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

MICHAEL MAURICE,

Appellant,

and

STATE OF WASHINGTON,
EMPLOYMENT SECURITY
DEPARTMENT,

Respondent.

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

I. INTRODUCTION.....1

II. COUNTERSTATEMENT OF THE ISSUES2

III. STATEMENT OF THE CASE2

 A. Drug Free Workplace Policy3

 B. The Employer Asked Maurice to Take a Drug Test.....4

 C. The Department’s Commissioner Denied Maurice’s Application for Unemployment Benefits.....7

IV. STANDARD AND SCOPE OF REVIEW8

V. ARGUMENT10

 A. The Employer’s Request To Submit to a Drug Test Within 48 Hours Afforded Maurice a Reasonable Amount of Time to Seek Union Representation Under the Facts and the Law11

 1. Substantial evidence supports the finding that ample efforts were made to contact the union, but Maurice still did not submit to a drug test11

 2. Forty-eight hours is a reasonable amount of time to secure union representation before an investigatory drug test15

 B. The Commissioner Properly Concluded That Maurice’s Refusal To Submit to a Drug Test Within 48 Hours Amounted to Statutory Misconduct19

 1. Maurice’s refusal to complete a drug test within 48 hours was a willful disregard of the employer’s interests and of the standards of behavior the employer had the right to expect, RCW 50.04.294(1)(a), (1)(b).....20

2.	Maurice’s refusal to complete a drug test within 48 hours was insubordinate, showing a willful refusal to follow the employer’s reasonable direction, RCW 50.04.294(2)(a)	22
VI.	CONCLUSION	24

TABLE OF AUTHORITIES

	<u>Page(s)</u>
<u>Cases</u>	
<i>Courtney v. Emp't Sec. Dep't</i> , 171 Wn. App. 655, 287 P.3d 596 (2012).....	8-9
<i>Cummings v. Dep't of Licensing</i> , 189 Wn. App. 1, 355 P.3d 1155 (2015).....	9
<i>Daniels v. Dep't of Emp't Sec.</i> , 168 Wn. App. 721, 281 P.3d 310 (2012).....	19
<i>Darkenwald v. Emp't Sec. Dep't</i> , 183 Wn.2d 237, 350 P.3d 647 (2015).....	8-9, 11, 18
<i>DeHeer v. Seattle Post-Intelligencer</i> , 60 Wn.2d 122, 372 P.2d 193 (1962).....	18
<i>Fred Hutchinson Cancer Research Ctr. v. Holman</i> , 107 Wn.2d 693, 732 P.2d 974 (1987).....	9
<i>Hamel v. Emp't Sec. Dep't</i> , 93 Wn. App. 140, 966 P.2d 1282 (1998).....	20
<i>In re Estate of Jones</i> , 152 Wn.2d 1, 93 P.3d 147 (2004).....	9
<i>In re: Gary A. Svoboda</i> , Emp't Sec. Comm'r Dec. 921, 1972 WL 131634 (1972).....	23-24
<i>In re: Leroy V. Harvey</i> , Emp't Sec. Comm'r Dec.2d 601, 1980 WL 344279 (1980).....	23-24
<i>Kirby v. Dep't of Emp't Sec.</i> , 179 Wn. App. 834, 320 P.3d 123 (2014).....	20
<i>Manhattan Beer Distributors, LLC and Joe Garcia Diaz</i> , 362 N.L.R.B. No. 192 (2015).....	15-18

<i>Martini v. Emp't Sec. Dep't</i> , 98 Wn. App. 791, 990 P.2d 981 (2000).....	23
<i>N.L.R.B. v. J. Weingarten, Inc.</i> , 420 U.S. 251, 95 S. Ct. 959, 43 L. Ed. 2d 171 (1975).....	5, 15
<i>Nelson v. Dep't of Emp't Sec.</i> , 98 Wn.2d 370, 655 P.2d 242 (1982).....	10
<i>Ralphs Grocery Co. and United Food and Commercial Workers Union, Local 324</i> , 2013 WL 1856585 (2013).....	16
<i>Ralphs Grocery Co.</i> , 361 N.L.R.B. 80 (2014)	16
<i>Smith v. Emp't Sec. Dep't</i> , 155 Wn. App. 24, 226 P.3d 263 (2010).....	10, 20
<i>Tapper v. Emp't Sec. Dep't</i> , 122 Wn.2d 397, 858 P.2d 494 (1993).....	8-11
<i>William Dickson Co. v. Puget Sound Air Pollution Control Agency</i> , 81 Wn. App. 403, 914 P.2d 750 (1996).....	9

