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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

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COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

LINDA DARKENWALD,

Respondent,

and

STATE OF WASHINGTON,
EMPLOYMENT SECURITY DEPARTMENT,

Appellant.

REPLY BRIEF OF RESPONDENT

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The Department of Employment Security, Respondent, concluded that after twenty-five years of employment, Mrs. Darkenwald "quit" her job as a dental hygienist when her employer insisted that she begin working three days a week. (He wanted her to work Fridays in addition to her regular Monday and Wednesday schedule). It concluded she did so because she had personal reasons for not wanting to work Fridays.[1] That was not the case. Mrs. Darkenwald had limited her work to two days a week, or less, since 2006 because of a disability related to an L&I permanent physical impairment which prevented her from working more days. She didn't care which two days she worked.[2] The Department has since stipulated that its decision that Mrs. Darkenwald refused to work Fridays was in error.[3]

Nevertheless, the Department continues to argue that Mrs. Darkenwald was appropriately denied benefits because she wasn't terminated, but rather that she quit without good cause when her employer insisted she begin working Fridays in addition to her regularly scheduled Monday and Wednesday workdays.

While the Department now argues that she had no good cause to refuse to work any three days a week, the decision to deny benefits was based

[1] Findings 9 and 18. R. 89-90.
[2] R. 16:24-25 and R. 18:20-25.
[3] CP 19-20.

on its erroneous position that Mrs. Darkenwald did not want to work on Fridays. The Department should not be permitted to change horses mid-stream and now argue a different basis to deny Mrs. Darkenwald benefits.

Regardless, Mrs. Darkenwald has consistently maintained that she did not quit her job, but was terminated by her employer without good cause. She further argues that she was not required to work more than two days a week because of her health and her status as a part-time worker. Alternatively, as the trial court concluded, and as argued in the Opening Brief of Respondent (21-39), if she quit, she quit for good cause.

1. Mrs. Darkenwald was terminated without good cause because her physical disability prevented her from working more than two days a week.

The Department's response contends that Mrs. Darkenwald was not discharged but quit her job without good cause, and that after twenty-five years of working together Mrs. Darkenwald's employer, Dr. Yamaguchi, was unaware that she had health issues which prevented her from increasing her work hours. Neither contention has any basis in a fair view of the facts of the case.

The Department does not contest that Mrs. Darkenwald had a limiting physical disability, the root cause being an L&I back injury at work (Response at 2-3). It admits that Mrs. Darkenwald "has a serious back and neck

problem which becomes more painful if she works too much. [She] Keeps her neck and back problems under control by seeing a chiropractor and a massage therapist on a regular basis."[4] She takes regular medication to control her condition.[5] It apparently contends only that her employer did not, after 25 years of working together understand that it limited her to working two days or less a week. However, her employer knew of her serious L&I injury, a permanent disability. He also admitted that he knew that her back was "a complaint,"[6] and that she was getting treatments by a doctor. He claimed, in his words, only that her back had not been a "loud," everyday occurrence.[7] This was because she limited her hours of work.

It is also not contested that Mrs. Darkenwald's work days had been decreasing ever since her injury. After 2006, she testified that if she tried to work more than two days a week, she couldn't work at all.[8] Some weeks she

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[4] Findings 6. R. 89.

[5] R. 24:14-17.

[6] R. 32:22-23

[7] R. 25:5-12

[8] R. 19:7-20:3: Q So, then, Ms. 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.

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 beck of cortisone. I do massage therapy. I see a chiropractor. Do you want more? I sought acupuncture.

Q I guess I would like whatever medical attention you've sought.

A Yeah, okay. I've really – when I was working more days a week and it was probably

only worked one day. She hadn't worked more than two days a week since 2006 because of her physical limitations. In July 2010, her regular schedule was limited to Monday and Wednesday, sometimes less. On July 28, 2010, when Dr. Yamaguchi told her he needed her to begin working three days a week, by adding Fridays. It was not a request. He testified it was necessary because of the growth of his business. He testified that if she "could have worked more days, *I would never have let her go*."[9] This "required" increase in her work schedule was not subject to negotiation or accommodation.

