NO. 44376-7

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

LINDA DARKENWALD,

Respondent,

v.

STATE OF WASHINGTON,
EMPLOYMENT SECURITY DEPARTMENT,

Appellant.

APPELLANT'S RESPONSE BRIEF

ROBERT W. FERGUSON
Attorney General

Eric Sonju
WSBA No. 43167
Assistant Attorney General
P.O. Box 10110
Olympia, WA 98504-0110
(306) 664-2475

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I. INTRODUCTION

For eight years following a diagnosis with a neck and back impairment, Linda Darkenwald worked as a dental hygienist for three or four days per week. Ms. Darkenwald's employer, Dr. Gordon Yamaguchi, eventually permitted her to reduce her hours to two days per week, an arrangement suitable for both employer and employee. But when a second dentist joined the practice, increasing its workload substantially, Dr. Yamaguchi asked Ms. Darkenwald to resume working three days per week. Ms. Darkenwald refused the request and quit her job, making no mention to her employer of any purported physical impediment to working her former schedule.

The Commissioner of the Employment Security Department denied Ms. Darkenwald unemployment benefits. He concluded that she did not have good cause to quit her job because she did not prove that a disability prevented her from working three days per week, nor did she notify her employer of any limitation caused by a disability. The Thurston County Superior Court reversed the Commissioner's decision, and the Department appeals this decision. Because substantial evidence supports the Commissioner's findings of fact and his conclusions of law are free from error, the Department respectfully requests that the Court reverse the superior court's decision and affirm the Commissioner's decision.

II. STATEMENT OF THE ISSUES[1]

1. To determine a claimant's eligibility for benefits, the Department must first determine whether she quit or was discharged. Did the Commissioner properly conclude that Ms. Darkenwald quit her job where she declined a request to work three days per week and refused to work the remaining few weeks of her regularly-scheduled shifts, and when her employer wanted her to continue working for his practice?

2. Did the Commissioner properly conclude that, when asked to work three days per week, Ms. Darkenwald did not have good cause to quit due to a neck and back impairment where she had worked three or four days per week for eight years with the impairment and did not notify her employer before she quit that she believed that the impairment prevented her from working three days per week?

III. STATEMENT 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.[2] In 1998, 12 years before the end of her employment in 2010, Ms. 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. Ms. Darkenwald's ailment becomes aggravated if she works too much. AR at 19, 89; FF 6. She regularly takes medication and

[1] Ms. Darkenwald included a motion to dismiss in her opening brief. The Court Clerk sent a letter to the parties dated April 16, 2013, in which he stated that this motion to dismiss was premature and would not be considered. The Clerk informed Ms. Darkenwald that she could renew her motion after the Department files its response brief. In accordance with this direction, the Department will not provide a response in its brief to Ms. Darkenwald's motion to dismiss.

[2] The superior court transmitted the Administrative Record in this matter as a standalone document. *See* CP Index. The Administrative Record is separately paginated from the Clerk's Papers and, therefore, will be cited to in this brief as "AR."

visits a chiropractor and a massage therapist to manage the impairment. AR at 24, 89, FF 6, 7.

For eight years after this diagnosis, Ms. 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 switched to working two days per week, Monday and Wednesday, for a total of 14 to 17 hours a week, receiving a wage of 48 dollars per hour. AR at 15-16, 21, 89; FF 1, 3. Dr. Yamaguchi stated that the reduction to two days per week four years earlier was made so that Ms. Darkenwald could spend more time with her family. AR at 25, 62.

Dr. Yamaguchi's dental practice became significantly busier, growing from four to six work stations, after his son joined the practice as a dentist. AR at 25-26, 89, FF 10. Because of this increased workload, Dr. Yamaguchi had to hire substitute dental hygienists on 53 separate days and open his office on 16 Fridays in the seven months before Ms. Darkenwald left the practice. AR at 26, 89; FF 11.

Ultimately, Dr. Yamaguchi determined that he needed Ms. 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 Ms. Darkenwald to tell her 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 mention to Dr. Yamaguchi in

either their verbal or written communications the claim that she now makes 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.