Statutes

RCW 34.05.558	8
RCW 34.05.570	8
RCW 34.05.570(1)(a)	8, 10, 18
RCW 34.05.570(3)(e)	9
RCW 50.01.010	10
RCW 50.04.294(1).....	19
RCW 50.04.294(1)(a)	1-2, 7, 10, 19-20, 22
RCW 50.04.294(1)(b).....	1-2, 7-8, 10, 19-20, 22

RCW 50.04.294(2).....	19
RCW 50.04.294(2)(a)	1-2, 8, 10, 19, 22-23
RCW 50.20.066	1
RCW 50.20.066(1).....	10
RCW 50.32.095	23
RCW 50.32.120	8
Title 50 RCW	10
<u>Regulations</u>	
WAC 192-150-205(1).....	20

I. INTRODUCTION

This is an unemployment benefits case. Michael Maurice worked as a pharmacist when his employer suspected he was under the influence of drugs at work. The employer directed him to submit to a drug test under its drug-free workplace policy and gave him 48 hours to secure union representation and complete the test. Under the facts and law, Maurice had a reasonable period of time to comply. Maurice failed to take a drug test within 48 hours, and the employer discharged him. The Commissioner properly concluded that Maurice's conduct amounted to statutory misconduct under the Employment Security Act, which disqualifies him from receiving unemployment benefits under RCW 50.20.066.

Maurice's arguments are founded on the inaccurate claim that his employer required him to take a drug test without union representation. But neither the record nor the findings support that view of the facts, and, on appeal, the Court must view the evidence in the light most favorable to the Department. Because Maurice had sufficient opportunity to secure union representation and complete the drug test but failed to do so, the Commissioner properly concluded that his actions amounted to a willful disregard of the employer's interest and a refusal to follow a reasonable direction. RCW 50.04.294(1)(a), (1)(b), (2)(a). The Court should affirm the Commissioner's decision.

II. COUNTERSTATEMENT OF THE ISSUES

1. Does substantial evidence support that ample efforts were made to reach the union, yet Maurice chose not to submit to a drug test in violation of the employer's directive and policy, when Maurice had 48 hours to secure union representation and complete the test, he spoke to a union representative when he left work, and the employer directly notified the union of the instruction that Maurice take a drug test?

2. Did Maurice commit work-connected misconduct under RCW 50.04.294(1)(a), (1)(b), or (2)(a) when he failed to complete a reasonable suspicion drug test within 48 hours of the directive to do so, despite a sufficient time to obtain union representation, in violation of the employer's reasonable drug test policy and instruction?

III. STATEMENT OF THE CASE

Most of the facts of this case are not in dispute. Michael Maurice worked as a pharmacist for Olympia Medical Center for Kaiser Permanente (Kaiser) from March 2009 until he was fired on August 24, 2017, for refusing to submit to a drug test. Administrative Record (AR) 24, 118 (Finding of Fact (FF) 3).

A. Drug Free Workplace Policy

Kaiser had a drug and alcohol testing policy that permitted managers to request an employee to submit to a drug test if there was a reasonable suspicion that the employee was under the influence:

- 5.1** A supervisor may have a “reasonable suspicion” that an employee is under the influence based upon observation of conduct and/or events. Factors which may establish reasonable suspicion include, but are not limited to:
 - 5.1.1** Sudden unexplained changes in behavior which adversely impact work performance.
 - 5.1.2** Discovery or presence of alcohol or illegal drugs in an employee’s possession or near the employee’s work space.
 - 5.1.3** Odor of alcohol and/or residual odor peculiar to alcohol or controlled substances.
 - 5.1.4** Personality changes or disorientation.
 - 5.1.5** Violation of safety policies, or involvement in an on the job accident or near accident.
- 5.2** When reasonable suspicion has been established to indicate an employee is under the influence of alcohol or drugs, the employee, at the sole discretion of management, will be asked to provide breath, blood and/or urine specimens for testing by a third party laboratory.
- 5.3** The provision of a specimen is voluntary; however, if an employee refuses to submit to a required testing, the refusal is considered a significant factor in reaching a decision regarding corrective/disciplinary action

AR 27, 79, 118 (FF 5). The employer also had a rule stating that a violation of employer standards may result in termination:

Violation of [Kaiser]’s standards of employee conduct may, in the discretion of [Kaiser], result in disciplinary or corrective action, up to and including termination of employment. A wide variety of conduct may violate [Kaiser]’s standards of employee conduct, including but not limited to the following: Lack of cooperation or refusal to follow instructions.

AR 25, 42-43, 77, 118 (FF 4). Maurice knew or should have known of the policies because the employer provided employee conduct documents to all employees upon hire, and the policies were generally available on the employer’s website.¹ AR 26-28, 48-50, 64-65, 110, 118 (FF 6).