When he told Mrs. Darkenwald that she had to start working Fridays in addition to Mondays and Wednesdays, her immediate response was "I hear you saying that I am fired.... When will I know when my last day is?" While Dr. Yamaguchi could have given any number of responses indicating that he wasn't firing her; that some alternative might have been available; or that he didn't understand her feeling of being fired, instead his only response

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quite severe, I had to file an L&I claim. That was back in 1998. And they said I had a permanent impairment rating of category 2 of the dorsal spine. And I had been encouraged to file that claim by my physician, Dr. Ellen Parker was her name at the time. She remarried and was Dr. Ellen Martin.

Q And so what's category 2 mean, to the best of your knowledge?

A Well, it's a permanent impairment. I can't make it go away. But if I work two days a week I do just fine.

Q And so –

A I'm sorry, you know, it doesn't – I can work two days a week. I feel good. If I work more than that it really actually becomes constant pain.

[9] R. 17:4-22.

was "Lynn [Dr. Yamaguchi's wife and the office receptionist] will tell you that."

When Mrs. Darkenwald spoke with Lynn she told Mrs. Darkenwald that the office had already hired a new hygienist to replace her. However, Lynn was uncertain when the replacement employee could start. Several days later, Lynn called Mrs. Darkenwald and asked her if she would stay on until August 23rd, because the new person could not begin work until then. Since she had been fired on July 28th, Mrs. Darkenwald declined the requested favor by her former employer that she work until August 23rd when her replacement could start.[10]

In both the administrative and Superior Court proceedings, Mrs. Darkenwald had contended that she had been discharged from her employment. That she had not quit. The Department had concluded however that she wasn't discharged but had quit without good cause.[11] The Thurston County Superior Court reversed the Department on the basis that Mrs. Darkenwald had good cause to quit because her health issues prevented her from working more than two days a week.[12]

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[10] R. 23:14-24:7.
[11] R. 89-92 and 114-116.
[12] CP 75-78.

As viewed by the Department, this case presents the threshold issue of whether Mrs. Darkenwald was discharged or quit. (Response at 9) An employee discharged for misconduct is disqualified from receiving unemployment insurance benefits. RCW 50.20.066. Conversely, an employee discharged for other than misconduct is entitled to benefits.

Application of the law to the facts is a question of law the court reviews de novo. *Terry v. Employment Security Dept.,* 82 Wn. App 745, 748-749, 919 P.2d 111 (1996). Specifically, the question of whether an employee was discharged or quit is ultimately a question of law reviewable under the error of law standard. *Safeco Ins. Companies v. Meyering,* 102 Wn.2d 385, 687 P.2d 195 (1984). (As in this case, the employer and employee in *Meyering* disagreed as to whether the employee had been discharged or quit. The court held it was a question of law and that it was free to substitute its judgment for that of the Department.)

> Moreover, in this case the principal dispute surrounds the meanings of the statutory terms "left work voluntarily", RCW 50.20.050, and "discharged", RCW 50.20.060.[13] These terms as used in the statutory subsections, are legal terms. Whether an individual case falls under one section as opposed to the other depends upon the facts of the case. After the facts are established, as they are in this case, the ultimate conclusion is a conclusion of law. *Leschi,* at 293, 525 P.2d 774, *see also Rasmussen v. Department of Empl. Sec.,* 98

[13] RCW 50.20.066 instead of 50.20.060 applies to this case since it arose after 2004. However, the statute uses the same disqualifying phrase "discharged for misconduct."

> Wash.2d 846, 658 P.2d 1240 (1983). Thus, the error of law standard applies and the reviewing court is entitled to make a de novo review of the record independent of the agency's actions. *Rasmussen,* at 850, 658 P.2d 1240.

102 Wn.2d at 389-391.

Thus, this court must decide the threshold issue of whether as a matter of law Mrs. Darkenwald quit or was discharged based on the facts in the record. Resolving that issue involves a question of statutory interpretation of the applicable provisions of Ch. 50.20 RCW.

Mrs. Darkenwald submits that the Department's determination that she quit her twenty-five year employment was in error. Darkenwald has consistently contended that she was discharged from her employment. While RCW 50.20.066 disqualifies an employee discharged for misconduct from receiving benefits, there is not even a suggestion that Mrs. Darkenwald was discharged for misconduct. Accordingly, if she was discharged she is entitled to benefits.

Resolution of the issue of whether the discharge or quit statutory provision applies to this case should be resolved by the Court's determination of which party initiated termination of the relationship. The record clearly reflects that the employer, Dr. Yamaguchi, initiated the separation by insisting on changing Darkenwald's schedule to one that she could not work.

