

NO. 66851-0

---

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

---

CHARLES DANIELS,

Respondent,

v.

STATE OF WASHINGTON  
EMPLOYMENT SECURITY DEPARTMENT,

Appellant.

---

**APPELLANT'S BRIEF**

---

ROBERT M. MCKENNA  
Attorney General

Anthony Paul Pasinetti  
Assistant Attorney General  
WSBA #34305  
Assistant Attorney General  
Attorneys for Appellant  
800 Fifth Avenue, Suite 2000  
Seattle, WA 98104  
Phone: (206) 464-7676  
Fax: (206) 389-2800  
E-mail: LALSeaEF@atg.wa.gov

2011 JUN -5 PM 4:57  
 COURT OF APPEALS  
 DIVISION I  
 CLERK OF COURT  
 J. J. ...

ORIGINAL

## TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	ASSIGNMENT OF ERROR.....	2
III.	STATEMENT OF ISSUES PERTAINING TO ASSIGNMENT OF ERROR.....	2
IV.	STATEMENT OF THE CASE .....	3
V.	STANDARD OF REVIEW.....	10
VI.	ARGUMENT .....	13
	A. Daniels is ineligible for unemployment benefits under the statutory definition of misconduct and the policy underlying the Act.....	14
	B. The Commissioner properly concluded that Daniels’ repeated inexcusable tardiness following warnings by his Employer disqualified him from unemployment benefits pursuant to RCW 50.04.294(2)(b). .....	17
	C. The Commissioner properly concluded that Daniels engaged in misconduct by violating his Employer’s policy regarding uniforms at the worksite when he failed to have his uniform on and was unprepared to perform his duties at the start of his shift. ....	21
	D. The Commissioner properly determined that Daniels’ actions cannot be attributed to an isolated instance of mistake or poor judgment. ....	24
VII.	CONCLUSION .....	26

## TABLE OF AUTHORITIES

### Cases

<i>Ciskie v. Emp't. Sec. Dep't</i> , 35 Wn. App. 72, 664 P.2d 1318 (1983).....	25
<i>Cowles Publ'g Co. v. Dep't of Emp't Sec.</i> , 15 Wn. App. 590, 550 P.2d 712 (1976).....	14
<i>Eggert v. Emp't. Sec. Dept.</i> , 16 Wn. App. 811, 558 P.2d 1368 (1976).....	11
<i>Emps. of Intalco Aluminum Corp. v. Emp't Sec. Dep't</i> , 128 Wn. App. 121, 114 P.3d 675 (2005).....	10
<i>Fred Hutchinson Cancer Research Ctr. v. Holman</i> , 107 Wn.2d 693, 732 P.2d 974 (1987).....	12
<i>Galvin v. Emp't Sec. Dep't</i> , 87 Wn. App. 634, 942 P.2d 1040 (1997), <i>review denied</i> , 134 Wn.2d 1004, 953 P.2d 95 (1998).....	22, 23
<i>Green Mountain School Dist. No. 103 v. Durkee</i> , 56 Wn.2d 154, 351 P.2d 525 (1960).....	15
<i>Hamel v. Emp't Sec. Dept.</i> , 93 Wn. App. 140, 966 P.2d 1282 (1998), <i>review denied</i> , 137 Wn.2d 1036 (1999).....	15, 23
<i>Heinmiller v. Dep't of Health</i> , 127 Wn.2d 595, 903 P.2d 433 (1995).....	12
<i>Leibbrand v. Emp't Sec. Dep't</i> , 107 Wn. App. 411, 27 P.3d 1186 (2001).....	22
<i>Shaw v. Emp't Sec. Dep't</i> , 46 Wn. App. 610, 731 P.2d 1121 (1987).....	18
<i>Smith v. Emp't Sec. Dept.</i> , 155 Wn. App. 24, 226 P.3d 263 (2010).....	11, 12, 15, 21

<i>Tapper v. Emp't Sec. Dep't</i> , 122 Wn.2d 397, 858 P.2d 494 (1993).....	10, 11, 12, 14
<i>Verizon NW, Inc. v. Emp't Sec. Dep't</i> , 164 Wn.2d 909, 194 P.3d 255 (2008).....	11
<i>William Dickson Co. v. Puget Sound Air Pollution Control Agency</i> , 81 Wn. App. 403, 914 P.2d 750 (1996).....	12
<i>Wilson v. Emp't Sec. Dept.</i> , 87 Wn. App. 197, 940 P.2d 269 (1997).....	14

**Statutes**

RCW 34.05 .....	12
RCW 34.05.558 .....	10
RCW 34.05.570(1)(a) .....	12
RCW 34.05.570(3).....	10
RCW 34.05.570(3)(d) .....	2
RCW 50.01.010 .....	14
RCW 50.04.294 .....	1, 2
RCW 50.04.294(1)(a) .....	13, 14, 15
RCW 50.04.294(2).....	16
RCW 50.04.294(2)(a)-(g) .....	16
RCW 50.04.294(2)(b).....	passim
RCW 50.04.294(2)(f).....	passim
RCW 50.04.294(3).....	24
RCW 50.20.066 .....	2, 26

RCW 50.20.066(1).....	14
RCW 50.32.150 .....	11

**Rules**

RAP 9.7(c) .....	3
RAP 10.3(h).....	12

**Regulations**

WAC 192-150-205(1).....	15
WAC 192-150-210(1).....	17
WAC 192-150-210(4).....	21
WAC 192-150-210(5).....	21

**Other Authorities**

Random House Dictionary (2011), available at <a href="http://dictionary.reference.com/browse/">http://dictionary.reference.com/browse/</a> repeated (visited June 1, 2011). .....	17
---	----

## I. INTRODUCTION

Charles Daniels was employed as a security guard, entrusted with protecting property of his Employer's clients during his scheduled shifts. Throughout his two years as a security guard, Daniels repeatedly showed up late for work and not in uniform. At the time of hire and after each instance of tardiness or improper work attire, Daniels was warned either in writing or verbally that he was required to show up for work in uniform and be able to perform his duties when his shift began. He was also warned that further violations would result in his discharge. Despite those warnings, Daniels was not in uniform or in place to perform his duties when his shift began on November 6, 2009. Rather, he was sitting in his car, covered by a blanket as if he had been sleeping, when his supervisor located him 45 minutes after his shift began. As a result, the Employer discharged Daniels.

The Commissioner of the Employment Security Department denied Daniels' unemployment benefits claim, correctly concluding Daniels' actions constituted misconduct as defined in RCW 50.04.294 because it showed willful disregard of the employer's interests. The Court should affirm the Commissioner's decision.

## II. ASSIGNMENT OF ERROR

The Employment Security Department (Department) assigns error to the superior court's order of reversal, Conclusion of Law 3.4.<sup>1</sup> The superior court erred in concluding the Commissioner misapplied and misinterpreted the law in determining that Daniels was disqualified from unemployment benefits for misconduct under RCW 50.20.066 and 50.04.294 due to repeated inexcusable tardiness following his Employer's warnings and/or violating his Employer's reasonable and known company rules that required him to be in uniform and ready to perform his duties at the start of his shift.

