NO. 44376-7

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

LINDA DARKENWALD,

Respondent,

and

STATE OF WASHINGTON,
EMPLOYMENT SECURITY DEPARTMENT,

Appellant.

OPENING BRIEF OF RESPONDENT AND MOTION TO DISMISS APPEAL

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INTRODUCTION

The Respondent, Linda Darkenwald, was employed as a Dental Hygienist in the offices of Dr. Gordon Yamaguchi D.D.S. for twenty-five years. Due to her physical disability, her hours of work had been gradually decreasing and for the last four years by agreement with her employer she had been working only two days a week. In July 2010, Dr. Yamaguchi determined he needed Mrs. Darkenwald to work three days a week instead of the two days she had been working the past four years for health reasons. When Mrs. Darkenwald informed the dentist that she could not work three days a week, the doctor insisted that was what he needed. Mrs. Darkenwald understood her employment was terminated because she could not work that many days a week.

The Employment Security Department denied Mrs. Darkenwald's application for unemployment insurance on the basis that she had quit her job without good cause.[1] On appeal, the Superior Court found that Mrs. Darkenwald had quit her employment with good cause because her physical disability prevented her from working more than two days a week. On De-

[1] It was also denied on the basis that Mrs. Darkenwald allegedly was not available (willing) to work at any job on Fridays. That was the basis for the denial in the companion case in Thurston County Cause No. 11-2-00115-3 which was reversed based on the agreement of the parties that the record clearly reflected she was willing to work Fridays.

cember 19, 2012, the Superior Court entered a Judgment reversing the Department's denial of benefits.[2]

Herein, Respondent submits that consistent with the Superior Court's interpretation of the record and the applicable law, Mrs. Darkenwald quit with good cause because she couldn't work the three days a week her employer demanded because of her disability. Because of her status as a "part-time worker" pursuant to RCW 50.20.119, Mrs. Darkenwald had other "good cause" to quit in addition to her health.

The Department filed a notice of appeal on January 8, 2013. Before filing a supersedeas without bond in the Superior Court on March 27, 2013, the Department paid Mrs. Darkenwald her back benefits.

ASSIGNMENTS OF ERROR

A. Darkenwald moves herein for dismissal of the Department's appeal on the grounds that the recent benefit payments made to Darkenwald make the appeal moot.

B. Darkenwald has not assigned any error to the Superior Court decision and is the Respondent herein because the Department has appealed

[2] CP 75-78. Because Mrs. Darkenwald's husband is a long time member of the Thurston County bar, the appeal was heard by a visiting judge, the Honorable Amber L. Finlay, Mason County Superior Court Judge.

the determination that Darkenwald is entitled to benefits because she quit for good cause. Darkenwald alleges that the Department's decision:

(1) Erroneously interpreted or applied the law;

(2) Was not supported by evidence that is substantial when viewed in light of the whole record; or

(3) Was arbitrary and capricious.[3]

ISSUES PRESENTED BY ASSIGNMENTS OF ERROR

The following issues are presented by Darkenwald's motion to dismiss and her assignments of error to the Department's decision denying benefits on the basis that she quit without good cause:

(1) Whether the Department's appeal should be dismissed as moot because of the recent benefit payments, which constitute a "redetermination," and because there is no evidence of fraud, misrepresentation or lack of disclosure by Mrs. Darkenwald.

(2) Whether an employee quits for "good cause" where:

(a) the employee's physical disability prevents her from working more than two days a week but her employer demands that she work three days a week (RCW 50.20(2)(b)(ii)); or

[3] RCW 34.05.570(3)(d)(e) and (i).

(b) the employee's statutory "Part-time worker" status (RCW 50.20.119) gives her the legal right to decline an employer's demand that she increase her work week to more than 17 hours a week; and

(c) the employer's request the employee work "on-call" as a substitute would have reduced her work hours by twenty-five percent or more. RCW 50.20.050 (2)(b)(vi).

STATEMENT OF THE CASE

Linda Darkenwald was employed as a Dental Hygienist in Dr. Yamaguchi's office for twenty-five (25) years.[4] Most dentist offices are only open four (4) days a week so it is extremely uncommon for a hygienist to work more than four (4) days a week.[5] At the time her employment was terminated, by agreement with her employer Mrs. Darkenwald was only working two days (between 14 to 17 hours) per week.[6]

Mrs. Darkenwald has "a serious neck and back problem" for which she had received medical attention. In fact, she had received "a permanent impairment rating of category 2 of the dorsal spine" from the Department of Labor and Industries back in 1998.[7] She described the medical consequences from working more than two days a week as "quite severe" and that "if I

[4] R. 15:14-15. (Department Record at 15 of 139 pages.)
[5] R. 24:18-23.
[6] R. 16:1-4 and 21:1-11.
[7] R. 137.

work more than that it becomes very chronic to the point of then I actually can't work."[8] She had not been able to work more than two (2) days a week for the last four (4) years because of the constant pain it caused.[9] It didn't matter to her what two days of the week she worked[10] including Fridays.[11] None of this testimony was challenged.

On July 28, 2010, Mrs. Darkenwald met with Dr. Yamaguchi privately. He told her that because his business was growing (he had added a dentist), he had to have someone who could work three (3) days a week. He wanted her to work Fridays [adding an additional seven to eight hours to her work week for a total of 21 to 23 hours per week]. Mrs. Darkenwald was surprised, because the dentist knew she couldn't work three (3) days a week. She told the Doctor "I hear you saying that I am fired." She followed that statement up with asking "[w]hen will I know when is my last day?" Dr. Yamaguchi didn't correct her, but rather replied "Lynn [his wife who also worked in the office as office manager] will tell you that."[12] Mrs.

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[8] R. 14:7-25.
[9] R. 15:2-6.
[10] R. 16:24.
[11] R. 18:24-25.
[12] Q. How did the job end for you?
A. On July the 28th...Wed. Dr. Yamaguchi asked me if I would talk to him and Lynn (his wife and office mgr.)...he said he would like somebody who could work three days a week...And so I asked him if I could repeat back what I had heard. I said I hear you saying that I am fired. You need somebody three days a week....When will I know when is my last day? ...'Lynn will tell you'. So I went up front and I asked Lynn, I said, 'I've been fired. When is my last day?" . . . Record p. 22 of 139 lines 4-18.

