

NO. 75405-0

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

JOSE CUESTA,

Respondent,

v.

STATE OF WASHINGTON, DEPARTMENT OF EMPLOYMENT
SECURITY,

Appellant.

FILED
Nov 03, 2016
Court of Appeals
Division I
State of Washington

REPLY BRIEF OF APPELLANT

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I. INTRODUCTION

Cuesta does not challenge any of the Commissioner's factual findings. He thus concedes that he twice failed to inspect airplane parts yet approved them as constructed properly. He also states that he is "unsure" how this happened. Taken together, this amounts to carelessness and negligence of such a degree as to show an intentional or substantial disregard of the employer's interest, which is misconduct under the Employment Security Act. RCW 50.04.294(1)(d). The Commissioner correctly so ruled. Additionally, the record supports that Cuesta violated a reasonable company rule of which Cuesta was aware, and Cuesta does not dispute this. Cuesta's argument that his conduct should be excused because he only engaged in this conduct twice in one day is unpersuasive because it is the degree of his negligence, not the frequency or duration, that supports the misconduct finding under RCW 50.04.294(1)(d).

The Commissioner did not find that Cuesta's conduct was accidental. Thus Cuesta's conduct was not inadvertence or an isolated instance of ordinary negligence. Nor was Cuesta's conduct the result of inefficiency, unsatisfactory conduct, or failure to perform due to inability or incapacity.

Finally, there are no grounds for a remand. Cuesta does not dispute any findings of fact, making it irrelevant whether portions of the transcript

were inaudible or that there were technical difficulties. And Cuesta waived his right to a Spanish interpreter when he failed to request one despite being made aware of this right in Spanish, and the lack of an interpreter did not prejudice him. This Court should affirm the Commissioner's decision denying Cuesta unemployment benefits and deny Cuesta's request for a remand for a new hearing.

II. ARGUMENT IN REPLY

A. **Cuesta Twice Approved Airplane Parts Without Inspecting Them and Was Discharged for Disqualifying Misconduct**

Cuesta does not dispute any of the Commissioner's findings of fact. Resp't's Br. at 10. The Commissioner found that Cuesta twice approved parts and marked them as inspected when he had not done so. AR 78 (FF 7 and 9). This is sufficient to establish misconduct under two provisions of the statute. The conduct was, first, careless and negligent and substantially disregarded the employer's interests and, second, a violation of a reasonable company rule of which Cuesta knew or should have known. RCW 50.04.294(1)(d), (2)(f).

1. **Cuesta's conduct was careless, negligent, and substantially disregarded his employer's interest**

Cuesta characterizes his conduct as a "mistake" or an "accident." Resp't's Br. at 4, 5, 12, 14-17. But the Commissioner never made a finding of fact that either of the instances in which Cuesta approved parts

that he never inspected were mistakes or accidents. AR 78-79 (FF 1-14). If a finding of fact was not made, it is assumed that the party did not meet their burden of proving this fact. *State v. Armenta*, 134 Wn.2d 1, 14, 948 P.2d 1280 (1997). Contrary to Cuesta's assertions,¹ the Commissioner did not characterize Cuesta's conduct as an accident in finding of fact 7 or 9. Resp't's Br. at 17. Rather, the Commissioner found that an airplane part that had not yet been completed because required holes had not been drilled in it was accidentally marked as completed. AR 78 (FF 9). Cuesta then marked the part as inspected and approved, even though he never inspected it. *Id.* The Commissioner properly determined this was careless or negligent.

Even if Cuesta's approval of the uninspected parts was unintentional, it is still misconduct because unintentional acts can be misconduct. *Markam Group, Inc. P.S. v. State Dep't of Emp't Sec.*, 148 Wn. App. 555, 562, 200 P.3d 748 (2009). The question is whether the unintentional act was of a sufficient degree and risk to the employer to rise to the level of misconduct. Here, the seriousness of the risk to the employer and the public posed by approving uninspected airplane parts cannot be more clear. Cuesta does not challenge the Commissioner's

¹ Cuesta repeatedly mischaracterizes findings of fact 7 and 9 to assert that the Commissioner found his actions were accidental. Resp't's Br. at 5 (FF 9), 12 (FF 7 and 9), 14 (FF 7 and 9), 15 (FF 7 and 9), 16 (FF 7), and 17 (FF 9).

finding that failure to properly inspect airplane parts could lead to “serious consequences,” that Cuesta was “aware of the gravity of his job,” or that parts inspection is meant to “assure the safety of the flying public.” AR 78-79 (FF 10-12).

