69279-8

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NO. 69279-8

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

JAY C. NYKOL,

Appellant,

v.

EMPLOYMENT SECURITY DEPARTMENT FOR THE STATE OF WASHINGTON,

Respondent.

RESPONDENT'S BRIEF

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I. INTRODUCTION

An employee who is discharged for violating a reasonable employer rule has been discharged for misconduct under the Employment Security Act and is disqualified from receiving unemployment benefits. Appellant Jay Nykol was employed as a firefighter at the Boeing Company and was required to have a valid driver's license as a condition of his employment. However, Nykol's driver's license was revoked after he was arrested for driving under the influence and entered a pre-trial diversion agreement. Boeing discharged Nykol because he did not have a valid driver's license[1] and he no longer met a condition of employment.

The Commissioner of the Employment Security Department denied Nykol's unemployment benefits claim, correctly concluding that Nykol's actions constituted misconduct as defined in RCW 50.04.294 because Nykol failed to comply with a reasonable employer rule—the requirement that he maintain a valid driver's license—when his voluntary

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[1] Nykol's assertion throughout his brief that he had a valid driver's license is inaccurate. Br. of Appellant at 4, 9, 11, 15, 36. The testimony from the administrative hearing reveals Nykol had an ignition interlock driver's license. AR 22, 29. This is a *restricted* license that allows an individual to drive while his or her license is suspended or revoked only if all vehicles driven are equipped with an ignition interlock device or, for an employer vehicle, the employer has executed a waiver of the ignition interlock device requirement. *See* RCW 46.04.217; 46.20.385; www.dol.wa.gov/driverslicense/iil.html. An ignition interlock device is an instrument that measures breath alcohol content into which a driver must blow before he or she can start the vehicle. *See* RCW 46.04.215; www.dol.wa.gov/driverslicense/ignitioninterlock.html.

actions of drinking and driving resulted in the revocation of his driver's license. The Court should affirm the Commissioner's decision.

II. COUNTERSTATEMENT OF ISSUES ON APPEAL

1. Under RCW 50.20.066 and RCW 50.04.294(2)(f), a person is disqualified from unemployment benefits if he was discharged from employment for violating a reasonable company rule about which he knew. Did the Commissioner properly conclude Nykol's conduct of driving under the influence, which resulted in the loss of his driver's license and failure to comply with Boeing's reasonable company rule requiring a valid driver's license for performance of his work duties, amount to disqualifying misconduct?

2. May Nykol litigate a disablity acommodation claim in an appeal of the denial of unemployment benefits?

III. COUNTERSTAMENT OF THE CASE[2]

Nykol worked at The Boeing Company as a firefighter for Boeing's in-house fire department. Administrative Record[3] (AR) 13-14, 64 (Findings of Fact (FF) 1-2). Nykol's employment was subject to a Collective Bargaining Agreement which provided that firefighters must attain and maintain an Emergency Vehicle Accident Prevention

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[2] Nykol's statement of the case cites the administrative record regardless of whether the point in the record is reflected in a finding of fact. *See* Br. of Appellant at 12-17. The Department provides this counterstatement of the case to present the facts as found by the Commissioner, which are the basis for this Court's review. *See Tapper v. Emp't Sec. Dep't*, 122 Wn.2d 397, 406, 858 P.2d 494 (1993).

[3] The Administrative Record (AR) is a Certified Record of Administrative Adjudicative Orders as defined by RAP 9.7(c). The Superior Court transmitted the Administrative Record in its entirety and did not repaginate it. Thus, rather than including a Clerk's Papers citation, this brief refers to the Administrative Record according to its original pagination.

certification and a valid Washington State driver's license. AR 15-16, 60, 63, 65 (FF 3).

In September 2010, Nykol was arrested for and charged with driving under the influence of alcohol (DUI) while he was off duty. AR 21, 28, 65 (FF 5). Nykol was aware before he received his DUI that he was required to hold a valid Washington State driver's license to maintain employment. AR 22-23, 65 (FF 4).