Darkenwald spoke with Lynn on August 2nd. Lynn told her she had already hired someone named Debbie to start around the 11th of August. In a later phone call Lynn told Mrs. Darkenwald they would like her to stay through the 23rd of August because Debbie couldn't start until then.[13] The record reflects that a replacement hygienist (Debbie) was actually hired.[14]

After twenty-five years of highly valued service, Linda Darkenwald's employment with Dr. Yamaguchi terminated. His office records show "discharge" as the reason.[15] In a statement to the Department, Lynn Yamaguchi stated that the dental office records reflected the reason for separation as "*Discharge*" and that "she [Mrs. Darkenwald] refused to work three days. She could not do three days a week."[16] Although Mrs. Darkenwald believed she had been fired (and replaced) because she couldn't work more than two days (14-17 hours) per week, the evidence is also con-

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[13] Q. And who informed you of what your last day of work would be?
A. Lynn
Q. And when did she do that?
A. So on August 2, a Monday, I came to work. And Lynn and I talked about when would be my last day. And she started to tell me *that she had a person named Debbie coming on board who she wasn't sure, you know, when Debbie could start.*(emphasis added) So she kind of thought about it. And then she said to me 'Well, I think around August 11th'. Then when I got home that day there was a voice mail from her saying 'No, we'd like you to stay through the 23rd of August'. So I heard that as they've hired a person to fill your spot. And she can't come on board until August 23rd.
Q. Okay, So you felt you were fired on July 28th.
A. Right. Record Pg. 23, of 139, line 25 through Pg. 24, line 23.
[14] R. 26.
[15] R. 131.
[16] R. 131, "Expert Fact Finding."

sistent with the legal conclusion that she quit for "good cause" because she could not increase her work week to more than 17 hours a week as the Superior Court determined.

Letters exchanged between the employee and employer are also consistent with the different understanding by both parties of how the relationship ended. In her letter, Mrs. Darkenwald begins by referring to her "being summarily fired."[17] The employer's response, although it says they hadn't "considered you fired" also says, "[t]he bottom line is I need a three day a week hygienist for the practice."[18] During the hearing, Dr. Yamaguchi testified: "If Linda could have worked more days *I would have never let her go*. She had a long outstanding history. She had seen a lot of my patients a long time."[19] (Emphasis supplied.) Regardless of the parties' intentions, it was at least clear that Mrs. Darkenwald's hygienist position was now a three day a week one. Dr. Yamaguchi may have wanted her to stay in the position, because she had been a good employee, but he gave no indication of changing his position that the person in the job had to work three days a week.

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[17] R. 45.
[18] R. 46.
[19] R. 26:17-19 [Emphasis supplied].

The Doctor's own testimony establishes that Darkenwald's termination on July 28th was a *fait accompli* when he spoke to her that date.

> Q. (By Judge Skeel) So, Dr. Yamaguchi, what did you ask her to do when you called her in for the interview. What was your request?
> A. I wanted to talk to her. I knew my consultant talked to her. And she said she was not going to be available for more days. I wanted to re-state that. *We need more days. I need to go ahead.* My practice has grown. And that's what the meeting was about.[20]

Dr. Yamaguchi claimed that despite her L&I injury to her neck and back in 1998, Mrs. Darkenwald had no physical disability (suggesting she could work three days a week). He gave as the reason for this belief that he knew she had run a marathon more than twenty-five years earlier in 1982.[21] Mrs. Darkenwald hasn't run a marathon since 1984.[22] No credible evidence refutes her testimony which is supported by the L&I disability determination.

In its decision, however, the Department confused Darkenwald's not being physically able to work three days with the admittedly unfounded finding that she was not interested in working on Fridays.[23] In fact the

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[20] R. 26:22-27:2.
[21] R. 28:22-23.
[22] R. 33:25-34:3.
[23] R. 89 (Finding 18).

Department concluded: "Claimant has not established that her medical condition was the reason she was not able to work on Fridays."[24]

The decision that Darkenwald was disqualified from benefits because she did not want to work on Fridays, made by the same Administrative Law Judge, and affirmed by the Commissioner, was reversed by a stipulated order because the Department agreed that the record did not support a finding that Darkenwald did not want to work on Fridays.[25] However, this error clearly influenced the Commission's decision regarding the reasons for Darkenwald's not working three days a week, even in this case concerning the reason for her employment termination.

On August 6, 2010, Linda Darkenwald made an Application for unemployment benefits.[26] A Determination Notice denying her benefits was issued on August 20, 2010. The notice stated:

> Your employer states that you quit on 8/2/10 because you were offered three days per week. You refused to work three days...You have not established good cause. Therefore benefits are denied.[27]

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[24] R. 92 (Conclusion 9).
[25] Decision 04-2010-3165, R. 94-96 and Stipulated and Agreed Order of Reversal CP 19-20.
[26] R. 53.
[27] R. 49.

On September 16, 2010, Mrs. Darkenwald filed a Notice of Appeal to the Department which stated: "I did not quit my job-rather, I was fired."[28]

A telephone hearing was held on October 13, 2010 on two reasons for the denial of benefits. In Docket No. 04-2010-31265 the issue was whether Mrs. Darkenwald was actively looking for work as required by RCW 50.20.010(1)(c); and in Docket No. 04-2010-31264 the issue was whether Mrs. Darkenwald voluntarily quit without good cause or was discharged for misconduct pursuant to RCW 50.20.050(2).[29]

The Department denied Mrs. Darkenwald benefits on both grounds.[30] Mrs. Darkenwald's petition for review[31] was denied.[32] Similarly, her Petitions for Reconsideration[33] were also denied.[34] Even though the employer initiated a change in employment requirements that had been in place for several years and which he knew the employee could not meet for medical reasons, the Department concluded that "claimant was the moving party in

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[28] R.70.
[29] R. 8:3-12.
[30] 10-14-10: Initial orders in Docket No. 31264 R. 88 and Docket No. 31265 R. 94.
[31] 11-12-10: Petition for Review: R. 102.
[32] 12-17-10: Decision of Commissioner denying review Docket No. 31264 R.114 and Docket No. 31265 R. 118.
[33] 12-27-10 Petition for Reconsideration Docket No. 31264 R. 123 and Docket No. 31265 R. 124.
[34] 1-7-11: Consolidated Order Denying Petitions for Reconsideration.

the job separation, did not have statutory good cause for leaving, and that benefits must therefore be denied."[35]

On appeal to the Superior Court, and prior to trial, the Department agreed that the evidence did not support the denial based on Mrs. Darkenwald's not actively looking for work on the basis that she wasn't available to work on Fridays. The Superior Court entered a stipulated order reversing the determination in Commission Docket No. 04-2010-31265 because Mrs. Darkenwald met the eligibility requirements of RCW 50.20.010(1)(c) (actively seeking work). The remaining issue in Commission Docket No. 04-2010-31264 was framed by the Department as whether Mrs. Darkenwald voluntarily quit work without good cause (RCW 50.20.050) and was therefore not "unemployed through no fault of their own" (RCW 50.01.010).[36]

Following a review of the Department record and after considering the written and oral arguments of counsel, the Superior Court reversed the Department's denial of benefits on the basis that Darkenwald had good cause to quit her employment because she was physically unable to work more than the two days a week she had been working for the past four years. On December 17, 2012, the court entered "Findings of Fact, Conclusions of Law

