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NO. 99285-1

**SUPREME COURT
OF THE STATE OF WASHINGTON**

RICCARDO GREEN,

PETITIONER,

VS.

WASHINGTON STATE EMPLOYMENT SECURITY DEPARTMENT,

RESPONDENT.

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

This is an appeal of the decision of the Employment Security Department's Commissioner denying Appellant Riccardo Green unemployment benefits because he was discharged from work for statutory misconduct. The Commissioner properly found that Appellant Riccardo Green was fired from his job at Swedish Health Services for insubordination and violating his employer's reasonable policy prohibiting the use of profanity and threats in the workplace.

Below, Green failed to challenge the Commissioner's findings that he swore at and threatened his coworkers and refused to comply with his employer's reasonable workplace rules, and those unchallenged findings fully support the conclusion that Green's conduct amounted to disqualifying misconduct under the Employment Security Act, Title 50 RCW. Further, the findings are based on the employer's unopposed testimony at the administrative hearing, which Green chose not to attend.

In superior court, Green failed to raise any cognizable legal challenge to the Commissioner's decision and thus did not sustain his burden of demonstrating error. Further, the superior court properly denied Green's unfounded evidentiary motions and motions for sanctions. On review, the Court of Appeals agreed with the Commissioner's decision and affirmed. *Green v. Emp't Sec. Dep't*, No. 81225-4-I,

2020 WL 6872883, at 3 (Wash. Ct. App. November 23, 2020) (unpublished). The Court of Appeals also properly declined to consider Green's assignments of error related to the superior court's denial of his evidentiary motions and motion for sanctions because they were unsupported by any argument or relevant authority.

Green fails to demonstrate—or even allege—that this decision meets any of the four exclusive criteria for review under RAP 13.4(b). Nor could he. The decision is based on a routine review of the Commissioner's unchallenged findings of fact and clear statutory standards. Because this case involves no conflict of law or significant constitutional question, and does not implicate issues of substantial public interest, this Court should deny review.

II. COUNTERSTATEMENT OF THE ISSUE

1. The Commissioner found that Green violated his employer's reasonable policies prohibiting profanity, made threats of violence in the workplace, and refused to follow his supervisor's rule requiring him to check in at the start of his shift. Do these unchallenged findings of fact support the conclusion that Green was discharged for disqualifying misconduct, and thus ineligible for unemployment benefits?

2. Did the Commissioner properly give Green's documentary evidence no weight when he failed to appear for the administrative hearing to authenticate the documents or describe their relevance?

3. Did the Court of Appeals properly decline to consider Green's appeal of various trial court motions because he failed to adequately brief those issues?

III. COUNTERSTATEMENT OF THE CASE

A. Employment History

Riccardo Green worked for Swedish Health Services (Swedish) as a linen attendant from 2008 until his termination in 2018. CP 224, 444 (Finding of Fact (FF) 4). Swedish has a written employee code of conduct prohibiting the use of profanity, violence, and threats of violence in the workplace. CP 236, 444 (FF 7). Swedish also has a general policy requiring its employees to act professionally. CP 236, 444 (FF 8). Swedish provided Green with copies of these policies when he was hired, and they were readily available online and were posted throughout the workplace. CP 236–37.

Beginning August 2016, Green engaged in a series of behaviors that violated the employer's policies and ultimately led to his termination. In one instance, he engaged in an angry exchange with his manager, Wade Schafer, by yelling at him in his office. CP 237–38. In another, he called one of his coworkers a "slave from Africa." CP 241, 444 (FF 12). Following these two incidents, Swedish issued a verbal warning to Green for making a derogatory comment to his coworker. CP 444 (FF 13).

Following the verbal warning, Green called Schafer, who is a Tieno Indian, a "white supremacist." CP 242, 444 (FF 14).

On another occasion, Green yelled and uttered profanities at a shift lead, made offensive comments to the lead, and invited him to "take it outside" to settle their differences. CP 235, 444 (FF 16). Swedish considered this conduct to be a violation of its written workplace policies, and it issued another verbal warning based on Green's use of profanity, unprofessional behavior, and threats against a coworker. CP 235-36, 444 (FF 17).

