

# COMMENTS

## In Willful Disregard of the Employment Security Act: Culpability and the Determination of Disqualifying Misconduct by the Courts

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In Washington, a claimant for unemployment compensation benefits is disqualified from receiving those benefits if he or she has been “discharged or suspended for misconduct connected with his or her work.”<sup>1</sup> Before 1993, no statutory definition of misconduct existed. The Washington courts generated their own definitions of and tests for misconduct. The Washington State Legislature, in 1993, created a statutory definition of misconduct that disqualifies a claimant from receiving unemployment compensation benefits.<sup>2</sup> Unlike some judicial definitions,<sup>3</sup> the legislative definition is concise: “‘Misconduct’ means 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.”<sup>4</sup>

Washington courts have not uniformly interpreted the statutory definition. There are three elements to this definition: (1) an employee’s act or failure to act (conduct); (2) the act or omission is done in willful disregard of her employer’s interest (culpability); and (3) the effect of the act or omission is harm to the employer’s business (harm).<sup>5</sup> Courts have not dealt directly with the legal issue of what

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1. WASH. REV. CODE § 50.20.060 (1996).

2. WASH. REV. CODE § 50.04.293 (1993); Act of July 25, 1993 ch. 483, § 1, 1993 Wash. Laws 2017, 2017.

3. See *infra* Part II.A.1-4.

4. WASH. REV. CODE § 50.04.293 (1993).

5. *Id.*

constitutes conduct under the definition, i.e., an act or failure to act,<sup>6</sup> though they have been clear that the determination of the particular conduct for which the claimant was terminated is a question of fact.<sup>7</sup> The harm element has been briefly addressed by some courts.<sup>8</sup> The elements of conduct and harm, however, are beyond the scope of this Comment, and will not be discussed in any detail.

In applying the statutory definition of misconduct, Washington appellate courts have differed significantly on the second element, the level of culpability required. On this issue, a split has developed between Divisions One and Three of the Washington Courts of Appeal. Division One has generated a broad test for misconduct based on several principles.<sup>9</sup> Division Three has developed a narrower test, including in the definition of misconduct only intentional behavior.<sup>10</sup> Division Two has not yet decided a case involving the statutory definition.<sup>11</sup>

This Comment argues that the most appropriate test for applying the statutory definition is an objective test based on knowing disregard of the employer's interests by the employee, rather than any current interpretation of the definition by the courts of Washington. In Section One of this Comment, the policies behind the Employment Security Act and the ramifications of different culpability elements are discussed. Section Two details the different tests for misconduct generated by the courts. Part A of Section Two discusses the common law tests and their culpability elements prior to the 1993 statutory definition of misconduct. Part B discusses the more recent tests and culpability elements generated by the courts to interpret the statutory definition of misconduct. Section Three argues that the policy of the Employment Security Act and the legislative history of the 1993

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6. Conceivably, a situation could arise in which an employee is fired for someone else's act or omission; for example, an employee could be fired because of a supervisor's failure to stop an employee's misconduct, or an employee could be discharged because of a family member's act.

7. See *Keenan v. Employment Sec. Dept.*, 81 Wash. App. 391, 395, 914 P.2d 1191, 1193 (1996). Theoretically, a case could turn on which particular conduct the court determines to be the alleged misconduct. See *id.*

8. Generally, where harm to the employer's business is required, courts both prior to and since the adoption of the statutory definition have recognized intangible, noneconomic harm as well as tangible, economic harm. See, e.g., *Peterson v. Dept. of Employment Sec.*, 42 Wash. App. 364, 370-71, 711 P.2d 1071, 1075 (1985); *Dermond v. Employment Sec. Dept.*, 89 Wash. App. 128, 133-36, 947 P.2d 1271, 1274-75 (1997).

9. *Wilson v. Employment Sec. Dept.*, 87 Wash. App. 197, 201-04, 940 P.2d 269, 272-73 (1997).

10. *Keenan*, 81 Wash. App. at 395, 914 P.2d at 1193.

11. Division Two may consider the issue within the next year, however, in *Rice v. Employment Sec. Dept.*, No. 22615-4-II (Wash. Ct. App. filed Nov. 14, 1997).

statutory definition best support an objective test with a knowing disregard culpability element as the appropriate interpretation of the statutory definition.

#### I. THE EMPLOYMENT SECURITY ACT AND THE RAMIFICATIONS OF A CULPABILITY ELEMENT

The Employment Security Act (Act) was enacted in 1937 to help alleviate the financial burden on individuals due to unemployment resulting from the Depression, and the subsequent drain on the state and national economy.<sup>12</sup> The Preamble states that the purpose of the Act is to set aside funds for an unemployment reserve to be used "for the benefit of persons unemployed through no fault of their own."<sup>13</sup> It goes on to state that in interpreting the Act, "this title shall be liberally construed for the purpose of reducing involuntary unemployment and the suffering caused thereby to the minimum."<sup>14</sup> Employment Security collects funds from employers and distributes them to the unemployed, creating a form of risk sharing.<sup>15</sup>

The exclusion of an individual from unemployment compensation for misconduct<sup>16</sup> may be viewed in light of the preamble to the Act, relating to the statutory purpose of reducing the suffering caused by *involuntary* unemployment.<sup>17</sup> Because of the statutory mandate to liberally construe the Act, Washington courts have generally viewed with caution any statutory construction that limits coverage.<sup>18</sup>

A narrow culpability test will result in fewer determinations of disqualifying misconduct, providing benefits to more claimants who might not receive them under a different test. A narrow test will, however, also result in increased cost to both the State and employers, and potentially undermine employers' efforts to reduce misconduct in the workplace. A broader culpability test, on the other hand, will result in denial of benefits to many more individuals, resulting in a reduced cost to both employers and the State.

A culpability test with predictable results will also be beneficial, as it may reduce the social costs involved, through the ability of

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12. Unemployment Compensation Act of 1937, ch. 162, 1937 Wash. Laws 574.

13. WASH. REV. CODE § 50.01.010 (1996).

14. *Id.*

15. *Id.*

16. WASH. REV. CODE § 50.20.060 (1996).

17. WASH. REV. CODE § 50.01.010 (1996).

18. See *Shoreline Community College Dist. No. 7 v. Employment Sec. Dept.*, 120 Wash. 2d 394, 842 P.2d 938 (1992); *Penick v. Employment Sec. Dept.*, 82 Wash. App. 30, 917 P.2d 136 (1996), *review denied*, 130 Wash. 2d 1004, 925 P.2d 989 (1997).

businesses to plan, decreased litigation, efficient litigation, and the possibility of deterrence. Determination of the appropriate interpretation of the culpability element for disqualifying misconduct is therefore very important, with ramifications for every worker and employer.