Cuesta’s attempts to distinguish *Johnson v. Emp’t Sec. Dep’t*, 64 Wn. App. 311, 824 P.2d 505 (1992) and *Smith v. Emp’t Sec. Dep’t*, 155 Wn. App. 24, 226 P.3d 263 (2010) are unavailing. In *Johnson*, the bus driver’s failure to be aware that she had a handgun in her purse was unintentional, yet it was still misconduct because it was gross negligence² and presented a clearly dangerous situation to the public and the employer. *Johnson*, 64 Wn. App. at 317. Similarly here, Cuesta’s failure to inspect parts, even if unintentional, presented a clear danger to the public and a serious risk to the employer.

And in *Smith*, the claimant unknowingly violated privacy laws by recording conversations with co-workers and members of the public. *Smith*, 155 Wn. App. at 36. The fact that the recordings took place over a lengthy period of time rather than one day is immaterial. *See* Resp’t’s Br. at 12. The germane point in *Smith* is that even the potential of adversely

² It is important to note that RCW 50.04.294(1)(d) does not require gross negligence for an action to be misconduct. Although *Johnson*’s loss of her gun on a public bus was grossly negligent conduct, the most pertinent point of the *Johnson* case is that even a single event may establish negligence of such degree as to show a substantial disregard of an employer’s interest and constitute misconduct.

impacting an employer's interests in serving its customers and exposing the employer to liability is an important factor in determining whether conduct rises to the level of "carelessness or negligence of such degree or recurrence to show an intentional or substantial disregard of the employer's interest" under RCW 50.04.294(1)(d). *Smith*, 155 Wn. App at 36. Cuesta's actions meet this standard of misconduct.

Cuesta also argues that because his mistakes were caught and Boeing was able to correct them by disassembling the aircraft, his actions were not a risk to the safety of the flying public. Resp't's Br. at 15-16. But the number or quality of safety precautions an employer has to catch an employee's carelessness or negligence should not diminish the seriousness of his or her conduct. Moreover, the fact that Boeing exerted substantial effort to recheck the partially assembled aircraft itself shows the seriousness of the risk that was posed.

The Commissioner found that a failure to inspect airplane parts has serious consequences and is a risk to the flying public, and Cuesta does not challenge these findings. AR 78-79 (FF 10-11). Importantly, the safety precautions Cuesta attempts to rely on occurred because of concerns about Cuesta's work and the ensuing investigation, which revealed another uninspected part. AR 29-30, 34, 78 (FF 9, 10). The disassembly required a mechanic to take the partially assembled aircraft apart and an inspector to

reinspect the parts before the aircraft could be assembled a second time. AR 34. This rework had to be done due to the risk to the flying public if parts are not properly inspected. AR 78 (FF 10). Cuesta's conduct was carelessness and negligence of such a degree as to show an intentional or substantial disregard of the employer's interest, and this Court should affirm the Commissioner's decision.

2. Cuesta concedes his conduct violated a reasonable company rule of which he knew or should have known

This Court should also affirm the Commissioner's decision because Cuesta violated a reasonable company rule of which he knew or should have known, which is per se misconduct. RCW 50.04.294(2)(f); *Daniels v. Dep't of Emp't Sec.*, 168 Wn. App. at 728. A rule is reasonable if it "is related to [the claimant's] job duties" and is "a normal business requirement or practice" for the position. WAC 192-150-210(4).

Cuesta does not dispute that he violated the company rule, that the rule was reasonable, or that he should have known of the rule. Resp't's Br. at 19. Under the plain language of the statute, this is misconduct per se. RCW 50.04.294(2)(f); *Daniels v. Dep't of Emp't Sec.*, 168 Wn. App. 721, 728, 281 P.3d 310 (2012) ("Certain types of conduct are misconduct per se."). Cuesta erroneously argues that he should not be subject to this misconduct statute because he is not "blameworthy." *Id.* But Cuesta is

blameworthy; it was his own conduct that led to his dismissal. He is at fault for his unemployment because he failed to exercise the care that a reasonably prudent person would exercise in inspecting airplane parts and for violating a reasonable employer rule of which he knew or should have known. Given Cuesta's conduct, it cannot be said that he became "unemployed through no fault of his own." RCW 50.01.010; *Tapper v. Emp't Sec. Dep't*, 122 Wn.2d 397, 408, 858 P.2d 494 (1993). This is particularly true under this provision of statutory per se misconduct which does not require actual knowledge of the rule. It is enough that an employee *should have known* of a rule and violated it. See WAC 192-150-210(5). Under this "should have known" standard, it is per se misconduct to violate a reasonable company rule of which an employee should have known, even if they did not actually know of the rule.

Here, the rule requiring Cuesta to physically inspect parts before marking them as complete was a process that had to be followed for safety reasons. AR 78 (FF 11). Entering a part into the system marked as inspected and approved without inspecting it is a violation of a reasonable company rule that Cuesta knew or should have been known. This Court should affirm the Commissioner's decision on this additional basis. RAP 2.5(a); *State v. Costich*, 152 Wn.2d 463, 477, 98 P.3d 795 (2014).

