

NO. 47349-6

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

DENISE FUGATE,

Respondent,

v.

WASHINGTON STATE DEPARTMENT OF EMPLOYMENT
SECURITY,

Appellant.

APPELLANT'S RESPONSE BRIEF

ROBERT W. FERGUSON
Attorney General

ERIC A. SONJU
Assistant Attorney General
WSBA No. 43167
PO Box 40110
1125 Washington Street SE,
Olympia WA 98504-0110
(360) 664-247

TABLE OF CONTENTS

I. INTRODUCTION.....1

II. STATEMENT OF THE ISSUES.....2

III. STATEMENT OF THE CASE.....3

IV. STANDARD OF REVIEW.....6

V. ARGUMENT7

A. Fugate Is Disqualified From Receiving Benefits Because She Was Insubordinate And Disregarded The Standards Of Behavior Her Employer Had The Right To Expect Of Her.....8

1. Fugate was insubordinate because she deliberately disregarded her employer’s reasonable and clear direction to not lift over five pounds or push loaded carts for a single workday.....9

2. Fugate deliberately disregarded standards of behavior that her employer had the right to expect of her by repeatedly ignoring her employer’s direction to limit her physical activity.....16

B. Fugate’s Conduct Was Not Inadvertent, Negligent, Or A Good Faith Error In Judgment Because She Deliberately Disregarded Her Employer’s Repeated Instructions To Limit Her Physical Activity19

VI. CONCLUSION22

TABLE OF AUTHORITIES

Cases

<i>Affordable Cabs, Inc. v. Dep't of Emp't Sec.</i> , 124 Wn. App. 361, 101 P.3d 440 (2004).....	7
<i>Anderson v. Emp't Sec. Dep't</i> , 135 Wn. App. 887, 146 P.3d 475 (2006).....	6
<i>Courtney v. Emp't Sec. Dep't</i> , 171 Wn. App. 655, 660, 287 P.3d 596 (2012).....	6, 7, 8
<i>Daniels v. Dep't of Emp't Sec.</i> , 168 Wn. App. 721, 281 P.3d 310 (2012).....	9
<i>Darkenwald v Emp't Sec. Dep't</i> , 183 Wn.2d 237, 350 P.3d 647 (2015).....	7
<i>Estate of Jones</i> , 152 Wn.2d 1, 93 P.3d 147 (2004).....	7
<i>King County v. Boundary Review Bd. For King County</i> , 122 Wn.2d 648, 860 P.2d 1024 (1993).....	11
<i>Kirby v. Dep't of Emp't Sec.</i> , 179 Wn. App. 834, 320 P.3d 123 (2014).....	14
<i>Nelson v. Emp't Sec. Dep't</i> , 98 Wn.2d 370, 655 P.2d 242 (1982).....	8
<i>State v. Bertrand</i> , 165 Wn. App. 393, 267 P.3d 511 (2011).....	11
<i>Tapper v. Emp't Sec. Dep't</i> , 122 Wn.2d 397, 858 P.2d 494 (1993).....	6, 7
<i>W. Ports Transp., Inc. v. Emp't Sec. Dep't</i> , 110 Wn. App. 440, 41 P.3d 510 (2002).....	7

<i>Wm. Dickson Co. v. Puget Sound Air Pollution Control Agency</i> , 81 Wn. App. 403, 914 P.2d 750 (1996).....	6, 7
---	------

Statutes

RCW 34.05.510	6
RCW 34.05.554(1).....	7, 10
RCW 34.05.558	6
RCW 34.05.570(1)(a)	6
RCW 34.05.570(1)(d)	6
RCW 50.01.010	8
RCW 50.04.294	9
RCW 50.04.294(1)(b)	2, 9, 16, 19
RCW 50.04.294(2).....	9
RCW 50.04.294(2)(a)	2, 9
RCW 50.04.294(3)(b)	19
RCW 50.04.294(3)(c)	20
RCW 50.20.066(1).....	2, 8
RCW 50.32.120	6

