

NO. 49362-4-II

COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

FILED
COURT OF APPEALS
DIVISION II
2017 JUN 15 AM 11:42
STATE OF WASHINGTON
BY DEPUTY

HAROLD GARY WILLIAMS,

Respondent,

v.

WASHINGTON STATE DEPARTMENT OF EMPLOYMENT
SECURITY,

Appellant.

REPLY BRIEF OF RESPONDENT

Patrick Leo McGuigan
WSBA No. 28897

Erin Norgaard
WSBA No. 32789

William J. Kim
WSBA No. 46792
Attorneys for Respondent

HKM Employment Attorneys LLP
600 Stewart Street, Suite 901
Seattle, WA 98101
(206) 838-2504

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2017 JUN 14 PM 3:12

6/14/17
P.W.D.

TABLE OF CONTENTS

| | |
|---|----|
| I. INTRODUCTION | 1 |
| II. ARGUMENT | 2 |
| A. Williams Did Not Commit Disqualifying Misconduct | 2 |
| 1. The evidence does not support the finding that Williams knew or should have known about Old Dominion’s supposed corporate “door check” policy..... | 2 |
| 2. The Commissioner’s credibility findings are not supported by substantial evidence..... | 5 |
| 3. The Commissioner misapplied the law on misconduct | 7 |
| a. Williams did not act with willful or wanton disregard of Old Dominion’s interests | 9 |
| b. Williams did not act with the requisite carelessness or negligence to support a finding of disqualifying misconduct | 11 |
| B. The ESD’s Failure to Address Relevant Neutral Third-Party Testimony and Refusal to Allow Testimony Regarding Alternative Reasons For Williams’s Termination was Arbitrary and Capricious | 15 |
| III. CONCLUSION | 16 |

TABLE OF AUTHORITIES

Cases

| | |
|---|-----------|
| <i>Campbell v. Emp't Sec. Dep't</i> , 180 Wn.2d 566, 326 P.3d 713 (2014)..... | 8 |
| <i>Dermond v. Emp't Sec. Dep't</i> , 89 Wn. App. 128, 947 P.2d 1271 (1997)..... | 12 |
| <i>Hamel v. Emp't Sec. Dep't</i> , 93 Wn. App. 140, 966 P.2d 1282 (1998)..... | 10 |
| <i>In re Chandler</i> , Empl. Sec. Comm's Dec.2d 954 (2010) | 6, 7 |
| <i>In re Griswold</i> , 102 Wn. App. 29, 15 P.3d 153 (2000)..... | 13 |
| <i>Johnson v. Emp't Sec. Dep't</i> , 64 Wn. App. 311, 824 P.2d 505 (1992)..... | 12, 13 |
| <i>Lei Li v. Holder</i> , 629 F.3d 1154 (9th Cir. 2011) | 6 |
| <i>Macey v. Emp't Sec. Dep't</i> , 110 Wn.2d 308, 752 P.2d 372 (1982)..... | 12 |
| <i>Michaelson v. Emp't Sec. Dep't</i> , 187 Wn. App. 293, 349 P.3d 896 (2015)..... | 8, 13, 14 |
| <i>Puget Sound Harvesters Ass'n v. Washington State Dept. of Fish & Wildlife</i> , 157 Wn. App. 935, 239 P.3d 1140 (2010)..... | 15 |
| <i>State v. Armenta</i> , 134 Wn.2d 1, 948 P.2d 1280 (1997)..... | 4 |

| | |
|--|------------|
| <i>Wilson v. Emp't Sec. Dep't</i> , 87 Wn. App. 197, 940 P.2d 269 (1997)..... | 13, 14, 15 |
|--|------------|

Statutes

| | |
|-------------------------|-------|
| RCW 50.01.010 | 7 |
| RCW 50.04.294 | 8, 12 |
| RCW 50.04.294(1)..... | 8, 11 |
| RCW 50.04.294(2)..... | 8, 9 |
| RCW 50.04.294(3)..... | 9, 13 |
| RCW 50.32.160 | 16 |
| WAC 192-150-210(5)..... | 10 |

