

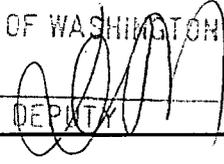
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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

No. 47349-6-II

BY

DEPT. 

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

DENISE FUGATE,

Respondent,

v.

WASHINGTON STATE DEPARTMENT OF EMPLOYMENT
SECURITY,

Appellant.

REPLY BRIEF OF RESPONDENT

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A. INTRODUCTION

The Respondent, Denise Fugate (“Ms. Fugate”), herein replies to arguments made by the Appellant, the Washington State Employment Security Department (“the State” or “ESD”), and appeals a final decision of the Commissioner of the Employment Security Department (“Commissioner”) issued on February 28, 2014, Docket Number 122013-00075. Ms. Fugate was injured at work, and believed based on statements made to her by Printcom’s office manager and assistant to the owners, Jim and Judy Coover, that her job was in jeopardy if she could not perform her duties as usual. Based on that belief and her desire to help the company and its customers waiting for shipments, she performed what job duties she could without feeling pain, some of which may have exceeded the restrictions placed on her by her doctor and the Coovers, but she was careful to avoid further injury. She did not deliberately disregard her employer’s standards of behavior, and to the extent that she failed to follow her employer’s instructions, her failure was a good faith error in judgment. She did not feel pain, and she feared that she would be terminated if she did not perform as many of her normal duties as she could.

Ms. Fugate respectfully asks that the Court uphold the reasoning of the ALJ who originally determined her entitlement to benefits, and

reject that of the Commissioner, who made unsupported factual findings and misapplied those findings to the law, denying her benefits.

B. ARGUMENTS IN REPLY

1. Ms. Fugate Made an Error in Judgment

The State argues that Ms. Fugate should be disqualified from benefits because her lifting beyond her restrictions was not accidental, and because she lacked authority to exercise judgment as to whether she performed her job. *See* Appellant’s Response Brief (“App. Br.”), 19-21. The State’s argument unduly limits the statute and relies upon inapposite analogies.

Ms. Fugate made a “mistake.” WAC 192-150-200(3)(b). She made a “good faith error[] in judgment or discretion.” RCW 50.04.294(3)(c). Her error lay, in part, in believing Jeri Melton, who instructed her on the day she injured her back that she should not tell the employer about her injury because her job would be at risk if she did. AR 35-37, 74 (FF6). Ms. Melton was Printcom’s office manager and assistant to the Cooverts, AR 39, 62, and the State argues she was entitled to give instructions to Ms. Fugate on behalf of the employer that Ms. Fugate should be expected to follow.¹ App. Br., 10, 18. Because of Ms. Melton’s statements (and presumably her own observations) Ms. Fugate

¹ Ms. Fugate disputed Ms. Melton’s authority to issue instructions on behalf of the employer to the Superior Court. CP 24-25.

held the good faith belief that her job would be in jeopardy if she could not fully perform her job, a finding the Commissioner did not alter. *See* Respondent's Opening Brief ("Resp. Br."), 19-21. Therefore, she did her best to complete as many of the duties of her work as she could without pain. *See* AR 23 ("I was merely doing small lifting and small...tiny movements ... merely trying to get the work out, make myself a productive worker."); AR 35-36, 37.

The State erroneously argues that the statutory exceptions should not apply because "Fugate was not engaged in an activity calling for her to exercise judgment or discretion." App. Br., 20. But the State's argument significantly limits the application of the statutory exceptions to misconduct, and should not be adopted. *Michaelson v. Emp't Sec. Dep't*, WL 1874303 at *3 (*amended* May 26, 2015) ("Construction of the benefits statute which 'would narrow the coverage of the unemployment compensation laws' is viewed 'with caution.'"). The statute does not call for the court to ask whether the employee had decision-making power over their mistake (indeed, no employee has discretion to be insubordinate), but only considers whether they made their error in good faith. If the legislature had intended that insubordinate employees should not be allowed to retain benefits when they committed good faith errors in judgment, it would have written the exceptions to misconduct as

subpart exceptions to the various acts described in RCW 50.04.294(2)(a)-(g) of the statute, and not as an exception to misconduct under RCW 50.04.294 generally. In effect, the State argues for a strict liability standard for insubordinate employees, where nothing matters except whether they were insubordinate – but that is not the statute the legislature wrote.

