

FILED

JUN 23 2014

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
BY _____

No. 324109-III

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

JESSICA PEDERSON,

Appellant,

v.

EMPLOYMENT SECURITY DEPARTMENT
OF THE STATE OF WASHINGTON,

Respondent.

BRIEF OF APPELLANT

George T. Hansen
WSBA #40044
Attorney for Appellant
Hansen Law, PLLC
917 Pitcher St.
Yakima, WA 98101
(509) 575-4444

TABLE OF CONTENTS

I. Assignment of Errors 1

II. Issues Pertaining To Assignment Error 1

III. Statement of Case1

IV. Argument 3

V. Conclusion 6

VI. Appendix 8

TABLE OF AUTHORTIES

Statutes

RCW 34.05..... 3

RCW 34.05.5103

RCW 50.20.0501,4

RCW 50.20.050(2)(b)5,6

RCW 50.20.050(2)(b)(ii) 3

RCW 50.20.050(2)(b)(v) 5

RCW 50.20.050(2)(b)(vi) 5

RCW 50.32.120 3

Case Law

Children's Hosp. & Med. Ctr. v. Dep't of Health,
95 Wn. App. 858, 864, 975 P.2d 567 (1999) 4

Employees of Pac. Maritime Ass'n v. Hutt,
88 Wn.2d 426, 562 P.2d 1264 (1977)) 5

<i>Everett Concrete Prods., Inc. v. Dep't of Labor & Indus.</i> , 109 Wn.2d 819, 823, 748 P.2d 1112 (1988)	4
<i>Gaines v. State, Dept. of Employment Sec.</i> , 140 Wn. App. 791 (Wash. App. Div. 1 2007)	3,4,5
<i>Overton v. Economic Assistance Authority</i> , 96 Wn.2d 552, 555, 637 P.2d 652 (1981)	4
<i>Silverstreak, Inc. v. Dep't of Labor & Indus.</i> , 159 Wn.2d 868, 879, 154 P.3d 891(2007)	3
<i>Tapper v. Employment Sec. Dep't</i> , 122 Wn.2d 397, 402, 858 P.2d 494 (1993)	4
<i>Washington Cedar & Supply Co., Inc. v. Dep't of Labor & Indus.</i> , 137 Wn. App. 592, 598, 154 P.3d 287 (2007)	4

Other Authorities

A NORMAN J. SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 74.7, at 921-23 (6th ed. 2003)	5
Dictionary.com	5
ENGROSSED H.B. 2255, 59th Leg., Reg. Sess., at 377 (Wash. 2005)	5
Washington Administrative Procedures Act	3

I. ASSIGNMENTS OF ERROR

1. The court erred by applying theories of contract law to the analysis of the issues presented in this matter.
2. The Court erred in its interpretation of RCW 50.20.050.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Is it a contract of employment when a prospective employee reports to work at an employment setting in which the actual terms of employment are different from the terms of prospective employment as discussed in the job interview?

When the terms of prospective employment, as discussed in a prior interview for employment, are subsequently modified by the employer in such a way that it becomes unclear whether the job offering is a position or an ongoing interview, is there a substantial change in employment per RCW 50.20.050?

III. STATEMENT OF CASE

Appellant was seeking a full-time position. Appellant reported to work at Chukar Fruit/Chukar Cherry Co. ("Chukar") for her first day of work with the understanding that she had obtained a full-time position as the Shipping Coordinator. CP at 17.

When Appellant arrived on her first day she learned that she would be working for three days and that she would be among a group of several candidates from whom the position would be filled. CP at 20. After Ms. Pederson became aware of these changes, she did not return to Chukar and resumed her job search while continuing to receive unemployment benefits.

On April 27, 2013, the Employment Security Department issued a written Determination Notice which denied the Appellant unemployment benefits and assessed an overpayment of \$1,678.00. CP at 9. The Appellant filed an appeal of the notice on May 2, 2013.

On May 30, 2013, the State of Washington Office of Administrative Hearings for the Employment Security Department issued an "Initial Order," setting aside the determination by Employment Security Department to disqualify Appellant from receiving unemployment benefits. Employer Chukar petitioned for review of the Initial Order.

