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NO. 66851-0-I

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**COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON**

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CHARLES DANIELS,

Respondent,

v.

STATE OF WASHINGTON  
EMPLOYMENT SECURITY DEPARTMENT,

Appellant.

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**APPELLANT'S REPLY BRIEF**

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## I. INTRODUCTION

Charles Daniels knew his Employer's tardiness and work attire policies prior to his discharge. He had received his Employer's handbook that set forth those rules at the outset of his employment. His direct supervisor, Lamar Kelly, had also informed Daniels of those rules.

Daniels had been inexcusably late or out of uniform at least twice before the final incident that resulted in his discharge on November 6, 2009. He had received verbal or written warnings from his direct supervisor, Lamar Kelly, each time. On those occasions, Mr. Kelly reminded Daniels that he was required to be in uniform, ready to work, at the start of each shift and that further violations would result in his discharge. On November 6, 2009, Daniels was not in uniform, ready to work, at the start of his shift. He did not have an excuse for his improper work attire or repeated tardiness. He was therefore discharged.

The Commissioner of the Employment Security Department, whose final decision is being reviewed by this Court, therefore properly concluded Daniels' actions constituted misconduct per se pursuant to RCW 50.04.294(2)(b) – he was inexcusably tardy following at least two warnings by his Employer for other inexcusable tardiness – and RCW 50.04.294(2)(f) – he violated reasonable company rules that he knew. The Court should thus affirm the Commissioner's decision.

## II. ARGUMENT

- A. **The Commissioner properly concluded Daniels committed misconduct per se due to his repeated inexcusable tardiness following at least two warnings from his employer; Daniels was therefore disqualified from unemployment benefits pursuant to RCW 50.04.294(2)(b) and WAC 192-150-210(1).**

Misconduct per se occurs by an employee's "repeated inexcusable tardiness following warnings by the employer." RCW 50.04.294(2)(b). To establish misconduct under this per se example, employers need only show that they warned their employee at least twice, either verbally or in writing, about his prior tardiness, and a violation of such warnings was the immediate cause of the employee's discharge. WAC 192-150-210(1).

Here, the Commissioner found that Daniels was repeatedly warned by his supervisor that tardiness was not acceptable and that despite such warnings, Daniels did not consistently report to work on time. Commissioner's Record (CR) at 102. Specifically, the Commissioner found that Daniels received a written warning to that effect in September 2008 and then numerous additional verbal warnings after that. CR at 102. Additionally, the Commissioner found that Daniels was late for his shift the night of November 6, 2010 and that his tardiness was inexcusable. CR at 104. These findings were supported by substantial evidence and supported a conclusion that Daniels committed misconduct per se.

**B. Daniels received a written warning for his repeated inexcusable tardiness in September 2008.**

Daniels' supervisor, Lamar Kelly, testified that he showed Daniels a written warning from September 2008 after Daniels had been late for work. CR at 22-23, 80. That warning stated that Daniels had previously been verbally warned numerous times for arriving late. CR at 80. In fact, the Employer verified through various sources, including log-in time sheets, that Daniels had been late at least eight times before that written warning was issued. CR at 80.

In his response brief, Daniels takes issue with the September 2008 disciplinary action form, claiming he did not sign it and that he was not aware of it. Respondent's Brief, at 35-36. However, at his hearing, Daniels confirmed receiving and signing the September 2008 written warning:

Q Mr. Daniels, did you have the opportunity to review Exhibit No. 6? Do you recall receiving disciplinary action forms from 2008?

A Whenever I received a disciplinary action form, I . . . .

Q Mr. Daniels, Mr. Daniels, Mr. Daniels, you need to listen to my question, please. My question is have you seen the documents that are there in Exhibit No. 6? Do you recall receiving these?

A The documents that I signed (inaudible).

Q They are from 2008. They are contained in Exhibit No. 6.

A I believe so.

CR at 38-39. Thus, the undisputed evidence supported the Commissioner's finding that Daniels had received a written warning for being tardy in September 2008. He had also been late at least eight other times before receiving that written warning and received verbal warnings following those occurrences. CR at 80.

**1. Daniels continued to be inexcusably tardy and received numerous additional verbal warnings for his repeated tardiness after the September 2008 written warning.**

Daniels' supervisor testified that he gave Daniels both verbal and written warnings to report to work on time between September 2008 and the date he was discharged in 2009. CR at 23, 30. While Mr. Kelly stated he documented those warnings, they were just not part of the record. CR at 23. Daniels' supervisor did not consider Daniels' stated reason for being late – traffic – to be a valid excuse for his repeated tardiness. CR at 24, 38.