Nykol advised Boeing of his DUI in January 2011. AR 16, 28, 52, 65 (FF 6). In mid-March 2011, Nykol entered into a pre-trial diversion agreement that provided for the revocation of his Washington State driver's license. AR 21. His driver's license was revoked by the Department of Licensing on April 17, 2011. AR 32. However, he obtained an ignition interlock driver's license, which permitted him to drive his personal vehicle by equipping it with an ignition interlock device. AR 21-22, 31, 65 (FF 5).

On April 20, 2011, after his driver's license was revoked, Boeing released Nykol from employment because he failed to meet a qualification for his job since he did not possess a valid Washington State Driver's License. AR 14-16, 18, 28, 32, 60, 65 (FF 6).

Under his ignition interlock driver's license, Nykol could have driven Boeing's noncommercial work vehicles without installation of an

ignition interlock device if Boeing executed a written waiver to that effect. AR 16-18, 24, 53, 65 (FF 7). Alternately, Boeing could have installed ignition interlock devices on the eleven-plus work vehicles that Nykol may have been required to drive. AR 17-18, 24, 53, 65 (FF 7).

Boeing however, elected not to execute a waiver because of the potential liability and safety issues that entailed, including that Nykol was known to transport patients to hospitals in Boeing's service vehicles. AR at 16-17. Further, installation of ignition interlock devices on emergency vehicles, which Nykol was required to drive as part of his job, was not feasible because he drove eleven or more different vehicles at different locations. AR 16-18, 19, 24, 65 (FF 7). Finally, there was no provision in the Collective Bargaining Agreement that required Boeing to accommodate employees with an ignition interlock waiver or installation of a device on each of the work vehicles an employee drove. AR 18, 23, 29.

After Boeing terminated Nykol's employment, Nykol opened a claim for unemployment benefits. The Department denied Nykol's claim after concluding that he violated a reasonable and known rule or policy of his employer. AR 44. Nykol appealed the Determination Notice, and an administrative hearing occurred. AR 42, 64. Following the hearing, an administrative law judge (ALJ) affirmed the Determination Notice,

concluding in an Initial Order that Nykol failed to comply with a reasonable employer rule—the requirement that he maintain a valid driver's license—when his voluntary actions of drinking and driving resulted in the suspension of his driver's license. AR 67 (Conclusion of Law (CL) 10). Nykol's violation of Boeing's rule amounted to statutory misconduct, disqualifying him from unemployment benefits. AR 67 (CL 10).

Nykol petitioned the Department's Commissioner to review the ALJ's Initial Order. AR 72-75. The Commissioner adopted the ALJ's findings of fact and conclusions of law, subject to several "additions, modifications and comments," and affirmed the ALJ's Initial Order. AR 78-79. Specifically, the Commissioner found that Boeing's requirement that Nykol maintain a valid driver's license was reasonable, that Nykol was aware of the rule, and that Nykol deliberately and willfully violated Boeing's reasonable rule when he lost his license, as Boeing was no longer able to employ him in his position as a Firefighter. AR 79.

Nykol petitioned the superior court for judicial review, and the superior court affirmed the Commissioner's decision. Clerk's Papers (CP) at 1-20, 54-56. This appeal followed.

IV. STANDARD OF REVIEW

Nykol seeks judicial review of the administrative decision of the Commissioner of the Employment Security Department. Judicial review of such decisions is governed by the Washington Administrative Procedure Act (APA) pursuant to RCW 34.05.510 and RCW 50.32.120. The court of appeals sits in the same position as the superior court on review of the agency action under the APA and applies the APA standards directly to the administrative record. *Smith v. Emp't Sec. Dep't*, 155 Wn. App. 24, 32, 226 P.2d 263 (2010).

The court must affirm the Commissioner's decision if it is supported by substantial evidence and is in accordance with the law. RCW 34.05.570(3). The Commissioner's decision is considered *prima facie* correct, and the burden of demonstrating its invalidity is on the appellant. RCW 50.32.150; RCW 34.05.570(1)(a); *Smith*, 155 Wn. App. at 32. Thus in order to reverse, the court, upon review of the entire record, must be left with the definite and firm conviction that a mistake has been made. *Eggert v. Emp't Sec. Dep't*, 16 Wn. App. 811, 813, 558 P.2d 1368 (1976).