The findings of fact made by the Office of Administrative Hearings were as follows:

1. On April 27, 2013, the Employment Security Department (Department) issued a written Determination Notice (Notice) which denied the claimant unemployment benefits and assessed an overpayment of \$1,678.00. The claimant is the Appellant in this matter and filed an appeal on May 2, 2013.

2. The claimant was employed by Chukar Fruit (employer), for 1 day on March 18, 2013. At the time of the job separation, the claimant was working full-time as a non-union Shipping Coordinator earning \$9.19 per hour.

3. The Claimant was hired as a full-time permanent employee. Upon arriving for her first day of work, her employer changed the conditions of employment to a 3-day temporary position. At the end of the 3-day period, the employer would choose a permanent employee among the other temporary employee candidates.

4. During the course of the claimant's 1-day of employment, the employer indicated that she should look for a job elsewhere.

5. The claimant quit her job. The claimant would not have accepted a 3-day temporary job and only accepted the position because it was a full-time permanent position.

6. During the weeks the claimant sought unemployment benefits, the claimant was physically able to work, was available for work, and actively sought work, as required.

A Conclusion of Law of the Administrative Law Judge was that Chukar changed the terms of employment from full-time permanent to 3-day temporary

thereby substantially reducing the hours of employment by more than 25% as per RCW 50.20.050(2)(b)(ii).

Chukar appealed this decision and on June 21, 2013, a Review Judge for the Commissioner's Review Office of the Employment Security Department of the State of Washington issued a decision setting aside the Initial Order. CP at 5. The Commissioner adopted the findings of fact of the Initial Order in part and entered additional conclusions of law including the following: "While claimant was undoubtedly disappointed when she learned that she did not yet have a permanent position, what she did have was essentially a working interview." CP at 5.

On January 30, 2014, a hearing on the Appeal of the Decision of Commissioner was held in Yakima County Superior Court before the Honorable Judge David Elofson. On March 11, 2014, the Court entered its "Findings of Fact, Conclusions of Law and Order" affirming the Decision of the Commissioner of the Employment Security Department. CP at 26.

On April 16, 2014, a Notice of Appeal was filed in Yakima County Superior Court and received by The Court of Appeals of the State of Washington Division III.

IV. ARGUMENT

Judicial review of Employment Security Department cases is governed by the Washington Administrative Procedures Act ("WAPA"), pursuant to RCW 34.05.510 and RCW 50.32.120. *Gaines v. State, Dept. of Employment Sec.*, 140 Wn. App. 791 (Wn. App. Div. 1 2007).

The Washington Administrative Procedure Act (WAPA), chapter 34.05 RCW, governs review of a final decision by the commissioner of the Employment Security [166 P.3d 1260] Department." *Id.* at 796 citing *Tapper v. Employment Sec. Dep't*, 122 Wn.2d 397, 402, 858 P.2d 494 (1993).

"A party will be provided relief from an adverse administrative decision if the law is erroneously interpreted or applied by the agency or if the order is not

supported by substantial evidence on the record. *Id.* citing *Silverstreak, Inc. v. Dep't of Labor & Indus.*, 159 Wn.2d 868, 879, 154 P.3d 891(2007) (citing *Everett Concrete Prods., Inc. v. Dep't of Labor & Indus.*, 109 Wn.2d 819, 823, 748 P.2d 1112 (1988)).

In reviewing an administrative decision, this court sits in the same position as the trial court, applying the WAPA standards directly to the record considered by the agency. *Tapper*, 122 Wn.2d at 403.

An agency's findings of fact and regulatory interpretations are granted appropriate deference. *Silverstreak, Inc. v. Dep't of Labor & Indus.*, 159 Wash.2d 868, 879. However, questions of law are reviewed de novo. Whether the law was correctly applied to the facts as found by the agency is also a question of law that the court reviews de novo. *Tapper*, 122 Wn.2d at 403, 858 P.2d 494.

