Washington Law Review

Volume 66 | Number 1

1-1-1991

Misconduct in Washington Unemployment Compensation Law—Henson v. Employment Security Department, 113 Wash. 2d 374, 779 P.2d 715 (1989)

Karen L. Forner

Follow this and additional works at: https://digitalcommons.law.uw.edu/wlr

Part of the Labor and Employment Law Commons

Recommended Citation

Karen L. Forner, Note, *Misconduct in Washington Unemployment Compensation Law—Henson v. Employment Security Department, 113 Wash. 2d 374, 779 P.2d 715 (1989)*, 66 Wash. L. Rev. 287 (1991).
Available at: https://digitalcommons.law.uw.edu/wlr/vol66/iss1/10

This Note is brought to you for free and open access by the Law Reviews and Journals at UW Law Digital Commons. It has been accepted for inclusion in Washington Law Review by an authorized editor of UW Law Digital Commons. For more information, please contact cnyberg@uw.edu.

Copyright © 1991 by Washington Law Review Association

MISCONDUCT IN WASHINGTON UNEMPLOYMENT COMPENSATION LAW—*Henson v. Employment Security Department*: 113 Wash. 2d 374, 779 P.2d 715 (1989).

Abstract: Unemployment compensation may be denied to employees dismissed for misconduct. In *Henson v. Employment Security Department*, the Washington Supreme Court misapplied the misconduct doctrine by blurring the distinction between on-duty and off-duty misconduct. This Note compares past Washington misconduct doctrine with its application in *Henson* and discusses the potential equal protection implications of this decision. The author concludes that *Henson* adversely affects employees and confuses the misconduct doctrine in Washington. Further, while there was no equal protection violation in *Henson*, the court's result opens the door to future equal protection challenges and violations.

The preamble to Washington's unemployment compensation statute states that unemployment reserves are to be used for the benefit of persons unemployed through no fault of their own.[1] The statute provides for the disqualification of an employee from unemployment benefits when an employee has been discharged for misconduct connected with his or her work.[2] While a violation of an employer work rule may justify the discharge of an employee, such a violation does not necessarily constitute misconduct for unemployment compensation purposes.[3] The analysis of whether unemployment benefits are due to a discharged employee, therefore, does not hinge upon whether the employee was rightly or wrongly discharged. The emphasis, rather, is on whether the employee's actions constituted disqualifying misconduct.

This Note examines the Washington Supreme Court's application of the misconduct doctrine in *Henson v. Employment Security Department*.[4] In *Henson*, the court upheld the denial of benefits to an applicant who was terminated for refusing to attend Alcoholics Anonymous (AA) meetings.[5] The author concludes that the court misapplied the misconduct doctrine by blurring the distinction between on-duty and off-duty misconduct and that in so doing, the court opened the door to potential equal protection challenges and violations.

1. WASH. REV. CODE § 50.01.010 (1989).
2. *Id.* § 50.20.060(1) (1989).
3. Ciskie v. Department of Empl. Sec., 35 Wash. App. 72, 76, 664 P.2d 1318, 1320 (1983) (employee's failure to notify supervisor properly before leaving work was good cause for discharge but not equated with disqualifying misconduct).
4. 113 Wash. 2d 374, 779 P.2d 715 (1989) (5-4 decision), *reconsideration denied*, Jan. 9, 1990 (order on file with the *Washington Law Review*).
5. *Id.* at 376–77, 779 P.2d at 717.

I. EMPLOYEE PROTECTION: WASHINGTON MISCONDUCT LAW AND EQUAL PROTECTION

A. *Henson v. Employment Security Department*

Henson, a shipping clerk, began working for Tam Engineering Corporation (Tam) in 1966.[6] Seventeen years later, in 1983, Tam came to suspect that Henson had an alcohol abuse problem.[7] At Tam's suggestion, Henson went to a hospital for evaluation.[8] The hospital did not diagnose Henson as an alcoholic, but the hospital director thought Henson had "an alcohol problem."[9] In 1984, Henson came to work smelling of alcohol at least six times.[10] Although Henson never drank on the job and his job performance was not impaired by his drinking, Tam decided that the odor of alcohol on Henson was detrimental to Tam's interests because Henson had contact with customers.[11]

After six warnings about the odor of alcohol, Tam insisted Henson attend a twenty-one day alcohol abuse program at Northwest Treatment Center (NTC).[12] Henson agreed to attend the program to save his job.[13] In November 1984, NTC released Henson with a diagnosis of middle-stage alcoholism.[14] NTC recommended the following aftercare program for Henson: first, that he attend twelve weeks of aftercare group therapy; second, that he return to his home and to work; and third, that he attend at least three AA meetings per week.[15] Henson agreed to the first and second parts of the aftercare program, but refused to attend the AA meetings, which were held in the evenings during off-work hours.[16] When Henson returned to work, Tam warned him that he would be discharged for refusing to attend AA

6. *Id.* at 375, 779 P.2d at 716.

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.* at 376, 779 P.2d at 716.

11. *Id.*

12. *Id.* Tam paid half the costs of the program not covered by Henson's medical insurance. *Id.*

13. *Id.*

14. *Id.* Middle-stage alcoholism can be characterized by three basic features: physical dependence as experienced in acute and protracted withdrawal syndromes, craving, and loss of control. J. MILAM & K. KETCHAM, UNDER THE INFLUENCE 63 (1981).

15. *Henson*, 113 Wash. 2d at 376, 779 P.2d at 716–17.