Regulations, Rules and Legislative History

| | |
|---------------------------------|----|
| Laws of 2006, ch. 13, § 9 | 12 |
| RAP 18.1 | 16 |

I. INTRODUCTION

The Employment Security Act is to be liberally construed in favor of granting benefits to unemployed workers. An employee who is terminated from employment is entitled to benefits unless the employer proves that the employee was discharged for disqualifying misconduct. An employee does not engage in disqualifying misconduct when he performs his duties in accordance with the direction of his supervisors and the custom and practice of the workplace.

Harold Gary Williams (“Williams”) did not commit misconduct disqualifying him from unemployment benefits when he followed the move order communicated to him by his supervisor and pulled a trailer without first checking the door. He acted in good faith reliance on the actions of his supervisor and coworker, and performed his job duties as he was trained and in accordance with the practice at Old Dominion Freight Lines (“Old Dominion”). The Employment Security Department (“ESD”) Commissioner’s decision to the contrary was clear error and should be reversed and remanded for an award of unemployment benefits.

II. ARGUMENT

A. WILLIAMS DID NOT COMMIT DISQUALIFYING MISCONDUCT.

1. The evidence does not support the findings that Williams knew or should have known about Old Dominion's supposed corporate "door check" policy.

Substantial evidence does not exist to support the finding that Williams knew of any corporate policy requiring hostlers to check trailer doors. First, no such policy existed in writing. CP 65-66. Although a policy need not be in writing to justify dismissal for a violation, the absence of such a written policy is relevant to whether an employee has received adequate notice of it. Here, Old Dominion provided no evidence of actual notice of the policy to Williams. Second, although the managers testified that Williams was verbally told of the policy sometime in late 2013 or early 2014, there was no evidence that he was given this specific directive in 2015, when he started working as a hostler. CP 41-42. Furthermore, the testimony regarding the verbal notice was vague and unclear: no one testified when Williams was directly notified, nor what, specifically, he was told. CP 41-42. Old Dominion also failed to present written minutes of the safety meetings where this policy was allegedly discussed, despite testimony that such meeting minutes might exist. CP 43, 68.

Third, the fact that Cruz and Brown, both dockworkers working on the dock loading and unloading trailers, were also not familiar with this alleged policy further corroborates Williams's lack of knowledge. ESD argues that the testimony of Cruz and Brown supports rather than contradicts Old Dominion's testimony. ESD is incorrect. Both Brown and Cruz testified that they had never heard of a policy mandating termination for any hostler who failed to check the trailer door before moving it. CP 93-94, 103-104. Furthermore, both testified that, when door-checking was discussed at meetings, the focus was on the dockworker, not the hostler, since it was the dockworker who was primarily responsible for closing the doors. CP 91-92, 98, 101-102.

Finally, the absence of any regular, consistent enforcement of this alleged policy further corroborates Williams's lack of knowledge. Had this truly been an important policy that was clearly and consistently communicated to the hostlers, as Old Dominion claims, one would expect to see evidence of actual enforcement of this policy. Yet, no such enforcement existed. Williams, Cruz, and Brown all testified that hostlers routinely pulled trailers without checking doors, yet no one other than Williams was reprimanded or terminated. CP 93, 103-104. This seriously undermines the credibility of Old Dominion's witnesses and corroborates Williams's testimony concerning his lack of knowledge and familiarity

with this policy. ESD is hard-pressed to argue in this appeal that Williams's failure to check the door was done in disregard of Old Dominion's interests when Old Dominion, itself, regularly eschewed the alleged policy at the Seattle terminal.¹

ESD argues that Old Dominion's implementation of a tire chock policy undermines Williams's argument about lack of enforcement. This argument is unconvincing and is based on an error of fact. The testimony in this case shows that Old Dominion implemented the tire chock policy only *after* Williams was terminated, and not before. CP 103. Safety measures implemented and enforced after Williams's termination are irrelevant to this analysis.

