

88772-1

FILED
COURT OF APPEALS
DIVISION II

2013 APR 30 AM 11:38

STATE OF WASHINGTON

BY 42631-5-II
DEPUTY

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

ROBERT CAMPBELL,

Petitioner,

v.

EMPLOYMENT SECURITY DEPARTMENT,
STATE OF WASHINGTON,

Respondent/Appellant below.

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2013 APR 25 PM 3:57

PETITION FOR DISCRETIONARY REVIEW OF
COURT OF APPEALS, DIVISION II DECISION

Marc Lampson
Unemployment Law Project
Attorney for Petitioner, Mr. Campbell
WSBA # 14998
1904 Third Ave., Suite 604
Seattle, WA 98101
206.441.9178

FILED
MAY 06 2013
CLERK OF THE SUPREME COURT
STATE OF WASHINGTON

Table of Contents

A.	IDENTITY OF PETITIONER.....	1
B.	CITATION TO COURT OF APPEALS DECISION	1
C.	STATEMENT OF THE CASE.....	1
	1. Substantive Facts: Job Separation.....	1
	 Mr. Campbell asked for two leaves of absences to relocate to take care of his daughter while his wife worked. Had he been granted the leaves, he would not have been eligible for unemployment benefits.....	1
	2. Procedural Facts.....	3
	 a. On appeal for judicial review, the Thurston County Superior Court reversed the ESD’s denial of benefits to Mr. Campbell, finding he had “good cause” to quit to relocate for the employment of his spouse.....	3
	 b. The Court of Appeals reversed based on the “reasonableness” prong of the statute.....	4
D.	ARGUMENT	4
	1. REVIEW SHOULD BE GRANTED BECAUSE THE DECISION CONFLICTS WITH PRIOR DECISIONS OF THE WASHINGTON SUPREME COURT AND COURT OF APPEALS IN COMPLETELY IGNORING THE LIBERAL CONSTRUCTION THAT IS TO BE AFFORDED THE EMPLOYMENT SECURITY ACT...4	
	2. REVIEW SHOULD BE GRANTED BECAUSE THE DECISION CONFLICTS WITH PRIOR DECISIONS OF THE WASHINGTON SUPREME COURT AND	

**COURT OF APPEALS THAT HOLD THAT
“REASONABLE” IS A FACTUAL DETERMINATION
AND THEREFORE IS ONE TO BE LEFT TO FACT
FINDERS, NOT APPELLATE COURTS AND
BECAUSE IT MISINTERPRETS THE STATUTE. 14**

E. CONCLUSION..... 18

APPENDICES:

1. COURT OF APPEALS DECISION

Table of authorities

Washington Cases

<i>Bauer v. ESD</i> , 126 Wash. App. 468, 108 P.3d 1240 (2005)	11
<i>Becker v. ESD</i> , 63 Wash. App. 673, 821 P.2d 81 (1991)	11
<i>Belgarde v. Brooks</i> , 19 Wash. App. 571, 576 P.2d 447 (1978)	10
<i>Cowles Pub. Co. v. ESD</i> , 15 Wash. App. 590, 550 P.2d 712 (1976)	10
<i>Dairy Valley Products, Inc. v. ESD</i> , 15 Wash. App. 769, 551 P.2d 1035 (1976)	11
<i>Delagrave v. ESD</i> , 127 Wn. App. 596, 609 (2005)	6
<i>Devine v. ESD</i> , 26 Wash. App. 778, 614 P.2d 231 (1980)	11
<i>Dickson v. U.S. Fidelity & Guaranty Co.</i> , 77 Wn.2d 785, 788, 466 P.2d 515 (1970).....	16
<i>Gibson v. ESD</i> , 52 Wash. App. 211, 758 P.2d 547 (1988)	12
<i>Griffith v. ESD</i> , 163 Wash. App. 1, 259 P.3d 1111 (2011)	11
<i>Harvey v. ESD</i> , 53 Wash. App. 333, 766 P.2d 460 (1988)	11