Ms. 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 Ms. Darkenwald's subsequent application for unemployment benefits, determining that she had quit her job without good cause. AR at 48-52. After a hearing at the Office of Administrative Hearings (OAH), the Administrative Law Judge (ALJ) determined that Ms. 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 Ms. Darkenwald, was more logically persuasive (i.e., more credible). AR at 90; Conclusion of Law (CL) 1. Ms. 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. Ms. Darkenwald appealed to the Thurston County Superior Court, and the

judge reversed the Commissioner's decision. The Department filed this appeal.

IV. STANDARD OF REVIEW

Washington's Administrative Procedure Act (APA) governs judicial review of the Commissioner's decisions concerning eligibility for unemployment benefits. RCW 34.05.510; RCW 50.32.120. This Court sits in the same position as the superior court on review of the agency action under the APA and applies the APA standards directly to the administrative record. *Courtney v. Emp't Sec. Dep't*, 171 Wn. App. 655, 660, 287 P.3d 596, 598 (2012). The Commissioner's decision is prima facie correct. RCW 34.05.570(1)(a); Anderson v. Emp't Sec. Dep't, 135 Wn. App. 887, 893, 146 P.3d 475 (2006). Because Ms. Darkenwald sought review of the Commissioner's decision in the superior court, and pursuant to this Court's General Order 2010-1, Ms. Darkenwald has the burden of demonstrating the invalidity of the Department's decision. RCW 34.05.570(1)(a). The Court may grant relief only if "it determines that a person seeking judicial relief has been substantially prejudiced by the action complained of." RCW 34.05.570(1)(d).

The Court undertakes the limited task of reviewing the Commissioner's findings to determine, based solely on the evidence in the administrative record, whether substantial evidence supports those

findings. RCW 34.05.558; *Wm. Dickson Co. v. Puget Sound Air Pollution Control Agency*, 81 Wn. App. 403, 411, 914 P.2d 750 (1996). Unchallenged factual findings are verities on appeal. *Tapper v. Emp't Sec. Dep't*, 122 Wn.2d 397, 407, 858 P.2d 494 (1993).

Evidence is substantial if it is "sufficient to persuade a rational, fair-minded person of the truth of the finding." *In re Estate of Jones*, 152 Wn.2d 1, 8, 93 P.3d 147 (2004). The reviewing court is to "view the evidence and the reasonable inferences therefrom in the light most favorable to the party who prevailed" at the administrative proceeding below and may not re-weigh evidence, witness credibility, or demeanor. *Affordable Cabs, Inc. v. Dep't of Emp't Sec.*, 124 Wn. App. 361, 367, 101 P.3d 440 (2004); *Wm. Dickson Co.*, 81 Wn. App. at 411; *W. Ports Transp., Inc. v. Emp't Sec. Dep't*, 110 Wn. App. 440, 449, 41 P.3d 510 (2002).

The Court then determines de novo whether the Commissioner correctly applied the law to those factual findings. *Tapper*, 122 Wn.2d at 407. However, because the Department has expertise in interpreting and applying unemployment benefits law, the Court should afford substantial weight to the agency's decision. *Courtney*, 171 Wn. App. at 660.

Washington law states that a "court shall grant relief from an agency order in an adjudicative proceeding if it determines that ... the order is arbitrary and capricious." RCW 34.05.570(3)(i). When an order

is alleged to be arbitrary or capricious, the scope of review is narrow, and the challenger carries a heavy burden." *Brown v. Dep't of Health, Dental Disciplinary Bd.*, 94 Wn. App. 7, 16, 972 P.2d 101 (1998). An arbitrary and capricious action is a "willful and unreasoning action, without consideration and in disregard of facts and circumstances." *Heinmiller v. Dep't of Health*, 127 Wn.2d 595, 609, 903 P.2d 433 (1995). In order to find that an order is arbitrary and capricious, it is not enough for the court to simply conclude that a Commissioner's decision is erroneous. Rather, the court must find that the Commissioner's decision was made in willful disregard of the facts and circumstances of the case. *Id.*