ESD also relies on vague testimony about termination decisions made outside of the Seattle terminal as evidence of Old Dominion's enforcement of this policy. However, ESD misunderstands the relevant scope of inquiry in this case, both at the hearing below and in this appeal. Termination decisions made outside of the Seattle terminal are

¹ The Commissioner did not find that Old Dominion consistently enforced this policy, nor could have made such a finding based on the evidence presented. ESD unconvincingly argues that the absence of such a finding helps rather than hurts its argument. The absence of a critical factual finding means a negative presumption as to that fact against the party who bore the burden of proof on that fact, here, Old Dominion. *State v. Armenta*, 134 Wn.2d 1, 14, 948 P.2d 1280 (1997). Here, it was Old Dominion's burden to establish at the hearing that the policy underlying Williams's termination was valid and enforced, which it did not. Therefore, the absence of any findings on this critical fact must be construed against Old Dominion, which, here, means a presumption that the policy was not regularly and consistently enforced in Seattle.

irrelevant. What matters is how the alleged policy was implemented, communicated, and enforced among employees at the Seattle terminal, where Williams worked. Williams, Cruz, and Brown all worked in Seattle, and specifically testified to the policies and practices of the hostlers at the Seattle terminal, and the absence of any enforcement of this alleged “door check” policy at that facility. Termination or discipline decisions related to this policy made outside of the Seattle terminal do not, contrary to ESD’s assertion, establish a consistent or regular practice of enforcement in Seattle. What may or may not have happened at remote terminals has no bearing on what Williams knew or should have known about this policy.

The evidence overwhelmingly shows that Old Dominion overlooked or ignored regular and routine violations of this alleged “door check” policy, which undermines any findings that Williams knew or should have known about the policy. CP 93-94. Given that, the Commissioner erred in finding that Williams had adequate notice of the policy he was allegedly terminated for violating, which is required for any findings of disqualifying misconduct.

2. The Commissioner’s credibility findings are not supported by substantial evidence.

While credibility findings are generally afforded considerable weight on appeal, this Court is not required to blindly accept such findings

when they have no support in the record. *See, e.g., Lei Li v. Holder*, 629 F.3d 1154, 1157 (9th Cir. 2011) (applying substantial evidence standard to credibility findings on immigrations proceeding). Here, the Commissioner's findings that Williams's testimony was less credible than the employer's testimony on key facts are not supported by the evidence in the record as a whole. They are also inconsistent with the ESD's criteria for determining witness credibility. *See In re Chandler*, Empl. Sec. Comm's Dec.2d 954 (2010).

In *In re Chandler*, the ESD set forth criteria to be considered in assessing credibility, including: demeanor, plausibility, motive, logical persuasiveness, and consistency with other evidence. *Id.* Although the Commissioner's ruling (and the ALJ's findings adopted by the Commissioner) includes cursory reference to some of these terms, it is not enough to simply parrot the language in an effort to insulate credibility findings from scrutiny on appeal. Here, the Commissioner neglected to provide any reasoning or analysis for its credibility findings (either those adopted from the ALJ's ruling or the additional credibility finding on review). Had the Commissioner followed the criteria, even a cursory review of the evidence would demonstrate the implausibility, suspect motives, and lack of logical persuasiveness regarding the employer's testimony. Particularly, as the ALJ noted in the record, Cruz and Brown

still worked for Old Dominion, yet risked their own employment by testifying. CP 89.

Had the Commissioner followed the *In re Chandler* guidelines, it would have also found that Williams gave detailed and consistent accounts of the lack of any notice of the supposed “door check” policy. This testimony was corroborated by neutral witnesses, who confirmed both the lack of notice of such a policy and the regular practice among hostlers at Old Dominion. CP 91-93,101-103. This testimony contradicted the employer’s testimony, yet these inconsistencies were seemingly ignored by the Commissioner.

