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NO. 90544-4

SUPREME COURT OF THE STATE OF WASHINGTON

LINDA DARKENWALD,

Petitioner,

v.

STATE OF WASHINGTON DEPARTMENT OF EMPLOYMENT SECURITY,

Respondent.

EMPLOYMENT SECURITY DEPARTMENT'S ANSWER TO PETITION FOR REVIEW

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ORIGINAL

TABLE OF CONTENTS

I. INTRODUCTION 1

II. COUNTERSTATEMENT OF THE ISSUES 2

III. COUNTERSTATEMENT OF THE CASE 3

IV. REASONS WHY REVIEW SHOULD BE DENIED 6

A. Darkenwald Failed to Provide a Physician's Statement Addressing Any Work Restrictions, As Required by WAC 192-150-060(2) to Establish Good Cause to Quit 7

B. The Court of Appeals Correctly Determined RCW 50.20.119 Does Not Apply to the Job Separation of a Currently Employed Part-Time Worker 10

V. CONCLUSION 15

TABLE OF AUTHORITIES

Cases

Anderson v. Emp't Sec. Dep't,
135 Wn. App. 887, 146 P.3d 475 (2006) 7

Campbell v. Emp't Sec. Dep't,
180 Wn.2d 566, 326 P.3d 713 (2014) 8, 13, 14

Darkenwald v. Emp't Sec. Dep't, ___ Wn. App. ___,
328 P.3d 977 (2014) .... passim

Statutes

RCW 50.22.020(1) 12

RCW 34.05.570(1)(a) 7

RCW 50.20.010(1) 11

RCW 50.20.010(1)(c) 11, 12, 13

RCW 50.20.010(1)(c) and .080 .... 3, 6

RCW 50.20.010(c)(ii) 11

RCW 50.20.050 .... 7, 10

RCW 50.20.050(2) 7

RCW 50.20.050(2)(a) 13

RCW 50.20.050(2)(b) .... passim

RCW 50.20.050(2)(b)(ii) 8, 9, 10

RCW 50.20.080 .... 11, 12, 13

RCW 50.20.119 .... passim

RCW 50.20.119(1) 12

Rules

RAP 13.4(b)(4) 2, 6

Regulations

WAC 192-150-055(1) 8

WAC 192-150-055(1)(a) 10

WAC 192-150-060 8

WAC 192-150-060(2) .... passim

WAC 192-170-010(a) 11

I. INTRODUCTION

Linda Darkenwald quit her job as a dental hygienist when her employer asked her to work three days per week rather than two or to serve as a substitute. The Commissioner of the Employment Security Department determined Darkenwald was ineligible for unemployment benefits because she did not have good cause to quit under RCW 50.20.050(2)(b). The Court of Appeals properly affirmed this decision in a published opinion. *Darkenwald v. Emp't Sec. Dep't*, ___ Wn. App. ___, 328 P.3d 977 (2014). Darkenwald seeks review of the court's rulings on only two issues.

The first issue concerns the application of WAC 192-150-060(2). Under this rule, to establish good cause to quit because of a disability, an individual must obtain a physician's statement attesting to any restrictions on the type or hours of work she may perform. The court correctly determined that Darkenwald did not satisfy this straightforward requirement because she provided no documentation addressing any such restrictions.

Darkenwald also seeks review of the Court of Appeals' ruling that RCW 50.20.119 was not applicable to determining whether she was entitled to receive unemployment benefits after quitting her job. In accordance with the language of the statute and controlling precedent, the

court applied RCW 50.20.050(2)(b), and determined that Ms. Darkenwald did not quit for any of the exclusive good cause reasons listed thereunder. The court rightly recognized, despite Ms. Darkenwald's argument otherwise, that RCW 50.20.119 does not permit a *presently employed* part-time worker, such as Darkenwald, to quit and collect unemployment benefits when she is asked to start working full-time. RCW 50.20.119 allows an *unemployed* person who is currently receiving benefits and who *previously* worked part-time to look for and accept only part-time work, providing an exception to the general rule that an unemployed person must look for and accept full-time and part-time work in order to receive benefits.