## III. STATEMENT OF ISSUES PERTAINING TO ASSIGNMENT OF ERROR

- A. Did the Commissioner correctly conclude that Daniels was discharged from his employment for misconduct as that term is defined in RCW 50.20.066 and 50.04.294?
- B. Per se examples of misconduct include an employee's repeated inexcusable tardiness following the Employer's warnings and an employee's violation of a reasonable and known work rule. Did the Commissioner correctly conclude that Daniels engaged in

---

<sup>1</sup> Conclusion of Law 3.4 states:

**Basis for Reversal: The order regarding the discharge of [Mr. Daniels] misapplied and misinterpreted the law.** Mr. Daniels' conduct was not misconduct; the Commissioner's Order to the contrary misinterpreted and misapplied the law and is therefore reversed under RCW 34.05.570(3)(d) (emphasis in original).

misconduct when Daniels was aware of his Employer's tardiness and work attire policies, he repeatedly violated those policies, and his supervisor warned him numerous times both verbally and in writing that he was required to comply with those policies or he would be discharged, yet he continued to be late for work and was not in uniform ready to perform his work duties when his shift began on the last night of his employment?

#### **IV. STATEMENT OF THE CASE**

Charles Daniels worked as a part-time security officer for the Star Protection Agency (Employer) from November 21, 2007, until November 11, 2009, when he was discharged. Commissioner's Record<sup>2</sup> (CR) at 13, 102 (Finding of Fact [FF] 2); CR at 92 (FF<sup>3</sup> 2). The Employer is in the business of providing security services to clients. CR at 19, 104 (Conclusion of Law [CL] 7). Accordingly, the Employer has a strong interest in ensuring that properties of the Employer's clients are secured as promised. CR at 19-20, 104 (CL 7).

---

<sup>2</sup> The Commissioner's Record (CR) is a Certified Record of Administrative Adjudicative Orders as defined by RAP 9.7(c). The Superior Court transmitted the CR in its entirety and did not repaginate it. Thus, rather than including a Clerk's Papers citation, this brief refers to the CR according to its original pagination.

<sup>3</sup> The Decision of Commissioner adopted many of the Administrative Law Judge (ALJ)'s findings of fact and conclusions of law in their entirety; the Commissioner supplemented Finding of Fact No. 2, modified Findings of Fact Nos. 3 and 4, supplemented Conclusions of Law 2-6, and did not adopt Conclusion of Law 7, replacing it with his own. CR at 91-94, 102-104. Copies of the Commissioner's Decision and the ALJ's Initial Order are attached in the Appendix for the Court's convenience.

Pursuant to the Employer's written policies, security officers are required to report to their assigned worksites on time dressed in uniform and ready to work—it is a matter of professional appearance as well as security. CR at 18, 21, 102 (FF 3-4), 104 (CL 7). Daniels was aware of these policies, which were set forth in the Star Protection Agency employee manual issued to him at the time he was hired. CR at 24, 39-40, 102 (FF 3-4).

Over the course of the two year employment relationship, Daniels' supervisor had ongoing concerns regarding Daniels' failure to consistently comply with the Employer's tardiness and work attire policies. CR at 20, 102 (FF 3-4). Daniels was tardy and showed up for work out of uniform on numerous occasions. CR at 20-23. Therefore, Daniels' supervisor repeatedly warned Daniels that tardiness and inappropriate work attire were not acceptable—Daniels was required to arrive at his assigned work site in uniform so that he could do his job when his shift started. CR at 21-22, 30-31, 80, 102 (FF 3-4).

Daniels was verbally warned on numerous occasions about his tardiness, but his tardiness continued to be a concern to his supervisor. Accordingly, on September 9, 2008, the Employer issued Daniels a written warning due to being late for work. CR at 23, 80, 102 (FF 3-4). In that warning, the Employer noted that Daniels had received at least three

oral notices from his direct supervisor Lamar Kelly on June 17, 2008, June 19, 2008, and June 20, 2008, for violations involving “attendance” and “lateness/early quit”, as well as “violation of company policies or procedures”. CR at 16-17, 39, 80. Moreover, the Employer reminded Daniels that he had been “verbally warned numerous times about arriving at [his] duty shift late”; that the Employer had verified from various sources “at least eight times” that Daniels was “30 minutes to 2 hours late”; and the Employer had witnessed Daniels being out of uniform “several times” when arriving for his shift. CR at 21, 80. Finally, the Employer emphasized to Daniels in the written warning that he was expected to be to work on time. CR at 80. Daniels signed the written warning, acknowledging that he had “read and understood” it. CR at 80.

Despite the warnings to report for work on time and in uniform, Daniels continued to ignore the warnings and his Employer’s policies. CR at 20-21, 23, 102 (FF 3-4). During the last year of the employment relationship (following the September 2008 written warning), Daniels received numerous additional verbal and written warnings from his supervisor to report for work on time and in uniform. CR at 23, 39, 46-47, 102-103 (FF 3-4). Daniels’ supervisor warned Daniels on more than one occasion that further violations of the Employer’s tardiness and work attire policies would result in his discharge. CR at 30.

Daniels did not deny that he was repeatedly late and out of uniform or that he received warnings each time he violated his Employer's policies. CR at 37, 39. Nor did Daniels provide the Employer with definitive reasons for his tardiness and improper work attire. CR at 20, 24. Rather, it was the supervisor's understanding that Daniels often came to work directly from another job with a different employer and was sometimes delayed as a result. CR at 20. The Employer did not consider this excusable tardiness. CR at 20-21, 24, 37-38, 103 (FF 3-4).

Daniels also attributed his tardiness, in part, to "traffic". CR at 38, 103 (FF 3-4). The Employer did not consider traffic to be an excuse for repetitive tardiness either. CR at 21, 24, 103 (FF 3-4). According to Daniels' supervisor, it was not the Employer's responsibility to make sure employees were on time and in uniform when their shifts began. CR at 18, 45. Rather, it was the employees' responsibility to arrive on-site in uniform ready to perform their duties; it did not matter where the employees were coming from or what they had been doing all day. CR at 18, 30-31, 45.

On November 6, 2009, Daniels arrived at his assigned building one and a half to two hours before the start of his scheduled shift; he did not have his uniform on. CR at 36, 43, 103 (FF 3-4). He intended to change

into his uniform in the building's bathroom but the building was locked. CR at 35, 44, 103 (FF 3-4).

Daniels attempted to call his supervisor to explain the situation but his supervisor did not receive the call. CR at 34-35, 103 (FF 3-4). Based on prior experience, Daniels knew that his supervisor "was so busy sometimes he has calls and he don't return the calls." CR at 35. Daniels also knew that his supervisor would probably arrive before the start of his shift to unlock the building and he would change into his uniform at that time. CR at 44, 103 (FF 3-4). Daniels waited across the street from the building in his car, covered by a blanket. CR at 35, 77, 103 (FF 3-4). He did not change into his uniform. CR at 43.

Daniels' supervisor arrived fifteen minutes before the start of Daniels' shift. CR at 17, 103 (FF 3-4). He retrieved the keys to the building and waited for Daniels outside the front of the building. CR at 17, 103 (FF 3-4). He did not see Daniels, nor was he approached or contacted by Daniels prior to the start of his shift. CR at 17, 103 (FF 3-4).

Daniels' supervisor unlocked the building and, at the start of Daniels' shift, began performing Daniels' work duties, while at the same time keeping a look out for Daniels. CR at 17, 20, 103 (FF 3-4). Daniels, however, did not attempt to locate his supervisor in or around the building after his supervisor arrived. He had decided instead to wait in his car until

his supervisor found him: “But he [his supervisor] wasn’t looking for my other car. He was looking for my previous vehicle, so he assumed I was late.” CR at 36.