Williams certainly does not ask this Court to reweigh all the testimony and evidence in this case. However, this Court should be concerned with the blanket credibility findings adverse to Williams that have little or no support in the record and appear to not follow the ESD’s own criteria for determining credibility. Such findings frustrate the purpose of the Unemployment Benefits Statute and contravene the strong legislative policy favoring benefits for employees.

3. The Commissioner misapplied the law on misconduct.

Washington’s Employment Security Act exists to provide compensation to individuals who are involuntarily unemployed. RCW 50.01.010; *Michaelson v. Emp’t Sec. Dep’t*, 187 Wn. App. 293, 300, 349

P.3d 896 (2015). This Court is “bound to give unemployment compensation statutes a liberal construction.” *Campbell v. Emp’t Sec. Dep’t*, 180 Wn.2d 566, 571, 326 P.3d 713 (2014). The ESD seeks to limit or narrow the intended scope of the statute as applied to Williams. This Court should view this attempt “with caution.” *Michaelson*, 187 Wn. App. at 300.

An employee is eligible for unemployment benefits unless the employer proves that the employee was discharged for disqualifying misconduct. *Id.* RCW 50.04.294 defines “misconduct” as follows:

- (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.

RCW 50.04.294(1). The statute includes specific examples of the kind of “willful or wanton disregard” that may rise to the level of misconduct.

RCW 50.04.294(2). Among these, and the only one relied upon by the ESD in this case, is “[v]iolation of a company rule if the rule is reasonable

and if the claimant knew or should have known of the existence of the rule.” RCW 50.04.294(2)(f).

Expressly *excluded* from these definitions and examples of misconduct are: (a) inefficiency, unsatisfactory conduct, or failure to perform well as the result of inability or incapacity; (b) inadvertence or ordinary negligence in isolated instances; or (c) good faith errors in judgment or discretion. RCW 50.04.294(3). This demonstrates a clear recognition that there may be circumstances where there are concerns about work performance (and a resulting termination), but the conduct does not otherwise rise to the level of misconduct that would justify a denial of benefits.

Here, the Commissioner made factual findings that are unsupported by substantial evidence in the record, and then compounded its error by misapplying this law. The Commissioner’s ruling must be reversed.

a. Williams did not act with willful or wanton disregard of Old Dominion’s interests.

ESD applies a broad interpretation of the meaning of “willful or wanton disregard” without any meaningful review of the statute and accompanying regulation. In doing so, ESD conflates the very act of pulling a trailer and the resulting equipment damage as willful and wanton

disregard of Old Dominion's rights. WAC 192-150-210(5) provides essential guidance in determining whether Williams knew or should have known about a company rule: "if [he was] provided an employee orientation on company rules, [he was] provided a copy or summary of the rule in writing, or the rule is posted in an area that is normally frequented by him and his co-workers." *Id.*

Given that the employer admits that this alleged policy was never in writing (CP 43) and is unaware of any minutes from safety meetings verifying that the alleged policy was discussed (CP 68), it is untenable to assert that Williams knew or should have known about the company rule. Hence, Williams could not have committed willful or wanton misconduct. Accordingly, ESD's reliance on *Hamel v. Emp't Sec. Dep't*, 93 Wn. App. 140, 146, 966 P.2d 1282 (1998), is wholly inapplicable and distinguishable. While the focus is not on whether the employee intended to harm the employer, *Hamel* involved separate bases in determining whether the conduct was willful. First, Hamel was provided an employee handbook containing a policy against sexual harassment. Second, the employer had communicated and reprimanded Hamel on multiple occasions, thereby showing that Hamel knew of this policy. Here, not only was this policy never communicated to Williams, Williams was never disciplined for this alleged conduct and was told to rely on the

dockworkers and computer system, rather than check the trailer door himself.

b. Williams did not act with the requisite carelessness or negligence to support a finding of disqualifying misconduct.

