

TABLE OF CONTENTS

I. INTRODUCTION.....1

II. COUNTERSTATEMENT OF THE ISSUES1

III. COUNTERSTATEMENT OF THE CASE2

IV. REASONS WHY REVIEW SHOULD BE DENIED6

 A. Consistent with the Employment Security Act and precedent, the Commissioner properly disqualified Nykol from unemployment benefits since the revocation of Nykol’s driver’s license due to his DUI violated Boeing’s requirement that its firefighters have a “valid driver’s license” and his ignition interlock license was not a “valid driver’s license.”7

 B. Given the limited record below, the Court of Appeals properly declined to find that an unemployment benefits claimant can litigate a disability accommodation claim in a misconduct appeal.....12

 1. The Court of Appeals properly held Nykol did not offer evidence to establish he had a disability and the Commissioner has no authority to adjudicate a disability claim14

 2. Alcoholism is not a defense to disqualifying misconduct.....18

V. CONCLUSION19

TABLE OF AUTHORITIES

Cases

<i>Alsip v. Klosterman Baking Co.</i> , 113 Ohio App. 3d 439, 680 N.E.2d 1320, Ohio Ct. App. 1 Dist. 1996)	17
<i>Failor's Pharmacy v. Dep't of Soc. and Health Servs.</i> , 125 Wn.2d 488, 886 P.2d 147 (1994).....	10
<i>Hamel v. Emp't Sec. Dep't.</i> , 93 Wn. App. 140, 966 P.2d 1282 (1998), review denied, 137 Wn.2d 1036 (1999).....	11
<i>Liebbrand v. Emp't Sec. Dep't.</i> , 107 Wn. App. 411, 27 P.3 1186 (2001).....	18
<i>Marquis v. City of Spokane</i> , 130 Wn.2d 97, 111, 922 P.2d 43 (1996).....	15
<i>Martinez v. New Mexico Eng'r Office</i> , 129 N.M. 413, 9 P.3d 657, 662-64 (N.M. Ct. App. 2000).....	17
<i>Nykol v. Emp't Sec. Dep't.</i> , No. 69279-8-I (Wash. Ct. App. October 14, 2013) 6, 8, 9, 13, 15, 17, 18	
<i>Safeco Ins. Companies v. Meyering</i> , 102 Wn.2d 385, 687 P.2d 195 (1984).....	16
<i>Smith v. Emp't Sec. Dep't.</i> , 155 Wn. App. 24, 266 P.2d 263 (2010).....	14, 15
<i>Tapper v. Emp't Sec. Dep't.</i> , 122 Wn.2d 397, 858 P.2d 494 (1993).....	14
<i>Washington Water Power Co. v. Human Rights Comm'n.</i> , 91 Wn.2d 62, 586 P.2d 1149 (1978).....	15
<i>Wilson v. Emp't Sec. Dept.</i> , 87 Wn. App. 197, 940 P.2d 269 (1997).....	10

<i>Wm. Dickson Co. v. Puget Sound Air Pollution Control Agency,</i> 81 Wn. App. 403, 914 P.2d 750 (1996).....	14
--	----

Statutes

42 U.S.C. § 12101-12209	16
RCW 46.04.215	3
RCW 46.04.217	3, 9
RCW 46.20.385	3
RCW 49.60	15, 16
RCW 50.01.010	7
RCW 50.04.293	10
RCW 50.04.294(1)(a)	7, 10, 11, 12
RCW 50.04.294(2)(a)-(g)	8
RCW 50.04.294(2)(f).....	1, 2, 8, 9, 12
RCW 50.08.010	16
RCW 50.08.020	16
RCW 50.12.010	16
RCW 50.20.066	1, 2
RCW 50.20.066(1).....	7, 14, 18
RCW 50.32.010-.110	16

Regulations

WAC 192-150-060(3)..... 16
WAC 192-150-205(1)..... 7
WAC 192-150-210(4)..... 8

Rules

RAP 13.4(b)..... 1, 6, 13, 19
RAP 13.4(b)(1) 9
RAP 13.4(b)(2) 9
RAP 13.4(b)(3) 9
RAP 13.4(b)(4) 9
RAP 9.7(c) 2

Other Authorities

1 Thomas Street, The Foundations of Legal Liability 100, 110
(1906)..... 11

I. INTRODUCTION

Jay Nykol was required to have a valid driver's license as a condition of his employment as a Boeing firefighter, which required him to drive multiple emergency vehicles. After his driver's license was revoked for driving under the influence, Boeing discharged him. Nykol applied for unemployment benefits, and the Commissioner of the Employment Security Department concluded Nykol was disqualified from benefits because he violated Boeing's driver's license requirement. Violating a reasonable employer rule is per se disqualifying misconduct under the Employment Security Act. RCW 50.20.066, RCW 50.04.294(2)(f).