The Commissioner determined Nykol was disqualified from benefits because he was discharged for misconduct. AR 79-80. Whether an employee was discharged for misconduct is a mixed question of law

and fact. *Tapper v. Emp't Dec. Dep't*, 122 Wn.2d 397, 402-03, 858 P.2d 494 (1993). Questions of law are subject to de novo review. *Id.* at 403. However, where an agency has expertise in a particular area, the court should accord substantial weight to the agency's decision. *Markam Group, Inc. v. Dep't of Emp't Sec.*, 148 Wn. App. 555, 561, 200 P.2d 748 (2009).

The Commissioner's findings of fact are largely undisputed for purposes of this appeal. Unchallenged findings of fact are verities on appeal. RAP 10.3(g); *Tapper*, 122 Wn.2d at 407. To the extent the findings are disputed, they are reviewed for support by substantial evidence. *Wm. Dickson Co. v. Puget Sound Air Pollution Control Agency*, 81 Wn. App. 403, 407, 411, 914 P.2d 750 (1996). This standard is of particular importance in this case because Nykol repeatedly states the Commissioner should have made additional findings regarding his alleged disability. Br. of Appellant at 3-5, 9-11 (Assignments of Error 1, 2, 7). But the question on review is whether the ALJ's actual findings are supported by substantial evidence, not whether the claimant's desired findings should have been entered.

Evidence is substantial if it is sufficient to "persuade a rational, fair-minded person of the truth of the declared premises." *Heinmiller v. Dep't of Health*, 127 Wn.2d 595, 607, 903 P.2d 433 (1995). Evidence

may be substantial enough to support a factual finding even if the evidence is conflicting and could lead to other reasonable interpretations. *Fred Hutchinson Cancer Research Ctr. v. Holman*, 107 Wn. 2d 693, 713, 732 P.2d 974 (1987). The court may not substitute its judgment for that of the agency on the credibility of the witnesses or the weight to be given to conflicting evidence. *Smith*, 155 Wn. App. at 35. Instead, the reviewing court should "view the evidence and the reasonable inferences therefrom in the light most favorable to the party that prevailed at the administrative proceeding below. *Tapper*, 122 Wn.2d 407.

On appeal, it is Nykol's burden to establish that the Commissioner's decision was in error. RCW 34.05.570(1)(a); *Smith*, 155 Wn. App. at 32. Nykol must therefore show that the Commissioner's conclusion that he was discharged for misconduct was incorrect.

V. ARGUMENT

This Court should affirm the Commissioner's decision because substantial evidence supports the findings of fact, and there are no errors of law. Nykol was discharged from his employment because his willful conduct in driving under the influence led to the revocation of his driver's license and the violation of Boeing's rule requiring a driver's license. Nykol acknowledged he knew a driver's license was a requirement of his firefighter position. AR 22-23. Consequently, the Commissioner properly

concluded Nykol engaged in disqualifying misconduct when he violated a known company rule. *See* RCW 50.04.294(1)(a), (2)(f).

Nevertheless, Nykol asserts he is entitled to unemployment benefits because Boeing should have accommodated his alcoholism, by executing an ignition interlock device waiver. Br. of Appellant at 3-11. Because Boeing did not execute a waiver, Nykol asserts it was Boeing's fault he was discharged. Bf. of Appellant at 2. Nykol is incorrect.

The only conduct at issue is Nykol's—whether the conduct that led to his discharge is disqualifying misconduct under the Employment Security Act. Boeing was under no obligation either to install ignition interlock devices on its vehicles or execute a waiver of that requirement. Boeing's decision to forgo both of these options is unrelated to whether Nykol engaged in disqualifying misconduct. Further, the Employment Security Act makes clear that alcoholism is not a defense to disqualification from unemployment benefits due to misconduct. *See* RCW 50.20.066(1).

