

68464-7

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Case No. 68464-7

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

JOAQUIN A MORAN

APPELLANT

v.

EMPLOYMENT SECURITY DEPARTMENT, STATE OF
WASHINGTON,

Respondent,

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2020 APR 11 AM 9:31

BRIEF OF APPELLANT

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I. RELIEF REQUESTED

I, Joaquin A. Moran, respectfully request the reversal of the February 9, 2012, decision of the Judge Commissioner of the Employment Security Department affirming the February 10, 2012, decision entered by the Office of Administrative Hearings denying my unemployment benefits.

II. PROCEDURAL & FACTUAL BACKGROUND

Procedural Background:

I, Joaquin A. Moran (“I”), was discharged by my employer, Krispy Kreme (“employer”), as a result of alleged misconduct. The Employment Security Department (“Respondent”) originally held in my favor and awarded me unemployment benefits, given that the evidence was conflicting as to what had occurred. *See*, Agency Record, Pg.111-112. My employer appealed the decision but failed to timely have its representatives available to testify at the hearing. As a result, a default decision was entered, which was appealed by my employer. *Id.* at Pg. 185. The Commissioner remanded the matter back to the Office of Administrative Hearings for a hearing on whether or not my employer had shown good cause for failing to appear at the original hearing, and if so, to determine whether or not I was entitled to unemployment benefits. *Id.* at Pgs. 193-220.

On remand, the Administrative Law Judge (“ALJ”) found that the employer had shown good cause for failing to appear for the original hearing. *Id.* at Pgs. 194-200. The ALJ also found that I engaged in misconduct. The ALJ set aside the Respondent’s decision and denied my unemployment benefits. I appealed the decision, but the

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Commissioner denied the appeal, adopted the Findings of Fact and Conclusions of Law of the ALJ, and affirmed the ALJ's decision. *Id.* at Pgs. 209-211.

Thereafter, a timely Petition for Review was filed with this Court by me.

Factual Background:

I was the general manager of a Krispy Kreme store (the "store"), from July, 2006, until I was discharged on August 30, 2010. In the operation of the store, on a weekly basis, inventory would be taken of the store's supplies, etc., and the final financial information would be reported to upper management.

While I was responsible for the overall management and performance of the store, along with my co-manager, I did not have to perform each and every task. As the manager of the store, I had the responsibility of delegating tasks to various employees of the store. Specifically, it was not a requirement for me, individually, to count the inventory each week. *See*, Agency Record, Pg. 102. I had delegated this task to the store's office manager, Ms. Velasco. *Id.* at Pgs. 45-52. She counted the inventory and reported the results to me. *Id.* If I believed or found the numbers were inaccurate or were not in the range they should be, I would follow-up to determine the discrepancy and always would have a witness observe the re-count. *Id.* at Pg. 59.

I followed this procedure for several years without complaint from upper management. In 2008, I did self-report to upper management wherein I reported that I had removed some items from the inventory count. After I had done so, I had realized that this was improper and that I should not have removed the items. I reported this to upper management and accepted the warning from upper management that I was not to

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remove or add items to the inventory account or I could face termination. *See, Agency Record, Pgs. 61-62.*

Other than this incident, my performance evaluations were positive. *See, Id.* at Pgs. 166-173. However, in August of 2010, I went on vacation, and as was the usual practice, the office manager was responsible for counting the inventory and reported it to the manager that was filling in for me (Assistant Manager). However, the Assistant Manager (Josh Spence) called Ms. Velasco (Office Manager) not to do the inventory and stated that he would do it instead. Discrepancies were found Josh Spence (Assistant Manager) in respect to the inventory. The inventory counts reflected that the food, packaging and retail costs were inconsistent. *See, Id.* at Pgs. 166-165. The discrepancies that were discovered consisted of relatively small quantities of supplies that the store carried.

I did not know that Ms. Velasco was overstating areas of the inventory intentionally or unintentionally. One of the discrepancies was with the shortening in the store's reservoir tanks. Another discrepancy was with some mugs and t-shirts that were distributed in spring, 2010, but were counted in the inventory up until my termination in August, 2010. I did not realize that Ms. Velasco was continuing to count these items. Any discrepancies in the inventory counts were simply not discovered by me.