Rules

RAP 2.5(a)	7, 11, 17
------------------	-----------

Regulations

WAC 192-150-200(3)(b)	20
-----------------------------	----

I. INTRODUCTION

After Denise Fugate hurt her back lifting a box at work, her employer followed her physician's recommendations and directed her to not lift more than five pounds or push carts with anything on them for a single workday. Despite repeated and explicit admonishments, Fugate refused to follow this instruction, lifting 15-, 42-, and 70-pound boxes and pushing a cart believed to carry much more than five pounds. Her employer terminated her for this insubordination.

The Commissioner of the Employment Security Department denied Fugate unemployment benefits because she committed disqualifying misconduct by deliberately refusing to follow her employer's reasonable direction and deliberately disregarding standards of behavior that her employer had the right to expect of her. Fugate's decision to repeatedly ignore her employer's orders was not merely ordinary negligence or a good faith error in judgment. Because substantial evidence supports the Commissioner's findings of fact, and the Commissioner's conclusions of law are free from error, the Department respectfully requests that the Court reverse the superior court and affirm the Commissioner's decision.

II. STATEMENT OF THE ISSUES

1. Does substantial evidence in the record support the Commissioner's findings that Fugate intentionally disregarded her employer's clear instructions when her doctor's written recommendations and her employer's written instructions are in the record, the employer testified about the instructions, Fugate never claimed below that she did not understand the instructions, and Fugate violated the instructions by repeatedly lifting well over five pounds and pushing a loaded cart?

2. Under the Employment Security Act, an individual commits statutory misconduct disqualifying her from unemployment benefits if she deliberately refuses to follow her employer's reasonable directions or deliberately disregards standards of behavior that her employer has the right to expect of her. RCW 50.20.066(1), 50.04.294(2)(a), 50.04.294(1)(b). Did Fugate commit disqualifying misconduct when she repeatedly lifted over five pounds and pushed a loaded cart after her employer reasonably instructed her not to do so for a single day after she strained her back?

III. STATEMENT OF THE CASE

Denise Fugate worked for Printcom as a press operator and bindery worker. Administrative Record¹ (AR) at 12-13, 73; Finding of Fact (FF). She strained her back lifting a 35- to 45-pound box and experienced painful muscle spasms. AR at 15, 22, 73, 94; FF 3. She gave her employer an account of her health that conflicted with accounts the employer received from her coworkers: Fugate said that she was fine after having lain down on the floor, but her coworkers told her employer that she was in pain. AR at 15-16, 34, 40, 95-94.

After receiving these conflicting reports, Printcom's secretary-treasurer, Judy Covert, sent Fugate to a medical clinic for an evaluation. AR at 16, 52, 73, 94-95; FF 3. A physician found that Fugate's back was tender, and he gave her a written recommendation on a Department of Labor and Industries form that she take the rest of the day off and limit her lifting, pulling, and pushing to five pounds for the next three days. AR at 16-17, 22-23, 63, 73-74, 94-95; FF 3. As the injury occurred on a Thursday, this restriction was effective for only one workday. AR at 13, 17, 30, 63, 73-74, 94-95; FF 3. Fugate returned to work that day with the

¹ The superior court transmitted the Administrative Record in this matter as a standalone document. *See* CP Index. The Administrative Record is separately paginated from the Clerk's Papers and, therefore, will be cited to in this brief as "AR."

physician's written recommendation, and Judy Coover sent her home with the advice that she rest and ice her back. AR at 16, 74; FF 4.

Coover instructed her assistant, Jeri Melton, to write a note detailing Fugate's medical restrictions for the following day and attach it to Fugate's timecard to ensure that she would see it the next morning. AR at 17, 64-65, 74, 94-95; FF 5. This note directed Fugate to not push carts with anything on them or lift or pick up anything heavier than four pounds for one day. AR at 64, 94. First thing Friday morning, Printcom's president, Jim Coover, verbally repeated the instructions in the note to Fugate and showed her the doctor's written recommendations. AR at 18, 32, 65, 94-95.