The Court of Appeals correctly applied the plain language of the provisions at issue to the specific facts of Darkenwald's case. This case involves no issue of substantial public interest that should be determined by this Court. Further review is not warranted.

II. COUNTERSTATEMENT OF THE ISSUES

For the reasons set forth below, the issues raised in Darkenwald's Petition for Review are not appropriate for review by this Court under RAP 13.4(b)(4). If the Court accepts review, however, the issues will be:

1. Did the Court of Appeals properly conclude that Darkenwald did not establish good cause to quit due to a disability when she did not provide a physician's statement or any other records

supporting any restrictions on the type or hours of work she could perform, as required by WAC 192-150-060(2)?

2. Under RCW 50.20.010(1)(c) and .080, an "unemployed individual" is eligible for benefits if she actively seeks and immediately accepts an offer of full-time work, but those who previously worked part-time need not search for full-time work. RCW 50.20.119. Did the Court of Appeals correctly conclude that the part-time work search exception in RCW 50.20.119 did not apply to Darkenwald because she was not an unemployed individual?

III. COUNTERSTATEMENT OF THE CASE

Linda Darkenwald worked as a dental hygienist for Dr. Gordon Yamaguchi for 25 years. Administrative Record (AR) at 15, 88; Finding of Fact (FF) 1.[1] In 1998, 12 years before the end of her employment in 2010, Darkenwald was diagnosed with a permanent impairment of her back and neck, which the Department of Labor and Industries recognized. AR at 86, 89; FF 5. Darkenwald's ailment becomes aggravated if she works too much. AR at 19, 89; FF 6. She regularly takes medication and visits a chiropractor and a massage therapist to manage the impairment. AR at 24, 89, FF 6, 7.

For eight years after this diagnosis, Darkenwald worked either three or four days per week. AR at 20-21, 88-89; FF 2. During the last four years of her employment, by agreement with Dr. Yamaguchi, she

[1] The superior court transmitted the agency record in this matter as a standalone document. The agency record is separately paginated from the Clerk's Papers and, therefore, will be cited to in this answer as "AR."

worked two days per week, Monday and Wednesday, for a total of 14 to 17 hours a week. AR at 15-16, 21, 89; FF 1, 3. Dr. Yamaguchi stated that the reduction to two days per week was made so that Darkenwald could spend more time with her family. AR at 25, 62.

Dr. Yamaguchi's dental practice became significantly busier after his son joined the practice as a dentist. AR at 25-26, 89, FF 10. Ultimately, Dr. Yamaguchi determined that he needed Darkenwald to work three days per week, as she had four years earlier. AR at 22, 26-27, 89; FF 13. When he met with Darkenwald to discuss this, she was unwilling to consider working more than two days per week. AR at 22, 27-28, 89; FF 14, 15. She did not tell Dr. Yamaguchi in either their verbal or written communications that her back and neck impairment prevented her from working her former schedule of three days per week. AR at 28, 61-63, 89; FF 15.

Darkenwald was scheduled to work her normal schedule until August 23, 2010, but, because she was upset at being asked to increase her workweek to three days, she decided to stop working on August 2, 2010. AR at 34, 90; FF 17. She testified that, because she was so upset, she "needed to end it then." AR at 34.

The Employment Security Department denied Darkenwald's subsequent application for unemployment benefits, determining that she

had quit her job without good cause. AR at 48-52. After an administrative hearing, the Administrative Law Judge (ALJ) determined that Darkenwald quit her job for personal reasons and did not establish that a medical disability prevented her from working three days per week. AR at 88-93. The ALJ made an express finding that Dr. Yamaguchi's testimony, when it conflicted with that of Darkenwald, was more logically persuasive (i.e., more credible). AR at 90; Conclusion of Law (CL) 1. Darkenwald then filed a petition for review with the Department's Commissioner, who affirmed the ALJ's order, adopting its findings of fact and conclusions of law. AR at 114-16.