Upon my return from vacation, I was approached by my supervisor regarding the discrepancies in the inventory count. I was summarily dismissed and applied for unemployment benefits shortly after my dismissal. At the first hearing before the ALJ, the employer's representative, TALX appeared for the hearing. (Agency Record, Pgs. 19-21) It provided contact information for two witnesses for its client, the employer. *Id.*

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One of these witnesses was reached via telephone by the ALJ, but the other witness was not reached. However, the unavailable first witness was the only first witness in my case, and had received notice of the hearing, along with the proposed exhibits, and the TALX representative had the witness's contact information. *Id.* at Pg. 22. The witness also knew of the hearing time, but she did not make herself available for the hearing. *Id.* at Pgs. 22-27. Because the witness that was unavailable could not be reached, the ALJ choose not to proceed with the hearing and an order of default was entered.

III. STATEMENT OF THE ISSUES

1. Whether the employer had shown good cause for failing to appear for the hearing, given that it had proper notice of the hearing and failed to properly request a continuance of the hearing.

2. Whether, I am entitled to unemployment benefits, given that the evidence did not establish that I had engaged in misconduct as contemplated under RCW 50.04.294(1) and RCW 50.04.294(2), and the Commissioner's Findings of Fact Nos. 1, 4, 6, 9, 10, 11, 12, 13, 14, 15-17, and Conclusions of Law 1, 2, 6, and 7 were in error.¹

IV. EVIDENCE RELIED UPON

I relies on the pleadings on file herein and specifically the Agency Record submitted herein.

V. LEGAL ARGUMENT

¹ The Commissioner adopted the Findings of Fact and Conclusions of Law of the Administrative Law Judge. *See*, Agency Record, Pgs. 209-210.

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STANDARD OF REVIEW

The Washington Administrative Procedure Act (“APA”), RCW 34.05, governs judicial review of a final decision by the ESD Commissioner. *Smith v. Employment Security Department*, 155 Wn. App. 24, 32, 226 P.3d 263 (2010). In reviewing the ESD Commissioner’s decision, the Court may reverse the decision on an error of law, if substantial evidence does not support the decision, or if the decision was arbitrary or capricious. *Id.*, citing RCW 34.05.570(3)(d), (e), (i). The burden of establishing invalidity of the agency action is on the party asserting invalidity. *Id.*

A. THE EMPLOYER DID NOT ESTABLISH GOOD CAUSE FOR FAILING TO PARTICIPATE IN THE ORIGINAL HEARING

The first issue to be addressed is whether or not the employer established good cause for failing to appear at the original hearing. The Commissioner adopted the ALJ’s Findings of Fact and Conclusion of Law that the employer had established good cause for failing to appear.² This was error on the part of the Commissioner. The bases for failing to appear at the hearing did not constitute good cause.

The employer was represented by TALX, which represents employers in unemployment hearings. The TALX representative had provided the hearing notice and exhibits to the employer. The employer noted the hearing, but the TALX representative provided a number to the ALJ that was for the wrong employee of the employer. The

² Findings of Fact Nos. 19-20 and Conclusions of Law No. 1.

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employee answered the phone and provided the number to the correct employee. When the ALJ called the correct employee, the employee had left her office and was unavailable to take the call nor did she attempt to call in at the time of the hearing as instructed on the notice of the hearing.

Inexplicably, the ALJ concluded that the employer had established good cause for failing to appear at the original hearing. This conclusion is in direct conflict with the facts and established precedent. *In re Nellie R. Groves*, Empl. Sec. Comm'r. Dec. 374 (1978), for example, the employer received notice of the hearing, but it failed to properly route it to the appropriate person that was to appear at the hearing on behalf of the employer. The employer appealed the order of default that was entered, and, on remand, the ALJ found that the employer had not established good cause for failing to appear at the original hearing.

In its decision, the Commissioner stated that, "The interested employer received the notice in due course; it was initially handled by the receptionist who transmitted it to the personnel or payroll office. There, after being opened, it was negligently placed in the claimant's personnel file rather than being forwarded to a suitable administrator. Accordingly, the interested employer was not represented at the hearing set for February 15, 2011. That failure can only be attributed to the negligence of the interested employer's agents which must necessarily be imputed to the interested employer.

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Accordingly, good and sufficient cause within the meaning of WAC 192-09-130 has not been shown.”