## II. JUDICIAL STANDARDS OF CULPABILITY

Prior to the 1993 statutory definition, codified at Washington Revised Code 50.04.293, the boundaries of disqualifying misconduct and culpability elements and tests were based on policies and principles adopted and developed from case law.<sup>19</sup> After the statutory definition took effect, the courts needed to interpret specific language in that definition: "in willful disregard of his or her employer's interests."<sup>20</sup>

In determining whether a worker's behavior or omission is misconduct, a court must reference the appropriate definition of misconduct, then apply a test to determine whether the facts of that particular case meet that definition.<sup>21</sup> Occasionally, the behavior or omission is so clearly misconduct that the court may apply the statutory definition directly as a test.<sup>22</sup> Many times, however, in cases with less straightforward facts, the court must move away from the statutory definition and adopt or develop a test with different language as a proxy for that definition.<sup>23</sup> The focus of this Comment is on the culpability element of each test for misconduct adopted by the courts, whether that test comes from the statutory definition of misconduct or from a definition developed by the courts to fit specific situations.

For analysis purposes, the culpability elements of the misconduct tests developed by Washington's courts and legislature can be divided into two types: the standard-based elements and the principle-based elements. The standard-based elements include a single criterion that the claimant's conduct must satisfy in order to be classified as misconduct. For example, a culpability element which requires negligent behavior is standard-based. A worker must have acted at least negligently in order to be disqualified from receiving benefits for misconduct. A worker fired for intentional misconduct would also be

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19. See, e.g., *Nelson v. Dept. of Employment Sec.*, 98 Wash. 2d 370, 375, 655 P.2d 242, 245 (1985); *Peterson*, 42 Wash. App. at 370, 711 P.2d at 1075.

20. WASH. REV. CODE § 50.04.293 (1993).

21. See, e.g., *Wilson v. Employment Sec. Dept.*, 87 Wash. App. 197, 940 P.2d 269 (1997).

22. See, e.g., *Keenan v. Employment Sec. Dept.*, 91 Wash. App. 391, 914 P.2d 1191 (1996).

23. See, e.g., *Dermond v. Employment Sec. Dept.*, 89 Wash. App. 128, 947 P.2d 1271 (1997).

disqualified, since her behavior or omission would be beyond the culpability criterion of negligent behavior.

In contrast, some culpability elements are made up of multiple principles which together define a boundary of misconduct. This principle-based culpability element is not based on a solitary criterion as discussed above. An example of a principle-based culpability element would be one stating that (1) inefficiency and poor performance do not constitute misconduct, but (2) misbehavior within the employee's control, which is repeated after warnings, does constitute misconduct. This example is principle-based because it relies on multiple situations to establish a rough boundary for behavior which can be defined as misconduct. In using this type of principle-based culpability element, a court would determine whether the claimant's behavior was mere inefficiency and poor performance, or whether it was in her control and continued after warnings to stop.

#### A. *Definitions Prior to the Adoption of the Disqualifying Misconduct Statute*

There were four different tests for misconduct generated by Washington courts prior to the promulgation of the statutory definition. The first of these tests contained a culpability element which was a combination of standard-based and principle-based elements. Two other tests contained standard-based culpability elements, and the most recent test contained a principle-based culpability element.

##### 1. Willful or Wanton Disregard

The first test of culpability for misconduct cases in Washington provided a general standard-based culpability element with more precise illustrations. It also contained a complementary principle-based aspect. In *Willard v. Employment Sec. Dept.*,<sup>24</sup> Division One of the Court of Appeals adopted the leading national test for disqualifying misconduct:

the intended meaning of the term "misconduct," . . . is limited to conduct evincing such *willful or wanton disregard of an employer's interests* as is found in[:]

- (1) deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee, or

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24. 10 Wash. App. 437, 517 P.2d 973 (1974).

- (2) in carelessness or negligence of such degree or recurrence as to manifest equal culpability, wrongful intent or evil design, or
- (3) to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to his employer.
- (4) On the other hand mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good-faith errors in judgment or discretion are not to be deemed "misconduct" within the meaning of the statute.<sup>25</sup>

The court in *Willard* characterized the essential issue in applying this test for misconduct as determining "whether the conduct of the employee manifests 'willful or wanton disregard of the employer's interests.'"<sup>26</sup> In *Willard*, hotel maids refused an order by hotel management to clean an extra room, believing that this would violate their unwritten bargaining agreement.<sup>27</sup> In applying the test, the court held that the refusal was an "unreasonable and intentional disregard of their employer's interest which amounted to 'misconduct' within the meaning of RCW 50.20.060,"<sup>28</sup> despite the maids' belief that the rule violated an oral labor agreement.

Division Three of the Court of Appeals, in *Shaw v. Employment Sec. Dept.*,<sup>29</sup> adopted the "willful or wanton disregard" test set out in *Willard*.<sup>30</sup> In holding that a tardy employee did not exhibit "willful or wanton disregard of [his] employer's interest," the *Shaw* court looked to the frequency of and the reasons for the tardiness.<sup>31</sup> The claimant was late 14 times in 15 months and the final instance of tardiness before his termination was for a good reason.<sup>32</sup> The court held that the claimant's tardiness did not constitute misconduct, stating that it applied the test consistently with "the principle that the disqualification provisions in the unemployment compensation act are

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25. *Id.* at 444, 517 P.2d at 977-78 (emphasis and enumeration added) (citing *Boynton Cab Co. v. Newbeck*, 296 N.W. 636 (Wis. 1941)).

26. *Id.* at 445, 517 P.2d at 978 (quoting WASH. REV. CODE § 50.20.060 (1996)).

27. *Id.* at 438, 517 P.2d at 974.

28. *Id.* at 446-47, 517 P.2d at 978-79.

29. 46 Wash. App. 610, 731 P.2d 1121 (1987).

30. *Id.* at 613-14, 731 P.2d at 1123.

31. *Id.* at 614, 731 P.2d at 1123.

32. *Id.* at 611-12, 731 P.2d at 1122.

liberally construed in favor of the employee.”<sup>33</sup> The court emphasized that each case had to be decided on its own facts.<sup>34</sup>

## 2. Intentional Disobedience

In reaction to the convoluted “willful or wanton disregard” standard adopted in *Willard*, Division Two of the Court of Appeals applied a standard-based culpability element based on intentional disobedience in *Durham v. Department of Employment Security*.<sup>35</sup> The *Durham* court reiterated the policy behind the Employment Security Act: “to provide for those who become unemployed through no fault of their own.”<sup>36</sup> In *Durham*, the claimants walked away from a job draining a furnace of molten copper after a direct order to stay and finish the job.<sup>37</sup> It was clear to the workers that they would have to work overtime to complete the job, which they refused to do.<sup>38</sup> Replacement workers completed the job in five minutes.<sup>39</sup>

The court reviewed *Willard* and, after rejecting the “willful or wanton disregard” test, generated its own test for determining disqualifying misconduct:

1. The employer’s order must have been reasonable.
2. The employee’s disobedience must have been intentional.
3. The consequences of disobedience to the employer must have been of substance and not merely trivial.
4. There must have been no overriding health or safety factors to excuse disobedience.<sup>40</sup>

In applying the test, the court held that (1) the order to stay was “manifestly reasonable,” (2) the claimants’ disobedience was “obviously intentional,” (3) there were potentially very serious consequences, and (4) no mitigating health or safety factors were present.<sup>41</sup> Consequently, the court held that the claimants were fired for misconduct connected to their work.<sup>42</sup> The claimants should have obeyed the order to finish the job and submitted a grievance under the collective bargaining agreement instead of walking off the job.

