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DIVISION II

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COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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HEATHER COURTNEY,

Appellant,

v.

EMPLOYMENT SECURITY DEPARTMENT,  
STATE OF WASHINGTON,

Respondent.

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**BRIEF OF APPELLANT**

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Marc Lampson  
Unemployment Law Project  
Attorney for Appellant  
WSBA # 14998  
1904 Fourth Ave., Suite 604  
Seattle, WA 98101  
206.441.9178

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## A. INTRODUCTION

Ms. Courtney worked as an event planner for “The Manor Inc.,” beginning in 2007. Comm. Rec. 92, Finding of Fact (“FF”) 1. Douglas Zahn, an owner of the business, originally hired Ms. Courtney. He was her only manager during the time she worked there. Comm. Rec. 93, FF 2.<sup>1</sup>

Mr. Zahn called Ms. Courtney on May 2, 2009, the day before she was to return to work from her vacation, and told her not to return to work because his sisters (Ms. Mabbutt & Ms. Cohn) had illegally taken over the business. Comm. Rec. 17; 93, FF 2. When Ms. Courtney went to the business to pick up her final pay check, the sisters told her that they were now her managers and that nothing had changed, but allowed her a few days to think about her job situation. Comm. Rec. 19-20; 93, FF 2.

In subsequent days, Ms. Courtney spoke “on a daily basis” with Mr. Zahn. Comm. Rec. 22. She and other former employees held a “business meeting” with Mr. Zahn at a local Starbucks. He told them that the takeover of the business had been illegal and

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<sup>1</sup> Thurston County Superior Court has transmitted the Administrative Record, aka Certified Appeals Board Record, in this matter as a single, stand-alone document; that Record is separately paginated so references in this brief to that record will appear as “CP Comm. Rec.,” meaning “Clerk’s Papers Commissioner’s Record.” All other references to the Clerk’s Papers will be in standard citation format, “CP,” with reference to the page number as it appears on the Superior Court Clerk’s Papers Index.

that he planned to again assume control of the business through litigation. Comm. Rec. 68.

On May 8, six days after Mr. Zahn had told Ms. Courtney not to return to work, Ms. Mabbutt signed and sent a termination letter to Ms. Courtney, stating that "The Manor, Inc. **has dismissed you** as of May 8, 2010, for Repeated Unexcused Absenteeism." Comm. Rec. 112 (emphasis added); see *also*, 28. Later, the employer stated in documents filed with the ESD concerning the "discharge information" that "the final incident that caused the claimant to be **discharged**" was "continued unexcused absenteeism." Comm. Rec. 86 (emphasis added). Michael Cohn, the employer's "General Administrator," testified that his wife, Francesca Cohn, and her sister, Carmella Mabbutt, had fired Ms. Courtney:

**[T]hey [the sisters] ended up letting her go for repeated unexcused absenteeism.**

Comm. Rec. 40 (emphasis added). In fact, he continued, it was the "right" of the employer "to hire and to terminate employees as it deems necessary." Comm. Rec. 40.

The ESD concluded Ms. Courtney "quit" her job without good cause and denied her unemployment benefits. Comm. Rec. 56.

The ESD's Commissioner affirmed, adopting an ALJ's conclusion that the job separation "should be adjudicated as a voluntary quit as it occurred at the initiative of the claimant who gave a temporizing answer to new management's request that the claimant stay in employment" and failed "to follow-up on her implied promise to respond within two days . . . ." Comm. Rec. 93, Conclusion of Law 1; adopted by the Commissioner at Comm. Rec. 108. The Superior Court affirmed. CP 49-51. This appeal of the Commissioner's decision timely followed. CP 52-57.

#### **B. ASSIGNMENTS OF ERROR**

1. The Commissioner erred in adopting the ALJ's Conclusion of Law 1 that Ms. Courtney "quit" her job. (Conclusion of Law ("CL") 1), Comm. Rec. 93, adopted by Commissioner at Comm. Rec. 108.
2. The Commissioner erred in adopting the ALJ's finding of fact, included in Conclusion of Law 1, that Ms. Courtney's job separation "occurred at the initiative of the claimant." (Conclusion of Law ("CL") 1), Comm. Rec. 93, adopted by Commissioner at Comm. Rec. 108.
3. The Commissioner erred in denying Ms. Courtney unemployment benefits. Comm. Rec. 108-109.

4. The Commissioner erred in adopting the ALJ's Findings of Fact 2 & 3. (Findings of Fact ("FF") 2 & 3, Comm. Rec. 92-93, adopted by Commissioner at Comm. Rec. 108.

5. Ms. Courtney is entitled under statute to fees and costs when a Commissioner's Order is reversed.

**ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Was Ms. Courtney fired without proof of misconduct, making her eligible for unemployment benefits, when the owner who hired her and managed her work told her not to return to the job, when the employer's termination letter to her stated she was "discharged" for "repeated unexcused absenteeism," and when the employer's administrator testified the employer fired Ms. Courtney as it had a "right" to do? (Issue Pertaining to Appellant's Assignments of Error 1 - 4).

2. Should attorney fees and costs be awarded to the law firm representing Ms. Courtney for its work on judicial review? (Issue Pertaining to Appellant's Assignment of Error 4).

## C. STATEMENT OF THE CASE

### 1. Substantive Facts: Job Separation.

- a. **Ms. Courtney did not return to work after Doug Zahn – an owner of the company who alone had hired and managed her - called her to tell her not to go back to work.**

Ms. Courtney began work as an “event planner” for “The Manor Inc.” in November 2007. Comm. Rec. 92, Finding of Fact (“FF”) 1. Douglas Zahn hired Ms. Courtney and was her manager as well as a 50% owner of the business. Comm. Rec. 93, FF 2.

On May 2, 2010, a day before she was scheduled to return from a vacation, Mr. Zahn called her to tell her that other members of his family, one a co-owner in the business, had “ousted” him from his management position. He “directed” her to have no contact with other members of his family and to not go to the worksite until further notice. Comm. Rec. 93, FF 2. This is how she told it:

[I]t was about 10:00 a.m. I received a voice mail [from Doug Zahn] saying that there was a family takeover and to not go in to work until further notice. I immediately returned his phone call. And began to think in terms of determine what had happened. It was a very confusing voice mail. And he essentially said that he and his wife were on the property. And his family and some members of his family, friends, confronted him, served him and his wife papers and [they] were forced to leave the property. Aggressively forced, as I was told. And he was in tears, he was crying. I began

crying. It was a horrible scenario to have to go through and it was very sudden.

Comm. Rec. 17.

When Ms. Courtney asked Mr. Zahn about her paycheck awaiting her at the job site, he "directed" her to go to the office to pick up the check but to speak to no one. Comm. Rec. 17; 93, FF 2.

So I – about 5:00 that afternoon – this is a Sunday afternoon – my father, mother and sister drove me to The Manor Property. They waited in the car by the main entrance. And I went in. And at that moment I didn't know the scale of what had happened. I essentially thought it was a family dispute. Some altercations may have happened, so I guess I just didn't understand the scale of what had happened that morning.

Comm. Rec. 17 – 18.

