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NO. 69279-8

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

JAY C. NYKOL,

Appellant,

v.

STATE OF WASHINGTON,
EMPLOYMENT SECURITIES DEPT.,

Respondents.

REPLY BRIEF OF APPELLANT

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

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I. The Employment Security Department's Brief Distorts Cases and Law Which Are Clarified Below:

A. Mr. Nykol had a valid driver's license

In footnote 1 of its brief, the Employment Security Department (hereinafter ESD) asserts, without any authority, that an ignition interlock license is not a valid driver's license. ESD attempts to question the validity of the ignition interlock license which is expressly authorized by RCW 46.20.385 by stating that it is a "restricted license". However, "restricted licenses" are governed by RCW 46.20.391 and RCW 46.20.394 which do not apply to Mr. Nykol. With that settled, it should be abundantly clear that Mr. Nykol had a valid driver's license such that a finding to the contrary is clearly erroneous.

On Page 11 of its brief, ESD frames the issue for the court as follows:

> 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 off duty] while intoxicated and consequently violated Boeing's driver's license requirement.

Since Mr. Nykol never lost legal right to drive and always maintained a valid driver's license, albeit a different kind, Mr. Nykol never violated any license requirement by his employer. Therefore, the answer to ESD's framed issue is "Yes." The Commissioner could not have found that Mr. Nykol knowingly ignored or failed to heed or failed to respect his employer's interest since Mr. Nykol never violated Boeing's driver's license requirement.

B. The entire record is reviewed to determine the facts

In footnote 2 of its brief, ESD asserts that review is limited only to the facts found by the Commissioner. However, such a limited review is not appropriate here.

> **Judicial review is not selective, but must be conducted on the entire record, not by isolating evidence**. *Norway Hill Preserv. & Protec. Ass'n v. King Cty. Coun.*, 87 Wn.2d 267, 552 P.2d 674 (1976). The duty of the reviewing court to search the entire record for evidence both supportive of and contrary to the agency's findings is found in *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 95 L. Ed. 456, 71 S. Ct. 456 (1951). RCW 34.04.130(6)(e) addresses the clearly erroneous standard of review for factual determinations "in view of the entire record (quoting) *Franklin County Sheriff's Office v Sellers*, 97 Wn.2d 317, 324, 646 P.2d 113 (1982).

Appellate review of administrative decisions is on the record of the administrative tribunal. **Although there is evidence to support a finding, the reviewing court can declare a finding to be clearly erroneous when based on the entire evidence in the record if it is left with a definite and firm conviction that a mistake has been committed**. *Franklin Cty.,* 97 Wn.2d at 324; *see also Ancheta v. Daly,* 77 Wn.2d 255, 259-60, 461 P.2d 531 (1969); *Universal Camera Corp. v. NLRB*; 340 U.S. 474, 95 L. Ed. 456, 71 S. Ct. 456 (1951).

Mixed questions of law and fact, or law application issues, involve the process of comparing, or bringing together, the correct law and the correct facts, with a view to determining the legal consequences. Such questions exist where there is dispute both as to the propriety of the inferences drawn by the agency from the raw facts and as to the meaning of the statutory term. *Daily Herald Co. v. Department of Empl. Sec.*, 91 Wn.2d 559, 561, 588 P.2d 1157 (1979). Because the resolution of mixed law and fact issues does not require "reweighing evidence of credibility and demeanor", this court reviews them under a de novo standard. *Franklin Cty.,* 97 Wn.2d at 330; *Department of Rev. v. Boeing Co.*, 85 Wn.2d 663, 538 P.2d 505 (1975); quoting *Johnson v ESD*, 112 Wn.2d 172, 175, 769 P.2d 305 (1989).

[The court has] "inherent and statutory authority to make a de novo review of the record independent of the agency's actions," we do not review witness credibility and we deem the decision prima facie correct. RCW 50.32.150; *Rasmussen*, 98 Wn.2d at 850 (quoting *Devine v ESD*, 26 Wn. App. 778, 781, 614 P.2d 231 (1980).