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33. *Id.* at 615, 731 P.2d at 1124.

34. *Id.* at 614-15, 731 P.2d at 1123.

35. 31 Wash. App. 675, 644 P.2d 154 (1982).

36. *Id.* at 678, 644 P.2d at 157 (quoting WASH. REV. CODE § 50.01.010 (1996)).

37. *Id.* at 677, 644 P.2d at 156.

38. *Id.*

39. *Id.*

40. *Durham*, 31 Wash. App. at 679, 644 P.2d at 157.

41. *Id.*

42. *Id.*

The intentional disobedience culpability element was again used by Division Two in *Darneille v. Department of Employment Security*,<sup>43</sup> in which the court affirmed the test set out in *Durham* and explicitly rejected the "willful or wanton disregard" test adopted in *Willard*.<sup>44</sup> Claimant Darneille, a cashier, was repeatedly counseled and warned about errors in cash register procedure.<sup>45</sup> After being disciplined and put on probation, she committed two more errors and was subsequently terminated.<sup>46</sup> The administrative law judge found these errors to be unintentional and negligent.<sup>47</sup>

The determinative issue before the *Darneille* court was whether the claimant's acts which led to her termination were done intentionally; in other words, whether she subjectively "intend[ed] to disobey the employer's rules or orders."<sup>48</sup> In applying the intentional disobedience test, the court held that Darneille had no intent to cause the errors, even though Darneille repeatedly violated the rules after warnings from her employer.<sup>49</sup> Therefore, her state of mind did not rise to the level of culpability required by the test.

### 3. Knowing Disregard

The Washington Supreme Court generated its own test for misconduct in *Nelson v. Department of Employment Security*,<sup>50</sup> which included a culpability element based on knowing disregard of the employer's interests. The claimant, a cashier for the employer, was arrested for and pleaded guilty to shoplifting.<sup>51</sup> Because of the employer's concern regarding the claimant's lack of trustworthiness, she was fired after informing her supervisor of the conviction.<sup>52</sup> The shoplifting occurred while the claimant was not on duty, and not on the premises of the employer.<sup>53</sup>

In concluding that the claimant's off-duty criminal behavior was not misconduct, the court adopted a test with a clear culpability standard requiring knowledge or intent of harm to the employer:

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43. 49 Wash. App. 575, 744 P.2d 1091 (1987).

44. *Id.* at 577-78, 744 P.2d at 1093.

45. *Id.* at 576-77, 744 P.2d at 1092.

46. *Id.* at 576, 744 P.2d at 1092.

47. *Id.*

48. *Darneille*, 49 Wash. App. at 578, 744 P.2d at 1094.

49. *Id.* at 579, 744 P.2d at 1094.

50. 98 Wash. 2d 370, 655 P.2d 242 (1982).

51. *Id.* at 371, 655 P.2d at 243.

52. *Id.* at 371-72, 655 P.2d at 243.

53. *Id.*



[T]he employee's conduct (1) had some nexus with her work; (2) resulted in some harm to the employer's interest; and (3) was in fact conduct which was (a) violative of some code of behavior contracted for between employer and employee, and (b) done with intent or knowledge that the employer's interest would suffer.<sup>54</sup>

The court stressed that the contractual agreement need not be formal or written, but could be in the form of "reasonable rules and regulations of the employer of which the employee has knowledge and is expected to follow."<sup>55</sup> Therefore, the employee had to have actual knowledge of the rule for his acts to be labeled misconduct.

The court determined that Nelson's act of shoplifting was not directly related to her job as a cashier. Her employer fired her because of the employer's concern about her trustworthiness, not because of any rule violation.<sup>56</sup> The court stressed that for behavior occurring outside the scope and course of employment to be considered misconduct, the employer must show a violation of a rule or regulation reasonably related to the employer's business.<sup>57</sup>

#### 4. Principle-Based Tests

Recognizing that the willful or wanton disregard test was confusing, the Washington Supreme Court set out a more workable test based on principles invoked in other cases. The court developed this test implicitly in *Macey v. Department of Employment Security*,<sup>58</sup> and then the court refined and explicitly stated the test in *Tapper v. Employment Security Department*.<sup>59</sup> The *Macey* court characterized the knowing disregard standard developed in *Nelson* as applying only to off-the-job, off-premises cases, as a contrast to the court's newly adopted principle-based test applying to on-duty or on-site cases.<sup>60</sup> The claimant in *Macey* gave a false answer in response to a resume question regarding past criminal convictions.<sup>61</sup> After working for the employer for six years, he was fired after the employer found out about a past conviction.<sup>62</sup>

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54. *Id.* at 375, 655 P.2d at 245.

55. *Nelson*, 98 Wash. 2d at 374, 655 P.2d at 244.

56. *Id.* at 371, 655 P.2d at 243.

57. *Id.* at 374, 655 P.2d at 244-45 (citing *Glese v. Employment Div.*, 557 P.2d 1354, 1357 (Or. Ct. App. 1976)).

58. 110 Wash. 2d 308, 752 P.2d 372 (1988).

59. 122 Wash. 2d 397, 858 P.2d 494 (1993).

60. *Macey*, 110 Wash. 2d at 314-15, 752 P.2d at 376.

61. *Id.* at 310, 752 P.2d at 373.

62. *Id.* at 310-11, 752 P.2d at 373.