Shortly after her employer directed her to limit her lifting to five pounds, Fugate lifted boxes weighing roughly 15 pounds. AR at 19, 66, 94-95. Melton witnessed this and admonished Fugate to follow the employer's direction. *Id.* But Fugate proceeded to lift even heavier items weighing 42 to 44 pounds, and 70 pounds, respectively. AR at 19, 66, 95.

Judy Coover learned from other employees that Fugate had not been obeying the light-duty orders given to her and admonished her again to follow orders. AR at 19, 95. A short time later, Coover observed Fugate push a cart carrying a load believed to weigh much more than five

pounds. AR at 20, 26, 74, 95-96; FF 8. At this point, Coover told Fugate to go home and formally terminated her later that day. AR at 20-21, 96.

After her termination, Fugate applied for unemployment benefits. AR at 56-58. The Department issued an initial determination that she had committed misconduct and thus was ineligible for benefits. AR at 45-49. Fugate appealed. AR at 52-53. At the administrative hearing, Fugate admitted that she lifted items exceeding the imposed weight limit but explained that she did so because she was no longer feeling any back pain and was afraid that her job would be in jeopardy if she could not demonstrate her physical ability to perform her job duties. AR at 22, 34-38, 74; FF 6, 8. After the hearing, the administrative law judge (ALJ) issued an initial order reversing the Department's decision. AR at 73-78.

The employer then petitioned the Department's Commissioner for review of the ALJ's decision, and the Commissioner set aside the ALJ's order and concluded that Fugate committed disqualifying misconduct. AR at 85-89, 94-98. The Commissioner adopted the ALJ's findings of fact and conclusions of law except for conclusion number 7, and augmented the findings and conclusions with his own. AR at 94-98.

Fugate then appealed to the Thurston County Superior Court, which reversed the Commissioner's decision. The Department appealed to this Court.

IV. STANDARD OF REVIEW

Washington's Administrative Procedure Act (APA) governs judicial review of a decision of the Employment Security Department's Commissioner concerning eligibility for unemployment benefits. RCW 34.05.510; RCW 50.32.120. When reviewing the Commissioner's decision, this Court sits in the same position as the superior court and applies the APA standards directly to the administrative record. *Courtney v. Emp't Sec. Dep't*, 171 Wn. App. 655, 660, 287 P.3d 596 (2012). The Commissioner's decision is prima facie correct, and the petitioner, Fugate, bears the burden of demonstrating its invalidity. RCW 34.05.570(1)(a); *Anderson v. Emp't Sec. Dep't*, 135 Wn. App. 887, 893, 146 P.3d 475 (2006). The Court may grant relief only if "it determines that a person seeking judicial relief has been substantially prejudiced by the action complained of." RCW 34.05.570(1)(d).

The Court undertakes the limited task of reviewing the Commissioner's findings to determine, based solely on the evidence in the administrative record, whether substantial evidence supports those findings. RCW 34.05.558; *Wm. Dickson Co. v. Puget Sound Air Pollution Control Agency*, 81 Wn. App. 403, 411, 914 P.2d 750 (1996). Unchallenged factual findings are verities on appeal. *Tapper v. Emp't Sec. Dep't*, 122 Wn.2d 397, 407, 858 P.2d 494 (1993).

Evidence is substantial if it is “sufficient to persuade a rational, fair-minded person of the truth of the finding.” *In re Estate of Jones*, 152 Wn.2d 1, 8, 93 P.3d 147 (2004). The reviewing court is to “view the evidence and the reasonable inferences therefrom in the light most favorable to the party who prevailed” at the administrative proceeding below and may not re-weigh evidence, witness credibility, or demeanor. *Affordable Cabs, Inc. v. Dep’t of Emp’t Sec.*, 124 Wn. App. 361, 367, 101 P.3d 440 (2004); *Wm. Dickson Co.*, 81 Wn. App. at 411; *W. Ports Transp., Inc. v. Emp’t Sec. Dep’t*, 110 Wn. App. 440, 449, 41 P.3d 510 (2002).