In response, Daniels did not refute his supervisor's testimony.

Rather he admitted to being late and written up on a regular basis:

Q Do you recall arriving late to your scheduled shifts on any other occasions?

A All the occasions when I was late, I would call Mr. Kelly . . . . You know, sometimes I would get Mr. Kelly, sometimes I wouldn't[.]

...

Q Do you recall ever receiving a disciplinary action form after – looks like about after October 2008?

A I'm not sure. Mr. Kelly was pretty regular about just write you up. Whenever he wrote me up, I really couldn't understand it.

CR at 37, 39.

Even if Daniels had refuted his supervisor's testimony, which he did not do, the Commissioner nevertheless deemed Mr. Kelly's testimony on this point to be credible based on his personal knowledge of the conversations in question. CR at 103. The Commissioner "is authorized to make his own independent determinations based on the record and has the ability and right to modify or to replace an ALJ's findings, including findings of witness credibility." *Smith v. Emp't Sec. Dept.*, 155 Wn. App. 24, 36 n. 2, 226 P.3d 263 (2010).

The un-refuted evidence was therefore sufficient to persuade the Commissioner that Daniels had received numerous warnings for being inexcusably late following the September 2008 written warning. *See Heinmiller v. Dep't of Health*, 127 Wn.2d 595, 607, 903 P.2d 433 (1995). These findings support the conclusion that he was discharged for disqualifying misconduct under RCW 50.04.294(2)(b) and WAC 192-150-210(1).

**2. Daniels was inexcusably tardy on November 6, 2009.**

In assessing whether tardiness is excusable or justified, the Department looks, in part, at whether a reasonable prudent person in the

same circumstances would have been tardy. WAC 192-150-210(1). The Department defines a “reasonable prudent person” to be an individual who uses good judgment or common sense in handling practical matters. WAC 192-100-010. For the Department, the actions of a person exercising common sense in a similar situation are the guide in determining whether an individual's actions were reasonable. *Id.*

Here, Daniels’ actions the evening of November 6, 2009 were not reasonable. Daniels, by his own testimony, arrived early for his 10 p.m. shift out of uniform. CR at 43. Daniels knew that his supervisor was usually early to the worksites and unlocked the buildings when he arrived. CR at 43-44. Furthermore, Daniels does not dispute that his supervisor, Lamar Kelly, arrived at his assigned worksite the night of November 6, 2009 at 9:45 p.m., fifteen minutes before his shift was scheduled to start at 10 p.m., and unlocked the building. Respondent’s Brief, at 34-39; Commissioner’s Record (CR) at 103-104. Nor does Daniels dispute that instead of starting his shift on time he sat in his car under a blanket, not in uniform, until his supervisor located him 35 minutes after his shift had begun.<sup>1</sup> Respondent’s Brief, at 34-39; CR at 103-104. Under these

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<sup>1</sup> Daniels does dispute the assertion in one of the exhibits that his vehicle was parked across the street from the work site. Respondent’s Brief, at 36. However, when asked at the hearing where he was after his shift started the night of November 6, 2009, Daniels testified he was in his car. CR at 36. He therefore had the opportunity but did not refute the assertion that his car was parked across the street. *See Pappas v. Emp’t*

circumstances, a reasonable person exercising common sense would not have been late to their shift after arriving early and knowing their supervisor would be there early to unlock the building. Rather, a reasonable person would have either arrived at work in uniform or continued looking for their supervisor so that they could change into their uniform and be ready to work at the start of their shift.

Nevertheless, Daniels attempts to excuse his actions by equating waiting in his car out of uniform after his shift began with being on time and at work. Respondent's Brief, at 19. He cites *Shaw v. Emp't Sec. Dept.*, 46 Wn. App. 610, 731 P.2d 1121 (1987) in support of his argument. Respondent's Brief, at 22. However, as discussed in the Appellant's opening brief, *Shaw* is inapplicable to Daniels' situation for several reasons.

First, Mr. Shaw's last two instances of tardiness were due to power outages and therefore found to be beyond his control and excusable. *Shaw*, 46 Wn. App. at 614-15. On the other hand, Daniels' repeated instances of tardiness prior to November 6, 2009 due to traffic were not excusable. CR at 24, 38. Moreover, his final instance of tardiness on November 6, 2009 was completely within his control where he arrived

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*Sec. Dept.*, 135 Wn. App. 852, 857-58, 146 P.3d 1208 (2006) (holding that hearsay evidence combined with a party's refusal to deny or refute the allegations is sufficient to support a finding of fact).

early out of uniform but remained in his vehicle well beyond his scheduled start time, even though he knew his supervisor would arrive early to unlock the building. CR at 36. In fact, Daniels did not leave his car until his supervisor located him 35 minutes after his shift began. CR at 104.

