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COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

JANA WOLFF,

Appellant,

v.

STATE OF WASHINGTON DEPARTMENT OF EMPLOYMENT
SECURITY,

Respondent.

RESPONDENT'S BRIEF

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I. INTRODUCTION

In order to be eligible for unemployment benefits, the Employment Security Act requires claimants to be “available for work,” RCW 50.20.010(1)(c)(ii), which includes being “willing to work full-time, part-time, and accept temporary work” WAC 192-170-010(1). Jana Wolff sought unemployment benefits yet refused to apply for any full-time positions, even though she did not meet either of the two exceptions to the requirement that claimants be available for full-time work. And, by refusing to seek full-time employment, Wolff placed a substantial restriction on her availability for work and substantially reduced the likelihood she could return to work at the earliest possible time. WAC 197-170-010(1)(a), (c), (d). Thus, Wolff was not “available for work” as required by the Act.

The Employment Security Department’s Commissioner correctly determined that Wolff was not eligible for benefits because she was not available for work under the law. This Court should affirm that decision.

II. COUNTERSTATEMENT OF ISSUES

1) To be eligible for unemployment benefits, a claimant must be “available for work” in accordance with the Employment Security Act and the Department’s rules. Did the Commissioner correctly determine that Wolff was not “available for work,” and was thus ineligible for benefits,

when she refused to apply for full-time positions, which substantially restricted her opportunities to return to work at the earliest possible time? RCW 50.20.010(1)(c)(ii); WAC 192-170-010(1).

2) Did the Commissioner correctly determine that full-time work was “suitable” for Wolff when she had previously worked full-time and had no disability? RCW 50.20.100(1); WAC 192-170-050.

III. COUNTERSTATEMENT OF FACTS

The facts of this case are not in dispute. Jana Wolff worked as an executive assistant for Gonzaga University on a modified full-time schedule: she worked between 24 and 32 hours each week and used a combination of personal leave and Family and Medical Leave Act (FMLA) time to meet full-time hours, until that leave was exhausted. Commissioner’s Certified Administrative Record (AR) 14, 18, 19, 284, 294; Finding of Fact (FF) 4. Wolff has two children with fetal alcohol syndrome who see a variety of therapists for treatment, and those appointments and travel require five to six hours each week. AR 17. Wolff used her modified schedule to be available for those appointments. AR 14; 284, FF 7; 294, FF 4.

At the end of Wolff’s employment with Gonzaga, the University gave her the option of either working an increased schedule, equal to 37.5 hours

each week, or resigning. CR 18-22; 284, FF5. Wolff refused to increase her hours and was dismissed.¹ CR 285-86; FF 6, Conclusion of Law (CL) 9.

Wolff applied for unemployment benefits. CR 284, FF 1; 294, FF 1. While claiming benefits and seeking a new job, she refused to consider any position that involved more than 30 hours of work each week. CR 13; 78; 284, FF 7; 294, FF 4. Because she would only work a maximum of 25-30 hours each week, Wolff applied for part-time jobs only and would not apply for full-time work. CR 78; 284, FF7; 294, FF 4.

In two determinations on her eligibility for benefits, the Department noted that the customary hours for Wolff's occupation are Monday to Friday, 8:00 a.m. to 6:00 p.m., and included a 40-hour workweek. CR 169; 194. Because Wolff refused to consider full-time employment, the Department denied Wolff's application for benefits. CR 29-33; 168-172; 284, FF1; 294; FF 1. Wolff appealed those denials, and a consolidated hearing was held before an Administrative Law Judge (ALJ). CR 284; 294.