The Court then determines de novo whether the Commissioner correctly applied the law to those factual findings. *Tapper*, 122 Wn.2d at 407. However, because the Department has expertise in interpreting and applying unemployment benefits law, courts afford substantial weight to the agency’s decision. *Courtney*, 171 Wn. App. at 660.

The appellant generally may not raise issues on appeal that she did not raise below before the agency, RCW 34.05.554(1), or before the superior court. RAP 2.5(a); *Darkenwald v Emp’t Sec. Dep’t*, 183 Wn.2d 237, 245 n.3, 350 P.3d 647 (2015).

V. ARGUMENT

Based on a physician’s recommendations, Fugate’s employer gave her a simple, reasonable direction not to lift over five pounds or push

loaded carts for just one day. Fugate did not claim that she did not understand the instructions. In fact, she admitted that she disregarded her employer's direction. Despite receiving multiple admonishments, she lifted 15-, 42-, and 70-pound boxes and pushed a cart believed to be carrying well over five pounds. She deliberately disregarded her employer's reasonable direction and standards of behavior her employer had the right to expect of her. The Commissioner correctly determined that Fugate committed misconduct disqualifying her from receiving unemployment benefits. The Court should affirm the Commissioner's decision.

A. Fugate Is Disqualified From Receiving Benefits Because She Was Insubordinate And Disregarded The Standards Of Behavior Her Employer Had The Right To Expect Of Her

The legislature enacted the Employment Security Act to provide compensation to individuals who are unemployed "through no fault of their own." RCW 50.01.010; *Courtney*, 171 Wn. App. at 660. As such, the Act provides that a claimant is disqualified from receiving unemployment benefits if she has been discharged from her job for work-connected misconduct. RCW 50.20.066(1). The burden is on the employer to show by a preponderance of the evidence that the claimant was discharged for disqualifying misconduct. *Nelson v. Emp't Sec. Dep't*, 98 Wn.2d 370, 374-75, 655 P.2d 242 (1982).

RCW 50.04.294 defines “misconduct” and includes a list of seven specific acts that are misconduct per se “because the acts signify a willful or wanton disregard of the rights, title, and interests of the employer or a fellow employee.” RCW 50.04.294(2); *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.”). The Commissioner determined that Fugate committed per se misconduct by engaging in “[i]nsubordination showing a deliberate, willful, or purposeful refusal to follow the reasonable directions or instructions of the employer.” RCW 50.04.294(2)(a); AR at 96. The Commissioner also concluded that Fugate deliberately disregarded standards of behavior the employer had the right to expect of her. RCW 50.04.294(1)(b); AR at 96. The Commissioner was correct.

- 1. Fugate was insubordinate because she deliberately disregarded her employer’s reasonable and clear direction to not lift over five pounds or push loaded carts for a single workday.**

The Commissioner correctly concluded that Fugate committed insubordination when she deliberately refused to follow the reasonable directions of her employer. AR at 96. The employer’s directions were clear and were explained to Fugate multiple times. AR at 17-19, 32, 64-66, 74, 94-95; FF 5. Fugate’s physician provided her a form on which he recommended limiting her lifting, pulling, and pushing to five pounds for

one work day. AR at 16-17, 22-23, 63, 73-74, 94-95; FF 3. Based on this recommendation, the employer, through both Jeri Melton and Jim Coover, directed Fugate to limit her lifting to five pounds and not push carts with anything on them for one work day. AR at 17-18, 32, 64-65, 74, 94-95; FF 5. She then lifted 15-pound boxes, was admonished by Jeri Melton, lifted 42- to 44-pound and 70-pound boxes, and was again admonished by Judy Coover. AR at 19-20, 26, 66, 74, 94-96; FF 8. She proceeded to push a cart believed to be loaded with well over five pounds of weight. AR at 20, 26, 74, 95-96; FF 8.