C. The Collective Bargaining Agreement provisions are immaterial as to whether the employer had a duty to accommodate Mr. Nykol's disability

On page 4 of its brief, ESD asserts that there was no provision in the Collective Bargaining Agreement that required Boeing to accommodate employees ..." Sadly, this argument is deceptive and intended to mislead this court. In *Hisle v Todd Pacific Shipyards*, 151 Wn.2d 853; 93 P.3d 108, this court correctly followed years of federal and state labor law when it stated, "as the United States Supreme Court pointed out in *Lueck*, 471 U.S. at 212, 'clearly, § 301 [of the NLRA] does not grant the parties to a **collective-bargaining agreement** the ability to contract for what is illegal under **state law.**' Following up on this statement, the high Court emphasized in *Livadas v. Bradshaw*, 512 U.S. 107, 123-24, 114 S. Ct. 2068, 129 L. Ed. 2d 93 (1994), that § 301 cannot be read broadly to pre-empt nonnegotiable rights conferred on individual employees as a matter of **state law,** and we stressed [in *Lueck*] that it is the legal character of a claim, as "independent" of rights under the **collective-bargaining agreement** (and not whether a grievance arising from "precisely the same set of facts" could be pursued) that decides whether a **state** cause of action may go forward." *Hisle* at 419.[1] Thus, RCW 49.60 and not a collective

[1] RCW 49.60.180 is not subject to preemption by a collective bargaining

bargaining agreement (CBA) governs whether an employer had a duty to accommodate Mr. Nykol's disability. It did!

D. Contrary to its brief, the employer was obligated to accommodate Mr. Nykol's disability and it should have signed the waiver of the ignition interlock device

Without any authority, ESD incorrectly asserts that "Boeing was under no obligation either to install ignition interlock devices on its vehicles or execute a waiver of that requirement." *See* ESD Response Brief p. 9. By making such a fallacious argument, ESD begs the question of whether Boeing's refusal to execute the IID waiver violated RCW 49.60.180 and whether that refusal caused Mr. Nykol's termination. The answer to both questions is in the affirmative and this Court should not simply disregard these issues as suggested in ESD's brief.

E. Mr. Nykol's employer was not harmed by having it sign a waiver of an IID.

ESD incorrectly asserts that "Nykol's violation of this rule (maintain a valid driver's license) harmed Boeing because it 'restricted his ability to drive', and thus, was work connected." *See*

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agreement because the right is independent of the bargaining agreement. *Commodore v. University Mechanical Contractors Inc.*, 120 Wn.2d 120, 132, 839 P.2d. 314 (1992).

ESD Response Brief p. 17. However, as stated in Section A, *Supra,* Mr. Nykol's interlock ignition license was not restricted. Since it was not restricted, he was capable of driving his employer's vehicle at any time, to any place, in conjunction with his normal driving requirements once it signed a waiver of his interlock ignition device. Boeing refused this reasonable request. Accordingly, Mr. Nykol did not harm his employer as argued by ESD.

F. Boeing's refusal to sign the IID waiver was the intervening cause of Mr. Nykol's termination

ESD asks this Court to simply ignore the analysis of causation even though it readily acknowledges that this Court should determine the probable consequences of one's actions. *See* ESD Response Brief p.14.

In this particular situation, the analysis of probable consequences requires us to examine whether Boeing's refusal to sign the IID waiver was the intervening cause of Mr. Nykol's termination. But for Boeing's refusal to sign a waiver that it had a duty to sign, Mr. Nykol would never have lost his job. There is simply no reason to ignore the examination of intervening

causation. Once that examination is conducted, this Court should determine that Mr. Nykol was not the cause of his termination.

G. The Commissioner had the Authority to determine whether Boeing's refusal to accommodate Mr. Nykol's disability was the cause of his termination

ESD argues that the Commissioner had no authority to determine Mr. Nykol's accommodation claim. *See* ESD Response Brief p. 18. However, ESD is precluded from raising that argument at this time.

1. Issues not raised before the agency may not be raised on appeal

With a few exceptions that do not apply here, RCW 34.05.554 precludes new issues being raised that were not raised before the agency. Here, the issue of whether the Commissioner had authority to determine whether an accommodation should have been made to determine causation of Mr. Nykol's termination was never raised during the unemployment hearing. As such this issue should not be raised now during this appeal.