A. The Commissioner Properly Concluded Nykol's Intentional Conduct, Which Resulted In the Loss Of His Driver's License, a Requirement For His Job, Constituted Per Se Misconduct That Disqualified Him From Receiving Unemployment Benefits

The Employment Security Act (the Act) was enacted to provide compensation to individuals who are "involuntarily" unemployed

"through no fault of their own." RCW 50.01.010; *Tapper*, 122 Wn.2d at 408. If a person is to qualify for benefits, the Act requires that the reason for the unemployment be external and apart from the claimant. *Cowles Publ'g Co. v. Dep't of Emp't Sec.*, 15 Wn. App. 590, 593, 550 P.2d 712, 715 (1976).

A claimant is disqualified from receiving unemployment benefits when he has been discharged for "misconduct connected with his or her work." RCW 50.20.066(1). Under the Act, misconduct includes, but is not limited to:

> (a) Willful . . . disregard of the rights, title, and interests of the employer[.]

RCW 50.04.294(1)(a). The term "willful" means intentional behavior done deliberately or knowingly, where the claimant is aware he is violating or disregarding the rights of his employer or a co-worker. WAC 192-150-205(1). "Disregard" as used in RCW 50.04.294(1)(a) is undefined by statute or regulation. In the absence of a statutory definition, courts may give a term its plain and ordinary meaning by reference to a standard dictionary. *Tenino Aerie v. Grand Aerie*, 148 Wn.2d 224, 239, 59 P.3d 655 (2002). A standard English dictionary defines "disregard" as, in relevant part: "1 a: to treat without fitting respect or attention...b. to treat as unworthy of regard or notice...2. to give no thought to: pay no

attention to." *Webster's Third New International Dictionary of the English Language* at 655 (2002). Thus, the question before the Court is whether the Commissioner erred in concluding Nykol deliberately or knowingly ignored, failed to heed, or did not properly respect Boeing's interest when he, a firefighter, drove while intoxicated and consequently violated Boeing's driver's license requirement.

The current definition of misconduct was enacted in 2003.[4] The category of misconduct set forth in RCW 50.04.294(1)(a) matches in large measure the pre-2003 definition of misconduct, with the exception that a showing of harm to the employer's business is no longer required. *See Wilson v. Emp't Sec. Dept.*, 87 Wn. App. 197, 201, 940 P.2d 269 (1997) (recognizing that "misconduct was, in part, "an employee's act or failure to act in willful disregard of his or her employer's interest."). Cases interpreting the matching portion of the prior definition are therefore instructive.

Those cases held that to amount to misconduct, an employee must have "voluntarily disregarded the employer's interest. His specific motivations for doing so, however, are not relevant." *Hamel v. Emp't Sec.*

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[4] Between 1993 and 2003, the Legislature defined misconduct "an employee's act or failure to act in willful disregard of his or her employer's interest where the effect of the employee's act or failure to act is to harm the employer's business." RCW 50.04.293. Prior to 1993, the Act included no definition of misconduct.

Dep't., 93 Wn. App. 140, 146, 966 P.2d 1282 (1998), review denied, 137 Wn.2d 1036 (1999). Furthermore, under both the prior definition and recent case law interpreting RCW 50.04.294(1)(a), an employee acts with willful disregard when he "(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." *Griffith v. Emp't Sec. Dep't*, 163 Wn. App. 1, 9, 259 P.3d 1111 (2011) *(quoting Hamel*, 93 Wn. App. at 146–47).

The Act goes on to provide illustrative *per se* examples of acts that are considered misconduct because they "signify a willful or wanton disregard of the rights, title, and interests of the employer or a fellow employee." RCW 50.04.294(2)(a)-(g). Applicable here is the Act's provision explicitly defining misconduct to include "[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). A company rule is reasonable if it is related to the employee's job duties, is a normal business requirement or practice for the employee's occupation or industry, or is required by law or regulation. WAC 192-150-210(4). A claimant knew or should have known about an employer's rule if he was provided an employee orientation on company rules or was provided a copy or summary of the rule in writing. WAC 192-150-210(5).