At her administrative hearing, Wolff reiterated that she was only willing to work "between 25 and 30 hours a week" due to her children's therapy schedule. CR 13; 284, FF 7; 294, FF 4. The ALJ affirmed the Department's determination that Wolff was not "available for work," as

¹ Wolff's eligibility for benefits based on her separation from Gonzaga is not at issue in this case. The only issue is whether she was available for work as required while claiming benefits.

required by RCW 50.20.010(c). CR 284-86; 294-95. The ALJ further concluded that Wolff did not meet the “only two exceptions to the requirement of being available for full-time work” set forth in WAC 192-170-010(1)(a)(ii): she was not a qualified part-time worker, and she suffers from no disability. CR 285-86, CL 4; 295, CL 4. Thus, the ALJ’s Initial Order affirmed the Department’s determination that Wolff was ineligible for benefits. CR 285-86; 295. Wolff petitioned the Department’s Commissioner for review of the Initial Order². CR 303-306.

On review, the Commissioner adopted the ALJ’s order and entered additional conclusions of law. CR 309-11. The Commissioner found that Wolff was not excused from pursuing full time work: “The regulation excludes from the full-time requirement disabled workers whom full-time work would be unsuitable and part-time employees as defined by WAC 192-170-070. Neither exception to the general full-time requirements are applicable here.” CR 309, Addt’l CL I.

The Commissioner further explained that “a lack of adequate child care may constitute a substantial restriction on a claimant’s availability for work” and that there was “no legal authority to suggest that [a] lack of childcare makes full-time employment unsuitable.” CR 315, Addt’l CL IV, V.

² The Commissioner has delegated the authority to review initial orders to the Commissioner’s Review Office. WAC 192-04-020(5). For ease, that designee is referred to as the Commissioner in this brief.

Wolff petitioned the Thurston County Superior Court for judicial review. CP 4-11. That court affirmed the Commissioner. CP 39-41.

IV. STANDARD OF REVIEW

The appellate court's "limited review of an agency decision is governed by the Administrative Procedure Act (APA), chapter 34.05 RCW." *Campbell v. Emp't Sec. Dep't*, 180 Wn.2d 566, 571, 326 P.3d 713 (2014); RCW 50.32.120. This Court sits in the same position as the superior court and applies the APA standards directly to the administrative record. *Campbell*, 180 Wn.2d at 571. Thus the decision on review is the Commissioner's final order, which adopted the ALJ's factual findings and legal conclusions and entered additional conclusions. *Campbell*, 180 Wn.2d at 571; *Tapper v. Emp't Sec. Dep't*, 122 Wn.2d 397, 406, 858 P.2d 494 (1993).

The Commissioner's decision is prima facie correct, and the burden of demonstrating its invalidity is on Wolff. RCW 34.05.570(1)(a); *In re Anderson*, 39 Wn.2d 356, 359, 235 P.2d 303 (1951), *Smith v. Emp't Sec. Dep't*, 155 Wn. App. 24, 32, 226 P.3d 263 (2010). This Court's task "is to determine whether the Department erroneously interpreted or applied the law" and "whether its decision is supported by substantial evidence." *Darkenwald v. Emp't Sec. Dep't*, 183 Wn.2d 237, 244, 350 P.3d 647 (2015); RCW 34.05.570(3)(d), (e).

Unchallenged factual findings are verities on appeal. *Darkenwald*, 183 Wn.2d at 244. Wolff has not challenged any of the Commissioner's factual findings. Instead, she asserts only "there was no substantial evidence on the record to support the finding that Wolff was not able, not available and was not actively seeking work." Pet'r's Opening Br. 2.

But whether Wolff was available for work is a mixed question of law and fact. To resolve a mixed question of law and fact, the Court must engage in a three-step analysis in which it: (1) determines whether the factual findings are supported by substantial evidence; (2) makes a *de novo* determination of the law; and (3) applies the law to the applicable facts. *See Tapper*, 122 Wn.2d at 403. Because Wolff has not challenged any of the Commissioner factual findings, they are verities in this appeal. *Darkenwald*, 183 Wn.2d at 244; *Smith*, 155 Wn. App. at 32–33. Thus, this Court's review is limited to determining whether the unchallenged factual findings support the conclusion that Wolff was not "available for work" as required by law. *Fuller v. Emp't Sec. Dep't*, 52 Wn. App. 603, 605, 762 P.2d 367 (1988). The Court reviews that legal conclusion *de novo*. RCW 34.05.570(3)(d); *Tapper*, 122 Wn.2d at 403. However, because the Department has expertise in interpreting and applying unemployment benefits law, the Court should accord substantial weight to the Department's interpretation of the statute

and the rule the agency promulgated. *Verizon Northwest, Inc. v. Washington Emp't Sec. Dep't*, 164 Wn.2d 909, 915, 194 P.3d 255 (2008).

