NO. 91031-6

SUPREME COURT OF THE STATE OF WASHINGTON

JON C. JAMES,

Petitioner,

v.

WASHINGTON STATE EMPLOYMENT SECURITY DEPARTMENT,

Respondent.

EMPLOYMENT SECURITY DEPARTMENT'S ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

An individual who leaves work voluntarily without good cause is disqualified from unemployment benefits. The Commissioner of the Employment Security Department correctly applied the plain language of the applicable statute and determined Jon James did not have good cause to quit. Although James alleged that he quit due to deteriorated safety of, and illegal activities in his worksite, he quit without reporting these alleged conditions to his employer or allowing a reasonable amount of time for his employer to address the conditions.

The Court of Appeals correctly affirmed the Commissioner's decision and rejected James's additional arguments on appeal. James could not raise the issue of "conditional benefits" on appeal because he did not raise it below. And, contrary to James's arguments, the Department did not improperly include certain documents in the administrative record.

Review by this Court is not warranted under any of the reasons in RAP 13.4(b). James appears to argue that review is warranted because his petition involves an issue of substantial public interest that this Court should determine. RAP 13.4(b)(4). It does not. The Commissioner properly applied the plain language of RCW 50.20.050, the voluntary quit statute, to the specific and straightforward facts of James's case. The Department respectfully asks the Court to deny review.

II. COUNTERSTATEMENT OF THE ISSUES

The issues raised in James'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 Commissioner properly conclude that James did not establish good cause to quit under RCW 50.20.050(2)(b)(viii) or (ix) because he quit without reporting any alleged safety hazards or illegal activities to his employer or allowing a reasonable amount of time for his employer to end the activities?

2. Did the Court of Appeals appropriately decline to address James's argument that the Department improperly denied him "conditional benefits" because he did not raise the issue before the agency?

3. Did the Department correctly include a document titled "Expert Fact Finding" in the agency record where the APA requires the record to include all evidence received and the document's inclusion did not otherwise prejudice James?

III. COUNTERSTATEMENT OF THE CASE

Jon James quit his job as a general laborer for Ace Landscaping after working for three weeks. Commissioner's Record (CR) at 38-39, 135; Finding of Fact (FF) 6. He quit because he believed that his employer had violated the law by not allowing him scheduled rest periods. CR at 43, 47-48, 73, 135; FF 7. James's job duties did not require him to engage in continuous labor; his work involved frequent changing of tasks

and tools. CR at 51-52, 62-63, 148. In a 10-hour workday, he had five 10- to 15-minute periods of downtime. *Id.*

Before he quit, James did not notify his supervisor or employer of his concern over the employer's allegedly illegal practice of not providing scheduled breaks. CR at 43-44, 52, 55, 63-64, 66-67, 135, 150; FF 8. He told some of his coworkers that he was quitting because he "wasn't going to take anymore," but said nothing to his supervisor or employer and made no effort to find an alternative to quitting. *Id.*

James also claims that he quit because of certain safety issues on the worksite. CR at 41-42, 45- 48, 73, 135; FF 7. Specifically, sometime prior to the day James quit, two of his coworkers rode in the bucket of a front loader on the worksite, and the crew installed an incorrect valve in an irrigation system. CR at 45-46, 56-57, 135; FF 7. The job superintendent reprimanded the employees who rode in the front loader, and the employer installed the correct valve when it learned of its error upon inspection. CR at 56-57, 84, 135, 148; FF 9. James never reported these issues to his employer before he quit; the employer had already resolved them. *Id.*

James filed a claim for unemployment benefits, which the Employment Security Department denied on the grounds that he quit without good cause. CR at 116-19. James appealed, and, after a hearing in the Office of Administrative Hearings, an administrative law judge

issued an initial order affirming the Department's decision. CR at 134-38. James then filed a petition for review with the Department's Commissioner, who issued a decision adopting and augmenting the administrative law judge's findings of fact and conclusions of law.

The administrative law judge and the Commissioner made express findings that the employer's testimony was more credible than that of James and resolved conflicting testimony in the employer's favor. CR at 135, 149; FF 5. The Commissioner concluded that James did not have good cause to quit his job because he failed to notify his employer of alleged illegal activity before he quit, failed to provide his employer a reasonable period of time to address the activity before he quit, and failed to prove that illegal activities in fact took place. CR at 150. The Commissioner also determined that James did not notify his employer of any unsafe working conditions and that the conditions cited by James were remedied before he quit. *Id.*

James appealed to Thurston County Superior Court, which affirmed the Commissioner's decision. James then appealed to the Court of Appeals. In an unpublished decision made without oral argument, the Court upheld the Commissioner's findings as being supported by substantial evidence and affirmed the Commissioner's determination that James was disqualified from benefits because he did not report worksite

hazards or illegal activities to his employer before he quit. *James v. Emp't Sec. Dep't*, No. 44714-2-II, slip op. at 5 (Wash. Ct. App. Sept. 23, 2014). The Court also declined to consider James's argument concerning conditional benefits because he had not raised it before the agency. *Id.* at 3. Finally, the Court rejected James's argument that the "Expert Fact Finding" documents were not disclosed to the administrative law judge or Commissioner because, in fact, the documents were included in the administrative record. *Id.* at 4. James now petitions this Court for review.