Darkenwald appealed to superior court, which reversed the Commissioner's decision. The Department then appealed to the Court of Appeals. In a published decision, the Court of Appeals reversed the superior court and affirmed the Commissioner's decision. *Darkenwald v. Emp't Sec. Dep't*, ___ Wn. App. ___, 328 P.3d 977 (2014). The court concluded that Darkenwald did not prove her disability was the primary reason she quit and that she failed to provide a physician's statement attesting to any work limitations, as required by WAC 192-150-060(2). The court also rejected her argument that RCW 50.20.119 gives a currently-employed part-time worker the right to quit her job and receive

unemployment benefits when asked to work full-time.[2] Darkenwald's Petition for Review to this Court followed.

IV. REASONS WHY REVIEW SHOULD BE DENIED

Darkenwald seeks review under RAP 13.4(b)(4) alone. Pet. for Review at 4. The Court will accept review under this provision only "[i]f the petition involves an issue of substantial public interest that should be determined by the Supreme Court." Darkenwald presents no such issue in her petition.

The Court of Appeals correctly applied the plain language of the physician's statement requirement found in WAC 192-150-060(2) and the part-time worker exception in RCW 50.20.119. WAC 192-150-060(2) requires a claimant to provide a physician's statement showing work restrictions. Darkenwald provided no such statement. RCW 50.20.119 provides that a person who worked part-time is not ineligible for benefits under RCW 50.20.010(1)(c) and .080 for looking for only part-time work. Only an "unemployed worker" can be ineligible under those provisions, so the part-time worker exception in RCW 50.20.119 applies only to

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[2] The Court of Appeals ruled on other issues that Darkenwald does not ask this Court to review. The court denied Darkenwald's motion to dismiss on the grounds that the Department, by paying Darkenwald unemployment benefits in accordance with the superior court's order of reversal, could recover those benefits payments only for fraud, misrepresentation, or nondisclosure. *Id.* at 981-82. The court also rejected Darkenwald's argument that she had good cause to quit due to a 25 percent or greater reduction in her hours or compensation. *Id.* at 986.

unemployed workers who previously worked part-time. Darkenwald was properly disqualified under the voluntary quit statute, RCW 50.20.050.

In seeking review, Darkenwald essentially argues that the Court of Appeals' interpretation of these unambiguous provisions is unfair. Darkenwald's quarrel is with the policies effectuated by the legislature and Department through RCW 50.20.119 and WAC 192-150-060(2). But review by this Court is not the appropriate forum for seeking a remedy to these objections. The court's application of the plain language of RCW 50.20.119 and WAC 192-150-060(2) does not raise an issue of substantial public interest that should be determined by this Court. The Court should deny review.

A. Darkenwald Failed to Provide a Physician's Statement Addressing Any Work Restrictions, As Required by WAC 192-150-060(2) to Establish Good Cause to Quit

The Court of Appeals held here that Darkenwald voluntarily quit her job, and Darkenwald does not seek review of this determination by this Court.

To be eligible for unemployment benefits under the voluntary quit statute, RCW 50.20.050(2), a claimant must show she had "good cause" for quitting. RCW 34.05.570(1)(a); *Anderson v. Emp't Sec. Dep't*, 135 Wn. App. 887, 893, 146 P.3d 475 (2006). A claimant can establish good cause only if she quit for one of the 11 reasons enumerated in

RCW 50.20.050(2)(b). *Campbell v. Emp't Sec. Dep't*, 180 Wn.2d 566, 572, 326 P.3d 713 (2014).

Darkenwald argues she had good cause to quit because a physical disability prevented her from working more than two days per week. Pet. for Review at 9. To establish good cause for quitting because of a disability, an employee must demonstrate that:

> (a) [She] left work primarily because of such illness, disability, or death;
>
> (b) The illness, disability, or death made it necessary for [her] to leave work; and
>
> (c) [She] first exhausted all reasonable alternatives prior to leaving work.

WAC 192-150-055(1); RCW 50.20.050(2)(b)(ii).