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[35] R. 114. Decision of Commissioner.
[36] CP 51 and 55.

and Judgment" consistent with the court's earlier rulings reversing the Department's denial of benefits and awarding Darkenwald reasonable attorney fees in the stipulated amount of $5,162.50.[37] The Department filed this appeal.[38]

The Department later made back benefit payments to Mrs. Darkenwald as follows:

> February 23, 2013: $18,492 for the period 8/07/10 through 8/13/11 (46 weeks at her weekly benefit amount of $402/week)
>
> February 24, 2013: $5,628 for the period 8/13/11 through 11-26/11 (14 weeks)
>
> February 25, 2013: $5,276 for the period 11/26/11 through 2/25/12 (13 weeks)
>
> February 25, 2013: $2,412 for the period 2/25/12 through 4/7/12 (6 weeks)
>
> Total payments: $31,758 for 79 weeks at $402/week.[39]

No explanatory letter came with these checks, nor was there nor has there been any formal notice pursuant to WAC 192-220-010 that the Department deemed these payments "overpayments" subject to an attempt at recoupment pursuant to RCW 50.20.190, nor has there been any notification or indication that the Department deemed these payments "provisional."

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[37] CP 75-78.

[38] CP 79-80.

[39] See Respondent's Motion to Permit Additional Evidence on Review filed April 3, 2013.

Subsequently on March 27, 2013 the Department filed a supersedeas.[40]

ARGUMENT

1. Standard on review.

Mrs. Darkenwald challenges the denial of unemployment insurance benefits by the Department. She bears the burden of establishing the invalidity of the Department decision. RCW 50.32.150. Although Darkenwald prevailed in the Superior Court, this court's review is of the Department's decision.

> In reviewing a superior court's final order on review of a commissioner's decision, we "apple[y] the standards of the Administrative Procedures Act directly to the record before the agency, sitting in the same position as the superior court." *Honesty in Evil. Analysis & Legislation (HEAL) v. Cent. Puget Sound Growth Mgmt. Hearings Bd.,* 96 Wash.App. 522, 526, 979 P.2d 864 (1999). We review only the commissioner's decision, not the administrative law judge's decision or the superior court's ruling. *Verizon Nw., Inc. v. Wash. Emp't Sec. Dep't,* 164 Wash.2d 909, 915, 194 P.3d 255 (2008).[41] We review the commissioner's legal determinations using the APA's "error of law" standard, which allows us to substitute our view of the law for the Board's. *Verizon Nw.,* 164 Wash.2d at 915, 194 P.3d 255; *see* RCW 34.05.570(3)(d). We review an agency's interpretation or application of the law de novo. *HEAL,*96 Wash.App. at 526, 979 P.2d 864. We give substantial

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[40] Supp. CP 81-83.

[41] In this case, however, the Commissioner expressly adopted the Administrative Law Judge's findings as her own. R. 114. They are thus reviewable as to whether they are supported by substantial evidence in the record.

weight to an agency's interpretation of the law within its expertise, such as regulations the agency administers. *Silverstreak, Inc. v. Dep't of Labor & Indus.,* 159 Wash.2d 868, 885, 154 P.3d 891 (2007); *Dep't of Labor & Indus. v. Granger,* 159 Wash.2d 752, 764, 153 P.3d 839 (2007). We will uphold an agency's findings of fact if, when viewed in light of the whole record before the court, substantial evidence supports it. *William Dickson Co. v. Puget Sound Air Pollution Control Agency,* 81 Wash.App. 403, 411, 914 P.2d 750 (1996).

The legislature enacted the Employment Security Act to award unemployment benefits to "persons unemployed through no fault of their own." RCW 50.01.010; *Safeco Ins. Cos. v. Meyering,* 102 Wash.2d 385, 392, 687 P.2d 195 (1984). The Act disqualifies a person from receiving benefits if the individual worker is to blame for the unemployment. *Safeco,* 102 Wash.2d at 392, 687 P.2d 195. Thus, the Act disqualifies a person from receiving benefits if she "left work voluntarily without good cause." [Footnote: Another section of the Act provides for discharge due to misconduct. RCW 50.20.060(1). Both sections will not apply to the same set of facts. *Safeco,* 102 Wash.2d at 389, 687 P.2d 195. Without analysis, citation to the statute, or citation to authority, Courtney adds as "issue in reply" whether Courtney was fired without proof of misconduct. Reply Br. of Appellant at 2 (capitalization omitted). We will not consider claims not supported by citation to authority, references to the record, or meaningful analysis. RAP 10.3(6); *Cowiche Canyon Conservancy v. Bosley,* 118 Wash.2d 801, 809, 828 P.2d 549 (1992).] RCW 50.20.050(2)(a). The phrase "left work voluntarily" in RCW 50.20.050 is a legal phrase determined by the facts of the case. *Read v. Emp't Sec. Dep't,* 62 Wash.App. 227, 233, 813 P.2d 1262 (1991). The Act requires the Department to analyze the facts of each case to determine what actually caused the employee's separation. *Safeco,* 102 Wash.2d at 392–93, 687 P.2d 195. A voluntary termination requires a showing that an employee intentionally terminated her own employment or committed an act that the employee knew would result in

> discharge. *Vergeyle v. Emp't Sec. Dep't,* 28 Wash.App. 399, 402, 623 P.2d 736, *review denied,* 95 Wash.2d 1021,1981 WL 191040 (1981), *overruled on other grounds by Davis v. Emp't Sec. Dep't,* 108 Wash.2d 272, 737 P.2d 1262 (1987). [Some footnotes omitted]

Courtney v. Employment Security Dept., 171 Wn. App. 655, 598-599, 287 P.3d 596 (2012).

The agency's findings must be supported by evidence that is substantial meaning it is "sufficient to persuade a rational, fair minded person of the truth of the finding." *Okamoto v. Employment Security Department,* 107 Wn. App 490, 497, 27 P.3d 1203 (2001).

The Department's action is arbitrary and capricious "if it is willful and unreasoning, without consideration for, and in disregard of, facts and circumstances." *Shoreline Community College v. Employment Security,* 59 Wn. App 65, 69-70, 595 P.2d 1178 (1990).

The Department denied benefits on the basis that Darkenwald quit without good cause.[42] An employee who voluntarily leaves work without good cause is disqualified from unemployment insurance benefits. RCW 50.20.050(2)(a). However, a person who voluntarily leaves work for good cause is not disqualified from receiving benefits. RCW 50.20.050(2)(b).

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[42] Darkenwald had argued before both the Department and the Superior Court that not only did the Department err in finding she did not have good cause to quit but that Dr. Yamaguchi was the initiating party and that she was eligible for benefits because she was "discharged" for other than misconduct (RCW 50.20.066).

Whether the employee left work for good cause is a mixed question of law and fact. *Terry v. Employment Security Dept.,* 82 Wn. App. 745, 748, 919 P.2d. 111 (1996). Application of the law to the facts is a question of law the court reviews de novo. *Id.* at 748-749.

