

ORIGINAL

No. 42631-5-II

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

ROBERT CAMPBELL,

Respondent,

v.

DEPARTMENT OF EMPLOYMENT SECURITY,

Appellant.

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STATE OF WASHINGTON
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COURT OF APPEALS
DIVISION II

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RESPONDENT MR. CAMPBELL'S REPLY BRIEF

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A. INTRODUCTION

The basic policy underlying all of unemployment insurance is to provide benefits to those who are unemployed “through no fault of their own.” RCW 50.01.010.

Mr. Campbell would not have been unemployed, would not have had to apply for unemployment benefits, and would not have been eligible for unemployment benefits, but for his employer’s denial of his requests for a leave of absence. It was under no obligation to do so, but had the employer granted Mr. Campbell a leave of absence, he would not have been eligible for unemployment benefits because people on leaves of absence do not qualify under the Act. Additionally, he would not have qualified for benefits once he was out of the country for his wife’s work because he would not have been “able, available, and actively seeking work.”

But the employer denied his leave request, as it had every right to do, and Mr. Campbell felt he had no other ethical choice vis-à-vis his employer or his family but to resign so that he could follow his wife and daughter to Finland, as an ALJ later found: “**for his wife’s work** under the Fulbright grant.” CP Comm. Rec. 53, FF 5. Mr. Campbell did not want to be unemployed and did not want an

income based on unemployment benefits, but under the “quit to follow” provisions of the Employment Security Act, Mr. Campbell qualified for unemployment benefits as the Superior Court held. He asks this court to affirm.

B. STATEMENT OF THE CASE

1. JOB SEPARATION

The facts in Mr. Campbell’s case are fully set out in his opening brief. The following facts, however, are central in responding to the State’s Brief.

The employer said it could not accommodate Mr. Campbell’s request for a leave of absence due to the difficult nature of finding a replacement, stating that the “time of year and his endorsed area of teaching would have ***created a major hardship on the district in trying to fill his role*** during such a limited absence.” CP Comm. Rec 49 (emphasis added).

The exhibits and testimony presented at the administrative hearing support the finding that Mr. Campbell quit to relocate for his wife’s work as a Fulbright Scholar. Mr. Campbell testified that his wife would be researching and teaching in Finland. CP Comm. Rec. 13. Under her Fulbright contract, Mr. Campbell’s wife was to

be paid \$17,000. CP Comm. Rec. 16. The employer's response to Mr. Campbell's letter of resignation acknowledges that Mr. Campbell quit to accompany his wife and young daughter while his wife taught and researched under a Fulbright Scholarship. CP Comm. Rec. 49.

2. PROCEDURAL HISTORY

An ALJ found as a fact that Mr. Campbell quit "**for his wife's work** under the Fulbright grant." CP Comm. Rec. 53, FF 5. The Commissioner adopted this finding of fact, along with all of the others. CP Comm. Rec. 66.

The Superior Court reversed the denial of benefits to Mr. Campbell, holding that he did have good cause to quit to relocate for his wife's employment teaching and researching in Finland. The State now appeals.¹ CP 34-37 & 38-43.

¹ Per General Order 2010-1, the respondent files the opening brief in administrative review cases and hence also this reply.

C. ARGUMENT

1. THE SUPERIOR COURT ORDER WAS CORRECT: MR. CAMPBELL WAS ENTITLED TO UNEMPLOYMENT BENEFITS BECAUSE UNDER THE PLAIN LANGUAGE OF THE STATUTE, HE QUIT FOR GOOD CAUSE “TO RELOCATE FOR THE EMPLOYMENT” OF HIS SPOUSE.

Unemployment benefits, our Legislature has stated, are “for the benefit of persons unemployed through no fault of their own,” and the Employment Security Act is to “be liberally construed for the purpose of reducing involuntary unemployment and the suffering caused thereby . . .” RCW 50.01.010.

The “quit to follow”² provision of the Employment Security Act states a claimant has “good cause” as follows:

(iii) The claimant: (A) Left work to relocate for the employment of a spouse or domestic partner that is outside the existing labor market area; and (B) remained employed as long as was reasonable prior to the move;

RCW 50.20.050(2)(b)(iii). That is the entire provision. It sets up two requirements: the claimant left work “to relocate for the employment of a spouse,” and “remained employed as long as was reasonable.”