Daniels’ supervisor called Daniels forty-five minutes after the start of Daniels’ shift. CR at 17, 103 (FF 3-4). Daniels answered in a groggy voice and informed his supervisor that he was waiting across the street from the building in his car. CR at 17, 77, 103 (FF 3-4). When the supervisor located Daniels’ vehicle, Daniels was still seated in his car covered by a blanket and looking as if he had been sleeping; he was not dressed in his work uniform. CR at 17, 35-36, 43, 45, 103 (FF 3-4). When his supervisor told him he needed to be in uniform, Daniels responded that he had been there for hours and had called his supervisor to get access to the building so he could change. CR at 18. Daniels supervisor did not remember receiving a phone call from Daniels about that. CR at 18, 103 (FF 3-4).

The supervisor testified that Daniels, as a professional security guard, should have been in uniform, performing his work duties, such as checking the outside of the building, from the beginning of his shift, even if he did not have access to the inside of the building. CR at 18, 45-46. Because Daniels was not ready to start work at the beginning of his shift, he was discharged. CR at 14, 47, 103 (FF 3-4).

Daniels applied for and was initially granted unemployment benefits. The Employer appealed the Department's Determination Notice and a hearing conducted by the Office of Administrative Hearings was held to determine whether Daniels had been discharged for misconduct. CR at 6, 52, 62, 69-71. The administrative law judge (ALJ) concluded that the Employer failed to establish misconduct by a preponderance of the evidence and affirmed the Department's Determination Notice. CR at 94.

The Employer petitioned the Department's Commissioner to review the ALJ's Initial Order. CR at 97-100. In a final agency decision, the Commissioner disagreed with the ALJ, concluding that Daniels' actions exhibited a willful or wanton disregard of his former Employer's interests, and therefore constituted misconduct per se, for two separate reasons. CR at 104.

First, the Commissioner held that, given the supervisor's numerous prior warnings, Daniels' inexcusable tardiness on the evening of November 6, 2009, constituted misconduct per se pursuant to RCW 50.04.294(2)(b). Second, the Commissioner found that Daniels' failure to be in uniform and on duty at the start of his shift that same evening violated a reasonable company rule known to Daniels, which also constituted misconduct per se pursuant to RCW 50.04.294(2)(f). CR at 104. Accordingly, as the Commissioner explained, "[g]iven the prior

warnings, [Daniels'] course of action (or lack thereof) cannot be attributed to an isolated incident of mistake or poor judgment." CR at 104.

Daniels appealed to King County Superior Court and the Honorable Michael C. Hayden reversed the Commissioner. The Department now appeals.

## V. STANDARD OF REVIEW

Although this is an appeal from the superior court order reversing the Commissioner's decision, an appellate court "sits in the same position as the superior court" and reviews the Commissioner's final decision, applying the APA standards "directly to the record before the agency." *Tapper v. Emp't Sec. Dep't*, 122 Wn.2d 397, 402, 858 P.2d 494 (1993); *Emps. of Intalco Aluminum Corp. v. Emp't Sec. Dep't*, 128 Wn. App. 121, 126, 114 P.3d 675 (2005) ("The appellate court reviews the findings and decisions of the commissioner, not the superior court decision or the underlying ALJ order."); RCW 34.05.558. This is of particular importance in this case because the Commissioner reversed the ALJ's order, and the superior court reversed the Commissioner's decision. It is the Commissioner's final decision that is reviewed by this Court.

The APA directs the court to affirm the Commissioner's decision if supported by substantial evidence and in accord with the law. RCW 34.05.570(3). The Commissioner's decision "shall be *prima facie*

correct, and the burden of proof shall be upon the party attacking [the decision].” RCW 50.32.150; *see Eggert v. Emp’t. Sec. Dept.*, 16 Wn. App. 811, 813, 558 P.2d 1368 (1976) (recognizing that the Court’s jurisdiction is “further limited by RCW 50.32.150”). Thus, upon review of the entire record, the court, in order to reverse, must be left with the definite and firm conviction that a mistake has been made. *Eggert*, 16 Wn. App. at 813.

The Commissioner determined that Daniels was ineligible for unemployment benefits because he was discharged for misconduct. CR at 104. Whether an employee was discharged for “misconduct” is a mixed question of law and fact. *Tapper v. Emp’t Sec. Dep’t*, 122 Wn.2d 397, 402-03, 858 P.2d 494 (1993). A court reviews the law *de novo* under the clear error standard. *Verizon NW, Inc. v. Emp’t Sec. Dep’t*, 164 Wn.2d 909, 915, 194 P.3d 255 (2008). It accords substantial weight to an agency’s interpretation of a law within the agency’s area of expertise. *Id.* Indeed, the courts may not reverse the Commissioner’s decision simply by weighing the evidence differently than the Commissioner or disagreeing with his conclusions. *Eggert*, 16 Wn. App. at 813. The court may not substitute its judgment for that of the agency on the credibility of the witnesses or the weight to be given to conflicting evidence. *Smith v. Emp’t Sec. Dept.*, 155 Wn. App. 24, 35, 226 P.3d 263 (2010).

The Commissioner's findings of fact are largely undisputed for purposes of this appeal. To the extent the findings are disputed, they are reviewed for support by substantial evidence. *William Dickson Co. v. Puget Sound Air Pollution Control Agency*, 81 Wn. App. 403, 407, 411, 914 P.2d 750 (1996). Evidence is substantial if sufficient to "persuade a fair-minded person of the truth of the declared premises." *Heinmiller v. Dep't of Health*, 127 Wn.2d 595, 607, 903 P.2d 433 (1995). Evidence may be substantial enough to support a factual finding even if the evidence is conflicting and could lead to other reasonable interpretations. *Fred Hutchinson Cancer Research Ctr. v. Holman*, 107 Wn.2d 693, 713, 732 P.2d 974 (1987). The reviewing court should "view the evidence and the reasonable inferences therefrom in the light most favorable to the party that prevailed" at the administrative proceeding below. *Tapper*, 122 Wn.2d at 407.

On appeal, it is Daniels' burden to establish that the Commissioner's decision was in error.<sup>4</sup> RCW 34.05.570(1)(a); *Smith*, 155 Wn. App. at 32. Daniels must therefore show that the Commissioner's conclusion that he was discharged for misconduct was incorrect. If he challenges any of the Commissioner's findings of fact underlying that

---

<sup>4</sup> Under RAP 10.3(h), Daniels, as "respondent who is challenging an administrative adjudicative order under RCW 34.05[,] . . . shall set forth a separate concise statement of each error which a party contends was made by the agency issuing the order, together with the issues pertaining to each assignment of error."

conclusion, he must demonstrate that the findings are not supported by substantial evidence in the record.

## VI. ARGUMENT

Daniels' supervisor found him in his car, not in uniform, over forty-five minutes after his shift was scheduled to begin. This conduct directly violated the employer's policies, and Daniels' supervisor had warned him numerous times, verbally and in writing, after similar violations that such conduct could lead to his discharge.