> Construction of a statute is a question of law reviewed de novo. *State v. Wentz,* 149 Wash.2d 342, 346, 68 P.3d 282 (2003) (citing *City of Pasco v. Pub. Emp't Relations Comm'n,* 119 Wash.2d 504, 507, 833 P.2d 381 (1992)). A court interpreting a statute must discern and implement the legislature's intent. *State v. J.P.,* 149 Wash.2d 444, 450, 69 P.3d 318 (2003) (citing *Nat'l Elec. Contractors Ass'n v. Riveland,* 138 Wash.2d 9, 19, 978 P.2d 481 (1999)).

Anthis v. Copland, 173 Wn.2d 752, 755, 270 P.3d 574, 576 (2012).

The Unemployment Compensation statutes [RCW Title 50] "...shall be liberally construed for the purpose of reducing involuntary unemployment and the suffering caused to a minimum." RCW 50.01.010.

> [W]hen the legislature has prefaced an enactment with a declaration of purpose, the declaration serves as an important guide in determining the intended effect of the operative sections. (citations omitted). If an examination of the operative section at issue leaves alternative interpretations possible, the one that best advances the overall legislative purpose should be adopted.

Anderson v. Morris, 87 Wn.2d 706, 716, 558 P.2d 155 (1976).

Mrs. Darkenwald argues, *inter alia*, the Commission's decision that she quit without good cause misapplied the law, is not supported by substantial evidence in the record and is arbitrary and capricious.

2. Motion to Dismiss the Department's appeal on the grounds that it is made moot by the recent payment of benefits to Mrs. Darkenwald.

(a) Person filing Motion: The Respondent, Linda Darkenwald, brings this motion.

(b) Statement of Relief Sought: Dismissal of the Department's Appeal.

(c) Relevant Portions of the Record: The motion is based on the Department's recent payment of benefits as reflected in the Department's benefits checks to Darkenwald sought to be added to the record by Darkenwald's Motion to Permit Additional Evidence on Review filed with this court on April 3, 2013.

(d) Grounds for the Motion:

The motion is brought pursuant to RAP 17.1, as a motion for other than a decision on the merits and RAP 17.4 for the reason that the motion if granted would preclude a hearing on the merits.

For the purposes of this motion, the Department's appeal should be characterized as an attempt pursuant to RCW 50.20.090 to "recoup" benefits already paid because of a "redetermination" pursuant to RCW 50.20.160. Benefit payments were made to Darkenwald *after* the notice of appeal was

filed from the Superior Court's decision reversing the Department's denial of benefits and prior to its filing a supersedeas.[43] These payments constitute a redetermination regarding Darkenwald's benefit eligibility and as such preclude the Department from recouping those benefits and render the appeal moot.

In a series of relatively recent decisions interpreting RCW 50.20.160(3), the Department itself has limited its right to recoup benefits previously paid. *In re: Tracy L. Weingard,* Empl.Sec.Comm'r Dec.2d 920 August 8, 2008. The Department had made payments for the weeks ending Nov. 3, 2007 through December 29, 2007. Nearly five months later, May 17, 2008, the Office of Administrative Hearings made a "redetermination" and initiated recoupment of the previously paid benefits. The Commissioner's decision reversing can be summarized as follows:

1. Each Department payment in satisfaction of the weekly claims in question constituted a determination of allowance of benefit.
2. Each payment or determination, absent timely appeal, becomes final.
3. Any redetermination more than 30 days after the *final adjudicated week* would be valid *only if* it were established that payments were made as a result of fraud, misrepresentation or nondisclosure.[44]
4. Accordingly, the redetermination notice was *void ab initio.*

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[43] CP 79-83.

[44] There is no evidence in this case of fraud, misrepresentation or nondisclosure.

See also *In re: Andrew V. Young,* Empl. Sec. Comm'r Dec. 2d 951, October 22, 2010. There the Department "redetermined" on 7/12/2010 that Young was not eligible for benefits paid for 1/11/2009 (72 weeks totaling $40,073) for failure to comply with work search requirements. The precedential decision declared this "redetermination" "*void ab initio*" for lack of jurisdiction. In *In re: Hendrickson-Jackson,* Empl. Sec. Comm'r Dec.2d 953, October 29, 2010,the Department paid benefits for the weeks ending 11/21/2009 through 3/13/2010, $5,326 for 16 weeks, but "redetermined" on 4/21/2010 that claimant was ineligible because she quit her job without good cause. This "redetermination" was held "*void ab initio*". The claimant in *In re: Carol L. Hader,* Empl. Sec. Comm'r Dec.2d 952, Oct. 29, 2010, twice informed the Department she was not available for full-time work for fear of jeopardizing her Social Security benefits. The Department did not inform her it did not consider this a valid reason for restricting her availability for work, but proceeded to pay her benefits for the weeks ending 6/6/2009 through 5/22/2010. Then, on 6/12/2010 it "redetermined" her ineligible and ordered repayment of $5,397. This "redetermination" was ruled "*void ab initio.*"[45]

[45] Copies of these precedential decisions can be found on the agency website esd.wa.gov searching Laws & Regulations "precedential decisions" using the search term "*void ab initio.*"

In the latest case reported on the Department Website, *In re: Jacob D. Gratzer,* Empl. Sec. Comm'r Dec.2d 969, April 29, 2011 the Chief Review Judge for the Commissioner's Review Office reiterated the principle that the Department simply had no jurisdiction to issue redetermination notices when it had no evidence of fraud, misrepresentation or nondisclosure, and that such determinations were therefore "*void ab initio,*" citing with emphasis the applicable statue as interpreted repeatedly by the Department:

> For all the reasons discussed above, we must avoid a literal reading of RCW 50.20.160 (3), and instead construe the second proviso of the statute to read: ...*AND PROVIDED FURTHER, that in the absence of fraud, misrepresentation, or nondisclosure, this provision or the provisions of RCW 50.20.190 shall not be construed so as to permit redetermination or recovery of an allowance of benefits which having been made after consideration of the provisions of RCW 50.20.010(1)(c), or the provisions of RCW 50.20.050, 50.20.060,50.20.080, or 50.020.090 has become final.* [Emphasis Supplied.]

Whether benefit payments finally made to Mrs. Darkenwald *more than two and one half years* after she applied were made because the Department finally realized it had made a mistake in initially denying them or because it was following the Superior Court's order is unclear and irrelevant. The payments constitute "final determinations" and any "redetermination" is prohibited by the Department's own interpretation of the applicable statutes absent evidence of fraud, misrepresentation or nondisclosure. Because there

is no such evidence the Department's appeal seeking to recoup Darkenwald's benefit payments is moot and should be dismissed.

