duty to sign the IID waiver and failed to do so. *See* RCW 50.92.097 (prohibits the use of any such finding for purposes of collateral estoppel in another action)

injury, i.e., 'but for' the defendant's actions the plaintiff would not be injured." *Id.*

Proximate legal causation analysis is determined as a matter of policy and whether the connection between the ultimate result and the act of the defendant is too remote or insubstantial to impose liability. **A determination of legal liability will depend upon 'mixed considerations of logic, common sense, justice, policy, and precedent.'"** *Schooley*, 134 Wn.2d at 478-79.

In the Initial Order, Administrative Law Judge Debra Pierce determined that "the claimant drank alcohol and drove a vehicle, resulting in a charge of driving under the influence of alcohol and the suspension of his driver's license." And, since he "also knew that he was required to maintain a valid driver's license to maintain his employment"... he "knew or should have known" **(foreseeability)** that "by drinking he jeopardized his employment" such that he "acted willfully disregarding the probable consequences" (The probable consequence in this case is Nykol's inability to drive for his employer.) CP 65 (Conclusion of Law 10).[9]

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[9] The ALJ correctly stated in Finding 7 ("If the employer executed a waiver permitting the claimant to drive without installation of an interlock device on the work vehicle the

However, Nykol could, in fact, legally drive for his employer! (as he had been for four months before his termination). CP 65 (ALJ Finding 7). And, because the employer's refusal to sign the IID waiver was not proper or lawful per RCW 49.60.180(2), the loss of the ability to drive for his employer was neither foreseeable nor probable.

If we apply foreseeability within the framework of misconduct as defined by statute, we would necessarily reach a different conclusion than that of the Commissioner. If an intervening cause is unforeseeable then "'it will break the causal connection between the defendant's negligence and the plaintiff's injury'" and negate a finding of cause in fact. *Maltman v. Sauer*, 84 Wn.2d 975, 982, 530 P.2d 254 (1975) (quoting *Qualls v. Golden Arrow Farms, Inc.*, 47 Wn.2d 599, 602, 288 P.2d 1090 (1955)). *See also* 57A AM. JUR. 2D *Negligence* § 692, at 635.

Ordinarily, whether an independent cause is reasonably foreseeable is a question of fact for the jury. The issue may be resolved as a matter of law, however, if there is no question that the intervening cause was unforeseeable. *McCoy v. American Suzuki Motor Corp.*, 136 Wn.2d 350, 358, 961 P.2d 952 (1998). The theoretical underpinning of

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claimant would drive, he would be permitted, by law, to drive the company vehicles"). CP 65.

an **intervening cause** which is sufficient to break the original chain of causation is the **absence of its foreseeability.** *Boeing Co. v. State*, 89 Wn.2d 443, 446, 572 P.2d 8 (1978); *Maltman*, 84 Wn.2d at 982; *Fosbre v. State*, 70 Wn.2d 578, 584, 424 P.2d 901 (1967).

Here, the employer's unlawful refusal to sign the IID waiver was, as a matter of law, the intervening cause and there is no basis to presume that Nykol could foresee his employer acting illegally. As a result, Nykol did not engage in misconduct and should not have been disqualified from receiving unemployment benefits.

VI. CONCLUSION

With all due respect, a gross miscarriage of justice has occurred. Nykol had a valid driver's license and the Commissioner's and the Court of Appeals' holdings to the contrary are without a basis in fact or law. Under the Court of Appeals' holding, all persons who are disabled and require some sort of different driver's license may be unable to obtain unemployment benefits if their respective employer's terminate their employment for lack of a valid driver's license.

To find misconduct in this case, the court would be required to find that Nykol's license was not valid; which it is. And to hold that Nykol's actions were willful it would have to find that the employer's refusal to

reasonably accommodate his disability was foreseeable and that its refusal to sign a waiver of the IID was not the proximate cause of his termination. These holdings cannot be so.

Finally, while not briefed here, the underlying briefs also address the jurisdiction of ESD to make a rule regarding a reasonable accommodation. ESD has jurisdiction and Nykol respectfully requests that this court accept his petition for review and ultimately reverse the denial of unemployment benefits, hold Nykol did not engage in misconduct and award fees and costs to him as well.