Following these events in 2016, Swedish received multiple complaints from other team members that Green had been rude and disrupted the workplace and that this behavior prevented them from completing their job duties. CP 242–43, 422-24, 445 (FF 18).

The following year, in 2017, Green used a white board used to delegate work duties to team members to write the word "discriminates" with an arrow pointing to Schafer's name. CP 234, 445 (FF 20). After this incident, Swedish gave Green a final warning for unprofessional behavior in the workplace. CP 234, 445 (FF 21).

Green also violated Swedish's labor rules. As part of its union agreement, Swedish requires its employees to obtain approval before working more than their regularly scheduled hours. CP 444 (FF 9). On

March 29, 2018, Green clocked out at 2:35 p.m. and continued to work until at least 5:00 p.m. without prior authorization. CP 232–33, 445 (FF 23). Swedish gave Green a second final written warning for violating the union agreement. CP 445 (FF 24).

Finally, later that year Schafer told the eight-member linen staff that they would be allowed a ten-minute grace period, known as the "ten-minute rule," to change into uniform after the start of a shift. After ten minutes, all employees were expected to check in with him before beginning their duties. CP 229, 445 (FF 25). Schafer used this meeting to communicate shift priorities and other important information. CP 239, 445 (FF 26). Green refused to check in on multiple occasions and responded to Schafer unprofessionally both in person and in email. CP 229-30, 445 (FF 27). Green emailed Schafer that he refused to comply with the ten-minute rule:

> I absolutely oppose and will continue to oppose your new "10 minute rule" as a sustained employment retaliatory, discriminatory, and racist practice, embedded in a sustained including but not limited to managerial abuse, managerial harassment, abuse of your managerial position, and neglect, which is an absolute waste of time, in-effective to dept. staff, interferes with personal routines before engaging in work duties, interferes with the completion of work duties, and a sustained racially discriminatory surveillance, period.

CP 335, 445 (FF 28).

Based on Green's refusal to comply with the ten-minute rule, and his previous conduct, Swedish discharged Green for insubordination and unprofessional behavior in the workplace. CP 316 (termination letter), 446 (FF 30, 31).

B. Procedural History

After his discharge, Green applied for unemployment benefits. CP 256. The Department initially granted his claim, and Swedish appealed the decision to the Office of Administrative Hearings (OAH). CP 255–56.

OAH notified Green that a telephonic administrative hearing was scheduled. CP 465, 470. The notice explained that if a party failed to appear, the Administrative Law Judge (ALJ) would make a decision based on the evidence presented at the hearing:

> IF YOU FILED THE APPEAL, and you fail to call in, the Administrative Law Judge may hold you in default and dismiss your appeal. RCW 34.05.440(2).
>
> IF YOU DID NOT FILE THE APPEAL, and you fail to call in, the Administrative Law Judge will make a decision on the evidence presented at the hearing.

CP 471.

After receiving the notice, Green sent case-related documents to OAH; however, because he believed attending the hearing was optional, he chose not to appear to present his case. CP 444 (FF 3), 447 (Conclusion of Law (CL) 11), 465–66 (Commissioner's decision). Swedish was

represented by human resources representative Ethan Howard, manager Wade Schafer, and a third party employer representative. CP 214–15.

Schafer testified that Swedish terminated Green due to repeated insubordination and unprofessional behavior and described several situations, recounted above, in which Green's behavior violated Swedish policies. CP 225. Schafer said that the final incident leading to Green's termination was his refusal to comply with the ten-minute rule. CP 226, 230.

Following the hearing, the ALJ determined that Green was terminated for statutory misconduct under the Employment Security Act, including repeated insubordination and violation of Swedish's reasonable policies, which disqualified him from unemployment benefit eligibility. CP 447 (CL 10). Further, the ALJ determined that, without Green's presence at the hearing to verify the authenticity of the documents he submitted, the documents were hearsay and should be given no weight. CP 447 (CL 11, 12). Accordingly, the ALJ made findings based on the employer's evidence and testimony, concluded that Green committed statutory misconduct and, as a result, determined he was disqualified from receiving benefits. CP 447 (CL 11, 12).

Green appealed the ALJ's decision to the Department's Commissioner. CP 455–59. His appeal explained that he had received the

notice and was aware of the hearing, but thought attending the hearing was optional. CP 456. He also disputed the ALJ's conclusions. CP 456.

