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DIVISION II

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STATE OF WASHINGTON

BY 
Court of Appeals Div. II
Cause No. 45950-7-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DEPARTMENT OF EMPLOYMENT SECURITY,
Appellant

v.

MARTIN MICHAELSON
Appellee,

APPELLEE MARTIN MICHAELSON'S OPENING BRIEF

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ORIGINAL

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I. INTRODUCTION

Martin Michaelson worked as a delivery truck driver for Food Services of America (FSA) from August 15, 2003 until March 23, 2013, when he was terminated for his involvement in three “chargeable” motor vehicle accidents in one year. CP Pg. 21, lines 15-21. Mr. Michaelson’s subsequent application for unemployment benefits was denied by the Employment Security Department on April 12, 2013. The Employment Security Department ruled that Mr. Michaelson’s involvement in three “preventable” accidents in one year violated FSA company policy and amounted to “willful and deliberate “misconduct” rendering Mr. Michaelson ineligible for benefits under RCW 50.04.294(1)(d).

The denial of Mr. Michaelson’s claim for unemployment benefits was affirmed on administrative appeal by Judge Gina T. Martigan on May 20, 2013, but reversed on judicial appeal to the Pierce County Superior Court by Judge Ronald Culpepper on February 11, 2014. The state of Washington then filed this timely appeal and Mr. Michaelson was ordered to file the Opening Brief.

II. STANDARD OF JUDICIAL REVIEW

The standard of judicial review applicable to Employment Security Department decisions is governed by the state of Washington's Administrative Procedure Act. When reviewing the Employment Security Department's decision, the court sits in an appellate capacity and must follow the standards found in RCW 34.05.570.¹

The Employment Security Department's findings of fact are reviewed under the substantial evidence standard. Under the substantial evidence standard, the reviewing court must determine if the administrative record contains "a sufficient quantity of evidence to persuade a fair-minded person of the truth or correctness to the agency's findings."² The reviewing court may not substitute its judgment for that of the agency regarding witness credibility or the weight of evidence.³

When an order is alleged to be arbitrary or capricious, the scope of review "is narrow, and the challenger carries a heavy burden."⁴ The court

¹ RCW 50.32.120; RCW 34.05.570.

² RCW 34.05.570(3)(e); *Thurston Co. v. Cooper Point Ass'n*, 148 Wn.2d 1, 8, 57 P.3d 1156 (2002).

³ *Smith*, 155 Wn. App. At 35 (citing *Affordable Cabs v. Dep't Empl. Sec.*, 124 Wn. App. 361, 367, 101 P.3d 440(2004)).

⁴ *Keene v. Board of Accountancy*, 77 Wn. App. 849, 859, 894 P.2d 582 (1995).

must determine whether the Employment Security Department has engaged in “willful and unreasoning action, without considerate and in disregard of facts and circumstances.”⁵ “Where there is room for two opinions, action is not arbitrary and capricious even though one may believe an erroneous conclusion has been reached.”⁶

When reviewing matters within agency discretion, “the court shall limit its function to assuring that the agency has exercised its discretion in accordance with law, and shall not itself undertake to exercise the discretion that the legislature has placed in the agency.”⁷

Conclusions of law are reviewed *de novo* pursuant to RCW 34.05.570(3)(d), but the appellate court should accord substantial weight to an agency’s interpretation of the laws the agency is assigned to administer.⁸

Whether an employee’s behavior constitutes “misconduct,” is a mixed question of law and fact.⁹ When the issue involves a mixed

⁵ *Heinmiller v. Dep’t of Health*, 127 Wn.2d 595, 609, 903 P.2d 433, (1995).

⁶ *Id.*

⁷ RCW 34.05.574(1). *Clausing v. State*, 90 Wn. App 863, 870-871, 955 P.2d 394 (1998).

⁸ *Ludeman v. State, Dep’t of Health*, 89 Wn. App. 751, 755, 951 P.2d 266(1997).

⁹ *Tapper v. Empl. Sec. Dep’t*, 122 Wn.2d at 402.

question of law and fact, the reviewing court must: (1) apply the substantial evidence standard to establish the relevant facts; (2) make a *de novo* determination of the correct law; and (3) apply the law to the facts.¹⁰ The burden of proving “misconduct” by a preponderance of the evidence, however, is always on the employer. *In re Murphy*, Empl. Sec. Comm’r Dec 2d 750 (1984).

III. ASSIGNMENT OF ERROR

A. The Employment Security Department’s conclusion, that Mr. Michaelson’s involvement in three motor vehicle accidents in 12 months was “misconduct,” which disqualified him from unemployment benefits under RCW 50.04.294(1)(d), was arbitrary and capricious, had no substantial supporting evidence, and was contrary to law and justice.