<i>Howard v. Royalty Specialty Underwriting, Inc.</i> , 121 Wash. App. 372, 89 P.3d 265 (2004)	17
<i>Hussa v. ESD</i> , 34 Wash. App. 857, 664 P.2d 1286 (1983)	10
<i>In re Griswold</i> , 102 Wash. App. 29, 15 P.3d 153 (2000)	12
<i>Kenna v. ESD</i> , 14 Wash. App. 898, 545 P.2d 1248 (1976)	11
<i>Nelson v. Employment Sec. Dept.</i> , 31 Wash. App. 621, 644 P.2d 145 <i>rev'd sub nom. Nelson v. Dep't of Employment Sec.</i> , 98 Wash. 2d 370, 655 P.2d 242 (1982)	10
<i>Nielsen v. ESD</i> , 93 Wash. App. 21, 966 P.2d 399 (1998)	11
<i>Penick v. ESD</i> , 82 Wash. App. 30, 917 P.2d 136 (1996)	10
<i>Peterson v. ESD</i> , 42 Wash. App. 364, 711 P.2d 1071 (1985)	12
<i>Rasmussen v. Employment Sec. Dept.</i> , 30 Wash. App. 671, 638 P.2d 100 (1981), <i>aff'd sub nom. Rasmussen v. Employment Sec. Dept. of State</i> , 98 Wash. 2d 846, 658 P.2d 1240 (1983)	10
<i>Scully v. ESD</i> , 42 Wash. App. 596, 712 P.2d 870 (1986)	12
<i>Shaw v. ESD</i> , 46 Wash. App. 610, 731 P.2d 1121 (1987)	11
<i>Smith v. Employment Sec. Dept.</i> , 155 Wash. App. 24, 226 P.3d 263 (2010)	10
<i>Smith v. ESD</i> , 55 Wash. App. 800, 780 P.2d 1335 (1989)	9, 10

<i>Spain v. Employment Sec. Dept.</i> , 137 Wash. App. 1005 (2007).....	8
<i>Spain v. ESD</i> , 164 Wash. 2d 252, 185 P.3d 1188 (2008).....	9
<i>Starr v. Washington State Dept. of Employment Sec.</i> , 130 Wash. App. 541, 123 P.3d 513 (2005), <i>overruled by Spain v. Employment Sec. Dept.</i> , 164 Wash. 2d 252, 185 P.3d 1188 (2008)	8, 9
<i>Tapper v. Employment Sec. Dept.</i> , 66 Wash. App. 448, 832 P.2d 136 (1992), <i>rev'd sub nom. Tapper v. State Employment Sec. Dept.</i> , 122 Wash. 2d 397, 858 P.2d 494 (1993)	11
<i>Warmington v. ESD</i> , 12 Wash. App. 364, 529 P.2d 1142 (1974)	11
<i>Wells v. ESD</i> , 61 Wash. App. 306, 809 P.2d 1386 (1991)	12
Federal Cases	
<i>Farming, Inc. v. Manning</i> , 212 F.2d 779, 782 (3 rd Cir. 1955).....	7
<i>United States v. Silk</i> , 331 U.S. 704, 712 (1947)	7
Statutes	
RCW 50.01.010	6, 8, 12
RCW 50.20.050(2)(b)(iii)(B).....	4, 15

Other Authorities

Liberal Construction,
available at

<http://www.esd.wa.gov/newsandinformation/legresources/uistudies/liberal-construction-2007.pdf>..... 7

Rules

RAP 13.4(b)..... 5, 15

A. IDENTITY OF PETITIONER

Robert Campbell is the petitioner here, though he was the respondent at the Court of Appeals. The Employment Security Department denied Mr. Campbell unemployment benefits. The Thurston County Superior Court reversed and granted benefits. The State appealed and the Court of Appeals, Division II, reversed the Superior Court.