The Commissioner found that Williams committed disqualifying misconduct by committing an act that constituted carelessness or negligence of such a degree as to show substantial disregard of his employer's interests under RCW 50.04.294(1)(d). CP 162. For the first time in this appeal, ESD now argues that Williams also engaged in disqualifying misconduct by committing an act that constituted carelessness or negligence that would likely cause serious bodily harm to a fellow employee, under RCW 50.04.294(1)(c). Both arguments fail. Although Williams admitted pulling a trailer without checking the door and while a dockworker was, unbeknownst to him, still inside the trailer, this was an isolated incident that, at worst, constituted a good faith error in judgment.

ESD relies on *Johnson v. Emp't Sec. Dep't*, 64 Wn. App. 311, 824 P.2d 505 (1992), for the proposition that Williams's single instance of pulling the trailer is sufficient to meet the statutory definition of "carelessness or negligence of such a degree as to show a substantial disregard of his employer's interests," under RCW 50.04.294(1)(d). ESD's

reliance is misplaced. First, *Johnson* predates the enactment of RCW 50.04.294,² and thus offers this Court little to no guidance in interpreting the definitions of misconduct contained therein. Second, *Johnson* relies heavily on *Macey v. Emp't Sec. Dep't*, 110 Wn.2d 308, 752 P.2d 372 (1982), in which the Court set forth general criteria for disqualifying misconduct. *Johnson*, 64 Wn. App. at 315-316. However, *Macey* was superseded by statute, evidencing the Legislature's rejection of that Court's less rigorous definition of misconduct. See *Dermond v. Emp't Sec. Dep't*, 89 Wn. App. 128, 134, 947 P.2d 1271 (1997) (noting Legislature's rejection of misconduct definition articulated in *Macey*).

Finally, *Johnson* is factually distinguishable from this case. In *Johnson*, a metro bus driver was terminated for unwittingly bringing, and losing, a loaded gun on the bus. *Johnson*, 64 Wn. App. at 313. Recognizing that a firearm is "a dangerous instrumentality for which strict liability is often imposed," the Court upheld the ESD's finding of misconduct based on the fact that the employee not only carried a loaded firearm to work, but also on the fact that she left the loaded firearm on the city bus at the end of her shift. *Id.* Unlike the employee's conduct in *Johnson*, which created a serious public safety hazard to both metro

² See Laws of 2006, ch. 13, § 9, effective June 7, 2006.

employees and members of the general public, Williams's actions did not involve a dangerous or deadly weapon, were limited in scope and reach (i.e., risk did not extend beyond the workplace), and, importantly, were consistent with his training and the general practice among other hostlers in his workplace.

The Legislature has made clear: single instances of ordinary negligence and good faith errors in judgement do not constitute misconduct disqualifying an employee from receiving benefits. RCW 50.04.294(3). A mere rule violation, even with notice, does not automatically rise to the level of misconduct, and ESD's arguments to the contrary must fail. *See, e.g., Michaelson*, 187 Wn. App. 293, 349 P.3d 896 (2015); *In re Griswold*, 102 Wn. App. 29, 15 P.3d 153 (2000); *Wilson v. Emp't Sec. Dep't*, 87 Wn. App. 197, 940 P.2d 269 (1997).

ESD's attempts to distinguish *Michaelson*, *Smith*, and *Wilson* are unconvincing. *Michaelson* involved conduct resulting in property damage, not just in one instance, but three. *Michaelson*, 187 Wn. App. at 397. Even there, the Court determined that all three instances together did not amount to "recurrence," let alone each one being of "such degree" to show substantial disregard of the employer's interest. Williams on the other hand, pulled a trailer early which resulted in damage in one instance.

Moreover, likening the facts here to *Smith* requests the Court to take at face value that illicit recordings are comparable to violating a vague and unwritten policy on the basis that Old Dominion could have been sued. Indeed, as the court in *Michaelson* aptly pointed out, *Smith* did not involve ordinary negligence, rather the conduct constituted criminal activity. *Michaelson*, 187 Wn.App. at 301.