Second, *Shaw* was decided prior to the enactment of the statute providing “repeated inexcusable tardiness” as an example of per se misconduct. See RCW 50.20.294(2)(b). “The Legislature is presumed to be familiar with judicial interpretations of statutes, and absent an indication it intended to overrule a particular interpretation, amendments are presumed to be consistent with previous judicial decisions.” *Pudmaroff v. Allen*, 138 Wn.2d 55, 64–65, 977 P.2d 574 (1999). Indeed, “[t]he Legislature is presumed to know the previous law, therefore, by changing the language of a statute, the Legislature is presumed to intend a change in the law.” *Chandler v. Otto*, 103 Wn.2d 268, 274, 693 P.2d 71 (1984). Thus in enacting RCW 50.04.294 in 2003, the legislature adopted a more expansive definition of misconduct than the court stated in *Shaw*. Where *Shaw* focused on whether the employee’s tardiness was “chronic,” “persistent,” or “excessive,” under RCW 50.04.294(2)(b) misconduct exists if the inexcusable tardiness is merely “repeated” following the employer’s warnings. Thus, the statute’s plain language signifies a departure from cases like *Shaw* and to the extent that such cases conflict

with the clear legislative intent of the new statute, they should be deemed overruled. *See Chandler*, 103 Wn.2d at 274.

As a result, it is the statutory misconduct per se provision, not *Shaw*, that should be applied to Daniels' actions in this case. Daniels was in his car, out of uniform, until 35 minutes after his shift began. Daniels was therefore late to his scheduled shift. He did not have an excuse for being late. The Commissioner therefore properly determined, based on substantial evidence, that Daniels was inexcusably tardy for his shift on November 6, 2009 following at least two prior warnings and that Daniels actions constituted misconduct per se under RCW 50.04.294(2)(b).

**C. The Commissioner properly concluded Daniels committed misconduct per se due to his violation of a reasonable and known company rule; Daniels was therefore disqualified from unemployment benefits pursuant to RCW 50.04.294(2)(f) and WAC 192-150-210(4) and (5).**

Misconduct per se occurs when an employee violates a reasonable and known company rule. RCW 50.04.294(2)(f). The Department will find that a rule is reasonable if it relates to an employee's job duties, amongst other reasons. WAC 192-150-210(4). Moreover, the Department will find an employee knew a rule if he was provided a copy or summary of the rule in writing. WAC 192-150-210(5).

Here, the Commissioner found that Daniels was aware of the Employer's policies that required employees to be at work on time and in

uniform. CR at 102. Specifically, the Commissioner found that Daniels was aware of the policies from the Employer's handbook that was issued to Daniels at the time he was hired. CR at 102. Moreover, the Commissioner found that Daniels' supervisor repeatedly warned Daniels that he was required to arrive at his "duty post" on time and in uniform. CR at 102. Finally, the Commissioner found Daniels violated the employer's reasonable rules on November 6, 2009 when he was not at his "duty post" in uniform at the start of his scheduled shift. CR at 104. These findings were supported by substantial evidence and supported a conclusion that Daniels committed misconduct per se.

**1. Daniels knew his Employer's tardiness and work attire policies.**

In his response brief, Daniels takes issue with the fact that the Employer's handbook was not in evidence. Respondent's Brief, at 34. But the "reasonable company rule" per se example of misconduct only requires that the employee "knew or should have known of the existence of the rule" before the employee violated it. RCW 50.04.294(2)(f). Thus, the absence of the handbook in the record is immaterial to whether Daniels' knew his Employer's rules that required him to be at his duty post on time and in uniform.

It was undisputed at the hearing that Daniels knew the Employer's rules before he had been discharged for violating them. Indeed, Daniels' supervisor, Mr. Kelly testified about the Employer's policies, his efforts to discipline Daniels for violating those policies, and that they were set out in the handbook. CR at 18, 21. Daniels testified that he had received the Employer's handbook and was familiar with his Employer's policies with regard to uniforms on-site and arriving to work on time:

Q When you were hired, were you provided some sort of an employee handbook or something like that that would identify your employer's policy?

A We went through a training and I believe later on we received a handbook and Mr. Kelly delivered the handbook to the sites.

Q Okay. So you were familiar with the Employer's policies with regard to uniforms on-site, computer use, arriving to work on time, all of that?

