

NO. 37144-8-II

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**COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON**

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LINDA AMBLER, CAROL PEDEN, FRANCES TAGBO and  
CHERYL WATERS,

Appellants,

v.

STATE OF WASHINGTON, EMPLOYMENT SECURITY  
DEPARTMENT, ET AL.,

Respondents.

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DIVISION II  
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**BRIEF OF RESPONDENTS**

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## I. INTRODUCTION

While Appellants requests for reallocation were pending with the Human Resources Management (HRM) Branch of the Employment Security Department (ESD), ESD, as part of a reorganization, laid off 126 employees and eliminated a number of positions, including the positions occupied by Appellants. ESD denied the reallocation requests, but Appellants eventually won reallocation when the Personnel Appeals Board (PAB) issued its decision in March 2006. Consequently, ESD reallocated Appellants and provided back pay based on the higher salary from the date the reallocation requests were received by HRM to the date their positions were eliminated in the reduction in force (RIF) on June 30, 2004.

Appellants feel aggrieved by the unavoidable fact that the circumstances of their employment changed before they succeeded in their quest for reallocation and the positions to which they wanted to be allocated no longer existed after June 30, 2004. Although they feel that an injustice has been done,

there is no legally cognizable wrong or injury from the fact that their jobs went away. They received all the rights they were due in the positions they had at the time of the RIF.

## **II. COUNTERSTATEMENT OF ISSUES ON APPEAL**

1. Whether the superior court correctly ruled that the effective date of Appellants' reallocation was March 17, 2003, the date their classification questionnaires were received by the HRM Branch of ESD, when the applicable regulation in effect at the time, WAC 356-10-050(6), stated that the effective date of a reallocation is the earliest date that a copy of the classification questionnaire is received by the agency's personnel office.
2. Whether the superior court correctly ruled that Appellants are not entitled to any additional compensation from the fact that their positions were eliminated in a RIF before they were reallocated, because such a remedy could not be established by a

reasonable basis and would require the court to engage in speculation and conjecture.

### **III. COUNTERSTATEMENT OF THE CASE**

On March 17, 2003, Appellants, who were trainers in the Unemployment Insurance (UI) Division of the ESD, submitted Classification Questionnaires (CQ) to the ESD's Human Resources Management Branch seeking reallocation from an Employment Security Program Coordinator 2 (ESPC 2) to an Employment Security Program Coordinator 3 (ESPC 3). CP at 25, 47, 51, 55, 59, 63, 67, 89, 92.

On June 30, 2004, ESD implemented an agency-wide Reduction in Force (RIF) that resulted in the lay off of 126 employees and the elimination of certain positions, including Appellants. CP at 41-42.

After some months of discussion with UI Division management regarding the duties of the position, on September 30, 2004, the Human Resources Administrator provided written responses denying the reallocation requests. CP at 47-70.

Appellants appealed ESD's decision to the Department of Personnel (DOP) on November 1, 2004. An allocation review hearing was held on April 11, 2005, by DOP Hearings Officer Paul L. Peterson. On May 26, 2005, Mr. Peterson entered a written determination that Appellants' positions should be reallocated to ESPC 3. CP at 71-73.

ESD appealed DOP's decision to the Personnel Appeals Board. CP at 74-78. The PAB affirmed DOP's determination on March 24, 2006. CP at 81-86.

Consequently, ESD reallocated the six positions to ESPC 3, and back pay was awarded to Appellants for 15 months, from March 17, 2003 to June 30, 2004, when the positions were eliminated. CP at 87-88, 96-97.

#### IV. ARGUMENT

**A. The Trial Court Correctly Held That The Effective Date Of A Reallocation Is The Date The Classification Questionnaire Is Received By The Agency's Personnel Office.**

WAC 356-10-050(6), in effect until July 1, 2005, provided:

For positions reallocated by agencies under their delegated allocation authority, the effective date of an incumbent's appointment status as provided for in subsection (2) or (5) of this section will be the earliest date that a copy of the classification questionnaire is received by the agency's personnel office or by the department of personnel.

CP at 215.

There is no dispute that Appellants' classification questionnaires were received by the agency's personnel office on March 17, 2003. CP at 25, 47, 51, 55, 59, 63, 67, 89, 92. Accordingly, ESD calculated the back pay correctly when it used the March 17, 2003, date as the beginning date of Appellants' allocation to the higher classification.