Daniels acknowledged he had received an employee handbook that set forth the Employer's tardiness and work attire policies. Daniels also acknowledged receiving numerous written and verbal warnings from his supervisor regarding his repeated tardiness and failure to be in uniform, ready to work, when his shift began. Nevertheless, Daniels argued that his conduct in not being in uniform and performing his duties at the start of his shift after being repeatedly warned of those requirements did not "rise to the level of statutory misconduct sufficient to deny him benefits." Clerk's Papers 9, at 15. Thus, the only question is whether the undisputed conduct constituted misconduct.

Because Daniels failed to start his shift on time dressed in uniform, he violated reasonable employer policies that he knew. This is misconduct under RCW 50.04.294(1)(a) and (2)(b) and (f).

**A. Daniels is ineligible for unemployment benefits under the statutory definition of misconduct and the policy underlying the Act.**

The Employment Security Act (the Act) was enacted to provide compensation to individuals who are “involuntarily” unemployed “through no fault of their own.” RCW 50.01.010; *Tapper*, 122 Wn.2d at 408. The Act requires that the reason for the unemployment be *external and apart* from the claimant: “Where any fault of unemployment lies with the claimant, the claimant is disqualified from receipt of unemployment benefits.” *Cowles Publ’g Co. v. Dep’t of Emp’t Sec.*, 15 Wn. App. 590, 593, 550 P.2d 712, 715 (1976). In keeping with this policy, a claimant is disqualified from receiving unemployment benefits when he has been discharged from his job for work-connected misconduct. RCW 50.20.066(1).

Under the Act, misconduct includes, but is not limited to:

- (a) Willful or wanton disregard of the rights, title, and interests of the employer or a fellow employee[.]

RCW 50.04.294(1)(a).

The current definition of misconduct was enacted in 2003. The category of misconduct set forth in RCW 50.04.294(1)(a) matches in large measure the pre-2003 definition of misconduct. *See Wilson v. Emp’t Sec. Dept.*, 87 Wn. App. 197, 201, 940 P.2d 269 (1997) (recognizing that

“misconduct” was, in part, “an employee’s act or failure to act in willful disregard of his or her employer’s interest”). Cases interpreting the matching portion of the prior definition are therefore instructive.<sup>5</sup> Those cases held that an employee “willful[ly] disregard[ed]” an employer’s interests when he “voluntarily disregard[ed] the employer’s interest”; his “specific motivations for doing so” were “not relevant.” *See, e.g., Hamel v. Emp’t Sec. Dept.*, 93 Wn. App. 140, 146, 966 P.2d 1282 (1998), *review denied*, 137 Wn.2d 1036 (1999). Furthermore, under both the prior definition and case law interpreting RCW 50.04.294(1)(a) “it is sufficient [for misconduct purposes] that an employee intentionally perform an act in willful disregard for its probable consequences.” *Smith v. Emp’t Sec. Dept.*, 155 Wn. App. 24, 37, 226 P.3d 263 (2010), *citing Hamel*, 93 Wn. App. at 146-47; *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.”).

The Act goes on to provide illustrative per se examples of employee acts that are considered misconduct because they “signify a

---

<sup>5</sup> When reviewing claims under a new statute, courts should look to prior judicial decisions on the subject, to the extent that these decisions do not conflict with the new standards. *See Green Mountain School Dist. No. 103 v. Durkee*, 56 Wn.2d 154, 351 P.2d 525 (1960) (New legislation is presumed to be in line with prior judicial decisions absent an indication that the legislature intended to completely overrule prior case law.)

willful or wanton disregard of the rights, title, and interests of the employer or a fellow employee.” *See* RCW 50.04.294(2)(a)-(g). Notably, the Act explicitly states that the per se acts of misconduct include “[r]epeated inexcusable tardiness following warnings by the employer” or a “[v]iolation of a company rule if the rule is reasonable and if the claimant knew or should have known of the existence of the rule”. RCW 50.04.294(2)(b), (f).

Here, the Commissioner concluded that Daniels’ actions exhibited a willful or wanton disregard of his former Employer’s interests, and therefore constituted misconduct per se, for two of the reasons set forth in RCW 50.04.294(2), either one of which would be sufficient to render Daniels ineligible for unemployment benefits. Because it was Daniels’ fault that he was unemployed and the conduct that led to his discharge falls within the statutory per se examples of misconduct, the Commissioner’s decision denying him benefits is free of error. *See* RCW 50.04.294(2)(b), (f). The Court should thus affirm the Commissioner’s decision.

**B. The Commissioner properly concluded that Daniels' repeated inexcusable tardiness following warnings by his Employer disqualified him from unemployment benefits pursuant to RCW 50.04.294(2)(b).**

A willful or wanton disregard of an employer's interest is exhibited by "*repeated inexcusable tardiness following warnings by the employer.*" RCW 50.04.294(2)(b) (emphasis added). "Repeated inexcusable tardiness" means "repeated instances of tardiness that are unjustified or that would not cause a reasonably prudent person in the same circumstances to be tardy." WAC 192-150-210(1) (emphasis added). Additionally, an "employer must have warned [an employee] *at least twice*, either verbally or in writing, about [his] tardiness, and violation of such warnings must have been the immediate cause of [his] discharge." WAC 192-150-210(1) (emphasis added). The term "repeated" is not defined by statute or regulation. A standard English dictionary definition defines "repeated" as: "7. to do or say something again." Random House Dictionary (2011), *available* at <http://dictionary.reference.com/browse/repeated> (visited June 1, 2011). Thus, to establish "repeated inexcusable tardiness" under RCW 50.04.294(2)(b), the Department requires at least three instances of inexcusable tardiness: two violations that result in employer warnings and a third violation that is the immediate cause of the employee's discharge. *See* WAC 192-150-210(1).

There is no case law that has interpreted the “repeated inexcusable tardiness” per se example of misconduct. The courts, in interpreting the prior definition of misconduct, did address when an employee’s tardiness evinced a “willful or wanton disregard of an employer’s interests”. *See, e.g., Shaw v. Emp’t Sec. Dep’t*, 46 Wn. App. 610, 614-15, 731 P.2d 1121 (1987) (holding 14 instances of tardiness in 15 months, where final two instances were due to power outages and beyond employee’s control, did not constitute misconduct). However, those cases did not address when “inexcusable tardiness” was “repeated”, as is now required under RCW 50.04.294(2)(b). Rather, with no general guidelines or “rules of thumb”, the courts looked at whether tardiness was “chronic”, “persistent”, or “excessive” in nature. *Id.* In enacting RCW 50.04.294(2)(b), the Legislature made “repeated inexcusable tardiness” per se misconduct; it did not follow cases like *Shaw* and require a showing of “chronic” or “excessive” inexcusable tardiness. Moreover, the Department, through its regulations, has provided “general guidelines” for “repeated inexcusable tardiness” cases decided under RCW 50.04.294(2)(b). As mentioned, those regulations only require a minimum of three violations. *See* WAC 192-150-210

Daniels did not deny that he was repeatedly tardy following numerous written and verbal warnings from his supervisor to be at his

worksite on time and in uniform so that he was ready to perform his duties when his shift began. CR at 22-23, 37, 39, 46. Instead, Daniels' response, when confronted with such warnings, was to minimize his actions and not take the warnings seriously. CR at 29-30, 39. Moreover, Daniels always objected to being disciplined and would try to provide a "rebuttal" for his actions. CR at 46.