B. The Employer Asked Maurice to Take a Drug Test

On Friday, August 4, 2017, a customer complained that Maurice seemed incoherent when dispensing medication. AR 33, 118 (FF 8). Based on the complaint, Maurice’s supervisor, Pinar Altayar, went to observe Maurice. AR 34-35, 118 (FF 10). According to Altayar, Maurice appeared disorganized, his speech was fast, slurred, and incoherent, and he moved

¹ In his brief, Maurice notes that the policy was adopted four days prior to the incident. Br. Appellant 4. However, he does not assign error to Finding of Fact 6, which found that he knew or should have known about the employer’s drug free workplace policies. *Id.* at 2. Indeed, employer testimony established that the newly-adopted policy was the same policy that had been in place for the past 10 years, when the pharmacy was with Group Health. AR 65. The pharmacy merely adopted new, similar policies to align with national Kaiser policies. *Id.* There are no grounds for Maurice to suggest that he was unaware of the employer’s reasonable suspicion drug testing policy.

very fast from one station to another. AR 35, 118 (FF 10). Two other managers observed similar behavior. AR 35-36, 118 (FF 9).

Based on these observations, the employer decided to ask Maurice to submit to a drug test. AR 36-37, 118 (FF 11). Altayar asked Maurice to go to a conference room so they could speak privately, but Maurice demanded to know what was happening. AR 38. Another manager, Peter Mendy, then handed Maurice a copy of the drug and alcohol policy, read him the policy, and told him they were sending him to take a drug test and there was a cab waiting for him outside. AR 38-39, 45, 118 (FF 113). Maurice responded that he was “pulling” his *Weingarten*² rights, demanded union representation, and refused to go to the conference room or submit to a drug test. AR 39. Altayar reiterated the request that he take a drug test, and Maurice responded, “Pinar, you’re a sweetheart, you’re new; if I go drug test or if I don’t go drug test . . . they will fire me.” AR 39-40, 119 (FF 17). Maurice made further statements that did not make sense to Altayar. AR 40, 119 (FF 17).

The employer believed that *Weingarten* rights applied only at an investigatory meeting where questions are asked, and they did not intend to

² *N.L.R.B. v. J. Weingarten, Inc.*, 420 U.S. 251, 95 S. Ct. 959, 43 L. Ed. 2d 171 (1975). “*Weingarten* rights” refers to a union employee’s right to union representation at an investigatory meeting—a meeting that may result in disciplinary action.

ask any questions. AR 44, 65. Since Maurice refused to take the drug test, the managers asked him to leave the building and told him human resources would contact him. AR 40, 119 (FF 18). Maurice took the lab order for the drug test, which was good for 48 hours, and left. AR 52, 53, 119 (FF 1, 21).

Despite the employer's mistaken belief about *Weingarten* rights, after Maurice left, the employer notified the union that they had directed Maurice to submit to a drug test. AR 30-31, 66, 119 (FF 20). Maurice also called and emailed a union representative after leaving to ask for assistance. AR 52. He testified he got a response and spoke to someone that same day, but did not say what that response was. AR 52-53. When asked whether he went to get the lab test the following day, a Saturday, he replied he did not, explaining, "My union was still advising me what to do in that situation. I was waiting for advice from the union rep." AR 53.

Even though the test was time sensitive, Maurice did not submit to a drug test within 48 hours, and the lab orders expired. AR 30, 53, 119 (FF 21, 22, 23). Maurice never did take a drug test. AR 53-54. Seven days later, on August 11, the employer held an investigatory meeting, at which Maurice was present with union representation. AR 40-41, 119 (FF 25). Following the meeting, the employer terminated Maurice on August 24 for his failure to follow instructions and for violating the employer's drug testing policy. AR 30, 42, 77, 119 (FF 26).

C. The Department’s Commissioner Denied Maurice’s Application for Unemployment Benefits

Maurice applied for unemployment benefits. AR 73. The Department initially allowed the claim, but the employer appealed, and an administrative hearing was held. AR 73-75, 117. At the hearing, Maurice gave somewhat conflicting testimony. At first, he stated that he “asked for union representation before I entered into the meeting and before I took the drug test. I said -- I said I would be more than willing to take the test. I just needed a union rep or a shop steward --” AR 47. But later, when asked, “[D]id you want representation to go along with you to the lab to get -- to submit to your drug test?”, Maurice replied, “No, not at all. I just wanted, you know, I just wanted present for even -- questions” AR 50. When the administrative law judge (ALJ) asked whether his employer “actually ask[ed] you any questions that you felt uncomfortable answering that day?”, Maurice stated, “No, ma’am, they did not.” AR 51.