V. ARGUMENT

Under the Employment Security Act, only claimants who meet the statutory eligibility requirements may receive unemployment benefits. RCW 50.20.010. The Commissioner correctly held—based on the uncontested facts—that Wolff was not eligible for benefits because she was not “available for work” as required by law. In order to be considered “available for work,” a claimant “must be ready, able, and willing, immediately to accept any suitable work.” RCW 50.20.010 (1)(c)(ii). And she must be “willing to work full-time, part-time, and accept temporary work during all of the usual hours and days of the week customary for your occupation.” WAC 192-170-010(1)(a).

Wolff refused to apply for or consider any full-time positions. There are only two exceptions to the requirement that a claimant be willing to accept full-time work: if a claimant worked part-time before losing her job (part time means 17 or fewer hours per week, WAC 192-170-065(1)), or if a claimant is disabled. WAC 192-170-020(1)(a)(ii). Wolff did not meet either of these exceptions. Her previous job was not part-time because it was more than 17 hours per week, and she is not disabled. Because the Commissioner correctly ruled that Wolff was not “available for work” as required, she was ineligible

to receive unemployment benefits. The Court should affirm the Commissioner's decision.

Further, the ALJ found—and the Commissioner adopted—that Wolff was “only willing to work 25-30 hours per week.” When she applied for unemployment benefits Wolff reported that she was willing to work “4-5 hours per day, 5 days per week” or “up to 24 hours per week with a flexible schedule.” CR 46. And, at her hearing Wolff testified that she was only willing to work 25-30 hours per week. CR 13.

A. Wolff Was Ineligible for Unemployment Benefits Because She Was Not “Available for Work” As Required by the Employment Security Act

Under RCW 50.20.010(1)(c), an unemployment benefits claimant must be able to work and available for work in any trade, occupation, profession, or business for which she is reasonably fitted. Only if she meets the threshold eligibility criteria can a claimant receive unemployment benefits. RCW 50.20.010. It is the claimant's burden she is eligible. *Jacobs v. Office of Unempl. Comp. & Placement*, 27 Wn.2d 641, 651, 179 P.2d 707 (1947).

The Department established minimum criteria for when a claimant is considered “available for work” under the Act. A claimant is available under the Act if she:

- (a) Is willing to work full-time, part-time, and accept temporary work during all of the usual hours and days of the week customary for the claimants occupation;
- (b) Is capable of accepting and reporting for any suitable work within the labor market in which the claimant is seeking work;
- (c) Does not impose conditions that substantially reduce or limit claimant's opportunity to return to work at the earliest possible time;
- (d) Is available for work during the hours customary for the claimant's trade or occupation; and
- (e) Is physically present in the claimant's normal labor market area, unless the claimant is actively seeking and willing to accept work outside his or her normal labor market.

WAC 192-170-010(1). Wolff has not challenged the regulation. Since the requirements are stated in the conjunctive, Wolff was required to meet each of the requirements in order to show she was available for work. *See Darkenwald*, 183 Wn.2d at 247. She did not: (1) she was unwilling to work any full-time position; (2) she substantially restricted her opportunity to return to work at the earliest possible time; and (3) she was not available for work during the hours customary for her trade or occupation. WAC 192-170-010(1)(a), (c), (d). Because Wolff was not available for work as required by the Employment Security Act, the Commissioner correctly determined that she was ineligible to receive benefits.

