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

MEDELEZ, INC., an Oregon Corporation,

Respondent,

v.

STATE OF WASHINGTON, EMPLOYMENT SECURITY
DEPARTMENT,

Appellant.

**BRIEF OF APPELLANT EMPLOYMENT SECURITY
DEPARTMENT**

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I. INTRODUCTION

This is an unemployment benefits case. Jeffrey Metzener worked as a truck driver for Medelez, Inc., until the employer ordered him to submit to breath alcohol testing on his day off. After the test revealed a breath alcohol concentration of 0.051, the employer fired him. But the employer did not have a policy prohibiting off-duty alcohol consumption. And although Mr. Metzener was subject to the terms of a substance abuse plan, the employer did not show that the plan prohibited off-duty alcohol consumption, either.

Substantial evidence supports the Commissioner of the Employment Security Department's findings that Mr. Metzener had no reason to know that his substance abuse plan prohibited off-duty drinking and that he reasonably did not expect to be required to take a breathalyzer test on his day off. In turn, the Commissioner correctly concluded that Mr. Metzener's conduct did not amount to statutory misconduct that would disqualify him from receiving unemployment benefits under RCW 50.20.066 and RCW 50.04.294. The Court should affirm the Commissioner's decision.

II. ASSIGNMENTS OF ERROR

The Department assigns no error to the final decision of the Department's Commissioner. However, because the Franklin County Superior Court erred in reversing the Commissioner's decision, and the

Department appeals that decision, the Department assigns error to the following aspects of the superior court's order:¹

1. The superior court erred in making its own credibility finding. CP 207-08 ¶ 7.
2. The superior court erred in reweighing the evidence. CP 208 ¶ 8.
3. The superior court erred in making its own findings of fact and concluding that the Commissioner's order is not supported by substantial evidence. CP 208 ¶¶ 8-9.
4. The superior court erred in reversing the Commissioner's decision that concluded Mr. Metzener is not disqualified pursuant to RCW 50.20.066(1). CP 209.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Does substantial evidence support the Commissioner's finding that Mr. Metzener did not have reason to know that off-duty alcohol consumption was prohibited under the terms of his substance abuse plan, where Mr. Metzener testified he was not told that off-duty consumption was prohibited, and testified he did not anticipate driving for the employer in the immediate future, and the employer did not refute this evidence?

¹ This is a judicial review under the Washington Administrative Procedure Act, Chapter 34.05 RCW, where the Court of Appeals sits in the same position as the superior court and reviews the Commissioner's decision. *Tapper v. Emp't Sec. Dep't*, 122 Wn.2d 397, 402, 858 P.2d 494 (1993). Accordingly, the Respondent, Medelez, Inc. must assign error to the Commissioner's findings and conclusions it challenges. See RAP 10.3(h); RCW 50.32.120 (judicial review of the Commissioner's decision is governed by the Administrative Procedure Act). "[A]ssignment of error to the superior court findings and conclusions is not necessary in review of an administrative action." *Waste Mgmt. of Seattle, Inc. v. Utils. & Transp. Comm'n*, 123 Wn.2d 621, 633, 869 P.2d 1034 (1994).

2. Did the Commissioner correctly conclude the employer did not establish misconduct when the employer did not show that Mr. Metzener knew or should have known that he was prohibited from drinking while off duty, thus Mr. Metzener did not willfully or negligently disregard his employer's interests?

IV. STATEMENT OF THE CASE

Mr. Metzener began work as a truck driver with Medelez Inc. in mid-February 2016. AR 12, 90, 96 (Finding of Fact (FF) 2). Three months prior to starting his job with Medelez, Mr. Metzener applied for a job with another employer. AR 79, 119; *see* AR 97 (FF 7). He took a pre-employment drug screen for that employer and tested positive for marijuana. AR 79, 119; *see* AR 97 (FF 7). As a result, that employer did not hire him. AR 17, 71, 119; *see* AR 97 (FF 7). In order to preserve his commercial driver's license (CDL), Mr. Metzener was required to comply with a substance abuse plan. AR 14, 36, 119; *see* AR 97 (FF 8).