The correct approach is that taken by the court in *Wilson v. Emp't Sec. Dep't*, where the court held that exceptions to statutory misconduct must be evaluated in light of the employee's *reason* for violating the employer's policy. 87 Wn. App. 197, 202, 940 P.2d 269 (1997) ("These acts were, by Wilson's own admission, in violation of the employer's policy. However, at most they amounted to ... an exercise of poor judgment.").² See also *Michaelson*, WL 1874303 at *4 (where an employee had three at-fault collisions in one year, "failed to exercise reasonable care," but did not evidence the necessary intentional or substantial disregard of his employer's interests to disqualify him from benefits).

² *Wilson* was determined prior to the ESA's 2004 revisions with respect to misconduct. However, the language of the post-2004 statute regarding exceptions is not substantively different from that considered by the court in *Wilson*. Compare "Behavior that is mere ... erroneous judgment, or ordinary negligence does not constitute misconduct for purposes of denying unemployment compensation," 87 Wn.App. at 202, with "Misconduct does not include ... (b) inadvertence or ordinary negligence in isolated instances; or (c) good faith errors in judgment or discretion." RCW 50.04.294(3).

The State's analogy regarding the window-washer who opts not to wear a safety harness is unhelpful to this case. *See* App. Br., 21. First, unlike the window washer who is willing to endanger himself only out of an urge to show up his coworkers, Ms. Fugate did not continue working simply because she wanted to but rather because she believed she must. A correct analogy might be to a window washer who refused a harness because he understood his employer negatively perceived window washers who wore harnesses to be less productive and might take adverse action against him for doing so. Ms. Fugate believed that if her injury caused her work to suffer, her job would be in jeopardy. She was not merely being flippant; she was doing her best to show her value because she believed the Coverts would jettison an employee who could not fully work. Her belief was apparently erroneous, but it was made in good faith, and she asks that the Court award her benefits in light of the ESA's statutory exceptions.

2. Ms. Fugate Did Not Deliberately Disregard Standards of Behavior

The Court should determine that Ms. Fugate's actions are not statutory misconduct pursuant to the exceptions in RCW 50.04.294(3)(c). If the Court declines to do so, however, it should reject the Commissioner's finding that Ms. Fugate acted with deliberate disregard of her employer's interests, and award benefits.

Ms. Fugate testified that she was trying to help the employer and believed her actions did so. AR 23-24, 91 (“I was regarding the needs of the customers and the importance of the job ... without anyone in the bindery to help me, I did the best job I could with regard to instructions and my ability to do the job.”). If her intent was to help her employer (and, she believed, retain her job) by doing as much of her job as possible without exacerbating her injury, it does not logically follow that she could also be acting with deliberate, intentional disregard for her employer’s best interests.

Here, *Kirby v. Emp’t Sec. Dep’t* provides an instructive analysis. *See* Resp. Br. 28-29. In *Kirby*, the employee refused to fill out a report when her employer instructed her to. *Kirby v. Emp’t Sec. Dep’t*, 179 Wn. App. 834, 840-41, 320 P.3d 123 (2014). Like Ms. Fugate, she feared the consequences if she followed the instruction. *Id.* at 840 (she feared that the report “would be used against her.”). There is no evidence she had authority to refuse her employer’s instruction, only that she had a good reason for doing so. *Id.* at 846-47.

Nevertheless, the court determined that the employer had not shown the employee was “aware she was disregarding the employer’s rights” by refusing to complete the report. *Id.* Even though she was directly and deliberately insubordinate, her reasons were relevant to the

court – she had already completed a report, and believed a second would be used against her. *Id.* at 840.

The State attributes the *Kirby* decision to “mutual confusion” between the employee and employer. App. Br., 14. But by the State’s own reasoning, the confusion is irrelevant, because the State argues that when an employee is deliberately insubordinate, they should not receive benefits. App. Br., 21. But the *Kirby* court held that the employee’s reason for refusing the instruction was important to the question of misconduct, and considered whether other factors, such as fear of retaliation, mitigated the employee’s actions.³ 179 Wn. App. at 848-49. The Court should similarly review Ms. Fugate’s conduct taking into account the ALJ’s unchallenged finding that Ms. Fugate worked without pain, because she feared for her job if she did not.