The court emphasized that the focus of the Act was on the conduct and fault of the employee.<sup>63</sup> In reformulating a test for disqualifying misconduct, the court framed the test in the policy and purpose of the Employment Security Act: "The policy of the act is to 'benefit . . . persons unemployed through no fault of their own'; the act is to be liberally construed for the purpose of reducing involuntary unemployment."<sup>64</sup> The court stated that misconduct connected with the employee's work would be disqualifying if it was such that unemployment was "in effect voluntary."<sup>65</sup> The test developed by the court contained three elements: (1) the rule or regulation "must be reasonable under the circumstances of employment"; (2) the conduct must be connected with the employee's work; and (3) the misconduct must violate the rule.<sup>66</sup>

While not explicitly developing a culpability element, the *Macey* court stated some principles touching on the state of mind necessary for disqualifying misconduct: (1) "unsatisfactory job performance whether stemming from inability to perform, errors of judgment or ordinary negligence does not constitute misconduct"; (2) intentional conduct is disqualifying misconduct if it also satisfies the three criteria above; (3) intentional conduct is not necessary to show misconduct; and (4) "repeated, but unexcused acts, especially after notice or warnings or in violation of established rules, may be of sufficient magnitude to constitute misconduct."<sup>67</sup>

In applying the test and these culpability principles to the facts of the case, the *Macey* court held that writing a false answer to a question regarding past criminal convictions constituted misconduct.<sup>68</sup> The application question and the employer's decision to fire the worker were reasonable, especially where the applicant was not necessarily barred from employment if he had had a criminal conviction.<sup>69</sup> The false answer was connected to the employee's work because the employer legitimately expected and relied upon an honest answer.<sup>70</sup> Finally, the employee intentionally supplied a false answer, because he was afraid he would not be hired if he told the truth about his prior

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63. *Id.* at 318, 752 P.2d at 377.

64. *Id.* at 315-16, 752 P.2d at 376 (quoting WASH. REV. CODE § 50.01.010 (1996)).

65. *Macey*, 110 Wash. 2d at 316, 752 P.2d at 376.

66. *Id.*

67. *Id.* at 318, 752 P.2d at 377-78.

68. *Id.* at 321, 752 P.2d at 379.

69. *Id.* at 320, 752 P.2d at 378.

70. *Macey*, 110 Wash. 2d at 320, 752 P.2d at 378.

conviction and his current parole status.<sup>71</sup> As the misconduct in question was intentional, the culpability requirements outlined in the principles were met.<sup>72</sup>

In *Tapper v. Employment Security Department*, the court explicitly expanded the principle-based culpability element implied by *Macey* by adding a fourth element to the *Macey* test:

- (4) The violations must be intentional, grossly negligent, or continue to take place after notice or warnings. That is, the behavior cannot be characterized as mere incompetence, inefficiency, erroneous judgment, or ordinary negligence.<sup>73</sup>

Emphasizing that the focus of the statute was on the fault of the employee,<sup>74</sup> the court recognized that even repeated warnings "do not transform incompetence into misconduct if the employee is basically incapable of the desired level of performance."<sup>75</sup> The claimant, however, refused to follow the instructions given to her and the procedures of the workplace.<sup>76</sup> The court thus concluded that this met the requirements of the culpability element.<sup>77</sup>

### 5. Summary of Pre-Statute Judicial Opinions

The culpability tests developed by the courts prior to the promulgation of the statutory definition varied. Even when the Washington Supreme Court stepped in to heal a divisional split and generated its own knowing disregard test in *Nelson v. Department of Employment Security*,<sup>78</sup> the test of culpability was not rigidly fixed. Five years later, in *Macey v. Department of Employment Security*, the court characterized that decision as applying only to conduct unrelated to the workplace.<sup>79</sup> The *Macey* court developed a principle-based culpability element, which applied to conduct directly related to the workplace. However, this culpability element was only implicit within the opinion. The legislature, reacting to the *Macey* court's apparent lack of a culpability element, promulgated its own standard in the form of a statutory definition of misconduct: "'Misconduct' means an employee's act or failure to act in willful disregard of his or her

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71. *Id.*

72. *Id.*

73. *Tapper*, 122 Wash. 2d at 409, 858 P.2d at 502.

74. *Id.* at 409, 858 P.2d at 501.

75. *Id.* at 411, 858 P.2d at 502.

76. *Id.* at 411, 858 P.2d at 503.

77. *Id.*

78. 98 Wash. 2d 370, 655 P.2d 242 (1982).

79. 110 Wash. 2d at 314-15, 752 P.2d at 376.

employer's interest, where the effect of the employee's act or failure to act is to harm the employer's business."<sup>80</sup> The first published case to apply the statutory definition appeared three years later.<sup>81</sup>

*B. Interpretations of the 1993 Statutory Definition of  
Disqualifying Misconduct*

1. Intentional Conduct

The first opinion applying the statutory misconduct definition implied that misconduct must be intentional in order to disqualify a claimant from receiving unemployment compensation benefits. The Court of Appeals of Washington, Division Three, in *Keenan v. Employment Security Department*<sup>82</sup> stated that the evidence in the record supported the findings that the claimant's behavior in knocking a coworker into a filing cabinet was "intentional and willful,"<sup>83</sup> and that she was fired for "willful misconduct."<sup>84</sup> The court, however, did not elaborate any further on the state of mind necessary for disqualifying misconduct.

The court was unclear as to the exact holding and failed to distinguish whether the claimant met the culpability test because (1) she intentionally committed an act, and that act was determinative of her disregard of her employer's interests; or (2) she committed an act and intentionally disregarded her employer's interests.<sup>85</sup> The difference between the two is subtle: in the first, the claimant must intentionally commit an act, and in the second, the claimant must intentionally disregard the employer's interests in committing the act. Also unclear is whether the test required subjective intent or objective intent. The determinative evidence of intent was the observations of the claimant's conduct by her coworkers.

Division Three continued to apply an intentional test for misconduct in later cases. In *Antoni v. Employment Security Department*,<sup>86</sup> an unpublished case, the court applied a subjective, intentional

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80. WASH. REV. CODE § 50.04.293 (1993); Act of July 25, 1993, ch. 483, § 1, 1993 Wash. Laws 2017, 2017.

81. *Tapper* was not decided under the statute because the claimant was terminated prior to the effective date of the legislation.

82. 81 Wash. App. 391, 914 P.2d 1191 (1996).

83. *Id.* at 395, 914 P.2d at 1193.

84. *Id.* at 393, 914 P.2d at 1192.

85. *See id.* at 395, 914 P.2d at 1193. The court merely states that "the evidence supports the ALJ's findings that Ms. Keenan's physical contact with another employee was intentional and willful." *Id.*

86. No. 15764-4-III, 1997 Wash. App. LEXIS 1183 (Wash. Ct. App. July 24, 1997).

test for culpability. The court concluded that there was no disqualifying misconduct when a vehicle-licensing employee was fired for treating customers rudely.<sup>87</sup> The employer admitted that he did not believe the employee was "intentionally" rude or that she was "deliberately" trying to harm his business.<sup>88</sup> Based on the employer's statements, the court affirmed the commissioner's decision that the claimant did not act willfully.<sup>89</sup>

The *Antoni* opinion clarified the test applied in *Keenan*. The *Antoni* court distinguished the facts and conclusion of that case from those in *Keenan* by emphasizing that in the latter, "the physical contact was willful within the terms of [the statutory definition]."<sup>90</sup> Under the intentional culpability test applied by Division Three, therefore, the act must be intentional, but not necessarily performed with the intent to harm the employer's business.

