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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 293157

**IN THE COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON**

THOMAS A. MATTSON,

Appellant,

vs.

STATE OF WASHINGTON
DEPARTMENT OF EMPLOYMENT SECURITY

Respondent.

APPELLANT'S REPLY BRIEF

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I. INTRODUCTION

Appellant, Thomas Mattson, appealed a decision of the Commissioner that his actions constituted statutory misconduct, arguing in part that his actions on the specific day in question were at most an error in judgment or negligence and that while such may have been a basis for separation from employment, the actions were not misconduct as that term is used in RCW 50.20.066 and defined in RCW 50.04.294, justifying the denial of unemployment benefits. Respondent, in part, argued that Mr. Mattson's failure to follow a safety protocol for entering a restricted area violated his employer's reasonable rule, and thus is per se misconduct. Pursuant to RAP 10.3 (c) this reply brief is limited to a response to issues in the Brief of Respondent not previously addressed in Appellant's Brief.

II. RESPONSIVE ARGUMENT

A. Respondent's argument that the actual protocol of Clearwater Paper known to the Appellant required he seek and receive permission to enter the restricted area immediately before entry is neither found in the administrative record nor a finding of fact as adopted by the Commissioner.

Respondent argues Mr. Mattson knew that his employer required him to follow the safety requirements of customers when making deliveries and

that Clearwater's (the relevant customer in this case) safety protocol required him to obtain permission "immediately" before entering the restricted area (Brief of Respondent, page 11, citing CP 37-38 and CP 96 (FF 4)), and because he knowingly failed to do this, he violated his employer's reasonable rule, which signifies willful disregard of the employer's interest and is therefore misconduct (Brief of Respondent, p.12).

No testimony taken before the administrative law judge or evidence presented used the term or described the actual safety protocol as seeking or receiving permission "immediately" before entering the restricted area. The administrative record does not use nor contain the word "immediately" in connection with permission to be sought, nor does it appear in the findings adopted by the Commissioner. Respondent argues that such, calling it then "contemporaneous permission," is the only logical protocol in light of the goal of safety (Brief of Respondent, p. 23). Respondent also argues that Mr. Mattson "testified that he had checked in with the Clearwater offices immediately before entering the restricted area "every previous time..." (Brief of Respondent, p. 24, citing CP at 53: 16-18), and then argued as his practice was always to ask permission immediately before entering the restricted area, it is most likely that he understood the safety protocol to

require exactly that (Brief of Respondent, p. 24); however, Mr. Mattson's testimony, as cited by the Respondent, and as also contained elsewhere in the administrative record, does not state that the safety protocol required permission be obtained "immediately" before entry, he merely stated, as cited: "Every previous time I have always gotten permission, and 99 percent of the time it was with Keith or they would send me to a shop steward." CP 53, lines 16-18. As Keith's office was not located near the restricted area (CP 52), Mr. Mattson's normal routine in asking permission to enter the restricted area would never have resulted in permission granted "immediately" before entry.

While the administrative record does not contain even one use of the word or additional requirement "immediately" in connection with permission to be sought from Clearwater Paper, the Respondent's Brief uses the phrase over 25 times, apparently in the hope that repetition reinforces the argument such should be found, despite the fact such term was neither testified to nor part of the findings as to the actual safety protocol. The administrative record, as well as the findings, merely indicate permission was required before entry into the restricted area, and Mr. Mattson indicated that he thought he had obtained such permission (CP 53).

The conclusions adopted by the Commissioner indicate a finding that “Claimant was clearly aware of the safety protocol,” and concluding that “it was therefore incumbent on him to notify Clearwater Paper that he was wanting to enter the restricted area at 2 p.m.” CP 98, Conclusion of Law 5. Such does not support he intentionally disregarded the safety protocol by deliberately not seeking permission, but rather what he should have done when he returned at 2:00 p.m. after having been told to return at that time in response to his earlier request for permission. The conclusion infers that he should have asked again at 2: p.m.; that it would have been reasonable for him to ask again; that he would have been safe in asking again. But such does not support or indicate intentional behavior done deliberately or knowingly by Mr. Mattson to disobey the actual protocol at Clearwater Paper. His failure in not seeking permission again when he returned was either negligence or an error in judgment on one particular instance.

B. Violation of a company rule is not misconduct under RCW 50.04.294 if the violation is unintentional, inadvertent, a result of ordinary negligence in an isolated instance or a result of a good faith error in judgment or discretion.