Following the hearing, the ALJ concluded that Maurice was discharged for statutory misconduct under the Employment Security Act and was, therefore, ineligible for unemployment benefits. AR 121 (Conclusions of Law (CL) 9, 10). The ALJ determined Maurice’s conduct amounted to a “willful disregard of the employer’s interest” under RCW 50.04.294(1)(a), a “[deliberate] disregard of standards of behavior the

employer has the right to expect of its employees” under RCW 50.04.294(1)(b), and insubordination under RCW 50.04.294(2)(a). AR 121 (CL 9, 10). On further administrative review, the Commissioner adopted the ALJ’s findings and conclusions and affirmed the ALJ’s order. AR 140-41. On judicial review, the superior court affirmed. CP 70-73.

IV. STANDARD AND SCOPE OF REVIEW

Judicial review of the Commissioner’s decision is governed by Washington’s Administrative Procedure Act (APA). RCW 50.32.120; RCW 34.05.570. This Court sits in the same position as the superior court and applies the APA standards directly to the agency decision and record. RCW 34.05.558; *Courtney v. Emp’t Sec. Dep’t*, 171 Wn. App. 655, 660, 287 P.3d 596 (2012). The Court reviews the decision of the Commissioner, not the underlying decision of the ALJ—except to the extent the Commissioner’s decision adopted any findings and conclusions of the ALJ’s order. *Tapper v. Emp’t Sec. Dep’t*, 122 Wn.2d 397, 405-06, 858 P.2d 494 (1993). Here, the Commissioner adopted all of the ALJ’s findings and conclusions. AR 140. The Commissioner’s decision is considered *prima facie* correct, and the party challenging the decision, Maurice, has the burden of demonstrating its invalidity. RCW 34.05.570(1)(a); *Darkenwald v. Emp’t Sec. Dep’t*, 183 Wn.2d 237, 244, 350 P.3d 647 (2015).

This Court undertakes the limited task of reviewing the findings of fact for substantial evidence. RCW 34.05.570(3)(e); *William Dickson Co. v. Puget Sound Air Pollution Control Agency*, 81 Wn. App. 403, 411, 914 P.2d 750 (1996). Substantial evidence is “sufficient to persuade a rational, fair-minded person of the truth of the finding,” *In re Estate of Jones*, 152 Wn.2d 1, 8, 93 P.3d 147 (2004). Evidence may be substantial even if conflicting or susceptible to other reasonable interpretations. *See Fred Hutchinson Cancer Research Ctr. v. Holman*, 107 Wn.2d 693, 713-14, 732 P.2d 974 (1987). The presence of conflicting evidence does not defeat the presence of substantial evidence in support of a Commissioner’s finding. *Cummings v. Dep’t of Licensing*, 189 Wn. App. 1, 14, 355 P.3d 1155 (2015). The reviewing court “views[s] the evidence and the reasonable inferences therefrom in the light most favorable to the party who prevailed” below and may not reweigh evidence or witness credibility. *William Dickson Co.*, 81 Wn. App. at 411 (citation omitted). Unchallenged findings are verities on appeal. *Darkenwald*, 183 Wn.2d at 244.

The Court determines de novo whether the Commissioner correctly applied the law to the findings. *Tapper*, 122 Wn.2d at 407. However, because the Department has expertise in interpreting and applying unemployment law, the Court should give appropriate weight to the agency’s interpretation. *Courtney*, 171 Wn. App. at 660.

V. ARGUMENT

The Washington Legislature enacted the Employment Security Act, Title 50 RCW, to provide compensation to those who are “involuntarily” unemployed “through no fault of their own.” RCW 50.01.010; *Tapper*, 122 Wn.2d at 408. Accordingly, an individual who has been discharged from work for statutorily defined “misconduct” is disqualified from receiving unemployment benefits. RCW 50.20.066(1). The initial burden is on the employer to show that the claimant was discharged for misconduct. *Nelson v. Dep’t of Emp’t Sec.*, 98 Wn.2d 370, 374-75, 655 P.2d 242 (1982). However, on appeal, it is the appellant’s burden to establish that the Commissioner’s decision was in error. RCW 34.05.570(1)(a); *Smith v. Emp’t Sec. Dep’t*, 155 Wn. App. 24, 32, 226 P.3d 263 (2010).

Here, the Commissioner correctly concluded that Maurice committed misconduct when he refused to take a drug test within 48 hours of the instruction to do so despite ample time to obtain union representation for the test. Maurice’s conduct (1) willfully disregarded the employer’s interest in a drug-free workplace, RCW 50.04.294(1)(a); (2) violated standards of behavior the employer had the right to expect of Maurice, RCW 50.04.294(1)(b); and (3) was insubordinate to the employer’s reasonable instruction, RCW 50.04.294(2)(a). This Court should affirm.