² This shorthand phrase is used by the Employment Security Department, and many practitioners, concerning cases involving the statute that allows a spouse or domestic partner to quit “to relocate for the employment of a spouse,” and the phrase will be used in quotes as a shorthand reference throughout this brief

The State's brief in this case, and the Commissioner's Decision it defends, misapply and misinterpret the "quit to follow" provision and other aspects of the Employment Security Act (ESA) on several grounds. First, no "inherent" obligation to exhaust reasonable alternatives to quitting exists in the ESA as the ESD claims here and the State's brief fails to cite any authority to support that claim; second, no obligation to exhaust reasonable alternatives exists in the "quit to follow" provision, as the plain language above shows; and third, even if there were an "obligation to exhaust," the ESA provisions that *do* have exhaustion requirements often explicitly state exhaustion is satisfied when a claimant asks for a leave of absence. Mr. Campbell asked for two leaves of absence.

A. No "inherent" exhaustion requirement exists in the Employment Security Act and the State's brief fails to cite any authority showing it does.

The ESD argues that "[i]nherent in the Employment Security Act is a policy requiring claimants to take reasonable steps to preserve their employment." State's Brief, p. 10. This is essentially the State's entire argument, or at least on 10 of the 12 pages devoted to argument. State's Brief, pgs. 10 – 20.

To make its argument that “reasonable steps to preserve” is “inherent” in the Act, the State cites *Robinson v. Employment Security Department*, 84 Wn. App. 774, 779, 930 P.2d 926 (1996). That case does *not* state on page 779, or anywhere else, the proposition for which the State now claims it stands for, that “inherent” in the ESA is a policy requiring claimants to take reasonable steps to preserve their employment in every and all instances.

Further, the legal holding in *Robinson* construes a portion of the “good cause quit” provision of the ESA that no longer exists, that in determining good cause “the commissioner shall only consider work-connected factors,” a provision that the Legislature took out of the Act in 2004.

Thus, the case has nothing to do with the law concerning quitting “to relocate for the employment of a spouse,” and the facts in the case bear no resemblance to the facts in Mr. Campbell’s case. In *Robinson*, the claimant quit because she feared her escrow agent’s license would be jeopardized due to the illegal practices of her employer, in that the employer itself was not properly licensed. She met with the employer and its attorney

about these concerns, but the employer refused to change its practices, so the claimant resigned out of fear of personal liability.

The result in *Robinson*, however, supports finding “good cause” in Mr. Campbell’s case as well. The court in *Robinson* reversed the ESD and found good cause to quit in part because the court recognized it was obligated to liberally construe the provisions of the Act. *Robinson*, 84 Wn. App. at 778. In applying this liberal construction, the court found the claimant had a “reasonable apprehension” to fear that her license would be jeopardized and that in talking to the intransigent employer and its attorney **once** about her fears, she had exhausted reasonable alternatives to preserving her job. *Robinson*, 84 Wn. App. at 779-780. Mr. Campbell asked his employer for a leave, not once, but twice and under the standards of *Robinson*, this constituted exhausting his reasonable alternatives to quitting.

Finally, the current version of the “good cause quit” provisions of the Act have a specific proviso that might have applied in *Robinson* and demonstrate that *if* there is an exhaustion requirement it is not “inherent” but is explicitly provided for by the Legislature. That provision provides “good cause” when “(ix) The individual 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) (emphasis added). Again, even if there were an exhaustion requirement in "quit to follow" cases, Mr. Campbell's actions would have satisfied it.

Following its discussion of *Robinson*, the State's brief then enumerates two other areas where exhaustion is required, quitting due to illness or disability and quitting due to worksite deterioration. In each instance, *the Legislature* has written in to the statute an exhaustion requirement. The Legislature did not do so in the "quit to follow" provision, as the plain language above demonstrates, and to try to graft onto that provision an exhaustion requirement is legislating, something that is left up to the Legislature, not the ESD.