ESD's effort to distinguish *Wilson* should also be rejected because the facts in that case undoubtedly support and confirms that Williams did not commit disqualifying misconduct. In *Wilson*, the claimant admitted to violating a policy, yet the Court still found that the conduct which resulted in the loss of a diamond amounted to at most "negligence, incompetence, or an exercise of poor judgment." *Wilson*, 87 Wn.App. at 272. Here, ESD appears to argue that based on one isolated instance years ago (CP 79-80, 95), Williams's conduct cannot be construed as ordinary negligence. Not only does this reading fail to account for the more recent case law developed out of *Michaelson*, ESD disregards critical evidence that Williams had not been disciplined and was instructed to do exactly the opposite by not checking the door. CP 87. As in *Wilson*, the Court should recognize that the record itself is devoid of any evidence of any "defiance, bad faith or indifference to the consequences of his actions" thereby precluding a finding of disqualifying misconduct.

**B. THE ESD’S FAILURE TO ADDRESS RELEVANT
NEUTRAL THIRD-PARTY TESTIMONY AND
REFUSAL TO ALLOW TESTIMONY REGARDING
ALTERNATIVE REASONS FOR WILLIAMS’S
TERMINATION WAS ARBITRARY AND CAPRICIOUS.**

“An agency action is arbitrary and capricious if it is willful and unreasoning and taken without regard to the attending facts or circumstances.” *Puget Sound Harvesters Ass’n v. Washington State Dept. of Fish & Wildlife*, 157 Wn. App. 935, 945, 239 P.3d 1140 (2010). In this case, the Commissioner, and the ALJ whose findings the Commissioner adopted without analysis or explanation, accepted at face value the testimony of Old Dominion while at the same time ignored the neutral, third party witness testimony that corroborated Williams’s claims and established that Old Dominion did not consistently enforce a door check policy against the hostlers. These credibility findings were made with little to no explanation or analysis considering all the evidence in the record.

Second, the ALJ, whose findings were adopted by the Commissioner, significantly limited Williams’s ability to fully develop a record discrediting Old Dominion’s stated reason for terminating him, specifically, that Williams was terminated not for violating a safety policy, but rather for complaining about a racially hostile work environment. CP 47, 60-61. In fact, Williams attempted to elicit further testimony regarding

his complaints of racism in the workplace, but the ALJ was not interested in hearing that testimony. CP 60-61.

The ESD's lack of interest or willingness to consider all the circumstances surrounding Williams's termination, and its blanket acceptance of Old Dominion's testimony and disregard of other contradictory evidence, demonstrate arbitrary or capricious action.

III. CONCLUSION

The Commissioner erred in denying Williams unemployment benefits based on a finding of disqualifying misconduct. Williams engaged in no such misconduct. Williams respectfully asks this Court to affirm the Superior Court's decision and reverse the Commissioner's denial of benefits. This Court should further grant Williams an award of attorney's fees and costs, as authorized by RCW 50.32.160, in an amount to be determined upon filing a cost bill pursuant to RAP 18.1.

RESPECTFULLY SUBMITTED this 14th day of June, 2017.

HKM EMPLOYMENT ATTORNEYS LLP



Patrick L. McGuigan, WSBA #28897

Erin Norgaard, WSBA #32789

William J. Kim, WSBA #46792

Attorneys for Respondent

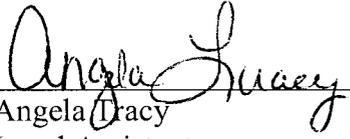
CERTIFICATE OF SERVICE

I, Angela Tracy, hereby declare under penalty of perjury under the laws of the State of Washington that on this date I sent a copy of the REPLY BRIEF OF RESPONDENT to counsel of record as follows:

R. July Simpson
Washington Attorney General
P.O. Box 40110
Olympia, WA 98504
rjuly@atg.wa.gov
Attorneys for Appellant

- Via U.S. 1st Class Mail
- Via Hand Delivery
- Via Overnight Delivery
- Via Facsimile
- Via Email

DATED this 14th day of June, 2017 at Seattle, Washington.



Angela Tracy
Legal Assistant

FILED
COURT OF APPEALS DIV. I
STATE OF WASHINGTON
2017 JUN 14 PM 3:34