Fugate argues for the first time to this Court that the employer's directions were unclear and that the Commissioner did not make findings as to what the employer's directions actually were. Opening Br. of Resp't at 24-25, 27. But she did not raise these arguments before the agency or the superior court. The Court should decline to consider them for the first time on appeal.

Fugate did not argue before the agency that she was uncertain as to what restrictions her employer imposed upon her. "Issues not raised before the agency may not be raised on appeal," except under certain circumstances neither applicable nor alleged here. RCW 34.05.554(1). As the Supreme Court recognizes, this "is more than simply a technical rule of appellate procedure; instead, it serves an important policy purpose

in protecting the integrity of administrative decisionmaking.” *King County v. Boundary Review Bd. For King County*, 122 Wn.2d 648, 668, 860 P.2d 1024 (1993).

And Fugate did not raise before the superior court the arguments that her employer’s instructions were unclear or that the Commissioner did not make findings as to what those instructions were. In the statement of facts in her brief filed with the superior court, Fugate stated that the employer directed her not to lift over five pounds or push carts with anything on them. *See* CP at 49-50. RAP 2.5(a) provides that “[t]he appellate court may refuse to review any claim of error which was not raised in the trial court.” This rule ensures “fairness due both the trial judge or agency and a litigant’s adversary, [and] a sense that one’s opponent should have a chance to defend, explain, or rebut some challenged ruling[.]” *See generally State v. Bertrand*, 165 Wn. App. 393, 406, 267 P.3d 511 (2011) (Quinn-Brintnall, J., concurring) (quoting Frank M. Coffin, *On Appeal: Courts, Lawyering, and Judging* 84-85 (1994)). “[I]f appellate courts were to consider some unpreserved issues . . . [it] would be an incentive for game-playing by counsel, for acquiescing through silence when risky rulings are made, and, when they can no longer be corrected at the trial level, unveiling them as new weapons on appeal.” *Id.* at 406-07 (quoting Coffin). RAP 2.5(a) reflects Washington’s

recognition of “the fundamental fairness of requiring parties to preserve issues they wish to present to the appellate courts for review.” *Id.* at 407. Fugate did not argue to the agency or to the superior court that her employer’s directions were unclear or that the Commissioner did not make findings as to what the employer’s directions were, and this Court should decline to consider these new arguments.

Even if the Court decides to address these new arguments, the arguments are wrong as they are not supported by evidence in the record. Fugate did not testify or argue at the administrative hearing that she was uncertain as to what restrictions were imposed upon her. On the contrary, she admitted lifting beyond her restrictions and pushing a loaded cart. AR at 23, 26-27, 34-38, 74; FF 6, 8. When the ALJ asked Fugate why she did not follow her employer’s orders, her response was not that she was uncertain as to what those orders were, but rather that she chose to disregard those orders and exceed her restrictions because she no longer felt pain and wanted to prove her work ethic to her employer so as not to jeopardize her job. AR at 22, 34-38, 74; FF 6, 8. The ALJ asked her about her coworkers having witnessed her lift more than her assigned limit, and Fugate said, “I don’t deny that I was lifting. I was doing my job.” AR at 34. When the ALJ questioned her further, Fugate testified, “I did lift some boxes. And I was trying to do my job. And I was not in

any pain. . . . I made a judgment call.” AR at 37. Fugate also testified that, on the day of her injury and her visit to the doctor, she was aware of and tried to abide by the doctor’s recommendation that she stay within a five-pound limit. AR at 22-23. Fugate’s own testimony and argument at the administrative proceeding thus contradict the new argument she now makes on appeal.