B. Cuesta's Conduct Does Not Fall Under One of the Exceptions to Misconduct

The Commissioner's findings of fact do not support the arguments that Cuesta's conduct falls under an exception to the misconduct statute. Cuesta attempts to categorize his conduct as an exception by arguing that his conduct was the result of an accident but the Commissioner never made this finding. Cuesta erroneously asserts that findings of fact 7 and 9 characterize his conduct as "accidental." Resp't's Br. at 5, 12, 14, 15, 16, and 17. In particular, Cuesta argues that finding of fact 9 states that he himself accidentally marked the part as complete. *Id.* at 17. But the finding of fact actually states that someone else accidentally marked a part as ready for inspection by Cuesta. AR 78 (FF 9). The finding goes on to state that Cuesta approved that part even though the part was not ready for inspection because the holes had not been drilled into the part yet. *Id.*

1. Cuesta's failure to inspect was not an instance of inadvertence or ordinary negligence under RCW 50.04.294(3)(b)

Cuesta's conduct was not "inadvertence or ordinary negligence in [an] isolated circumstance" and thus outside the definition of misconduct. RCW 50.04.294(3)(b). Cuesta's conduct was not accidental or inadvertent and rose above the level of mere ordinary negligence. He took an active step to approve a part into the computer as inspected and complying with

engineering requirements even though he had not physically inspected it. AR 78 (FF 7). Cuesta was aware of the requirement that he physically inspect parts before signing off on them, yet twice affirmatively took steps to approve them without having inspected them. AR 78 (FF 7 and 9). Thus, this case is distinguishable from *Michaelson v. Emp't Sec. Dep't*, 187 Wn. App. 293, 349 P.3d 896 (2015) and *Wilson v. Emp't Sec. Dep't*, 87 Wn. App. 197, P.2d 269 (1997).

Cuesta's conduct was not ordinary negligence. By inaccurately stating that he had inspected airplane parts—that he had accurately completed his vital role—Cuesta's negligence rose beyond the ordinary. It is not the number of times or the course of time over which the negligent events occur that is the deciding factor in whether negligence is ordinary negligence, or rises to the level of misconduct. Resp't's Br. at 11. Rather, it is the degree of careless or negligence that matters. RCW 50.04.294(1)(d) and (3)(b). In *Michaelson*, the claimant was discharged because three accidents in one year was adequate grounds for his employer to fire him, but these fender benders were ordinary negligence—the ordinary failure to exercise reasonable care—and thus not disqualifying misconduct. *Michaelson*, 187 Wn. App. at 901. Here, as in *Johnson*, Cuesta's actions constituted a higher level of negligence because

they constituted a substantial danger to the general public and was of such a degree as to show a substantial disregard for his employer's interests.

This case is also distinguishable from *Wilson*. In *Wilson*, the claimant failed to take proper steps to keep track of loose diamonds and, as a result, lost two diamonds. *Wilson*, 87 Wn. App. at 199. The value of the lost diamonds was less than \$1500. *Id.* By contrast, here, Cuesta affirmatively took actions leading to the misstatements that he had inspected parts when he had not. AR 78 (FF 7 and 9). The partially assembled airplane had to be taken apart, reinspected, and put back together again to ensure the safety of the flying public. AR 78 (FF 10). This safety measure happened only because Cuesta's manager was on site due to concerns raised by fellow inspectors that Cuesta was not properly inspecting parts. AR 29-30. If Cuesta's coworkers had not noticed his failure, a plane could have been assembled with uninspected and improperly constructed parts. Cuesta is incorrect in his assertion that these acts of carelessness or negligence are comparable. Resp't's Br. at 12.

The misconduct statute contemplates varying degrees of misconduct, and includes sufficiently careless or negligent acts to show a substantial disregard of the employer's interests. RCW 50.04.294(1)(d). Here, Cuesta's actions put the flying public and his employer's interests at risk by approving uninspected airplane parts. Cuesta's actions went

beyond inadvertence or ordinary negligence and rises to the level of carelessness or negligence of such degree to show an intentional or substantial disregard of his employer's interest. Finding this conduct to not be sufficient in degree of carelessness or negligence to amount to misconduct would render subsection (1)(d) meaningless. Cuesta's conduct was not an exception to misconduct.