Despite Daniels' efforts to minimize his actions, Daniels' repeated instances of tardiness were unjustified and would not have caused a reasonably prudent person to be tardy. Daniels' supervisor believed Daniels was working at another job which contributed to his ongoing tardiness. CR at 20. Daniels denied that was the case and instead attributed his repeated tardiness to traffic. CR at 37-38. Whether it was working at another job or traffic in general, neither reason provided justification for Daniels' repeated instances of tardiness. CR at 24. Rather, Daniels was required to be at his work site in uniform and ready to perform his duties at the start of his shift. CR at 17, 24. The Commissioner therefore properly found that Daniels' tardiness was inexcusable. CR at 104 (CL 7).

Daniels' violation of his employer's warnings on the evening of November 6, 2010 was the immediate cause of his discharge. In addition to being warned that he was required to arrive at his work site on time and

in uniform so that he could perform his duties at the start of his shift, Daniels was specifically warned that further violations would result in his discharge. CR at 30. Despite those warnings, Daniels voluntarily chose to show up to the work site on November 6, 2010 without his uniform on and, as a consequence of that decision, was not ready to perform his duties until well after his shift began. CR at 17, 35-36, 43, 45.

Daniels did not believe he should have been disciplined for his actions on November 6, 2010 and other occasions where he showed up early for his shift out of uniform: "That's my time still. I had time to change." CR at 44. He may be right. However, that is not what occurred here. Rather, the building was unlocked fifteen minutes before the beginning of his shift. During the ensuing fifteen minute period, Daniels did not locate his supervisor or enter the building to change into his uniform. Instead, he remained in his car, out of uniform, until forty-five minutes after the start of his shift. Consequently, he was not ready to perform his duties as required and was therefore late for work. The Commissioner therefore properly determined that Daniels' actions constituted misconduct per se pursuant to RCW 50.04.294(2)(b).

**C. The Commissioner properly concluded that Daniels engaged in misconduct by violating his Employer's policy regarding uniforms at the worksite when he failed to have his uniform on and was unprepared to perform his duties at the start of his shift.**

An employee demonstrates willful or wanton disregard of an employer's interest by violating "a reasonable company rule if the rule is reasonable and if the [employee] knew or should have known of the existence of the rule." RCW 50.04.294(2)(f); *Smith v. Emp't Sec. Dept.*, 155 Wn. App. 24, 34, 226 P.3d 263 (2010). Daniels wisely has not challenged the reasonableness of the Employer's tardiness and work attire policies, since those rules plainly satisfy the requirement that company rules are reasonable if they are related to the employee's job duties, are a normal business requirement or practice for the employee's occupation or industry, or are required by law or regulation. WAC 192-150-210(4); Clerk's Papers 9. Moreover, Daniels acknowledged receiving the employee handbook that set forth the Employer's tardiness and work attire policies. CR at 39-40. *See* WAC 192-150-210(5) (the Department will find that an employee knew or should have known about company rules if he was provided an employee orientation on company rules or a copy or summary of the rules in writing).

The "reasonable company rule" per se example of misconduct is consistent with case law interpreting the prior definition of misconduct.

*See Leibbrand v. Emp't Sec. Dep't*, 107 Wn. App. 411, 425, 27 P.3d 1186 (2001) (employee “willfully disregarded his employer’s interest” by missing several days of work without required approval after warnings); *Galvin v. Emp't Sec. Dep't*, 87 Wn. App. 634, 645-647, 942 P.2d 1040 (1997), *review denied*, 134 Wn.2d 1004, 953 P.2d 95 (1998) (employee “willfully disregarded employer’s interest” by taking a vacation without required approval after warnings).

In order to constitute misconduct under the prior definition, where an employer rule violation was involved, the employee’s violation of the employer’s rule had to be “intentional, grossly negligent, *or* continue to take place after notice or warnings.” *Leibbrand*, 107 Wn. App. at 425; *Galvin*, 87 Wn. App. at 643 (emphasis added).

Interpreting the prior definition of misconduct, *Galvin* is particularly instructive. There the employer had a 48-hour advance approval requirement for vacations. *Galvin*, 87 Wn. App. at 637. The approval requirement was repeatedly, clearly, and personally communicated to Ms. Galvin, the employee, both verbally and in writing. *Id.* at 638. She was also told the requirement was a condition of her continued employment. *Id.* Despite those communications, Ms. Galvin failed to obtain 48-hour advance approval for a vacation. *Id.* In affirming the Commissioner’s decision that Ms. Galvin willfully disregarded her

employer's interests, the Court recognized that Ms. Galvin's "absence [without advanced approval] was entirely within her control. Her conduct was in direct violation of a reasonable rule connected with her work, was intentional, *and* took place after numerous warnings." *Id.* at 645-47 (emphasis added).

Here, as in *Galvin*, Daniels violated his Employer's reasonable rule after numerous warnings. He was repeatedly reminded of his Employer's tardiness and work attire policies both verbally and in writing. CR at 23, 39-40, 46-47, 102-103. He was also told that continued violations of the policies would result in his discharge. CR at 30. Despite those warnings, Daniels showed up for his scheduled shift on November 6, 2009, out of uniform and ultimately tardy because he was not present to perform his duties at the start of his shift. CR at 17, 35-36, 45, 103 (FF 3-4).

Daniels attempts to shift the responsibility for his actions to his Employer. He claims he arrived early and intended to change into his uniform as required, but the building was locked when he arrived. CR at 44. While his specific motivations for being out of uniform well after his shift began are irrelevant, *see Hamel*, 93 Wn. App. at 146, Daniels ignores that he had ample time to comply with his Employer's policies but chose not to do so. Given his early arrival, he could have gone somewhere else to change. CR at 104 (CL 7). If that was not

possible, his supervisor arrived at and unlocked the building at least fifteen minutes before his shift began. CR at 17, 103 (FF 3-4). Instead of complying with his Employer's rules, Daniels remained in his car, out of uniform, well beyond the start of his shift.

Thus, Daniels' actions, like those of Ms. Galvin, were entirely within his control. His conduct was in direct violation of his Employer's policies and took place after numerous warnings. Accordingly, the Commissioner properly determined that the Petitioner's conduct constituted misconduct per se pursuant to RCW 50.04.294(2)(f).

**D. The Commissioner properly determined that Daniels' actions cannot be attributed to an isolated instance of mistake or poor judgment.**

The Legislature has exempted certain work-connected conduct from the definition of "misconduct". Under RCW 50.04.294(3), "misconduct" does not include:

- (a) Inefficiency, unsatisfactory conduct, or failure to perform well as the result of inability or incapacity;
- (b) Inadvertence or ordinary negligence in isolated instances;
- or
- (c) Good faith errors in judgment or discretion.

Here, the Commissioner correctly held that Daniels' conduct did not fall within the exempted acts: "Given the prior warnings, [Daniels']

course of action (or lack thereof) cannot be attributed to an isolated incident of mistake or poor judgment.” CR at 104 (CL 7). The record amply supports the Commissioner’s conclusion. As previously mentioned, Daniels had previously been tardy and not in uniform ready to start his shift on many occasions. CR at 20-21, 23, 102 (FF 3-4). The final incident was therefore not isolated in nature. Nor can it be characterized as inadvertent or ordinary negligence when he voluntarily chose to arrive at the work site out of uniform and did not change into his uniform before his shift began.