V. ARGUMENT

This Court should affirm the Commissioner's decision because substantial evidence supports its findings of fact and its conclusions of law are free from error. The Employment Security Act ("the Act") "shall be liberally construed for the purpose of reducing *involuntary* unemployment and the suffering caused thereby to a minimum." RCW 50.01.010 (emphasis added). As such, the burden is on the claimant to establish her right to benefits under the Act, and this burden of proof never shifts during the course of proceedings. *Townsend v. Emp't Sec. Dep't*, 54 Wn.2d 532, 534, 341 P.2d 877 (1959); *In re Anderson*, 39 Wn.2d 356, 365, 235 P.2d 303 (1951). The Act requires the Department to analyze the facts of each

case to determine what actually caused the employee's separation. *Courtney*, 171 Wn. App. at 661 (internal citation omitted). Liberal construction of the Act does not require payment of benefits to a claimant who was responsible for her own separation from employment.

Ms. Darkenwald chose to end her employment. She could have continued working for her employer, and her employer had no desire for the employment relationship to end. The Commissioner correctly determined that Ms. Darkenwald voluntarily quit her job, not that she was discharged.

The Commissioner also properly concluded that Ms. Darkenwald did not have good cause for quitting. She did not carry her burden of proving that a disability made it necessary for her to quit, that she notified her employer of any disabling condition, or that a disability was her primary reason for quitting.

Nor did Ms. Darkenwald have good cause to quit on the ground that she was "vested" as a part-time worker and entitled to quit rather than accept full-time work. The good cause reasons for quitting are strictly limited to those found in RCW 50.20.050, and this part-time worker concept is not included therein. *Campbell v. Dep't of Emp't Sec.*, No. 42631-5-II, slip. op. at 5, 297 P.3d 757, 760 (Wash. Ct. App. March 26, 2013).

Finally, Ms. Darkenwald did not have good cause to quit on the grounds that her employer reduced her hours by 25 percent or more. RCW 50.20.050(2)(b)(vi). She was asked to work more hours, not fewer. She was offered an on-call position as an alternative, but she did not accept it. She never experienced a reduction in hours, and her assumption that she would have if she served as a substitute is irrelevant and based on unreasonable speculation.

Ms. Darkenwald was not involuntarily unemployed through no fault of her own. The Commissioner properly recognized this and denied her unemployment benefits. This Court should affirm this decision.

A. Ms. Darkenwald Voluntarily Quit Her Job

To determine whether an individual is at fault for her unemployment and therefore disqualified from receiving benefits, the Employment Security Act first requires a determination of whether the person voluntarily quit her job or was discharged. *Safeco Ins. Cos. v. Meyering*, 102 Wn.2d 385, 389, 687 P.2d 195 (2012). Properly characterizing a job separation presents a mixed question of law and fact. *Id.* at 390. Determining whether an employee voluntarily quit turns on whether the employee "intentionally terminated her own employment or committed an act that the employee knew would result in discharge." *Courtney*, 171 Wn. App. at 661 (internal citation omitted). How the

parties characterize the separation is not determinative because the facts that caused the unemployment control which law applies. *See Read v. Emp't Sec. Dep't*, 62 Wn. App. 227, 233, 813 P.2d 1262 (1991).

Substantial evidence supports the Commissioner's determination that Ms. Darkenwald voluntarily quit her job. Ms. Darkenwald decided to stop working for Dr. Yamaguchi because she did not want to increase her workweek from two to three days. AR at 89-90, FF 14-17. Ms. Darkenwald and Dr. Yamaguchi both testified that, on July 28, 2010, the latter asked the former to begin working three days per week. AR at 22, 26-27. Both testified that Ms. Darkenwald refused this request. *Id.*

Ms. Darkenwald testified that she was scheduled to work her regular schedule of two days per week until August 23, 2010 but that "it was just so emotional and so upsetting" and she "needed to end it then." AR at 24, 34. She also stated in a letter sent to Dr. Yamaguchi on August 2, 2010 that she was declining to work through August 23, 2010. AR at 61. Dr. Yamaguchi responded with a letter stating that Ms. Darkenwald was not fired and he did not consider her to be fired at any point. AR at 26, 62. He said that he hoped that she would continue working with the practice as a substitute if she chose not to work three days per week. AR at 27, 62.