A. The Employer’s Request To Submit to a Drug Test Within 48 Hours Afforded Maurice a Reasonable Amount of Time to Seek Union Representation Under the Facts and the Law

The factual foundation of Maurice’s legal argument is faulty: his employer did not require him to submit to a drug test without union representation. Rather, as the Commissioner found, “ample efforts were made to reach the union.” AR 121 (CL 10).³ Substantial evidence in the record supports this finding, and, under the law, 48 hours was a reasonable amount of time for Maurice to seek union representation for the time-sensitive drug test.

1. Substantial evidence supports the finding that ample efforts were made to contact the union, but Maurice still did not submit to a drug test

Maurice does not assign error to any of the findings of fact. Br. Appellant 2. Accordingly, the Court should treat them as verities. *Darkenwald*, 183 Wn.2d at 244.

However, underlying Maurice’s argument that it was not reasonable for the employer to direct him to take a drug test without union representation is the notion that the employer “require[d] him to forgo” his right to union representation before submitting to a drug test. Br. Appellant

³ Although this finding is contained in a conclusion of law, where “findings are buried or hidden within conclusions of law, it is within the prerogative of an appellate court to exercise its own authority in determining what facts have actually been found below.” *Tapper*, 122 Wn.2d at 406.

12. On the contrary, the Commissioner properly found that “[a]mple efforts were made to reach the union on August 4, 2017. Nevertheless, claimant chose not to submit to a drug test in violation of the employer’s directive and policy.” AR 121 (CL 10). Maurice’s argument thus implicitly challenges this finding. But substantial evidence supports the finding.

It is undisputed that based on a customer’s complaint about Maurice’s behavior and consistent observations of multiple pharmacy managers, the employer asked Maurice to submit to a drug test. AR 118 (FF 8, 10, 11). Maurice’s direct supervisor, Altayar, asked Maurice to go with her to a conference room so they could discuss the matter privately. AR 38, 118 (FF 12). When Maurice refused to go to a conference room and demanded to know what was happening, another manager handed him a copy of the drug and alcohol policy and informed him they were sending him to a drug test. AR 38-39, 45, 118 (FF 13). Maurice responded that he was asserting his *Weingarten* rights and refused to go to the conference room or take a drug test without union representation. AR 39, 51. One of the managers then handed Maurice the lab orders for the drug test, asked him to leave, and told him human resources would contact him. AR 40, 119 (FF 18). The lab orders were good for 48 hours. AR 54, 66, 119 (FF 21).

The human resources representative testified that after Maurice left work, she emailed a him copy of the lab orders and “cc’d” the union. AR 30,

66. She also said that she contacted the union directly to notify it of the drug test request. *Id.* And Maurice testified that he called and emailed a union representative after leaving and spoke to someone from the union that day. AR 52-53. But Maurice never took the drug test. When asked why he did not get tested before the 48 hours expired, he simply stated that the “union was still advising me what to do in that situation.” AR 53. He presented no evidence that he was unable to obtain union representation for the test or that the lab was closed over the weekend. In fact, when asked at the hearing if he went to test the next day, Saturday, he said it was because he was still awaiting advice from his union. AR 53. He did not say that the lab was closed or that no one would accompany him.

And at the hearing, Maurice offered conflicting testimony concerning whether he was asserting his *Weingarten* rights for the drug test or only for anticipated questioning. At first, he stated that he “asked for union representation before I entered into the meeting and before I took the drug test. I said -- I said I would be more than willing to take the test. I just needed a union rep or a shop steward --” AR 47. But later, when asked, “[D]id you want representation to go along with you to the lab to get -- to submit to your drug test?”, Maurice replied, “No, not at all. I just wanted, you know, I just wanted present for even -- questions” AR 50. When the ALJ asked whether his employer “actually ask[ed] you any questions

that you felt uncomfortable answering that day?”, Maurice stated, “No, ma’am, they did not.” AR 51. Thus the record is not clear whether Maurice even wanted a union representative present at a drug test, or whether he just wanted an opportunity to confer with a representative before taking the test. Maurice cannot claim that the employer interfered with his ability to consult with his union.

But even if Maurice *was* requesting union representation at the drug test itself, viewing the evidence in the light most favorable to the Department, substantial evidence supports the conclusion that he had ample opportunity to obtain union representation before having to take the test. Contrary to Maurice’s arguments, the employer did not prevent him from availing himself of representation. And there is no evidence that he was *unable* to secure union representation or complete the test. Rather, the evidence shows that both he and the employer contacted the union directly shortly after Maurice left work, and Maurice actually spoke with someone. Maurice simply failed to comply with the employer’s reasonable request to submit to a drug test within 48 hours based on the employer’s reasonable suspicion that he was under the influence at work.⁴

⁴ Maurice does not dispute that the employer had reasonable suspicion to believe that he was under the influence.