B. CITATION TO COURT OF APPEALS DECISION

Appellant Robert Campbell seeks review of the decision by the Court of Appeals, Division II, filed March 26, 2013, entitled *Campbell v. Employment Security Department*, No. 42631-5-II. It is attached.

C. STATEMENT OF THE CASE

1. Substantive Facts: Job Separation.

Mr. Campbell asked for two leaves of absences to relocate to take care of his daughter while his wife worked. Had he been granted the leaves, he would not have been eligible for unemployment benefits.

Mr. Campbell was a full-time Spanish teacher for University Place School in Renton beginning in August 2004. CP Comm.

Rec. 52, Finding of Fact (“FF”) 1.¹ In April 2010 he asked for a leave of absence for spring 2011 so that he could accompany his wife and daughter to Finland where his wife would have a teaching and research job under the Fulbright Program beginning in February 2011. CP Comm. Rec. 53, FF 2 & 4. The employer denied this request. CP Comm. Rec. 53, FF 3.

Mr. Campbell then requested a leave of absence for the entire 2010-2011 school year. CP Comm. Rec. 53, FF 4. This request was also denied. *Id.* Had he been granted either leave of absence, he would not have qualified under the statute for unemployment benefits because he would have still been “attached” to the workforce.

The employer stated the leave requests were denied because finding a replacement for Mr. Campbell would be too great a hardship on the district. CP Comm. Rec 49.

Not wanting to suddenly quit at the beginning or middle of the school year, leaving his employer in an extremely difficult

¹ 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.

situation in trying to replace him, Mr. Campbell felt he had no other ethical – and reasonable – choice but to quit at the end of the 2010 school year. He did so, as an ALJ later found, so that he could follow his wife and daughter to Finland “for his wife’s work under the Fulbright grant.” CP Comm. Rec. 53, FF 5. Once in Finland, he would not have qualified for unemployment benefits because he would not have been “able, available, and actively seeking work.” A leave of absence would also have disqualified him from benefits.

But in July, finding himself unemployed, he applied for unemployment benefits. CP Comm. Rec. 40-45.

2. Procedural Facts

- a. On appeal for judicial review, the Thurston County Superior Court reversed the ESD’s denial of benefits to Mr. Campbell, finding he had “good cause” to quit to relocate for the employment of his spouse.**

The Employment Security Department (ESD) denied benefits, holding Mr. Campbell did not have good cause to quit. CP Comm. Rec. 36, 66-67.

The Superior Court reversed, however, holding that Mr. Campbell did have good cause to quit to relocate for his spouse’s employment. CP 34-37. Specifically, the Superior Court held that

Mr. Campbell had met “both prongs” of the “quit to follow” statute. CP 37. The second prong of the statute states that the claimant “remained employed as long as was reasonable prior to the move.” RCW 50.20.050(2)(b)(iii)(B).

b. The Court of Appeals reversed based on the “reasonableness” prong of the statute.

The State appealed the Superior Court’s grant of benefits to Mr. Campbell. Reversing the Superior Court, the Court of Appeals held as follows:

Here, Campbell has offered *no evidence establishing that he required seven months to prepare* for the temporary four-month trip to Finland. *The explanation for his decision to resign at the end of the school year involved ethical and professional concerns for his employer.* Campbell’s decision to quit at the end of the school year had no relation to the timing of the temporary relocation to Finland. Therefore, Campbell failed to show that he remained employed as long as possible.

Slip op. at 7 (emphasis added).

D. ARGUMENT

1. REVIEW SHOULD BE GRANTED BECAUSE THE DECISION CONFLICTS WITH PRIOR DECISIONS OF THE WASHINGTON SUPREME COURT AND COURT OF APPEALS IN COMPLETELY IGNORING THE LIBERAL CONSTRUCTION THAT IS TO BE AFFORDED THE EMPLOYMENT SECURITY ACT.

The decision of Division II of the Court of Appeals in this case fails to mention, much less apply, the liberal construction that

is to be accorded the Employment Security Act. Liberal construction is mandated by the Washington Legislature's Preamble to the Act and is mandated by decades of case law, particularly case law from Division I and Division III of the Court of Appeals. Consequently, review of Division II's decision in this case should be granted.