Furthermore, Daniels repeatedly and consistently ignored his Employer’s policies, culminating in his failure to show up for work at all until called by his supervisor 35 to 45 minutes into the shift, and then arriving not in uniform. The Commissioner correctly reasoned:

[A]ssuming the claimant arrived at the work site 90 minutes early on November 6, 2009 but could not get into the building, it defies logic that he did not drive elsewhere to change clothes. After all, he had 90 minutes to do so. Instead, the claimant sat in his car under a blanket for 35 minutes after his shift began.

CR at 104. His actions, therefore, cannot be characterized as a good faith error in judgment or discretion. See *Ciskie v. Emp’t. Sec. Dep’t*, 35 Wn. App. 72, 76, 664 P.2d 1318 (1983) (finding employee's actions did not rise to the level of misconduct because he “did . . . attempt to comply with his

employer's rule" and that his efforts "were sufficient to dispel any inference that the employee's conduct was motivated by bad faith or that he simply did not care about the consequences of his actions").

## VII. CONCLUSION

For the foregoing reasons, the Commissioner correctly concluded that Daniels was discharged from his employment for disqualifying misconduct and properly denied him unemployment benefits pursuant to RCW 50.20.066. The superior court erred in reversing the Commissioner's decision. The Department requests that the Court reverse the superior court decision and re-instate the Commissioner's decision.

RESPECTFULLY SUBMITTED this 6 day of June 2011.

ROBERT M. MCKENNA  
Attorney General



ANTHONY PASINETTI  
WSBA No. 34305  
Assistant Attorney General

# Appendix

**STATE OF WASHINGTON  
OFFICE OF ADMINISTRATIVE HEARINGS  
FOR THE EMPLOYMENT SECURITY DEPARTMENT**

**IN THE MATTER OF:**

Charles Danels

Claimant

**DOCKET NO: 02-2010-02320 R**

**INITIAL ORDER**

**ID:** [REDACTED]

**BYE:** 11/13/2010

**UIO:** 770

**Hearing:** This matter came before Administrative Law Judge Cynthia M. Morgan on March 25, 2010 at Seattle, Washington after due and proper notice to all interested parties.

**Persons Present by Telephone:** The claimant, Charles Danels; the employer-appellant, Star Protection Agency, represented by Nancy Glass, HR Generalist; Lamar Kelly, Portfolio Manager; and the employer representative, Carrie Cline, Penser North America.

**STATEMENT OF THE CASE:**

The employer filed an appeal on January 08, 2010 from a Decision of the Employment Security Department dated December 19, 2009. At issue in the appeal is whether the employer had good cause for failure to appear at a previously scheduled hearing; and whether the claimant was discharged from employment for a willful or wanton disregard of the rights, title, and interests of the employer or a fellow employee as defined in RCW 50.04.294(1)(a), or other misconduct pursuant to RCW 50.20.066, or voluntarily quit without good cause pursuant to RCW 50.20.050. Also at issue is whether the claimant was able to, available for, and actively seeking work during the weeks at issue.

Having fully considered the entire record, the undersigned Administrative Law Judge enters the following Findings of Fact, Conclusions of Law and Initial Order:

**FINDINGS OF FACT:**

1. On February 2, 2010, a hearing was scheduled in this matter for 10:15 a.m. See Exhibit D. The employer representative was handling another hearing in another judge's courtroom, which ran long. The employer was unable to leave the room to contact the judge assigned to this matter to inform her that she was running late. The hearing let out at 10:39 a.m. and the employer immediately called the office to inform them of the situation. As the hearing time had passed, the

INITIAL ORDER - 1

hearing could not be re-opened. The employer immediately filed a Petition for Review, citing the above reasons for its request. See Exhibit C.

2. The claimant began employment with the interested employer on November 21, 2007 and last worked as a security officer on November 7, 2009. At the time of the job separation, the claimant was scheduled to work a part-time temporary status and was paid \$13.35 per hour.
3. On November 6, 2009, the claimant was assigned a new location and was scheduled to begin at approximately 10:00 p.m. The employer arrived on site at approximately 9:45 p.m. and could not locate the claimant. The employer called the claimant, who indicated he was out front and the employer finally located the claimant sitting in his car without his uniform on, looking as if he had been sleeping, at approximately 10:35 p.m. The claimant testified that he arrived to the job site approximately one and one-half hours prior to his shift, but because it was a new location, he was unable to gain entry into the building to change into his uniform. The claimant returned to his car in front of the building and called the employer to let his supervisor know he had arrived and was waiting out front in his car. The employer denied receiving any calls.
4. The employer's policy requires employees to be in their uniform upon arrival to work, to be ready to perform tasks upon report and to only use client computers for work use. Prior to the final incident, the employer testified that the claimant had arrived late to work on several occasions. The claimant also arrived without uniform and used client computers to excess for personal use. Each violation was addressed both verbally and in writing. The claimant disagreed that he had been warned on several occasions and had not been warned that further violation would result in his termination. The employer submitted only two warnings from 2008 and one email regarding the final incident. See Exhibit 6.
5. During the weeks at issue the claimant was willing and able to accept any offer of suitable work and sought work as directed by the Department.

#### **CONCLUSIONS OF LAW:**

1. In determining whether or not an individual has established a good cause for failing to appear at prior proceedings, the undersigned first notes that the term "good cause" implies circumstances beyond their reasonable control of the individual. In the instance case, the employer provided credible testimony that she was in attendance at another hearing scheduled before the administrative hearing scheduled in this matter. The claimant was unable to notify the judge in this matter that she was in another hearing until after the time of that hearing had passed. Therefore, the undersigned concludes the employer has established good cause for failing to appear at the prior proceeding.
2. The provisions of RCW 50.04.294, RCW 50.20.066, WAC 192-150-085, WAC 192-150-200, WAC 192-150-205, and WAC 192-150-210 apply. A claimant shall be

disqualified from benefits if discharged from employment for misconduct. RCW 50.04.294(1)(a) defines misconduct, in part, as willful or wanton disregard of the rights, title, and interests of the employer or a fellow employee.

3. According to RCW 50.04.294(2)(a)-(g), examples of a willful and wanton disregard of the interests of the employer or a fellow employee are: insubordination, repeated and inexcusable tardiness after warnings, dishonesty related to employment, repeated and inexcusable absences, deliberate and illegal acts, deliberate acts that provoke violence or a violation of the law or collective bargaining agreement, violation of reasonable company rules, and violations of the law while acting within the scope of employment. WAC 192-150-200(1) and (2), provide that the action or behavior must be connected with the claimant's work and result in harm or create the potential for harm to the employer's interests. This harm may be tangible, such as damage to equipment or property, or intangible, such as damage to the employer's reputation or a negative impact on staff morale. Misconduct does not include inadvertence or ordinary negligence in isolated instances, good faith errors in judgment, inefficiency, unsatisfactory conduct, or failure to perform well as the result of inability or incapacity. See RCW 50.04.294(3).

4. The burden of establishing work-related misconduct is on the employer. The burden is successfully carried when the employer has proven misconduct, as defined by the statute, by a preponderance of the evidence. A preponderance of the evidence is that evidence which, when fairly considered, produces the stronger impression, has the greater weight, and is more convincing as to its truth when weighed against the evidence in opposition thereto. *Yamamoto v. Puget Sound Lbr. Co.*, 84 Wash. 411, 146 Pac. 861 (1915). Wn. App. 197 (1997).