She arrived at the worksite to find that the office she had shared with Mr. Zahn had been forcibly entered and was in the process of being repaired.

It was definitely still a mess. I continued walking through the property into the back part of the office. And there's an office corridor to where the time clock is, where the bulletin board is. And right when I walked through that door I noticed that the door and the screen to the door were not there. It was a mess. There were two gentlemen working on the door, or what looked to be like they were working on the door. I didn't speak directly to them. I began crying because this is my office. This is definitely my office that is supposed to be secure.

So I began crying. . . . And I walked into the office. My desk was in complete disarray. There were personal papers, folders. I leave my desk extremely tidy as an event manager. . . It was a complete disaster.

Comm. Rec. 18.

She picked up her check from where the paychecks are always left and began to leave. Comm. Rec. 18; 93, FF 2. Mr. Zahn's two sisters, Ms. Carmela Mabbutt (a co-owner of the business) and Ms. Francesca Cohn, then arrived:

And they could tell I was emotional. And I was confused. And I think they were equally as confused. And they stopped me and asked what I was doing. And I said I had come to pick up my paycheck. And continuing crying. They started informing me that nothing was changed. I think they were attempting to just calm me down. But nothing has changed; that they were the new managers of The Manor. That there was an altercation this morning. I told them, you know, I was listening to what they were saying. But I was trying not to talk to them, as well, because I was under the advisement of Doug, my manager. So I told them that I needed a few days to think about this. I was confused with the situation. I'm getting information from Mr. Douglas Zahn. I'm getting information from his two sisters. And I told them I needed a few days to think about this. And they said that was fine.

Comm. Rec. 19; *see also*, 93, FF 2.

Though the sisters tried to calm her and told her that she "knew" them, she testified that prior to the chaotic scene at the worksite, she had "met Ms. Mabbutt once. And this was in passing. She's never been a manager. She's never had any authority over

me. She's never given me direction." Comm. Rec. 20. She said the same was true of Ms. Cohn: "[S]he's never been in a management role while I was at The Manor for 2 ½ years." Comm. Rec. 20.

She continued her story, as a skeptical and sarcastic ALJ asked her questions:

**Ms. Courtney:** And I essentially just walked out at that point leaving completely emotional at this point. Understanding Doug's request to not go in, fearing for our safety. And I did feel like my safety was compromised. I felt my credibility was being questioned. And I immediately left the building. I told my father and my sister and my mother immediately the details of what happened. And then I called Doug immediately and repeated the same sad story. And to this day I haven't set foot on the property again. I've been too scared.

**ALJ:** Too scared?

**Ms. Courtney:** Yes.

**ALJ:** **They had large guns?**<sup>2</sup>

**Ms. Courtney:** More intimidation, Your Honor. I've never worked in an environment where I felt my safety was compromised. . . . My desk had been compromised. And my work environment

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<sup>2</sup> Canon 3 of the *Code of Judicial Conduct* states that "Judges Shall Perform Duties of Their Office Impartially and Diligently," and Section (A)(3) of that Canon states that judges "should be patient, dignified, and courteous to litigants . . . with whom judges deal in their official capacity . . . ." Sarcasm is neither dignified nor courteous, especially when it is directed at an unemployed claimant who is herself being dignified and respectful.

I felt was compromised. And then additional, I guess, testimony from Doug Zahn and from my co-workers also had altercations with the family members. It wasn't a safe environment. I felt like I wasn't in a safe environment at that point, Your Honor.

Comm. Rec.20-21 (emphasis added).

On the evening of May 4, Ms. Courtney and other Manor employees met with Doug Zahn, as she related in her written appeal to the ESD:

Many Manor employees met at the Starbucks Coffee shop on the corner of Highway 99 and Airport Road shortly after 6pm for a business meeting. Doug Zahn and his wife Chris met with us to discuss the details of the *"hostile takeover"* and the future of the business with Doug as the 50% owner and manager. He informed us that he was going to *"file multiple lawsuits and possibly three restraining orders on the parties involved"*. He also discussed that he was *"working with his lawyer to determine the validity of the takeover"*. We were under his direction the entire time.

Comm. Rec. 68 (italics in original). Later Ms. Courtney testified that during the week of May 3 "Doug was telling me and my co-workers that he was working to resolve the situation. He was also attempting to get restraining orders on some of the individuals involved in this take over." Comm. Rec. 34.

When the same ALJ later asked Ms. Courtney if she ever got back in touch with the sisters, she said she had not:

I did not get back with them, Your Honor. I was in contact with Doug this entire time. I spoke with him on a daily basis. To my impression, to my understanding, the takeover was an illegal take over. And during this entire time several employees were under Doug's advisement that this take over was illegal; and that he would eventually take over the business again. There are two lawsuits pending right now.

Comm. Rec. 22. She further explained why she had not contacted the sisters:

I essentially was trying to follow Mr. Zahn's guidance and not talking to anybody. To go in, get my paycheck, and leave. And this situation happened. I didn't feel that I took directives from these individuals that were never my manager. I was taking directions from my manager, who's been my full manager.

Comm. Rec.22. Ms. Courtney nevertheless continued to do work for The Manor as best she could from home from May 3 to May 6.

Comm. Rec. 22-23; 93, FF 3.

On Friday, May 7, Ms. Mabbutt called Ms. Courtney and ended the employment relationship:

I received a voice mail from Ms. Mabbutt. When phone calls come in from The Manor, sometimes they come in as unavailable or restricted, which solicitor calls also come in that way. So I didn't answer the phone. I received a voice mail. I told Doug that afternoon, or after I received the phone call, that I'd gotten a phone call from Ms. Mabbutt saying that it's obvious that I had resigned. I hadn't shown up for work. And he said that several other employees also received the same phone call.

Comm. Rec. 25. See also, Comm. Rec. 93, FF 3.<sup>3</sup>

Ms. Courtney said she had no intention to quit and had never told anyone that she had quit. Comm. Rec. 27. She testified that during the period of time she had not come to work, it was her understanding that Mr. Zahn had told her not to come to work.

Comm. Rec. 28.

**b. The employer sent Ms. Courtney a letter stating it had “dismissed” her for “Repeated Unexcused Absenteeism.”**

The employer stated in documents filed with the ESD concerning the “discharge” here that “the final incident that caused the claimant to be **discharged**” was “continued unexcused absenteeism.” Comm. Rec. 86 (emphasis added). Further, Michael Cohn, the employer’s “General Administrator,” testified that his wife, Francesca Cohn, and her sister, Carmella Mabbutt, had fired Ms. Courtney:

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<sup>3</sup> ALJs are to enter Findings of Fact, singular. FF 2 in this case is nearly a half-page long, beginning on page 92 and continuing on to 93; Finding of Fact 3 is almost as long. Comm. Rec. 92-93. These findings therefore state many, many, many facts, some of which are accurate and some of which are not; to the extent that these findings (2 & 3) are inaccurate, petitioner has assigned error to them above and will indicate below the specific facts that are inaccurate or misleading. Here, for instance, the ALJ’s finding states with regard to the incoming phone call from Ms. Mabbutt that Ms. Courtney “saw from whom the incoming telephone was coming” and that Ms. Courtney “elected not to receive the call . . .” Based on the testimony quoted here from the only person who would know the facts – Ms. Courtney - this finding is obviously in error because it is inaccurate and not based on substantial evidence.