> It is a basic and long held premise that we look to the immediate cause for the job separation in determining whether the voluntary quit or discharge statute is applicable. (Citations omitted). It is that immediate cause of the unemployment that is relevant.

In re Hensley, Emp.Sec.Comm'r, Dec.2d 636 Sept. 12, 1980. The employer, having changed the status of Hensley's employment, was determined to be the "moving party" who "discharged" the employee. Also see *In re Rodvelt,* Comm.Dec.2d 521 (1979). (Cited by ALJ Decision in Conclusion of Law #2 at R. 90). *In re Nelson,* Emp.Sec.Comm'r. Dec.2d 658 (1981).[14]

> Under the Employment Security Act, an individual who is discharged 'for misconduct connected with his or her work' is disqualified from benefits." *Hamel v. Employment Sec. Dep't,* 93 Wash.App. 140, 145, 966 P.2d 1282 (1998) (quoting RCW 50.20.060), *review denied,* 137 Wash.2d 1036, 980 P.2d 1283 (1999). The ESA defines "misconduct" as "an employee's act or failure to act in willful disregard of his or her employer's interest where the effect of the employee's act or failure to act is to harm the employer's business." RCW 50.04.293. Therefore, to constitute "disqualifying misconduct," the employee's conduct must be "both willful ('willful disregard of [the] employer's interest') and harmful to the employer ('effect ... is to harm the employer's business.')." *Dermond v. Employment Sec. Dep't,* 89 Wash.App. 128, 133, 947 P.2d 1271 (1997)(quoting *Galvin v. Employment Sec. Dep't,* 87 Wash.App. 634, 641-42, 942 P.2d 1040 (1997), *review denied,* 134 Wash.2d 1004, 953 P.2d 95 (1998)); *accord Hamel,* 93 Wash.App. at 144-47, 966 P.2d 1282.

[14] Copies of these administrative decisions can be found published at the department's website esd.wa.gov. They are binding on the Agency and considered persuasive authority by the court. *Campbell v. State of Washington,* ___Wn. App ___ 297 P.3d 757 (2013) at FN 3.

Haney v. Employment Sec. Dept., State of Wash., 96 Wn.App. 129, 134, 978 P.2d 543, 547 (1999).

The Department correctly found that Darkenwald "has a serious back and neck problem which becomes more painful if she works too much."[15] It found that for the last four years Darkenwald had been working 14-17 hours (two days) per week.[16] This was the status quo. It further found that Dr. Yamaguchi decided he needed Darkenwald to work three days instead of two and that he initiated a change in the status quo by telling her he was requiring her to work three days.[17] While these findings correctly reflect the evidence, other findings of the Department do not.

The Department erroneously found the reason Darkenwald refused to work three days was that she wasn't willing to work Fridays.[18] On appeal it admitted this finding was completely unsupported by the evidence. It stipulated to a reversal of the denial of benefits on that basis.[19] Unfortunately, this finding was made by the same Administrative Law Judge who made the findings and decision in this case. Those findings were then incorporated by

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[15] Finding of Fact 6. R. 89.

[16] Finding of Fact 3. R. 89.

[17] Finding of Fact 13 & 14. R. 89.

[18] Finding of Fact 9 and 18. R. 89-90.

[19] AR 118 of 139. This decision was reversed upon the Department's stipulation that the evidence did not support the finding that Darkenwald would not work Fridays. She was in fact willing to work any two days of the week. CP 19-20.

the Commissioner into his decision. Accordingly, the basis upon which the Department erroneously denied Mrs. Darkenwald benefits in decision 04-2010-31265 (that she wouldn't work Fridays) was also part of the basis for the decision that Mrs. Darkenwald quit without good cause in this case.

Specifically, in Decision 04-2010-31264, the case on appeal to this court, the Department twice found (erroneously) that Mrs. Darkenwald would not work Fridays.[20] Based on those erroneous findings, the Department concluded that Mrs. Darkenwald was insubordinate by refusing to work on Fridays, and that her employer hadn't discharged her, but rather that she quit by refusing to work a third day (Friday) in each week. [21]

The Department mischaracterized her position by concluding "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*."[22] The Department now agrees that was not the case, that it was not the day of the week, but the number of days in the week she worked that aggravated Mrs. Darkenwald's medical condition and making her unable, not unwilling, to work three days a week.