As stated in *Overton v. Economic Assistance Authority*, 96 Wn.2d 552, 555, 637 P.2d 652 (1981):

Where an administrative agency is charged with administering a special field of law and endowed with quasi-judicial functions because of its expertise in that field, the agency's construction of statutory words and phrases and legislative intent should be accorded substantial weight when undergoing judicial review.... We also recognize the countervailing principle that it is ultimately for the court to determine the purpose and meaning of statutes, even when the court's interpretation is contrary to that of the agency charged with carrying out the law.

Courts retain the ultimate responsibility for interpreting a statute or regulation. *Washington Cedar & Supply Co., Inc. v. Dep't of Labor & Indus.*, 137 Wn. App. 592, 598, 154 P.3d 287 (2007) (citing *Children's Hosp. & Med. Ctr. v. Dep't of Health*, 95 Wn. App. 858, 864, 975 P.2d 567 (1999)).

The legislature specifically sets forth that RCW 50.20.050 is to be interpreted liberally. *Gaines v. State, Dept. of Employment Sec.*, 140 Wn. App. at 797 (emphasis added).

“The legislature further finds that the system is falling short of [the Act's] goals by failing to recognize the importance of applying liberal construction for

the purpose of reducing involuntary unemployment, and the suffering caused by it, to the minimum, and by failing to provide equitable benefits to unemployed workers.” *Id.* at 797 citing ENGROSSED H.B. 2255, 59th Leg., Reg. Sess., at 377 (Wash. 2005).

“The legislature also added to the preamble of the Act that ‘this title shall be liberally construed for the purpose of reducing involuntary unemployment and the suffering caused thereby to the minimum.” *Id.*

“Unemployment compensation statutes were enacted for the purpose of relieving the harsh economic, social and personal consequences resulting from unemployment. If these statutes are to accomplish their purpose, they must be given a liberal interpretation.” *Id.* at 797-98 citing A NORMAN J. SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 74.7, at 921-23 (6th ed. 2003) (footnotes omitted) (citing cases from 35 states, including *Employees of Pac. Maritime Ass'n v. Hutt*, 88 Wn.2d 426, 562 P.2d 1264 (1977)).

In *Gaines*, the Court reversed the Commissioner’s decision and reinstated the decision of the Administrative Law Judge. The Court determined that the employment was unsuitable for Gaines and that suitability of the employment should be evaluated under this liberal construction of the Act.

In the Decision of Commissioner, it was determined that Ms. Pederson’s employment was a “working interview.” CP at 5. Interview is defined as:

A formal meeting in which one or more persons question, consult, or evaluate another person.¹

An interview is not a full-time position. Ms. Pederson should not be disqualified from receiving benefits under RCW 50.20.050(2)(b) as she had not yet secured suitable employment.

Ms. Pederson arrived at Chukar Cherry Co. with the understanding that she had a full-time position. The conditions of employment were altered when it was discovered that she did not have a full-time position, but rather a “working

¹ Dictionary.com

interview.” Her expectation of a 40 hour work week was reduced to a three day working interview.

Chukar changed the position in such a way that there was a greater than 25% reduction in hours from a full-time position. Therefore, Ms. Pederson was not disqualified to receive benefits under RCW 50.20.050(2)(b)(v) and (vi).

In his oral findings and decision from January 30, 2014, Judge Elofson relied on contract law to find that an oral contract had been entered into between employer and employee.

“The issue, as I look at it, is essentially when did the contract of employment and it’s a contract. IT can be an oral contract and when it consummated and there are discussions that lead in to employment. I can’t – I would have to find that prior to her appearance and starting would be when the contract of employment began”.

RP at pp. 14 ll. 21-24. Neither party had raised any issue of contract law in their briefs or arguments, nor cited to any case that might support the position raised by the judge. The Appellant would respectfully submit that the Judge’s finding was in error.

Appellant respectfully submits that the employer, Chukar, misled her as to the nature of the job, that the job was not the job that she had applied for and that both her hours and her pay were reduced by greater than 25% from what had been previously agreed upon.

V. CONCLUSION

Ms. Pederson should not be disqualified from receiving benefits following the one day working interview. Further, Ms. Pederson is not disqualified for leaving the interview as the terms of the position were changed to the extent the position was no longer suitable for Ms. Pederson. Both Appellant’s pay and hours had been significantly diminished. Ms. Pederson was not disqualified to receive benefits under RCW 50.20.050(2)(b). The decision in the Initial Order from the Administrative Law Judge should be reinstated and this matter should be remanded for a determination of fees and costs.