IV. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Whether there was substantial evidence supporting the Employment Security Department’s decision that all three of the accidents at issue were caused by Mr. Michaelson’s negligence or carelessness

¹⁰ *Tapper*, 122 Wn.2d at 403.

which was “of such degree or recurrence” as to prove “substantial disregard” of his employer’s interest?

V. STATEMENT OF THE CASE

Mr. Michaelson worked as a delivery truck driver for FSA for almost ten years. CP Pg. 21, lines 15-20. He was an excellent driver, took safety very seriously, and worked very hard and diligently to protect the interest of his employer, FSA, to the best of his ability. CP Pg. 38, lines 16-19. On an average day, he drove 100 miles and stopped to make 10 to 17 deliveries. Each delivery required Mr. Michaelson to stop and then reverse the truck. CP Pg. 33, lines 10-25. During his FSA career, Mr. Michaelson had an excellent work and driving record except in the last twelve months of his employment when he had the misfortune of being involved in three motor vehicle accidents, on May 19, 2012, August 24, 2012, and March 12, 2013. *Id.*

FSA fired Mr. Michaelson for violating a written policy in the FSA employee handbook that prohibits involvement in three or more “chargeable” accidents in a one year. CP Pg. 69. According to the FSA

manual, an accident is deemed “chargeable” if the employee is “accountable.” The word “accountable” is not defined in the manual.

According to the FSA employee manual, an accident is not “chargeable” “if the driver committed no violation of traffic ordinances, rules or safe driving practices and additional alertness and control would not have prevented the accident.”

Mr. Michaelson admits that he was given the handbook and read and understood the policy. CP Pg. 75. He simply argues that two of the three accidents at issue were not caused by his negligence “of such degree or recurrence” to show “substantial disregard for his employer’s interest” sufficient to justify denial of unemployment benefits under RCW 50.04.294(1)(d).

A. May 19, 2012 Accident

On May 19, 2012, Mr. Michaelson was backing up his truck when another driver in a 2005 PT Cruiser suddenly pulled behind him and stopped, causing a collision. CP Pg. 34, lines 23-25; Pg. 35 lines 1-25; Pg. 36 lines 1-15. There was no personal inquiry and no traffic citation. Mr. Michaelson followed company policy including the “get out and look,”

and mirror check. He had his reverse lights and warning beeper on, but the other driver paid no attention. In a letter of suspension dated August 31, 2012, FSA told Michaelson that “striking a stationary object is a preventable accident.” Since the accident was “preventable,” it was “chargeable.” CP Pg. 63. FSA blames its driver 100% of the time if ever involved in any accident while in reverse. CP Pg. 31, lines 21-25; CP 32, lines 1-2; Pg. 70.

B. August 24, 2012 Accident

On August 24, 2012, Mr. Michaelson was stopped at a red light in Gig Harbor and accidentally rolled backwards hitting a 2007 Denali, causing approximately \$1,800.00 in property damage. CP Pg. 34, lines 10-22 However, Mr. Michaelson admits that he was at fault for this accident and consequently, it will not be discussed further. *Id*

C. March 12, 2013 Accident

On March 12, 2013, Mr. Michaelson backed his truck into a loading dock, stopped, and applied the parking brake. CP Pg. 36, lines 16-23. This caused the trailer to shift and the lower rear bumper hit a locking mechanism on the loading dock, causing a small dent in the bumper which

was fixed by hand. CP Pg. 36, lines 16-25; Pg. 37, lines 1-15. FSA admitted there was no cost associated with it. According to FSA, this was the third and final “chargeable” accident that necessitated Mr. Michaelson’s termination. CP Pg. 61.

Michaelson testified at his administrative hearing that minor scraping of the bumper on the loading dock “occurs regularly.” CP Pg. 29, lines 4-8. FSA admitted it happened before with other drivers but did not know whether anyone had been previously written up or disciplined for it. CP Pg. 31, lines 8-15.

VI. ARGUMENT

THE EMPLOYER DID NOT PROVE THAT MR. MICHAELSON’S INVOLVEMENT IN THE MOTOR VEHICLE ACCIDENTS ON MAY 14, 2012 AND MARCH 12, 2013, WAS “MISCONDUCT” AS DEFINED BY RCW 50.04.294(1)(d) SUFFICIENT TO JUSTIFY DENIAL OF UNEMPLOYMENT BENEFITS

A claimant may not receive unemployment benefits if his job termination was due to misconduct, furthering the legislative intent to

preserve state resources for workers who are unemployed through no fault of their own. As RCW 50.20.066(1) provides:

“With respect to claims that have an effective date on or after January 4, 2004:

An individual shall be disqualified from benefits beginning with the first day of the calendar week in which he or she has been discharged or suspended for misconduct connected with his or her work and thereafter for ten calendar weeks and until he or she has obtained bona fide work in employment covered by this title and earned wages in that employment equal to ten times his or her weekly benefit amount. Alcoholism shall not constitute a defense to disqualification from benefits due to misconduct.