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[20] Findings 9 and 18 AR 89-90 of 139.
[21] Conclusion 3 AR 90 of 139.
[22] ALJ Conclusion of Law 9 R. 92.

Because this decision reflects the mistaken finding that Darkenwald wouldn't work Fridays, it also ignores the well-established reason Darkenwald couldn't work more than the two days a week she had been working, her health issues. Mrs. Darkenwald testified that her schedule was limited to two days per week because her neck and back problems were aggravated to the point that she couldn't work at all when she worked more hours.[23] The evidence that for health reasons she could not work anymore than the 14 to 17 hours she was already working was never refuted. Dr. Yamguchi's testimony that she was healthy enough to run marathons twenty-five years previously and more than fifteen years prior to back injury, as the trial court opined, hardly forms a basis to refute the evidence of her more recent health problems.[24]

When Dr. Yamaguchi insisted that Darkenwald work more than three 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 erroneously characterized this as "in-

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[23]Q. So, then, Mrs. Darkenwald, I guess I will ask why is it a 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.

[24] 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.

subordination" by Darkenwald.[25] Darkenwald, on the other hand, immediately responded that she understood she was being terminated. Dr. Yamaguchi didn't immediately contest this understanding but rather seemed to confirm it by telling her to talk with his wife about when her last day would be.

Protecting her health didn't make Mrs. Darkenwald insubordinate and she didn't quit. She simply recognized the reality that because her employer was insisting she work more days than she physically could, her employment was over. She followed up by contacting Dr. Yamaguchi's wife, as he had directed. At no time was she ever given any indication that her employment was not over following her meeting with the dentist. In fact, the dentist's wife contacted her again to ask her only if she would be willing to work a few more days until her replacement, who had already been hired, could start working.

This is a remarkably different case than the recent decision in *Courtney v. Employment Security Dept.,* 171 Wn.2d 655 (2012) where the court said that

> 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. [citations omitted].... [A] voluntary termination requires that an employee intentionally act, knowing that discharge would result.

[25] ALJ Conclusion 3, R. 90.

Courtney was offered continued employment by her employer and after requesting a few days to think it over, never responded and never returned to work. The court noted that Courtney "did not suffer from physical pain or a disability, constraining her action or limiting her choices." That is hardly the case here. Mrs. Darkenwald's physical limitation limited her choice to work the 3 days per week her employer was demanding.

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

RCW 50.20.119 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…*

WAC 192-170-070(1) permits a part time worker to "*refuse any job of 18 or more hours per week.*"

The Department argues that these provisions only apply to unemployed individuals who or are required to look for work to be eligible for unemployment compensation.

The Department decisions 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."[26] This "conclusion" is a truncated statement of the law. It omits the critical phrases, "accept only work..." and "refuse any job..." *supra*. If Darkenwald could refuse employment of more hours with a new employer, why would refusing more hours with her current employer disqualify her from benefits?

Under the Department's strained interpretation of the new statute, Mrs. Darkenwald faced a "Catch 22" situation. If she accepted her employer's demand, she would immediately lose her "part-time worker" status. If she quit in order to preserve that status, in the Department's view the quit would not be for statutory good cause and, of course, the two-day a week job she left would have disappeared.

Protecting her "part-time worker" status was a legitimate basis for Mrs. Darkenwald to refuse her employer's demand that she work more days (hours). The fact that her part time status is linked to her health limitations makes it even more compelling.

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[26] R. 118. The Department found Mrs. Darkenwald worked 14-17 hours per week for at least the past 4 years, Finding of Fact 3. R. 89.

2. If Mrs. Darkenwald is determined to have "quit" her employment, she quit for good cause.

An employee who quits work for good cause is not disqualified from receiving unemployment benefits.[27] The Department contends that "Mrs. Darkenwald decided to stop working for Dr. Yamaguchi because she did not want to increase her workweek from two to three days [adding Fridays to her schedule]."[28]

The Department concedes that health reasons can be good cause for an employee to quit.[29] However, it contends that because she did not specifically tell Dr. Yamaguchi that she couldn't work more days because of her health, her undisputed disability cannot be "good cause" to quit. It also argues that she did not exhaust all reasonable alternatives before quitting because she could have either worked three days per week (an argument that begs the question of her physical ability to do so) or worked as a substitute.