**[T]hey [the sisters] ended up letting her go for repeated unexcused absenteeism.**

Comm. Rec. 40 (emphasis added). In fact, he continued, it was the “right” of the employer “to hire and to terminate employees as it deems necessary.” Comm. Rec. 40.

On May 8, six days after Mr. Zahn had told Ms. Courtney not to return to work, Ms. Mabbutt signed and sent a termination letter to Ms. Courtney that stated that “The Manor, Inc. has dismissed you as of May 8, 2010, for Repeated Unexcused Absenteeism.” Comm. Rec. 28, 112. Ms. Courtney said she had never been previously reprimanded for unexcused absences. Comm. Rec. 28.

## **2. Procedural Facts**

- a. The ESD decided Ms. Courtney had “quit” without “good cause” and was therefore ineligible for benefits.**

Being unemployed, Ms. Courtney applied for unemployment benefits and from the beginning stated that she “didn’t quit.” Comm. Rec. 73. In response to her application, the employer stated in documents filed with the ESD that “the final incident that caused the claimant to be discharged” was “continued unexcused absenteeism.” Comm. Rec. 86.

Nevertheless, the ESD denied benefits finding that because Ms. Courtney “stopped coming to work” and “**decided to follow directions** of the replaced manager,” she had “quit” without good cause. Comm. Rec. 56 (emphasis added).

- b. **On appeal, the Commissioner adopted an ALJ’s conclusion that Ms. Courtney had quit without good cause because she had given a “temporizing answer” and an “implied promise.”**

On appeal, an ALJ concluded as follows:

1. An employment separation will be adjudicated as a quit or as a discharge depending in large measure upon on [sic] whose initiative this separation occurs. This separation should be adjudicated as a voluntary quit as it occurred at the initiative of the claimant who gave a temporizing answer to new management’s request that the claimant stay in employment, then fails to follow-up on her implied promise to respond within two days, or thereabouts, and lastly refused to take the telephone call from the corporate president or to respond to the message given by the corporate president in that telephone call.

Comm. Rec. 93, Conclusion of Law 1. At the hearing, the employer’s representative, Mr. Cohn –the husband of one of the sisters - in questioning Ms. Courtney, emphasized that her work was “at-will employment” and asked her if she understood that this meant that “your employment can be terminated at any time?” Ms. Courtney said she understood that. Comm. Rec. 29-32.

Adopting all of the ALJ's findings and conclusions, including Conclusion of Law 1, that because Ms. Courtney "gave a temporizing answer to new management's request" she would be deemed to have quit, the Commissioner affirmed the denial of benefits. Comm. Rec. 108-109. The Superior Court affirmed. CP 49-51. This appeal of the Commissioner's decision timely followed. CP 52-57.

#### **D. ARGUMENT**

**1. MS. COURTNEY SHOULD HAVE RECEIVED UNEMPLOYMENT BENEFITS BECAUSE SHE WAS FIRED, AS THE EMPLOYER'S DOCUMENTS AND TESTIMONY PROVE, AND THERE WAS NO SHOWING OF MISCONDUCT TO DISQUALIFY HER FROM BENEFITS.**

Ms. Courtney did not quit her job. Doug Zahn, the owner who had hired her and who solely managed her work, told her not to go back to work after her vacation. When she obeyed, Mr. Zahn's sisters fired her for "repeated unexcused absenteeism," as proved through employer documents and testimony. Comm. Rec. 28, 40, 86, 112. The Commissioner's Order that finds to the contrary is an error of law because it misinterprets and misapplies

the law regarding when a quit occurs for unemployment purposes and because it is not based on substantial evidence.

- a. **Ms. Courtney did not quit because to be a quit the law requires proof of a “knowing” or “intentional” act intended to terminate one’s employment.**

Under the Employment Security Act, as it has been interpreted by decades of case law, a finding that a person has “quit” a job requires an intentional, affirmative act manifesting an intent to separate from the job:

The act requires the Department analyze the facts of each case to determine what actually caused the employee’s separation. *A voluntary termination requires a showing that an employee **intentionally terminated** her own employment. Vergelye v. Department of Empl. Sec., 28 Wn. App. 399, 402, 623 P.2d 736 (1981).*

*Safeco Ins. Co. v. Meyering*, 102 Wn.2d 385, 393, 687 P.2d 195 (1984) (emphasis added). In the *Safeco Ins. Co.* case, Ms. Meyering “unilaterally and voluntarily submitted her resignation to her supervisors,” a pretty good sign she intended to quit.

But the *Vergelye* decision cited in *Safeco* is even more instructive for Ms. Courtney’s case. Ms. Vergelye had asked the employer months in advance for approval of certain vacation dates for which she needed to make elaborate and involved arrangements due to her husband’s health condition. When the

date of the vacation approached, the employer refused to allow her to take the vacation at the time she had arranged and it offered her other alternatives. She refused and signed a document that said, "Alternative not acceptable. I will not report for work beginning 9-2-77 thru 10-2-77. I understand termination of employment will result." *Vergeyle v. ESD*, 28 Wn. App. 399, 401, 623 P.2d 736 (1981).

When she later argued that she had been discharged and had not quit, this Court – though ultimately allowing benefits – concluded she had quit because when she signed the document that said "termination will result," "she knew her unauthorized absence would result in her discharge." 28 Wn. App. at 402. In reaching this conclusion, this Court relied upon an out-of-state case that had held a person may be deemed to have quit through "the commission of an act ***which the employee knowingly intended to result in his discharge . . . .***" *Id.*

When these two cases are compared to Ms. Courtney's case, it is obvious that she did not quit. First, unlike *Safeco*, she did not "unilaterally and voluntarily" hand in a resignation letter. Second, unlike *Vergeyle*, she committed no act which she "knowingly intended to result" in her discharge. In fact, Ms.

Courtney took no affirmative steps to end her employment. Further, treating this case as a run-of-the-mill change of management situation completely ignores the context in which Ms. Courtney worked and in which she was separated from that work. The evidence here actually shows that Ms. Courtney continued to do her job and did so under the direction of her manager, Mr. Zahn.

Moreover, there is ample evidence that she was fired: the employer stated in documents filed with the ESD concerning “discharge information” that “the final incident that caused the claimant to be discharged” was “continued unexcused absenteeism.” Comm. Rec. 86. The termination letter to Ms. Courtney from Ms. Mabbutt stated that “The Manor, Inc. has dismissed you as of May 8, 2010, for Repeated Unexcused Absenteeism.” Comm. Rec. 28, 112. Michael Cohn, the employer’s “General Administrator,” testified that his wife, Francesca Cohn, and her sister, Carmella Mabbutt, who were also part owners of the business, had fired Ms. Courtney:

**[T]hey [the sisters] ended up letting her go for repeated unexcused absenteeism.**

Comm. Rec. 40 (emphasis added). In fact, he continued, it was the “right” of the employer “to hire and to terminate employees as it

deems necessary.” Obviously, therefore, Ms. Courtney was fired as the record amply reflects.

The Commissioner’s conclusion to the contrary was an error of law and should be reversed.