2. Forty-eight hours is a reasonable amount of time to secure union representation before an investigatory drug test

The Department does not dispute that an employee has a right to union representation before consenting to take an investigatory drug test.⁵ *See Manhattan Beer Distributors, LLC and Joe Garcia Diaz*, 362 N.L.R.B. No. 192, *2 (2015).⁶ However, “exercise of the right may not interfere with legitimate employer prerogatives.” *N.L.R.B. v. J. Weingarten, Inc.*, 420 U.S. at 258. Thus while an employer must “afford [an employee] a reasonable period of time to obtain union representation” before submitting to a drug test, the employee may not “postpone indefinitely a drug test” by asserting *Weingarten* rights. *Manhattan Beer Distributors*, 362 N.L.R.B. No. 192, *4 (2015).

Here, the Commissioner properly found that both the employer’s drug test policy and the request to submit to a drug test within 48 hours were reasonable. The Commissioner found that the employer afforded Maurice ample opportunity to obtain union representation for the drug test, and substantial evidence supports that unchallenged finding. AR 121 (CL 10).

⁵ Maurice complains that the Commissioner did not adequately evaluate *Weingarten* rights in the context of a drug test. Br. Appellant 15-16. That is of no consequence because the Commissioner made the relevant findings to conclude that the employer did not infringe on his *Weingarten* rights because it afforded him sufficient time—48 hours—to secure union representation for the drug test.

⁶ The Department concedes that the fact that the employer in *Manhattan Beer Distributors* wanted to interview the employee in addition to drug test him does not make a material difference in this case. *See* Br. Appellant 14-15; AR 121 (CL 11).

The primary cases on which Maurice relies—*Ralphs Grocery* and *Manhattan Beer Distributors*—do not support his argument that the employer’s request was not reasonable. Br. Appellant 13-15. In those cases, the employers did not afford the employees a reasonable amount of time to seek union representation before firing them for refusing to take drug tests.

In *Ralphs Grocery*, after the employer directed an employee to take a drug test, it allowed him only 10 to 15 minutes to contact his union representative. *Ralphs Grocery Co. and United Food and Commercial Workers Union, Local 324*, 2013 WL 1856585 (2013), *adopted as modified by Ralphs Grocery Co.*, 361 N.L.R.B. 80 (2014). When the employee informed his managers that he had been unable to reach his union representative and would not submit to a drug test without representation, the employer told him he had one minute to meet the assistant store director at his car to be transported to the test or he would be suspended immediately. *Id.* The employee continued to refuse to test, and the employer suspended him pending further investigation. *Id.* The employee was then terminated the following day. *Id.* The NLRB concluded the employer had improperly required the employee to submit to a drug test without representation. *Id.*

Similarly, in *Manhattan Beer Distributors*, the employer directed an employee to submit to a drug test after smelling marijuana on him. *Manhattan Beer Distributors*, 362 N.L.R.B. No. 192, *1 (2015). The

employee said he would not take a drug test without his shop steward present. *Id.* He could not reach the assistant shop steward, and the shop steward would not accompany him because it was his day off. *Id.* While the employee was on the phone with the shop steward, the manager instructed him to get in his car so he could take him for his drug test. *Id.* The employee refused. *Id.* The employer discharged him the next day for refusing to submit to a drug test. *Id.* The NLRB concluded that the employer had not afforded the employee a reasonable period of time to obtain union representation. *Id.* at *4. The Board noted that the employer “never communicated . . . that taking a drug test was time-sensitive” *Id.*

In contrast to the employees in *Ralphs Grocery* and *Manhattan Beer*—who had mere minutes to secure union representation—Maurice had *two days* to obtain representation and comply with the drug test. AR 66 (“We gave him 48 hours to test[.]”). Although the employer was not aware whether *Weingarten* rights included the right to union representation at an employer-directed drug test, and they instructed him to leave the pharmacy, Maurice still had ample opportunity to secure union representation after he left, and the employer did not prevent Maurice from obtaining union representation for the test. Indeed, soon after he left the building, Maurice contacted the union and spoke with someone. And *the employer* emailed the union directly as well “to help support the request,” attaching the lab orders.

AR 30, 66. The human resources representative “personally . . . emailed the union rep and confirmed with the union rep that they had notice that we made this request because . . . the time would lapse.” AR 66.