## 2. Principle-Based Tests

A second line of cases in Division One has adopted a principle-based culpability test in interpreting the statutory definition. These cases have used as a guideline the culpability element of the Washington Supreme Court's test for misconduct delineated in *Tapper*.<sup>91</sup> The principle-based test for interpreting the statutory definition was first adopted in *Wilson v. Employment Security Department*.<sup>92</sup>

In order to constitute misconduct, an employee's violation of an employer's rule "must be intentional, grossly negligent, or continue to take place after notice or warning." Behavior that is mere incompetence, inefficiency, erroneous judgment, or ordinary negligence does not constitute misconduct for purposes of denying unemployment compensation.<sup>93</sup>

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87. *Id.* at \*5.

88. *Id.* at \*4.

89. *Id.*

90. *Id.* at \*5-\*6.

91. *Tapper*, 122 Wash. 2d at 409, 858 P.2d at 502. Another unpublished Division Three case, decided after *Antoni*, used the *Tapper* test to decide whether misconduct existed. See *Patrick v. Employment Sec. Dept.*, No. 14683-9-III, 1998 Wash. App. LEXIS 285 (Wash. Ct. App. Feb. 24, 1998). Because the date of separation was before the effective date of the statutory definition, the case was decided under the *Tapper* test, which includes a principle-based culpability standard. *Id.* at \*5. The determination of culpability was unremarkable. The court held that the claimant's intentional acts of copying confidential documents after warnings not to do so met the criteria for the fourth (culpability) element of the *Tapper* test.

92. 87 Wash. App. 197, 940 P.2d 269 (1997).

93. *Id.* at 202, 940 P.2d at 272 (quoting *Tapper*, 122 Wash. 2d at 407, 858 P.2d at 502) (other citations omitted).

The *Wilson* court determined that the actions of the claimant (a jewelry store manager), who lost diamonds in his possession on two occasions because of his delay in logging them into the store inventory, were no more than "negligence, incompetence, or an exercise of poor judgment."<sup>94</sup> His negligence also did not follow notice or warnings.<sup>95</sup>

The *Wilson* court therefore held that his actions did not constitute disqualifying misconduct. The claimant intended to comply with store policy by logging in the diamonds and putting them in a safe.<sup>96</sup> The court noted that there was no explicit policy regarding the length of time the claimant had to log in the diamonds.<sup>97</sup> Emphasizing that sufficient grounds for discharge did not necessarily satisfy the requirements of disqualifying misconduct, the court determined that since the claimant was not motivated by "defiance, bad faith or indifference to the consequences of his actions," his conduct did not rise to the level of statutory misconduct.<sup>98</sup>

Several months later, another Division One court, in *Galvin v. Employment Security Department*, applied the same principle-based culpability test.<sup>99</sup> After reviewing the history of the misconduct definition, the *Galvin* court declared that both the new statutory definition and the principle-based test from *Tapper* were consistent with the language of the willful or wanton disregard culpability test adopted in *Shaw*.<sup>100</sup> Because there was consistency between the *Tapper* principle-based test and the statutory definition, the court stated that the *Wilson* court's principle-based culpability test was a fair interpretation of the legislature's intent in enacting the statutory definition.<sup>101</sup> The court determined that the claimant was discharged for disqualifying misconduct when she intentionally left work early to take care of personal business.<sup>102</sup> However, she could not be disqualified from receiving benefits solely for uncontrollable absences resulting from her own illness.<sup>103</sup>

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94. *Id.* at 202, 940 P.2d at 272.

95. *Id.* at 202, 940 P.2d at 273.

96. *Id.* at 202, 940 P.2d at 272.

97. *Id.* at 203, 940 P.2d at 273.

98. *Id.* at 204-05, 940 P.2d at 274.

99. 87 Wash. App. 634, 942 P.2d 1040 (1997).

100. *Id.* at 642-43, 942 P.2d at 1044.

101. *Id.* at 643-44, 942 P.2d at 1045.

102. *Id.* at 645, 942 P.2d at 1145.

103. *Id.* at 645, 942 P.2d at 1045.

The court in *Dermond v. Employment Security Department*<sup>104</sup> again affirmed the use of the principle-based test from *Tapper* in interpreting the statutory definition. The court stated that the claimant's continuous refusal to remedy or even discuss questionable work performance failed to comply with her employer's reasonable order and was "intentional and came after warning that termination would occur [and therefore] was not a mere error in judgment."<sup>105</sup> The court thus held that she had a state of mind sufficient to disqualify her for misconduct.<sup>106</sup>

One opinion, however, was different than the other principle-based cases. In a unique, unpublished opinion from Division Three, the court in *Waters v. Department of Employment Security*<sup>107</sup> applied the *Macey* principle-based test. The claimant, a helicopter pilot for a private company, failed to check-in as required and was repeatedly insubordinate and hostile.<sup>108</sup> Instead of inferring culpability principles from the opinion, as the *Tapper* court had done, the *Waters* court used the culpability and harm elements of the statutory definition as a supplement to the other elements of the *Macey* test.<sup>109</sup> The court held that the claimant's conduct amounted to willful disregard of his employer's interest.<sup>110</sup>

### C. Summary of Post-Statute Cases

There are two main groupings of cases interpreting the statutory definition. The Division Three cases apply an intentional culpability element interpreted directly from the language of the statutory definition. *Waters* seems to be an aberration, using the elements from the statutory definition to add to the test provided in *Macey*. The Division One cases clearly adopt the principle-based culpability test developed in *Tapper*, which itself was derived from principles expounded by the *Macey* court. Division Two has yet to decide a case involving the statutory definition, although it will have the opportunity soon.<sup>111</sup> A divisional split has thus developed. This creates an opportunity for the Washington Supreme Court to heal the divisional

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104. 89 Wash. App. 128, 947 P.2d 1271 (1997).

105. *Id.* at 133, 947 P.2d at 1274.

106. *See id.*

107. No. 15214-6-III, 1997 WL 328799 (Wash. Ct. App. June 17, 1997).

108. *Id.* at \*1-\*2.

109. *Id.* at \*4.

110. *Id.*

111. *See supra* note 11.

split and allow businesses, attorneys, and the Department to apply a uniform standard.

### III. THE NELSON KNOWING DISREGARD TEST: THE MOST APPROPRIATE TEST FOR INTERPRETING THE STATUTORY DEFINITION

The culpability tests currently applied by the courts of appeal are not the most appropriate to use in interpreting the statutory definition. Nor are they the interpretations intended by the legislature in promulgating the statute. Rather, the knowing disregard culpability test delineated in *Nelson v. Department of Employment Security* is the most appropriate interpretation of the statutory definition.<sup>112</sup>

How would a court or an administrative law judge apply a knowing conduct test? There are two considerations: (1) whether the test is based on objective or subjective knowledge, and (2) what is meant by someone acting "with knowledge."