The Court of Appeals correctly applied the statutory language and precedent in affirming the Commissioner's decision denying benefits to Nykol. Nykol does not set forth any reason for review under Rule of Appellate Procedure 13.4(b), which provides the exclusive bases for accepting review of the Court of Appeals' decision. Further review by this Court is unwarranted. The Court of Appeals' decision is consistent with prior case law, and this case raises no significant constitutional questions or issues of substantial public importance.

II. COUNTERSTATEMENT OF THE ISSUES

If this Court accepts review, the issues will be as follows:

1. Under RCW 50.20.066 and RCW 50.04.294(2)(f), a person is disqualified from unemployment benefits if he was discharged from employment for violating a reasonable company rule about which he knew. Did the Commissioner properly conclude Nykol engaged in disqualifying misconduct by driving under the influence, which resulted in the loss of his driver's license and failure to comply with Boeing's reasonable company rule requiring a valid driver's license for performance of his work duties?
2. May Nykol litigate a disability accommodation claim in an appeal when the Employment Security Act does not grant authority to the Commissioner to adjudicate discrimination claims and the Act explicitly states that alcoholism is not a defense to statutory misconduct?

III. COUNTERSTATEMENT OF THE CASE

Nykol worked at Boeing as a firefighter for Boeing's in-house fire department. Administrative Record¹ (AR) 13-14, 64 (Findings of Fact (FF) 1-2). Nykol's employment was subject to a Collective Bargaining Agreement, which provided that firefighters must attain and maintain a valid Washington State driver's license. AR 15-16, 60, 63, 65 (FF 3).

In September 2010, Nykol was arrested for and charged with driving under the influence of alcohol (DUI) while he was off duty. AR 21, 28, 65 (FF 5). Nykol knew before he received his DUI that he was

¹ The Administrative Record (AR) is a Certified Record of Administrative Adjudicative Orders as defined by RAP 9.7(c). The superior court transmitted the Administrative Record in its entirety and did not repaginate it. Thus, rather than including a Clerk's Papers citation, this brief refers to the Administrative Record according to its original pagination.

required to hold a valid Washington State driver's license as a condition of his employment. AR 22-23, 65 (FF 4).

Nykol advised Boeing of his DUI in January 2011. AR 16, 28, 52, 65 (FF 6). In mid-March 2011, Nykol entered into a pre-trial diversion agreement that provided for the revocation of his Washington State driver's license. AR 21. His regular, unrestricted driver's license was subsequently revoked by the Department of Licensing. AR 32. However, he obtained an ignition interlock driver's license, which permitted him to drive his personal vehicle by equipping it with an ignition interlock device.² AR 21-22, 31, 65 (FF 5).

After his regular driver's license was revoked, Boeing released Nykol from employment because he failed to meet a qualification for his job since he did not possess a valid Washington State Driver's License. AR 14-16, 18, 28, 32, 60, 65 (FF 6).

² The testimony from the administrative hearing reveals Nykol had an ignition interlock driver's license. AR 22, 29. This license allows an individual to drive while his license is suspended or revoked *only* if all vehicles driven are equipped with an ignition interlock device or, for an employer vehicle, the employer has executed a waiver of the ignition interlock device requirement. *See* RCW 46.04.217 ("Ignition interlock driver's license' means a permit issued to a person by the department that allows the person to operate a noncommercial motor vehicle with an ignition interlock device while the person's regular driver's license is suspended, revoked, or denied."); RCW 46.20.385; www.dol.wa.gov/driverslicense/iil.html. An ignition interlock device is an instrument that measures breath alcohol content into which drivers must blow before they can start their vehicle. *See* RCW 46.04.215; www.dol.wa.gov/driverslicense/ignitioninterlock.html.