Viewing this evidence and the reasonable inferences therefrom in the light most favorable to the Department, the evidence is sufficient to lead a rational, fair-minded person to believe the Commissioner's finding that Ms. Darkenwald ended her employment after declining a request to lengthen her workweek to three days. The testimony of Ms. Darkenwald and Dr. Yamaguchi differed on certain material points, but the Commissioner adopted the ALJ's express credibility determination that Dr. Yamaguchi's testimony was more logically persuasive on conflicting points. AR at 90, 114; CL 1. The court cannot reweigh credibility or demeanor evidence when reviewing factual inferences made by the Commissioner. *Affordable Cabs*, 124 Wn. App. at 367. Furthermore, the Court must uphold the Commissioner's findings even if the evidence is conflicting and could lead to other reasonable interpretations. *Fred Hutchinson Cancer Research Ctr. v. Holman*, 107 Wn.2d 693, 713, 732 P.2d 974 (1989).

Ms. Darkenwald could have continued working for Dr. Yamaguchi; it was entirely up to her. She could have chosen to work for three days per week or as a substitute. AR at 61. She was also scheduled to work her normal schedule of two days per week for several more weeks but decided that she "needed to end it then." AR at 24, 34. Ms. Darkenwald intended to end the employment relationship, Dr. Yamaguchi

did not. Importantly, Dr. Yamaguchi had no desire for Ms. Darkenwald to stop working for his practice. AR at 62. He wanted her to work three days per week or serve as a substitute. *Id.*

Instead, Ms. Darkenwald refused any change to her schedule and then refused to continue working for Dr. Yamaguchi altogether. Ms. Darkenwald may argue that she had good cause to quit because of a change in her hours, but it does not change the fact that she quit in the first place. The Commissioner thus properly concluded that Ms. Darkenwald voluntarily quit her job.

B. The Commissioner Properly Determined That Ms. Darkenwald Did Not Have Good Cause for Quitting Based On A Disability

To be eligible for unemployment benefits under RCW 50.20.050(2), a claimant who voluntarily quit her job has the burden of showing that 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). RCW 50.20.050(2)(a); *Campbell v. Dep't of Emp't Sec.*, No. 42631-5-II, slip. op. at 5, 297 P.3d 757, 760 (Wash. Ct. App. March 26, 2013).

Ms. Darkenwald argues that she had good cause to quit because a physical disability prevented her from working more than two days a

week. 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). The Commissioner properly concluded that Ms. Darkenwald did not satisfy these requirements.

1. **Ms. Darkenwald's impairment was not the primary reason that she quit nor did it make it necessary for her to quit.**

To prove good cause, Ms. Darkenwald is required to show that she left work primarily because of her neck and back impairment and the impairment made it necessary for her to quit. WAC 192-150-055(1); RCW 50.20.050(2)(b)(ii). The Commissioner correctly concluded that she established neither.

Ms. Darkenwald never mentioned in her communications with Dr. Yamaguchi that her impairment physically prevented her from increasing her workweek to three days. AR at 22, 28, 61, 63. She also did not mention the limitation imposed by her neck and back problem in her initial

written application for unemployment benefits. AR at 53-58. Dr. Yamaguchi's stated that Ms. Darkenwald objected to lengthening her workweek, not because of any physical condition, but because doing so would negatively impact her lifestyle, including the time she was able to spend with her family. AR at 25, 62. Ms. Darkenwald's silence and Dr. Yamaguchi's understanding of her motivations support the conclusion that her neck and back problem was not the primary reason for quitting.

The Commissioner also correctly determined that Ms. Darkenwald did not prove that her impairment made it necessary to leave her job. AR at 92; CL 9. Ms. Darkenwald had worked for three or four days per week in the eight years following her 1998 diagnosis. AR at 20-21, 88-89; FF 2. Ms. Darkenwald failed to explain what had changed in 2010 that prevented her from working three days per week, as she had previously.