Should the knowing conduct culpability standard use an objective or subjective test? The culpability element ("with intent or knowledge that the employer's interest would suffer")<sup>113</sup> would be applied very differently depending on which test was used. An objective test would be based on the actions of a reasonable person in the shoes of the worker. The behavior of any given worker would be compared with the behavior of this reasonable person. Did the worker act when a reasonable person would realize that this particular conduct would be against the employer's interests? If so, the worker has acted in willful disregard of his employer's interests.

A subjective test, on the other hand, would focus solely on the worker's state of mind at the time of the alleged misconduct. Did the worker act with actual knowledge that the employer's interests would suffer? If so, the worker has acted in willful disregard of his employer's interests.

The objective test is the better test for purposes of defining instances of misconduct. While the wording of the knowing disregard element, as well as the misconduct statute, might imply a focus on the subjective state of mind of the worker, an objective test would be more consistent in its application and easier to apply. Although there could be no per se legal standard defining a particular behavior as misconduct in all contexts, an objective test allows for more consistent decisions by eliminating consideration of an individual's particular

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112. 98 Wash. 2d at 375, 655 P.2d at 245.

113. *Id.*



psychological idiosyncrasies. Instead, focus is placed on a generic person in the particular situation and context of the claimant. In addition, shifting the focus away from an individual's state of mind would eliminate the need for the finder of fact to determine retrospectively the actual thought processes of the worker, making the test easier to apply than a subjective test. An objective test would also be more faithful to the intent of the legislature.<sup>114</sup>

Using the culpability standards more fully developed in other areas of law will help in determining when one acts with knowledge. Under Washington criminal law, a person acts knowingly or with knowledge when she has information which would lead a reasonable person similarly situated to be aware of facts, circumstances, or results described by a criminal statute.<sup>115</sup> In the criminal context, a person acts "willfully" by, *inter alia*, acting knowingly.<sup>116</sup>

Translating the criminal standards into a form usable for our purposes, an employee would act with knowledge as required by the knowing disregard element if she was aware of facts or circumstances which would lead a reasonable person in the same situation to believe that her action would be against or probably cause harm to her employer's interest. As in the criminal statute, willful disregard would be satisfied by acting with knowledge. This definition of knowledge is broader than actual, subjective knowledge. It is much closer to the concept of constructive knowledge.

Applying this test to a hypothetical will be helpful. A truck driver employee is speeding down a wet road, driving too fast for safety under the weather conditions. He has an accident and exposes the employer to liability for property damage and injury. As the driver did not intend to cause the accident, an intentional conduct test would allow him to receive benefits. To apply the principle-based test from *Wilson*, the court would focus on whether the truck driver was grossly negligent or was previously cited for reckless driving.

Using the knowing disregard test, however, the court would focus on an objective test: whether a reasonable truck driver would deduce

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114. See *infra* Part III.A.

115. See WASH. REV. CODE § 9A.08.010 (1996).

(1)(b) Knowledge. A person knows or acts knowingly or with knowledge when:

- (i) he is aware of a fact, facts, or circumstances or result described by a statute defining an offense; or
- (ii) he has information which would lead a reasonable man in the same situation to believe that facts exist which facts are described by a statute defining an offense.

116. WASH. REV. CODE § 9A.08.010(4) (1996).

from his speeding on a rainy day that he has increased his chances of an accident, which would probably be against the employer's interests? By speeding on a rainy day, when a reasonable truck driver would slow down, the truck driver employee disregards his employer's interest in preventing accidents that lead to liability, and thereby engages in disqualifying misconduct.

The knowing disregard test detailed above is the test most consistent with both the legislature's intent in creating the statutory definition and the policies and purposes of the Employment Security Act.

### A. Legislative History

The legislative history of the statute is the strongest evidence supporting the use of the knowing disregard culpability element in interpreting the statutory definition. The Final Legislative Report characterized the purpose of the statute: to define disqualifying misconduct and to supersede a Washington Supreme Court definition of misconduct, which was overly broad and required neither a culpability element nor harm to the employer's interest.<sup>117</sup> The House Bill Report on the statute identified the *Macey* test (which implicitly included the principle-based standard) as the case law test to be replaced.<sup>118</sup> The purpose of the bill was to limit the definition of misconduct, and thus expand the number of eligible claimants for unemployment benefits from the number who would be allowed under *Macey*.<sup>119</sup>

A memo written on the proposed definition of misconduct by a staff attorney for the Senate Committee on Labor and Commerce<sup>120</sup> criticized the *Macey* decision, and proposed the test developed in *Nelson*, including its knowing disregard culpability element, as an appropriate interpretation of the statutory definition.<sup>121</sup> The memo cited and followed the *Macey* dissent closely, criticizing the majority decision as (1) not requiring intent/knowledge of the harmful nature

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117. State of Wash., 1993 Final Legis. Report on Regulating Unemployment Insurance, S. 53-ESSB 5702, Reg. Sess. 288 (Wash. 1993).

118. H.R. 53-ESSB 5702, Reg. Sess. 2 (Wash. 1993).

119. S. 53-SB 5464, Reg. Sess. 1 (Wash. 1993).

120. Senate Comm. on Labor & Commerce, Memorandum on Definition of "Misconduct," S. 53-SB 5464, Reg. Sess. (Wash. 1993). Written by David Cheal on March 11, 1993, this memo [hereinafter Misconduct Memo] was sent to Christine Cordes, his counterpart at the House Committee on Commerce and Labor (on file with the *Seattle University Law Review*).

121. *Id.* The memo was actually written on SB 5464. SB 5464 was the statute which originated the misconduct definition found in WASH. REV. CODE § 50.04.293. It was subsumed into ESSB 5702 by an amendment. The latter bill eventually became law.

of their behavior, (2) not requiring harm to the employer, (3) being logically inconsistent and superfluous in some areas, and (4) requiring one test for on-duty conduct and another for off-duty.<sup>122</sup>

The memo noted that both the majority and dissent in *Macey* cited the overall purpose of the Act: "to protect against the impact of involuntary unemployment through no fault of the employee."<sup>123</sup> As discussed in many court cases, this purpose placed the focus of a court's attention on the degree of fault of the employee, creating a fault-based unemployment compensation system. The memo also restated the policy of unemployment insurance: "benefits should be available to those otherwise eligible except in the clearest of cases—where the conduct that led to termination is so clearly culpable as to amount to voluntary unemployment."<sup>124</sup> The *Macey* court's opinion did not explicitly require a culpability element in its test, but nonetheless rejected negligence as sufficient to constitute disqualifying misconduct. The memo author asked how one could find fault without some standard of culpability.<sup>125</sup>

In contrast to his criticism of *Macey*, the author of the memo argued that the proposed statutory definition included all of the elements of the *Nelson* test,<sup>126</sup> including the knowing conduct culpability requirement. Both the *Nelson* test and the statutory definition required actual harm to the employer's interest. The "willful disregard of the employer's interest" culpability element of the statutory definition corresponded to the requirements of intentional or knowing conduct that violated expected behavior contracted for between employer and employee. The employer's interest was inferred from the contract. The employee's willful disregard of the employer's interests could be shown by either intentional disregard, or conduct done with actual or constructive knowledge that the employer's interests would suffer.<sup>127</sup>

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122. Misconduct Memo, *supra* note 120, at 2; see also *Macey*, 110 Wash. 2d at 324, 752 P.2d at 380 (Dore, J., dissenting).