3. Mrs. Darkenwald quit for good cause because her health would not permit her to work three days a week.

RCW 50.20.050 (2)(b)(ii) provides that an individual has good cause to quit and is not disqualified from benefits under circumstances where the separation was necessary because of illness or disability of the employee. A Department regulation regarding availability for work defines a "disability" as "a sensory, mental, or physical condition that (i) is medically recognizable or diagnosable; (ii) exists as a record or history; and (iii) substantially limits the proper performance of your job." WAC 192-70-050. WAC 192-70-055 requires that the employee who leaving is necessitated by a disability exhaust any reasonable alternatives.

Darkenwald's neck and back condition, recorded in her L&I records as a permanent impairment, meets all these requirements as well as the ordinary meaning of the term. Her employer left her no reasonable alternative to working three days a week for her to exhaust.[46]

Even the Department's Findings substantiate Mrs. Darkenwald's medical disability:

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[46] The employer's suggestion she could have worked in an "on-call" position is dealt with *infra*.

> Claimant has a serious back and neck problem which becomes more painful if she works too much. Claimant keeps her neck and back problems under control by seeing a chiropractor and a massage therapist on a regular basis.[47]

"Claimant filed an L&I Claim in 1998 for problems she was having with her neck and back. Claimant was classified as having a permanent impairment."[48]

Mrs. Darkenwald consistently contended that she would work any two days of the week, but no more, because of her neck and back pain. Findings of Fact Nos. 6, 7 and 8,[49] the formal finding of "permanent impairment of the dorsal spine by the Department of Labor and Industries[50] and petitioner's unchallenged testimony[51] all support Mrs. Darkenwald's claim that her disability prevented her from working more than the two days she had regularly been working the past four years, with her employer's agreement.

The Department correctly found that Darkenwald "has a serious back and neck problem which becomes more painful if she works too much."[52] It found that for the last four years Darkenwald had been working 14-17 hours (two days) per week.[53] It further found that Dr. Yamaguchi decided he need-

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[47] R. 89, Finding 6.
[48] R. 89, Finding 5.
[49] R. 89.
[50] R. 137.
[51] R. 1:7-25.
[52] Finding of Fact 6. R. 89.
[53] Finding of Fact 3. R. 89.

ed Darkenwald to work three days instead of two and that he told her his business needed her to work three days.[54] While these findings correctly reflect the evidence, other findings do not.

The Department found the reason Darkenwald refused to work three days was that she wasn't willing to work Fridays, which it has now admitted was completely unsupported by the evidence.[55] The findings fail to reflect that Dr. Yamaguchi was obviously well aware of Darkenwald's back and neck problems. In fact, they were the result of a work place injury.[56] Nevertheless the Department seems to have accepted his testimony that she was healthy, based on her condition more than twenty-five years earlier and before her workplace injury. Dr. Yamaguchi testified: "She was a very healthy girl. *I mean, her back may be a complaint*, but she exercised daily. *She ran a marathon.*"[57] (Emphasis supplied.) Darkenwald had run a marathon in 1982, but she had run her last marathon in 1984, more than twenty-five years previously and well before her back injury in 1998![58] Based on this testimony, the Department apparently rejected the evidence regarding Darkenwald's limiting health restrictions and erroneously concluded that Darkenwald was

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[54] Finding of Fact 13 & 14. R. 89.
[55] Finding of Fact 9 and 18. R. 89-90. CP 19-20.
[56] R. 137.
[57] R. 28:22-23.
[58] R. 33:25-34:3.

the initiating party and quit without good cause.[59] In doing so, the Department admittedly misconstrued the evidence regarding Darkenwald's health issues related to her working a third day a week, stating: "Claimant had good personal reasons for quitting her job as she did not want to work more than two days per week. Claimant has not established that her medical condition was the reason she was not able to work on Fridays."[60]

This decision not only relied on the mistaken finding that Darkenwald wouldn't work Fridays, but ignores the well established reason Darkenwald didn't want to work more than the two days a week she had been working, because when she worked more hours her neck and back problems were aggravated to the point that she couldn't work at all![61] The evidence that for health reasons, she could not work anymore than the 14 to 17 hours she was already working was never challenged, much less refuted.[62]

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[59] ALJ Conclusion of Law 3, R. 90 and Commissioner's Decision R. 114.

[60] ALJ Conclusion of Law 9 R. 92.

[61] Q. So, then, Mrs. Darkenwald, I guess I will ask why is it that you're limited to working 14, 16 hours a week?
A. Well, I have quite a serious neck and back problem. And if I work more than that it becomes very chronic to the point of then I actually can't work. R. 19.

[62] The trial court correctly noted that Dr. Yamaguchi's belief that Mrs. Darkenwald could actually work three days a week because she had run a marathon more than twenty-five years previously and prior to her L&I injury, did not in any way contradict the evidence regarding her current physical limitations. CP 76, Finding of Fact III.

When Dr. Yamaguchi insisted that Darkenwald work more than two days when she physically couldn't, he was the initiating party. He put Mrs. Darkenwald in the position where she had no choice but to refuse or endanger her health. The Department even erroneously characterized this as "insubordination" by Darkenwald.[63]

Even under a strained interpretation of "quit," her decision not to work more than two days was for statutorily defined "good cause." Mrs. Darkenwald was physically constrained from working more than two days a week. Therefore, even if the court determines that she "quit," quitting for that reason is "good cause" under RCW 50.20.050(2)(b) and entitles her to benefits. This is consistent with the express provisions and the purpose for the Act.

The Employment Security Act was enacted to provide compensation to individuals who are involuntarily unemployed through *no fault* of their own. RCW 50.01.010 (emphasis added) and *Gaines v. Employment Sec. Dep't*, 140 Wn. App. 791, 798 (2007).

It was not Mrs. Darkenwald's fault that her employer needed to increase her work week beyond what she was physically capable of. After twenty-five years of working with her in a small office and being well

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[63] ALJ Conclusion 3, R. 90.

aware of L&I's permanent disability determination for an injury suffered at that job and having accommodated a reduction in her work week from four days, then to three days and finally to two days a week, which she had worked for the prior four years, her employer was aware that she could not go back to three days. He even admitted he was aware of her back complaints.

Nevertheless, the doctor's decision that she had to work three days a week was non-negotiable. His belief that she was healthy enough to work three days a week because she had run a marathon more than twenty-five years ago lacks credibility. It would have been "a futile act" to argue with the doctor about his "need" and therefore it was not an alternative required to be exhausted by RCW 0.20.050(2)(b)(ii)(A).

Mrs. Darkenwald's contention that she "quit for good cause" is supported by the record. Her disability was established by her unrebutted testimony and the determination of permanent disability by L&I. Her condition gradually deteriorated after 1998 to the point that she had to cut her days from four to three, and finally since 2006 to only two days a week for the past four years.

> Q (From Judge Skeel) So then, Mrs. Darkenwald, I guess I will ask you why it is that you're limited to working 14,16 hours a week?