However, even if this Court determines that this new issue should not be precluded from consideration, the Court should determine that the Commissioner had such authority.

2. The Commissioner has the authority

ESD cites four principal cases for the assertion that the Commissioner lacks the authority to analyze the application of RCW 49.60.180 to determine whether someone engaged in misconduct: (a) *Smith v ESD,* 155 Wn. App 24, 226 P.3d 264 (Div II, 2010); (b) *Haney v Emp. Sec. Dept.*, 96 Wn.App 129, 138 n.2, 978 P.2d 543 (1999); (c) *Washington Water Power Co. v Human Rights Comm'n,* 91 Wn.2d 62, 65, 658 P.2d 1149 (1978); and, (d) *Marquis v City of Spokane,* 130 Wn. 2d 97, 111, 922 P.2d 43 (1996). **None of those cases hold that the Commissioner lacks authority to make determinations of accommodations that are relevant and necessary to a determination of misconduct.** Moreover, *Washington Water Power Co*. and *Marquis* involve rule making and not adjudication while *Smith* and *Haney* are easily distinguished based upon their facts.

a. *Smith v ESD,* 155 Wn. App 24, 226 P.3d 264 (Div II, 2010).

There the court stated:

> "The Commissioner found that Smith committed misconduct by secretly recording his conversations with co-workers and members of the public without their knowledge or consent in violation of Kitsap County policy and state law. Additionally, the Commissioner found that Smith committed misconduct by removing unauthorized software from his county-owned laptop computer after his supervisor instructed him to return the laptop without deleting anything on it." *Smith* at 29.

In its brief, ESD takes liberty with the language in *Smith* by inaccurately stating "the court held that in an appeal of the denial of unemployment benefits, whether an employer terminated its employee in retaliation for his whistle blowing activities was not an issue properly before the Court of Appeals. *See* ESD Response Brief p. 19, citing *Smith*, 155 Wn. App at 41. However, that is not what *Smith* holds.

The *Smith* court held that surreptitious and illegal recordings of conversations while employed are grounds for misconduct and those activities **preceded any claim filed by Plaintiff for whistle blowing**. Similarly, Smith's theft of software also provided grounds to prove misconduct. *Smith* at 30-31; 39. Smith did not dispute

making the recordings. *Smith* at 39. Within that context, where an employee admitted to misconduct and was found to have engaged in illegal tape recording before any alleged retaliation occurred, the Court of Appeals correctly stated: "If the county terminated Smith in retaliation for his whistle blowing activities, he is entitled to compensation for wrongful termination. But that issue is not properly before us and we cannot treat every appeal from an unemployment compensation decision as a wrongful termination case." That holding in that context is not applicable to Nykol where Nykol has not admitted to any wrongdoing and vehemently denies being ineligible for work since he always possessed a valid driver's license as corroborated by the record.

b. *Haney v Emp. Sec. Dept.*, 96 Wn.App 129, 138 n.2, 978 P.2d 543 (1999).

On page 20 of its brief, ESD argues that the National Labor Relations Act (NLRA) cannot be reviewed in making a determination of misconduct for the proposition that other acts like RCW 49.60.et.seq, cannot be reviewed as well. To support that mistaken proposition, ESD quotes the following sentence: "[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 Security Act], and would inevitably lead to unnecessary confusion regarding what does or does not constitute disqualifying misconduct..." *Haney* at 137.

However, ESD failed to inform this Court that Haney admitted her conduct [insults] were not covered or protected by the NLRA and that is why the court chose not to examine application of NLRA principles to determine whether misconduct occurred. *Haney* at 137 **"Because Haney concedes that her response to the letter of reprimand is not a protected activity under the NLRA, we need not and do not decide if NLRA-protected activity can constitute disqualifying misconduct under Washington's Employment Security Act. We note, however, that state courts are split on this issue."** Accordingly, *Haney* is not useful in analyzing this case.

c. *Washington Water Power Co. v Human Rights Comm'n*, 91 Wn.2d 62, 65, 658 P.2d 1149 (1978); and *Marquis v City of Spokane*, 130 Wn. 2d 97, 111, 922 P.2d 43 (1996);

These two cases involve agency rule making and not agency adjudication. Regardless, the court in *Marquis* correctly pointed out that in a determining an agency's power and authority it should look to the purpose of the act to determine whether an agency is acting inconsistent with its powers. Here it is not. The purpose of the Employment Security Act is set forth in its entirety.