Dr. Yamaguchi knew of Mrs. Darkenwald's back injury that started with her permanent L&I impairment (back injury) while working for him. He referenced his knowledge of her continuing back complaints and her exercises and treatments for it. The two had twice reduced her hours after her

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[27] Respondent's Opening Brief at 15-16. RCW 50.20.050.
[28] Response Brief at. 10.
[29] Response Brief at 13 and Finding of Fact 6. R. 89.

injury. Mrs. Darkenwald clearly understood that Dr. Yamaguchi, for whom she had worked for twenty-five years, was aware of her physical limitations.

When Dr. Yamaguchi insisted he needed Mrs. Darkenwald to increase her work week to three days by working Fridays in addition to Monday and Wednesday, he offered no alternatives to his twenty-five year employee. In fact, it does not appear he was even concerned with why Mrs. Darkenwald felt she was being terminated because he insisted she work another day a week. His only response to her statement "so I hear I am being fired" was to direct her to talk with his wife as to when her last day of work would be. He made it clear his business needed her (or someone else) to work three days a week. His testimony made clear that this was a business imperative for him. Of course, he had that right. But Mrs. Darkenwald had the right to refuse when it endangered her health.

In addition to the reasons related to her health, Mrs. Darkenwald was entitled to refuse to abandon her part-time worker status. The Department argues that RCW 50.20.050 lists the exclusive reasons an individual may quit their job and still receive unemployment.[30] In support of that position, it cites *Campbell v. State of Washington,* ___ Wn. App ___, 297 P.3d 757 (2013) wherein this court stated: "[w]hen the legislature amended RCW

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[30] Response Brief at 12.

50.20.050(2)(b) in 2009, it made clear that good cause to quit was limited to the listed statutory reasons. RCW50.20.050(2)(a)."

However, *Campbell* did not involve the application of another provision in RCW Ch. 50.20, as this case does (RCW 50.20.119). Statutes in *pari materia* must be construed together. *Hallauer v. Spectrum Properties, Inc.*, 143 Wn.2d 126, 18 P.3d 540 (2001); *In re Yim,* 139 Wn.2d 581, 989 P.2d 512 (1999).

> The principle of reading statutes in pari materia applies where statutes relate to the same subject matter. *In re Personal Restraint Petition of Yim,* 139 Wash.2d 581, 592, 989 P.2d 512 (1999). Such statutes " 'must be construed together.' " *Id.* (quoting *State v. Houck,* 32 Wash.2d 681, 684–85, 203 P.2d 693 (1949)). "In ascertaining legislative purpose, statutes which stand in pari materia are to be read together as constituting a unified whole, to the end that a harmonious, total statutory scheme evolves which maintains the integrity of the respective statutes." *State v. Wright,* 84 Wash.2d 645, 650, 529 P.2d 453 (1974). If the statutes irreconcilably conflict, the more specific statute will prevail, unless there is legislative intent that the more general statute controls. *Wark v. Nat'l Guard,* 87 Wash.2d 864, 867, 557 P.2d 844 (1976); *Pearce v. G.R. Kirk Co.,* 22 Wash.App. 323, 327, 589 P.2d 302 (1979). Courts also consider the sequence of all statutes relating to the same subject matter. *Tunstall v. Bergeson,* 141 Wash.2d 201, 211, 5 P.3d 691 (2000), *pet. for cert. filed* (Wash. Jan. 4, 2001).

Hallauer v. Spectrum Properties, Inc., 143 Wn.2d 126, 146, 18 P.3d 540, 550 (2001).

> Statutes in pari materia are those which relate to the same person or thing, or the same class of persons or things...." *State v. Houck,* 32 Wash.2d 681, 684, 203 P.2d 693 (1949).

> "Statutes in pari materia must be construed together ... and in construing [them], ... all acts relating to the same subject matter or having the same purpose, should be read in connection therewith as together constituting one law." *Houck,* 32 Wash.2d at 684–85, 203 P.2d 693.

Beckman v. Wilcox, 96 Wn. App. 355, 364, 979 P.2d 890, 895 (1999).