1. Nykol's Conduct Amounted to Willful Disregard of His Employer's Interests

Nykol does not challenge the finding that Boeing had a rule requiring him to maintain a valid Washington State driver's license as a condition of his employment. AR 65 (FF 3). Nor does he dispute that Boeing's rule requiring a driver's license is reasonable.[5] As the Commissioner properly noted, the driver's license was related to Nykol's job duties and was a normal requirement for his occupation as a firefighter driver/operator. AR 79. Nykol also does not dispute that he knew about the existence of the rule. AR 22-23, 65 (FF 4). And he does not dispute that he was arrested for DUI and that his driver's license was consequently revoked.

Nykol's conduct falls squarely within this category of *per se* misconduct: there was a reasonable employer rule, he knew about it, and he violated it. In his brief, Nykol all but ignores RCW 50.04.294(2)(f). But this provision cannot be ignored; it is central to this appeal. The

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[5] The employer's rule provided as follows:

> Employees shall attain and maintain the following qualifications as conditions of holding the referenced classification:
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> ...
>
> (d) For all firefighters, Emergency Vehicle Accident Prevention certification as defined by applicable state regulations and a valid Washington State Driver's License.
>
> ...

AR 63.

unequivocal, plain language of RCW 50.04.294(2)(f) establishes that Nykol committed disqualifying misconduct.

The Commissioner found Nykol was "was released from employment because he failed to meet the requirements of performing his job duties since he did not possess a Washington State Driver's License." AR 65 (FF 9). Nykol's assertion that he was not terminated for this reason is belied by the record.[6] Br. of Appellant at 10 (Assignment of Error 8), 17. There is substantial evidence in the record to support the Commissioner's characterization of why the job separation occurred. *See Fred Hutchinson*, 107 Wn.2d at 713 ("evidence may be substantial enough to support a factual finding even if the evidence is conflicting and could lead to other reasonable interpretations."). Boeing's representative specifically testified Nykol was terminated because "he did not meet the qualifications for the requirements of him to perform his job duties. . . . He was not able to maintain a Washington State driver's license." AR 15. And Nykol testified consistently that it was his DUI and license revocation that led to his termination. AR 28-29.

[6] Nykol attempts to shift the analysis of his misconduct away from his own conduct and towards what Boeing could have done to keep him employed, i.e. execute the ignition interlock device waiver and allow Nykol to drive its vehicles with his restricted ignition interlock license. As explained further below, the Court should not be persuaded by this faulty analysis of what is required to establish an employee's disqualifying misconduct.

The Commissioner in Conclusion of Law 10 well summarized the facts and law applicable to Nykol's claim:

> In this case, 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. The claimant also knew that he was required to maintain a valid driver's license to maintain his employment. In choosing to drink and drive, the claimant knew, or should have known, that he jeopardized his ability to continue to maintain a driver's license, and therefore willfully disregarded the probable consequences of his conduct. Whether the claimant's actions resulting in the suspension of his driver's license was on the job, or on his personal time, the loss of his driving privilege was the result of a voluntary act, and resulted in his non-compliance with a reasonable employer rule. The claimants' failure to maintain a valid driver's license under these circumstances was misconduct, as defined in RCW 50.04.294.

This conclusion was a correct application of the misconduct statute and precedent. For example, in *Hamel,* an employee was discharged after repeatedly violating the employer's policy against sexual harassment despite being aware the policy. *Hamel*, 93 Wn. App. at 142-43. Like the employee in *Hamel*, Nykol engaged in intentional conduct—he was aware of the requirement he have a license but still chose to drink and drive which predictably led to the loss of his required driver's license. He therefore committed misconduct and was properly disqualified from benefits.

To be disqualifying misconduct, the conduct must be work-connected. RCW 50.20.066(1). Because Boeing's rule is reasonable, Nykol's violation of it is work-connected. Further, while RCW 50.04.294(2)(f) does not require a showing of harm in order to demonstrate misconduct, in providing guidance in determining when a claimant's conduct is "work-connected" misconduct, the Department has explained that the conduct must result in harm or create the potential for harm to the employer's interests. WAC 192-150-200(2). The harm may be tangible, such as damage to equipment or property, or intangible, such as damage to the employer's reputation. *Id.*