Moreover, Dr. Yamaguchi had no knowledge that her impairment limited her to working two days per week. He testified, "I don't understand, you know, the timing for the back treatment, if that was an issue as she stated. She worked different hours up to 2006. But it was ten years before that when the claim for her back was, you know, submitted." AR at 25. The Commissioner found Dr. Yamaguchi's account to be more logically persuasive and correctly determined that Ms. Darkenwald had not carried her burden of showing that her condition made it necessary for

her to quit. This resolution of the conflicting evidence should not be disturbed on appeal.

2. Ms. Darkenwald did not exhaust all reasonable alternatives before quitting because she did not notify her employer of any limitations imposed by a disabling condition.

To exhaust all reasonable alternatives, a claimant is directed by rule to do as follows: "[Y]ou 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." WAC 192-150-060(1). "If your employer offers you alternative work or otherwise offers to accommodate your disability, you must demonstrate good cause to refuse the offer." WAC 192-150-060(4).

Ms. Darkenwald failed to satisfy these requirements. She did not notify Dr. Yamaguchi of her claim that her neck and back impairment would prevent her from working three days per week. Ms. Darkenwald did not testify during the OAH hearing that she informed Dr. Yamaguchi of any physical limitation before she quit. AR at 22. Nor did she mention the purported limitation caused by her impairment in her August 2, 2010 letter to Dr. Yamaguchi or in her reply letter of August 8, 2010. AR at 61, 63. She also did not mention any limitation imposed by her neck and back

problem in her initial written application for unemployment benefits. AR at 53-58.

When asked during the hearing whether Ms. Darkenwald explained why she would not work three days per week, Dr. Yamaguchi said, "Well, she didn't say it was her back at that time, or anything (unintelligible). She didn't say her neck, which the medication was for recently. She didn't say (unintelligible) – she didn't say anything along that line." AR at 28.

In his response to a letter left for him by Ms. Darkenwald shortly after she quit, Dr. Yamaguchi wrote, "You stated at this period of your life that an increase to three days would not be possible. . . . Over the past years you have requested and I have accommodated to reduced number of days per week. From four, to three, and now two days. This had worked for both of us, allowing you to spend time and balance for your family and grand children [sic]." AR at 62.

The evidence establishes that Ms. Darkenwald did not notify Dr. Yamaguchi of any physical limitation that prevented her from working three days per week and Dr. Yamaguchi was not otherwise aware of any such limitation. Accordingly, the Commissioner properly concluded that Ms. Darkenwald did not exhaust all reasonable alternatives because she

did not notify her employer of any disabling condition before quitting. She is thus ineligible for benefits on this basis alone.

3. It would not have been a futile act for Ms. Darkenwald to inform her employer of her disabling condition before quitting.

An individual "may be excused from failure to exhaust reasonable alternatives prior to leaving work . . . if [she] can show that doing so would have been a futile act." WAC 192-150-055(3); *see also* RCW 50.20.050(2)(b)(ii)(A). If Ms. Darkenwald had informed Dr. Yamaguchi of her claim that her impairment would prevent her from working three days a week, he would have had an opportunity to provide an accommodation. Ms. Darkenwald did not establish that providing this notice would have been a futile act.

Ms. Darkenwald argues that it would have been futile because Dr. Yamaguchi knew that her impairment prevented her from working three days per week but made a non-negotiable decision that she was to do so. Respondent's Br. at 25-26. This is false and not supported by the record. Dr. Yamaguchi was not aware of any physical limitation that prevented Ms. Darkenwald from working three days per week and he had a history of accommodating her scheduling requests.

Dr. Yamaguchi did not decide to increase Ms. Darkenwald's hours knowing that she physically would not be able to work three days per

week. At the time he sought to increase Ms. Darkenwald's hours, Dr. Yamaguchi was aware of her diagnosis with an impairment back in 1998, but he was completely unaware of Ms. Darkenwald's belief that this impairment would prevent her from working three days per week in 2010. This is clear from his testimony: "I don't understand, you know, the timing for the back treatment, if that was an issue as she stated. She worked different hours up to 2006. But it was ten years before that when the claim for her back was, you know, submitted." AR at 25. Dr. Yamaguchi's belief that Ms. Darkenwald was able to work more hours is supported by the fact that, as Dr. Yamaguchi alluded to, Ms. Darkenwald had worked for three or four days a week for eight years *after* being diagnosed with her impairment. AR at 16, 21, 88-89; FF 3.