With an ignition interlock driver's license, Nykol could have driven Boeing's noncommercial work vehicles without installation of an ignition interlock device if Boeing executed a written waiver to that effect. AR 16-18, 24, 53, 65 (FF 7). Alternately, Boeing could have installed ignition interlock devices on the eleven-plus work vehicles that Nykol may have been required to drive. AR 17-18, 24, 53, 65 (FF 7).

Boeing however, elected not to execute a waiver because of the potential liability and safety concerns, including that Nykol was known to transport patients to hospitals in Boeing's service vehicles. AR at 16-17. Further, installation of ignition interlock devices on the eleven or more emergency vehicles Nykol was required to drive as part of his job was not feasible because the devices would have prevented anyone from starting the vehicles before taking a breath test. AR 16-18, 19, 24, 65 (FF 7). Finally, there was no provision in the Collective Bargaining Agreement that required Boeing to accommodate employees with an ignition interlock waiver or installation of a device on each of the work vehicles an employee drove. AR 18, 23, 29.

After Boeing terminated Nykol, he sought unemployment benefits. The Department denied Nykol's claim after concluding that he violated a reasonable and known rule or policy of his employer, which amounts to disqualifying misconduct under the Employment Security Act. AR 44.

Nykol appealed the decision, and an administrative hearing occurred. AR 42, 64. Following the hearing, an administrative law judge (ALJ) affirmed the denial of benefits, concluding that Nykol failed to comply with a reasonable employer rule—the requirement that he maintain a valid driver’s license—when his voluntary actions of drinking and driving resulted in the suspension of his driver’s license. AR 67 (Conclusion of Law (CL) 10). Nykol’s violation of Boeing’s rule amounted to statutory misconduct, disqualifying him from unemployment benefits. AR 67 (CL 10).

Nykol petitioned the Department’s Commissioner to review the ALJ’s decision. AR 72-75. The Commissioner adopted the ALJ’s findings of fact and conclusions of law, subject to several “additions, modifications and comments,” and affirmed the ALJ’s Initial Order. AR 78-79. Specifically, the Commissioner found that Boeing’s requirement that Nykol maintain a valid driver’s license was reasonable, that Nykol was aware of the rule, and that Nykol deliberately and willfully violated Boeing’s reasonable rule when he lost his license, as Boeing was no longer able to employ him in his position as a firefighter. AR 79.

Nykol appealed the Commissioner’s decision to superior court. Clerk’s Papers (CP) at 1-20. Sitting in an appellate capacity, the superior court affirmed the Commissioner’s decision. CP at 54-56. The Court of

Appeals also affirmed the Commissioner's decision. *Nykol v. Emp't Sec. Dep't*, No. 69279-8-I (Wash. Ct. App. October 14, 2013). The Court of Appeals held that Nykol violated a work rule requiring him to have a valid driver's license and was properly disqualified from unemployment benefits. The Court rejected Nykol's argument that his ignition interlock license was a valid driver's license. *Nykol*, slip op. at 5. The Court further held that Boeing did not fail to accommodate Nykol's disability and rejected Nykol's argument that he was terminated not because of his misconduct, but because Boeing failed to accommodate his disability of alcoholism by signing a waiver allowing him to drive the company's vehicles. *Id.* at 5-6.

IV. REASONS WHY REVIEW SHOULD BE DENIED

Under RAP 13.4(b), the Court may grant review only:

- (1) if the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
- (2) if the decision of the Court of Appeals is in conflict with a decision of another division of the Court of Appeals; or
- (3) if a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
- (4) if the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

Nykol ignores these criteria. In any event, review is unwarranted. The Court of Appeals correctly applied the Employment Security Act and case law interpreting what amounts to disqualifying misconduct under the Act.

The decision does not conflict with any other decision of the Supreme Court or Court of Appeals. Further, the opinion raises neither a constitutional issue nor an issue of substantial public interest. Accordingly, the Court should deny review.