When Mr. Metzener started work for Medelez, he informed the employer of his prior positive test results and substance abuse plan. AR 71, 79, 120; *see* AR 97 (FF 8). Under the terms of the substance abuse plan, Mr. Metzener was required to take a return to duty test and at least six follow-up drug screens within twelve months of his hire date. AR 22–23, 36, 40, 97 (FF 9–11), 120. But as of September 2016—approximately seven months into his employment—the employer had not directed him to take any follow-up drug screens. AR 40, 120. In September 2016, Mr. Metzener

and the employer's safety and operations manager, Ms. Fischer, discussed the issue and agreed that Mr. Metzener needed to undergo follow-up testing. AR 40, 97 (FF 10), 120.

Around this time, Mr. Metzener was experiencing debilitating back pain, which limited his ability to perform some job duties. AR 41–43, 120. He told his supervisor, Mr. Rodriguez, and Ms. Fischer about his back problems. AR 42–43, 120. Mr. Metzener told Mr. Rodriguez that he needed surgery for his back, which would render him unable to return to work until two weeks after surgery. AR 42–43, 70, 121.

On September 21, 2016, Mr. Metzener worked his scheduled shift. AR 39, 120. On or about this date, Ms. Fischer discovered that Mr. Metzener had not performed a return-to-duty test—a test, distinct from follow-up testing, required by the Federal Motor Carrier Safety Administration before a driver can return to work after a positive test. AR 23, 97 (FF 9, 12), 121; 49 C.F.R. § 40.305(a). The employer directed Mr. Rodriguez to take Mr. Metzener's keys before he departed for the day. AR 22, 120. Mr. Rodriguez did so but did not convey an explanation to Mr. Metzener. AR 33, 38, 44, 120. Mr. Metzener understood he would not receive his keys back or be able to drive until further notice. AR 43, 44, 120. He testified he believed he was being placed on a leave of absence, and would not be returning until after he recovered from surgery. AR 43; *see*

AR 122 (finding claimant did not anticipate he would return to duty for three weeks due to medical treatment).

The next day, Mr. Metzener was not scheduled to work. AR 21, 38, 97 (FF 18), 121. On the afternoon of this day off, Mr. Metzener had a late lunch, during which he consumed two alcoholic beverages. AR 44, 98 (FF 24), 121. Shortly after lunch, the employer contacted him and directed him to report to a testing facility for a return-to-duty screening. AR 23, 38, 97 (FF 20), 121.

Mr. Metzener asked to postpone the test, but Ms. Fischer denied his request because she believed federal regulations prohibited rescheduling. AR 14, 44–45, 121. Mr. Metzener reported to the testing facility and submitted to the test. AR 24, 87, 98 (FF 21), 121. His breathalyzer tests indicated breath alcohol concentrations of 0.051 and 0.049. AR 87, 98 (FF 23), 121. The employer anticipated that these results would cause the Department of Licensing to suspend Mr. Metzener's CDL. AR 15, 67 (employer's termination letter, stating, "per FMCSA regulations your CDL will be suspended.") 91; *see* AR 121.

The employer terminated Mr. Metzener because of his "Positive return to Duty Drug and/or Alcohol Test, September 22, 2016." AR 67, 98 (FF 26); *see* AR 13, 121.

After he was terminated, Mr. Metzener applied for unemployment insurance benefits. The Department initially denied his application for violating the employer's substance abuse testing policy. AR 53, 97 (FF 1). Mr. Metzener appealed, and an administrative law judge (ALJ) affirmed the Department's decision. AR 100. The ALJ gave great weight to the testimony of Dawn Fischer in determining that Mr. Metzener was on notice "of the testing requirements," and was "on notice that he could be tested." AR 100 (CL 12). Therefore, according to the ALJ, when he tested positive for alcohol, he violated his plan and committed misconduct. *Id.*

On further review by the Commissioner, the Commissioner determined that Mr. Metzener did not have reason to know that off-duty consumption of alcohol was prohibited under the terms of his substance abuse plan. AR 122. Mr. Metzener testified that he was never informed off-duty consumption of alcohol was prohibited by the plan, and the employer did not refute this testimony with documentary or testimonial evidence. *Id.* Accordingly, the Commissioner ruled that the employer failed to meet its burden to show that Mr. Metzener engaged in misconduct, and allowed benefits. AR 122.