**b. It was an error of law for the Commissioner to “construct” a “quit” from Ms. Courtney’s actions.**

To conclude as the Commissioner did here that Ms. Courtney quit and was not fired is merely a version of the “constructive quit” doctrine that has been repudiated by Washington courts. *Bauer v. Employment Security Department*, 126 Wn. App. 468, 108 P.3d 1240 (2005). The “constructive quit” doctrine has been firmly rejected by Washington courts:

The voluntary constructive quit doctrine has not been adopted by Washington courts or the legislature. The doctrine does not fit within the current statutory scheme or interpretive cases. To adopt the doctrine would usurp the legislative function.

*Bauer v. Employment Security Department*, 126 Wn. App. 468, 481, 108 P.3d 1240 (2005).

In *Bauer*, the Commissioner, similar to Ms. Courtney’s case, had held the claimant had “effectively quit his employment” by failing to maintain his commercial driver’s license. On appeal, the State argued that the legislature’s phrase regarding good cause

quits, that one "left work voluntarily," could be reasonably interpreted to include a work separation due to "termination-triggering conduct," which the State argued in *Bauer* was his serious traffic offenses leading to the loss of his license.

The *Bauer* court rejected this reasoning and the logic of "constructive quits" generally because "quitting" requires some sort of affirmative act that demonstrates an intent to quit. Further, *Bauer* rejected the ESD's interpretation of the statute when ESD argued that "termination-triggering conduct" that itself does not show an intention to quit a job can be "construed" or "constructed" to constitute a quit: "The department's interpretation is a narrow construction of the statute that would disqualify a greater number of employees. This is contrary to the statute's history of liberal construction." *Bauer*, 126 Wn. App. at 477.

The *Bauer* court instead adopted with obvious approval a decision from Maine on the issue of whether a "voluntary" quit can be constructed from a claimant's actions or inactions:

The Supreme Court of Maine addressed an almost identical statute and held:

[A]n individual leaves work "voluntarily" only when freely making an affirmative choice to do so. The clear import of the statute is that it is the intentional act of leaving employment rather than the deliberate

commission of an antecedent act which disqualifies an individual from eligibility for benefits. To read the doctrine of constructive voluntary quit or constructive resignation into [the statute] is to overstep the bounds of administrative construction and usurp the legislative function.

*Brousseau v. Me. Employment Sec. Comm'n*, 470 A.2d 327, 330 (Me. 1984) (footnote omitted). **That view is consistent with the jurisprudence of Washington.** We cannot substitute our judgment or usurp the prerogative of the legislature. *State v. Bunting*, 115 Wn. App. 135, 139, 61 P.3d 375 (2003).

*Bauer*, 146-147 (emphasis added to language from *Bauer*).

As noted in the first argument section above, our courts have addressed the plain meaning of “leaving voluntarily”:

[T]he phrase “due to leaving work voluntarily” has a plain, definite and sensible meaning, free of ambiguity; it expresses a clear legislative intent that to disqualify a claimant from benefits **the evidence must establish that the claimant, by his or her own choice, intentionally, of his or her own free will, terminated the employment.**

*Vergeyle v. Dep't of Employment Sec.*, 28 Wn. App. 399, 402, 623 P.2d 736 (1981) (emphasis added) (quoting *Allen v. CORE Target City Youth Program*, 275 Md. 69, 79, 338 A.2d 237 (1975)), *overruled on other grounds by Davis v. Employment Sec. Dep't*, 108 Wn.2d 272, 737 P.2d 1262 (1987).

In other words, decision makers cannot invent a quit when the employer's acts show an intent to fire someone and when there

is no evidence of an intent to quit: "[a] voluntary termination requires a showing that an employee intentionally terminated her own employment." *Safeco Ins. Cos. v. Meyering*, 102 Wn.2d 385, 393, 687 P.2d 195 (1984). The claimant in *Safeco* actually submitted a resignation letter, a good sign that she intentionally quit her job. No such act occurred in Ms. Courtney's case.

The ALJ in this case – and by adoption, the Commissioner - mistakenly concluded as follows:

1. An employment separation will be adjudicated as a quit or as a discharge depending in large measure upon on [sic] whose initiative this separation occurs. This separation should be adjudicated as a voluntary quit as it occurred at the initiative of the claimant who gave a temporizing answer to new management's request that the claimant stay in employment, then fails to follow-up on her implied promise to respond within two days, or thereabouts, and lastly refused to take the telephone call from the corporate president or to respond to the message given by the corporate president in that telephone call.

Comm. Rec. 93. This conclusion is mistaken legally, factually, and logically.

First, this conclusion misstates the law – since it cites to no law, that is not surprising. The law is not who takes the "initiative," but whether the employee "intentionally" terminated the employment. Mr. Zahn told Ms. Courtney not to go back to work;

and his sister called Ms. Courtney four days later and told her “the employment relationship” was “ended.” Ms. Courtney, in other words, manifested no intent to quit; instead, the owner/manager she had always worked with told her not to come to work and then the putative new owners/managers, with whom she had never worked, told her that her employment had “ended.” Further, all evidence shows she was fired: the termination letter (Comm. Rec. 112; 28), the employer’s statement to the ESD statement (Comm. Rec. 86), and the employer’s testimony (Comm. Rec. 40).

Second, Ms. Courtney’s giving “a temporizing answer,” whatever that means, to “new” management in the chaotic situation of arriving at work to find her office had been forcibly entered and to receive conflicting instructions from the owners – Mr. Zahn who said **stay away** and Ms. Mabbutt who said **stay** – is not “termination-triggering conduct” on Ms. Courtney’s part.

Third, supposedly failing to “follow-up on her *implied promise* to respond within two days, or thereabouts” hardly manifests an intent to quit. The nature of a promise is an explicit pledge, which was not made here. But even if a promise can be “implicit,” a promise cannot be breached if there is no performance date for the promise – here the ALJ says the performance date was

“two days, or *thereabouts*.” Ms. Courtney was fired on May 7, about 5 days, or thereabouts, after any alleged implied promise.

Fourth, not picking up the phone at home is one’s prerogative and the ALJ’s Finding on this is not supported by substantial evidence. The ALJ’s, and by extension, the Commissioner’s finding says with regard to the incoming phone call from Ms. Mabbutt that Ms. Courtney “saw from whom the incoming telephone was coming” and that Ms. Courtney “elected not to receive the call . . .” But the only person who would know the facts here, Ms. Courtney, testified as follows:

I received a voice mail from Ms. Mabbutt. When phone calls come in from The Manor, sometimes they come in as unavailable or restricted, which solicitor calls also come in that way. So I didn’t answer the phone. I received a voice mail. I told Doug that afternoon, or after I received the phone call, that I’d gotten a phone call from Ms. Mabbutt saying that it’s obvious that I had resigned. I hadn’t shown up for work. And he said that several other employees also received the same phone call.

Comm. Rec. 25. See *also*, Comm. Rec. 93, FF 3. Thus the ALJ’s finding that suggests Ms. Courtney refused a call specifically from Ms. Mabbutt is obviously in error because it is inaccurate and not based on substantial evidence.