3. Ms. Fugate Appropriately Raised All Issues On Appeal

Ms. Fugate does not argue that she did not follow Printcom’s instructions because she was unclear or uncertain about them. *See* App. Br., 10. Rather, she challenges the Commissioner’s finding that the action for which she was terminated actually violated her medical

³ It is worth noting that this approach does not unfairly penalize employers for enforcing their own policies or unfairly reward employees as the State’s argument implies – employers remain free to terminate employees for any infraction they wish – but instead sets an appropriately more liberal analysis of the employee’s behavior in light of their entitlement to benefits. *See* RCW 50.10.010; *Johnson v. Emp’t Sec. Dep’t*, 64 Wn. App. 311, 314-15, 824 P.2d 505 (1992).

restrictions, because the nature of those restrictions was not established. Evidence regarding the restrictions was presented at hearing and considered by both the ALJ and the Commissioner. Ms. Fugate argued before the Superior Court that it had not been established whether pushing the cart violated her restrictions, CP 56, 59, but it is not relevant whether she did because the Court stands in the shoes of the Superior Court in reviewing the Commissioner's decisions, and the State had ample opportunity to respond in any case. *See* Resp. Br., 13.

The State asks the Court to disregard arguments which are significant to the determination of Ms. Fugate's eligibility for benefits. Printcom left Ms. Fugate a note instructing her not to lift over 4 pounds or push any carts, but then only very shortly afterward Mr. Coover instructed her to follow her doctor's note, which advised that she *seldom* lift or push over 5 pounds and never lift more than a greater amount. AR 32-34, 63-64. The State argues that "[t]he employer's directions were clear and were explained to Fugate multiple times." App. Br., 9. This is incorrect – Ms. Fugate received one set of restrictions from her doctor, a different set of restrictions from Printcom, after which Mr. Coover told Ms. Fugate to follow the instructions on her doctor note. AR 65. The difference matters because Printcom's instructions said she should not lift or push at all, and the doctor's instructions said she could lift and push

but should “seldom” do so. AR 63,64. She was fired for pushing a cart one time, and the force required to push it was not established. AR 74 (FF 8). If the instructions in the doctor note that she “seldom” push control, then she did not violate her restriction at all, and the action which led to her termination was not misconduct.

Similarly, the State argues the court should decline to consider whether the Commissioner lacked sufficient evidence to find that Ms. Fugate lied to her employer about her injury because she did not raise it to the Superior Court. App. Br., 17. The Commissioner made a finding which undermined Ms. Fugate’s credibility without purpose (how she reported her injury to her employer was not the reason for her termination and does not bear on her eligibility for benefits) and its findings are utterly unsupported by the statements contained in the record.⁴ The State should not be supported in its attempt to call Ms. Fugate a liar with impunity.

All issues in question were raised before the agency at hearing. *See* RCW 34.05.554. Both Ms. Fugate and Printcom raised the issue of the content of Fugate’s limitations, and presented evidence of their understanding of the instructions, which conflicted, causing the ALJ to

⁴ The State acknowledges Ms. Coovert’s testimony regarding what Mr. Coovert told her was hearsay. App. Br., 18 (“Her testimony was consistent with Jim Coovert’s account, *relayed by Judy Coovert,,*” emphasis added).

determine that Fugate lifted beyond her restrictions at some points but that the record did not establish that pushing the cart violated her restrictions. AR 74 (FF 8). Additionally, documents memorializing the restrictions (the doctor note and the note left on Ms. Fugate's timesheet) were entered into evidence and considered by the ALJ, Commissioner, Superior Court, and now this Court.

Ms. Fugate had no opportunity or reason to discuss the conflict between the two sets of instructions before the agency – she prevailed before the ALJ, and it was the employer, not Ms. Fugate, who presented issues for appeal to the Commissioner. AR 85-91. Ms. Fugate provided a one-page response to the employer's appeal, wherein she reiterated that her intent was to do her best job and that she was afraid of being fired. AR 91. She was unrepresented before the agency, and cannot be expected to have anticipated every argument available to her when she responded to Printcom's Commissioner appeal. Moreover, the Commissioner had not yet made the findings in question.