1. Wolff's refusal to consider full-time work violated the availability requirement of WAC 192-170-010(1)(a)

The Department will consider a claimant available for work, if, among other requirements, she is "willing to work full-time, part-time, and

accept temporary work during all of the usual hours and days of the week customary for your occupation.” WAC 192-170-010(1)(a). There are only two exceptions to the requirement that an unemployment benefits claimant be available to work full-time. WAC 192-170-010(1)(a)(ii). Those exceptions are: (1) if a claimant is a part-time eligible worker, WAC 192-170-070; or (2) if a claimant has a disability that prevents her from working part-time, WAC 192-170-050(1)(b). Because Wolff was unwilling to work full-time, she was not available for work unless she met one of those two exceptions. Based on the unchallenged findings of fact, the Commissioner properly determined that Wolff was not a part-time eligible worker and she did not have a disability preventing her from working full-time. She was, therefore, not “available for work” as required by the Act. And, because she was not available for work, the Commissioner correctly concluded that she is ineligible for unemployment benefits.

a. Wolff did not meet the exception for part-time workers

A claimant who meets the definition of a part-time eligible worker under RCW 50.20.119 may refuse “any job of 18 or more hours per week.” WAC 192-170-010(1)(a)(ii); WAC 192-170-070(1). RCW 50.20.119 defines “part-time worker” as a person who: “(a) earned wages in employment in at least forty weeks in the individual’s base year; and (b) did

not earn wages in employment in more than seventeen hours per week in any weeks in the individual's base year." RCW 50.20.119. More plainly, a part-time worker is an individual who worked in at least 40 weeks, but never worked more than 17 hours in any week.

At Gonzaga, Wolff was a full-time employee. In her last position with Gonzaga, she worked between 24 and 32 hours per week, using a mixture of vacation and medical leave for additional hours to reach full time status. AR 14; 18-19; 22. In Wolff's voluntary quit statement, she wrote that she earned "\$3,650 per month for 37.5 hours per week." AR 38. And in her letter contesting the Department's denial of benefits, Wolff wrote that she was working "approximately 24.5 hours per week." CR 35. At no point did Wolff ever work less than 24 hours in a week. Accordingly, Wolff is not a "part-time worker" and does not qualify for that exception to the full-time work search requirement.

b. Wolff does not have a disability, and she was not excused from seeking full-time work

The only other exception to the full-time work requirement is WAC 192-170-050(1)(b), which permits the Department, at its discretion, to "determine that less than full-time work is suitable" if a claimant suffers from a disability. WAC 192-170-010(1)(a)(ii). The Commissioner correctly

concluded that Wolff was not exempt from the full-time work requirement under this provision because she did not have a disability.

Again, it was Wolff's burden to show that she is eligible for benefits. As a threshold requirement, a claimant must "have a disability," which is defined as "a sensory, mental, or physical condition: that: (i) is medically recognizable or diagnosable; (ii) exists as a record or history; and (iii) substantially limits the proper performance of your job." WAC 192-170-050(1)(a). If a claimant has a disability, she also must show that her disability "prevents [her] from working the number of hours that are customary to the occupation; [she] is actively seeking work for the occupation and hours [she] has the ability to perform; and the restriction on the of number of hours [she] can work, the essential functions [she] can perform, and the occupations [she] is seeking does not substantially limit [her] employment prospects." WAC 192-170-050(1)(b).

Wolff does not have a disability, nor does she claim to have one. Instead, she asks the Court to disregard the plain language of the regulation and apply the disability exception to her circumstances. Appellant's Opening Br. 17. Wolff argues that though she "does not have a disability herself," the fact that her "adopted sons require additional and regular medical care" should qualify as a disability for her. *Id.* She is mistaken. Wolff relies on a separate provision of the Act in support of her argument,

RCW 50.20.050(2)(b)(ii). But that provision is limited to determining if a claimant has good cause for voluntarily quitting a job; it does not address whether, once a claimant is unemployed and receiving unemployment benefits, a claimant is *available for work* under the Act, which is the issue here. Nothing in the Employment Security Act or the regulations implementing it relieves a benefits claimant of the requirement to search for full-time work due to the disability of a family member.