IV. REASONS WHY REVIEW SHOULD BE DENIED

Although James does not address RAP 13.4 in his petition, he appears to argue that the Court should accept review under RAP 13.4(b)(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." James presents no such issue in his petition.

As the Department will show, the Commissioner correctly applied the plain language of the voluntary quit statute, RCW 50.20.050(2)(b), to determine that James did not establish good cause for quitting work and was therefore disqualified from receiving unemployment benefits. James's only argument appears to be, essentially, that the statute's requirement that an individual report any illegal activity or safety hazards

before quitting is unfair. It is for the legislature to address James's concern, not the Court. The Court should deny review because the Commissioner's proper application of the plain language of the voluntary quit statute raises no issue of substantial public concern.

The Court should likewise deny review of the other issues James puts forward. James did not raise the issue of conditional benefits before the agency below and cannot raise it on appeal. Although James argues that it is of public concern that the Department allegedly withheld certain "fact finding statements" from him, he has shown no legal error and had ample opportunity to cross-examine his former employer's evidence in the administrative hearing. None of these issues is one of substantial public importance that should be determined by this Court. The Court should deny review.

A. The Commissioner Correctly Determined that James Did Not Have Good Cause Under the "Worksite Safety" or "Illegal Activities" Provisions Because He Did Not Report Any Problematic Conditions to His Employer Before He Quit

The legislature enacted the Employment Security Act to provide compensation to individuals who are involuntarily unemployed "through no fault of their own." RCW 50.01.010; *Courtney v. Emp't Sec. Dep't*, 171 Wn. App. 655, 660, 287 P.3d 596 (2012). As such, a person is ineligible to receive unemployment benefits if he "left work voluntarily

without good cause." RCW 50.20.050(2)(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 he 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).

James argued below that he had good cause to quit his job under the "worksite safety" and "illegal activities" provisions of the voluntary quit statute. *See* RCW 50.20.050(2)(b)(viii) & (ix). The "worksite safety" provision directs that an individual has good cause to quit his job if his "worksite safety deteriorated, the individual reported such safety deterioration to the employer, and the employer failed to correct the hazards within a reasonable period of time." RCW 50.20.050(2)(b)(viii); WAC 192-150-130(2). The "illegal activities" provision similarly gives an individual good cause to quit if he "left work because of illegal activities in the individual's worksite, the individual reported such activities to the employer, and the employer failed to end such activities within a reasonable period of time." RCW 50.20.050(2)(b)(ix); WAC 192-150-135(2).

Common to both provisions is the requirement that, before he quits, an individual must first report the alleged safety hazards or illegal activities to his employer and allow a reasonable amount of time for the

employer to correct the conditions at issue. The Commissioner correctly found, based on the unequivocal and consistent testimony of the employer and James's supervisor, that James did not report any safety issues or illegal activities to them before he quit. CR at 52, 55, 63-64, 66-67, 135, 150; Finding of Fact (FF) 8. The Court of Appeals properly affirmed that substantial evidence in the record supports the Commissioner's factual finding. *James*, No. 44714-2-II, slip op. at 4-5. To the extent that James challenges this finding, the Commissioner made an express finding that the testimony of the employer's witnesses was more credible than James's testimony. CR at 135, 149; FF 5. Under the Administrative Procedure Act, chapter 34.05 RCW (APA), a reviewing court "will not substitute [its] judgment for that of the agency regarding witness credibility." *Smith v. Emp't Sec. Dep't*, 155 Wn. App. 24, 35, 226 P.3d 263 (2010) (internal citations omitted).

Substantial evidence supports the Commissioner's finding that James did not report to his employer any alleged safety hazards or illegal activities. Accordingly, by the plain language of RCW 50.20.050(2)(b)(viii) & (ix), James did not have good cause to quit and is disqualified from benefits.

In his petition, James's principle argument is that the pre-quit reporting requirement in the worksite safety and illegal activities

provisions is unfair because it requires a worker to suffer from or even themselves commit safety violations and illegal activities before they quit. That is not the case. First, the Department has provided by rule that the reasonable period of time an individual must provide his employer to correct illegality or safety hazards is the amount of time a reasonably prudent person would continue to work under the conditions. WAC 192-150-130(2)(b); -135(4). Accordingly, if exceptionally egregious conditions exist on the worksite, an individual would have good cause to quit promptly after notifying his employer.