And the Commissioner did make sufficient findings as to what the employer’s restrictions actually were. The Commissioner found that Fugate’s doctor filled out a Labor and Industries form indicating that she should limit her lifting, pulling, and pushing to five pounds. AR at 73-74; FF 3. He found that, the next morning, Jeri Melton, as directed by the employer, identified the restrictions on Fugate’s activity in a note attached to her timecard. AR at 17, 64-65, 74, 94-95; FF 5. The Commissioner found that lifting over five pounds and pushing the cart were both beyond Fugate’s restrictions. AR at 94-96. The Commissioner did make findings concerning Fugate’s restrictions, and the restrictions are clear.

Fugate strains to attach significance to the Commissioner’s decision not to spell out the contents of the note that Jeri Melton attached to her timecard. Opening Br. of Resp’t at 25. But the Commissioner expressly cited “Exhibit No. 20” in his finding that Melton attached a

note to Fugate's timecard detailing her work restrictions. AR at 94. Exhibit No. 20 is a copy of the note, found at page 64 of the administrative record. The note directed Fugate not to push carts with anything on them and to limit her lifting to five pounds. AR at 64. Fugate's statement of facts in her superior court brief provided this same description of the contents of the note. *See* CP at 49. She did not argue below that the Commissioner was obligated to include the contents of the note in his order rather than cite its location in the agency record. Nor does she cite any authority supporting this argument. There is no such authority.

Ms. Fugate's reliance on *Kirby v. Department of Employment Security* in support of her argument that she did not commit misconduct is misplaced because the facts of that case are not on point with those here. *See* Opening Br. of Resp't at 28-29. In *Kirby*, the employer directed its security guard employee to write incident reports, but the employee refused because she had already written the reports. *Kirby v. Dep't of Emp't Sec.*, 179 Wn. App. 834, 839-41, 320 P.3d 123 (2014). The employer did not know the employee had already written the reports, and the employee did not know that the employer was unaware of her previous reports. *Id.* at 847. Because of this mutual misunderstanding and confusion, the employer had not shown "that the employee was

aware that he or she was disregarding the employer's rights." *Id.* The court also considered whether the claimant had committed per se misconduct by engaging in insubordination but likewise held that the mutual confusion of the employer and employee rendered the employer's direction to rewrite the incident reports unreasonable. *Id.* at 847-48.

In contrast, here, there was no such confusion, and the employer's directions were both clear and reasonable. Fugate knew what the doctor's recommendations were. She knew what her employer's instructions were. And the instructions were reasonable. Fugate does not argue that they were unreasonable, and for good reason. Fugate strained her back, and a physician recommended that she limit her lifting, pushing, and pulling to five pounds. AR at 15-17, 22-23, 63, 73-74, 94-95; FF 3. Relying on this advice, the employer directed Fugate to limit her activity accordingly for a single day to ensure that she fully recovered. AR at 17-18, 32, 64-65, 74, 94-95; FF 5. As the Commissioner noted, the employer was "trying to protect both the interests of its employee (to avoid further injury) and its business (to avoid liability and injury to other employees). . . . It was not unreasonable for the employer to expect claimant to comply with the restrictions for one day while still being able to work." AR at 96.

But Fugate “made a judgment call” to repeatedly refuse to follow her employer’s reasonable instructions. AR at 37. She should not “be allowed to substitute her own judgment about what was more important to the employer.” *Id.* Fugate’s employer reasonably and clearly directed her to limit her lifting, pushing, and pulling for a single day. Fugate refused, aware that she was disregarding her employer’s right to direct how she would carry out her work duties. This is insubordination that disqualifies Fugate from unemployment benefits. The Court should affirm.

2. **Fugate deliberately disregarded standards of behavior that her employer had the right to expect of her by repeatedly ignoring her employer’s direction to limit her physical activity.**

The Commissioner also properly determined that Fugate’s conduct demonstrated a deliberate disregard of standards of behavior that her employer had the right to expect of her, which constitutes disqualifying misconduct under RCW 50.04.294(1)(b).