Finally, not calling back after one has been fired is not “termination-triggering conduct.” The termination-triggering conduct

in this case was first, Mr. Zahn's conduct in telling Ms. Courtney to not return to work and Ms. Mabbutt's conduct in writing a letter telling her she was dismissed for unexcused absenteeism. When the termination-triggering conduct is the employer's the case is treated as a discharge and there must be a showing of misconduct. No such showing was made here and the Commissioner's Order should therefore be reversed.

In unemployment compensation appeals, the Court of Appeals reviews the findings and conclusions of *the Commissioner* of the Employment Security Department. *Okamoto v. Employment Security Department*, 107 Wn. App. 490, 496, 27 P.3d 1203, *rev. denied*, 145 Wn.2d 1022 (2001). Accordingly, the Court of Appeals reviews the Superior Court's decision *de novo*. *National Electrical Contractors Assoc. v. Employment Security Department*, 109 Wn. App. 213, 219, 34 P.2d 860 (2001).

The Commissioner's decision here is reviewed under the Administrative Procedure Act and will be reversed on judicial review if any one of several grounds is satisfied. RCW 34.05.570. Specifically, in the instant case, "the agency has erroneously interpreted or applied the law." RCW 34.05.570(3)(d).

Issues of law are the responsibility of the judicial branch. *Tapper v. Employment Security*, 66 Wn. App. 448, 451, 832 P.2d 449 (1992), *rev'd on other grounds*, 122 Wn.2d 397, 858 P.2d 494 (1993). Therefore, when reviewing legal questions the court is allowed to substitute its judgment for that of the administrative agency. *Franklin County Sheriff's Office v. Sellers*, 97 Wn.2d 317,324-325, 646 P.2d 113 (1982) *cert. denied*, 459 U.S. 1106 (1983). Pure questions of law are reviewed *de novo*. *Franklin County Sheriff's Office v. Sellers*, 97 Wn.2d 317, 646 P.2d 113 (1982). In resolving a mixed question of law and fact, the court first establishes the relevant facts, determines the applicable law, and applies it to the facts. *Tapper v. Employment Security Department*, 122 Wn.2d 397, 403, 858 P.2d 494 (1993).

While deference is granted to the agency's factual findings, the agency's application of the law is reviewed *de novo*. *Dermond v. Employment Security Department*, 89 Wn. App. 128, 132, 947 P.2d 1271 (1997).

Additionally, the Commissioner's conclusion must also be reversed because this conclusion was unsupported by substantial evidence. An agency's order can be reversed when it does not rest on substantial evidence and evidence is only "substantial when

viewed in light of the whole record before the court, which includes the agency record for judicial review, supplemented by any additional evidence received by the court under this chapter. . . ."

RCW 34.05.570(3)(e); *Olmstead v. Department of Health*, 61 Wn. App. 888, 812 P.2d 527 (1991).

"Substantial evidence" exists if the record contains evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise. *Bering v. Shaw*, 106 Wn.2d 212, 721 P.2d 918 (1986), *cert. denied*, 479 U.S. 1050 (1987). An appellate court will reverse factual findings of the trier of fact if those findings are not supported by substantial evidence. *Mood v. Banchemo*, 67 Wn.2d 835, 410 P.2d 776 (1966).

Therefore, the Commissioner's Order must be reversed here as an error of law because it misinterprets the law discussed above and because it was not based on substantial evidence.

**2. ATTORNEY FEES AND COSTS IN THIS CASE ARE MANDATED BY STATUTE WHEN A COMMISSIONER'S ORDER IS REVERSED ON JUDICIAL REVIEW.**

A claimant who succeeds in convincing a court to reverse a Commissioner's Order is allowed reasonable attorney fees and costs as mandated by statute:

It shall be unlawful for any attorney engaged in any appeal to the courts on behalf of an individual involving the individual's application for initial determination, or claim for waiting period credit, or claim for benefits to charge or receive any fee therein in excess of ***a reasonable fee to be fixed by the superior court in respect to the services performed in connection with the appeal taken thereto and to be fixed by the supreme court or the court of appeals in the event of appellate review, and if the decision of the commissioner shall be reversed*** or modified, such fee and the costs shall be payable out of the unemployment compensation administration fund. ***In the allowance of fees the court shall give consideration to the provisions of this title in respect to fees pertaining to proceedings involving an individual's application for initial determination, claim for waiting period credit, or claim for benefits.*** In other respects the practice in civil cases shall apply.

RCW 50.32.160 (emphasis added). The fees and costs

contemplated in this statute are stated in mandatory terms: "such fee and the costs *shall* be payable out of the unemployment compensation administration fund." *Id.*

Therefore, pursuant to this statute and RAP 18.1, appellant requests that attorney fees and costs be awarded upon reversal of the Commissioner's Order in this case.

#### **E. CONCLUSION**

For the reasons stated above, Heather Courtney respectfully requests that this court reverse the Commissioner's Decision in this

case because she did not quit her job, but was fired without proof of misconduct.

Petitioner also requests that reasonable attorney fees be awarded in an amount to be determined upon filing of a cost bill subsequent to a decision in this matter and under authority of RCW 50.32.160 that mandates attorney fees and costs be awarded upon reversal or modification of a Commissioner's Order.

Dated this 1<sup>st</sup> Day of September 2011.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Marc Lampson', is written over a horizontal line. The signature is fluid and cursive, with a large loop at the end.

Marc Lampson  
Attorney for Appellant  
WSBA # 14998  
1904 Fourth Ave., Suite 604  
Seattle, WA 98101  
206.441.9178

# **APPENDIX A: RCW 50.04.294**

RCW 50.04.294

Misconduct — Gross misconduct.

With respect to claims that have an effective date on or after January 4, 2004:

(1) "Misconduct" includes, but is not limited to, the following conduct by a claimant:

- (a) Willful or wanton disregard of the rights, title, and interests of the employer or a fellow employee;
  - (b) Deliberate violations or disregard of standards of behavior which the employer has the right to expect of an employee;
  - (c) Carelessness or negligence that causes or would likely cause serious bodily harm to the employer or a fellow employee;
- or
- (d) Carelessness or negligence of such degree or recurrence to show an intentional or substantial disregard of the employer's interest.

(2) The following acts are considered misconduct because the acts signify a willful or wanton disregard of the rights, title, and interests of the employer or a fellow employee. These acts include, but are not limited to:

- (a) Insubordination showing a deliberate, willful, or purposeful refusal to follow the reasonable directions or instructions of the employer;
- (b) Repeated inexcusable tardiness following warnings by the employer;
- (c) Dishonesty related to employment, including but not limited to deliberate falsification of company records, theft, deliberate deception, or lying;
- (d) Repeated and inexcusable absences, including absences for which the employee was able to give advance notice and failed to do so;
- (e) Deliberate acts that are illegal, provoke violence or violation of laws, or violate the collective bargaining agreement. However, an employee who engages in lawful union activity may not be disqualified due to misconduct;
- (f) Violation of a company rule if the rule is reasonable and if the claimant knew or should have known of the existence of the rule; or
- (g) Violations of law by the claimant while acting within the scope of employment that substantially affect the claimant's job performance or that substantially harm the employer's ability to do business.