The employer appealed to superior court. CP 1-34. The employer argued that Mr. Metzener engaged in willful misconduct because he willfully consumed alcohol after he was warned that he was going to be

called in for such testing. CP 170. The employer advanced a new argument in its reply brief, that Metzener's actions "fall squarely within RCW 50.04.294(1)(d), because he acted with negligent disregard for his employer's interests." CP 204.

The superior court reversed the Commissioner's ruling. In doing so, the Court made a credibility finding against Mr. Metzener's testimony, assigned weight to the testimony of Ms. Fischer about the contents of the substance abuse plan, and made its own finding of fact that Mr. Metzener "was subject to all laws and regulations . . . of the Department of Transportation . . . regarding drug and alcohol screening . . . and that it was his responsibility to know and abide by such at all times." CP 208 ¶ 9. The Court did not state what law or regulation of the Department of Transportation required Mr. Metzener to abstain from alcohol off-duty.

The Department and Mr. Metzener both appealed the superior court's order, and this Court consolidated the appeals.

V. STANDARD AND SCOPE OF REVIEW

The Administrative Procedure Act (APA) governs the courts' judicial review of the Commissioner's decision. RCW 34.05.570; RCW 50.32.120. This Court sits in the same position as the superior court and applies the APA standards directly to the agency decision and record. RCW 34.05.476(3); *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 decision of the ALJ—except to the extent the Commissioner adopted any findings and conclusions of the ALJ’s initial order as her own. *Tapper v. Emp’t Sec. Dep’t*, 122 Wn.2d 397, 406, 858 P.2d 494 (1993). The Commissioner may also make her 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. Dep’t*, 155 Wn. App. 24, 35 n. 2, 226 P.3d 263 (2010). The Commissioner’s decision is considered *prima facie* correct, and the party challenging the decision, here Medelez, Inc. 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 that which 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). Review of the facts is limited to the administrative record. RCW 34.05.558. In reviewing the record for substantial evidence, the Court must do no more than search for the presence of evidence. *Dep’t of Licensing v. Sheeks*, 47 Wn. App. 65, 69,

734 P.2d 24 (1987). 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 reviewing court may not reweigh evidence or re-determine credibility. *William Dickson Co.*, 81 Wn. App. at 411. Any unchallenged findings are “treated as verities on appeal.” *Darkenwald*, 183 Wn.2d at 244.

The Court reviews questions of law *de novo*, giving substantial weight to the agency’s interpretation of the statutes it administers. *Smith*, 155 Wn. App. at 32. The question of whether a claimant engaged in misconduct connected with his work is a mixed question of law and fact. *Kirby v. Dep’t of Emp’t Sec.*, 185 Wn. App. 706, 713, 342 P.3d 1151 (2014). To resolve a mixed question of law and fact, the Court engages in a three-step analysis in which it: (1) determines whether the Commissioner’s factual findings are supported by substantial evidence; (2) makes a *de novo* determination of the law; and (3) applies the law to the facts. *Tapper*, 122 Wn.2d at 403.

VI. ARGUMENT

The Employment Security Act, RCW Title 50, was enacted to provide compensation to individuals who are “involuntarily” unemployed “through no fault of their own.” RCW 50.01.010; *see Tapper*, 122 Wn.2d at 409. The Legislature directed that the Act be liberally construed “for the

purpose of reducing involuntary unemployment and the suffering caused thereby to the minimum.” RCW 50.01.010. Courts should view with caution any construction of the unemployment benefits statute that narrows the coverage of unemployment compensation. *Griffith v. Dep’t Emp’t Sec.*, 163 Wn. App. 1, 8, 259 P.3d 1111 (2011).