In addition, under WAC 192-150-060:

> (1) If you leave work because of a disability you must notify your employer about your disabling condition before the date you leave work or begin a leave of absence. Notice to the employer shall include any known restrictions on the type or hours of work you may perform.
>
> (2) Any restrictions on the type or hours of work you may perform must be supported by a physician's statement or by the terms of a collective bargaining agreement or individual hiring contract.

The language of this rule is plain: Darkenwald was required to obtain a physician's statement supporting any restrictions imposed by her disability

on the type or hours of work she could perform.[3] The court reviewed the record and found she submitted only a one-page document from the Department of Labor and Industries. *See Darkenwald*, 328 P.3d at 980, 981; AR at 86. This document attests to Darkenwald's diagnosis with a permanent back impairment, but it contains no information whatsoever concerning what limitations, if any, the impairment placed on the type or hours of work that Darkenwald could perform. AR at 86. Darkenwald did not submit any other documentation or medical testimony. *Darkenwald*, 328 P.3d at 986.

Darkenwald asserts that the Court of Appeals' decision "imposes a considerable and unreasonable burden upon a claimant in an administrative proceeding" and places "strict evidentiary requirements" upon Darkenwald and similarly situated claimants. Pet. for Review at 10. In fact, the Court of Appeals imposed no such burdens or requirements; it simply applied the plain standards of the rule. The Employment Security Department promulgated the rule at issue to effectuate the legislature's mandate in RCW 50.20.050(2)(b)(ii) that a claimant prove that her disability made it necessary for her to quit. If Darkenwald disagrees with the policy advanced by these provisions, that is a matter for the legislature

[3] Darkenwald does not argue that her purported work restrictions are supported by a collective bargaining agreement or individual hiring contract. *See* WAC 192-150-060(2).

and the agency in its rulemaking capacity. The Court of Appeals engaged in a straightforward application of RCW 50.20.050(2)(b)(ii) and WAC 192-150-060(2) to the facts of Darkenwald's case. This does not raise an issue of substantial public interest that this Court should determine.

Furthermore, even if Ms. Darkenwald were to prevail on this issue, she would remain ineligible for benefits. In addition to ruling against Ms. Darkenwald on the physician's statement issue, the Court of Appeals also determined Darkenwald did not prove her disability was the primary reason why she quit, another requirement for establishing good cause. WAC 192-150-055(1)(a); *Darkenwald*, 328 P.3d at 985. Darkenwald does not seek review of this ruling. Accordingly, even if this Court were to conclude Darkenwald did provide the proper physician's statement under WAC 192-150-060(2), she would remain ineligible for benefits because she did not prove her disability was the primary reason why she quit.

B. The Court of Appeals Correctly Determined RCW 50.20.119 Does Not Apply to the Job Separation of a Currently Employed Part-Time Worker

Because Darkenwald voluntarily quit her job—a conclusion she does not challenge here—the Department had to make an initial determination about her eligibility for benefits under the voluntary quit statute, RCW 50.20.050. The Court of Appeals correctly held that RCW 50.20.119, which applies to the work search requirements for

unemployed individuals to remain eligible for benefits, did not apply to Darkenwald's initial eligibility as a result of her job separation.

Once the Department has determined a claimant is not disqualified from receiving benefits due to the job separation, to remain eligible each week, the "unemployed individual" must be "able to work, and . . . available for work in any trade, occupation, profession, or business for which he or she is reasonably fitted." RCW 50.20.010(1)(c). To be available for work, "an individual must be ready, able, and willing, immediately to accept any suitable work which may be offered to him or her and must be actively seeking work pursuant to customary trade practices." RCW 50.20.010(c)(ii). In addition, an individual is available for work only if she is "willing to work full-time, part-time, and accept temporary work during all of the usual hours and days of the week customary for [her] occupation." WAC 192-170-010(a). In short, if an unemployed individual looks only for part-time work or refuses an offer of full-time work, she will be ineligible under RCW 50.20.010(1)(c) and disqualified under RCW 50.20.080, respectively.