Dr. Yamaguchi understood that Ms. Darkenwald's impairment did not prevent her from working three days per week and that past changes in her schedule were due to family reasons, not physical ones. He did not make his decision to increase her hours already knowing that she would not be able to work more. Ms. Darkenwald was obligated to inform him of any physical limitations that prevented her from working more hours; to do so would not have been futile.

Furthermore, Dr. Yamaguchi's history of accommodating Ms. Darkenwald's requests to change her schedule also establishes that it

would not have been futile for Ms. Darkenwald to provide notice of her impairment to him before quitting. Shortly after she quit, Dr. Yamaguchi wrote to Ms. Darkenwald, "Over the past years you have requested and I have accommodated to reduced number of days per week. From four, to three, and now two days. This had worked for both of us, allowing you to spend time and balance for your family and grand children [sic]." AR at 62. And he testified, "[A]long the way I tried my best to accommodate her life schedule, she was important. She went from one to four to three to two [days per week]." AR at 27. Ms. Darkenwald has not shown that Dr. Yamaguchi would not have provided an accommodation for the compelling reason of a physical disability.

Ms. Darkenwald has not and cannot prove that it would have been futile to explain to Dr. Yamaguchi that she believed that her impairment would have prevented her from working three days per week, as required under WAC 192-150-055(3) and RCW 50.20.050(2)(b)(ii)(A). Ms. Darkenwald was required to inform him of her disabling condition to allow him the opportunity to accommodate it. The Commissioner correctly determined that she failed to do so and is thus ineligible for unemployment benefits.

C. Ms. Darkenwald did not have good cause to quit on the ground that she was a part-time worker who was asked to work a full-time schedule.

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 v. Dep't of Emp't Sec.*, No. 42631-5-II, slip. op. at 5, 297 P.3d 757, 760 (Wash. Ct. App. March 26, 2013). These reasons do not include being asked to work three days per week instead of two. Ms. Darkenwald attempts to add another good cause provision to the list in RCW 50.20.050(2)(b). The Commissioner correctly rejected this effort.

The Employment Security Act, Chapter 50 RCW, imposes numerous requirements on an unemployed individual who seeks benefits. One of these requirements is that, if the individual voluntarily quit her job, she must have done so for one of the good cause reasons listed in RCW 50.20.050(2)(b). This requirement focuses on the reason for the job separation. It is discussed above in the context of Ms. Darkenwald's decision to quit her job.

Another requirement for receiving benefits is that, after quitting and becoming unemployed, "[a]n 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). Generally, "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." If the individual does not apply for or accept suitable work, which includes full-time work, then she is disqualified from benefits. RCW 50.20.010(1)(c); RCW 50.20.080; WAC 192-170-010.

Under these provisions alone, if an unemployed individual searches for and makes herself available only for part-time work, she would be disqualified from receiving unemployment benefits. But the legislature enacted RCW 50.20.119 to provide otherwise. That section 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.

RCW 50.20.119; *see also* WAC 192-170-070(1).

This part-time worker provision relates only to whether an individual is considered to be available for work once she has become unemployed 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 Ms. Darkenwald voluntarily quit her job, she must first establish her eligibility under the voluntary quit statute, RCW 50.20.050(2)(b). This is not reading into the statute, as Ms. Darkenwald argues. It is a plain reading *of* the statute.

An *unemployed* individual is eligible for benefits only if she is available for work. As the statute says, "An *unemployed* individual shall be eligible to receive waiting period credits or benefits with respect to any week in his or her eligibility period only if the commissioner finds that: . . . (c) He or she is able to work, and is available for work . . . ." RCW 50.20.010(1) (emphasis added). The other provisions noted above make it clear that, to be "available for work," an unemployed individual must search for and be willing to accept full-time work. If not, that individual is disqualified from benefits under RCW 50.20.010(1)(c) and RCW 50.20.080.

But, under 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. Ms. Darkenwald strains to attach significance to the use of the present-tense in this provision. 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.