The Commissioner adopted the ALJ's findings of fact and conclusions of law and affirmed. CP 465–66. In affirming, the Commissioner explained that Green's conduct violated Swedish's reasonable policies and "evinced insubordination showing a deliberate, willful, or purposeful refusal to follow the reasonable directions or instructions of the employer." CP 465–66. The Commissioner further concluded that Green's behavior violated standards of conduct any employer has a right to expect of an employee. CP 466. The Commissioner determined that these actions amounted to misconduct and that Green was disqualified from receiving benefits. CP 466.

Green appealed to superior court. He then submitted various evidentiary motions, a jury demand, and motions for sanctions. The superior court denied these motions because they were inappropriate for judicial review under the Administrative Procedure Act (APA) and had no support in law or fact, and affirmed the Commissioner's decision. CP 567–68; 569-71. Green appealed.

In an unpublished opinion, the Court of Appeals affirmed. *Green v. Emp't Sec. Dep't*, No. 81225-4-I, 2020 WL 6872883 (Wash. Ct. App. November 23, 2020) (unpublished). The Court held that the

Commissioner's determination that Green was discharged for disqualifying misconduct was supported by the unchallenged findings of fact and consistent with the law. *Id.* at 5. The Court of Appeals rejected Green's argument that the ALJ improperly declined to consider his evidence because the decision was consistent with the law and, further, Green had failed to provide any authority or meaningful argument to support his claim. *Id.* at 4. Finally, the Court declined to consider Green's arguments regarding the superior court's denial of his motions in limine, to empanel a jury, and for sanctions because he had inadequately briefed the issues. *Id*. at 6.

IV. REASONS WHY REVIEW SHOULD BE DENIED

The Court of Appeals properly upheld the Commissioner's determination that Green was disqualified from receiving unemployment benefits because he was discharged from his job for misconduct under the Employment Security Act. Similarly, the Court of Appeals properly upheld the ALJ's decision to give no weight to Green's hearsay evidence when he did not attend the administrative hearing. Finally, the Court of Appeals appropriately declined to consider Green's assignments of error related to his various superior court motions because he failed to support them with argument or citation to legal authority.

Green fails to include any meaningful argument explaining why this Court's review is warranted under any of the exclusive criteria set forth in RAP 13.4(b). He instead reargues the facts related to his discharge, makes unfounded allegations of misconduct against the Department and its counsel, and discusses facts related to a superior court case not subject to appeal. Because none of these constitutes grounds for review under RAP 13.4(b), the Court should deny review.

A. Because Green Did Not Challenge the Commissioner's Findings of Fact, They Are Verities On Appeal

Green did not challenge the Commissioner's findings of fact in the superior court or the Court of Appeals. *Green*, slip op. at 4, 5. Instead, his arguments related to an evidentiary ruling made by the ALJ at the administrative hearing and the denial of various motions he filed in superior court. The Court of Appeals thus properly treated the Commissioner's findings as verities. *Tapper v. Emp. Sec. Dep't*, 122 Wn.2d 397, 407, 858 P.2d 494 (1993) (unchallenged findings are verities on appeal); *Green*, slip op. at 4. Green makes no meaningful argument in his Petition for Review to establish that the Court of Appeals misapplied the law or erred in its determination.

B. The Commissioner and the Court of Appeals Properly Concluded That The Unchallenged Findings Regarding Green's Conduct Amounted to Misconduct Under Title 50 RCW

The Commissioner's unchallenged findings support the determination that Green was discharged for misconduct. Consistent with the clear standards governing misconduct in Title 50 RCW, the Court of Appeals affirmed the Commissioner's determination.

In general, the Employment Security Act, Title 50 RCW, provides four broad categories of misconduct that disqualify an applicant from receiving unemployment benefits. RCW 50.04.294. Relevant here, misconduct occurs when an employee engages in a willful or wanton disregard of the rights, title, and interest of the employer or fellow employees. RCW 50.04.294(1)(a). The Act also includes several actions that constitute per se misconduct, including when an employee engages in insubordination showing a deliberate, willful, or purposeful refusal to follow the reasonable directions or instructions of the employer. RCW 50.04.294(2)(a). Further, an employee commits misconduct by violating a reasonable employer policy that either was or should have been known by the employee. RCW 50.04.294(2)(f).