Before the current definition of misconduct was enacted, this Court adopted a 3-part test for determining when off-duty conduct is disqualifying misconduct: the employee's conduct (1) had some nexus with the employee's work; (2) resulted in some harm to the employer's interest; and (3) was in fact conduct which was (a) violative of some code of behavior contracted for between employer and employee, and (b) done with intent or knowledge that the employer's interest would suffer. *Nelson v. Emp't Sec. Dep't,* 98 Wn.2d 370, 375, 655 P.2d 242 (1982). The court cited with approval the standard that "in order to show that the conduct is work-connected, [the employer must] point to some breach of a rule or regulation that has a reasonable relation to the conduct of the employer's

business." *Id.* at 374 (*quoting Giese v. Empl. Div.*, 27 Or.App. 929, 935, 557 P.2d 1354 (1976)).

The *Nelson* court concluded the employee's shoplifting conviction was not work-connected. However, the employer in *Nelson* did not have any rule or regulation prohibiting the type of conduct at issue. In contrast, Boeing specifically required, as a basic qualification for employment, that Nykol have a driver's license. AR 60, 63. Nykol's violation of this rule harmed Boeing because it restricted his ability to drive, and thus, was work-connected.

2. Tort law and the principle of "intervening causes" do not apply to the statutory interpretation of the Employment Security Act

This case involves a matter of statutory interpretation, not the common law of torts. Nykol's invitation to import principles of tort law, specifically the principle of "intervening causes," should be rejected by this Court. While the foreseeability of the probable consequences of Nykol's intentional conduct must be considered, *Hamel*, 93 Wn. App. at 146-47, Nykol takes the analysis too far. Br. of Appellant at 24-27. Nykol cites no authority that tort principles dictate the result in an unemployment benefit appeal. Even if such authority existed, it was Nykol's drinking and driving that was the proximate case of his discharge, not any subsequent conduct by Boeing.

Nykol engaged in intentional conduct when he drank alcohol and drove a vehicle. Aware that his job required him to maintain a valid driver's license, he engaged in this conduct in willful disregard of the probable consequence that his license would be suspended or revoked, precluding him from being able to perform his job duties. AR 67 (CL 10); *Hamel*, 93 Wn. App. at 146-47. He thus willfully disregarded Boeing's interests, RCW 50.04.294(1)(a), and violated a reasonable company rule. RCW 50.04.294(2)(f). His conduct, therefore, amounted to misconduct under the Act.

B. Nykol Is Precluded From Litigtating His Disablity Acommodation Claim in an Appeal of the Denial of Unemployment Benefits

Rather than addressing the statutory definition of misconduct set forth above, Nykol attempts to shift the Court's focus away from analyzing whether he committed disqualifying misconduct and towards analyzing his alcoholism as an alleged disability Boeing was required to accommodate. Br. of Appellant at 3-11 (Assignments of Error 1-8). The Court should not be persuaded by this effort because (1) the Commissioner has no authority to adjudicate a disability claim; therefore, findings and conclusions regarding Nykol's alleged disability were unnecessary; (2) the employer was not required to execute a waiver of the ignition interlock device requirement, and its choice not to is neither

relevant to whether Nykol committed misconduct nor does it excuse Nykol's violation of the employer's rule requiring him to have a valid driver's license; and (3) pursuant to RCW 50.20.066(1), alcoholism is not a defense to disqualification due to misconduct.

1. The Commissioner has no authority to adjudicate a disability claim

Throughout his brief, Nykol asserts the Commissioner erred by failing to make findings and conclusions regarding his alleged disability. Br. of Appellant at 2-10. However, as discussed, the question before this Court is whether substantial evidence supports the findings actually made by the Commissioner, not whether evidence supports the findings that Nykol wishes the Commissioner had made. *See Wm. Dickson Co.*, 81 Wn. App. at 407. More importantly, the issue before the Commissioner was not whether Boeing was justified as a matter of employment law in terminating Nykol, but rather whether the facts surrounding Nykol's discharge meet the test for misconduct. *See Tapper*, 122 Wn.2d at 412.