As this Court recently held in *Campbell*, "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 v. Dep't of Emp't Sec.*, No. 42631-5-II, slip. op. at 5, 297 P.3d 757, 760 (Wash. Ct. App. March 26, 2013). Ms. 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.

D. The Commissioner properly determined that Ms. Darkenwald did not have good cause to quit because of a 25 percent reduction in her usual compensation or hours.

Under RCW 50.20.050(2)(b)(v) and (vi), an individual has good cause to quit if her usual compensation or hours were reduced by 25 percent or more. Here, Ms. Darkenwald quit after being asked to work more hours. Thus, the Commissioner correctly concluded that she did not have good cause to quit on these grounds.

RCW 50.20.050(2)(b)(vi) plainly states that an individual has good cause if her "usual hours were reduced by twenty-five percent or more." An increase from two days to three days per week is not the reduction required by this provision. In addition, WAC 192-150-115 and WAC 192-150-120 require that the reduction in compensation or hours must have been caused by the employer. Here, Dr. Yamaguchi offered an increase in hours.

Furthermore, Ms. Darkenwald's usual compensation and hours were never in fact reduced by 25 percent. She was scheduled to work two days per week until August 23, 2010, but she chose to quit on August 2, 2010. AR at 34, 90; FF 17. At no point were her compensation and hours reduced.

Her argument that her hours inevitably would have been reduced if she took a substitute position is merely speculative and not adequate to satisfy her burden of showing a reduction. "[G]ood cause must be based upon existing facts as contrasted to conjecture . . . ." *Korte v. Emp't Sec. Dep't*, 47 Wn. App. 296, 302, 734 P.2d 939 (1987). Nothing in the record outside of Ms. Darkenwald's self-serving predictions establishes that as a substitute she would not be able to work and earn more than 75 percent of what she worked and earned before. To the contrary, Dr. Yamaguchi testified that he had hired substitute dental hygienists on 53 separate days and opened his office on 16 Fridays in the seven months before Ms. Darkenwald left the practice. AR at 26, 89; FF 11.

In her brief, Ms. Darkenwald points to Dr. Yamaguchi's testimony that he had brought in four separate temporary substitute hygienists to work those days. Respondent's Br. at 41. She then assumes that Ms. Darkenwald necessarily would be one of four substitutes and would only work roughly 13 days per year. The arithmetic may not be difficult, but the equation is wrong. Ms. Darkenwald assumes that Dr. Yamaguchi would continue to use four separate hygienists and not provide her the opportunity to work more than her one-quarter share, as if this is somehow preferable for Dr. Yamaguchi. But the very reason that Dr. Yamaguchi sought to change Ms. Darkenwald's hours was that he could no longer

tolerate hiring four different substitute hygienists. As he testified, "I have to not have four different temporary substitute hygienists come here." AR at 27. If any assumption is to be made, it would be that Dr. Yamaguchi would have been happy to have Ms. Darkenwald work as many of the substitute days as she liked rather than split them with three other hygienists.

Ms. Darkenwald's assumption that she would experience a 25 percent reduction in hours or compensation is based on unreliable speculation. More importantly, her hours and compensation were never, in fact, reduced. The Commissioner correctly concluded that she did not have good cause to quit her job on this basis.

VI. CONCLUSION

Because Ms. Darkenwald failed to establish that she had good cause for quitting her job, the Department respectfully requests that this Court affirm the Commissioner's decision finding Ms. Darkenwald ineligible for unemployment compensation.

RESPECTFULLY SUBMITTED this 3rd day of June, 2013.

ROBERT W. FERGUSON
Attorney General

for WSBA No. 25,159

ERIC A. SONJU
WSBA # 43167
Assistant Attorney General
Attorneys for Respondent

PROOF OF SERVICE

I, Rachel M. Gibbons, certify that I caused a copy of this document, **Appellant's Response Brief,** to be served on all parties or their counsel of record by Email Service on the date below and as follows to:

Edward E. Younglove III
P.O. Box 7846
Olympia, WA 98507-7846
edy@ylclaw.com

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

DATED this 3 day of June, 2013, at Olympia, WA.

RACHEL M. GIBBONS, Legal Assistant

WASHINGTON STATE ATTORNEY GENERAL

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