The provisions of RCW 50.20.050 must be construed in light of the Legislature's later creation of the part-time worker status in RCW 50.20.119. That statute was added after RCW 50.20.050 was amended as referenced in *Campbell.* The Department's interpretation that a part-time worker must accept full-time work would defeat the purpose of RCW 50.20.119, and its implementing regulation WAC 192-170-070. These provisions allow "part-time workers" to remain eligible for benefits while limiting their availability for work to 17 or fewer hours per week and permit them to refuse any job of 18 or more hours per week.

The purpose of both statutes can be easily reconciled by construing RCW 50.20.119 as deeming a part-time worker's refusal to accept full time work in order to preserve her part-time worker status as a "quit for good cause." Alternatively, the new statute can be reconciled with RCW 50.20.066 by construing the employer's demand that a "part-time worker" convert to "full time" status as a "discharge" should she refuse.

RCW 50.20.119 represents a significant change in Washington employment law. This case appears to be present a question of first impression. It is notable that the termination of Mrs. Darkenwald's employment was neither a "quit" nor a "discharge" as those terms are employed in common usage, defined in English dictionaries or understood by the parties themselves. Dr. Yamaguchi did not want his highly valued hygienist of 25 years to leave. He didn't want to "let her go." He didn't want to "fire" her and he didn't think that he had. Mrs. Darkenwald didn't want to leave her job of 25 years. She simply couldn't accommodate his demand that she convert to full time status. She didn't want to "quit" her job and didn't think that she had.

It is respectfully submitted that a more helpful and accurate way to view this particular job termination in light of RCW 50.20.119 and WAC 192-170-070 would be as an employer's demand that a "part-time worker" abandon that status as a condition of continued employment and the employee's legal refusal to accommodate that demand.

Dr. Yamaguchi's demand as the employer of an "at will" employee that she work three days a week rather than two was the same as terminating her old job and offering her a new job. RCW 50.20.119 permitted Mrs.

Darkenwald to protect her part-time worker status by rejecting such an offer without jeopardizing her unemployment compensation eligibility.

Alternatively, the Department suggests that continuing as a substitute employee would have been a reasonable alternative for Mrs. Darkenwald rather than "quitting." The record reflected that even before hiring the three day a week hygienist to replace Mrs. Darkenwald who only worked two, Dr. Yamaguchi only used his four substitute (on call) employees a total of 53 days a year. (For the past four years Mrs. Darkenwald had been working approximately 100 days a year.) Even if she got all the substitute days (highly unlikely) she would have had substantially more than a twenty-five percent (25%) reduction in her compensation, a specified reason for good cause to quit. RCW 51.50.020(2)(b)(vi).

If the Court determines that Mrs. Darkenwald was not discharged, but quit her employment, she quit for reasons that qualified her for unemployment compensation.

3. The Department's appeal should be dismissed.

Mrs. Darkenwald renews her Motion to Dismiss.[31] The issue presented by Respondent's Motion to Dismiss, which appears to be one of first impression, is whether the Department, a government insurer, after

[31] Opening Brief of Respondent and Motion to Dismiss at 17.

paying full benefits, can force the insured to refund payments absent a showing of fraud, misrepresentation or nondisclosure. Why the Department determined over two and one half years after Mrs. Darkenwald's claim was filed to pay her claim in full, when it was not otherwise required to, has not been explained by the Department.[32]

By continuing this appeal the Department necessarily seeks to force Mrs. Darkenwald to pay that money back. However, having, according to its own precedential decisions, irreversibly "determined" eligibility by the payment of benefits, it is prohibited from doing so. Because the Department lacks authority to recoup the payments, the eligibility issue that was before the superior court is no longer before this court. The issue was rendered moot by the Department's payment of benefits.

The Department's own precedential "void ab initio" decisions interpreting and applying RCW 50.20.160(3) reflect its lack of statutory authority to "redetermine" "determinations" of eligibility made by the payment of benefits.[33]

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[32] No explanation accompanied the checks. Nor did any *caveat* that they came with any "strings attached" or that any prudent payee would be well advised to refrain from spending the money for medical or other emergencies. The Department has yet to provide an explanation although the Clerk's letter of April 16, 2013 invited argument.) (Appellant's Response Brief at 2.)