16. *Id.* at 376, 779 P.2d at 717. Henson never agreed to go to Alcoholics Anonymous meetings. *In re* Henson, No. 5-02297, at 15 (Empl. Sec. Dep't May 9, 1985) (on file with the *Washington Law Review*). Henson felt that AA meetings were useless and would not benefit him. *Id.* at 18. Henson had attended AA meetings during the twenty-one day in-patient program at NTC. *Id.*

meetings,[17] but Henson still refused to go.[18] This refusal was made on the job site and during working hours.[19] Tam discharged Henson because his refusal to attend AA meetings denied Tam assurance that the treatment program would be fully completed.[20] Without completion of the program, Tam had no guarantee that on-duty drinking problems would not occur.[21] Henson then applied for unemployment benefits.[22]

The Employment Security Department (ESD) denied Henson's application for unemployment benefits.[23] The trial court and the court of appeals upheld the ESD's decision.[24] The Washington Supreme Court affirmed.[25]

1. The Henson *Decision and Reasoning*

The Washington Supreme Court found that Henson committed on-duty misconduct, disqualifying him for unemployment benefits.[26] There is no definition of misconduct in the Washington statute.[27] Instead, the court based its analysis on two Washington cases that established judicial tests for finding disqualifying misconduct. In *Macey v. Department of Employment Security,*[28] the court formulated a three-part test for on-duty disqualifying misconduct;[29] in *Nelson v. Department of Employment Security,*[30] the court formulated a four-

17. *Henson,* 113 Wash. 2d at 376, 779 P.2d at 717.
18. *Id.*
19. *Id.* at 378, 779 P.2d at 718.
20. *Id.*
21. *Id.*
22. *Id.* at 376, 779 P.2d at 717.
23. The hearing examiner decided that Henson had been discharged for work-connected misconduct. *In re* Henson, No. 5-02297, at 38 (Empl. Sec. Dep't May 9, 1985) (on file with the *Washington Law Review*). On appeal within the ESD, the administrative law judge upheld the denial. *Id.* at 56. The ESD Commissioner affirmed. *Id.* at 84.
24. The Pierce County Superior Court upheld the commissioner's decision. Henson v. Employment Sec. Dep't, No. 85-2-05924-2 (Super. Ct. Apr. 2, 1987). The Court of Appeals certified the appeal to the Supreme Court of Washington. *Henson,* 113 Wash. 2d at 377, 779 P.2d at 717.
25. *Henson,* 113 Wash. 2d at 377, 779 P.2d at 717.
26. *Id.* at 381, 779 P.2d at 719.
27. WASH. REV. CODE § 50.20.060(1) (1989).
28. 110 Wash. 2d 308, 752 P.2d 372 (1988).
29. The three prongs of the *Macey* test are: (1) the employer's rule must be reasonable under the circumstances, (2) the conduct of the employee must be work-related and must affect the employee's work performance and the work force in general, and (3) the conduct of the employee must in fact violate the rule. *Id.* at 319, 752 P.2d at 378 (because an employee who lied on an employment application violated a reasonable rule and the act was work-related, it was diqualifying misconduct).
30. 98 Wash. 2d 370, 655 P.2d 242 (1982).

part test for determining off-duty disqualifying misconduct.[31] The *Macey* on-duty test requires only that the employer demonstrate that the behavior of the employee affected the employee's work. The employer need not show harm from the change in work performance.[32] The *Nelson* off-duty test requires a more concrete demonstration that the employer was adversely affected.[33]

The majority concluded that Henson's refusal to attend AA meetings during off-duty hours was on-duty misconduct because the refusal itself occurred on the work site and during working hours.[34] Because the conduct was characterized as on duty, the court applied the less stringent *Macey* test.[35] The majority began by evaluating whether the requirement that Henson attend AA meetings was reasonable under the circumstances, the first prong of the *Macey* test.[36] The majority found the rule reasonable for four reasons. First, Tam could have fired Henson earlier for having alcohol on his breath.[37] Second, Tam had invested its time and money in Henson's recovery and thus could expect completion of the entire NTC program, including recommended follow-up treatment.[38] Third, attendance at AA meetings would decrease the likelihood of Henson's coming to work with alcohol on his breath.[39] Finally, the court concluded that an implied contract between Henson and Tam to attend the AA meetings resulted when Henson agreed to go to NTC.[40]

31. The four requirements of the *Nelson* test are: (1) the employee's misconduct must have some nexus with the employment, (2) the misconduct must constitute a violation of a rule reasonably related to the conduct of the employer's business or a code of behavior contracted for between the employer and employee, (3) the employee must have acted with the intent or knowledge that the employer's interest would suffer, and (4) the misconduct must actually result in some harm to the employer's interest. *Id.* at 375, 655 P.2d at 245 (employee who shoplifted in off hours and notified employer did not violate any employer rule or regulation and thus did not commit disqualifying misconduct).

32. *Macey,* 110 Wash. 2d at 319, 752 P.2d at 378.

33. *Nelson,* 98 Wash. 2d at 375, 655 P.2d at 245. However, Washington courts have also found disqualifying misconduct without a showing of employee work impairment or direct employer harm. These cases involved dismissal for dishonesty, with the dishonesty itself being considered "per se" harm to the employer. *See, e.g.,* Macey v. Department of Empl. Sec., 110 Wash. 2d 308, 752 P.2d 372 (1988) (employee lied about criminal record on employment application); Franz v. Department Empl. Sec., 43 Wash. App. 753, 760, 719 P.2d 597, 602 (1986) (employee rolled back postage meter to cover up poor work performance).

34. Henson v. Employment Sec. Dep't, 113 Wash. 2d 374, 378, 779 P.2d 715, 718 (1989).

35. *Id.* at 378, 779 P.2d at 718.

36. *Id.*

37. *Id.* at 379, 779 P.2d at 718.

38. *Id.*

39. *Id.*

40. *Id.* at 379–80, 779 P.2d at 718.

The majority then determined that the conduct was related to Henson's employment, thus satisfying the second prong of the *Macey* test.[41] The court noted that to show a sufficient connection, *Macey* requires both an effect on the employee's own work performance and on the work force in general.[42] The court acknowledged that Henson's actual work performance was not impaired.[43] The court found, however, that Henson's job was affected because Tam would not be able to trust Henson to deal with the public for fear that alcohol on his breath would adversely affect customer relations,[44] and because another employee would therefore have to be hired to perform Henson's duties.[45] The majority also found that Henson's refusal to attend AA meetings would affect the work force in general, stating that "it is within the legitimate interests and expectations of an employer that all employees come to work without smelling of alcohol."[46]

Finally, the majority found that an employer rule was broken when Henson refused to go to AA meetings as required by Tam, thus satisfying the third prong of the *Macey* test.[47] Having determined that Henson's conduct occurred on duty, and that all three prongs of the *Macey* on-duty test were met, the majority found that Henson committed misconduct that disqualified him from unemployment compensation benefits.[48]

2. *The Dissenting Opinion's Interpretation of Misconduct*

Judge Durham dissented,[49] asserting that there was no legal basis for the majority's finding of disqualifying misconduct.[50] The crux of the dissent was that there was never a showing, as required in all previous Washington misconduct cases, that Henson's refusal to attend AA meetings had a significant adverse effect on his employer.[51] The

41. *Id.* at 380, 779 P.2d at 719.