In *Smith*, the court held that in an appeal of the denial of unemployment benefits, whether an employer terminated its employee in retaliation for his whistleblowing activities was not an issue properly before the Court of Appeals. *Smith*, 155 Wn. App. at 41. It is a subject for a jury to determine in a wrongful termination action and not relevant to

the court's review of an agency's decision to deny an application for benefits. *Id.*

Similarly, in *Haney v. Emp't Sec. Dep't*, 96 Wn. App. 129, 138 n.2, 978 P.2d 543 (1999), this Court declined to decide the issue of whether a protected activity under the National Labor Relations Act (NLRA) can constitute disqualifying misconduct under the Act. This Court stated: "[I]nterjecting NLRA principles into unemployment compensation cases involving individual claimants not covered under the NLRA would not further the purposes of the NLRA or the [Employment Secuirty Act], and would inevitably lead to unnecessary confusion regarding what does or does not constitute disqualifying misconduct under the [Act]."). *Id.* at 137.

Nykol argues that the Commissioner committed an error of law by not analyzing his alleged disability claim under the Washington Law Against Discrimination (Anti-Discrimination Act), chapter 49.60 RCW. Br. of Appellant at 3-4. However, as in *Smith* and *Haney*, the Commissioner properly refrained from interjecting the Anti-Discrimination Act into the Employment Security Act for purposes of determining unemployment benefit eligibility. AR 78.

"An administrative agency is limited in its powers and authority to those which have been specifically granted by the legislature."

Washington Water Power Co. v. Human Rights Comm'n, 91 Wn.2d 62, 65, 586 P.2d 1149 (1978); *Marquis v. City of Spokane*, 130 Wn.2d 97, 111, 922 P.2d 43 (1996). Here, the Legislature established the Department under the Employment Security Act to implement that Act, granting the Commissioner power to make rules and adjudicate unemployment benefit claims pursuant to that Act. RCW 50.08.010; 50.08.020; 50.12.010; 50.32.010-.110. The Department is "endowed with quasi-judicial functions" because of its "expertise in [the employment security] field." *Safeco Ins. Companies v. Meyering*, 102 Wn.2d 385, 687 P.2d 195 (1984). The Commissioner has no authority to adjudicate any disability discrimination claim that may exist; rather, such a claim should be made with Washington's Human Rights Commission, *see* RCW 49.60 *et seq.,* or the Equal Employment Opportunity Commission, *see* 42 U.S.C. § 12101-12209 (American with Disabilities Act or ADA). The Department lacks the authority and expertise necessary to rule on a potential claim arising under those other laws. *See, e.g.*, WAC 192-150-060(3) (nothing in unemployment insurance law requires an employer to offer alternative suitable work when an employee has a disability, or modify duties so that the employee can perform his current job).

Each law serves a different purpose and provides for different remedies. Indeed, interjecting the "accommodation claim" analysis into

employment security law would result in confusion and unintended adjudication of the disability and anti-discrimination law issues by the state agency entrusted with employment security. *See Martinez v. New Mexico Eng'r Office*, 129 N.M. 413, 9 P.3d 657, 662-64 (N.M. Ct. App. 2000) (the state's personnel board lacks power to adjudicate ADA issues, which rest with the Equal Employment Opportunity Commission and the state's human rights commission); *Alsip v. Klosterman Baking Co.*, 113 Ohio App.3d 439, 680 N.E.2d 1320, 1325 (Ohio Ct. App. 1 Dist. 1996) ("Federal labor law does not apply and confuses the relevant focus of the [state employment security bureau's] inquiry: 'Are the employees unemployed through no fault of their own?'"). There was no statutory basis for the Commissioner of the Employment Security Department to evaluate whether Boeing was required to accommodate Nykol pursuant to Washington's Anti-Discrimination Act or the ADA. Despite Nykol's demand that the Commissioner issue findings regarding his disability, there was no need for findings because such a factual inquiry is foreclosed by the limitation on the Commissioner's authority.

Nykol had an opportunity to file a complaint with the Human Rights Commission or Equal Employment Commission and seek relief, including reinstatement, back pay, and damages. *See* RCW 49.60.230, .250. The record here does not reveal whether or not he chose to do so.

Regardless, he should not be allowed to address claims unrelated to his eligibility for unemployment benefits. Thus, the Commissioner properly declined to consider Nykol's "accommodation claim" in his unemployment benefit case.