In 2003, the Washington Legislature chose to define the term “misconduct” more specifically, beyond the three-prong test for “willful disregard of an employer’s interest” previously set forth in case law. RCW 50 .04.294 defines “misconduct” as follows:

“With respect to claims that have an effective date on or after January 4, 2004:

- (1) "Misconduct" includes, but is not limited to, the following conduct by a claimant:
 - (a) Willful or wanton disregard of the rights, title, and interests of the employer or a fellow employee;
 - (b) Deliberate violations or disregard of standards of behavior which the employer has the right to expect of an employee;

(c) Carelessness or negligence that causes or would likely cause serious bodily harm to the employer or a fellow employee; or

(d) Carelessness or negligence of such degree or recurrence to show an intentional or substantial disregard of the employer's interest.

(2) The following acts are considered misconduct because the acts signify a willful or wanton disregard of the rights, title, and interests of the employer or a fellow employee. These acts include, but are not limited to:

(a) Insubordination showing a deliberate, willful, or purposeful refusal to follow the reasonable directions or instructions of the employer;

(b) Repeated inexcusable tardiness following warnings by the employer;

(c) Dishonesty related to employment, including but not limited to deliberate falsification of company records, theft, deliberate deception, or lying;

(d) Repeated and inexcusable absences, including absences for which the employee was able to give advance notice and failed to do so;

(e) Deliberate acts that are illegal, provoke violence or violation of laws, or violate the collective bargaining agreement. However, an employee who engages in lawful union activity may not be disqualified due to misconduct;

(f) Violation of a company rule if the rule is reasonable and if the claimant knew or should have known of the existence of the rule; or

(g) Violations of law by the claimant while acting within the scope of employment that substantially affect the claimant's job performance or that substantially harm the employer's ability to do business..."

RCW 50.04.294(3) then goes on to state what "misconduct"

does not include:

“(a) Inefficiency, unsatisfactory conduct, or failure to perform well as the result of inability or incapacity;

(b) Inadvertence or ordinary negligence in isolated instances;

(c) Good faith errors in judgment or discretion...”

Two of the three allegedly “chargeable” or “preventable” accidents at issue are insufficient as a matter of law to prove “misconduct,” or “an intentional or substantial disregard of the employer’s interest” as required by RCW 50.04.394(1)(d) to justify the denial unemployment benefits following involuntary termination.

FSA and the Employment Security Department failed to understand or recognize that it was impossible for Mr. Michaelson to prevent an accident with a moving object that suddenly and negligently stopped right behind him as the driver of the PT Cruiser did in this case. Mr. Michaelson had followed FSA driving policies and procedures to the letter. CP Pg. 26, lines 8-26; Pg. 27 lines 1-15. He got out and looked and checked his mirrors. Mr. Michaelson was using both warning lights and an audible beeper to warn anyone nearby he was in reverse gear. Given all of

the facts and circumstances, Mr. Michaelson was not negligent and the FSA should never have concluded the May 19, 2012 accident was “chargeable.”

The March 12, 2013 incident involving the minor dent in the rear bumper was also not “misconduct” sufficient to deny unemployment benefits. The dent was fixed by hand and there was no cost to the employer. Surely this fails to rise to the level of carelessness or negligence of such a degree that it shows intentional disregard of FSA’s interests.

VII. CONCLUSION

For all of the foregoing reasons, appellee Michaelson requests that his court affirm the Pierce County Superior Court’s reversal of the Employment Security Department’s finding of misconduct so that he may receive the unemployment benefits to which he is legally entitled under Washington law.

VIII. REQUEST FOR ATTORNEYS FEES

Mr. Michaelson requests the award of costs and reasonable attorneys fees pursuant to RCW 50.32.160, RCW 50.32.100, and RCW 4.84.010.

DATED: This 30 day of June, 2014.



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DECLARATION OF SERVICE

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ORIGINAL

I, Sara Lillie-Lugo, do hereby declare that this 30th day of June, 2014, I forwarded a true and correct copy of Appellee Martin Michaelson's Opening Brief as specified below.

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED: This 30th day of June, 2014.


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