42. *Id.*

43. *Id.* Henson's supervisor testified that he did not think that Henson's drinking affected his work performance. *In re* Henson, No. 5-02297, at 31 (Empl. Sec. Dep't May 9, 1985) (on file with the *Washington Law Review*).

44. *Henson,* 113 Wash. 2d at 380, 779 P.2d at 719.

45. *Id.* at 380–81, 779 P.2d at 719.

46. *Id.* at 381, 779 P.2d at 719.

47. *Id.*

48. Judges Utter, Pearson, Andersen, and Smith concurred with Judge Dolliver's majority opinion. *Id.*

49. Callow, C.J., and Judges Brachtenbach and Dore concurred. *Id.* at 387, 779 P.2d at 722.

50. *Id.* at 381, 779 P.2d at 719 (Durham, J., dissenting).

51. *Id.* at 383, 779 P.2d at 720 (Durham, J., dissenting). Note, however, that in *Macey* there was no direct harm to the employer when the employee lied about his criminal record— the harm was implied. Macey v. Department of Empl. Sec., 110 Wash. 2d 308, 321, 752 P.2d 372, 379 (1988).

dissent did not distinguish between on-duty and off-duty misconduct, but rather indicated that a showing of harm to the employer is necessary in any case of disqualifying misconduct.[52] The dissent also cited several ESD decisions for this proposition, some involving alcohol treatment.[53] In all cases where misconduct was found, there was a current, not potential, adverse effect on the employer.[54] The dissent therefore concluded that the decision to deny benefits was unfair and that the ESD's decision should be reversed.[55]

B. Equal Protection Analysis of Denying Unemployment Benefits

Although the issue was not raised in *Henson,* the ESD's denial of Henson's application for benefits implicates the equal protection clause.[56] Henson could have argued that he had a fundamental right to refuse to attend AA meetings, and that when the ESD rejected his application for benefits because of his refusal, it denied him equal protection.[57]

The fourteenth amendment provides that "[no] state shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws."[58] Equality can be denied when

52. *Henson,* 113 Wash. 2d at 383, 779 P.2d at 720 (Durham, J., dissenting). The dissent acknowledged that employees who come to work with alcohol on their breath may be required to seek necessary and effective treatment. The ESD ruled that requiring employees to enter treatment when they had alcohol-related work absences was reasonable as a condition of continued employment. *In re* Garcia, 422 Wash. Empl. Sec. Comm'r Dec. 5 (1978). The dissent noted that Henson received treatment by completing the twenty-one day in-patient treatment program and agreeing to attend twelve weekly group meetings as part of the aftercare program. *Henson,* 113 Wash. 2d at 386, 779 P.2d at 721 (Durham, J., dissenting). There was no evidence that Henson had alcohol on his breath after treatment. In Judge Durham's opinion, a failure to attend recommended AA meetings did not establish that the employer would be adversely affected. *Id.* at 387, 779 P.2d at 722 (Durham, J., dissenting).

53. *Id.* at 385–86, 779 P.2d at 721 (Durham, J., dissenting) (citing *In re* Purcell, Wash. Empl. Sec. Comm'r. Dec. 540 (1979) (employee's violation of agreement to abstain from drinking alcohol off the job was not misconduct because there was no direct harm to employer)); *In re* Garcia, Wash. Empl. Sec. Comm'r Dec. 422 (1978) (failure to attend an alcohol treatment program as a condition of continued employment is misconduct because the employer suffered harm from alcohol-related work absences).

54. *Henson,* 113 Wash. 2d at 384–85, 779 P.2d at 720–21 (Durham, J., dissenting).

55. *Id.* at 387, 779 P.2d at 722 (Durham, J., dissenting).

56. The Washington Supreme Court has applied equal protection analysis to several unemployment compensation cases. *See* Toulou v. Department of Social & Health Servs., 27 Wash. App. 137, 616 P.2d 678 (1980); Davis v. Department of Empl. Sec., 108 Wash. 2d 272, 737 P.2d 1262 (1987).

57. *Henson* is not an entitlement case. The entitlement doctrine applies only to cases where the plaintiff has already qualified for and received benefits, and then the benefits are terminated. Goldberg v. Kelly, 397 U.S. 254 (1970). Henson never qualified for benefits, and is thus precluded from any entitlement protection, which would require certain procedural due process.

58. U.S. CONST. amend. XIV, § 1.

the government classifies "so as to distinguish, in its rules or programs, between persons who should be regarded as similarly situated."[59] Courts apply strict scrutiny to these classifications if the challenged state law is disadvantageous to some suspect class or impinges on a constitutionally protected fundamental right.[60] If neither of these two criteria is present, then the rational basis test is applied.[61]

1. Strict Scrutiny for Denying Unemployment Benefits

Under the strict scrutiny test, a challenged law will be upheld only if it is necessary to achieve a compelling government interest.[62] The courts apply strict scrutiny to any challenged statute that is based upon a suspect classification.[63] A classification is suspect if it gives distinct treatment to a group that has historically been the victim of discrimination.[64] Race and national origin are two classifications that are considered suspect.[65]

a. Strict Scrutiny for Burdens on Fundamental Rights

If a statute burdens the exercise of a fundamental right, strict scrutiny is also applied.[66] A fundamental right is a right explicitly or implicitly guaranteed by the Constitution.[67] The United States Supreme Court has defined several fundamental rights,[68] including fundamental rights derived from the right to privacy.[69] Each of these rights can invoke equal protection.[70] The United States Supreme

59. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 1438 (2d ed. 1988).

60. *Id.* at 1451.

61. *Id.* at 1439–43.