(3) "Misconduct" does not include:

- (a) Inefficiency, unsatisfactory conduct, or failure to perform well as the result of inability or incapacity;
- (b) Inadvertence or ordinary negligence in isolated instances; or
- (c) Good faith errors in judgment or discretion.

(4) "Gross misconduct" means a criminal act in connection with an individual's work for which the individual has been convicted in a criminal court, or has admitted committing, or conduct connected with the individual's work that demonstrates a flagrant and wanton disregard of and for the rights, title, or interest of the employer or a fellow employee.

[2006 c 13 § 9. Prior: 2003 2nd sp.s. c 4 § 6.]

Notes:

**Retroactive application – 2006 c 13 §§ 8-22:** See note following RCW 50.04.293.

**Conflict with federal requirements – Part headings not law – Severability – 2006 c 13:** See notes following RCW 50.20.120.

**Conflict with federal requirements – Severability – Effective date – 2003 2nd sp.s. c 4:** See notes following

# **APPENDIX B: ESD'S ORIGINAL ORDER**

0000000000NMDT

STATE OF WASHINGTON  
EMPLOYMENT SECURITY DEPARTMENT  
Determination Notice  
07/02/2010

770  
HEATHER COURTNEY  
23922 41ST DR SE APT 15F  
BOTHELL WA 98021-7771

Return address:  
EMPLOYMENT SECURITY DEPT  
TELECENTER APPEALS  
FAX : (800) 301-1795  
PO BOX 19018  
OLYMPIA WA 985070018

BYE: 04/30/2011

ID: [REDACTED]

A copy of this determination was mailed to the interested parties at their address on 07/02/2010.

**YOUR RIGHTS/SUS DERECHOS:** If you disagree with this decision, you have the right to appeal. Your appeal must be received or postmarked by 08/02/2010. See "YOUR RIGHT TO APPEAL" at the end of this decision. Si no está de acuerdo con esta decisión, tiene el derecho de registrar un apelación. Vea "SU DERECHO DE APELACION" al final de esta decisión.

**NOTICE/AVISO:** The language below is intended to be general context of the cited law. You may ask for a copy of the complete law by calling your Telecenter at 1-800-318-6022 or by logging on to [www.rcw.go2ui.com](http://www.rcw.go2ui.com). La intención del lenguaje de abajo es para dar un contexto general de la ley que se cita. Puede pedir una copia de esa ley al TeleCentro 1-800-318-6022 ó al entrar en [www.rcw.go2ui.com](http://www.rcw.go2ui.com).

State law says that if you quit your job, you may be denied unemployment benefits unless you had good cause for quitting. Good cause can include quitting to accept another job. The new job must be bona fide work covered by unemployment insurance. You must have remained employed in your previous job as long as was reasonable prior to starting your new job. See RCW 50.20.050(2) (b) (i).

07/02/2010

1 of 5 [REDACTED]

# Archived Copy

FACTS:

You opened your claim for unemployment benefits on 05/11/10. You also reported that you were on leave of absence with THE MANOR INC.

Your employer stated that you are considered to have quit effective 05/07/10. On 05/02/10, you were informed by the company President and the Secretary that your manager was replaced. You also were informed that you still had a job. However, you have stopped coming to work and did not respond to their calls since that time.

You stated that you learned that your manager was replaced on 05/02/10 due to a family takeover. You also said that new management notified you that nothing was changed regarding your employment with the company. You explained that you stopped coming to work because your old manager told you not to come to work until further notice. You also were not sure if the new management was credible.

REASONING:

Based on available information, this decision is being adjudicated as quit since you stopped coming to work and perform your regular duties as an employee of the company. Instead, you decided to follow directions of the replaced manager.

According to the final incident, you have not established good cause for leaving work because your reason for quitting is not considered sufficient as provided by the law, RCW 50.20.050(2).

DECISION: Based on the information provided, you did not have good cause to quit your job.

RESULT: Benefits are denied beginning 05/02/2010. This denial will continue for at least seven weeks and until you go back to work and earn seven times your weekly benefit amount in work that is covered by unemployment insurance.

07/02/2010

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**Archived Copy**

Employer: State law says you may be eligible for relief of benefit charges to your experience rating account if the quit was not attributable to you. If you returned the Notice to Employer--Claimant's Separation Statement (EMS 5361) and the job separation was not attributable to you, you will receive a written decision that grants you relief of charges. (This does not apply if you are a taxable local government employer or you reimburse the trust fund for benefit charges.) See RCW 50.29.021.

If you did not return the EMS 5361, your experience rating account will be charged unless (a) you requested relief of benefit charges from the first Notice to Base Year Employer (EMS 166) within 30 days of the date it was mailed, and (b) the department grants your request for relief of charges.

**YOUR RIGHT TO APPEAL:**

If you disagree with this decision, you have the right to appeal. An appeal is a written statement that you disagree with this decision. Your appeal must be received or postmarked by 08/02/2010. An appeal is a request for a hearing with an Administrative Law Judge (ALJ) from the Office of Administrative Hearings (OAH). If you miss the deadline to appeal, tell us why the appeal is late. The ALJ will decide if you have "good cause" for a late appeal. You can fax or mail your written appeal to the fax number or return address listed at the beginning of this decision. We will not accept appeals by e-mail or telephone.

An appeal must include:

- Your name
- Your social security number (claimant's)
- Your current address
- Your telephone number
- The decision you want to appeal
- The reason(s) you want to appeal
- Your signature (we will return it if not signed)

If you or one of your witnesses does not speak English, tell us you need an interpreter and the language that you or your witness speaks.

OAH will mail you, and any other interested party on the decision, a Notice of Hearing with the date and time of the hearing, and a copy of the case file. Most hearings are held by telephone.

07/02/2010

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**Archived Copy**

For additional information about the appeal process, please see "How Can I Appeal?" in the UI Claims Kit at [www.appeal.go2ui.com](http://www.appeal.go2ui.com) or call your Claims TeleCenter.

CLAIMANT: You must continue to file your weekly claims during the appeal process if you are not working full-time. If you win your appeal, you will be paid for the weeks you claimed.

“ SU DERECHO DE APELACION:

Si no está de acuerdo con esta decisión, tiene el derecho de apelar. La apelación es una declaración por escrito diciendo que no esta de acuerdo con esta decisión y quiere pedir una audiencia con un juez administrativo de la Oficina de Audiencias Administrativas (OAH). Su apelación deberá recibirse o tener matasellos fechado, en o antes de: 08/02/2010, envíela ya sea por fax o por correo, vea el número de fax o domicilio al principio de esta decisión. No aceptamos apelaciones por correo electrónico ni por teléfono.

Si se le pasa la fecha límite para registrar su apelación, explique porqué su apelación es tardía. El juez decidirá si tiene "una buena razón" para apelación tardía.

La apelación deberá incluir:

- Su nombre
- El número de seguro social del reclamante
- Su domicilio postal actual
- Su número de teléfono
- La decisión que quiere apelar
- Las razones por lo que no está de acuerdo con la decisión
- Su firma (se devuelven si no tienen firma)
- La razón que tiene para apelar a destiempo, si es que la apelación es tardía.