And the requirements of the disability regulation clearly require the claimant herself to be disabled to be excused from the full-time work search requirement. The rule defines a disability as “a sensory, mental, or physical condition that: (i) is medically recognizable or diagnosable; (ii) exists as a record or history; and (iii) substantially limits the proper performance of your job.” WAC 192-170-050(1)(a). All of these considerations fall under subsection (1), “physical fitness.” They all pertain to the claimant’s ability to perform work in determining whether that work is “suitable.” Thus, Wolff’s contention that the Commissioner was required to consider “that Wolff is the mother of twin boys with fetal alcohol syndrome” in determining whether she met the availability requirements is mistaken.

Finally, while the Act is to be liberally construed, it is also intended “for the benefit of persons unemployed through no fault of their own.” RCW 50.01.010. That is why the Act establishes minimum eligibility

criteria and why courts have consistently enforced those criteria. RCW 50.20.010; *see, e.g., Jacobs v. Office of Unempl. Comp. & Placement*, 27 Wn.2d 641, 179 P.2d 707 (1947), *Townsend v. Emp't Sec. Dep't*, 54 Wn.2d 532, 341 P.2d 877 (1959) (finding a claimant who was not applying for jobs to be ineligible for benefits), *Arima v. Emp't Sec. Dep't*, 29 Wn. App. 344, 347, 628 P.2d 500 (1981). One of those criteria is that a claimant “must be ready, able and willing, immediately to accept any suitable which may be offered.” RCW 50.20.010(1)(c)(ii); *Jacobs*, 27 Wn.2d 641 (1947). If a claimant is not willing and able to immediately accept any suitable work, then he or she is not without fault in remaining unemployed. *Id.*

While a family member’s illness or disability may provide good cause to voluntarily leave a job, it is not a basis for the claimant not to seek full-time work while she is claiming unemployment benefits. Wolff is not disabled, and she did not meet the threshold requirement for that exception to the full-time work requirement under WAC 192-170-050(1)(b). She was required to seek full-time employment.

2. Wolff’s refusal to consider full-time work substantially reduced her opportunity to return to work at the earliest possible time, WAC 192-170-010(1)(c)

Unemployment benefits claimants may not “impose conditions that substantially reduce or limit [the] opportunity to return to work at the earliest possible time.” WAC 192-170-010(1)(c). While some restrictions

on one's availability are acceptable, a substantial restriction renders a claimant ineligible for benefits. WAC 192-170-010(1)(c); *Jacobs v. Office of Unempl. Comp. & Placement*, 27 Wn.2d 641, 651, 179 P.2d 707 (1947); *In re Wolanski*, Emp't Sec. Comm'r Dec.2d 860 at *2 (1997). A substantial restriction is any that prevents a claimant from accepting work during the customary hours their work is available. *Jacobs*, 27 Wn.2d at 654, 660.³ As the Commissioner has explained, any condition that renders a claimant "unavailable for any hours customarily worked in his or her occupation" constitutes a substantial restriction. *In re Wolanski*, Emp't Sec. Comm'r Dec.2d 860 (1997) at *2. This is true even if there is a sympathetic reason for the restriction, including the need to care for children. *See In re Yeoman*, Emp't Sec. Comm'r Dec. 1200 (1974); *In re Lininger*, Emp't Sec. Comm'r Dec.2d 213 (1976).

In *Jacobs*, the claimant was willing to work only during daylight hours in order to be home with her children at night. *Jacobs*, 27 Wn.2d at 649. The Court determined that this limitation made the claimant unavailable for work under the Act, and therefore ineligible for benefits.

³ The eligibility statute in effect in *Jacobs* was nearly identical to the current statute: a claimant could be eligible for benefits "only if the Commissioner finds . . . (c) he is able to work, and is available for work in any trade, occupation, profession, or business for which he is reasonably fitted. To be available for work, an individual must be ready, able, and willing, immediately to accept any suitable work which may be offered to him." Laws of 1945, ch. 35 § 68(c).