5. Mitigating and extenuating circumstances may be considered in resolving questions of misconduct. *In re Solar*, Empl. Sec. Comm'r Dec. 1059 (1973). Whether the claimant was "motivated by defiance, bad faith or indifference to the consequences of his actions" will also be considered in deciding misconduct. *Wilson v. Employment Security Department*, 87 Wn. App. 197, 940 P.2d 269 (1997). A claimant's acts can be in violation of the employer's policy, but if they only amount to negligence, incompetence or an exercise of poor judgment, then they are not enough to constitute misconduct under RCW 50.04.293. Conduct may justify discharge, but not rise to the level of statutory misconduct. *Wilson*, supra.

6. Further, *Hamel vs. Employment Security Department*, 93 Wn. App. 140, 966 P.2d 1282 (1998), states that the employee must be found to have voluntarily disregarded the employer's interest, but the employee's specific motivation for the conduct is not relevant in analyzing intent. Because the word 'willful' modifies the word 'disregard,' the employee must have voluntarily disregarded the employer's interest. Consequently, an employee acts with willful disregard when he (1) is aware of his employer's interest; (2) knows or should have known that certain conduct jeopardizes that interest; but (3) nonetheless intentionally performs the act, willfully disregarding its probable consequences. The claimant's conduct does not rise to the level of statutory misconduct.

7. Here, the claimant's actions were not deliberate, but inefficient, unsatisfactory conduct, or the failure to perform well as the result of inability or incapacity. As a result, despite claimant's errors, statutory misconduct is not established. This decision does not question the employer's right to discharge claimant, nor the wisdom of that act. It is decided only that the evidence presented will not support a denial of benefits under the statute. Claimant is therefore eligible for unemployment benefits pursuant to RCW 50.20.066.

8. RCW 50.20.010(1)(c) requires each claimant to be able to, available for, and actively seeking work. The claimant was able to, available for, and actively seeking work during the weeks at issue and is therefore not subject to denial under the above-cited statute and related laws and regulations.

**Now therefore it is ORDERED:**

The Decision of the Employment Security Department under appeal is **AFFIRMED**.

The employer has established good cause for failing to appear at a previously scheduled hearing, and the Default Order dated February 2, 2010 is **VACATED**.

The claimant was not discharged due to a willful or wanton disregard of the rights, title, and interests of the employer or a fellow employee as defined in RCW 50.04.294(1)(a), and is therefore not subject to disqualification pursuant to RCW 50.20.066(1).

**Employer:** If you are a base year employer for this claimant, or become one in the future, your experience rating account will be charged for any benefits paid on this claim or future claims based on past wages you paid to this individual. If you are a local government or reimbursable employer, you will be directly liable for any benefits paid. Benefit charges or liability will accrue unless this decision is set aside on appeal. See RCW 50.29.021. If you pay taxes on your payroll, any charges for this claim could be used to calculate your future tax rates.

**Notice to Claimant:** Your former employer has the right to appeal this decision. If this decision is reversed because it is found you committed misconduct connected with your work, all benefits paid as a result of this decision will be an overpayment. State law says you will not be eligible for waiver of the overpayment, nor can the department accept an offer of compromise (repayment of less than the total amount paid to you). The benefits must be repaid even if the overpayment was not your fault. See RCW 50.20.066(5).

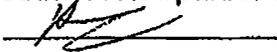
The claimant was able to, available for and actively seeking work during the weeks at issue as required by RCW 50.20.010(1)(c).

Dated and Mailed on March 26, 2010 at Seattle, Washington.



Cynthia M. Morgan  
Administrative Law Judge  
Office of Administrative Hearings  
600 University Street, Suite 1500  
Seattle, WA 98101-3126

**Certificate of Service**

I certify that I mailed a copy of this order to the within-named interested parties at their respective addresses postage prepaid on the date stated herein. 

**PETITION FOR REVIEW RIGHTS**

This Order is final unless a written Petition for Review is addressed and mailed to:

**Agency Records Center  
Employment Security Department  
PO Box 9046  
Olympia, Washington 98507-9046**

and postmarked on or before **April 26, 2010**. All argument in support of the Petition for Review must be attached to and submitted with the Petition for Review. The Petition for Review, including attachments, may not exceed five (5) pages. Any pages in excess of five (5) pages will not be considered and will be returned to the petitioner. *The docket number from the Initial Order of the Office of Administrative Hearings must be included on the Petition for Review.* Do not file your Petition for Review by Facsimile (FAX). Do not mail your Petition to any location other than the Agency Records Center.

CMM:cmm

**Mailed to the following:**

Charles Daniels  
1122 E Pike St Unit 597  
Seattle, WA 98122-3916

Claimant

Star Protection Agency  
c/oPenser North America  
700 Sleater-Kinney Rd SE #B-170  
Lacey, WA 98503-1150

Employer Representative

**CERTIFICATE OF SERVICE**

I certify that I mailed a copy of this decision to the  
with the named interested parties at their respective  
addresses, postage prepaid, on June 4, 2010.

Representative, Commissioner's Review Office,  
Employment Security Department

UIO: 770  
BYE: 11/13/2010

**BEFORE THE COMMISSIONER OF  
THE EMPLOYMENT SECURITY DEPARTMENT  
OF THE STATE OF WASHINGTON**

Review No. 2010-2078

In re:

**CHARLES DANIELS**  
SSA No. [REDACTED]

Docket No. 02-2010-02320-R

**DECISION OF COMMISSIONER**

On April 26, 2010, STAR PROTECTION AGENCY, by and through Carrie Cline for Penser North America, Inc., petitioned the Commissioner for review of a decision issued by the Office of Administrative Hearings on March 26, 2010. Pursuant to chapter 192-04 WAC this matter has been delegated by the Commissioner to the Commissioner's Review Office. Having reviewed the entire record and having given due regard to the findings of the administrative law judge pursuant to RCW 34.05.464(4), the undersigned enters the following.

The undersigned adopts the Office of Administrative Hearings' finding of fact No. 1.

Finding No. 2 is adopted. Evidence of record establishes the claimant was employed by the interested employer as a security officer from November 2007 to on or about November 11, 2009, when he was discharged.

Finding Nos. 3 and 4 are adopted but are modified to state instead as follows: Pursuant to written policy, the employer's security officers are required to report to their assigned locations on time, dressed in uniform and ready to work. The claimant was aware of the policy which was set forth in the employee handbook, issued to the claimant at hire. Over the course of the two year employment relationship, the claimant's supervisor had ongoing concerns regarding the claimant's failure to consistently comply with the above referenced policy. The claimant was repeatedly warned by his supervisor that tardiness was not acceptable and that he was required to arrive at his "duty post" in uniform. In September 2008, the claimant was issued written notice to that effect. Exhibit No. 6, page 4.

Despite the warnings to report for work on time, the claimant did not consistently do so. During the last year of the employment relationship (following the September 2008 written warning), the claimant received numerous additional verbal warnings from his supervisor to

report for work on time. (On that point, testimony of the claimant's supervisor -- based on personal knowledge of the conversations in question -- is deemed credible and is included herein as fact.) The claimant did not provide the employer with definitive reasons for his tardiness, but it was the supervisor's understanding that the claimant often came to work directly from another job with a different employer and was sometimes delayed, which the interested employer does not consider excusable tardiness. The claimant attributes his tardiness, in part, "to traffic." The employer does not consider traffic to be an excuse for repetitive tardiness.