> Whereas, **economic insecurity due to unemployment is a serious menace to the health, morals, and welfare of the people of this state; involuntary unemployment is, therefore, a subject of general interest and concern which requires appropriate action by the legislature to prevent its spread and to lighten its burden which now so often falls with crushing force upon the unemployed worker and his or her family. Social security requires protection against this greatest hazard of our economic life**. This can be provided only by application of the insurance principle of sharing the risks, and by the systematic accumulation of funds during periods of employment to provide benefits for periods of unemployment, thus maintaining purchasing powers and limiting the serious social consequences of relief assistance. **The state of Washington, therefore, exercising herein its police and sovereign power endeavors by this title to remedy any widespread unemployment situation which may occur and to set up safeguards to prevent its recurrence in the years to come**. **The legislature, therefore, declares that in its considered judgment the public good, and the general welfare of the citizens of this state**

> **require the enactment of this measure, under the police powers of the state, for the compulsory setting aside of unemployment reserves to be used for the benefit of persons unemployed through no fault of their own, and that this title shall be liberally construed for the purpose of reducing involuntary unemployment and the suffering caused thereby to the minimum.** RCW 50.01.010

It is clear by analysis of ESD's own regulations that it is authorized to determine whether an individual is disabled or requires an accommodation. WAC 192-150-055 states:

> (1) *General rule.* To establish good cause for leaving work voluntarily because of **your** illness or **disability** or the illness, disability, or death of a member of your immediate family, you must demonstrate that:
>
> (a) You left work primarily because of such illness, **disability**, or death; and
>
> (b) The illness, **disability**, or death made it necessary for you to leave work; and
>
> (c) You first exhausted all reasonable alternatives prior to leaving work, including:
>
> (i) Notifying your employer of the reason(s) for the absence as provided in WAC 192-150-060; and
>
> (ii) Asking to be reemployed when you are able to return to work. (You are not required to request reemployment after the job separation has occurred to establish good cause.)

(2) For claims with an effective date of January 4, 2004, or later, you are not eligible for unemployment benefits unless, in addition to the requirements of subsections (1)(a)-(c) above, you terminate your employment and are not entitled to be reinstated in the same or similar position.

(3) *Exception.* You may be excused from failure to exhaust reasonable alternatives prior to leaving work as required by subsection (1)(c) if you can show that doing so would have been a futile act.

(4) *Definitions.* For purposes of this chapter:

(a) "Disability" means a sensory, mental, or physical condition that:

(i) Is medically recognizable or diagnosable;

(ii) Exists as a record or history; and

(iii) Substantially limits the proper performance of your job;

The definition for the existence of a disability under WAC 192-150-055 is nearly identical to the definition of a disability under 49.60.040(7) which defines a disability as follows:

(a) **"Disability" means 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

> (ii) The employee must have put the employer on notice of the existence of an impairment, and medical documentation must establish a reasonable likelihood that engaging in job functions without an accommodation would aggravate the impairment to the extent that it would create a substantially limiting effect.
>
> (e) For purposes of (d) of this subsection, a limitation is not substantial if it has only a trivial effect.[2]

Since the department has promulgated rules to determine whether someone has a disability, it is clear that it has the authority to determine whether Nykol had a disability and whether Boeing's refusal to sign the IID was unreasonable such that its actions caused his termination.

3. Claims of sexual harassment and overtime have been raised and adjudicated within hearings for unemployment benefits without any claim that the department lacked authority.

In *Martini v ESD*, 98 Wn.App 791, 990 P.2d 981 (2000) the court determined that **the ALJ and Commissioner**

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[2] WAC 192-150-060(3) has no application to Nykol's request for an accommodation because Nykol did not ask for a different job and did not ask to modify his duties. Rather, all he asked was for a waiver of the IID. However, WAC 192-150-060(4) clearly anticipates an accommodation request made by one's disability. Accordingly, WAC 192-150-060 further gives evidence to the fact that ESD has the authority to adjudicate whether one is disabled and whether one has been reasonably accommodated.

had the ability to determine whether the employer was engaged in an illegal employment act and thus an employee was allowed to resign and be awarded unemployment benefits.