123. Misconduct Memo, *supra* note 120, at 2.

124. *Id.* (citing *Macey*, 110 Wash. 2d at 324, 752 P.2d at 380).

125. *Id.*

126. The first element of the *Nelson* test requires nexus with the employee's work, which is not part of the statutory definition. However, this Comment argues that this is not necessary, as WASH. REV. CODE § 50.20.060 states that an employee can be disqualified for misconduct "connected with his or her work." Therefore, the nexus element is provided by the disqualifying misconduct statute (WASH. REV. CODE § 50.20.060) and is not required to be part of the statutory definition of misconduct laid out in WASH. REV. CODE § 50.04.293. Of course, the conduct must still meet the requirement of being connected with work.

127. The memo notes: "Employers are apparently concerned about the knowledge element, in particular that it could be construed to mean actual knowledge, or sometimes referred to as

The legislative history supports the application of the knowing disregard culpability test in interpreting the culpability element of the statutory definition of misconduct. The main purpose of the statutory definition was to overrule the *Macey* Court's opinion. An ancillary purpose was to reduce the number of disqualifications for misconduct produced by the overly broad *Macey* test. The research memo drafted for the Senate committee that was considering the statutory definition supported the use of the *Nelson* test, including its knowing disregard culpability element, as the best interpretation of the statutory definition. As the memo was part of the committee files, the *Nelson* test and its knowing disregard element was arguably in the minds of members of both committees when they recommended the statutory definition to the Legislature.

No other interpretation is supported by the legislative history. An interpretation of the misconduct definition using an intentional test is not supported because of its omission in both the memo and the language of the statute. The legislature certainly could have used "intentional" or "purposeful" as the sole culpability test; many Washington courts have used that language as *part* of their culpability tests since the first standard set out in *Willard*.<sup>128</sup> Therefore, the intentional culpability requirement in Division Three's recent cases is not supported by legislative history.

To the extent that the principle-based culpability test applied in *Tapper* was based implicitly on the *Macey* opinion, the refutation by the legislature of the *Macey* test would apply also to the principle-based culpability test derived from *Tapper* and used by Division One (i.e., *Wilson* and its progeny). Neither the intentional nor the principle-based tests, therefore, are supported by the legislative history. The legislature clearly intended a test closer to the knowing disregard test.

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subjective intent. The bill could be amended to limit the intent requirement to an objective standard, i.e., what a reasonable person should have known in the circumstances." Misconduct Memo, *supra* note 120, at 2. It suggests possible express language in the statute which would define "willful" as an "imputed appreciation of the logical and natural consequences of one's acts or omissions as understood by a person of reasonable intelligence and perception," but this was never included in an amendment. *Id.*

128. See, e.g., *Tapper v. Employment Sec. Dept.*, 122 Wash. 2d 397, 858 P.2d 494 (1993); *Macey v. Dept. of Employment Sec.*, 110 Wash. 2d 308, 752 P.2d 372 (1988).

### B. Policy

Using a knowledge-based culpability test also furthers the policy goals of the Employment Security Act. The Preamble to the Act states that the overall purpose of the Act is to "benefit . . . persons unemployed through no fault of their own."<sup>129</sup> The Act should be liberally construed for the purpose of reducing involuntary unemployment and the suffering caused by involuntary unemployment.<sup>130</sup>

Some courts have focused on the fault of the employee by asking the question of whether the employee's "unemployment is in effect voluntary."<sup>131</sup> As the fund providing benefits to unemployment compensation claimants is made up mostly of employer contributions, it would be unfair to employers for the fund to compensate employees who were discharged for misconduct.<sup>132</sup> In addition, courts have recognized that the misconduct disqualification is penal in nature and serves as a general deterrent to employee misconduct.<sup>133</sup> However, they have also made a distinction between good cause for firing an employee and disqualifying misconduct under the Employment Security Act.<sup>134</sup> Disqualifying misconduct is necessarily a higher standard.

As a whole, the policy informing the Employment Security Act promotes a balanced approach. To focus solely on protecting all claimants and construing the Act liberally would allow for benefits to those terminated for serious misconduct. This would place a serious burden on the unemployment compensation fund and eliminate whatever deterrent effects a misconduct disqualification would provide. However, to focus solely on protecting the fund and employers from those claimants fired for cause and punishing claimants for unintentional conduct would undermine the express purpose of the Act to reduce the suffering caused by involuntary unemployment. Therefore, a balanced approach is called for.

The policy goals of the Employment Security Act are protected by using the knowing disregard test set out in *Nelson*. By requiring the employee's purposeful intent or constructive knowledge that her conduct would harm the employer's interests, the test puts the focus

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129. WASH. REV. CODE § 50.01.010 (1996).

130. *Id.*

131. *See, e.g., Tapper*, 122 Wash. 2d. at 409, 858 P.2d at 501.

132. *Id.*

133. *Id.*

134. *See, e.g., Wilson v. Employment Sec. Dept.*, 87 Wash. App. 197, 204-05, 940 P.2d 269, 274 (1997).

of the court's investigation on the employee's actions in light of his motivation and knowledge. This culpability test would disallow benefits only in cases where there is actual harm to the employer caused by the employee who knew or should have known (based on facts known to him) that the employer's interests might be harmed because of his actions. This aspect protects claimants who were fired for cause, but not for bad faith or unreasonable acts. The test allows benefits only to those claimants who could not reasonably foresee harm to an employer's interests from their actions. This aspect protects the fund and employers from paying unemployment benefits to claimants terminated for intentional misconduct or unreasonable acts which the employee should have known would cause harm to the employer. Thus, the knowing disregard culpability test still promotes a deterrent effect.

Other options do not further the policy goals. If no culpability element were required, such as in a test for misconduct requiring only a rule violation, the policy goals focusing on fault and a liberal interpretation of the Act benefiting the claimant would not be supported. A search for fault that amounts to voluntary termination, a higher standard than that necessary for discharge, requires a focus on the state of mind of the employee. Without a culpability test, the search for "voluntary" termination would be irrelevant. Every employee who was terminated for cause would simultaneously be unable to collect unemployment benefits, eliminating the distinction between the two.