DATED this 19 day of June, 2014.

HANSEN LAW, PLLC



GEORGE T. HANSEN, WSBA #40044
Attorney for Appellant

VI. Appendix

RCW 34.05.510	i
RCW 50.20.050	ii
RCW 50.32.120	iii

RCW 34.05.510

Relationship between this chapter and other judicial review authority.

This chapter establishes the exclusive means of judicial review of agency action, except:

(1) The provisions of this chapter for judicial review do not apply to litigation in which the sole issue is a claim for money damages or compensation and the agency whose action is at issue does not have statutory authority to determine the claim.

(2) Ancillary procedural matters before the reviewing court, including intervention, class actions, consolidation, joinder, severance, transfer, protective orders, and other relief from disclosure of privileged or confidential material, are governed, to the extent not inconsistent with this chapter, by court rule.

(3) To the extent that de novo review or jury trial review of agency action is expressly authorized by provision of law

RCW 50.20.050

Disqualification for leaving work voluntarily without good cause (as amended by 2009 c 247).

(1) With respect to claims that have an effective date before January 4, 2004:

(a) An individual shall be disqualified from benefits beginning with the first day of the calendar week in which he or she has left work voluntarily without good cause and thereafter for seven calendar weeks and until he or she has obtained bona fide work in employment covered by this title and earned wages in that employment equal to seven times his or her weekly benefit amount.

The disqualification shall continue if the work obtained is a mere sham to qualify for benefits and is not bona fide work. In determining whether work is of a bona fide nature, the commissioner shall consider factors including but not limited to the following:

- (i) The duration of the work;
- (ii) The extent of direction and control by the employer over the work; and
- (iii) The level of skill required for the work in light of the individual's training and experience.

(b) An individual shall not be considered to have left work voluntarily without good cause when:

(i) He or she has left work to accept a bona fide offer of bona fide work as described in (a) of this subsection;

(ii) The separation was because of the illness or disability of the claimant or the death, illness, or disability of a member of the claimant's immediate family if the claimant took all reasonable precautions, in accordance with any regulations that the commissioner may prescribe, to protect his or her employment status by having promptly notified the employer of the reason for the absence and by having promptly requested reemployment when again able to assume employment: PROVIDED, That these precautions need not have been taken when they would have been a futile act, including those instances when the futility of the act was a result of a recognized labor/management dispatch system;

(iii) He or she has left work to relocate for the spouse's employment that is due to an employer-initiated mandatory transfer that is outside the existing labor market area if the claimant remained employed as long as was reasonable prior to the move; or

(iv) The separation was necessary to protect the claimant or the claimant's immediate family members from domestic violence, as defined in RCW 26.50.010, or stalking, as defined in RCW 9A.46.110.

(c) In determining under this subsection whether an individual has left work voluntarily without good cause, the commissioner shall only consider work-connected factors such as the degree of risk involved to the individual's health, safety, and morals, the individual's physical fitness for the work, the individual's ability to perform the work, and such other work connected factors as the commissioner may deem pertinent, including state and national emergencies. Good cause shall not be established for voluntarily leaving work because of its distance from an individual's residence where the distance was known to the individual at the time he or she accepted the employment and where, in the judgment of the department, the distance is customarily traveled by workers in the individual's job classification and labor market, nor

because of any other significant work factor which was generally known and present at the time he or she accepted employment, unless the related circumstances have so changed as to amount to a substantial involuntary deterioration of the work factor or unless the commissioner determines that other related circumstances would work an unreasonable hardship on the individual were he or she required to continue in the employment.