Thus unlike the employers in *Ralphs Grocery* and *Manhattan Beer*, Kaiser did not deny Maurice’s request for union representation, as Maurice contends. Br. Appellant 19. Rather, the employer afforded Maurice “a reasonable period of time to obtain union representation” before submitting to the drug test. *Manhattan Beer Distributors*, 362 N.L.R.B. No. 192, *4 (2015). Maurice points to no case that suggests that 48 hours is an inadequate period of time to secure union representation under *Weingarten*. *DeHeer v. Seattle Post-Intelligencer*, 60 Wn.2d 122, 126, 372 P.2d 193 (1962) (where no authority is cited, the court may assume counsel found none after a diligent search). And Maurice was aware of the time-sensitive nature of the test, yet he failed to complete the test, without adequate explanation. Maurice’s failure to complete the test within 48 hours “postpone[d] indefinitely [the] drug test.” *Id.* Maurice has failed his burden of demonstrating the invalidity of the Commissioner’s finding that “ample efforts were made to reach the union.” AR 121 (CL 10); RCW 34.05.570(1)(a); *Darkenwald*, 183 Wn.2d at 244. That statement is correct under the facts and the law.

B. The Commissioner Properly Concluded That Maurice’s Refusal To Submit to a Drug Test Within 48 Hours Amounted to Statutory Misconduct

The Employment Security Act provides four broad categories of misconduct that will disqualify an applicant from receiving unemployment benefits. RCW 50.04.294(1). Relevant here, “misconduct” includes “[w]illful or wanton disregard of the rights, title, and interests of the employer or a fellow employee,” RCW 50.04.294(1)(a), and “[d]eliberate violations or disregard of standards of behavior which the employer has the right to expect of an employee.” RCW 50.04.294(1)(b). AR 121 (CL 9, 10).

The statute also identifies specific examples of *per se* misconduct, “because the acts signify a willful or wanton disregard of the rights, title, and interests of the employer or a fellow employee.” RCW 50.04.294(2); *Daniels v. Dep’t of Emp’t Sec.*, 168 Wn. App. 721, 728, 281 P.3d 310 (2012) (“Certain types of conduct are misconduct *per se*.”). One such act of *per se* misconduct is “[i]nsubordination showing a deliberate, willful, or purposeful refusal to follow the reasonable directions or instructions of the employer.” RCW 50.04.294(2)(a). Here, the Commissioner properly concluded that Maurice’s failure to submit to a reasonable suspicion drug test within 48 hours, when he had sufficient time to obtain union representation, amounted to misconduct under these provisions. The Court should affirm the Commissioner’s decision.

1. Maurice's refusal to complete a drug test within 48 hours was a willful disregard of the employer's interests and of the standards of behavior the employer had the right to expect, RCW 50.04.294(1)(a), (1)(b)

As discussed, substantial evidence supports the finding that Maurice had ample time to secure union representation, but he still failed to complete a reasonable suspicion drug test within 48 hours of the request. This finding supports the conclusion that Maurice willfully disregarded his employer's rights and interests and the standards of behavior the employer had the right to expect. RCW 50.04.294(1)(a), (1)(b); AR 121 (CL 9, 10).

An employee acts with willful disregard when she (1) is aware of her employer's interest, (2) knew or should have known that certain conduct jeopardizes that interest, and (3) nonetheless intentionally performs the act, willfully disregarding its probable consequences. *Kirby v. Dep't of Emp't Sec.*, 179 Wn. App. 834, 844, 320 P.3d 123 (2014). It is sufficient for misconduct purposes that an employee "intentionally perform an act in willful disregard for its probable consequences." *Smith*, 155 Wn. App. at 37; *see also* WAC 192-150-205(1) ("'Willful' means intentional behavior done deliberately or knowingly, where you are aware that you are violating or disregarding the rights of your employer or a co-worker."). Intent to harm the employer is not required. *Hamel v. Emp't Sec. Dep't*, 93 Wn. App. 140, 146, 966 P.2d 1282 (1998).

In general, employers have an interest in maintaining drug-free workplaces. Pharmacies have a heightened interest in their pharmacists not being under the influence while dispensing medicine, as it can pose a serious safety issue. *See* AR 29, 118-19 (FF 14). Kaiser implemented a policy to ensure these interests were satisfied by permitting managers to request that an employee submit to a drug test if they had a reasonable suspicion that the employee was under the influence. AR 27, 79, 118 (FF 5). While submitting to a drug test was voluntary, the policy explained that refusing to submit to a test could be considered a significant factor in any disciplinary decision. *Id.* A version of this policy had been in effect for at least 10 years. AR 65. All employees received copies of the policies, and the policies also were available on the employer's internal website. AR 26-27. By communicating these policies to Maurice, the employer put Maurice on notice of its expectations and had the right to expect that he would remain drug-free at work and submit to a drug test upon reasonable suspicion.