62. *Id.* at 1452 n.4.

63. *Id.* at 1451.

64. *Id.* at 1465.

65. *Id.*

66. *Id.* at 1451.

67. *Id.* at 1458.

68. San Antonio School Dist. v. Rodriguez, 411 U.S. 1, 33–34 (1973). The right to interstate travel, the right to speak, and the right to vote are protected fundamental rights. *Id.* at 32, 36. The right to education, housing, and food are not fundamental rights. *Id.* at 33, 35.

69. The right to privacy encompasses rights or matters relating to marriage, procreation, contraception, family relationships, childrearing and education. Whalen v. Roe, 429 U.S. 589, 600 n.26 (1976).

70. L. TRIBE, *supra* note 59, at 1451.

Court has held that the freedom to control one's own body[71] and to care for one's health and person[72] are fundamental rights.

In *Bedford v. Sugarman,*[73] the Washington Supreme Court adopted the United States Supreme Court's definitions of fundamental rights derived from the right to privacy.[74] Washington courts have also identified a fundamental right to make certain medical decisions, which is similar to the federal right to control one's own body. In *In re Colyer,*[75] the Washington Supreme Court granted a terminally ill adult patient the right to refuse medical treatment that only served to prolong the dying process.[76] The court in *Colyer* reasoned that the right to privacy extends to such a health-care decision.[77] The Washington Supreme Court subsequently reaffirmed the fundamental right of competent adults to determine the type of medical treatment they will receive.[78] In *In re Schuoler,* the court held that the constitutional right to privacy encompasses the right to choose one type of medical treatment over another, or to refuse treatment altogether.[79] The court also recognized the right to refuse medical treatment in *In re Ingram.*[80] There, the court held that, unless outweighed by some state interest, a person has the right to make personal medical decisions.

b. Funding Constraints as Burdens on Fundamental Rights

Even when a fundamental right exists, government funding need not be allocated equally to avoid infringing on the exercise of that right. Unequal funding does not necessarily trigger strict scrutiny of a statute under an equal protection analysis. For example, in *Maher v. Roe,*[81] the United States Supreme Court recognized the fundamental

71. "No right is held more sacred, or is more carefully guarded . . . than the right of every individual to the possession and control of his own person, free from all restraint or interference of others . . . ." Union Pac. Ry. Co. v. Botsford, 141 U.S. 250, 251 (1891) (plaintiff need not submit to medical examination against her will to substantiate tort claim). *But see* Roe v. Wade, 410 U.S. 113, 154 (1973) (certain important state interests, such as mandatory vaccinations for citizens, may limit the fundamental right to control one's own medical decisions).

72. Doe v. Bolton, 410 U.S. 179, 213 (1973).

73. 112 Wash. 2d 500, 772 P.2d 486 (1989).

74. *Id.* at 513, 772 P.2d at 493 (citing Whalen v. Roe, 429 U.S. 589, 600 n.26 (1977)); *see supra* note 69.

75. 99 Wash. 2d 114, 660 P.2d 738 (1983).

76. *Id.* at 138–39, 660 P.2d at 751.

77. *Id.* at 120, 660 P.2d at 742.

78. *In re* Schuoler, 106 Wash. 2d 500, 506, 723 P.2d 1103, 1107 (1986).

79. *Id.* at 507, 723 P.2d at 1108.

80. 102 Wash. 2d 827, 836, 689 P.2d 1363, 1368 (1984) (a patient's preference for radiation treatment over surgery had to be followed because it was not a life and death choice and thus the state's interest in preserving life did not prevail).

81. 432 U.S. 464 (1977).

right to abortion, but held that a state is not required to fund abortions.[82] This holding rested on the Court's determination that states are free to make value judgments regarding the exercise of fundamental rights through the allocation of public funds, so long as there is a rational basis for the funding.[83] Thus, a state regulation that funded childbirth expenses for indigent women but not abortion expenses did not amount to a burden on a fundamental right.[84]

While courts ordinarily allow legislatures to allocate public funds as they see fit, the Court has drawn a line beyond which legislative allocation of funds violates the equal protection guarantee. In *Shapiro v. Thompson,*[85] the United States Supreme Court held that a welfare program's durational residence requirements for the receipt of public benefits were unconstitutional.[86] The Court held that the program in *Shapiro* violated the equal protection clause by unjustifiably burdening the fundamental right to travel freely among the states.[87] Thus while most government program eligibility requirements are upheld, if they burden a fundamental right, the programs may be found unconstitutional.

Just as federal courts have allowed legislatures to influence the exercise of fundamental rights through resource allocation, so too have Washington courts. In *Bedford v. Sugarman,*[88] the Washington Supreme Court relied on reasoning similar to that in *Maher.* The *Bedford* court upheld a shelter assistance and drug treatment program requiring indigent alcoholics and drug abusers to move into designated shelters to become eligible for the program's benefits.[89] The court noted that even if the shelter applicants had a fundamental right at

82. *Id.* at 469.
83. *Id.* at 474.
84. *Id.* at 469–70.
85. 394 U.S. 618 (1969).
86. *Id.* at 619, 627.
87. *Id.* at 619, 629–31. The Court in *Maher* distinguished *Shapiro* because the statute in *Maher* did not directly penalize those who exercised a fundamental right, as did the statute in *Shapiro. Maher,* 432 U.S. at 474–75 n.8. The Court stated that the denial of welfare benefits to one who had recently exercised the right to travel across state lines, as found in *Shapiro,* was sufficiently analogous to a criminal fine to justify strict judicial scrutiny. *Id.* The Court reasoned that if the program in *Maher* had denied general welfare benefits to all women who had obtained abortions and who were otherwise entitled to benefits, then it also would have justified strict scrutiny. *Id.* As a result, the Court found that there was no support in the right-to-travel cases for the view that the state in *Maher* must have shown a compelling interest for its decision not to fund elective abortions. *Id.* The Court seemingly viewed the statute in *Shapiro* as a direct penalty but viewed the statute in *Maher* as merely an indirect impact resulting from a legitimate classification.
88. 112 Wash. 2d 500, 772 P.2d 486 (1989).
89. *Id.* at 501, 772 P.2d at 487.