Si para la audiencia en inglés usted o uno de sus testigos necesita Intérprete, pídale en el mismo escrito y diga qué idioma se necesita.

OAH enviará a todas las partes una Notificación para Audiencia con la fecha y hora de la audiencia y una copia del expediente. La mayoría de las audiencias son por teléfono.

Para mayor información acerca del proceso de apelación, vea la sección "Cómo puedo apelar una decisión?" en el Manual para Reclamos por Desempleo que le enviamos, o por Internet en [www.appeal-sp.go2ui.com](http://www.appeal-sp.go2ui.com) o llame al TeleCentro.

07/02/2010

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# **APPENDIX C: ALJ'S ORDER**

STATE OF WASHINGTON  
OFFICE OF ADMINISTRATIVE HEARINGS  
FOR THE EMPLOYMENT SECURITY DEPARTMENT

IN THE MATTER OF:

Heather Courtney

Claimant

DOCKET NO: 05-2010-28122

INITIAL ORDER

ID: [REDACTED]

BYE: 04/30/2011

UIO: 770

**Hearing:** This matter came before Administrative Law Judge Morgan Collins on August 09, 2010 at Yakima, Washington after due and proper notice to all interested parties.

**Persons Present:** the claimant-appellant, Heather Courtney; claimant's representative Jenee, Jahn, a law student with Unemployment Law project; and claimant's witness, Douglas Zahn, a 50% owner of the interested employer and a former manager. The interested employer, The Manor Inc., appeared by Michael Cohn, General Administrator; Carmela Mabbutt, Corporate President and Manager; and Michael Garber, a contractor.

**STATEMENT OF THE CASE:**

The claimant filed an appeal on July 13, 2010 from a Decision of the Employment Security Department dated July 02, 2010. At issue in the appeal is whether the claimant had good cause for quitting pursuant to RCW 50.20.050(2)(b)(i) due to a bona fide offer of work, voluntarily quit with or without good cause pursuant to RCW 50.20.050(2)(a) or was discharged for misconduct pursuant to RCW 50.20.066. Also at issue is whether the claimant was able to, available for, and actively seeking work during the weeks at issue.

**Having fully considered the entire record, the undersigned Administrative Law Judge enters the following Findings of Fact, Conclusions of Law and Initial Order:**

**FINDINGS OF FACT:**

1. Claimant was employed on November 1, 2007, by the interested employer and last worked April 28, 2010, as event manager, a full-time non-union position that paid \$20 per hour.

2. Claimant had been on vacation and was scheduled to return to work Monday, May 3,

INITIAL ORDER - 1

2010, when on May 2, 2010, she was contacted by Mr. Zahn, the person who had hired claimant some years before and under whose direction, as manager, claimant had worked thereafter. Mr. Zahn informed claimant that he had been ousted from his position as manager, an ouster which he was contesting, carried out by other members of the owning family. Mr. Zahn suggested/directed the claimant not to have any contact with other persons in the owning family and not to go to work until further notice. Claimant inquired about what should be done about the paycheck that was awaiting her at the office. Mr. Zahn requested/directed claimant to go to the office to pick up the paycheck but not to speak to anyone. Claimant went to the office, having been driven there by family members, found that forced entry to her inner office shared by her and Mr. Zahn had been made, and was in the process of repair, picked up her paycheck and gathered her personal possessions. Claimant then began to withdraw from the premises when Mr. Zahn's two sisters, Miss Mabbutt and Miss Cohn, came down the stairs from the private apartment above. Claimant made no inquiry of these ladies who volunteered that claimant should regard that nothing had been changed, that her job was safe, and that new management desired for her to continue in employment. In response, claimant asked for a few days to think this matter over. The sisters, noting that claimant was removing something from the office, requested to and did inspect what it was that claimant was taking. Some of what claimant was carrying they permitted claimant to continue to take and some items they prevented claimant, at least temporarily, from taking.

3. Monday, Tuesday, Wednesday, Thursday then passed, the claimant asserting at hearing, working as best she could from her home on matters related to the interested employer. Claimant had not taken the initiative to respond, as she had indicated she would, to the sisters' reassurances and requests that claimant stay in employment. On Friday, May 7, Miss Mabbutt telephoned claimant. Claimant was present at the time and saw from whom the incoming telephone was coming. Claimant elected not to receive the call; but listened to the message left by Miss Mabbutt. That message was to the effect that claimant having not responded as she had promised, Miss Mabbutt considered the employment relationship to be ended. Claimant, having heard the message at the time at the very instant that it was delivered, did not pick up the telephone to speak with Miss Mabbutt or in the alternative did not immediately telephone Miss Mabbutt.

#### **CONCLUSIONS OF LAW:**

1. An employment separation will be adjudicated as a quit or as a discharge depending in large measure upon on whose initiative this separation occurs. This separation should be adjudicated as a voluntary quit as it occurred at the initiative of the claimant who gave a temporizing answer to new management's request that the claimant stay in employment, then fails to follow-up on her implied promise to respond within two days, or thereabouts, and lastly refused to take the telephone call from the corporate president or to respond to the message given by the corporate president in that telephone call.

2. RCW 50.20.050(2)(a) provides that a claimant is disqualified from receiving

unemployment benefits for leaving work voluntarily without good cause. RCW 50.20.050(2)(b) identifies eleven specific non-disqualifying reasons to quit work:

- (i) to accept a bona fide offer of new work;
- (ii) due to illness or disability;
- (iii) to relocate for mandatory military transfer of spouse;
- (iv) to protect self or family from domestic violence or stalking;
- (v) reduction in pay by twenty-five percent or more;
- (vi) reduction in hours by twenty-five percent or more;
- (vii) worksite change that increases commute distance or difficulty;
- (viii) unsafe worksite conditions;
- (ix) illegal activities in the worksite;
- (x) change in work duties that violates religious convictions or sincere moral beliefs;
- (xi) to enter apprenticeship program.

3. Claimant has not shown that her voluntary quit of this employment was for one of the reasons, above set out, that authorized the Department to pay unemployment insurance benefits to someone who voluntarily quits. Because claimant has not made the required showing, claimant may not receive unemployment insurance benefits as a result of this voluntary quit.

4. RCW 50.20.010(1)(c) requires each claimant to be able to, available for, and actively seeking work. The claimant was able to, available for, and actively seeking work during the weeks at issue and is therefore not subject to denial under the above-cited statute and related laws and regulations. Benefits were not denied pursuant to availability. The provisions of RCW 50.20.050(2)(b)(i) and WAC 192-150-050 apply.

**Now therefore it is ORDERED:**

The Decision of the Employment Security Department under appeal is **AFFIRMED**. The claimant has not established good cause for quitting pursuant to RCW 50.20.050. Benefits are denied pursuant to RCW 50.20.050 for the period beginning May 20, 2010 and thereafter for seven calendar weeks and until the claimant has obtained bona fide work in covered employment and earned wages in that employment equal to seven times his or her weekly benefit amount. ("Covered employment" means work that an employer is required to report to the Employment Security Department and which could be used to establish a claim for unemployment benefits.) The claimant was able to, available for and actively seeking work during the weeks at issue as required by RCW 50.20.010(1)(c).