- A. **Consistent with the Employment Security Act and precedent, the Commissioner properly disqualified Nykol from unemployment benefits since the revocation of Nykol's driver's license due to his DUI violated Boeing's requirement that its firefighters have a "valid driver's license" and his ignition interlock license was not a "valid driver's license."**

The Commissioner properly decided Nykol's case in accordance with the Employment Security Act and case law, and the Court of Appeals properly affirmed. The Act sets aside unemployment funds for the benefit of "persons unemployed through no fault of their own." RCW 50.01.010. A claimant is disqualified from receiving unemployment benefits when he has been discharged for "misconduct connected with his or her work." RCW 50.20.066(1). Under the Act, misconduct includes, but is not limited to, "[w]illful or wanton disregard of the rights, title, and interests of the employer." RCW 50.04.294(1)(a). The term "willful" means intentional behavior done deliberately or knowingly, where the claimant is aware he is violating or disregarding the rights of his employer or a co-worker. WAC 192-150-205(1). The Act goes on to provide illustrative examples of acts that are considered *per se* misconduct because they

“signify a willful or wanton disregard of the rights, title, and interests of the employer or a fellow employee.” RCW 50.04.294(2)(a)-(g). Applicable here is the Act’s provision explicitly defining misconduct to include 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)(f). A company rule is reasonable if it is related to the employee’s job duties, is a normal business requirement or practice for the employee’s occupation or industry, or is required by law or regulation. WAC 192-150-210(4).

As the Court of Appeals noted, “Nykol does not dispute that the requirement that he possess a valid Washington driver’s license is a company rule, that the rule is reasonable, or that the loss of his regular driver’s license was work related.” *Nykol*, slip op. at 4. Nykol merely asserts his ignition interlock driver’s license should be considered a “valid driver’s license,” so he did not violate his employer’s rule. Pet. for Review at 7-8. The Court of Appeals properly rejected this argument and instead concluded his ignition interlock license was a “specialty” license since he was not allowed to drive company vehicles unless ignition interlock devices were installed on them or Boeing signed a waiver. *Nykol*, slip op. at 5. Boeing declined to do either of these things. AR 16-18, 19, 24, 65 (FF 7).

Nykol presents no argument or authority that the court's holding regarding the validity of his driver's license conflicts with other decisions of the Court of Appeals or Supreme Court. RAP 13.4(b)(1), (2). Nor does he argue the court's ruling raises a significant constitutional question or an issue of substantial public interest. RAP 13.4(b)(3), (4). Rather, like he did below, he attempts to shift the blame for his job separation to the employer by asserting Boeing should have signed the ignition interlock device waiver. Pet. for Review at 5. However, as the Court of Appeals explained, the plain and ordinary meaning of the term "valid Washington driver's license" is a "license that allows a person to drive in Washington unrestricted and unfettered, with no special conditions" and "does not mean a specialty license, available only if an individual's regular license is suspended" *Nykol*, slip op. at 5; *see also* RCW 46.04.217 ("'Ignition interlock driver's license' means a permit issued to a person by the department that allows the person to operate a noncommercial motor vehicle with an ignition interlock device *while the persons' regular driver's license is suspended, revoked, or denied.*") (emphasis added).

Because Nykol did not have a valid driver's license as Boeing required, he violated a reasonable employer rule which is *per se* misconduct under the Employment Security Act. RCW 50.04.294(2)(f). The Court of Appeals below properly applied the misconduct statute in

concluding that Nykol was discharged for misconduct and disqualified from unemployment benefits. Nykol presents no conflict justifying review, and his petition for review should be denied.

The current definition of misconduct was enacted in 2003.³ 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. *See Failor’s Pharmacy v. Dep’t of Soc. and Health Servs.*, 125 Wn.2d 488, 493, 886 P.2d 147 (1994) (where Legislature carried over prior definition into current statute, “cases interpreting the latter may illuminate the former”).

Those cases held that to commit misconduct, an employee must have “voluntarily disregarded the employer’s interest. His specific motivations for doing so, however, are not relevant.” *Hamel v. Emp’t Sec. Dep’t.*, 93 Wn. App. 140, 146, 966 P.2d 1282 (1998), review denied, 137

³ Between 1993 and 2003, the Legislature defined misconduct “an employee’s act or failure to act in willful disregard of his or her employer’s interest where the effect of the employee’s act or failure to act is to harm the employer’s business.” RCW 50.04.293. Prior to 1993, the Act included no definition of misconduct.

Wn.2d 1036 (1999). Furthermore, under both the prior definition and recent case law interpreting RCW 50.04.294(1)(a), 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.” *Griffith v. Emp’t Sec. Dep’t*, 163 Wn. App. 1, 9, 259 P.3d 1111 (2011) (quoting *Hamel*, 93 Wn. App. at 146–47).