The Department has also clarified by rule that, "[f]or health or safety issues that present imminent danger of serious bodily injury or death to any person, [an individual's] employer must take immediate steps to correct the situation." WAC 192-150-130(2)(b)(i). "Serious bodily injury" means "bodily injury which creates a probability of death, or which causes serious permanent disfigurement, or which causes a significant loss or impairment of the function of any bodily part or organ whether permanent or temporary." WAC 192-150-130(2)(c). James provided no evidence of any such serious danger.

And an individual need not report illegality before quitting if his "employer is conducting the illegal activity and notifying [his] employer could jeopardize [his] safety or is contrary to other federal and state laws

(for example, whistleblower protection laws)." WAC 192-150-135(2). James has put forth no evidence or argument showing that notifying his employer of its alleged failure to provide scheduled rest periods jeopardized his safety or was contrary to the law. He makes only a passing argument that the reporting requirement violates the 14th Amendment without any further analysis. Courts do not consider issues presented with only "[p]assing treatment . . . or lack of reasoned argument." *Holland v. City of Tacoma*, 90 Wn. App. 533, 538, 954 P.2d 290 (1998), as amended (May 22, 1998) (internal citation omitted).

In sum, this case involves a straightforward application of unambiguous statutory language to straightforward facts. It does not involve an issue of substantial public importance justifying further review by this Court.

B. The Court of Appeals Properly Declined to Consider James's Argument Concerning Conditional Benefits Because He Did Not Raise the Issue Before the Agency

Review of James's argument concerning conditional benefits is unwarranted. James raised this issue for the first time when he appealed to the Court of Appeals, arguing that the Department should have paid him conditional benefits under WAC 192-120-050. *James*, No. 44714-2-II, slip op. at 3. The Court of Appeals correctly declined to address his argument because he did not raise the issue during administrative

proceedings below. *Id.* This Court should likewise decline review of this issue because it is not one of the few kinds of issues that may be raised for the first time on appeal under the APA. *See* RCW 34.05.554.[1]

C. The Department Included the Document Titled "Expert Fact Finding" in the Agency Record in Accordance with the APA and Without Prejudice to James

Finally, the Court should decline review of James's arguments related to evidence he describes as "fact finding statements" from the employer. Although the nature of James's challenge is somewhat unclear, he appears to allege that the Department withheld certain evidence from him before his administrative hearing.

Before the superior court, James raised an issue with respect to a document in the "Miscellaneous" section of the agency record titled,

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[1] RCW 34.05.554 provides:

(1) Issues not raised before the agency may not be raised on appeal, except to the extent that:

(a) The person did not know and was under no duty to discover or could not have reasonably discovered facts giving rise to the issue;

(b) The agency action subject to judicial review is a rule and the person has not been a party in adjudicative proceedings that provided an adequate opportunity to raise the issue;

(c) The agency action subject to judicial review is an order and the person was not notified of the adjudicative proceeding in substantial compliance with this chapter; or

(d) The interests of justice would be served by resolution of an issue arising from:

(i) A change in controlling law occurring after the agency action; or

(ii) Agency action occurring after the person exhausted the last feasible opportunity for seeking relief from the agency.

(2) The court shall remand to the agency for determination any issue that is properly raised pursuant to subsection (1) of this section.

"Expert Fact Finding," which included notes regarding a Department staff member's telephone interview with James's former employer. CR at 169-71; Clerk's Papers at 38-58. Ultimately, James has shown no error with respect to the "Expert Fact Finding" document because, by statute, it was appropriately included in the agency record and the employer testified at the hearing to everything contained therein. *See* RCW 34.05.476(2)(d) ("[t]he agency record shall include: . . . evidence received or considered,"); CR at 51-52, 54-55, 62, 63, 65, 68, 169-71 (employer's testimony). James had an opportunity to cross-examine the employer's testimony and has put forth no argument establishing that including these pages in the record violated the APA or otherwise prejudiced him. This is not an issue of substantial public importance, and the Court should decline to review it.

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V. CONCLUSION

James's petition does not involve any issue of substantial public interest. The Department respectfully asks the Court to deny review.

RESPECTFULLY SUBMITTED this 21st day of January, 2015.

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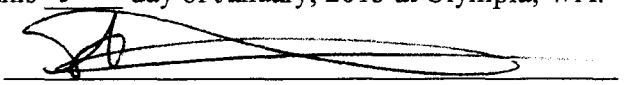

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