B. The "quit to follow" provision of the ESA says *nothing* about exhausting reasonable alternatives.

The ESD's attempt to graft onto the "quit to follow" provision proposed language about a claimant having to take "reasonable steps to preserve their employment" must fail. The language the ESD wishes were in the statute is nowhere associated with the "quit

to follow” provision in the statute, its regulations, or in case law interpreting the “quit to follow” provision.

The State’s brief cites and discusses a Commissioner’s Decision from thirty-two years ago that has nothing to do with “quit to follow,” but happens to have to do with a school. *In re E.S. Lansberry*, Emp. Sec. Dep’t Comm’r Dec.2d 641 (1980). As a source of legal authority, it is a nullity. ESD Commissioner’s Decisions have no precedential authority in this court, the case is not about quitting to “relocate for the employment” of a spouse, and it construes a version of the ESA even more ancient than the one construed in *Robinson*. From the decision, it is hard even to discern which provisions are being construed.

It appears one provision the decision construes is one that is not even part of the “good cause quit” provisions, but is one that allows a claimant to refuse “new work” if it is “substantially unfavorable” to the claimant. The employer in *Lansberry* needed to reassign the claimant from secretary to some other yet undetermined position. The other provision being construed – and likely it was not actually a provision of the statute but a creation of several commissioner’s decisions - is one that no longer exists because the Legislature took it away in 2009: that one may have

good cause to quit “due to unjustified, unwarranted criticism of an employee by an employer.”

Finally, this decision is apparently discussed by the State’s brief merely because it has language about leaving a job “prematurely.” This “crane analysis,” lifting language from a case that has no legal or factual resemblance to the case at hand, but trying to apply it anyway, must fail. The quit to follow provision already states that one must work “as long as was reasonable” before quitting, so the *Lansberry* case is both wholly distinguishable and wholly irrelevant.

The State’s brief next discusses *Johns v. Employment Security Department*, 38 Wn. App. 566, 686 P.2D 517 (1984), again a case that has nothing to do with the quit to follow provision, but one that construes the same provision of the good cause quit statute construed in *Robinson* concerning “work-connected factors” and “exhaustion,” provisions in the Act that no longer exist after their removal by the Legislature in 2004. So *Johns’* applicability to Mr. Campbell’s case is completely missing: the case construes a portion of the Act that no longer exists and the case concerns a reason for quitting that is totally inapposite of Mr. Campbell’s reason: “philosophical differences with his supervisors.”

“Exhausting alternatives” is not “inherent” in the Act. Where exhaustion is required, the Legislature can and has made it explicitly part of the statute. It did not do so with regard to “quit to follow” cases.³

C. Even if exhaustion were required in Mr. Campbell’s case, he *did* exhaust reasonable alternatives by asking for two different leaves of absence.

Moreover, even if all the State’s arguments were correct – that Mr. Campbell had an obligation to “exhaust reasonable alternatives to quitting” - he had done so by asking on two occasions for two different lengths of leaves of absence. Leaves of absence are in fact one of the ways that one does exhaust reasonable alternatives under the provisions of the Act that *do* require it. For instance, the “medical good cause quit” provision specifically requires that in order to exhaust one’s reasonable alternatives to quitting, one must have “pursued all reasonable alternatives to preserve his or her employment status **by**

³ The State’s discussion of *In re Burkholder*, Emp. Sec. Comm’r Dec.2d 315 (1977) (State’s Brief, p. 14-15) and *In re Ackler*, Emp. Sec. Comm’r Dec.2d 581 (1979) (State’s Brief, p. 19) are as equally unconvincing as its other case citations for the same reasons: these cases are not precedent, they construe the Act as it was over 32 years ago, they do not construe language regarding quitting “to relocate **for the employment** of a spouse,” and both merely provide non-analogous factual examples that the timing of a quit must be reasonable. “Reasonable” is *always* a factual question that is construed in the law on a case-by-case basis, and under the circumstances of this case, Mr. Campbell’s timing was reasonable as he had no other choice.

requesting a leave of absence. . .” RCW

50.20.050(2)(b)(ii)(A)(emphasis added). Mr. Campbell asked twice for two different kinds of leaves of absence.