[33] *In re: Weingard,* Emply. Sec. Commr' Dec.2d 920 (2008), review Judge Westfall. *In re: Young,* Emply. Sec. Commr' Dec.2d 951 (2010), chief review Judge Hock. *In re: Hader,* Emply. Sec. Commr' Dec.2d 952 (2010), review Judge Grace. *In re: Hendrick-*

In each of these cited decisions, by three different review judges, the Department held that it lacked authority to re-visit the issue of eligibility post-payment, because each payment constituted a final irreversible determination absent a showing of fraud, misrepresentation or nondisclosure. Each redetermination was "void ab initio."

As in *Young,* "The threshold legal issue in this case is whether the Department had statutory authority to issue the July 12, 2010 Determination Notice, retroactively holding claimant ineligible for benefits pursuant to 50.20.010(1)(c)." Interpreting RCW 50.20.160(3), the Department's chief review Judge in that case held it lacked such authority because "[e]ach of the Department's 73 payments constituted a determination of allowance of benefits." (Mrs. Darkenwald would have received 79 benefit checks had they been paid when legally required instead of the four checks she received in February 2013.)

Simply stated, having determined to pay benefits, the Department made an irreversible determination of eligibility by each payment and may not later attempt to force the payee to pay back the benefits.

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son-Jackson, Emply. Commr' Dec. 2d 953 (2010), review Judge Westfall. *In re: Gratzer,* Emply. Commr' Dec.2d 969 (2011), chief review Judge Hock.)

Cal. Dept. of Human Resources Dev. v. Java, 402 U.S. 121, 91 Sup. Ct. 1347, 28 L.Ed.2d 666 (1971) cited in the Department's response is distinguishable from this case. The California agency, after an administrative hearing, had determined eligibility, and payments to the claimant began immediately. But the employer later learned of the determination and appealed. California statutes allowed such an appeal, and required the Department to suspend the payment of benefits pending a decision on the appeal, which the agency immediately did. Washington has no such statutory scheme. *Java* held that the statute "violated the command of 42 USC 503(a)(1) that unemployment compensation programs must be reasonably calculated to insure full payment of unemployment benefits when due." The term "due" refers to the Department's administrative decision.

> We conclude that the word 'due' in 503(a)(1), when construed in light of the purposes of the Act, means the time when payments are first administratively allowed as a result of a hearing of which both parties have notice and are permitted to present their respective positions...

402 U.S. at 133..

The public policy behind the federal statute was to "give effect to the congressional objective of getting money into the pocket of the unemployed worker at the earliest point that is *administratively* feasible." 402 U.S. at 135. (emphasis added) The California statute conflicted because it

required the Department to cancel payments after they had begun, as soon as administratively feasible, just because the employer appealed.

In this case, the Department did not pay benefits to Mrs. Darkenwald immediately after she filed for them or after the administrative hearing, when they would have been "administratively feasible." It first paid her benefits only in February 2013, after its appeal of the superior court decision and more than two years after the Commissioner's decision. The rationale of *Java* has no application to this case.

The Department's appeal should be dismissed because, having irreversibly determined eligibility by paying benefits to Mrs. Darkenwald, the Department has no more authority to continue contesting her eligibility by continuing this appeal than it would have had to contest it by a redetermination notice which would have been, by its own precedential decisions, "void ab initio."

4. Mrs. Darkenwald is entitled to an award of reasonable attorney fees.

The Department does not address Mrs. Darkenwald's contention that if this court affirms the trial court's decision reversing the Department, she is entitled to her costs and reasonable attorney fees including those on appeal. RCW 50.32.160 is clear in providing she is entitled to fees if this court reverses or modifies the Department's decision.

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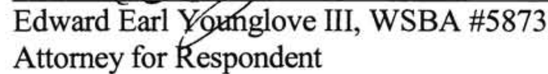
STATE OF WASHINGTON

BY ____
DEPUTY

RESPECTFULLY SUBMITTED this 27th day of June, 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 Reply Brief of Respondent upon the following:

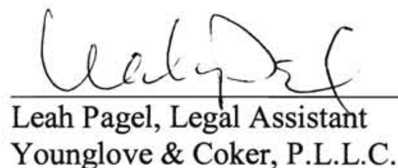
Washington State Court of Appeals
Division Two
950 Broadway, Suite 300
Tacoma, WA 98402

I further certify that on the below date, I caused a true and correct copy of the foregoing Reply Brief of Respondent 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 27th day of June, 2013 at Olympia, Washington.



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