Respondent argues violation of a company rule, if reasonable and known to the employee, is per se misconduct, arguing that the examples

provided in RCW 50.04.294(2), which include violation of a company rule, are per se misconduct (Brief of Respondent, p. 10-11). Respondent did not provide or cite to any legal basis for this conclusion other than the statutory provisions under RCW 50.04.294. Research disclosed only one reported case in Washington in which the term or label 'misconduct per se' was used in a similar context of an unemployment benefit case; however, even in that case the court required that the employee's disobedience must have been intentional. *Pacquing v. Employment Security*, 41 Wn.App. 866, 707 P.2d 150 (1985). Respondent's use of the label per se misconduct and argument that such should be found is apparently that if the conduct is addressed by the statutory illustrative example, such automatically constitutes statutory misconduct, thereby relieving both an agency or court of the necessity for any further inquiry or analysis as to whether the individual facts of the case or evidence of the employee's fault or behavior support the conclusion the employee committed statutory misconduct. Although not on point, when addressing cases of "negligence per se," generally breach of a duty imposed by statute, ordinance or administrative rule shall not be considered negligence per se. Violating an applicable statute may still be considered by the trier of

fact as evidence of negligence, but generally violation of the statute itself does not constitute negligence per se. RCW 5.40.050.

While focusing on one example of behavior as provided by the legislature that could be considered misconduct, labeling such as “misconduct per se,” and then apparently disregarding the remainder of the applicable statute, the Respondent’s position is contrary to the court’s role in statutory interpretation to give effect to every word, clause and sentence of a statute, and that no part should be deemed inoperative or superfluous unless the result of obvious mistake or error. *Cox v. Helenius*, 103 Wn.2d 383, 387-388, 693 P.2d 683 (1985). “The goal is to avoid interpreting statutes to create conflicts between different provision so that we achieve a harmonious statutory scheme.” *Am. Legion Post v. Dep’t of Health*, 164 Wn.2d 570, 585, 192 P.3d 306 (2008), citing *Echo Bay Cmty. Ass’n v. Dep’t of Natural Res.*, 139 Wn.App. 321, 327, 160 P.3d 1083 (2007), *review denied*, 163 Wn.2d 1-16 (2008). Violating a company rule is one listed example of statutory misconduct found under RCW 50.04.294; however, the statute also indicates the listed examples are “considered misconduct because the acts signify a willful or wanton disregard of the rights title and interests of the employer...” RCW 50.04.294(2). If the underlying act of the employee is not intentional

or not willful or wanton, whether or not it has been listed as an example should not mean it automatically qualifies as or equates to statutory misconduct. Even if the acts of an employee come within an example as provided for under RCW 50.04.294(2), such would not negate the specific exclusions provided for under RCW 50.04.294(3) that certain acts are not to be considered as misconduct, such as inefficiency, unsatisfactory conduct, inadvertence, ordinary negligence in isolated instances, or good faith errors in judgment. Respondent's apparent position of labeling the act misconduct per se as it is addressed by one of the statutory examples, but ignoring the claimant's intent, would be contrary to the contemplated definition of misconduct under the statute. RCW 50.04.294(1)(a) indicates misconduct is conduct by an employee that is in willful or wanton disregard of an employer's interest. WAC 192-150-205(1) defines willful as "intentional behavior done deliberately or knowingly..." RCW 50.04.294(2) lists examples of acts that constitute misconduct "because the acts signify a willful or wanton disregard...". While case law supports that the misconduct disqualifying an employee for unemployment benefits must be intentional (*Darneille v. Employment Security*, 49 Wn.App. 575, 578, 744 P.2d 1091(1987)) such requirement is also clearly contemplated within the statute.

III. CONCLUSION

The court in *Darneille* indicated that “the determinative question must always be: did the employee intend to disobey the employer’s rules or orders?” *Darneille*, 49 Wn.App. at 578. RCW 50.04.294 contemplates intentional conduct as an issue in cases of misconduct with respect to unemployment benefits claims. Mr. Mattson sought and obtained what he thought was permission to enter the restricted area so that he could complete his delivery. Upon his return to Clearwater Paper at 2: p.m. as directed he proceeded into the restricted area. He may have been acting voluntarily or of his own volition, but such was not with deliberate intent to ignore or disobey the safety protocol, his decision to proceed at that time was inadvertant, ordinary negligence in an isolated incident, or a good faith error in judgment or discretion. While he should have asked again, his failure to do so does not support or indicate intentional behavior done deliberately or knowingly to disobey the actual protocol at Clearwater Paper.

RESPECTFULLY SUBMITTED this 19th day of January, 2011.



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