Id. at 660. As the Court explained, a claimant is not permitted to limit the hours they will accept work when, “the work he is qualified to perform is not likewise limited.” *Id.* at 654 (quoting *Ford Motor Co. v. Appeal Bd. of Michigan Unempl. Comp. Comm’n*, 316 Mich. 468, 25 N.W.2d 586 (1947)).

The Court addressed a claimant’s refusal to consider permanent work in *Arima v. Emp’t Sec. Dep’t*, 29 Wn. App. 344, 347, 628 P.2d 500 (1981). There, the Court of Appeals determined that a claimant who restricted her job search to temporary summer employment—to the exclusion of any permanent position—was ineligible for unemployment benefits, because she substantially limited her opportunity to gain employment at the earliest opportunity. *Arima*, 29 Wn. App. at 347. The claimant worked as a secretary for a community college during a nine-month instructional year and was unemployed during the summer. *Id.* at 345. The college had year-round, secretarial positions available, but the claimant did not apply for them because she was seeking only a temporary summer position. *Id.* At 345-46.

The Court held that the claimant was not eligible for unemployment benefits because refusing to consider offers of year-round employment substantially limited her chances of returning to work at the earliest possible time. *Id.* at 351. As the Court noted, unemployment benefits are “designed to act as a buffer or hedge against the ravages of sudden and unexpected

loss of one's livelihood," and thus should not be awarded to a claimant whose "self-imposed limitation constitutes a voluntary withdrawal from the employment market." *Id.*

Like the claimant in *Arima*, Wolff has imposed restrictions on her job search that substantially reduce her opportunities to return to work as early as possible. While Wolff was not responsible for her separation from Gonzaga, she is responsible for limiting her chances to return to work.

The Commissioner directly determined that a claimant may not restrict her ability to accept work "due to her inability to find a suitable babysitter for her son." *In re Yeoman*, Emp't Sec. Comm'r Dec. 1200 (1974) at *2. In that case, the claimant was a single mother whose ex-husband appeared to threaten the "safety and welfare of her son" for whom she could not find adequate care. *Id.* at *1-2.

Wolff's attempt to differentiate the restrictions she has imposed on her availability from those imposed by the claimant in *Yeoman* is ineffective. Pet'r's Op. Br. 15. In fact, Wolff has restricted her availability more so than the claimant in *Yeoman*. There, the claimant limited her availability for work based on the shift, but was still available to work full-time throughout the week. *Id.* at *1. Here, Wolff has rejected any full-time employment, thus limiting her availability more than the claimant in *Yeoman*. And, while the Commissioner noted the *Yeoman* claimant lacked

transportation, that was an independent and secondary rationale for finding her unavailable. *Id.* at *2.

This case is also indistinguishable from *In re Lininger*. In that case, the claimant's "lack of adequate care for her young son posed a substantial restriction on her immediate availability for work" and thus she was "disqualified . . . on that basis alone." *In re Lininger*, Emp't Sec. Comm'r Dec.2d 213 (1976) at *3. Here, Wolff also significantly limited her availability, making herself unavailable for any full-time positions and unavailable during the customary hours for her occupation, which are Monday through Friday from 8:00 a.m. to 6:00 p.m. CR 169; 194. While the claimant in *Lininger* was also disqualified from receiving benefits because she was not actively pursuing work, that was, again, a separate and independent basis for the disqualification. *In re Lininger*, at *3.

Wolff's refusal to consider any full-time employment constitutes a substantial restriction on her availability, in violation of WAC 192-170-010(1)(c) That substantial restriction makes her unavailable for work under the Act and ineligible to receive unemployment benefits. The Commissioner's decision should be affirmed.