(d) Subsection (1)(a) and (c) of this section shall not apply to an individual whose marital status or domestic responsibilities cause him or her to leave employment. Such an individual shall not be eligible for unemployment insurance benefits beginning with the first day of the calendar week in which he or she left work and thereafter for seven calendar weeks and until he or she has requalified, either by obtaining bona fide work in employment covered by this title and earning wages in that employment equal to seven times his or her weekly benefit amount or by reporting in person to the department during ten different calendar weeks and certifying on each occasion that he or she is ready, able, and willing to immediately accept any suitable work which may be offered, is actively seeking work pursuant to customary trade practices, and is utilizing such employment counseling and placement services as are available through the department. This subsection does not apply to individuals covered by (b)(ii) or (iii) of this subsection.

(2) With respect to claims that have an effective date on or after January 4, 2004:

(a) An individual shall be disqualified from benefits beginning with the first day of the calendar week in which he or she has left work voluntarily without good cause and thereafter for seven calendar weeks and until he or she has obtained bona fide work in employment covered by this title and earned wages in that employment equal to seven times his or her weekly benefit amount.

The disqualification shall continue if the work obtained is a mere sham to qualify for benefits and is not bona fide work. In determining whether work is of a bona fide nature, the commissioner shall consider factors including but not limited to the following:

- (i) The duration of the work;
- (ii) The extent of direction and control by the employer over the work; and
- (iii) The level of skill required for the work in light of the individual's training and experience.

(b) An individual is not disqualified from benefits under (a) of this subsection when:

(i) He or she has left work to accept a bona fide offer of bona fide work as described in (a) of this subsection;

(ii) The separation was necessary because of the illness or disability of the claimant or the death, illness, or disability of a member of the claimant's immediate family if:

(A) The claimant pursued all reasonable alternatives to preserve his or her employment status by requesting a leave of absence, by having promptly notified the employer of the reason for the absence, and by having promptly requested reemployment when again able to assume employment. These alternatives need not be pursued, however, when they would have been a futile act, including those instances when the futility of the act was a result of a recognized labor/management dispatch system; and

(B) The claimant terminated his or her employment status, and is not entitled to be reinstated to the same position or a comparable or similar position;

(iii)(A) With respect to claims that have an effective date before July 2, 2006, he or she: (I) Left work to relocate for the spouse's employment that, due to a mandatory military transfer: (1) Is outside the existing labor market area; and (2) is in Washington or another state that, pursuant to statute, does not consider such an individual to have left work voluntarily without good cause; and (II) remained employed as long as was reasonable prior to the move;

(B) With respect to claims that have an effective date on or after July 2, 2006, he or she: (I) Left work to relocate for the spouse's employment that, due to a mandatory military transfer, is outside the existing labor market area; and (II) remained employed as long as was reasonable prior to the move;

(iv) The separation was necessary to protect the claimant or the claimant's immediate family members from domestic violence, as defined in RCW 26.50.010, or stalking, as defined in RCW 9A.46.110;

(v) The individual's usual compensation was reduced by twenty-five percent or more;

(vi) The individual's usual hours were reduced by twenty-five percent or more;

(vii) The individual's worksite changed, such change caused a material increase in distance or difficulty of travel, and, after the change, the commute was greater than is customary for workers in the individual's job classification and labor market;

(viii) The individual's worksite safety deteriorated, the individual reported such safety deterioration to the employer, and the employer failed to correct the hazards within a reasonable period of time;

(ix) The individual left work because of illegal activities in the individual's worksite, the individual reported such activities to the employer, and the employer failed to end such activities within a reasonable period of time;

(x) The individual's usual work was changed to work that violates the individual's religious convictions or sincere moral beliefs; or

(xi) The individual left work to enter an apprenticeship program approved by the Washington state apprenticeship training council. Benefits are payable beginning Sunday of the week prior to the week in which the individual begins active participation in the apprenticeship program.

(3) Notwithstanding subsection (2) of this section, for separations occurring on or after July 26, 2009, an individual who was simultaneously employed in full-time employment and part-time employment and is otherwise eligible for benefits from the loss of the full-time employment shall not be disqualified from benefits because the individual:

(a) Voluntarily quit the part-time employment before the loss of the full-time employment; and

(b) Did not have prior knowledge that he or she would be separated from full-time employment.

RCW 50.32.120
Procedure for judicial review.

Judicial review of a decision of the commissioner involving the review of an appeals tribunal decision may be had only in accordance with the procedural requirements of RCW 34.05.570.