The question of whether the facts surrounding a claimant’s discharge constitute “misconduct” is a different inquiry from whether an employer may terminate an employee. *Tapper*, 122 Wn.2d at 412. It is possible for an employee’s conduct to justify termination and, yet, still warrant unemployment benefits. *See Wilson v. Emp’t Sec. Dep’t*, 87 Wn. App. 197, 203–04, 940 P.2d 269 (1997). The employer bears the burden of establishing misconduct. *Nelson v. Dep’t of Emp’t Sec.*, 98 Wn.2d 370, 374–75, 655 P.2d 242 (1982). Thus, a claimant who has been discharged from work generally qualifies for benefits unless the employer establishes that it discharged the claimant for misconduct connected with the claimant’s work. *See RCW 50.20.066(1)*.

Here, the Commissioner correctly ruled that the employer failed to prove Mr. Metzener committed misconduct connected with his work. AR 122. Mr. Metzener did not know or have reason to know that the terms of his substance abuse plan forbade him from drinking alcohol while off duty, and the employer did not establish that the plan *in fact* prohibited off-duty

alcohol consumption. AR 119, 122. Nor did the employer show that Mr. Metzener's actions were in "willful" disregard of the employer's interests, or negligent to "such degree" to show an intentional or substantial disregard of the employer's interest. *See* RCW 50.04.294(1)(a), (d). The Court should affirm the Commissioner's ruling allowing Mr. Metzener unemployment benefits.

A. Substantial Evidence Supports the Commissioner's Findings

At the superior court, the employer challenged the Commissioner's finding that Mr. Metzener did not have reason to know that off-duty alcohol consumption was prohibited. *See* CP 176. The employer argued that Mr. Metzener "was aware" that "he was not able to consume mind altering substances" and that "he was required to participate in random drug and alcohol screenings" CP 176. In addition, the superior court's order rejected the Commissioner's finding that "the claimant did not anticipate that he was going to 'return to duty' in the immediate future" CP 208 ¶ 9.

But substantial evidence supports both of those findings. Mr. Metzener testified that he had not been told off-duty alcohol consumption was prohibited, and this testimony was not refuted by the employer. AR 45, 119. And the Commissioner gave weight to Mr. Metzener's testimony that he did not anticipate returning to duty in the near term. AR 43, 119, 122.

1. Substantial evidence supports the finding that Mr. Metzener had no reason to know the plan forbade off-duty alcohol consumption

Mr. Metzener testified that he had not been told off-duty consumption of alcohol was prohibited, and the employer did not refute this testimony. AR 119, 122. When asked at the hearing, “were you given instructions that you should not have any alcohol even when you were off work?” Mr. Metzener replied “no.” AR 45. The employer did testify that employees are required to submit to “random” testing, but did not specify whether that included testing while an employee was off-duty. AR 15. Additionally, the employer offered as an exhibit only page two of what Ms. Fischer identified as Mr. Metzener’s substance abuse plan.² AR 68. But that page showed only that Mr. Metzener was required to perform a return to duty “drug test” and follow-up urine testing if he is laid off from safety sensitive duties and then resumes safety sensitive work. AR 68. It says nothing about breath tests for legal, off-duty alcohol consumption. *Id.*

² Although Ms. Fischer read what she purported to be the first page of the plan into evidence, the Commissioner apparently gave less weight to her reading, which the Commissioner noted was hearsay. AR 119. While hearsay is admissible in this administrative setting (and indeed no party objected to the testimony, nor was it stricken by the ALJ), the Commissioner may not base a finding exclusively on hearsay evidence. RCW 34.05.461(4) (the presiding officer shall not base a finding exclusively on evidence which would be inadmissible in a civil trial). No other evidence of record supports the employer’s contention that the plan prohibited Mr. Metzener from consuming any “mind/mood altering chemicals.” AR 20.