Fugate discussed whether the Commissioner's findings were sufficiently specific with respect to her restrictions before the Superior Court. CP 56, 59. It does not matter whether she did, though, because the Court today stands in the shoes of the Superior Court in evaluating the decision of the Commissioner. *See* Resp. Br., 13. There is no reason

that arguments made before the Superior Court should have bearing on arguments made here when this Court is looking to the validity of the Commissioner's decision and not that of the Superior Court. In any case, the State had ample opportunity to respond to each and any argument made by Ms. Fugate, and did so. *See, e.g.* App. Br., 12-13, 17-18.

The State's citation to *King County v. Boundary Review Bd. For King County* is not applicable here. App. Br., 10-11, citing 122 Wn.2d 648, 668, 860 P.2d 1024 (1993). In that case, the court declined to consider whether an ordinance prohibited the desired actions when neither the existence of the ordinance nor its effects were raised at the evidentiary hearing. *Id.* at 669. *See also Darkenwald v. Emp't Sec. Dep't*, 183 Wn.2d 237, 245 n.3, 350 P.3d 647 (2015) (where the court declined to consider Petitioner's argument that her benefits should be considered under an entirely separate statute – i.e. as a refusal to work per RCW 50.20.080 rather than a quit per RCW 50.20.050 – and where Petitioner did not make the argument at hearing, and not until her response to amicus briefs). Here, the restrictions, and Ms. Fugate's actions, were fully developed in the record, arise under the same subsection of the statute argued by Ms. Fugate throughout, and the inconsistency between the doctor's note and Printcom's instructions was established with ample opportunity for both Printcom and the State to

respond. Ms. Fugate has changed nothing about her argument that the State cannot demonstrate she deliberately violated her employer's reasonable instructions when it failed to establish the facts necessary to make such a finding. The State argues for the integrity of agency decisionmaking, App. Br., 10-11, but its integrity is similarly harmed when agencies reach decisions which are unsubstantiated or even belied by the record. Ms. Fugate respectfully requests that the Court review the factual findings made by the Commissioner for substantial evidence, and conduct a *de novo* review of the application of the substantially supported facts to the law, per the appropriate standard of review. Resp. Br., 13.

In the event the Court determines that Ms. Fugate did not raise the disputed issues below, it may still consider the disputed arguments based on its authority to liberally interpret or waive the Rules of Appellate Procedure in order to avoid reaching decisions based upon "compliance or noncompliance with these rules" and "in order to serve the ends of justice." RAP 1.2(a), (c).

C. CONCLUSION

Ms. Fugate respectfully requests that this court affirm the decision of the superior court reversing the Commissioner's decision denying benefits based on misconduct. The Commissioner's finding that Ms. Fugate intentionally disregarded instructions by her employer was not

based on substantial evidence in the record and the conclusion that Ms. Fugate engaged in disqualifying misconduct was an error of law. Ms. Fugate also respectfully requests that this court affirm the prior Order awarding attorney fees to Ms. Fugate, and order that attorney fees pursuant to this appeal be paid.

RESPECTFULLY SUBMITTED this 30th day of September,
2015.

TELLER & ASSOCIATES, PLLC

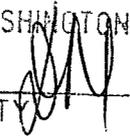
A handwritten signature in black ink, appearing to read "Denise Diskin". The signature is fluid and cursive, with a large initial "D" and "D".

J. DENISE DISKIN
WSBA #41425
Attorney for Respondent

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CERTIFICATE OF SERVICE STATE OF WASHINGTON

I hereby declare under penalty of perjury under the laws of the ^{BY} ~~DEPUTY~~ 

State of Washington that on September 30, 2015, I caused to be served by email delivery, per counsel agreement, a true and correct copy of the foregoing pleading upon counsel of record at the addresses stated below:

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And caused to be filed a true and correct copy of the foregoing pleading upon the court:

Court of Appeals, Division II
950 Broadway, Suite 300
Tacoma, WA 98402


Brenda Blankenship