A Yes. Yes, I was. As a matter of fact, Mr. Kelly would inform everybody before he trained you, you know –

CR at 39-40. Furthermore, Daniels also testified to receiving and signing the September 2008 disciplinary action form that reiterated to Daniels the Employer's tardiness and work attire rules. CR at 39, 80.

Thus, the undisputed evidence established that Daniels knew his Employer's tardiness and work attire rules prior to his discharge for violating those rules. CR at 102-104.

**2. Daniels violated his Employer's reasonable and known rules that required him to be at his duty post on time and in uniform.**

The "reasonable company rule" per se example of misconduct is satisfied if the rule was (1) reasonable; (2) known or should have been known to the employee prior to being discharged for violating it; and (3) violated by the employee. RCW 50.04.294(2)(f). Here, Daniels' Employer required employees to be at their duty post on time and in uniform. As discussed above, those company rules were reasonable as they related to the employee's job duties. Moreover, Daniels' knew about them from the outset of his employment. On November 6, 2009, Daniels was not at his duty post on time or in uniform. He violated the Employer's tardiness and work attire rules. The Commissioner properly determined that Daniels' actions constituted misconduct per se.

In his response brief, Daniels asserts that cases that preceded the enactment of the per se examples of misconduct required egregious, often repeated, conduct or substantial financial loss to the employer in order to establish misconduct. Respondent's Brief, at 24-25. That was not true. Rather, while some pre-2004 cases may have involved egregious conduct, such conduct was not required to establish misconduct. *See, e.g., Harvey v. Empl. Sec. Dep't*, 53 Wn. App. 333, 766 P.2d 460 (1988) (refusal to obey supervisor's order to fold linen prior to moving on to other work

constituted misconduct); *Peterson v. Empl. Sec. Dep't*, 42. Wn. App. 364, 711 P.2d 1071 (1985) (refusing to answer supervisor's questions and leaving premises after being told to stay constituted misconduct); *Durham v. Empl. Sec. Dep't*, 31 Wn. App. 675, 644 P.2d 154 (1982) (refusing to obey supervisor's order to work overtime to finish a job constituted misconduct); *Willard v. Empl. Sec. Dep't*, 10 Wn. App. 437, 517 P.2d 973 (1974).

Even if past cases held as Daniels suggests, there are no such requirements in the plain and unambiguous language of RCW 50.04.294(2)(f) amended after each of the cases Daniels relies on. Statutory construction is unnecessary and improper when the wording of a statute is unambiguous. *Kinnan v. Jordan*, 131 Wn. App. 738, 751, 129 P.3d 807 (2006). Thus, the court need only derive the meaning of that statutory provision from its wording. *See Clark v. Payne*, 61 Wn. App. 189, 192, 810 P.2d 931 (1991) (recognizing that “[i]f the statutory language is plain and unambiguous, the court’s inquiry must end because a statute’s meaning must be derived from the wording of the statute itself.”).

To the extent earlier case law becomes necessary to assist the court in interpreting the plain language of RCW 50.04.294(2)(f), those cases found misconduct occurred when there was not only “a violation of a reasonable, work-related rule, but the conduct must be ‘intentional, grossly

negligent, or continue to take place after notice or warnings.’” *Galvin v. Emp’t Sec. Dep’t*, 87 Wn. App. 634, 643, 942 P.2d 1040 (1997), quoting *Tapper v. Emp’t Sec. Dep’t*, 122 Wn.2d 397, 409, 858 P.2d 494 (1993) (emphasis added). Accordingly, those cases did not require, as Daniels argues, that the violation was both intentional *and* continued to take place after notice or warnings. Respondent’s Brief, at 24 (citing *Galvin v. Emp’t Sec. Dep’t*, 87 Wn. App. at 646). Indeed, while not required to do so, the *Galvin* court merely found in applying the *Tapper* misconduct test that Ms. Galvin’s actions were both intentional *and* that they occurred after notice or warnings. *Galvin*, 87 Wn. App. at 646.

Here, Daniels was provided earlier warnings that he was required to be at his duty post on time and in uniform. CR at 21. Despite those earlier warnings, he violated his Employer’s reasonable, work-related rule on November 6, 2009. Thus, under either RCW 50.04.294(2)(f) or pre-2004 case law, the Commissioner properly determined that Daniels actions in not being at his duty post on time and in uniform constituted misconduct.

### III. CONCLUSION

For the foregoing reasons and the reasons set forth in the Appellant’s opening brief, the Department requests that the Court reverse

the superior court decision and affirm the Commissioner's decision.

RESPECTFULLY SUBMITTED this 10<sup>th</sup> day of August, 2011.

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