On November 6, 2009, the claimant was scheduled to be on duty at his assigned work site at 10 p.m. At approximately 8:30 p.m. (according to the claimant), the claimant arrived at the work site. The claimant did not arrive at the work site in uniform. Having arrived for work early, he intended to enter the building and change into his uniform in the client's restroom. The employer did not necessarily approve of that practice, but the claimant had done so before without reprimand. On November 6, 2009, however, when the claimant arrived at the work site, he could not get into the building. The claimant called his supervisor's cell phone number, but the supervisor did not receive the claimant's call. Based on prior experience, the claimant assumed his supervisor would arrive at the work site approximately 30 minutes before the beginning of his shift and would let the claimant into the building to change. The claimant waited in his car. At approximately 9:45 p.m., the supervisor arrived at the work site. He did not see the claimant nor was he approached or contacted by the claimant, so the supervisor walked the outside parameters of the building but could not find the claimant. At 10:30 p.m., the supervisor contacted the claimant on the claimant's cell phone and was told the claimant was waiting across the street from the work site in his car. Exhibit No. 6, page 1. The claimant was covered by a blanket because he was cold. By then, it was 10:35 p.m. The claimant had been at the work site for more than two hours and was 35 minutes late for work but had not yet changed into his uniform. Given the prior warnings to report for work on time and in uniform, the decision was made to terminate the employment relationship. On November 11, 2009, the claimant was so informed.

Finding No. 5 is adopted.

The undersigned adopts the Office of Administrative Hearings conclusion No. 1.

Conclusion Nos. 2 through 6 are adopted. Under the Employment Security Act, an indefinite period of disqualification is imposed during which unemployment benefits are denied when a claimant was discharged for work related misconduct RCW 50.20.066. Pursuant to statutory definition, misconduct is established by wilful or wanton disregard of

an employer's interest, RCW 50.04.294(1)(a). A wilful or wanton disregard of an employer's interest is exhibited by repeated inexcusable tardiness following warnings by the employer. RCW 50.04.294(2)(b). Likewise, misconduct is established by violation of a reasonable company rule of which the claimant knew or should have known. RCW 50.04.294(2)(f).

Conclusion No. 7 is not adopted. The undersigned concludes instead as follows: Here, the employer is in the business of providing security services for clients. Accordingly, the employer has a vested interest in ensuring that properties of the employer's clients are guarded/patrolled as promised and that security is maintained. To that end, the employer relies on security officers to report for work in uniform as scheduled. It is a matter of professional appearance, as well as security. At the least, the claimant exhibited a wanton disregard of his employer's interest on November 6, 2009, when he was neither in uniform nor on duty as scheduled. Excuses notwithstanding, it was the claimant's responsibility to do so. Regarding the uniform (or lack thereof): First, the claimant should have arrived at the work site wearing (rather than carrying) his uniform. The undersigned is not persuaded that the employer condoned the claimant's practice of dressing for work in the restrooms of the buildings he was supposed to guard. Regardless, assuming the claimant arrived at the work site 90 minutes early on November 6, 2009 but could not get into the building, it defies logic that he did not drive elsewhere to change clothes. After all, he had 90 minutes to do so. Instead, the claimant sat in his car under a blanket for 35 minutes after his shift began. Regarding the claimant's contention that he was waiting for his supervisor to arrive and unlock the building so that he could change his clothes: It was not the supervisor's responsibility to ensure the claimant could get dressed for work; the supervisor came to the work site to ensure the client's premises were being guarded. Given the circumstances, the claimant's tardiness was inexcusable, as was his violation of the employer's policy regarding uniforms at the work site. Given the prior warnings, the claimant's course of action (or lack thereof) cannot be attributed to an isolated incident of mistake or poor judgement. Misconduct has been established.

Conclusion No. 8 is adopted.

Now, therefore,

**IT IS HEREBY ORDERED** that the decision of the Office of Administrative Hearings issued on March 26, 2010, is **MODIFIED**. The employer has established good cause for failing to appear at a previously scheduled hearing, and the February 2, 2010 default order is **VACATED**. Benefits are denied pursuant to RCW 50.20.066(1) beginning November 8, 2009 and continuing thereafter for ten calendar weeks and until the claimant has obtained work in

earned wages equal to ten times his weekly benefit amount. Benefits are not denied pursuant to RCW 50.20.101(1)(c) during the weeks at issue. Under RCW 50.20.066(5), the claimant must repay all benefits paid in error because of a disqualification from benefits based on misconduct. The amount of the overpayment owed by the claimant is REMANDED to the Department for calculation. *Employer:* If you pay taxes on your payroll and are a base year employer for this claimant, or become one in the future, your experience rating account will not be charged for any benefits paid on this claim or future claims based on wages you paid to this individual, unless this decision is set aside on appeal. See RCW 50.29.021.

DATED at Olympia, Washington, June 4, 2010.\*

*Annette Womac*

---

Review Judge  
Commissioner's Review Office

\*Copies of this decision were mailed to all interested parties on this date.

#### RECONSIDERATION

Pursuant to RCW 34.05.470 and WAC 192-04-190 you have ten (10) days from the mailing and/or delivery date of this decision/order, whichever is earlier, to file a petition for reconsideration. No matter will be reconsidered unless it clearly appears from the face of the petition for reconsideration and the arguments in support thereof that (a) there is obvious material, clerical error in the decision/order or (b) the petitioner, through no fault of his or her own, has been denied a reasonable opportunity to present argument or respond to argument pursuant WAC 192-04-170. Any request for reconsideration shall be deemed to be denied if the Commissioner's Review Office takes no action within twenty days from the date the petition for reconsideration is filed. A petition for reconsideration together with any argument in support thereof should be filed by mailing or delivering it directly to the Commissioner's Review Office, Employment Security Department, 212 Maple Park Drive, Post Office Box 9046, Olympia, Washington 98507-9046, and to all other parties of record and their representatives. The filing of a petition for reconsideration is not a prerequisite for filing a judicial appeal.

#### JUDICIAL APPEAL

If you are a party aggrieved by the attached Commissioner's decision/order, your attention is directed to RCW 34.05.510 through RCW 34.05.598, which provide that further appeal may be taken to the superior court within thirty (30) days from the date of mailing as shown on the attached decision/order. If no such judicial appeal is filed, the attached decision/order will become final.

**If you choose to file a judicial appeal, you must both:**

- a. **Timely file your judicial appeal directly with the superior court of the county of your residence or Thurston County. If you are not a Washington state resident, you must file your judicial appeal with the superior court of Thurston County. See RCW 34.05.514. (The Department does not furnish judicial appeal forms.) AND**
- b. **Serve a copy of your judicial appeal by mail or personal service within the 30-day judicial appeal period on the Commissioner of the Employment Security Department, the Office of the Attorney General and all parties of record.**

**The copy of your judicial appeal you serve on the Commissioner of the Employment Security Department should be served on or mailed to: Commissioner, Employment Security Department, Attention: Agency Records Center Manager, 212 Maple Park, Post Office Box 9046, Olympia, WA 98507-9046. To properly serve by mail, the copy of your judicial appeal must be received by the Employment Security Department on or before the 30th day of the appeal period. See RCW 34.05.542(4) and WAC 192-04-210. The copy of your judicial appeal you serve on the Office of the Attorney General should be served on or mailed to the Office of the Attorney General, Licensing and Administrative Law Division, 1125 Washington Street SE, Post Office Box 40110, Olympia, WA 98504-0110.**