RESPECTFULLY SUBMITTED this 13 day of November, 2013.

By: _____

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APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

JAY C. NYKOL, Appellant, v. WASHINGTON STATE DEPARTMENT OF EMPLOYMENT SECURITY, Respondent.	)	No. 69279-8-I UNPUBLISHED OPINION FILED: October 14, 2013

VERELLEN, J. — Former Boeing employee Jay Nykol appeals the decision denying his application for unemployment benefits. Boeing terminated his employment as a firefighter when his driver's license was suspended due to an off-duty driving under the influence (DUI) charge. Nykol argues that he did not violate the work rule requiring him to have a valid Washington driver's license because he obtained a restricted ignition interlock driver's license (Interlock License) after his regular license was suspended. In the alternative, Nykol contends that he was terminated not because of his misconduct, but because Boeing failed to accommodate his disability of alcoholism by signing a waiver allowing him to drive the company's vehicles. Neither argument is persuasive. We affirm.

FACTS

Nykol began working for Boeing in 1988, and was last employed as a firefighter driver/operator on April 20, 2011. The pertinent collective bargaining agreement requires that firefighters must have a valid Washington State driver's license. Nykol knew this requirement.

Nykol was charged with DUI in September 2010. Nykol's regular driver's license was suspended pursuant to a pretrial diversion agreement. He obtained a restricted Interlock License[1] that permitted him to drive vehicles equipped with an ignition interlock device. Nykol also enrolled in an alcohol treatment program.

After Nykol advised Boeing of his DUI charge, license suspension, and restricted Interlock License, Boeing considered and rejected two alternatives that would allow Nykol to continue to drive its emergency vehicles. First, Boeing could have ignition interlock devices installed on every emergency vehicle that Nykol might be required to drive. Boeing determined this was impractical. Second, Boeing had the option of waiving the ignition interlock device requirement, pursuant to RCW 46.20.385(1)(c)(i), which would allow Nykol to drive its vehicles. However, Boeing adhered to its preexisting policy of declining to execute ignition interlock device waivers due to liability and safety issues. Because Nykol was unable to perform his job duties in these circumstances, Boeing terminated his employment.

[1] An Interlock License is a permit issued by the Department "that allows the person to operate a noncommercial motor vehicle with an ignition interlock device while the person's regular driver's license is suspended, revoked, or denied." RCW 46.04.217.

The Department of Employment Security (Department) denied Nykol's claim for unemployment insurance benefits. Nykol appealed, and a hearing was conducted by an administrative law judge. The administrative law judge affirmed, concluding that Nykol was discharged due to misconduct; specifically, for losing his driver's license. Nykol petitioned for review of the administrative law judge's order by the commissioner of the Department. The commissioner affirmed. Nykol then petitioned King County Superior Court to review the commissioner's ruling pursuant to the Administrative Procedure Act, chapter 34.05 RCW. The superior court affirmed, and denied Nykol's subsequent motion for reconsideration. Nykol appeals.

DISCUSSION

Nykol disputes the commissioner's conclusion that he committed per se misconduct pursuant to RCW 50.04.294(2)(f) by violating Boeing's driver's license requirement. Instead, Nykol contends that his Interlock License is a valid Washington driver's license, hence, he never violated the driver's license requirement. He alternatively argues that Boeing had a duty to accommodate his disability of alcoholism by signing an ignition interlock device waiver. Neither argument is persuasive.

When a claimant has been discharged or suspended for misconduct connected with his or her work, he or she is disqualified from receiving unemployment insurance benefits.[2] The existence of misconduct is a mixed issue of fact and law.[3] Such

[2] RCW 50.20.066(1).

[3] Tapper v. State Emp't Sec. Dep't, 122 Wn.2d 397, 402-03, 858 P.2d 494 (1993); see also Daniels v. State Dep't of Emp't Sec., 168 Wn. App. 721, 727, 281 P.3d 310, review denied, 175 Wn.2d 1028 (2012); Markham Grp., Inc., P.S. v. State Dep't of Emp't Sec., 148 Wn. App. 555, 561, 200 P.3d 748 (2009).

misconduct is defined as including:

> (a) Willful or wanton disregard of the rights, title, and interests of the employer or a fellow employee;[4]
>
> (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.[5]

Per se misconduct also includes the "[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."[6]

Nykol does not dispute that the requirement that he possess a valid Washington driver's license is a company rule, that the rule is reasonable, or that the loss of his regular driver's license was work related.