3. Wolff was not available for work during the hours customary for her occupation

Finally, Wolff was not "available for work" because she did not meet the requirements of WAC 192-170-010(1)(d). That provision requires

a claimant to be “available for work during the hours customary for your trade or occupation.” WAC 192-170-010(1)(d). The customary hours of work for Wolff’s occupation were Monday-Friday from 8:00 a.m. to 6:00 p.m. AR 169; 194. Wolff was not willing to accept work during those hours. Instead, she would only consider work during portions of those hours. AR 46. In fact, Wolff acknowledged that she was not available for work during the customary hours of her occupation. AR 54.

Therefore, she was not available for half of the hours customary for her occupation. It is not enough to be willing and available to work during *some* of the hours that are customary for an occupation. An unemployed claimant must be willing and available to return to work during *all* of her occupation’s usual hours. WAC 192-170-010(1)(d). Wolff was not, and the Commissioner’s determination that she was not available for work as required and the Court should affirm the Commissioner’s decision.

B. Work is “Suitable” for a Claimant If She Has the Ability to Perform the Work in Question

A claimant must “be ready, able, and willing, immediately to accept any suitable work. . . .” RCW 50.20.010(1)(c)(ii). Suitable work is “employment in an occupation in keeping with the individual's prior work experience, education, or training” or if the claimant lacks experience,

education, or training, “employment which the individual would have the physical and mental ability to perform.” RCW 50.20.100(1).⁴

Wolff argues that full-time work is not suitable for her, and the Commissioner erred by requiring her to seek full-time employment. Appellant’s Opening Br. 13. She contends that the Commissioner was required to consider her childcare needs under the catchall “other factors” clause included in RCW 50.20.100(1).⁵ Wolff is incorrect.

First, as discussed above, there are only two exceptions to the full-time work requirement. Wolff did not meet either of those two exceptions. Her attempt to shoehorn an additional exception into the regulation is unavailing.

Second, Wolff miscomprehends the “suitable work” prong. Under RCW 50.20.100 and the accompanying regulation, the suitability inquiry focuses on whether the claimant is capable of performing the work in question, not whether the claimant’s schedule permits the claimant to perform the work. That is why an “an occupation in keeping with the

⁴ The statute contains further definitions of suitable work, which apply to agricultural workers and victims of domestic violence, neither of which is applicable here. RCW 50.20.100(2)-(4).

⁵ The catchall provision provides that: “In determining whether work is suitable for an individual, the commissioner shall also consider the degree of risk involved to the individual’s health, safety, and morals, the individual’s physical fitness, the individual’s length of unemployment and prospects for securing local work in the individual’s customary occupation, the distance of the available work from the individual’s residence, and such other factors as the commissioner may deem pertinent. RCW 50.20.100(1).

individual's prior work experience, education, or training” is considered suitable, unless the claimant is incapable of performing the work. RCW 50.20.100; WAC 192-170-050.

That the suitability inquiry focuses on the claimant’s ability to perform the work is further supported by the plain language of RCW 50.20.100. The word “suitable” modifies the word “work.” RCW 50.20.100(1). The question is whether the work itself is of a type the claimant has the skills and ability to perform. This is a separate and distinct inquiry from whether a claimant is “available” to perform the work, which is required by RCW 50.20.010(c). Accordingly, the “suitable work” statute starts from the general premise that work that is “in keeping with” a claimant’s “work experience, education, or training” is suitable for a claimant because the claimant has already established the ability to perform work of that nature. Further, the statute focuses on the nature of the work itself: “if the individual has no prior work experience, special education, or training for employment available in the general area,” then suitable work is “employment which the individual would have the physical and mental ability to perform.” RCW 50.20.100(1).

Similarly, the Department’s “suitable work” regulation, WAC 192-170-050, focuses on whether the claimant is capable of performing the work in question, not the claimant’s personal circumstances: “In determining

whether work is suitable . . . the department will consider whether you have a disability that prevents you from performing the essential functions of the job without a substantial risk to your health or safety.” WAC 192-170-050(1). And the regulation also starts from the general premise that work “in keeping with” a claimant’s “prior work experience, education, or training” is suitable. WAC 192-170-050(1)(c). Even in considering whether less than full-time work is appropriate, the Department considers the ability of the claimant to perform the work in question. WAC 192-170-050(b).