The State’s brief argues that asking for a leave of absence is not fulfilling the obligation to “exhaust reasonable alternatives” because “his efforts [were] to preserve his employment for *after* he returned from Finland, not before he left for Finland. He was trying to ensure that he would have a job upon his return.” State’s Brief, p. 12-13. Any request for a leave of absence is an effort to preserve one’s employment for *after* one returns from the leave. When one asks for a medical leave of absence, one is not saying give me a leave now so I can work now so I can feel better when I come back. The leave is to be able to no longer work, to take a leave, with some assurance that upon returning, *after* the leave, the job will be preserved.

The State’s brief then misconstrues and mischaracterizes both Mr. Campbell and his reasons for quitting: he quit when he quit because to continue to work with the intention all the time of quitting either right before the fall term began or right before the spring term began would be leaving the employer in a lurch without anytime to

find a replacement. The reason the employer declined the leaves of absence in the first place was the inability to find a replacement.

It may be true that Mr. Campbell could have kept working right up until the time he left for Finland, or right up until the beginning of the Fall Semester, if he did not mind being sleazy, deceitful, a liar, duplicitous, and ruining any chance he might have on his return for re-employment having built a reputation for being dishonest and not caring about the employer's best interests. But it seems Mr. Campbell found such behavior objectionable, so he quit, providing the employer ample time to find a replacement.

The employer said it could not accommodate Mr. Campbell's request for a leave of absence due to the difficult nature of finding a replacement, stating that the "time of year and his endorsed area of teaching would have **created a major hardship on the district in trying to fill his role** during such a limited absence." CP Comm. Rec 49 (emphasis added).

It was therefore not Mr. Campbell's imagination that by dishonestly staying on through the summer and fall, with every intention of leaving in the spring, he would create hardship for his

employer.⁴ His employer told him so and denied his request for a leave precisely for this reason.

The State's brief argues that Mr. Campbell should have disregarded his employer's needs: "Even if Campbell's decision was made solely with his employer's staffing needs in mind, **he was under no obligation to accommodate his employer's needs (particularly after they refused to accommodate his).**"

State's Brief, p. 17. True. None of us are obligated to be ethical; Mr. Campbell chose to be so.

Additionally, Mr. Campbell was a care-giver, a father, who had mutual responsibility to care for his daughter while his wife worked – wherever she worked. The State's brief says it was "understandable" he "would not want his family to separate for even four months. . . ." State's Brief, 13. This is both condescending and misleading; it fails to acknowledge that Mr. Campbell was quitting "to relocate for the employment of his spouse" in part to take care of his daughter.

⁴ The State's brief claims it "is not clear from the record" that Mr. Campbell quit "to allow his employer as much notice and time as possible to find a replacement," but then goes on to quote Mr. Campbell saying he wanted to be "ethical and professional." State's Brief, p. 17. The State claims this "did not specify that it was to accommodate his employer's staffing needs." In saying he wanted to be "ethical and professional" he was answering the question: "Why didn't you just keep working for them?" CP Comm. Rec. 14-15. The record is indeed clear: he left out of an ethical and professional obligation to the employer and himself.

Finally, the State's brief states a new legal proposition for which it cites absolutely no legal authority: "[Q]uitting full-time, long-term employment for such a temporary, short-term position is **not the type of personal choice the unemployment compensation fund is intended to subsidize.**" State's Brief, p. 13. No legal authority is cited for this claim. The plain language of the statute says nothing that empowers the ESD to evaluate the relocating spouse's new work in terms of duration, compensation, hours, or anything other than it was "outside the existing labor market area." RCW 50.20.050(2)(b)(iii).