Further, the plan was established by Mr. Metzener's substance abuse professional as a result of a prior, positive test for marijuana, an illicit substance under federal law. *See* AR 79. Page two of the plan does not clearly establish that alcohol—a non-illicit substance—was at issue. AR 68, 119. Accordingly, the Commissioner properly determined that the employer's evidence did not refute Mr. Metzener's unequivocal testimony that he was never told that off-duty alcohol consumption was prohibited. AR 45, 119. The employer offered no evidence that such conduct *was* prohibited. The Court should uphold this finding.

2. Substantial evidence supports the finding that Mr. Metzener did not anticipate returning to duty in the immediate future

The Commissioner found that, at the time the employer requested a return to duty screening, Mr. Metzener “did not anticipate that he was going to ‘return to duty’ in the immediate future, rather, it was the claimant’s understanding that treatment/surgery for his back issue would render him unable to work for approximately three weeks (on or about October 11).” AR 121. Mr. Metzener’s testimony and the medical documents in the record support this finding.

Mr. Metzener testified that he injured his back and was having extreme physical difficulty performing work tasks. AR 41–42. Mr. Metzener further testified that he told his supervisor he had hurt his back

and that he probably would not be able to work for two weeks after his operation, which was scheduled for September 29. AR 43; *see* AR 70 (medical release from work form indicating a return to work date of October 11). Substantial evidence thus also supports the finding that Mr. Metzener did not anticipate returning to driving duties in the immediate future. AR 121. This Court should uphold this finding too.

B. The Commissioner Correctly Concluded that Mr. Metzener's Conduct Did Not Meet the Definition of Misconduct

At issue is whether, as the employer alleged below, Mr. Metzener's conduct rose to the level of willful or negligent disregard of the employer's interests, within the meaning of RCW 50.04.294(1)(a) and (d). *See* CP 202–04 (Employer's Reply, characterizing the conduct as willful but citing subsection (1)(d)). Under the Act, the definition of misconduct includes "willful or wanton disregard of the rights, title, and interests of the employer or a fellow employee" RCW 50.04.294(1)(a), and "carelessness or negligence of such degree or recurrence to show an intentional or substantial disregard of the employer's interest." RCW 50.04.294(1)(d). Mr. Metzener's actions were neither willful nor negligent because he did not know nor have reason to know that he was prohibited from consuming alcohol off-duty.

The question of whether the facts surrounding a claimant's discharge constitute "misconduct" is wholly separate from the question of

whether an employer is “justified” in terminating an employee as a matter of employment law. *Tapper*, 122 Wn.2d at 412; *Wilson*, 87 Wn. App. at 203–04. It is possible for an employee’s conduct to justify termination and, yet, still warrant unemployment benefits. *See Wilson*, 87 Wn. App. at 203–04 (awarding employee unemployment benefits even though employer was justified in terminating employee). Here, the Commissioner noted that the employer’s decision to discharge Mr. Metzener was not questioned, but still correctly concluded that Mr. Metzener’s conduct did not amount to statutory misconduct under the Employment Security Act. AR 122.

1. Mr. Metzener’s consumption of alcohol off-duty did not “willfully” disregard the rights, title, and interests of the employer

The Commissioner properly concluded that Mr. Metzener did not intentionally jeopardize his employer’s interest by consuming two drinks with lunch while off-duty. An employee acts in willful disregard of an employer’s interest when the employee “(1) is aware of his employer’s interest; (2) knows or should have known that certain conduct jeopardizes that interest; but (3) nonetheless intentionally performs the act, willfully disregarding its consequences.” *Hamel v. Emp’t Sec. Dep’t*, 93 Wn. App. 140, 146–47, 966 P.2d 1282 (1998). A showing of “willfulness” is established by evidence that the employee was aware that he was disregarding the employer’s rights. *Kirby v. Dep’t of Emp’t Security*, 179

Wn. App. 834, 847, 850, 320 P.3d 123 (2014) (employee's refusal to follow a directive was not willful misconduct when she was confused by the conflicting directives of her supervisor and company CEO, and was thus not aware she was disregarding her employer's rights); *see* WAC 192-150-205(1).