This case involves a matter of statutory interpretation informed by existing precedent, not the common law of torts as Nykol argues. Pet. For Review at 14-17. The Court of Appeals properly declined Nykol’s invitation to import principles of tort law, specifically the principle of “intervening causes.” Nykol cites no authority that tort principles dictate the result in an unemployment benefit appeal. Whether Nykol knew or should have known the probable consequences of his conduct is a factor in determining misconduct, *Hamel*, 93 Wn. App. at 146-47, but Nykol analyses the question incorrectly. Under Nykol’s analysis, Boeing would be held responsible for Nykol’s decision to drive drunk, which is inconsistent with “considerations of logic, common sense, justice, policy, and precedent.” 1 Thomas Street, *The Foundations of Legal Liability* 100, 110 (1906). Nykol asks this Court to ignore the fact that he drove drunk and to instead place the blame for the loss of his driver’s license and the

driver's license and the ultimate consequence of his termination from employment on Boeing. Even if a proximate cause analysis is applied, it was Nykol's decision to drive drunk that was both the but-for and legal cause of his discharge. His discharge resulted from the loss of his driver's license which was a foreseeable consequence of drunk driving.

Nykol engaged in intentional conduct when he drank too much alcohol and drove a vehicle. Aware that his job required him to maintain a valid driver's license, he engaged in this conduct in willful disregard of the probable consequence that his license would be suspended or revoked, precluding him from being able to perform his job duties. AR 67 (CL 10); *Hamel*, 93 Wn. App. at 146-47. He thus willfully disregarded Boeing's interests, RCW 50.04.294(1)(a), and violated a reasonable company rule. RCW 50.04.294(2)(f). His conduct amounted to misconduct under the Act. The Court of Appeals' decision reached the right result, and Nykol fails to show why this Court should grant review.

B. Given the limited record below, the Court of Appeals properly declined to find that an unemployment benefits claimant can litigate a disability accommodation claim in a misconduct appeal.

Rather than addressing the statutory definition of misconduct set forth above, Nykol attempts to shift the Court's focus away from the fact that he lost his driver's license, which was a known condition of his

employment, towards analyzing his alcoholism as an alleged disability Boeing was required to accommodate. Pet. for Review at 8-17. He does not argue this issue raises an important constitutional question or an important issue of public importance, nor does he point to any conflict with Washington law. RAP 13.4(b). Again, Nykol fails to meet any criteria for this Court to accept review.

This Court should disregard Nykol's effort to shift the focus from the pertinent provisions of the Employment Security Act for two reasons. First, the Commissioner only has the authority to adjudicate claims under the Employment Security Act and does not have the authority to adjudicate any alleged discrimination claims. As the Court of Appeals noted, "Nykol testified at the administrative hearing that he told Boeing that he was 'suffering from alcoholism,' but presented no other evidence of his diagnosis. He also failed to present evidence that would allow a determination that his diagnosis met the statutory definition of a disability that would require accommodation." *Nykol*, slip. op. at 6. Thus, while Nykol suggests the Commissioner should have adjudicated his disability claim in the context of determining whether Nykol was eligible for unemployment benefits, the record is too "limited" to even "establish a failure to accommodate a disability." *Id.* Second, under

RCW 50.20.066(1), alcoholism is not a defense to disqualification due to misconduct.

- 1. The Court of Appeals properly held Nykol did not offer evidence to establish he had a disability and the Commissioner has no authority to adjudicate a disability claim**

Throughout his petition, Nykol proposes other courses of action Boeing could have taken rather than terminating his employment. Pet. for Review at 5-6, 12-13. However, the issue before the Commissioner was not whether Boeing was justified as a matter of employment law in terminating Nykol's employment, but rather whether the facts surrounding Nykol's discharge meet the statutory test for misconduct. *See Tapper v. Emp't Sec. Dep't*, 122 Wn.2d 397, 412, 858 P.2d 494 (1993). Further, the question before this Court, should review be accepted, is whether substantial evidence supports the findings actually made by the Commissioner, not whether evidence supports the findings that Nykol wishes the Commissioner had made. *See Wm. Dickson Co. v. Puget Sound Air Pollution Control Agency*, 81 Wn. App. 403, 407, 914 P.2d 750 (1996).