**Employer:** If you pay taxes on your payroll and are a base year employer for this claimant, or become one in the future, your experience rating account will not be charged for any benefits paid on this claim or future claims based on wages you paid to this individual, unless this



**APPENDIX D:**

**COMMISSIONER'S DECISION**

**CERTIFICATE OF SERVICE**

I certify that I mailed a copy of this decision to the within named interested parties at their respective addresses, postage prepaid, on October 1, 2010.

*[Signature]*  
Representative, Commissioner's Review Office,  
Employment Security Department

UIO: 770  
BYE: 04/30/2011

**BEFORE THE COMMISSIONER OF  
THE EMPLOYMENT SECURITY DEPARTMENT  
OF THE STATE OF WASHINGTON**

Review No. 2010-4598

In re:

**HEATHER COURTNEY**  
SSA No. [REDACTED]

Docket No. 05-2010-28122

**DECISION OF COMMISSIONER**

On September 8, 2010, HEATHER COURTNEY, by and through Carolyn McConnell, Law Student Intern of the Unemployment Law Project, petitioned the Commissioner for review of a decision issued by the Office of Administrative Hearings on August 12, 2010. Pursuant to chapter 192-04 WAC this matter has been delegated by the Commissioner to the Commissioner's Review Office. Having reviewed the entire record and having given due regard to the findings of the administrative law judge pursuant to RCW 34.05.464(4), the undersigned adopts the Office of Administrative Hearings' findings of fact and conclusions of law.

The claimant, ably represented by the Unemployment Law Project, was afforded a full and fair opportunity to present her case before the Office of Administrative Hearings. In her petition for review, the claimant reiterates points raised and addressed at the hearing, which points were properly resolved by the administrative law judge in the decision of the Office of Administrative Hearings.

The claimant has failed to show, by a preponderance of competent evidence of record, good cause for voluntarily leaving employment as that term is contemplated by RCW 50.20.050(2)(a) and RCW 50.20.050(2)(b). The decision of the Office of Administrative Hearings will not be disturbed.

Now, therefore,

**IT IS HEREBY ORDERED** that the decision of the Office of Administrative Hearings issued on August 12, 2010, is **AFFIRMED**. Claimant is disqualified pursuant to RCW 50.20.050(2)(a) beginning May 20, 2010, and thereafter for seven calendar weeks and until he or she has obtained bona fide work in employment covered by this title and earned wages in that employment equal to seven times his or her weekly benefit amount. The

claimant was able to, available for and actively seeking work during the weeks at issue as required by RCW 50.20.010(1)(c). *Employer:* If you pay taxes on your payroll and are a base year employer for this claimant, or become one in the future, your experience rating account will not be charged for any benefits paid on this claim or future claims based on wages you paid to this individual, unless this decision is set aside on appeal. See RCW 50.29.021.

DATED at Olympia, Washington, October 1, 2010.\*

*John M. Sells*

---

Review Judge  
Commissioner's Review Office

\*Copies of this decision were mailed to all interested parties on this date.

#### RECONSIDERATION

Pursuant to RCW 34.05.470 and WAC 192-04-190 you have ten (10) days from the mailing and/or delivery date of this decision/order, whichever is earlier, to file a petition for reconsideration. No matter will be reconsidered unless it clearly appears from the face of the petition for reconsideration and the arguments in support thereof that (a) there is obvious material, clerical error in the decision/order or (b) the petitioner, through no fault of his or her own, has been denied a reasonable opportunity to present argument or respond to argument pursuant WAC 192-04-170. Any request for reconsideration shall be deemed to be denied if the Commissioner's Review Office takes no action within twenty days from the date the petition for reconsideration is filed. A petition for reconsideration together with any argument in support thereof should be filed by mailing or delivering it directly to the Commissioner's Review Office, Employment Security Department, 212 Maple Park Drive, Post Office Box 9046, Olympia, Washington 98507-9046, and to all other parties of record and their representatives. The filing of a petition for reconsideration is not a prerequisite for filing a judicial appeal.

#### JUDICIAL APPEAL

If you are a party aggrieved by the attached Commissioner's decision/order, your attention is directed to RCW 34.05.510 through RCW 34.05.598, which provide that further appeal may be taken to the superior court within thirty (30) days from the date of mailing as shown on the attached decision/order. If no such judicial appeal is filed, the attached decision/order will become final.

If you choose to file a judicial appeal, you must both:

- a. Timely file your judicial appeal directly with the superior court of the county of your residence or Thurston County. If you are not a Washington state resident, you must file your judicial appeal with the superior court of Thurston County. See RCW 34.05.514. (The Department does not furnish judicial appeal forms.) AND

**APPENDIX E: EMPLOYER'S LETTER**

**"DISMISSING" MS. COURTNEY FOR**

**"REPEATED UNEXCUSED ABSENCES"**

8/5/2010

mail (2430x3167)



Carmela Mabbutt  
13032 Admiralty Way  
Everett, WA 98204  
May 12, 2010

Heather Courtney  
14120 NE 183<sup>rd</sup> St #304  
Woodinville, WA 98072

Dear Heather Courtney:

I regret to inform you that The Manor, Inc. has dismissed you as of May 8, 2010, for Repeated Unexcused Absenteeism. We missed you for your scheduled shifts for the period of 5/3 - 5/8. As you know we rely heavily on our event manager showing up for their shift so we can provide excellent service to our clients and to book events.

Your final paycheck statement is included since you haven't come to work and did not come in to collect your paycheck on 5/15 or 5/17. We're sorry that you have decided not to work for The Manor, Inc. any longer. Our records indicate that you are still in possession of a Dell laptop that belongs to The Manor, Inc. As is our policy, if you make arrangements with us by 5/21 and return the laptop in good working condition, we will reimburse the total deducted from your final pay.

This is our formal request for you to return any other property of The Manor, Inc. in your possession. Please make arrangements to collect any personal property you may have left here by May 27<sup>th</sup>, 2010, or usable items will be donated to charity and the rest discarded.

Thank you,

Carmela Mabbutt  
President

The Manor Inc.  
13032 Admiralty Way  
Everett, WA 98204

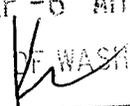


Phone: 425.745.4020  
Fax: 425.267.0105  
Manor@seanet.com  
www.manor-events.com

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DIVISION II

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STATE OF WASHINGTON  
BY  DEPUTY

IN THE COURT OF APPEALS, DIVISION II  
FOR THE STATE OF WASHINGTON

HEATHER COURTNEY,  
Respondent,  
and

STATE OF WASHINGTON,  
EMPLOYMENT SECURITY  
DEPARTMENT,  
Appellant.

No. 42550-6-II

**CERTIFICATE OF SERVICE BY MAIL**

**CERTIFICATE**

I certify that I emailed an electronic copy on September 1, 2011, and mailed a paper copy of the Appellant's Opening Brief in this matter on September 2, 2011, to the Respondent ESD's attorney, Dionne Padilla-Huddleston, WSBA# 38356, Office of the Attorney General, PO Box 40110, Olympia, WA 98504-0110.

Dated this September 2, 2011.



Marc Lampson  
WSBA # 14998  
Attorney for Respondent