Considerations for acceptance of review in this case include the following:

(1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or

(2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or

* * *

(4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

RAP 13.4(b).

To achieve its purpose, the Employment Security Act must be liberally construed in favor of the unemployed worker and this construction is mandated by the Washington Legislature:

The legislature, therefore, declares that in its considered judgment **the public good, and the general welfare of the citizens of this state require the enactment of this measure**, under the police powers of the state, for the

compulsory setting aside of unemployment reserves to be used for the benefit of persons unemployed through no fault of their own, and that **this title shall be liberally construed** for the purpose of reducing involuntary unemployment and the suffering caused thereby to the minimum.

RCW 50.01.010 (emphasis added).

When the legislature mandates liberal construction in favor of the worker, courts ***should not narrowly interpret provisions to the worker's disadvantage*** when the statutory language does not suggest that such a narrow interpretation was intended:

When the legislature mandates liberal construction in favor of the worker, ***we should not narrowly interpret provisions to the worker's disadvantage when the statute does not suggest that such a narrow interpretation was intended.***

Delagrave v. ESD, 127 Wash. App. 596, 609, 111 P.3rd 879

(Division III, 2005) (emphasis added).

Over 65 years ago, the United States Supreme Court held that the federal unemployment law was to be liberally interpreted:

As the federal social security legislation is an attack on recognized evils in our national economy, **a constricted interpretation of the phrasing** by the courts would not comport with its purpose. Such an interpretation would only make for a continuance, to a considerable degree, of the difficulties for which the remedy was devised and would invite adroit schemes by some employers and employees to avoid the immediate burdens at the expense of the benefits sought by the legislation.

United States v. Silk, 331 U.S. 704, 712 (1947)(emphasis added).

The federal courts in the decades since the United States Supreme Court's decision in 1947 have continued to demand liberal interpretation of unemployment statutes. See, e.g., *Farming, Inc. v. Manning*, 212 F.2d 779, 782 (3rd Cir. 1955).

And in 2007, Washington's Employment Security Department published a 32 page research paper on the subject: *Liberal Construction*, available at <http://www.esd.wa.gov/newsandinformation/legresources/uistudies/liberal-construction-2007.pdf> . In that paper, the ESD noted the following:

Based on these two rulings [*Silk* and *Farming, supra*], the United States Department of Labor (DOL) "has long taken the position that, because FUTA [Federal Unemployment Tax Act] is a remedial statute aimed at overcoming the evils of unemployment, ***it is to be liberally construed to effectuate its purposes and exemptions to its requirements are to be narrowly construed.***" DOL has issued several unemployment-insurance program letters over the years in which they restate their position on this subject.

Id. at 2 (emphasis added). On seven pages of that paper the ESD cites to and summarizes in excess of 40 Washington Supreme Court or Court of Appeals cases (very few of them from Division II)

that have affirmed the liberal construction to be afforded the Washington Employment Security Act. *Id.* at 23 – 29.

Division II of the Court of Appeals' decision in the instant case cites RCW 50.01.010, the Act's Preamble, but fails to acknowledge that the preamble states the Act is to be liberally construed. Slip op. at 5. In fact, Division II of the Court of Appeals has a history of ignoring the liberal construction to be afforded the Employment Security Act.

In 2005, Division II held that the then recently enacted voluntary quit provisions of the statute provided an exhaustive list of non-disqualifying reasons. *Starr v. Washington State Dept. of Employment Sec.*, 130 Wash. App. 541, 123 P.3d 513 (2005), *overruled by Spain v. Employment Sec. Dept.*, 164 Wash. 2d 252, 185 P.3d 1188 (2008). In *Starr*, Division II failed to mention liberal construction, which was central to the claimant's argument that the list was not an exhaustive list.