In reviewing administrative action, this court sits in the same position as the superior court, applying the standards of the Administrative Procedures Act directly to the record before the agency.[7] The Administrative Procedures Act allows a reviewing court to reverse an administrative decision when the decision is based on an error of law, is not based on substantial evidence, or is arbitrary or capricious.[8]

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[4] An employee acts with willful disregard of an employer's interest when the employee "(1) is aware of his employer's interest; (2) knows or should have known that certain conduct jeopardizes that interest; but (3) nonetheless intentionally performs the act, willfully disregarding its probable consequences. Hamel v. Emp't Sec. Dep't, 93 Wn. App. 140, 146-47, 966 P.2d 1282 (1998).

[5] RCW 50.04.294(1).

[6] RCW 50.04.294(2(f).

[7] Macey v. Emp't Sec. Dep't, 110 Wn.2d 308, 312, 752 P.2d 372 (1988).

[8] RCW 34.05.570(3).

Nykol first contends his specialty Interlock License was a "valid" Washington driver's license. But Nykol acknowledges that he was not allowed to drive company vehicles unless ignition interlock devices were installed or Boeing signed a waiver. It is also undisputed that Boeing declined to install ignition interlock devices or to sign a waiver, consistent with its preexisting policy. Nykol provides no compelling authority or argument that his specialized license with its limitations is an unqualified valid Washington State driver's license for purposes of the company rule. The plain and ordinary meaning of the term "valid Washington driver's license" is a license that allows a person to drive in Washington unrestricted and unfettered, with no special conditions. It does not mean a specialty license, available only if an individual's regular license is suspended, that has special restrictions and conditions. Nykol's violation of the work rule requiring a valid Washington driver's license was per se misconduct.

Nykol also argues that that Boeing failed to reasonably accommodate his disability of alcoholism as required by the Law Against Discrimination, chapter 49.60 RCW. That statute provides that it is an unfair practice for any employer:

> (2) To discharge or bar any person from employment because of . . . the presence of any sensory, mental, or physical disability. . . .
>
> (3) To discriminate against any person in compensation or in other terms or conditions of employment because of . . . the presence of any sensory, mental, or physical disability.[9]

Under RCW 49.60.040(7), "disability" means "a sensory, mental, or physical impairment that . . . [i]s medically cognizable or diagnosable; or . . . [e]xists as a record or history; or . . . [i]s perceived to exist whether or not it exists in fact."

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[9] RCW 49.60.180.

Nykol testified at the administrative hearing that he told Boeing that he was "suffering from alcoholism,"[10] but presented no other evidence of his diagnosis. He also failed to present evidence that would allow a determination that his diagnosis met the statutory definition of a disability that would require accommodation. There are serious doubts whether an employer's failure to accommodate an employee's alleged disability impacts a determination of per se misconduct for purposes of unemployment benefits. Nykol provides no compelling authority that discrimination on the basis of disability impacts per se misconduct for purposes of unemployment benefits.[11] Further, even assuming that RCW 49.60.180 has some application to unemployment benefit determinations, this limited record and limited briefing do not establish a failure to accommodate a disability. Nykol fails to meet his burden of demonstrating the invalidity of the commissioner's decision.[12]

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[10] Certified Appeal Board Record at 29.

[11] Nykol argues that a court can determine "whether one could or should receive unemployment benefits if an employee's rights guaranteed by RCW 49.60.et.seq., were being violated." Reply Br. at 17. He cites Martini v. Emp't Sec. Dep't, 98 Wn. App 791, 796, 990 P.2d 981 (2000) (Minimum Wage Act violation by employer gave employee "per se good cause" to voluntarily leave work, entitling employee to benefits), Sweitzer v. Emp't Sec. Dep't, 43 Wn. App. 511, 516, 718 P.2d 3 (1986) (stating in dicta that if job assignments a female employee received "were the result of sex discrimination," she would have good cause to voluntarily quit and be entitled to benefits), and Hussa v Emp. Sec. Dep't, 34 Wn. App. 857, 864, 664 P.2d 1286 (1983) (female employee who voluntarily quit for good cause due to sex discrimination was entitled to unemployment benefits). But those cases all involve determinations of whether an employee voluntarily quit for good cause and are not instructive in the context of an employee's termination for per se misconduct.