Mr. Campbell did not want to quit. He asked his employer for a one-semester leave of absence, and was refused; he asked the employer for a one-year leave of absence, and was refused.⁵ If either of those requests had been granted he would not have been eligible for unemployment benefits because people on leaves of

⁵ Two red herrings are to be laid to rest. First, the State's brief at page 15, in footnote 4, argues that there was some question about Mr. Campbell's being "able, available, and actively seeking work." The ALJ found Mr. Campbell to be so in Finding of Fact 6 and the Commissioner adopted this finding. CP Comm. Rec. 53, FF 6; 66. The State's footnote also argues "had Campbell continued working until moving, he **would not have been ineligible** for benefits during the summer months of 2010 if the school intended to continue employing him ...". This is either a typographical error on "ineligible" or it is a mistake in law. If Mr. Campbell had "reasonable assurance" of employment in the Fall of 2010 he would NOT have been eligible for benefits. RCW 50.44.050. Second, the State's brief claims "Campbell ... essentially seeks an exception to the rule for school teachers." State's Brief, p. 16. Mr. Campbell argued nothing of the sort in his opening brief and does not do so here.

absence are not eligible, and once he was with his wife and daughter out of the country he would not have been eligible because he would not have been “able, available, and actively seeking work.” It was only the employer’s actions that created an unfortunate situation in which Mr. Campbell felt he had no other choice but to quit. No one is blaming the employer for its decision, nor should Mr. Campbell be faulted for his. Sometimes there is not a “good guy” and a “bad guy,” but merely people trying to do the best with the situations in which they find themselves.

2. MRS. CAMPBELL’S WORK TEACHING AND RESEARCHING UNDER A CONTRACT FOR PAY FOR \$17,000 WAS “EMPLOYMENT” UNDER THE STATUTORY DEFINITION OF THAT TERM WHICH INCLUDES SERVICE OF “WHATEVER NATURE” “PERFORMED ... UNDER ANY CONTRACT ... WRITTEN OR ORAL, EXPRESS OR IMPLIED.”

Mr. Campbell quit his teaching job when he was denied a leave of absence to accompany his wife and daughter for his wife’s employment as a teacher and researcher. The Employment Security Act (ESA) allows a claimant unemployment benefits when the claimant quits a job to relocate for a spouse’s employment. RCW 50.20.050(2)(b)(iii).

The State's brief spends the final two pages of its argument claiming that Mr. Campbell should not have qualified under the quit to follow provision because his wife's position was not really "work" or "employment." State's Brief, p. 20-22. The State's brief is obligated to defend the Commissioner's Decision on this point. The Commissioner concluded that the evidence did "not establish the Fulbright Scholarship equated with employment." CP Comm. Rec. 67. The Commissioner thought the evidence did "not establish whether the Fulbright grant was essentially scholarship income (paid primarily for the benefit of the claimant's spouse) or compensation for personal services." CP Comm. Rec. 67.

Nothing in the statute, regulations, or case law gives the ESD the power to decide whether the relocating spouse's new position meets the an ESD review judge's idea of what is "really" work or employment.

The ESA's definition of "employment" is extremely broad:

"Employment", subject only to the other provisions of this title, means personal service, of *whatever* nature, *unlimited* by the relationship of master and servant as known to the common law or any other legal relationship, *including* service in interstate commerce, *performed for wages or under any contract* calling for the performance of personal services, *written or oral, express or implied.*

RCW 50.04.100 (emphasis added). Though there is no authority to show that this definition even applies in the ESD's assessment of a relocating spouse's employment, for argument's sake, if it does apply then there is no dispute that Mrs. Campbell's teaching and researching for pay under a contract qualified as "employment."

The State's brief quotes this same statute, and proceeds to ignore most of its words, including "whatever," "unlimited by the relationship of master and servant," "performed for wages *or under any contract,*" and that the contract need not be an "express" or "written" contract but can be an "implied" and "oral" contract. Couple this definition of employment with the "liberal construction" that the Legislature's preamble insists be applied to the statute, and the Commissioner's conclusion and the State's argument that Mrs. Campbell's teaching and researching under a "contract" for the "pay" of "\$17,000" is somehow suspect is an argument and a conclusion that cannot stand.

The State's brief questions whether Mrs. Campbell "was going to perform personal services for an employer." State's Brief, p. 21. But the ESA's definition of "employer" under the statute is almost as broad as its definition of "employment," especially given a liberal construction:

(1) "Employer" means **any individual or type of organization**, including any partnership, association, trust, estate, joint stock company, insurance company, limited liability company, or corporation, whether domestic or foreign, or the receiver, trustee in bankruptcy, trustee, or the legal representative of a deceased person, **having any person in employment** or, having become an employer, has not ceased to be an employer as provided in this title.