Here, the employer's asserted interest is in Mr. Metzener's CDL. AR 15 (employer's testimony that without his CDL, Mr. Metzener cannot do his job as a truck driver); *see* AR 121.³ But, as the Commissioner found, Mr. Metzener did not know, nor have a reason to know, that his plan prohibited drinking off-the job—or by extension—that his plan empowered his employer to test him for alcohol off the job. AR 119. Therefore his decision to drink off-duty did not disregard his employer's interest in his CDL, because he did not know or have reason to know that drinking on a day off work could jeopardize his CDL.

For the same reasons, the employer failed to show that Mr. Metzener intentionally consumed the two drinks in willful disregard of the

³ The employer may have anticipated that the Department would suspend Mr. Metzener's CDL. *See* AR 15 (Ms. Fischer's testimony that "once the Department of Licensing is notified of that failure, a person's CDL is suspended."); AR 91 (Employer's separation statement asserting that, "[d]ue to FMCSA regulations his CDL will be suspended . . ."). But the employer made the decision to discharge Mr. Metzener on the day he took the test, AR 91, and the employer's given reason for discharging Mr. Metzener was his "positive return to [d]uty" test. AR 88; *see* AR 91. There is no documentation in the record that the Department of Licensing in fact suspended or disqualified Mr. Metzener's CDL prior to his termination. The Commissioner's finding to the contrary, AR 121, is not supported in the record.

consequences. Indeed, the Commissioner made findings to the contrary—that Mr. Metzener did not have reason to know he was forbidden to drink off-duty and did not anticipate being summoned for a return-to-duty drug test on September 22 because he would not be returning to safety-sensitive work for three weeks. AR 119, 122.

Although the employer argued below that Ms. Fischer put Mr. Metzener on notice that he would need to perform a return-to-duty test before returning to work, the Commissioner found Mr. Metzener believed his employer would not be returning him to duty in the immediate future. AR 122. He had advised his supervisor that he was injured, needed surgery, and would not return until two weeks post-operation. *See* AR 43. This finding supports the conclusion that Mr. Metzener did not consume alcohol on his day off in willful disregard of its likely consequences, because a person in Mr. Metzener's position would not reasonably expect the employer to summon him for a return-to-duty test on September 22. *See* AR 43.

The factual findings and evidence supporting them do not establish that Mr. Metzener was aware he was disregarding the rights and interests of his employer. RCW 50.04.294(1)(a); *see Kirby*, 179 Wn. App. at 847. Therefore, the Commissioner properly concluded that he did not

intentionally jeopardize his employer's interest by consuming two drinks while off-duty.

2. Mr. Metzener's consumption of alcohol off duty was not "carelessness or negligence of such degree" to show an "intentional or substantial disregard of the employer's interest"

Under RCW 50.04.294(1)(d), if a worker engages in a single significant act of carelessness or negligence, or repeatedly fails to exercise the care that a reasonable person usually exercises, it can amount to "misconduct." *Cuesta v. Dep't of Emp't Sec.*, 200 Wn. App. 560, 570–71, 402 P.3d 898 (2017). Courts have found carelessness or negligence that rises above "ordinary negligence" when the employee's actions create a risk of impacting the employer's interests in serving its customers and expose the employer to liability. *See Cuesta*, 200 Wn. App. at 574–75; *Smith*, 155 Wn. App at 36.

In *Cuesta*, the court held that an airplane inspector committed negligent misconduct when he signed off on parts that he did not inspect. *Cuesta*, 200 Wn. App. at 572. The inspector's negligence showed a substantial disregard for the employer's interests in keeping passengers safe because he "was aware of the gravity of his job, knew that his inspection was to ensure the safety of the flying public, and was aware that 'he must

never approve or “sign off” on work without performing the inspection.”
Id. at 574–75 (quoting findings of the ALJ).