**B. The Trial Court Correctly Held That There Is No Remedy Available To Appellants For The RIF That Occurred Before They Successfully Appealed The Denial Of Their Reallocation Requests.**

WAC 356-10-060(8), the Merit System Rule in effect at the time relevant to this case, provided:

Wherever possible, agencies shall continue employee's duties unchanged, pending an allocation decision.

CP at 215. Thus, ESD was required to maintain Appellants in their ESPC 2 positions until the final outcome of the allocation decision. All RIF rights and options are determined for impacted employees using their class, status and seniority in effect at the time of the RIF. CP at 40. At the time of the RIF, Appellants were ESPC 2s and had to be treated as such in the RIF. Because the call centers were closed, their positions were eliminated. The positions would have been eliminated no matter what level within the ESPC classification Appellants occupied at the time. CP at 42.

Nevertheless, Appellants claim that they were injured because of a later reallocation decision that entitled them to a retroactive salary adjustment. They seek additional compensation at the higher salary level for some time period after their positions were eliminated on the grounds that they would have had different lay off options if they had been reallocated before June 30, 2004.

However, subjective, self-serving characterizations are insufficient to establish damages. “Evidence or proof of damages must be established by a reasonable basis, and must not subject the trier of fact to mere speculation or conjecture.” *ESCA Corp. v. KPMG Peat Marwick*, 86 Wn. App. 628, 641, 939 P.2d 1228 (1997), *aff’d*, 135 Wn.2d 820, 959 P.2d 651 (1998). Any statements made by Appellants regarding the RIF options as an ESPC 3 would be speculative and self-serving at best. *See ESCA Corp.*, 86 Wn. App. at 639. There is no reasonable basis on which to fashion any “remedy.”

Moreover, ESD had a RIF in 2005 and again in 2006. There is no guarantee that any of the Appellants would not have ended up in worse positions if they had been laid off in 2004 as ESPC 3s, took one of the available options, and then been laid off again in 2005 or 2006. Thus, any award of additional compensation would result in a windfall. A party should not recover any windfall in the award of damages. *Pepper v. J.J. Welcome Const. Co.*, 73 Wn. App. 523, 543-44, 871 P.2d 601

(1994), *review denied*, 124 Wn.2d 1029, 883 P.2d 326 (1994);  
1 Dan B. Dobbs, *Remedies* § 3.1, at 280 (2d ed. 1993).

Because the 2004 RIF did not cause a “wrong” or “injury” to Appellants, and any claims as to how they had been allegedly “wronged” would be conjecture and speculation, the superior court correctly granted summary judgment to ESD.

**C. The Court Should Not Consider Appellants’ Claim Of Denial Of Due Process, Raised For The First Time In Their Appeal Brief.**

**1. Appellants have not shown manifest error of constitutional magnitude meriting review.**

Appellants raise new issues on appeal. Appellants now claim a denial of due process. This issue was neither pled nor raised below and there is no record related to the many allegations of denial of due process set forth in their brief.

The general rule is that appellate courts will not consider issues raised for the first time on appeal. RAP 2.5(a); *State v. Kirkman*, 159 Wn.2d 918, 926, 155 P.3d 125 (2007); *State v. Tolia*, 135 Wn.2d 133, 140, 954 P.2d 907 (1998); *State v. McFarland*, 127 Wn.2d 322, 332-33, 899 P.2d 1251 (1995).

Nevertheless, a claim of error may be raised for the first time on appeal if it is a manifest error affecting a constitutional right. RAP 2.5(a)(3); *Kirkman*, 159 Wn.2d at 926; *State v. Walsh*, 143 Wn.2d 1, 7, 17 P.3d 591 (2001); *Tolias*, 135 Wn.2d at 140. However, the error must be “manifest” and truly of constitutional dimension. *Kirkman*, 159 Wn.2d at 926; *State v. WWJ Corp.*, 138 Wn.2d 595, 602, 980 P.2d 1257 (1999).

Exceptions to RAP 2.5(a) are construed narrowly. *WWJ Corp.*, 138 Wn.2d at 603. “Manifest” in RAP 2.5(a)(3) requires a showing of actual prejudice. *Walsh*, 143 Wn.2d at 8; *McFarland*, 127 Wn.2d at 333-34. The litigant must identify a constitutional error and show how the alleged error actually affected his or her rights. “It is this showing of actual prejudice that makes the error ‘manifest’, allowing appellate review.” *McFarland*, 127 Wn.2d at 333. The courts reject the argument that all trial errors which implicate a constitutional right are reviewable under RAP 2.5(a)(3), noting that “[t]he exception actually is a narrow one, affording review only of certain

constitutional questions.” *State v. Scott*, 110 Wn.2d 682, 687, 757 P.2d 492 (1988) (internal quotation marks omitted).