RCW 50.04.080 (emphasis added). Why the organization paying Mrs. Campbell \$17,000 under a contract to teach and research is not an employer is not explained by the Commissioner or the State.

The State's brief questions whether the employer pays "under a contract calling for personal services." State's Brief, p. 21. Uncontroverted testimony, as well as the ALJ's findings of fact adopted by the Commissioner, stated that Mrs. Campbell would be "teaching and researching" and that Mr. Campbell quit his work "for his wife's work." CP Comm. Rec. 13; 16; 59, FF 2, 5. The Commissioner adopted this finding of fact and the State, as the appellant, has failed to assign error to it.

The State's brief then argues that it is "unclear"⁶ whether "teaching," "researching," and "making presentations" constitutes

⁶ This is a common tactic throughout the State's brief, to complain that something is "unclear" in the record, done so that the State can argue that Mr. Campbell did not meet his burden of proof. The central facts upon which this case turn, discussed here and in Mr. Campbell's opening brief, are completely "clear" despite the State's complaints to the contrary.

“personal services’ under RCW 50.04.010.” State’s Brief, p. 21-22.

First, there is no 50.04.010, so presumably the State meant 50.04.100, the definition of employment, which as discussed above is a very broad and liberal definition of employment. But the State fails to argue *why* teaching, researching, and making presentations should not be considered “personal services.” Anyone who has taught, researched, or made presentations under a contract for pay would consider these acts employment for personal services.

The State’s brief then states that the “record does not establish⁷ whether Campbell’s wife is a graduate student, or a professor, or some other type of Fulbright scholar.” State’s Brief, p. 22. But then there is no explanation why these distinctions should make a difference and the reason is: it makes no difference.

The statute does not preclude a graduate student or a professor or “some other kind of scholar” from getting a job in, for example, Spokane and causing his or her spouse to quit a job in Seattle to rejoin the spouse in Spokane. Or anywhere else in the world. The “quit to follow” provision says nothing about the relocating spouse’s work having to be full-time, part-time, or permanent, nor does it say anything about how the “income” should

⁷ Again, the tactic to claim that something is “unclear,” when here, it does not matter.

be allocated for the relocating spouse's work to qualify the quitting spouse for benefits.

Therefore, Mr. Campbell met his burden to prove he quit for his wife's "employment" as defined under the statute, and as found as an uncontested fact by the ALJ. Therefore, Mr. Campbell respectfully requests that this Court affirm the Superior Court's reversal of the Commissioner's Decision in this case.⁸

D. CONCLUSION

Mr. Campbell respectfully requests that this court affirm the Superior Court's Order in this case and thereby reverse the Commissioner's Order that denied Mr. Campbell benefits. The Superior Court's Order correctly found that both prongs of the quit to follow provision of the Employment Security Act were met and that good cause to quit was established. Counsel also requests reasonable attorney fees and costs for the time spent in bringing about an award of benefits to Mr. Campbell.

⁸ The State laments that ruling for Mr. Campbell in this case will "create an incongruous result." This court is fully empowered to narrow its holding in favor of Mr. Campbell to the peculiar circumstances of this case.

Dated this 12th day of March 2012.

Respectfully submitted,

A handwritten signature in black ink, consisting of a large, sweeping initial 'M' followed by a series of loops and a long horizontal stroke extending to the right.

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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY _____
DEPUTY

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

7 ROBERT CAMPBELL,)
8 Respondent,)
9 and)
10 DEPARTMENT OF EMPLOYMENT)
11 SECURITY,)
12 Appellant.)

No. 42631-5-II

CERTIFICATE OF SERVICE BY MAIL

CERTIFICATE

I certify that I emailed an electronic and mailed a paper copy of the Respondent's Reply Brief in this matter on March 12, 2012, to the Respondent ESD's attorney, Leah Harris, Office of the Attorney General, 800 Fifth Ave, Suite 2000, Seattle, WA 98104-3188.

Dated this March 12, 2012.



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