Fugate injured her back but was not forthright with her employer about the seriousness of the injury. She told her employer that she was fine after having lain on the floor, information that conflicted with the accounts of her coworkers, who reported to the employer that Fugate was in pain. AR at 15-16, 34-35, 40. Fugate argues that the Commissioner’s

finding that Fugate gave conflicting accounts about her health status is not supported by substantial evidence. *See* Opening Br. of Resp't at 21-23. Fugate did not raise this issue before the superior court, and this Court should decline to address it for the first time on appeal pursuant to RAP 2.5(a).

Not only did Fugate waive this argument, but it is incorrect. She raises a semantic argument that the Commissioner incorrectly found that Fugate herself gave multiple conflicting accounts about her health status. *See* Opening Br. of Resp't at 22. The Commissioner found that Fugate "gave conflicting accounts about her health status after she apparently hurt her back at work. She told her employer she was fine, but the employer received reports from other employees that they observed claimant in pain." AR at 94. The full context of the Commissioner's finding makes it plain that the Commissioner found that Fugate's account conflicted with her coworkers' accounts.

Fugate also challenges the finding that Fugate told the employer that she was fine, which was inconsistent with her coworkers' reports that she was still in pain. AR at 94-95; *see* Opening Br. of Resp't at 22-23. This is supported by substantial evidence. Judy Covert testified that Fugate told Jim Covert that she was fine after having lain on the floor. AR at 15. Testifying after Judy Covert, Fugate did not question her

about or dispute this account and she confirmed that she told Jim Covert that she had lain on the floor. AR at 34-35. She testified that she “was not about to leave or go . . . to the doctor” and, more generally, that she was going to work through the pain, “suck it up,” and not act like a “sissy.” AR at 23, 35. Her testimony was consistent with Jim Covert’s account, relayed by Judy Covert, that she had minimized her injury by telling him that she was “fine.” The Commissioner’s finding is not based exclusively on hearsay testimony and is supported by substantial evidence.

The principal basis for the Commissioner’s conclusion that Fugate deliberately disregarded her employer’s standards of behavior is Fugate’s purposeful decision to repeatedly ignore her employer’s instructions to limit her physical exertion. *See* AR at 96. Jeri Melton and Jim Covert provided Fugate clear instructions not to lift anything over five pounds for a single workday. AR at 17-18, 32, 64-65, 74, 94-95; FF 5. But she proceeded to lift 15 pound boxes. AR at 19, 66, 94-95. Melton admonished her to follow the employer’s order, but she then lifted 42- to 44-pound and 70-pound boxes. *Id.* Judy Covert admonished her again after learning that she was not lifting within her restrictions. AR at 19, 95. Covert then observed Fugate push a cart believed to hold a load much heavier than five pounds. AR at 20, 26, 74, 95-96; FF 8. Fugate

received repeated orders not to exceed her restrictions, but she repeatedly chose to exceed those restrictions.

An employer has the right to expect its employees to follow its reasonable instructions. Fugate deliberately disregarded this reasonable standard of conduct and “undermined the employer’s confidence that she would follow the employer’s workplace rules and support the employer’s operations.” AR at 96. The Commissioner properly determined that Fugate’s conduct amounted to misconduct under RCW 50.04.294(1)(b). The Court should affirm.

B. Fugate’s Conduct Was Not Inadvertent, Negligent, Or A Good Faith Error In Judgment Because She Deliberately Disregarded Her Employer’s Repeated Instructions To Limit Her Physical Activity

Fugate argues that her repeated violations of her employer’s orders were mere “[i]nadvertence or ordinary negligence in isolated instances” and thus not disqualifying misconduct, per RCW 50.04.294(3)(b). But as reviewed in the previous section, her acts of insubordination were neither isolated nor inadvertent; they were numerous and intentional. She received multiple admonishments to restrict her lifting, pushing, and pulling, but she repeatedly refused to abide by these directives. AR at 17-20, 26, 32, 64-66, 74, 94-96; FF 5, 8. And this conduct was not mere inadvertence or ordinary negligence. She

did not simply make an “accident or mistake.” WAC 192-150-200(3)(b). She expressly admitted that she was aware she was lifting well over the weight restriction, making a deliberate judgment call to disregard her employer’s direction to limit her activity for a single day. AR at 22-23, 26-27, 34-38, 74; FF 6, 8. And she did so at least four separate times that one day. AR at 19-20, 26, 66, 74, 94-96; FF 8.