Yet when asked to submit to a drug test upon reasonable suspicion that he was under the influence, Maurice refused to do so. He now claims that he merely refused to test without union representation and that the employer required him to test without it. Br. Appellant 8, 12, 22-23. But the record belies that claim. At the hearing, when asked why he did not complete the drug test within 48 hours, he said his union was still advising

him what to do. AR 53. He did not say that he was unable to secure union representation; he was simply awaiting advice, rather than complying with the employer's directive and policy. Accordingly, the Commissioner properly concluded that Maurice's failure to complete the drug test within 48 hours amounted to a willful disregard of the employer's rights and interests in maintaining compliance with its drug-free workplace policies and of the standards of behavior the employer had the right to expect under RCW 50.04.294(1)(a), (1)(b). AR 121 (CL 9).

2. Maurice's refusal to complete a drug test within 48 hours was insubordinate, showing a willful refusal to follow the employer's reasonable direction, RCW 50.04.294(2)(a)

Maurice's conduct also was insubordinate because it was a willful refusal to follow the reasonable direction of his employer. RCW 50.04.294(2)(a).

Maurice concedes that the employer's drug test policy was reasonable. Br. Appellant 22. He argues, however, that it was not reasonable to *enforce* that policy in a manner that denied him his *Weingarten* rights. *Id.* at 22-23. But as explained above, the employer did no such thing. The employer afforded Maurice 48 hours to comply with the drug test directive, contacted his union to assist, and did nothing to interfere with his ability to obtain union representation. The employer's directive was, therefore,

reasonable, and Maurice's refusal to comply with it amounted to insubordination under RCW 50.04.294(2)(a).

Although the employer was not aware whether *Weingarten* rights included the right to union representation at an employer-directed drug test, the employer did not prevent Maurice from obtaining union representation for the test. Indeed, soon after he left the building, human resources notified the union by email that Maurice had been directed to take a drug test, attaching the lab orders. AR 30-31, 66, 119 (FF 20). And Maurice made contact with the union immediately after leaving. AR 52-53, 59, 61, 119 (FF 21). He did not timely submit to the drug test because he was still waiting for the union to advise him what to do. AR 53. Thus he simply failed to take steps necessary to avail himself of union representation and take the drug test before the lab orders expired. This was insubordination because it was a willful refusal to follow the employer's reasonable instruction to submit to a drug test within 48 hours. RCW 50.04.294(2)(a).

Maurice's reliance on two precedential Commissioner's decisions is unavailing.⁷ *See* Br. Appellant 22. In those cases, the employer directed the employees to perform work in violation of their labor agreements. *In re: Gary A. Svoboda*, Emp't Sec. Comm'r Dec. 921, 1972 WL 131634 (1972);

⁷ Under RCW 50.32.095, the Commissioner may designate certain decisions as precedential. Those decisions serve as persuasive authority for the Court. *Martini v. Emp't Sec. Dep't*, 98 Wn. App. 791, 795, 990 P.2d 981 (2000).

In re: Leroy V. Harvey, Emp't Sec. Comm'r Dec.2d 601, 1980 WL 344279 (1980). The Commissioner concluded in both cases that the requests were not reasonable and, therefore, the employees' refusal to comply with the requests was not insubordinate. *In re: Svoboda*, 1972 WL 131634 at *2-3; *In re: Harvey*, 1980 WL 344279 at *3.

In contrast here, the employer's drug-test policy was reasonable, as Maurice concedes. And contrary to Maurice's contention, the employer did not require him to submit to the test without union representation. Accordingly, the request to submit to the drug test and comply with the reasonable policy was reasonable, and Maurice's refusal to comply with the request was insubordinate. The Court should affirm.

VI. CONCLUSION

The foundation of Maurice's argument—that the employer required him to forgo *Weingarten* rights and submit to a drug test or be fired—is not supported by the evidence. His employer gave him 48 hours to submit to a drug test and ample opportunity to secure union representation, and even contacted the union directly. Maurice's failure to take the drug test amounted to statutory misconduct under the Employment Security Act. The Department respectfully asks the Court to affirm the Commissioner's decision.

RESPECTFULLY SUBMITTED this 20th day of March, 2019.

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PROOF OF SERVICE

I, Bethany Kenstowicz, hereby state and declare as follows:

1. That I am a citizen of the United States of America, a resident of the State of Washington, over the age of eighteen (18) years, and not a party to the above-entitled action.

2. That on the 20th day of March 2019, I caused to be served a true and correct copy of Brief of Respondent, as follows:

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I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON that the foregoing is true and correct.

DATED this 20th day of March 2019, in Seattle, Washington.


BETHANY KENSTOWICZ
Legal Assistant

AGO/LICENSING AND ADMINISTRATIVE LAW DIV

March 20, 2019 - 3:00 PM

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