2. Cuesta's conduct was not inefficiency, unsatisfactory conduct, or failure to perform well as the result of inability or incapacity under RCW 50.04.294(3)(a)

Cuesta had the skills to perform well as an inspector at Boeing—he had been employed at Boeing for eight years, was trained, and was provided step by step instructions on how to inspect parts by comparing the parts he inspected against drawings he was provided. AR 77-78 (FF 3 and 5). Accordingly, his conduct cannot be “inefficiency, unsatisfactory conduct or failure to perform well as the result of inability or incapacity” and thus outside the definition of misconduct. RCW 50.04.294(3)(a). Cuesta argues his case is analogous to *Markam Group, Inc. P.S. v. State Dep't of Emp't Sec.*, 148 Wn. App. 555, 200 P.3d 748 (2009), because he lacked the necessary skills to work in an unfamiliar area with an unfamiliar numbering system. Resp't's Br. at 14. In *Markam*, the ALJ found that the claimant was discharged primarily because she lacked the

skills necessary to perform her job to her employer's expectations and thus was unable to perform the job as expected. *Markam*, 148 Wn. App. at 559.

But Cuesta had the skills to work in the new area. The testimony shows that Boeing inspectors are frequently asked to work in areas outside of their normal assigned area and Cuesta had *worked in this area before*. AR 37-38. Boeing employs hundreds of inspectors who cover each other's work when necessary, and working outside his normal work area is within the scope of Cuesta's abilities or experience. *Id.* And, although Cuesta was working outside his usual assignment area, the work he was required to do was the same. AR 28 (FF 6). Because Cuesta had the ability and capability to perform work in this particular area correctly—and had done so in the past—this case is distinguishable from *Markam*. Cuesta's negligence was not due to "inefficiency, unsatisfactory conduct or failure to perform well as the result of inability or incapacity" under RCW 50.04.294(3)(a).

C. There Are No Grounds for a Remand

There are no grounds for a new hearing because the quality of the recording of the administrative hearing does not prejudice Cuesta when he does not dispute any of the findings of fact. Nor was Cuesta prejudiced by his failure to request an interpreter. The appeal notice clearly stated he could request a Spanish interpreter if he needed one, and he did not

request one, and the transcript of the hearing shows that Cuesta has a strong grasp of the English language, if not fluency.

Cuesta challenges none of the Commissioner's findings of fact. Nor does he argue that certain findings should have or would have been made with a better audio quality. Additionally, he does not explain how the inaudible portions of the transcript impede appellate review. Therefore, remand for a new hearing is neither appropriate nor necessary because Cuesta cannot be prejudiced. Resp't's Br. at 10 (stating Cuesta only challenged the legal conclusions reached by the Commissioner). Any inaudible portions would, at most, create a question of fact under a substantial evidence standard. But Cuesta does not challenge the factual findings. He merely disagrees with how the law was applied to those undisputed facts.

Even if he disputed the findings of fact, Cuesta also has not demonstrated or argued that he was prejudiced by any missing portions of the hearing transcript. During the hearing, the ALJ commented on the technical difficulties. AR 29. She then asked the parties to speak up if they needed anything be repeated and to inform her if it ever became a problem. AR 29-30. Cuesta never spoke up to inform the ALJ that he had trouble hearing or to state that he had problems preventing him from understanding the proceeding. *See* AR 7-58.

Additionally, Cuesta did not request an interpreter when one was available to him, and he was aware of that right. He thus waived that right. Cuesta received a notice from ESD informing him he could request an interpreter. AR 63-64. The notice was in both English and Spanish, *id.*, which Cuesta now argues is his best language. Resp't's Br. at 21. But Cuesta's testimony, answers, questions, closing, and written documents submitted as a part of the record show that Cuesta has a strong command of the English language, if not fluency. *See* AR 12, 14-16, 37-48, 50-51, 57-58.³ Cuesta therefore cannot plausibly claim he has been prejudiced by his waiver of his right to an interpreter.

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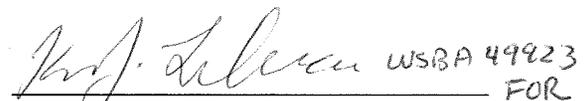
³ AR 12 (indicating he understood the explanation of the hearing process), 14-16 (Cuesta's direct testimony where he answered the ALJ's questions clearly and without needing her to repeat any of the questions), 37-42 (Cuesta's redirect testimony), 42-48 (Cuesta clearly answers questions on cross examination), 50-51 (during which Cuesta asked cogent questions of his witness), and 57-58 (Cuesta's closing remarks).

III. CONCLUSION

For the reasons stated above, and in the Department's opening brief, the Department asks the Court to reverse the superior court's decision, including the attorney fees and costs award, and affirm the Commissioner's decision denying Cuesta unemployment benefits.

RESPECTFULLY SUBMITTED this 3rd day of November, 2016.

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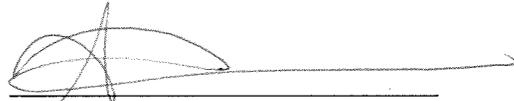
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DATED this 31st day of November, 2016, at Olympia, Washington.



AMY PHIPPS, Legal Assistant