Similarly, in 2007 Division II held that the then recently enacted voluntary quit provisions of the statute were unambiguous and rejected the argument that liberal construction was applicable. *Spain v. Employment Sec. Dept.*, 137 Wash. App. 1005 (2007) *rev'd sub nom. Spain*, 164 Wash. 2d 252. The Supreme Court

reversed, holding the list was not exhaustive. *Spain v. ESD*, 164 Wash. 2d 252, 185 P.3d 1188 (2008).

In the instant case, Division II cites *Starr* and *Spain* but fails once again to discuss “liberal construction” in reference to those cases, opining that “the claimant must meet the statute’s plain language requirements,” and citing to its own overruled decision in *Starr*, claiming *Starr* was “reversed on other grounds.” Slip op. at 5. The Division II opinion then goes on to construe the word “reasonable” to defeat Mr. Campbell’s claim, failing to discuss that such a term must be construed liberally and failing to recognize that if any word in the legal lexicon is subject to ambiguity and varied interpretations and not subject to a “plain language” interpretation, it is the word “reasonable.”

Division II stands alone among the divisions of our Court of Appeals in largely ignoring the liberal construction to be accorded the Employment Security Act, often not mentioning it at all, as in *Starr* and in the instant case. On the rare occasions Division II mentions it in published opinions, at best, three times, it is rarely to the claimant’s advantage:

- *Smith v. ESD*, 55 Wash. App. 800, 780 P.2d 1335 (1989)
(voluntary quit was without good cause)

- *Penick v. ESD*, 82 Wash. App. 30, 917 P.2d 136 (1996)
(trucking company not exempt, truck drivers were covered EEs)
- *Smith v. Employment Sec. Dept.*, 155 Wash. App. 24, 226 P.3d 263 (2010) (no specific mention of liberal construction, but acknowledgement that narrow constructions must be viewed with caution, misconduct found)

By contrast, Division III has cited liberal construction on at least twelve, and arguably thirteen times in its published decisions, and often in favor of the claimant, beginning in 1976:

- *Cowles Pub. Co. v. ESD*, 15 Wash. App. 590, 550 P.2d 712 (1976)
- *Belgarde v. Brooks*, 19 Wash. App. 571, 576 P.2d 447 (1978)
- *Rasmussen v. Employment Sec. Dept.*, 30 Wash. App. 671, 638 P.2d 100 (1981), *aff'd sub nom. Rasmussen v. Employment Sec. Dept. of State*, 98 Wash. 2d 846, 658 P.2d 1240 (1983)
- *Nelson v. Employment Sec. Dept.*, 31 Wash. App. 621, 644 P.2d 145 *rev'd sub nom. Nelson v. Dep't of Employment Sec.*, 98 Wash. 2d 370, 655 P.2d 242 (1982)
- *Hussa v. ESD*, 34 Wash. App. 857, 664 P.2d 1286 (1983)

- *Shaw v. ESD*, 46 Wash. App. 610, 731 P.2d 1121 (1987)
- *Harvey v. ESD*, 53 Wash. App. 333, 766 P.2d 460 (1988)
- *Becker v. ESD*, 63 Wash. App. 673, 821 P.2d 81 (1991)
- *Tapper v. Employment Sec. Dept.*, 66 Wash. App. 448, 832 P.2d 136 (1992), *rev'd sub nom. Tapper v. State Employment Sec. Dept.*, 122 Wash. 2d 397, 858 P.2d 494 (1993)
- *Nielsen v. ESD*, 93 Wash. App. 21, 966 P.2d 399 (1998)
- *Bauer v. ESD*, 126 Wash. App. 468, 108 P.3d 1240 (2005)
- *Delagrave v. ESD*, 127 Wash. App. 596, 111 P.3d 879 (2005)
- *Griffith v. ESD*, 163 Wash. App. 1, 259 P.3d 1111 (2011) (no citation to liberal construction, but acknowledgment that narrow constructions must be viewed with caution).