An unemployment benefits appeal is not the appropriate forum for adjudicating more complex employment law disputes. For example, in *Smith v. Emp't Sec. Dep't*, 155 Wn. App. 24, 266 P.2d 263 (2010), the court held that whether an employer terminated its employee in retaliation

for his whistleblowing activities was not an issue properly resolved in an unemployment benefits appeal. *Smith*, 155 Wn. App. at 41. It is instead a subject for a jury to determine in a wrongful termination action and not relevant to the court's review of an agency's decision to deny an application for benefits. *Id.*

Nykol's unemployment benefits appeal is likewise not the right forum to adjudicate his alleged disability claim under the Washington Law Against Discrimination (Anti-Discrimination Act), chapter 49.60 RCW. Pet for Review at 1-2 (Issues B and C). Furthermore, as the Court of Appeals noted, the evidence Nykol presented was insufficient to establish a diagnosis of alcoholism, much less that alcoholism meets the statutory definition of a disability requiring accommodation. *Nykol*, slip. op. at 6. As in *Smith*, the court properly refrained from interjecting the Anti-Discrimination Act into the Employment Security Act for purposes of determining unemployment benefit eligibility. AR 78.

This result is consistent with the general principle that "an administrative agency is limited in its powers and authority to those which have been specifically granted by the legislature." *Washington Water Power Co. v. Human Rights Comm'n*, 91 Wn.2d 62, 65, 586 P.2d 1149 (1978); *Marquis v. City of Spokane*, 130 Wn.2d 97, 111, 922 P.2d 43 (1996). Here, the Legislature established the Department under the

Employment Security Act to implement that Act, granting the Commissioner power to make rules and adjudicate unemployment benefit claims pursuant to that Act. RCW 50.08.010; 50.08.020; 50.12.010; 50.32.010-.110. The Department is “endowed with quasi-judicial functions” because of its “expertise in [the employment security] field.” *Safeco Ins. Companies v. Meyering*, 102 Wn.2d 385, 687 P.2d 195 (1984). The Commissioner has no authority to adjudicate a disability discrimination claim; rather, such a claim should be made with Washington’s Human Rights Commission, *see* RCW 49.60 *et seq.*, or the Equal Employment Opportunity Commission, *see* 42 U.S.C. § 12101-12209 (American with Disabilities Act or ADA). Unlike those agencies, the Department lacks the authority and expertise necessary to rule on a potential claim arising under those other laws. *See, e.g.*, WAC 192-150-060(3) (nothing in unemployment insurance law requires an employer to offer alternative suitable work when an employee has a disability, or modify duties so that the employee can perform his current job).

Each law serves a different purpose and provides for different remedies. Indeed, interjecting the “accommodation claim” analysis into employment security law would result in confusion and unintended adjudication of the disability and anti-discrimination law issues by the state agency entrusted with making unemployment benefits decisions. *See*

Martinez v. New Mexico Eng'r Office, 129 N.M. 413, 9 P.3d 657, 662-64 (N.M. Ct. App. 2000) (the state's personnel board lacks power to adjudicate ADA issues, which rest with the Equal Employment Opportunity Commission and the state's human rights commission); *Alsip v. Klosterman Baking Co.*, 113 Ohio App. 3d 439, 680 N.E.2d 1320, 1325 (Ohio Ct. App. 1 Dist. 1996) ("Federal labor law does not apply and confuses the relevant focus of the [state employment security bureau's] inquiry: 'Are the employees unemployed through no fault of their own?'").

There was no statutory basis for the Commissioner of the Employment Security Department to evaluate whether Boeing was required to accommodate Nykol pursuant to Washington's Anti-Discrimination Act or the ADA. Despite Nykol's demand that the Commissioner issue findings regarding his disability, there was no need for findings because such a factual inquiry is foreclosed by the limitation on the Commissioner's authority. This is especially true when, as noted by the Court of Appeals, Nykol presented no evidence of his diagnosis other than his own limited testimony and "failed to present evidence that would allow a determination that his diagnosis met the statutory definition of a disability that would require accommodation." *Nykol*, slip op. at 6. The Court of Appeals properly declined to consider Nykol's

“accommodation claim” in his unemployment benefit case. *Nykol*, slip op. at 6.