stake,[90] the program involved only a financial incentive and not a direct governmental restraint on choices. The court found that the financial incentive did not sufficiently burden any fundamental right and therefore did not trigger strict scrutiny.[91] The court also noted that in the area of social legislation, the government must be given broad latitude to experiment with possible solutions to social problems.[92]

2. *Rational Basis for Denying Unemployment Benefits*

If a statute does not involve a suspect class and does not burden a fundamental right, the standard of judicial review is the "rational basis" test. The federal rational basis test requires only that a state law rationally furthers a legitimate state purpose.[93]

The Washington Supreme Court has developed a three-step inquiry to test for an equal protection violation under the rational basis test.[94] The first step questions whether the classification applies alike to all members within the designated class. The second step questions whether some basis in reality exists for reasonably distinguishing between those within and without the designated class. The third step questions whether the challenged classification has any rational relation to the purposes of the challenged statute.[95]

II. *HENSON v. ESD:* ANALYSIS AND IMPLICATIONS

A. *The* Henson *Court Misapplied the Washington Misconduct Doctrine*

1. *The Court Should Not Have Applied the On-duty Test*

The *Henson* court's classification of Henson's refusal to attend AA meeting as on-duty conduct[96] was fundamentally flawed. The court found that the conduct occurred while Henson was on duty because Henson's refusal to attend the meetings took place on the job site and during working hours.[97] The court should have classified Henson's

90. The court found that the fundamental right to autonomy did not extend to the shelter applicants' choice of where to live. The right of autonomy is derived from the right of privacy. *Id.* at 513–14, 772 P.2d at 493 (citing Whalen v. Roe, 429 U.S. 589, 600 n.26 (1976)); *see supra* note 69.

91. *Bedford,* 112 Wash. 2d at 514–15, 772 P.2d at 494.

92. *Id.* at 508, 772 P.2d at 490.

93. Maher v. Roe, 432 U.S. 464, 470 (1977).

94. Conklin v. Shinpoch, 107 Wash. 2d 410, 418, 730 P.2d 643, 648 (1986).

95. *Id.*

96. Henson v. Employment Sec. Dep't, 113 Wash. 2d 374, 378, 779 P.2d 715, 718 (1989).

97. *Id.*

conduct as off duty. The AA meetings were held during off-duty hours and off the job site. The court confused the refusal with the conduct itself. This raises the question how the court would have categorized Henson's conduct if Henson had telephoned his refusal, made the refusal minutes after working hours ended, or sent a letter to his employer explaining his refusal. The effect of such refusals would be the same as Henson's on-the-job refusal. However, characterizing these other refusals as on duty would distort the distinction between on duty and off duty beyond applicability.

Henson's misconduct was not sufficiently work-related to justify the application of the on-duty test, because the only element of Henson's conduct that was on duty was his refusal.[98] Evaluating where and when Henson made the refusal evades the real issue: whether the failure to attend AA meetings was sufficiently connected with his work to deny him benefits. The appropriate test was the *Nelson* off-duty test, because the AA meetings were not sufficiently connected with Henson's work to justify an on-duty analysis.[99] The AA meetings were held during Henson's off-hours and off the work site. By ignoring these factors and focusing on Henson's on-duty refusal, the court significantly and unjustifiably expanded what qualifies as on-duty misconduct.

The distinction between on-duty and off-duty conduct is significant because the two standards require an employer to show different degrees of impact from the employee's conduct in order to prove misconduct.[100] Under the on-duty test, the employer need only show employee work-impairment, whereas under the off-duty test the employer must show actual harm to the employer.[101]

The employer was not required to show actual harm in *Henson.* Following Henson's completion of the twenty-one day residential program at NTC, no evidence existed showing that Henson had continuing alcohol problems.[102] Tam could only speculate about potential harms that might result from Henson not attending AA. Tam presented no evidence regarding the likelihood that the potential harm would occur. Had the court properly characterized Henson's refusal

98. *Id.*
99. *See supra* notes 28–33 and accompanying text.
100. *See supra* notes 28–33 and accompanying text.
101. *See supra* notes 28–33 and accompanying text.
102. *Henson,* 113 Wash. 2d at 387, 779 P.2d at 722.

to attend AA as off-duty misconduct, the showing of harm to Tam that the off-duty test requires would not have been sustained.[103]

2. The Macey *On-duty Test Was Not Met*

Even if the *Henson* court's application of the on-duty test was appropriate, the court misapplied the *Macey* on-duty test and thereby compounded the confusion surrounding the misconduct doctrine. The *Macey* test requires that the employee's conduct have an effect on the employee's work performance in particular and on the work force in general.[104] The court did not require such a showing in *Henson*, but instead referred to an amorphous general impairment of Henson's work performance that would allegedly result from Henson's refusal to attend AA meetings.[105] The court apparently concluded that the *Macey* test was met by a prediction of such general harm. Under the court's own assessment of the facts of the case, however, the *Macey* test was not met because no specific impairment of Henson's work performance was found.[106] As a result of the court's dilution of its on-duty test, the degree of impairment that will satisfy the on-duty test is uncertain.[107]

3. Henson *Altered the Misconduct Test*

Henson leaves no clear misconduct test to be applied in future cases. It does, however, provide precedent for finding misconduct when an employee breaks a rule and the employer predicts future harm to the business that could result from that violation. The court ignored the substantial difference between actual harm to an employer and potential harm.

103. This result is supported by *In re* Garcia. Wash. Empl. Sec. Comm'r Dec. 422 (1978); *see supra* notes 52–53 and accompanying text. In *Garcia*, the refusal to attend an alcohol treatment program was properly characterized as off-duty misconduct. *Id.* In *Garcia*, however, the employer was able to show direct harm from the employee's alcohol related absences, and thus the off-duty misconduct test was met. *Id.*

104. Macey v. Department of Empl. Sec., 110 Wash. 2d 308, 319, 752 P.2d 372, 378 (1988).

105. The court found Henson's usefulness to the company affected by the employer's uncertainty about Henson's future conduct and the employer's need to have another employee temporarily perform Henson's public duties. *Henson*, 113 Wash. 2d at 380–81, 779 P.2d at 719.