In *Martini*, the issue was whether the employee was entitled to unemployment benefits if he quit because his employer was violating Washington's overtime laws. He was. By analogy, the ALJ and the Commissioner had the legal ability to determine whether Mr. Nykol's alcoholism was a disease and whether it should be accommodated. These are merely necessary inquiries to determine whether Mr. Nykol engaged in misconduct and would have no prejudicial or precedential value in other forums.[3]

Washington Courts have never shirked from determining whether one could or should receive unemployment benefits if an employee's rights guaranteed by RCW 49.60.et.seq., were being violated. *See Sweitzer, v. ESD,* 43 Wn. App. 511; 718 P.2d 3; 1986 Wash. App. LEXIS 2814 (Div 1, 1986). See also, *Hussa v*

[3] RCW 50.32.097 limits the admissibility of any finding or conclusion made by an ALJ, the department or its agents. Thus, the employer and employee are precluded from using ESD's decision as offensive or defensive collateral estoppel. Had the legislature intended that ESD was prohibited from adjudicating issues necessary to determine misconduct, it would have done so. However, that is not the case here.

ESD; 34 Wn. App. 857; 664 P.2d 1286; 1983 Wash. App. LEXIS 2500; 40 A.L.R.4th 296 (Div 3, 1983) (allowing benefits to woman resigned because of being sexually harassed.)[4]

4. The employer opened the door as to whether accommodations were required.

During the unemployment hearing, the following testimony was elicited by the employer's representative.

> Q. Is there any provision in the Collective Bargaining Agreement that requires that Boeing accommodate something in this situation.
>
> A. There is not. OAH Record Page 18 of 94. *See also* OAH Record page 33 of 94 (admitting employer had to make accommodations according to the law and admitting the analysis is whether a reasonable accommodation could be made.)

Now that the issue of accommodation was raised by the employer, Mr. Nykol had every right to proceed in contradicting and impeaching the employer's position and prove that the employer

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[4] Ironically, at the trial court the judge verbally held, "My conclusion is this: ...alcoholism ... is a disability. I think that the issue was properly before the commissioner. I think that RCW 49.60 has as its goal the general eradication of disparate treatment or inappropriate treatment based on a person's disabilities, et cetera. And I do not agree that just because it's an unemployment issue that the commissioner or the Employment Security Department cannot take those issues under consideration, particularly in a situation like this where there didn't appear to be any challenge to the alcoholism at the administrative level below." RP 22-23

had a duty to accommodate Nykol. "Inadmissible **evidence** is admissible if a party **opens the door** to the **evidence** during direct examination and the **evidence** is relevant to some issue at trial." *State v. Gefeller,* 76 Wn.2d 449, 455, 458 P.2d 17 (1969), *aff'd,* 154 Wn.2d 477, 114 P.3d 637 (2005).

5. ESD's reliance upon out of state cases is misplaced

Our state's laws against discrimination are broader and are interpreted more liberally than its federal counterpart and require an employer to reasonably accommodate someone in Mr. Nykol's situation. "Because our Law Against Discrimination contains a provision requiring liberal construction not contained in Title VII, we are not bound by federal law." *Hiatt v. Walker Chevrolet Co.*, 64 Wn. App. 95, 99 n. 2, 822 P.2d 1235 (1992) (citing *Allison v. Housing Auth.*, 118 Wn.2d 79, 821 P.2d 34 (1991)). Similarly, RCW 50.01.010 also has a liberal mandate such that this Court should be cautious about adopting or relying on irrelevant ADA interpretation, federal cases or other state cases when doing so would not serve the purpose of the act.

Mr. Nykol had a valid driver's license, did not cause his termination and did not engage in misconduct. Accordingly, the Commissioner's decision should be reversed with an order to the department to pay Mr. Nykol unemployment benefits retroactive to his application date.

RESPECTFULLY SUBMITTED this 19 day of February, 2013.

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