> A. Well, I have quite a serious neck and back problem. And if I work more than that it becomes very chronic to the point of then I actually can't work.
> Q. And what medical attention have you sought for your neck and back problems?
> A. I've gone to physicians. I've done physical therapy. I've done a session of (unintelligible). I've had injections in my neck of cortisone. I do massage therapy. I see a chiropractor. Do you want more? I've done acupuncture.[64]

Mrs. Darkenwald *could not* work more than two days a week. In effect, her employer confronted her with the classic Hobson's choice. To decline his demand to return to a three day week would cause her to lose her job. To accept it would guarantee severe pain, deterioration of her health and the likely inability to work at all. That is no choice at all. Under the circumstances of this case, Mrs. Darkenwald quit for good cause and is entitled to benefits.

4. Mrs. Darkenwald quit for good cause when her employer insisted she work more hours than she was required to accept as a part-time worker.

In addition to being entitled to refuse to work the extra hours because of her physical disability, as a "part-time worker" Darkenwald had a right to refuse employment in a job of more than 17 hours.

RCW 50.20.119(1) defines a "part time worker" as someone who "is available for, seeks, applies for, or accepts only work of seventeen or fewer

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[64] R. 19.

hours per week by reason of the application of RCW 50.20.010(1)(c), 50.20.080, or 50.22.020(1) relating to availability for work and active search for work, or failure to apply for or refusal to accept suitable work." WAC 192-170-070(1) permits a part time worker to "refuse any job of 18 or more hours per week."

"Part-Time Worker" status was created by the adoption of RCW 50.20.119 in 2006. It declares that

> ... an otherwise eligible individual may not be denied benefits for a week because the individual is a part-time worker and is available for, seeks, applies for, or accepts only work of seventeen or fewer hours per week...

The Department determination in this case disregarded this provision.

In Finding of Fact No. 3, the Administrative Law Judge found "[f]or the last four years, by mutual agreement, claimant has been working on Mondays and Wednesdays, between 14 and 17 hours per week." In Findings of Fact No. 13 and 14 he clearly found that it was the decision of the employer, not the employee, to terminate this status.

> At the end of July 2010, the owner decided that he needed to have claimant work three days per week as opposed to two days per week because of the added business the practice had after a second dentist was added.

Finding No. 13. "On July 28, 2010, the owner met with claimant and told her that the business needed her to work three days per week." Finding No. 14.[65]

The finding is supported by the testimony of the employer himself. "Yeah, it is real growth, I do need people. I do need staff. And Linda-I asked her first-we would never-if Linda could have worked more days *I would have never let her go*."[66] (Emphasis Supplied.) This testimony corroborates the letter the employer sent to Mrs. Darkenwald dated August 3, 2010 in which he states "[t]he bottom line is I need a three day a week hygienist for the practice."[67]

The Review Judge recognized Mrs. Darkenwald's part-time status in citing the applicable law. "A claimant who has worked 17 hours or less per week during her benefit payment year is required to seek only part time work. RCW 50.20.119, WAC 192-170-070."[68]

While both the Administrative Law Judge and the Review Judge acknowledged Mrs. Darkenwald's status as "Part-Time Worker," as defined by RCW 50.20 119, neither addressed the statute's express provision that a Part-Time Worker need not accept work of eighteen or more hours per week in relation to Darkenwald's right to refuse to work more hours.

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[65] R. 89, Findings of Fact in Initial Order in 04-2010-31264.
[66] R. 26:16-18.
[67] R. 46.
[68] R. 118.

It is clear from the record, the employer gave Mrs. Darkenwald an ultimatum which could fairly be paraphrased as follows: "Because my business is growing, I need a hygienist here three, not two days per week [21 to 23 hours per week]. Seventeen hours or less no longer works for my practice. If you want to work here, your new job is three days not two days per week."

As previously discussed, the characterization of a termination is ultimately a question of law. *Bauer v. Emp't. Sec. Dep't,* 126 Wn. App. 468, 108 P.3d 1240 (2005). *Bauer* illustrates that courts need not and do not always defer to the Department's resolution of that question. In that case, the Department concluded that Mr. Bauer "constructively quit" his employment when his cumulative traffic violations led to his termination. The Court declined to accept what it termed the Department's "strained analysis" and held that Bauer was "discharged" and entitled to benefits and attorney fees. *Bauer* at 480. *Bauer* is contrary to the Department's reasoning in this case.

It has long been the law that an employee who quits after being told they are going to be discharged quits "in lieu of discharge" and is deemed to have been discharged, not to have quit. See *In re Birkoski,* Comm. Dec. 620 (1955). *In re Morris,* Emp.Sec.Comm'r Comm. Dec.801

(1969), cited in *Bauer, supra* an employee was content with his 16 ½ hour part-time position and refused to accept full-time employment. The Department deemed it a "constructive voluntary quit." Stating that Washington does not recognize that doctrine, the court rejected the Department's decision. Mr. Morris's free exercise of choice, intentionally made, caused his separation from work. In plain English, he "quit." As did an employee who refused to join a Union (1979) and one who refused a drug test knowing refusal would be deemed a voluntary quit (1994). (Department decisions cited in *Bauer.*)

At first glance, these decisions cited in *Bauer* might appear to support the Department's contention that Mrs. Darkenwald quit without good cause. However, *non semper ea sunt quae videntur* (things aren't always what they appear). *Bauer* was decided in 2005. The statute creating a new category of "Part-Time Worker" was not enacted until the following year, June 2006. By 2010 Mrs. Darkenwald had worked a regular schedule of less than 17 hours per week for four years and was clearly vested as a "part-time worker" under the statute.[69]

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[69] RCW 50.20.119(2) provides that "part-time worker" means an individual who: (a) Earned wages in "employment" in at least forty weeks in the individual's base year; and (b) did not earn wages in "employment" in more than seventeen hours per week in any weeks in the individual's base year.

In distinguishing *Morris*, *Bauer* held that part-time employee Morris's voluntary choice not to accept full-time employment when offered was not a "constructive quit," but a voluntary one. At the time, this was an accurate assessment of Washington law. However, the adoption of RCW 50.20.119 changes matters. Mr. Morris, like Mrs. Darkenwald, was working fewer than 17 hours a week, and refused to work more because he planned to return to school in the fall. His employer's response to the refusal was "I need a full time worker and have no alternative but to discharge you." In 1969 it was legally correct for the Department to deem this a "voluntary quit" no matter what term the employer used.