106. *Id.* at 380, 779 P.2d at 719.

107. The dissent also misinterpreted the *Macey* misconduct doctrine. *See supra* note 52. The dissent proposed the rule that all misconduct cases must show a significant adverse effect on the employer. *Henson*, 113 Wash. 2d. at 383, 779 P.2d at 720 (Durham, J., dissenting). There was, in fact, no direct employer harm in *Macey*. *Macey*, 110 Wash. 2d at 321, 752 P.2d at 379. The dissent apparently would blur or possibly dissolve the distinction between *Macey* and *Nelson* by requiring employer harm in both on-duty and off-duty misconduct cases.

a. Henson *Leaves Misconduct Standards Unclear*

Henson offers conflicting standards as to what is off-duty or on-duty conduct, and what degree of harm to the employer must be shown. *Henson* broadened the circumstances in which the on-duty standard is applied and lessened the degree of work performance impairment needed to show misconduct.[108] The result is a blurring of the distinction between the *Macey* on-duty and *Nelson* off-duty misconduct tests. The practical significance of this confusion will be increased litigation involving ESD disqualifications for breach of employer rules until a more workable standard is established.[109] This will, of course, be costly to employees, employers, and the state. Employees will face long waits for unemployment benefits. Employers will continuously have to revise office procedures and respond to litigation. The state will have to absorb the cost of increased litigation and administrative and judicial appeals resulting from the confusion in *Henson.*

b. Lifestyle Choices Remain Unprotected

Under *Henson,* off-duty activities and lifestyle choices other than drinking or attending AA meetings are also vulnerable to invasion by employers. Employees' off-duty behavior no longer must have a tangible negative impact on the employer before employees can be disqualified for misconduct.[110] An employer could make a rule, inform the employee of the rule, and speculate about possible future harm to the business that could result from the rule's violation. Then, if the employee broke the rule, the employee could be dismissed for misconduct and would be ineligible for unemployment benefits.[111] For example, an employer could make a rule that all employees must abstain from smoking, even in their off hours, based on speculation that smokers will be less productive workers. An employee caught smoking while off duty, or one who refused to agree not to smoke, could be fired and denied unemployment benefits.[112] Classifying such a refusal as misconduct stretches the rational relationship between a miscon-

108. *See supra* notes 98–99 and accompanying text.

109. A possible solution to the problems posed by *Henson* would be for the state legislature to pass legislation, or for the ESD to pass regulations, defining disqualifying misconduct by codifying the *Macey* and *Nelson* tests.

110. *See supra* notes 102–07 and accompanying text.

111. Employer actions would, however, be limited by existing protective statutes, such as the federal civil rights laws.

112. Similar results could occur in cases of employees who gamble or have unmarried live-in partners. These lifestyle choices are left unprotected by *Henson.*

duct finding and denying unemployment benefits to those unemployed through no fault of their own.[113]

Intrusions by employers into the private lives of employees, like the intrusion in *Henson,* are unwarranted. Employers have a greater right to dictate employee behavior during the hours for which employees are paid than they do during unpaid hours. When the behavior at issue occurs during paid hours, the *Macey* on-duty test should apply, with its less stringent requirement of impairment. During unpaid hours, however, the *Nelson* off-duty test should apply, with its more burdensome requirement of showing substantial harm to the employer. An employee's decisions about behavior during unpaid hours, even though made during paid hours, as in *Henson,* should be governed by the *Nelson* off-duty test.[114]

c. Henson *May Deter Alcohol Related Misconduct*

A positive effect of *Henson* is that employees will be encouraged to follow through with alcohol treatment suggested by their employers, because a failure to do so may result in a denial of unemployment benefits. Alcohol abuse is estimated to cost the American economy $65 billion a year in lost productivity.[115] Absenteeism among problem drinkers is 8.3 times greater than among other employees.[116] Further, almost forty percent of industrial fatalities and forty-seven percent of industrial injuries are linked to alcohol abuse.[117] A result of *Henson* is that unemployment benefits are distributed to those who are making an attempt to deal with alcohol abuse by participating fully in treatment programs. Thus, *Henson* helps decrease costs associated with

113. *See infra* notes 118–43 and accompanying text for the equal protection implications of unemployment classifications.

114. The ESD cannot disregard a decision of the Washington Supreme Court, but the ESD has limited its application of *Henson* to avoid invading other personal decisions. Currently the ESD is assuming that *Henson* is limited to cases of drug and alcohol treatment unless the court holds otherwise. Interview with Norm Erickson, Washington ESD Commissioner's Review Office (Feb. 6, 1990) (notes on file with the *Washington Law Review*). The ESD has chosen to limit the application of *Henson* because otherwise the ESD would be in the position of finding a violation of virtually any employer rule to be disqualifying misconduct, a proposition with implications the ESD did not want to adopt. *Id.* Relying on an ESD administrative policy that is subject to change at the whim of the ESD, however, does not offer sufficient safeguards to employees under the unemployment compensation program. The *Henson* decision remains a threat to employees' individual rights.

115. BNA SPECIAL REPORT, ALCOHOL AND DRUGS IN THE WORKPLACE: COSTS, CONTROLS, AND CONTROVERSIES 8 (1986).

116. T. DENENBERG & R.V. DENENBERG, ALCOHOL AND DRUGS: ISSUES IN THE WORKPLACE 5 (1983).

117. *Id.* at 7.

alcohol abuse by encouraging treatment and funnels public monies to those who minimize long term costs by getting treatment.

B. *Result of Applying Equal Protection Analysis to* Henson

Although the court did not consider the issue, *Henson* implicates the equal protection clause. Equal protection challenges have been made in similar Washington unemployment classification cases and in federal cases.[118] While there was probably no equal protection violation in *Henson,* the court's misapplication of the misconduct doctrine opens the door for the statute to be challenged on equal protection grounds in future cases. In view of the potential expansion of *Henson* to other important rights, courts should be sensitive to intrusions that are not rationally related to the ESD's goal of granting benefits to those unemployed through no fault of their own.