The Commissioner's unchallenged findings establish that Green engaged in multiple actions that rose to the level of disqualifying misconduct. For instance, the employer had a policy of requiring all

employees to check in with a manager 10 minutes after the start of a shift. CP 229, 239, 445 (FF 26). The purpose of the policy was to ensure management could communicate shift priorities to employees. CP 239, 445 (FF 26). Green refused to comply with this reasonable policy and documented this persistent refusal in an email to his manager. CP 355. Green's refusal to comply with his employer's reasonable check-in policy was insubordination under RCW 50.04.294(2)(a); *Smith v. Emp't Sec. Dep't*, 155 Wn. App. 24, 40–41, 226 P.3d 263 (2010) (violating an employer's reasonable directive is insubordination rising to the level of misconduct). It was also a violation of a reasonable and known employer policy under RCW 50.04.294(2)(f).

Further, Green violated numerous other employer policies. For instance, the employer testified that it had a written policy barring the use of profanity and threats of violence in the workplace. CP 236, 444 (FF 7). Green violated this policy, and committed disqualifying misconduct, by yelling profanities at his shift lead and saying they should "take it outside" to settle their differences. CP 235, 444 (FF 16); RCW 50.04.294(2)(f) (misconduct occurs by violating an employer's reasonable rule). His actions also violated a standard of behavior Swedish—or any employer—has a right to expect of its employees. RCW 50.04.294(1)(b).

Moreover, Green called his coworkers and supervisor offensive names. *See, e.g.* CP 241 (calling coworker a "slave from Africa"), 242 (calling supervisor a "white supremacist"), 444 (FF 12, 14, 20). This was statutory misconduct under RCW 50.04.294(1)(b) because it was in deliberate violation or disregard of standards of behavior an employer has the right to expect of an employee. CP 466.

Further, consistent with its union contract, Swedish required all employees to obtain manager approval before working beyond their regularly scheduled hours. CP 233, 444 (FF 9). Yet on May 29, 2018, Green clocked out at 2:35 p.m. and proceeded to work off the clock until at least 5:00 p.m. without prior authorization. CP 232–33, 445 (FF 23). This, too, was a violation of an employer policy. RCW 50.04.294(2)(f).

The Court of Appeals correctly determined that this behavior amounted to misconduct under RCW 50.04.294. *Green*, slip op. at 5. Green has not established the Court of Appeals' decision warrants review under any of the exclusive criteria set forth in RAP 13.4(b).

C. The Commissioner Appropriately Declined to Give Green's Documentary Evidence Any Weight When Green Failed to Appear at the Hearing to Authenticate the Documents

Green argued below that the ALJ erred by not considering the emails and other documents he submitted for the administrative hearing.

Green, slip op. at 3. But Green's argument on this issue was unsupported by any law and the Court of Appeals was right to reject it.

In general, the Commissioner has the authority to weigh the evidence, and a reviewing court should not reweigh the evidence on appeal. *Affordable Cabs, Inc. v. Dep't of Emp't Sec.*, 124 Wn. App. 361, 367, 101 P.3d 440 (2004)

Below, Green chose not to attend the administrative hearing. CP 465 (Commissioner's Decision). Instead, he submitted numerous emails, complaints, and other documents containing hearsay that he had filed with his employer for consideration at the hearing. *See, e.g.,* CP 221, 404-41. The ALJ "admitted" them into the record, but only for the limited purpose of allowing the employer to question Green in the event he later called into the telephonic hearing. CP 223. Because Green never appeared, the ALJ determined that the exhibits were hearsay and did not consider them, effectively giving them no weight. CP 447 (CL 11).[1]

As the Court of Appeals concluded, Green offered "no basis or authority for finding error in the ALJ's treatment of his exhibits." *Green*,

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[1] Hearsay evidence may be admissible in administrative proceedings, but a presiding officer has discretion to limit consideration of hearsay evidence based on statutory or constitutional grounds, and to exclude evidence that is irrelevant, immaterial, or unduly repetitious. RCW 34.05.452(1). Further, the Commissioner may not base a finding solely on hearsay or other evidence that would be inadmissible in a civil trial unless the hearing officer determines that doing so would not unduly abridge a party's opportunity to confront witnesses and rebut evidence. RCW 34.05.461(4); *see Pappas v. Emp't Sec. Dep't*, 135 Wn. App. 852, 857, 146 P.3d 1208 (2006).

slip op. at 4. Green identifies no legal or factual error in this reasoning to warrant this Court's review under RAP 13.4(b).