However, since adoption of RCW 50.20.119 in 2006 and the implementing of WAC 192-170-070, that is no longer the case. Today both Morris and Darkenwald would be statutorily classified as Part-Time Workers with the vested right to continue in Part-Time Worker status.[70]

The Department ALJ's Finding of Fact 3 clearly establishes Mrs. Darkenwald's status as a "Part-Time Worker" as defined by RCW 50.20.119 for at least four years, but the Conclusions of Law do not even

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[70] It should be noted that this new statutory term differs significantly from the terms used in WAC 192-180-013 regarding job search requirements for individuals who work less than full time. Under that regulation, "partially unemployed" workers are those "Part time eligible" workers and "Part time" workers "...who work part time *but do not meet the requirements of* RCW 50.20.119." (Emphasis added.) Unlike Mrs. Darkenwald who clearly does.

cite to the statute or the implementing regulation, WAC 192-170-070.[71] The Review Judge at least acknowledged the statute and WAC, but omitted critical language from it. "[a] claimant who has worked 17 hours or less per week during her benefit year is required *to seek* only part time work. RCW 50.20.119, WAC 192-170-070"[72] (emphasis added).

The statute, however, refers to more than just a job "seeker." It explicitly refers to an individual who "*is* a part-time worker and *is* available for ...or *accepts* only work of seventeen or fewer hours per week..." WAC 192-170-070 is even more explicit. "If you *are* a part-time eligible worker as defined in RCW 50.20.119, *you may limit your availability* for work to 17 or fewer hours per week. You may *refuse* any job of 18 or more hours per week." It is respectfully submitted that Dr. Yamaguchi's offer to Mrs. Darkenwald of three days a week rather than two was an offer that *could be refused* by Mrs. Darkenwald because it was no longer a "part-time job."

The Department argued in the trial court that Part-Time Worker status comes into play only *after* a job separation and therefore exists only for the unemployed. Petitioner respectfully disagrees with this "reading-into the statute." No language in the statute or in the regulation limits the

[71] R. 89.
[72] Conclusion 1 R. 118.

application as the Department argues. Both use the *present* tense. "...an otherwise qualified individual may not be denied benefits for any week because the individual *is* a part-time worker..." RCW 50.20.119. "If you *are* a part-time worker..." WAC 192-170-070 (emphasis added). By definition one who is unemployed is not a "worker"; one who is not actually working, though looking for work, is not a "worker."

At the time of her separation, Mrs. Darkenwald was a twenty-five year worker and for the last four years a "Part-Time Worker" as defined by the new statute. The Department's interpretation would create for her and anyone similarly situated a classical "Catch-22" situation. Were she to have accepted a work week schedule of more than 17 hours she would have immediately lost her vested status because "[f]or purposes of this section 'part-time worker' means an individual who...(b) *did not* earn wages in employment in *more than seventeen hours per week* in any work in the individual's base year." RCW 50.020.119(2). Under the Department's interpretation, she would have had to first separate from employment in order to be deemed a "Part-Time Worker" not disqualified from seeking benefits. But separation for that reason, which under this interpretation would not be statutory "good cause," would disqualify her from benefits.

"If a statute is plain and clear, we will not read into it things that are not there." *In re Personal Restraint of Taylor,* 105 Wn.2d 67, 69, 711 P.2d 345 (1985). The language in the statute and implementing regulation are clear. There is simply no basis for the Department's assertion that the statute and regulation comes into play only *after* a job separation. Mrs. Darkenwald's employer decided, prior to her discharge, to change her legal status because the job itself had changed from a two day/week job to a three day/week job. The change was her employer's doing, not her choice. Exercising her vested statutory right, she refused to abandon her status as "Part-Time Worker" by *accepting* more than 17 hours of work. She exercised her right to *limit her availability*. This interpretation is also consistent with the liberal application of the benefits provisions of the Act.[73]

> We review the commissioner's conclusions of law under the error of law standard. *Cascade Nursing Servs., Ltd. v. Employment Sec. Dep't*, 71 Wn. App. 23 , 29, 856 P.2d 421 (1993). The case also involved the commissioner's interpretation of RCW 50.20.050. Interpreting the meaning of a statute is a question of law subject to de novo review. *Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 9, 43 P.3d 4 (2002). Only when the court is reviewing an agency's interpretation of an ambiguous statute is the agency's interpretation of the statute afforded deference. *Postema v. Pollution Control Hearings Bd.*, 142 Wn.2d 68, 77, 11 P.3d 726 (2000). No deference is accorded if the agency's interpretation conflicts with the statute. *Id.* This court retains the ultimate authority to interpret a statute.

[73] RCW 50.01.010, *supra.*

> *City of Pasco v. Pub. Employment Relations Comm'n*, 119 Wn.2d 504 , 507, 833 P.2d 381 (1992). Therefore, "we may substitute our interpretation of the law for that of the agency.

Port of Seattle v. Pollution Control Hearings Bd., 151 Wn.2d 568, 593, 90 P.3d 659 (2004).

> The fundamental object of statutory interpretation is to ascertain and give effect to the intent of the legislature' which is done by 'first look[ing] to the plain meaning of words used in a statute.'

Enter. Leasing, Inc. v. City of Tacoma, Fin. Dep't, 139 Wn.2d 546, 552, 988 P.2d 961 (1999) (alterations in original) (quoting *State v. Sweet,* 138 Wn.2d 466, 477-78, 980 P.2d 1223 (1999)).

> When words in a statute are plain and unambiguous, statutory construction is not necessary, and this court must apply the statute as written unless the statute evidences an intent to the contrary.

Enter. Leasing, 139 Wn.2d at 552.

> The meaning of a plain and unambiguous statute must be derived from the wording of the statute itself." *State v. Tili*, 139 Wn.2d 474; Bauer v. Employment Sec. Dep't Mar. 2005 126 Wn. App. 468 107, 115, 985 P.2d 365 (1999). All of the language in the statute must be given effect so that no portion is rendered meaningless or superfluous.

Davis v. Dep't of Licensing, 137 Wn.2d 957, 963, 977 P.2d 554 (1999).

Bauer v. Employment Sec. Dept., 126 Wn. App. 468, 474 (2005) cited by Department as authority.

Although neither RCW 50.20.119 nor WAC 192-170-070 require a worker to give a reason for not abandoning Part-Time Worker status, Mrs. Darkenwald's reasons merit discussion for two reasons. First, to remind the court of the Department's stipulated erroneous conclusion that she simply didn't want to change her "personal life style" by working on Fridays. Second, to point out that there are two alternate grounds for finding her eligible for benefits (her physical disability and her part-time status). Again, the *Bauer* court's comments are helpful. Although it found "good cause" irrelevant in his case because it deemed him "discharged," it did go on to refer to the Legislative policy dictating a liberal interpretation of the Act.

> The fact that claimant has a safety valve if he can show good cause reflects the legislature's intent to grant unemployment benefits to a claimant even if he, as a practical matter, caused his own unemployment by quitting, as long as he has a good reason for doing so.

Bauer at 480.