Had the court applied an equal protection analysis, *Henson* would not have qualified for strict scrutiny[119] because there was not a sufficient burden on a fundamental right. Further, under the rational basis test the ESD denial of benefits would stand. Equal protection analysis does show, however, that while Henson did not have a right to funding, he did have a fundamental right to refuse to attend AA meetings.

1. *Fundamental Right at Stake in* Henson

Henson could have argued that he had a fundamental right to choose not to attend AA meetings. Henson could have claimed that AA meetings constituted treatment for the disease of alcoholism, and therefore his refusal to attend AA meetings was the exercise of a fundamental right to make a medical care decision. Individuals have the right to exercise control over their bodies and health.[120] The right to make medical care decisions is a logical extension of that right. Therefore, Henson had the right to decide whether or not to attend AA meetings.

Henson also had a fundamental right to refuse to attend AA meetings under Washington law. The Washington Supreme Court has acknowledged a fundamental right to make decisions about one's own medical treatment.[121] The Washington Supreme Court has also indi-

118. *See supra* note 56, notes 81–87 and accompanying text.

119. Henson did not claim that his racial identity or ethnic background was the basis for the ESD's decision; thus the court would not apply strict scrutiny based on a suspect classification.

120. *See* Union Pac. Ry. Co. v. Botsford, 141 U.S. 250, 251 (1891); Roe v. Wade, 410 U.S. 179, 213 (1973) (Douglas, J., concurring).

121. *See In re* Colyer, 99 Wash. 2d 114, 120, 660 P.2d 738, 742 (1983); *supra* notes 75–77 and accompanying text.

cated that competent adults have a right to determine the type of medical treatment they will receive.[122] Henson could have argued that he should have been extended the same right to determine how he wished to deal with alcoholism. As part of his medical treatment, Henson chose to attend the twenty-one-day in-treatment program. He chose not to attend the AA meetings. This determination is essentially a health care decision and thus is protected as the exercise of a fundamental right.

2. *Denial of Funding in* Henson *Is Not a Burden on a Fundamental Right*

Henson's refusal to attend AA meetings was a protected fundamental right, but the state's denial of unemployment benefits based on Henson's refusal did not require strict scrutiny, and did not violate the equal protection clause. The denial of funding in *Henson* is similar to the denial of funding in *Maher.* As the court in *Maher* noted, even when a fundamental right exists, there is no requirement that equal government funding must be allocated to avoid infringing on the exercise of that right.[123] While the *Maher* court recognized a fundamental right to abortion, it held that a state is free to make value judgments regarding the exercise of this fundamental right through its allocation of public funds.[124] Similarly, although the ESD could recognize Henson's right to make medical decisions regarding the treatment of alcoholism, it would not be required to pay Henson unemployment benefits if he chose not to complete treatment.

In *Shapiro v. Thompson,*[125] however, the Supreme Court found that the denial of public funds burdened a fundamental right such that strict scrutiny was required.[126] While the court in *Maher* distinguished *Shapiro* because of the direct penalty effect of the statute,[127] another aspect distinguishes *Maher* and *Shapiro* more clearly still. The statute in *Shapiro* was held unconstitutional because the Court found the statute purposely burdened a fundamental right.[128] The *Shapiro* court found no compelling justification to deny families wel-

122. *In re* Schuoler, 106 Wash. 2d 500, 506, 723 P.2d 1103, 1107 (1986); *In re* Ingram, 102 Wash. 2d 827, 689 P.2d 1363 (1984); *see supra* notes 79–80 and accompanying text.

123. *See supra* text accompanying notes 81–84.

124. Maher v Roe, 432 U.S. 464, 474 (1977).

125. 394 U.S. 618 (1969); *see supra* notes 85–87 and accompanying text (discussing *Shapiro*).

126. The program burdened the right to interstate travel. *Shapiro,* 394 U.S. at 638.

127. *Maher,* 432 U.S. at 474–75 n.8.

128. "[T]he purpose of inhibiting migration by needy persons into the state is constitutionally impermissible." *Shapiro,* 394 U.S. at 629.

fare aid solely because they had been residents for less than a year.[129] The Court held that because the statute impermissibly deterred interstate travel, the statute triggered strict scrutiny. Conversely, the purpose of the statute at issue in *Maher* was to promote childbirth, not to burden the right to abortion.[130] Failing to fund abortions was merely a side effect of applying that statute.[131]

When this analysis is applied to *Henson,* it appears there was no burden on a fundamental right. The purpose of the statute in *Henson* was not to burden health care decisions, but rather to distribute benefits to those unemployed through no fault of their own. As in *Maher,* the financial impact on Henson was merely an unfortunate side effect of applying the statute and not a direct punishment for the exercise of a fundamental right. Therefore strict scrutiny would not apply.

The denial of funding to Henson also did not burden a fundamental right under Washington law. Henson's decision to refuse treatment for alcoholism through AA is analogous to the situation in *Bedford v. Sugarman.*[132] In both *Henson* and *Bedford,* the plaintiffs had to comply with certain standards in order to qualify for public funds.[133] The *Bedford* court found that a requirement that the plaintiffs live in shelters did not infringe on their ability to make crucial decisions about fundamental rights.[134] Significant to this finding was the fact that the restraint on the plaintiffs was financial in nature.[135]

Similarly, when the ESD denied Henson's application for unemployment benefits, it merely required him to abide by the legislative qualifications to receive benefits. This did not infringe on his ability to make crucial decisions about fundamental rights. Despite the financial burden of not receiving benefits, Henson still retained the freedom to refuse to attend AA meetings. There was no governmental restriction on his choice. Nobody forced him to attend AA meetings. Under *Bedford,* a financial restraint of this type does not trigger strict scrutiny.

129. *Id.* at 627.

130. *Maher,* 432 U.S. at 478–79.

131. *Id.* at 474; see *supra* note 87.

132. 112 Wash. 2d 500, 772 P.2d 486 (1989); *see supra* notes 88–92 and accompanying text (discussing *Bedford*).

133. *Id.* at 502–03, 772 P.2d at 487; Henson v. Employment Sec. Dep't, 113 Wash. 2d 374, 376, 779 P.2d 715, 719 (1989).

134. *Bedford,* 112 Wash. 2d at 515–16, 772 P.2d at 494.