2. Alcoholism is not a defense to disqualifying misconduct.

The decision not to consider Nykol’s “accommodation claim” is further bolstered by RCW 50.20.066(1) that expressly states “[a]lcoholism shall not constitute a defense to disqualification from benefits due to misconduct.” This provision does not disqualify individuals from benefits based on their status as alcoholics; rather, it simply eliminates evidence of alcoholism as a defense to disqualification based on misconduct. *Liebbrand v. Emp’t Sec. Dep’t*, 107 Wn. App. 411, 420, 27 P.3 1186 (2001). In essence, this statute holds an alcoholic employee to the same performance and behavior standards as other employees. *Id.*

In *Liebbrand*, an employee’s absence from work in violation of the employer’s attendance policy was disqualifying misconduct despite the fact that his absence was due to his alcoholism. *Id.* at 424-426. RCW 50.20.066(1) requires the Commissioner to determine whether the employee committed misconduct without regard to the effect that his alcoholism may have had on his behavior. *Id.* at 427. Similarly, Nykol, like all firefighters at Boeing, had to comply with Boeing’s rule to have a valid driver’s license; any alleged alcoholism does not excuse his violation

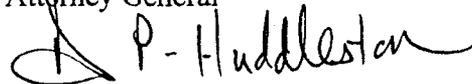
of Boeing's rule. Nykol presents no reason for this Court to accept review. His petition should be denied.

V. CONCLUSION

Nykol does not cite any ground on which this Court should accept review under RAP 13.4(b). He makes no showing that the Court of Appeals' decision in this case conflicts with a decision of the Supreme Court or another division of the Court of Appeals. He makes no showing that there is a significant question of law under the constitution, or that there is an issue of substantial public interest that this Court should determine. To the contrary, the Court of Appeals' decision is consistent with the Employment Security Act and prior case law and raises no issue that justifies review by this Court. Therefore, the Department asks the Court to deny review.

RESPECTFULLY SUBMITTED this 10th day of January, 2014.

ROBERT W. FERGUSON
Attorney General



DIONNE PADILLA-HUDDLESTON
WSBA #38356

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

PROOF OF SERVICE

I, JUDY ST. JOHN, hereby state and declare as follows:

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

2. That on the 10th day of January 2013, I caused to be served by mailing a true and correct copy of **Answer to Petition for Review**, with proper postage affixed thereto to:

Richard J. Hughes
1202 S. 2nd Street, Suite A
Mount Vernon, WA 98273

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

DATED this 10th day of January 2013, in Seattle, Washington.



JUDY ST. JOHN, Legal Assistant

OFFICE RECEPTIONIST, CLERK

From: St. John, Judith (ATG) <JudithS@ATG.WA.GOV>
Sent: Friday, January 10, 2014 9:11 AM
To: OFFICE RECEPTIONIST, CLERK
Cc: rhughes@isomedia.com; Padilla-Huddleston, Dionne (ATG)
Subject: RE: Jay C. Nykol v State of Washington Dept. of Employment Security, No. 89544-9 -- Answer to Petition For Review
Attachments: AnsPetForReview_Nykol.pdf

Dear Clerk,

Attached for filing is Answer to Petition for Review by State of Washington Department of Employment Security in *Jay C. Nykol v State of Washington Department of Employment Security*, No. 89544-9.

The attorney for the Petitioner is receiving a courtesy copy of this email and a hard copy will follow via U.S. Mail.

Sincerely,
Judy St. John
Legal Assistant to:
Dionne Padilla-Huddleston, April Bishop
& Leah Harris

*Office of the Attorney General
Seattle Licensing and Administrative Law Division
800 Fifth Avenue, Suite 2000
Seattle, Washington 98104-3188*
☎ 206.587.4215
✉ judiths@atg.wa.gov

In Recognition of the AGO Sustainability Plan, please print only if necessary.

CONFIDENTIALITY NOTICE: This transmission may contain confidential information protected by state or federal law. The information is intended only for use consistent with the state business discussed in this transmission. If you are not the intended recipient, you are hereby notified that any disclosure, copying, distribution, or the taking of any action in reliance on the contents is strictly prohibited. If you have received this transmission in error, please notify the sender immediately to arrange for return, destruction or deletion of the transmission. Your cooperation is appreciated.