Even if it was appropriate to litigate a disability discrimination claim in an unemployment benefits case, Nykol presented no evidence at his administrative hearing regarding his disability and that it met the definition of disability under RCW 49.60.040.[7] Rather, he now asserts without support that alcoholism meets the definition of disability under RCW 49.60.040(7)(a) and RCW 49.60.180 and entitles him to accommodation. Br. of Appellant at 18-24.

Further, the Americans with Disabilities Act, 42 U.S.C § 12114(c)(4), authorizes discharges for misconduct that may be caused by alcoholism:

> [An employer] may hold an employee . . . who is an alcoholic to the same qualification standards for employment or job performance and behavior that such entity holds other employees, even if any unsatisfactory performance or behavior is related to the . . . alcoholism of such employee.

[7] At the administrative hearing, Nykol presented no evidence of a disability. Thus, at this stage of the proceedings, Nykol's assertions regarding alcoholism as a disability are argument, rather than evidence. *See In re Wolstenholme*, Comm'r Dec.2d 349 (1977) (allegations in petition for review are argument, not evidence). Further, because he failed to present any evidence in support of the arguments below or otherwise make them part of the agency record, they should not be considered. *See* RCW 34.05.558 (judicial review must be confined to agency record).

Thus, the ADA does not immunize Nykol from the consequences of his drunk driving. *See also* RCW 50.20.066(1) ("Alcoholism shall not constitute a defense to disqualification from benefits due to misconduct"); *Maddox v. University of Tennessee*, 62 F.3d 843, 848 (6th Cir. 1995) (holding employers permitted to discipline for egregious or criminal conduct, including off-duty drunk-driving, regardless of alcoholism disability). Accordingly, the Commissioner properly concluded Nykol was discharged for misconduct, disqualifying him from receiving unemployment benefits.

2. Alcoholism is not a defense to disqualifying misconduct.

Neither Boeing nor Nykol asserted Nykol was discharged because he was an alcoholic, and Nykol does not assert his alcoholism excuses his conduct. Br. of Appellant at 7. Nykol was discharged because he drank *and drove*, resulting in the loss of his driver's license. In any event, the Employment Security Act sets forth in RCW 50.20.066(1) that "[a]lcoholism shall not constitute a defense to disqualification from benefits due to misconduct." This provision does not disqualify individuals from benefits based on their status as alcoholics; rather, it simply eliminates evidence of alcoholism as a defense to disqualification based on misconduct. *Liebbrand v. Emp't Sec. Dep't*, 107 Wn. App. 411, 420, 27 P.3 1186 (2001).

Further, in analyzing RCW 50.20.066(1), this Court has held an alcoholic employee to the same performance and behavior standards as other employees. *Liebbrand*, 107 Wn.App. at 420. In *Liebbrand*, an employee's absence from work in violation of the employer's attendance policy was disqualifying misconduct despite the fact that his absence was due to his alcoholism. *Id.* at 424-426. RCW 50.20.066(1) requires the Commissioner to determine whether the employee committed misconduct without regard to the effect that his alcoholism may have had on his behavior. *Id.* at 427. Similarly, Nykol, like all firefighters at Boeing, had to comply with Boeing's rule to have a valid driver's license; any alleged alcoholism does not excuse his violation of Boeing's rule. The Commissioner's decision, therefore, should be affirmed.

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VI. CONCLUSION

Nykol engaged in intentional conduct that resulted in the loss of his driver's license, a requirement for his job. The Commissioner properly concluded that Nykol's discharge-precipitating conduct amounted to disqualifying misconduct under the Act. For the foregoing reasons, the Department respectfully requests that the Court affirms the Commissioner's decision denying Nykol unemployment benefits.

RESPECTFULLY SUBMITTED this 24th day of January, 2013.

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PROOF OF SERVICE

I, Dan Marvin, certify that I served a copy of this **Respondent's Brief** on all parties or their counsel of record on the date below as follows:

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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 25th day of January, 2013, at Seattle, WA.

Dan Marvin, Legal Assistant