D. The Court of Appeals Properly Declined to Consider Green's Assignments of Error Related to The Denial of Motions Because He Failed to Provide Meaningful Argument or Citation to Legal Authority

The Court of Appeals properly declined to consider Green's appeal of various superior court motions. *Green*, slip op. at 6. Below, Green assigned error to the superior court's denial of his evidentiary motions, including motions in limine, to empanel a jury, to exclude hearsay evidence, to exclude certain witnesses, and for sanctions against the Department and counsel. CP 55 (motion for a jury); CP 63 (motion to admit additional evidence); CP 558 (Green's reply). However, he failed to support his assignment of error with meaningful argument or citation to legal authority. Based on this, the Court of Appeals properly declined to consider the issues. *Green*, slip op. at 6; *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992). Green provides no argument to demonstrate why this Court's review of that decision is warranted under RAP 13.4(b).

In any event, Green's evidentiary motions appeared to be based on the mistaken belief that there would be a trial to decide his appeal. However, under the APA, the superior court sat in its appellate capacity

and its review was confined to the record before the Commissioner. RCW 34.05.558; *Affordable Cabs, Inc.*, 124 Wn. App. at 367. No authority would have entitled Green to a jury trial or limited the administrative record considered by the Commissioner. Likewise, Green's motions for sanctions included allegations of conflict of interest, conspiracy, and unfair business practices that were entirely speculative and without legal support. CP 555, 560.

The Court of Appeals properly declined to consider his argument.

E. There is No Basis For This Court's Review

The Court of Appeals appropriately affirmed the Commissioner's decision because the unchallenged findings supported the determination that Green was discharged for misconduct.

In his Petition for Review, Green includes numerous arguments that are unrelated to whether review is appropriate under RAP 13.4(b). For instance, it appears Green advances claims of procedural error unrelated to the Court of Appeals' decision, reargues facts without regard for the standard of review, advances theories about the circumstances related to his termination, and makes unfounded allegations of unprofessional conduct. *See e.g.*, Pet. for Review at 3 (complaint about briefing deadline); 6-14 (recounting the facts without regard for the Commissioner's findings or the standard of review); 17-20 (allegations relating to motion for

sanctions). His claims were not properly raised and, critically, fail to address the core purpose of his petition: demonstrating why this Court's review is warranted under the exclusive factors set forth in RAP 13.4(b). Indeed, Green makes no allegation that the Court of Appeal's decision conflicts with a decision of this Court; no allegation that the decision conflicts with a published decision of the Court of Appeals; no claim that it raises a significant question of law under the Constitution of the State of Washington or the United States; and no claim that the petition involves a matter of substantial public interest.

The Court should decline to accept review.

V. CONCLUSION

This case involves the routine application of law to unchallenged findings of fact and unsupported challenges to the superior court's discretionary rulings on various inappropriate motions. There is no basis for the Court's review under RAP 13.4(b). The Department respectfully asks the Court to deny review.

RESPECTFULLY SUBMITTED this 2nd day of February, 2021.

ROBERT W. FERGUSON
Attorney General

s/Jacob Dishion
JACOB DISHION, WSBA #46578
Assistant Attorney General
Attorney for Respondent

PROOF OF SERVICE

I, Jacob Dishion, hereby state and declare as follows:

1. That I am a citizen of the United States of America, a resident of the State of Washington, over the age of eighteen (18) years, and not a party to the above-entitled action.

2. That on the 2nd day of February 2021, I caused to be served a true and correct copy of **Answer to Petition for Review**, as follows:

E-served via Washington State Appellate Courts Portal

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SUSAN CARLSON, CLERK
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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 2nd day of February 2021, in Seattle, Washington.

s/Jacob Dishion
JACOB DISHION, WSBA # 46578

AGO/LICENSING AND ADMINISTRATIVE LAW DIV

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