Darkenwald was an at will employee and Yamaguchi had a right to change the job, essentially creating a new job of three days a week instead of the old two day a week job Darkenwald had been performing. However, as a statutorily defined "Part-Time Worker" RCW 59.20.119 and WAC 192-170-070 Mrs. Darkenwald had the absolute right (good cause) to refuse the re-

quirement that she work more than 17 hours per week and decline the offer, even if it resulted in her unemployment.

An analogous situation, and one equally applicable to the substitute hygienist offer discussed *infra* was discussed in *Forsman v. Employment Security,* 59 Wn. App. 76, 795 P.2d 1184 (1990). Confronted with an impending substantial detrimental change in working conditions, i.e. a dramatic reduction in wage and hours, the employee chose to leave. The Court found that a substantial and reasonably unacceptable change to the job itself is good cause for leaving. See also *Grier v. Employment Security,* 43 Wn. App. 92, 715 P.3d 534 (1986).

The conclusion that Mrs. Darkenwald's decision to leave in response to her employer's ultimatum that she work more hours than the law requires constituted a "quit without good cause" was an erroneous conclusion of law subject to "de novo" review. The Hobson's choice she was given was no choice at all. As a matter of law, it was the employer's unilateral and nonnegotiable decision that led to termination of her employment.

An employee who walks away from an unchanged job may be deemed to have quit without good cause. An employer who tells an employee that, though the job hasn't changed, "you're fired," has clearly discharged her. But when an employer tells an employee the job itself has substantially

changed, and the employee has a right to decline to accept the change, the declination is properly deemed a "quit with good cause." In effect, the employer has terminated the old job and made an offer of a new job.

Dr. Yamaguchi initiated the separation by telling Darkenwald that she had to work three days a week to keep her job, when she could only work the two days a week she had been working for four years. He was the moving party. She had good cause to refuse his demand and "quit."

5. Mrs. Darkenwald was not required to accept an "on call" substitute position which would reduce her work hours by more than twenty-five percent.

The Department may argue that Darkenwald was also disqualified because she did not accept alternate employment as a "substitute [on call] hygienist" for Dr. Yamaguchi.

An individual has good cause and is not disqualified from benefits for leaving work voluntarily if their usual hours are reduced by twenty-five percent or more. RCW 51.50.020(2)(b)(vi) and WAC 192-150-120.[74] Ms. Darkenwald's usual two day a week hours ranged between 14-17 hours.

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[74] **192-150-120. Reduction in hours of twenty-five percent or more--RCW 50.20.050 (2)(b)(vi).**
(1) Your "usual hours" will be determined based on:
(a) The hours of work agreed on by you and your employer as part of your individual hiring agreement;
(b) For seasonal jobs, the number of hours you customarily work during the season; or
(c) For piecework, the number of hours you customarily work to complete a fixed

Had Mrs. Darkenwald accepted her employer's alternative offer of "substitute work," her hours and pay would have clearly been reduced by more than twenty-five percent from the two days a week (her "usual hours").[75]

> Q. Mrs. Darkenwald, would taking a substitute position, had you agreed to that, would it impact your benefits or your other conditions of work?
> A. I was not offered by Dr. Yamaguchi any benefits along with subbing. He did not say, "You could be my sub and you'll still get benefits that you've been getting." So, yes, I would lose the benefits that I had.
> Q. And given the number of registered dental hygienists that work at the practice, is it fair to say that taking a substitute position would have reduced your hours.
> A. Yes.[76]

The alternative to three day work offered to Mrs. Darkenwald was irregular "substitute" status. By definition being on call as a substitute is not the same as having a job. Such occasional work is at the unpredictable discretion of an employer and circumstances. It is clear from the record that even if Mrs. Darkenwald had been willing to be on her former employer's call list, she could not have expected anything like seventy-five percent of the hours she had been usually working for the past four years.

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volume of work.
(2) To constitute good cause for quitting under this section, employer action must have caused the reduction in your usual hours.

[75] The Department decisions didn't even address this issue. One of the grounds for reversal of an agency decision is that "the agency has not decided all issues requiring resolution by the agency." RCW 34.05.570(3)(f).

[76] R. 23:4-13.

Dr. Yamaguchi testified: "And, for example, for the calendar year ending at the point when Linda last worked, we had 53 days of substitute hygienists coming in. You know, that's quite a few. And of that there's four different people substituting."[77] The arithmetic is not difficult, and amounts to less than ten percent of her usual hours.[78]

Reduction of hours by more than 25% is also a "good cause" for Darkenwald's leaving. Nothing in the record even remotely suggests that she could reasonably expect to be called to substitute 13 hours a week (75% of her regular hours) on a regular predictable schedule.

6. Darkenwald is entitled to attorney's fees on appeal.

RCW 50.32.160 provides that if the decision of the Commissioner is reversed or modified, the claimant's reasonable attorney's fees shall be paid from the unemployment compensation administration fund. The trial court awarded Darkenwald's counsel attorney's fees in the amount of $5,162.50 based upon the parties' stipulation that such fees were reasonable. This court should affirm that award.

Darkenwald should be awarded attorney fees and costs on appeal pursuant to RCW 50.32.160 and RAP 18.1.

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[77] R. 26:6-9. This is about one day a week spread among the four "on-call" hygienists.
[78] Mrs. Darkenwald's usual hours were 2 days x 52 weeks = 104 days in a year. As a substitute she could expect 53 days ÷ 4 = 13 days of work a year. This is less than 10% of her usual hours.

CONCLUSION

Darkenwald's employer changed the fundamental nature of her part time job. She declined to accept the new job status and jeopardize her health. She had statutory rights to decline to preserve both her health and her part time status. She had other "good cause" to decline the "substitute on-call hygienist" position because of the dramatic reduction in her hours.

It was error for the Department to conclude that Mrs. Darkenwald was disqualified from receiving unemployment benefits and the decision of the Superior Court reversing the Department should be affirmed and Mrs. Darkenwald allowed benefits plus costs and reasonable attorney's fees.

RESPECTFULLY SUBMITTED this 24 day of April, 2013.

YOUNGLOVE & COKER, P.L.L.C.

Edward Earl Younglove III, WSBA #5873
Attorney for Respondent

CERTIFICATE OF SERVICE

I certify that on the below date, I caused to be hand delivered via ABC Legal Services the original and two true and correct copies of the foregoing Opening Brief of Respondent and Motion to Dismiss Appeal upon the following:

Washington State Court of Appeals
Division Two
950 Broadway, Suite 300
Tacoma, WA 98402

I further certify that on the below date, I caused a true and correct copy of the foregoing Opening Brief of Respondent and Motion to Dismiss Appeal to be sent by U.S. Mail, postage prepaid to:

Eric A. Sonju
Office of the Attorney General
1125 Washington St SE
PO Box 40100
Olympia, WA 98504-0100

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

DATED this 9th day of April, 2013 at Olympia, Washington.

Leah Pagel, Legal Assistant
Younglove & Coker, P.L.L.C.