Likewise, in this case, the sole reason the employer failed to appear for the hearing was a result of its own negligence. Basically, the excuse for not appearing for the hearing was that the employer’s witness became busy with her job duties, *see*, Agency Record, Pg. 22, Lines 3-9, but she was employed by the employer and knew of the hearing well in advance. She should have and could have scheduled herself to be available on the morning of the hearing. The employer’s witness also knew that the employer had a representative from TALX appearing on its behalf. When she did not hear from anyone, she could have contacted her own representative to determine the status of the hearing or contact the ALJ’s offices, but she did neither. The employer did not show good cause for failing to appear for the hearing.

Because it failed to show good cause, the order of default should not have been vacated or set aside. Instead, it should have been upheld, and the decision of the Employment Security Department granting me unemployment benefits should have been upheld.

B. SUBSTANTIAL EVIDENCE DID NOT ESTABLISH THAT I HAD ENGAGED IN MISCONDUCT

In reviewing the Commissioner’s decision, the Court must look at the Commissioner’s findings of fact for substantial evidence in light of the whole record.

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Smith, 155 Wn. App. at 32, *citing*, RCW 34.05.570(3)(e). “Substantial evidence” is evidence that would persuade a fair-minded person of the truth or correctness of the matter. *Id.* at 32-33. Whether an employee’s behavior constitutes misconduct, warranting termination, is a mixed question of law and fact. *Id.* However, the employer has the burden of establishing that I engaged in misconduct resulting in a discharge and denial of unemployment benefits.

Here, the Commissioner improperly determined that there was substantial evidence to uphold the ALJ’s decision to deny benefits to me under RCW 50.04.294(1)(a) and (2)(f). *See*, Agency Record, Pgs. 209-210. Under these two sections, “Misconduct” is defined as:

- (a) Willful or wanton disregard of the rights, title, and interests of the employer or a fellow employee; and
- (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:
 - (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 . . .

See, RCW 50.04.294(1)(a) and (2)(f).

“Willful” means intentional behavior done deliberately or knowingly, where you are aware that you are violating or disregarding the rights of your employer. WAC 192-150-205(1). The Courts have held that an employee acts with willful disregard of an employer's interest when the employee is: (1) ... aware of his employer's interest; (2)

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knows or should have known that certain conduct jeopardizes that interest; but (3) nonetheless intentionally performs the act, willfully disregarding its probable consequences. *See, Hamel v. Emp't Sec. Dep't*, 93 Wn. App. 140, 146-147, 966 P.2d 1282 (1998), review denied, 137 Wn.2d 1036 (1999).

However, RCW 50.04.294(3) excludes the following acts from the definition of "misconduct": (a) inefficiency, unsatisfactory conduct, or failure to perform well as a result of inability or incapacity; (b) inadvertence or ordinary negligence in isolated instances; or (c) good faith errors in judgment or discretion. *See, RCW 50.04.294(3)*. In this case, I am not denying that I knew of my employer's policies regarding inventory counts. I am, though, denying that I intentionally failed to abide by them or that I violated them in August of 2010 when I was terminated. During the hearing, the evidence did not support the ALJ's findings that I had to have known of the discrepancies in the inventory prior to my vacation and intentionally ignored Ms. Velasco's incorrect, inventory counts.

The discrepancies involved the counting of retail and food items. As to the retail items, my employer alleged that I was instructing Ms. Velasco to continue to count retail items that were no longer in the store. However, I explained that I did not realize that the retail inventory that was no longer in the store was still being counted. *See, Agency Record, Pgs. 56-58*. In addition, my former co-manager that testified during the hearing stated that he recalled a meeting with me and management wherein management stated,

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in regards to excess inventory, that, “. . . This is what we need to do. We need to slowly start taking things out that you are not going to use.” *See, Id.* at Pgs. 66-67. My former co-manager then testified that, “We had things in there that were two, three, four years old that just needed to be marked out of stock. So I do remember that – that end of the conversation, yes, ma’am.” *Id.*