Wolff has never argued that she is incapable of working as an administrative or executive assistant. Indeed, she testified that she was looking “for a wide variety of work” including “administrative assistant, um, executive assistant” or work as a private consultant. CR 13. Any of those positions were in keeping with Wolff’s professional experience and training, and she was capable of performing them.

Finally, Wolff is correct that the Commissioner is required to consider “such other factors as the Commissioner may deem pertinent” in determining whether work is suitable. Appellant’s Opening Br. 13. But she ignores the Department’s rule setting forth the factors the Commissioner “deems pertinent.” WAC 192-170-050. Because those other factors apply to the capacity of the claimant to perform the work, the Commissioner was correct in not considering scheduling when determining if part-time work

was suitable for Wolff. As explained above, the language of WAC 192-170-050, like RCW 50.20.100(1), focuses on whether a claimant can physically and mentally perform required tasks, as unemployment benefits are intended to provide temporary relief while claimants seek work. The Commissioner did not err by requiring Wolff to be available to work full-time.

C. Wolff's Policy Arguments Should Be Addressed to the Legislature

Wolff bases many of her arguments on policy issues. Appellant's Opening Br. 12-14. She asserts this Court should reverse the Commissioner because, "the conclusion that Wolff is unavailable for work because she cannot work full-time is against the legislature's purposive intent." Appellant's Opening Br. 18. In support of this claim, Wolff presents a variety of policy arguments, drawn from various law review articles and policy journals. *Id.* As a preliminary matter, none of the facts supporting these policy claims are part of the record on this appeal, and therefore should not be considered here. RCW 34.05.558.

Moreover, these policy arguments are more appropriately addressed to the Legislature. *State v. Jackson*, 137 Wn.2d 712, 725, 976 P.2d 1229 (1999). The Commissioner applied the law as interpreted in *Jacobs* and *Arima*. In the decades that have elapsed since *Arima* and *Jacobs*, the

Legislature has amended the Employment Security Act numerous times. See e.g., Laws of 2009, ch. 493, §§ 1-7; Laws of 2006, ch. 13, §§ 1-28. But, despite multiple opportunities to do so, the Legislature has not amended the availability requirements. This failure to amend the statute indicates it concurs with the judicial interpretation of the statute. *Buchanan v. Int'l Brotherhood of Teamsters*, 94 Wn.2d 508, 511, 617 P.2d 1004 (1980).

Wolff presents compelling policy positions, but “an argument for the adoption of a previously unrecognized public policy under Washington law is better addressed to the Legislature.” *Sedlacek v. Hillis*, 145 Wn.2d 379, 390, 36 P.3d 1014 (2001) (citing *State v. Jackson*, 137 Wn.2d 712, 725 (1999)). The Commissioner properly applied the law and determined that Wolff was not eligible for unemployment benefits.

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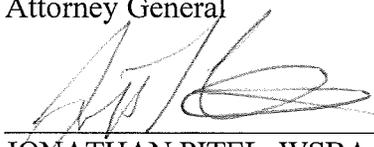
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VI. CONCLUSION

Unemployment benefits are temporary support for individuals who are seeking work and unemployed through no fault of their own. Wolff was not willing to work full-time because she wanted to be available for her children's appointments. That is an understandable decision. But it conflicted with the statutory eligibility requirements that a claimant must meet in order to receive unemployment benefits. The Commissioner's decision finding her ineligible was correct, and this Court should affirm that decision.

RESPECTFULLY SUBMITTED this 28th day of December,
2017.

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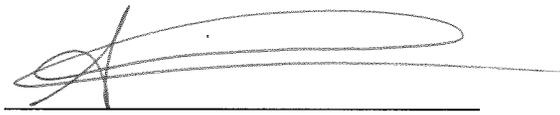
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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 28th day of December, 2017, at Olympia,
Washington.



AMY PHIPPS, Legal Assistant

AGO/LICENSING AND ADMINISTRATIVE LAW DIV

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