However, the legislature enacted RCW 50.20.119 to make an exception to the work search and acceptance requirements for part-time workers. If an unemployed person worked part-time, she will not be ineligible for benefits under RCW 50.20.010(1) if she looks only for part-

time work or disqualified from benefits under RCW 50.20.080 for refusing an offer of full-time work.[4] RCW 50.20.119(1). And again, as the Court of Appeals recognized, one is disqualified under those provisions only if one is an "unemployed worker" who is not available for full-time work. RCW 50.20.010(1)(c); *Darkenwald*, 328 P.3d at 987.

The Court of Appeals applied the plain language of RCW 50.20.119 and the provisions it cross-references and recognized that the part-time worker exception relates only to whether an individual is considered to be available for work once she has become unemployed, is not disqualified as a result of the job separation, and is claiming unemployment benefits. It does not give a currently employed part-time worker good cause to quit her job if her employer wants to increase her hours. Because Darkenwald voluntarily quit her job, she must first establish her eligibility under the voluntary quit statute, RCW 50.20.050(2)(b).

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[4] RCW 50.20.119 provides:

(1) With respect to claims that have an effective date on or after January 2, 2005, an otherwise eligible individual may not be denied benefits for any 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 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.

(2) For purposes of this section, "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.

This Court recently held that good cause to quit one's job is strictly limited to the reasons listed in RCW 50.20.050(2)(b). RCW 50.20.050(2)(a); *Campbell*, 180 Wn.2d at 572. These reasons do not include being asked to work full-time instead of part-time. Darkenwald asked the Court of Appeals to graft another good cause provision onto the list in RCW 50.20.050(2)(b), and the court correctly declined to do so.

In her briefing below, Darkenwald strained to attach significance to the use of the present-tense in RCW 50.20.119 ("an unemployed individual is not disqualified if she "*is* a part-time worker and is available for, seeks, applies for, or accepts only" part-time work). But an individual cannot both be unemployed and work part-time. RCW 50.20.119 clearly states that a part-time worker, within the meaning of the statute, is not disqualified from benefits under RCW 50.20.010(1)(c) or RCW 50.20.080 if she makes herself available only for part-time work. These provisions specifically pertain to an individual's work search while she is unemployed and claiming benefits. The part-time worker provision simply does not relate to the reason for a job separation. Its only application is to create an exception to the disqualification of an unemployed individual for not seeking or accepting an offer of full-time work.

"When the legislature amended RCW 50.20.050(2)(b) in 2009, it made clear that good cause to quit was limited to the listed statutory reasons." *Campbell*, 180 Wn.2d at 572. Darkenwald can argue, as she does, that one of these good cause reasons justified her decision to quit her job rather than start to work full-time. But there is no statutory basis for her to argue that her part-time work schedule alone entitled her to quit and receive benefits when asked to work three days per week instead of two. The Court of Appeals applied the law to the facts of Darkenwald's case in accordance with the plain language of RCW 50.20.119 and the Court's decision in *Campbell*. Its ruling on this issue is not one of substantial public interest that this Court should decide. Review is not warranted.

V. CONCLUSION

The Court of Appeals applied WAC 192-150-060(2) and RCW 50.20.119 according to their plain terms. Darkenwald has not presented an issue of substantial public interest in her petition. The Department respectfully asks the Court to deny review.

RESPECTFULLY SUBMITTED this 19th day of September, 2014.

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I, Amy Phipps, certify that I caused a copy of this document—

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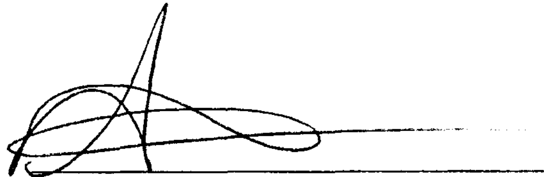

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Supreme Ct. No. 90544-4

Attached, for filing in the above referenced case, please find Employment Security Department's Answer to Petition for Review. A hard copy will not be mailed.

Thank you,

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