The fact of the matter was that there were items in the store that had been in the store’s inventory for a long period of time. Simply because I did not realize that certain retail items were continuing to be counted or that they should have been slowing taken out of the inventory count does not mean that I intentionally had them counted. As to the food inventory counts, the testimony was in regards to crayon juice and shortening that was allegedly improperly counted but nothing else was significant. *See, Agency Record, Pg. 101.* According to the employer, the fryers only hold 14 cubes of shortening but the inventory showed approximately 18 cubes, *see, Id.*, and I agreed that the fryer’s only held 14 cubes. However, the reservoir tanks hold approximately the same amount, and I did not instruct Ms. Velasco to put an exact figure in the inventory account but to use her judgment. *See, Id., Pg. 103, Lines 19-25, Pg. 105, Lines 1-7.*

As a manager, I had the authority to delegate certain tasks to employees at the store. *Id.* at Pg. 102, Lines 8-9. I delegated the task of counting the inventory to Ms. Velasco. When I believed Ms. Velasco made a mistake, the evidence showed that I would correct the mistake and have another employee observe the re-count. *Id.* at Pg. 59,

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Lines 10-25. This was confirmed by my former co-manager during the hearing and was undisputed by the employer. *Id.* at Pgs. 65-66.

I testified that I did not realize that Ms. Velasco had incorrectly counted the inventory and incorrectly reported it to me. Ms. Velasco testified that she was instructed to do so by me, but, in response to questioning by me, she also testified that, “Sometimes, I’m mad because you – you – I get in at three in the morning and I have to recount it and recount it again. And if the . . . not there, how are we going to put it back there? And it is . . . the next week, too . . .” *See*, Agency Record, Pg. 90, Lines 1-9. Ms. Velasco did not like having to come in to do the inventory and did not like having to recount the inventory and working with me to correct the discrepancies. Moreover, Ms. Velasco was a completely biased witness because her position with her employer would have been in jeopardy had she stated that she had improperly counted the inventory.

At the hearing, the evidence submitted by the employer did not support its position that I intentionally or knowingly had Mr. Velasco misstate the inventory. At the most, the evidence only showed that there were mistakes made by me in supervising Ms. Velasco and/or reviewing the inventory count that she provided to me. The employer did not carry its burden in establishing that I intentionally violated a company rule or intentionally engaged in misconduct or even knew that there were discrepancies. In fact, the evidence showed that discrepancies did occur and when discovered had to be

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corrected. Simply because I did not catch the alleged discrepancies that the employer used as a basis for terminating him does not mean I engaged in statutory misconduct.

During the hearing, in a question to one of the employer's managers regarding my responsibilities with respect to the inventory counts, the manager stated that, "Yes. Whatever the numbers vary, whether the food cost is too high, too low, if there are discrepancies that are in the numbers, the general manager is questioned. And it is the general manager that is questioned because at the end of the day they own those numbers." *See*, Agency Record, Pg. 101, Lines 19-25, Pg. 102, Lines 1-3; *see, also, Id.* at Pg. 101, Lines 8-18 (testifying that the managers typically do the counts themselves because they are responsible for the numbers). The employer terminated me because there were discrepancies in the inventory count, not because they had actual proof that I was intentionally misstating the inventory.

At the most, one could argue that I should not have delegated the task of counting the inventory to Ms. Velasco and that my conduct was unsatisfactory conduct or a good faith error in judgment or discretion. *See*, RCW 50.04.294(3)(a)-(c). However, there was insufficient evidence to support a finding that I intentionally did not follow my employer's procedures or intended to harm my employer in August, 2010.

VI. CONCLUSION

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Substantial evidence did not support a conclusion that I engaged in disqualifying misconduct. The Commissioner's Findings of Fact Nos. 1, 4, 6, 9, 10, 11, 12, 13, 14, 15-17, and Conclusions of Law 1, 2, 6, and 7 were in error. I would respectfully request that the Court set aside the order denying me unemployment benefits and find that I am entitled to unemployment benefits because I did not engage in statutory misconduct. For an award of attorney's fees and costs I incurred in appealing this matter.

DATED this 11th day of June, 2012.



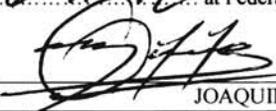
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DECLARATION OF SERVICE

I hereby certify that on the date stated below I deposited a copy of this document (1) in the mails of the United States of America, addressed to each counsel of record, postage prepaid, and/or (2) with a recognized legal messenger service for delivery to each counsel of record.

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

Dated 6-11-12 ... at Federal Way,
Washington.



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