Nor did Fugate make a “good faith error[] in judgment or discretion.” RCW 50.04.294(3)(c). If she had misjudged the weight of a box she lifted, that may have qualified as such an error. But ignoring a reasonable direction four times and intentionally lifting over the weight restriction and pushing a loaded cart do not. Fugate was not engaged in an activity calling for her to exercise judgment or discretion. Just as the “employer would not be allowed to substitute its judgment for the doctor’s opinion as to the claimant’s physical restrictions,” Fugate was not entitled to substitute her own judgment for the employer’s about how much she should lift. AR at 96. The employer expressly told her to limit her lifting to five pounds and to not push a cart with anything on it for a single workday and warned her to obey this restriction multiple times. AR at 17-19, 32, 64-66, 74, 94-95; FF 5. She had no authority to then override her employer’s judgment and ignore the instruction altogether.

Fugate may have been afraid that failing to perform her normal job duties for one day could jeopardize her job, but the Employment Security Act does not grant an employee an absolute right to do whatever she thinks she needs to do to put herself in the best light to her employer and receive employer-funded unemployment benefits if her employer terminates her as a result. AR at 36-37, 74; FF 6. For instance, a window-washer may believe that he will work more quickly and show himself to be a more productive worker than his peers if he does not wear a safety harness. But if he refuses to wear the harness after his employer admonishes him numerous times to wear it, he cannot be said to have engaged in a good faith error in judgment. Fugate essentially argues that the very purpose of this exception is to permit an employee to override her employer's judgment with her own, even if the employer repeatedly and explicitly directs the employee to not follow that judgment. Opening Br. of Resp't at 34-35. But she points to no authority or statutory language supporting this proposition. The Commissioner correctly concluded that an employee may not repeatedly disregard her employer's clear, reasonable instructions and be eligible for unemployment benefits when the employer holds her accountable for her insubordination.

VI. CONCLUSION

Fugate engaged in misconduct by repeatedly ignoring her employer's reasonable direction to limit her lifting, pushing, and pulling for a single workday because she had strained her back. The Department respectfully requests that the Court reverse the superior court and affirm the Commissioner's decision finding Fugate ineligible for unemployment benefits.

RESPECTFULLY SUBMITTED this 31st day of August, 2015.

ROBERT W. FERGUSON
Attorney General


ERIC A. SONJU, WSBA 43167
Assistant Attorney General

PO Box 40110
Olympia WA 98504-0110
(360) 664-2475

PROOF OF SERVICE

I, Amy Phipps, certify that I caused a copy of this document—
Respondent’s Brief—to be served on all parties or their counsel of record
as follows on the date below and as follows to:

Served electronically to:
Denise Diskin
Teller & Associates, PLLC
1139 34th St., Ste. B
Seattle, WA 98122-5119
Denise@stellerlaw.com

Filed electronically with:
David Ponzoha, Clerk
Court of Appeals Division II

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

DATED this 31st day of August, 2015, at Olympia, Washington.



AMY PHIPPS, Legal Assistant

WASHINGTON STATE ATTORNEY GENERAL

August 31, 2015 - 9:51 AM

Transmittal Letter

Document Uploaded: 5-473496-Appellant's Brief.pdf

Case Name:

Court of Appeals Case Number: 47349-6

Is this a Personal Restraint Petition? Yes No

The document being Filed is:

Designation of Clerk's Papers

Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: _____

Answer/Reply to Motion: _____

Brief: Appellant's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: _____

Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Amy A Phipps - Email: amyp4@atg.wa.gov