Under RAP 2.5(a), we decline to address new constitutional issues raised for the first time on appeal unless the claim reflects a manifest error affecting a constitutional right. RAP 2.5(a) was not designed to allow parties a means for obtaining new trials whenever they can identify a constitutional issue not litigated below. If the record is insufficient to evaluate the merits of the constitutional claim, then we must deny review. In addition, the party making the new argument must show a concrete detriment to the claimant's constitutional rights such that actual prejudice has resulted.

*In re Disability Proceeding Against Diamondstone*, 153 Wn.2d 430, 443, 105 P.3d 1 (2005) (citations and internal quotation marks omitted).

Appellants have not met their burden of establishing that the trial court made a manifest error of constitutional dimension and that they have suffered actual prejudice. In *Carlson v. Lake Chelan Cmty. Hosp.*, 116 Wn. App. 718, 75 P.3d 533 (2003), the plaintiff's appellate argument was based on due process. However, the plaintiff had never pled a due process claim. His

complaint asserted claims for breach of employment contract, age discrimination, disability discrimination, and breach of promise of specific treatment. Further, he did not argue a due process theory at the time he proposed his general damage instruction and verdict form at trial. Thus, the Court of Appeals found no basis to consider his new argument on appeal. The court stated, “The fact that Mr. Carlson attempts to raise a claim of a constitutionally protected property interest does not support a claim that the trial court committed a ‘manifest error affecting a constitutional right’ for purposes of RAP 2.5(a).” *Carlson*, 116 Wn. App. at 744.

Likewise, simply because on appeal Appellants have attempted to raise a due process claim does not mean that the superior court committed a manifest error affecting a constitutional right for purposes of allowing review of the new claim under RAP 2.5(a)(3).

**2. There is an insufficient record to address appellants' due process claims.**

Moreover, the record below is devoid of evidence supporting the various new allegations being made. Appellants claim that ESD violated WAC 356-10-030(5) by not establishing allocation procedures. Because this is a new allegation, there is no evidence at all on this. This is demonstrated by the fact that Appellants' brief contains no citations to the record for these alleged "facts." See Brief of Appellants at 12. Nevertheless, ESD asserts that it has always complied with all applicable merit system rules.

Appellants also argue "undue delay" in the review of their reallocation requests. Again, there is no record below regarding any delay and whether it was "undue." There were many discussions between Human Resources Management and UI Division management regarding the duties of Appellants' positions and the work being performed as part of the agency's

review of the reallocation requests. See CP at 47, 51, 55, 59, 63, 67. There is nothing in the record to support Appellants' allegation that this careful review created any undue delay.

[T]he record is insufficiently developed to evaluate its merits. Without a developed record, the claimed error cannot be shown to be manifest, and the error does not satisfy RAP 2.5(a)(3).

*WWJ Corp.*, 138 Wn.2d at 603.

This Court cannot evaluate the merits of Appellants' new issues because there was no record developed at the superior court to support these new allegations of denial of due process.

#### **V. ATTORNEY FEES AND COSTS**

The superior court's decision is correct. Therefore, Appellants are not entitled to attorney fees and costs.

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## VI. CONCLUSION

Based on the foregoing, ESD respectfully requests that the Court affirm the judgment of the superior court.

RESPECTFULLY SUBMITTED this 17<sup>th</sup> day of June, 2008.

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I certify that I served a copy of Brief of Respondent, filed by the State of Washington, Dep't of Employment Security on all parties or their counsel of record on June 17, 2008, as follows:

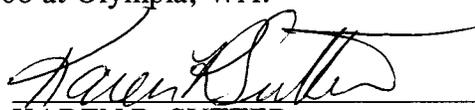
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TO:

Wm. Michael Hanbey PO Box 2575 Olympia, WA 98507	David C. Ponzoha, Court Clerk/Administrator Court of Appeals, Division II 950 Broadway, Suite 300 Tacoma, WA 98402-4454
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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 17 day of June, 2008 at Olympia, WA.

  
\_\_\_\_\_  
KAREN R. SUTTER