[12] See RCW 34.05.570(1)(a); Smith v. Emp't Sec. Dep't, 155 Wn. App. 24, 32, 226 P.3d 263 (2010); Anderson v. Emp't Sec. Dep't, 135 Wn. App. 887, 893, 146 P.3d 475 (2006).

Nykol contends it would be error to disqualify him from benefits solely on the basis that he was not "unemployed through no fault of his own," referencing RCW 50.01.010. But the commissioner's denial of benefits here was premised on a finding of per se misconduct. Accordingly, this case does not present the issue of whether an employee's fault is an adequate basis for denying benefits, absent misconduct.

Nykol fails to demonstrate reversible error.[13]

Affirmed.

WE CONCUR:

[13] Nykol requests attorney fees, pursuant to RCW 50.32.160. Because he does not prevail in his appeal, we deny his request.

APPENDIX B

CERTIFICATE OF SERVICE
I certify that I mailed a copy of this decision to the within named interested parties at their respective addresses postage prepaid on August 26, 2011.

C Higgins

Representative, Commissioner's Review Office,
Employment Security Department

UIO: 770
BYE: 04/14/2012

BEFORE THE COMMISSIONER OF
THE EMPLOYMENT SECURITY DEPARTMENT
OF THE STATE OF WASHINGTON

Review No. 2011-3168

In re:	Docket No. 04-2011-21059
JAY C. NYKOL SSA No. 327-42-4315	DECISION OF COMMISSIONER

On August 1, 2011, JAY C. NYKOL petitioned the Commissioner for review of an Initial Order issued by the Office of Administrative Hearings on July 8, 2011. Pursuant to chapter 192-04 WAC this matter has been delegated by the Commissioner to the Commissioner's Review Office. Having reviewed the entire record, and having given due regard to the findings of the administrative law judge pursuant to RCW 35.05.464(4), we adopt the Office of Administrative Hearings' Findings of Fact and Conclusions of Law, subject to the following additions, modifications and comments.

Responding to the petition, having carefully reviewed the entire record in this matter, we can find no basis for setting aside the administrative law judge's decision. The petition reiterates points addressed at the hearing which, in our opinion, were properly resolved in the administrative law judge's decision. Initially, we note that pursuant to RCW 50.20.066, "with respect to claims that have an effective date on or after January 4, 2004: (1) . . . Alcoholism shall not constitute a defense to disqualification from benefits due to misconduct."

As noted by the administrative law judge, a claimant shall be disqualified from benefits if discharged from employment for misconduct pursuant to RCW 50.20.066(1), as more particularly defined at RCW 50.04.294. Misconduct which signifies a willful or wanton disregard of the rights, title and interests of the employer or fellow employee includes 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).

Misconduct may not be inferred or presumed. In re Hawkins, Empl. Sec. Comm'r Dec.2d 465 (1978); In re Carpenter, Empl. Sec. Comm'r Dec.2d 176 (1976). Rather, the employer has the burden of establishing misconduct by a preponderance of evidence. *See e.g.*,

In re Verner, Empl. Sec. Comm'r Dec.2d 617 (1980). A preponderance of evidence is that evidence which, when fairly considered, produces the stronger impression, has the greater weight, and is the more convincing as to its truth when weighed against the evidence in opposition thereto. Yamamoto v. Puget Sound Lbr. Co., 84 Wash. 411, 146 Pac. 861 (1915).

Unemployment benefits are properly payable only to claimants unemployed through no fault of their own. RCW 50.01.010. In cases involving claimants who have become unemployed due to their failure to meet continuing requisites of employment, it cannot be said that they became unemployed through no fault of their own.

The preponderance of evidence in this case shows claimant was required to attain and maintain certain qualifications as a condition of employment in his position as a Firefighter Driver/Operator. Specifically, claimant was to hold a valid Washington State driver's license. *See* adopted Findings of Fact Nos. 1 and 3.