135. "Any restraints [plaintiffs] may feel on their freedom to make this choice are of a financial, not governmental, nature, and thus are not a constitutional concern." *Id.* at 515, 772 P.2d at 494 (comparing to Harris v. McRae, 448 U.S. 297, 316–17 (1980)).

This distinction is also supported by other Washington cases. A Washington appellate court held that there is no requirement that persons involved with welfare cannot, consistent with the equal protection clause of the Constitution, be treated differently depending upon their status at a given time.[136] The Washington Supreme Court has also held that decisions regarding allocations of public funds should be given deference, and that "statutory discrimination in public welfare programs will be upheld if any state of facts reasonably may be conceived to justify it."[137]

3. *ESD's Denial of Benefits Meets the Rational Basis Test*

Since *Henson* did not trigger strict scrutiny, the rational basis test would have been applied in an equal protection challenge to the ESD's decision.[138] Under both the federal and Washington rational basis tests, courts ask: (1) whether the legislature has a legitimate interest, and (2) whether the law or regulation rationally furthers that interest.[139] *Henson* meets the constitutional requirements. There was both a permissible purpose and a rational basis to exclude Henson from unemployment compensation benefits.

The legislature may make value decisions that affect funding levels for different groups so long as classifications are made for a permissible purpose. The Washington State legislature has clearly identified the purpose of unemployment benefits. Benefits are to be disbursed to protect those unemployed through no fault of their own. Just as the legislative purpose in *Maher* was to promote childbirth,[140] the Washington legislature chose to allocate public funds to promote a public value. *Henson* supports the legislature's intent to restrict unemploy-

136. Toulou v. Social & Health Servs., 27 Wash. App. 137, 146, 616 P.2d 678, 683 (1980) (a public assistance recipient who received outside income was not entitled to benefits, even when outside income was used to pay outstanding debts).

137. Davis v. Department of Empl. Sec., 108 Wash. 2d 272, 280, 737 P.2d 1262, 1267 (1987) (no equal protection violation occurred when unemployment benefits were denied to an applicant who quit her job to relocate to live in a meretricious relationship, even though benefits were awarded to applicants who quit jobs to live in marital relationships).

138. *See supra* text accompanying notes 93–95.

139. Maher v. Roe, 432 U.S. 464, 470 (1977) (quoting San Antonio School Dist. v. Rodriguez, 411 U.S. 1, 17 (1973)). The first element of the Washington rational basis test—does the classification apply alike to all members within the designated class—is implicit in the federal rational basis test. *See* L. TRIBE, *supra* note 59, at 1438–40. The second element of the Washington test—the existence of a basis in reality for the classification—focuses on whether there is a reasonable basis for making the classification. This is equivalent to the federal requirement that the classification be legitimate. Davis v. Department of Employment Sec., 108 Wash. 2d 272, 280, 737 P.2d 1262, 1267 (1987).

140. *Maher*, 432 U.S. at 478.

ment compensation to applicants who are not at fault for their unemployment.

The denial of benefits to those who refuse alcoholism treatment rationally furthers the state's legitimate interest in awarding benefits to those not at fault for their unemployment. Henson could rationally be determined to be at fault because he deliberately refused to attend AA meetings when the employer had several interests in requiring him to attend.[141] Because the nexus between the classification and state purpose need not be great under the rational basis test,[142] the ESD's classification in *Henson* meets the constitutional requirements.[143]

III. CONCLUSION

The Washington Supreme Court misapplied the misconduct doctrine in *Henson.* The court abandoned the previous misconduct doctrine in order to deny Henson unemployment benefits. The previous distinction between on-duty and off-duty misconduct should be re-adopted to reflect the different duties an employee owes to an employer during paid and unpaid hours.

While the injury to Henson was not an equal protection violation, the court's decision leaves employees vulnerable to unwarranted intru-

141. The court put special emphasis on the interest of the employer (rather than the state) in finding that Henson was not entitled to benefits because: (1) if an employer pays for an employee's recovery program, the employer is entitled to expect the employee to follow through; (2) employers do not have to wait until a customer complains about the odor of alcohol to dismiss an employee for misconduct; (3) an employee who makes an oral contract with the employer to undergo alcohol treatment is not entitled to unilaterally breach the contract; and (4) it is within the legitimate interests and expectations of an employer that all employees come to work without smelling of alcohol. Henson v. Employment Sec. Dep't, 113 Wash. 2d 374, 379–81, 779 P.2d 715, 718–19 (1989).

142. L. TRIBE, *supra* note 59, at 1443.

143. This result is similar to that reached in *Maher* and *Davis.* In *Maher,* 432 U.S. at 478, the Supreme Court found that denying funding for abortions rationally furthered the state's interest in encouraging normal childbirth. *Id.* Similarly, the denial of benefits to Henson due to his refusal to attend AA meetings furthered the state's interest in denying unemployment benefits to those who are at fault. The Washington Supreme Court permitted the ESD to deny unemployment benefits to those quitting their jobs because they chose to relocate to live in meretricious relationships, but to award benefits to those quitting their jobs to relocate to live in marital relationships. Davis v. Department Empl. Sec., 108 Wash. 2d 272, 280, 737 P.2d 1262, 1267 (1987); *see supra* notes 56, 137. The court in *Davis* found that the legislature had a legitimate purpose in promoting the stability of the family unit, and accepted the ESD's view that those who quit work to live in a meretricious relationship do not have a serious commitment to the family unit. *Davis,* 108 Wash. 2d at 280, 737 P.2d at 1267. Thus the classification was rationally related to the state interest in stable family units. *Id.* at 281, 737 P.2d at 1267. Similarly, the classification of Henson's refusal to attend AA meetings as misconduct is rationally related to the state's interest in denying benefits to those at fault for their unemployment.

sions into their private lives by employers and may therefore lead to future equal protection challenges and violations. To avoid unwarranted intrusions, courts deciding such cases should be sensitive to equal protection issues. Unwarranted intrusions would also be avoided if the Washington Supreme Court refashions the misconduct doctrine so that it offers protection to employees and clear guidelines to employers. After *Henson,* the doctrine does neither.

Karen L. Forner