Likewise, the principle-based culpability test is too broad in disqualifying claimants from benefits. It includes grossly negligent acts, which by its definition are not included in knowing or intentional conduct. It would disqualify from benefits claimants who in their particular situation could not reasonably foresee the results of their actions. Gross negligence is also a vague concept and not amenable to clear definition, which would lead to unpredictable results.

At the other extreme, if purposeful disregard of the employer's interest were required, a determination of misconduct could be extremely rare, hurting employers and the court system. Employers would be legitimately frustrated with the compensation system to which they contribute. Employees who committed gross wrongs against their employers would be allowed unemployment benefits at the expense of their employers. The courts would spend much of their time trying to understand the thoughts of the employee at the time of his or her conduct—a nearly impossible task. Having available an

objective test for determining knowing disregard, the agency and courts may efficiently go about their task of determining misconduct.

#### IV. CONCLUSION

The definition of disqualifying misconduct has been changed many times by Washington courts in the history of the Employment Security Act, especially in the last fifteen years. The legislature intervened in 1993 to codify a definition which met the policies and purposes of the Act. As there is again a split among the Divisions of the Court of Appeals, the Supreme Court of Washington might ultimately decide the correct interpretation of the new statutory definition. Based on the policies of the Employment Security Act and the legislative history of the statutory definition of misconduct, this Comment contends that the correct interpretation of the culpability element found in the statutory definition is that of a knowing disregard culpability test—specifically the test found in *Nelson*. This standard, rather than the tests adopted by the Courts of Appeal, best balances the policies of the Employment Security Act and includes the culpability requirement intended by the Legislature when that body enacted the statutory definition codified in Wash. Rev. Code 50.04.293.

#### EPILOGUE

Since this Comment was finalized, a Division Two panel issued an opinion interpreting the statutory definition of misconduct differently than Divisions One and Three. Independent of the positions taken by the parties or the opinions of other courts, the court in *Hamel v. Employment Sec. Dep't*<sup>135</sup> developed its own test for misconduct, with a “should have known” culpability element: [A]n 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.<sup>136</sup> The “should have known” standard requires an intentional act, but the actor need not intend harm to the employer or even subjectively know that his actions will probably harm the interests of the employer.<sup>137</sup>

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135. 1998 Wash. Ct. App. No. 22919-6-II, 966 P.2d 1282.

136. *Id.* at ¶ 19, 966 P.2d at 1286.

137. *Id.* at ¶ 20, 966 P.2d at 1286.

This is an objective test, relying on whether a "reasonable person" would consider an act harmful to an employer's interest.<sup>138</sup>

The *Hamel* court rejected the principle-based test<sup>139</sup> of the *Macey* and *Tapper* courts both because the test was superseded by the statutory definition, and because the test allowed a court to find misconduct solely on the basis of "repeated warnings."<sup>140</sup> Consequently, the court criticized Division One cases for adopting the principle-based culpability element for use in interpreting the statutory definition.<sup>141</sup> While "repeated warnings" cannot be the sole reason to deny benefits, the court said, such warnings might provide "strong evidence of the employee's knowledge that the conduct is inconsistent with the employer's interest."<sup>142</sup>

Applying the "should have known" standard, the court held that Hamel willfully disregarded his employer's interests. Hamel, in spite of two reprimands and knowing about Red Robin's strict written policy against sexual harassment, made inappropriate, sexual comments to coworkers or customers on three occasions.<sup>143</sup> Hamel was "aware of Red Robin's interest in preventing sexual harassment."<sup>144</sup> The court held that Hamel knew or should have known what a "reasonable person" would know, specifically that Hamel's conduct could harm his employer's interest.<sup>145</sup> Finally, the court found that Hamel intentionally made those comments.<sup>146</sup> The court thus held that the actions by Hamel met the statutory definition of misconduct and that unemployment compensation benefits should be denied.<sup>147</sup>

The knowing disregard culpability element proposed by this Comment is nearly identical to the "should have known" standard developed in *Hamel*, as both are objective standards based on what the employee knew or should have known.<sup>148</sup> The knowing disregard

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138. *Id.*

139. *Id.* at ¶¶ 15-16, 966 P.2d at 1286; *See infra* Part II.A.4. The culpability element implicit in *Macey v. Dep't of Employment Sec.*, 110 Wash.2d 308, 318, 752 P.2d 372, 377-78 (1988), and explicitly set out in *Tapper v. Employment Sec. Dept.*, 122 Wash. 2d 397, 409, 858 P.2d 494, 502 (1993), states that "[t]he violations must be intentional, grossly negligent, or continue to take place after notice or warnings. That is, the behavior cannot be characterized as mere incompetence, inefficiency, erroneous judgment, or ordinary negligence."

140. *Id.* at ¶¶ 15-22, 966 P.2d at 1285-86; *See infra* Part II.A.4.

141. *Id.* at ¶ 23, 966 P.2d at 1287; *See infra* Part II.A.4.

142. *Id.*

143. *Id.* at ¶¶ 1-6, 966 P.2d at 1284.

144. *Id.* at ¶ 20, 966 P.2d at 1286.

145. *Id.*

146. *Id.*

147. *Id.* at ¶ 23, 966 P.2d at 1286.

148. *See infra* Part III (referring to *infra* Part II.A.3).



element requires that an employee's conduct be "(a) violative of some code of behavior contracted for between employer and employee, and (b) done with intent or knowledge that the employer's interest would suffer."<sup>149</sup> An act is "done with intent or knowledge" when the actor is "aware of facts or circumstances which would lead a reasonable person in the same situation to believe that her action would be against or probably cause harm to her employer's interests."<sup>150</sup> Part (a) of the knowing disregard culpability element corresponds directly to the first part of the *Hamel* court's "should have known" standard, that the employee is "aware of his employer's interest." The primary means by which an employee becomes aware of the interests of his employer is through contracts and express policies. Part (b) of the knowing disregard culpability element corresponds directly to parts (2) and (3) of the "should have known" test, since both require that an employee think and act as a reasonable person in the same situation. Under both, an employee is denied benefits if he should have known that an act would probably cause harm to his employer's interest, and yet he acts nonetheless.

The test for misconduct proposed by this Comment and the test generated by the *Hamel* court are consistent with each other. Therefore, for the reasons stated in Part III of this Comment, unlike the tests generated by Divisions One and Three, the "should have known" standard of the *Hamel* court is supported by both the legislative history of the statutory definition and the policy goals of the Employment Security Act.<sup>151</sup>

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149. See *infra* Part II.A.3 (quoting *Nelson v. Dep't of Employment Sec.*, 98 Wash. 2d 370, 375, 655 P.2d 242, 245 (1982)).

150. See *infra* Part III.

151. Division Two has heard arguments and is now considering another case involving the statutory definition: *Rice v. Employment Sec. Dep't*, 1997 Wash. Ct. App. No. 22615-4-II.