A company rule is reasonable if it is related to claimant's job duties, is a normal business requirement or practice for the claimant's occupation or industry, or is required by law or regulation. WAC 192-150-210(4). Here, the driver's license was related to claimant's job duties and was a normal business requirement and practice for claimant's occupation and industry. *See* adopted Finding of Fact No. 3. Therefore, the employer's requirement that claimant maintain a valid driver's license is reasonable. Claimant was aware of the rule. *See* adopted Finding of Fact No. 4. Claimant lost his license, and as a result, the employer was no longer able to employ claimant in his position as a Firefighter Driver/Operator. Thus, the evidence shows that claimant deliberately and willfully violated the employer's reasonable rule. Finally, claimant was not unemployed through no fault of his own. RCW 50.01.010. The employer has proved by a preponderance of evidence that claimant committed misconduct pursuant to RCW 50.04.294(2)(f).

Now, therefore,

IT IS HEREBY ORDERED that the July 8, 2011 Initial Order of the Office of Administrative Hearings is AFFIRMED on the issue of the job separation. Claimant is disqualified pursuant to RCW 50.20.066(1), beginning April 17, 2011, for ten calendar weeks and until he has obtained bona fide work in employment covered by Title 50 RCW and earned wages in that employment equal to ten times his weekly benefit amount. The Initial Order is AFFIRMED on the issue of availability. Claimant is eligible during the weeks at issue pursuant to RCW 50.20.010(1)(c). *Employer:* If you pay taxes on your payroll and are a base year employer for this claimant, or become one in the future, your experience rating account will not be charged for any benefits paid on this claim or future claims based on wages you

paid to this individual, unless this decision is set aside on appeal. See RCW 50.29.021.

DATED at Olympia, Washington, August 26, 2011.*

Rhonda J. Brown

Review Judge
Commissioner's Review Office

*Copies of this decision were mailed to all interested parties on this date.

RECONSIDERATION

Pursuant to RCW 34.05.470 and WAC 192-04-190 you have ten (10) days from the mailing and/or delivery date of this decision/order, whichever is earlier, to file a petition for reconsideration. No matter will be reconsidered unless it clearly appears from the face of the petition for reconsideration and the arguments in support thereof that (a) there is obvious material, clerical error in the decision/order or (b) the petitioner, through no fault of his or her own, has been denied a reasonable opportunity to present argument or respond to argument pursuant WAC 192-04-170. Any request for reconsideration shall be deemed to be denied if the Commissioner's Review Office takes no action within twenty days from the date the petition for reconsideration is filed. A petition for reconsideration together with any argument in support thereof should be filed by mailing or delivering it directly to the Commissioner's Review Office, Employment Security Department, 212 Maple Park Drive, Post Office Box 9555, Olympia, Washington 98507-9555, and to all other parties of record and their representatives. The filing of a petition for reconsideration is not a prerequisite for filing a judicial appeal.

JUDICIAL APPEAL

If you are a party aggrieved by the attached Commissioner's decision/order, your attention is directed to RCW 34.05.510 through RCW 34.05.598, which provide that further appeal may be taken to the superior court within thirty (30) days from the date of mailing as shown on the attached decision/order. If no such judicial appeal is filed, the attached decision/order will become final.

If you choose to file a judicial appeal, you must both:

a. Timely file your judicial appeal directly with the superior court of the county of your residence or Thurston County. If you are not a Washington state resident, you must file your judicial appeal with the superior court of Thurston County. See RCW 34.05.514. (The Department does not furnish judicial appeal forms.) AND

b. Serve a copy of your judicial appeal by mail or personal service within the 30-day judicial appeal period on the Commissioner of the Employment Security Department, the Office of the Attorney General and all parties of record.

The copy of your judicial appeal you serve on the Commissioner of the Employment Security Department should be served on or mailed to: Commissioner, Employment Security Department, Attention: Agency Records Center Manager, 212 Maple Park, Post Office Box 9555, Olympia, WA 98507-9555. To properly serve by mail, the copy of your judicial appeal must be received by the Employment Security Department on or before the 30th day of the appeal period. See RCW 34.05.542(4) and WAC 192-04-210. The copy of your judicial appeal you serve on the Office of the Attorney General should be served on or mailed to the Office of the Attorney General, Licensing and Administrative Law Division, 1125 Washington Street SE, Post Office Box 40110, Olympia, WA 98504-0110.