Similarly, in *Smith*, the court held that a public employee’s recording of conversations with co-workers and members of the public without their consent constituted carelessness or negligence of such degree as to show intentional or substantial disregard of the county employer’s interest. *Smith*, 155 Wn. App at 36–37. This was because public knowledge of Smith’s recordings could have adversely impacted the county’s interests in serving its constituents by making citizens less willing to discuss issues with county employees and because it could have exposed the county to litigation and liability. *Id.* at 36.

Unlike the claimants in *Cuesta* and *Smith*, Mr. Metzener’s off-duty conduct did not invoke his employer’s interest in safety, minimizing liability risk, or maintaining its public image. Mr. Metzener was not scheduled to drive for the employer in the near future, and no evidence of record establishes that he drove a private vehicle under the influence. AR 119. Indeed, a 0.051 BAC falls below the legal threshold of 0.08. *See* RCW 46.61.502(1)(a). And, although the employer has an interest in its employees maintaining their CDLs, the Commissioner found that Mr. Metzener did not know, nor have reason to know, that his substance abuse plan prohibited him from drinking alcohol off duty. AR at 119. By

extension, he did not know, or have reason to know, that his off-duty conduct could jeopardize his CDL. Nor was he on notice that the employer could require him to submit to a return-to-duty test while he was off-duty and taking leave for surgery. AR 121. The employer did not establish that Mr. Metzener engaged in negligence of such degree to show an intentional or substantial disregard of its interests. *See* RCW 50.04.294(1)(d).

3. Without more, the employer’s anticipation that Mr. Metzener’s CDL would be disqualified does not render his actions “misconduct”

The employer may rely on *Nykol v. Department of Employment Security*, No. 69279-8-I, 2013 WL 5637006 (Wash. Ct. App. Oct. 14, 2013) (unpublished),⁴ to argue that the loss of a driving privilege that is required for one’s work amounts to misconduct. But *Nykol* differs from the present case in multiple material respects.

First, the employee in that case, who drove emergency vehicles for the employer, lost his regular driver’s license as a result of his arrest for driving under the influence of alcohol. *Nykol*, 2013 WL 5637006, at *1. In contrast here, Mr. Metzener’s conduct was lawful. Second, the employer in *Nykol* had a company policy requiring its firefighter drivers to have valid licenses. *Id.* *Nykol* knew of this rule. *Id.* He should have known that driving

⁴ Because the case is unpublished, it has no precedential value, is not binding on any court, and can be cited only for such persuasive value as the court deems appropriate. GR 14.1.

under the influence—an unlawful act—would put that interest at risk. Here, the employer did not establish that Mr. Metzener’s plan prohibited him from drinking off the job or that Mr. Metzener should have known that drinking off the job could put his CDL—and thus his employer’s interests—at risk. AR 119, 122.

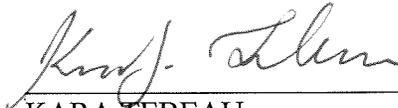
Finally, the *Nykol* court affirmed the Commissioner’s conclusion that Nykol’s actions amounted to misconduct as a violation of a reasonable company rule of which the employee was aware. RCW 50.04.294(2)(f); *Nykol*, 2013 WL 5637006, at *2–3. But here, the employer’s asserted bases for misconduct are RCW 50.04.294(1)(a) and (d)—willful disregard and negligence of such a degree to show a substantial disregard of the employer’s interest. Because the employer did not establish the existence of any specific employer rule or policy that Mr. Metzener violated, RCW 50.04.294(2)(f) does not apply.

VIII. CONCLUSION

The Commissioner properly concluded that Mr. Metzener's employer did not establish that he willfully or negligently disregarded the employer's interests. *See* RCW 50.04.294(1)(a), (d); AR 122. The Court should affirm the Commissioner's decision that Mr. Metzener is eligible for unemployment benefits.

RESPECTFULLY SUBMITTED this 7th day of November, 2018.

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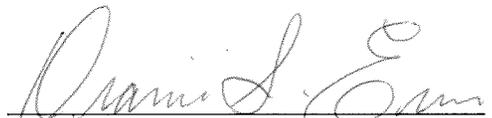
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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 7 day of November, 2018, at Olympia, WA.


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