Similarly, Division I has cited liberal construction nine times in its published opinions regarding the Employment Security Act, often in the claimant's favor, beginning in 1974:

- *Warmington v. ESD*, 12 Wash. App. 364, 529 P.2d 1142 (1974)
- *Dairy Valley Products, Inc. v. ESD*, 15 Wash. App. 769, 551 P.2d 1035 (1976)
- *Kenna v. ESD*, 14 Wash. App. 898, 545 P.2d 1248 (1976)
- *Devine v. ESD*, 26 Wash. App. 778, 614 P.2d 231 (1980)

- *Peterson v. ESD*, 42 Wash. App. 364, 711 P.2d 1071 (1985)
- *Scully v. ESD*, 42 Wash. App. 596, 712 P.2d 870 (1986)
- *Gibson v. ESD*, 52 Wash. App. 211, 758 P.2d 547 (1988)
- *Wells v. ESD*, 61 Wash. App. 306, 809 P.2d 1386 (1991)
- *In re Griswold*, 102 Wash. App. 29, 15 P.3d 153 (2000).

The decision in the instant case construes the word “reasonable” as inapplicable to Mr. Campbell because he quit seven months before he had to move with his wife and daughter to take care of his daughter while his wife worked overseas. Slip op. at 7.

The decision completely ignores why this was indeed “reasonable,” liberally construed or not: 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 quit, 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. The employer was under no obligation to grant a leave, but had it 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 because his quit was "reasonable" under the specific circumstances of this case, as the Superior Court held.

2. REVIEW SHOULD BE GRANTED BECAUSE THE DECISION CONFLICTS WITH PRIOR DECISIONS OF THE WASHINGTON SUPREME COURT AND COURT OF APPEALS THAT HOLD THAT “REASONABLE” IS A FACTUAL DETERMINATION AND THEREFORE IS ONE TO BE LEFT TO FACT FINDERS, NOT APPELLATE COURTS AND BECAUSE IT MISINTERPRETS THE STATUTE.

The Court of Appeals’ decision in this case misinterprets the statute and conflicts with prior Washington Supreme Court and Court of Appeals decisions holding that what is “reasonable” under the circumstances is a factual determination to be made by fact-finders, and a decision that is ordinarily deferred to by appellate courts. Mr. Campbell’s decision to quit his job was based on ethical considerations, which made it a “reasonable” decision to quit seven months in advance of his need to move, and the Court of Appeals has incorrectly read the statute to mean that “reasonable” pertains to how long a person needs to prepare to move after quitting a job. Review of the Court of Appeals decision should therefore be granted.

Considerations for acceptance of review in this case include the following:

(1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or

(2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or

* * *

(4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

RAP 13.4(b).

Mr. Campbell met both prongs of the “quit to follow” statute, and he was therefore entitled to receive benefits as the Superior Court held. First he “left work to relocate for the spouse’s employment.” RCW 50.20.050(2)(b)(iii)(A). Second, he “remained employed as long as was reasonable prior to the move.” RCW 50.20.050(2)(b)(iii)(B).

Division II construes the second prong as somehow involving a determination about how long a claimant needs to be able to move from one location to another: “Campbell has offered no evidence establishing that he required seven months to prepare for the temporary four-month trip to Finland.” Slip op. at 7. He offered no such evidence because he was not required by the statutes or regulations or case law to “establish” that he needed seven months to “prepare” for the move; he had only to establish

what he did establish: he “remained employed as long as was reasonable prior to the move.”

The emphasis is on “reasonable,” not “move,” and as discussed throughout, Mr. Campbell’s quitting when he did was reasonable under the specific circumstances of this case.

The Court of Appeals decision in the present case therefore directly conflicts with cases that hold that what is “reasonable” under specific circumstances turns on a factual determination that the appellate court ordinarily does not make, especially when that has been determined below.

“What constitutes a reasonable length of time under the instant circumstances is a factual determination, and we will not substitute our judgment for that of the trial court.” *Dickson v. U.S. Fidelity & Guaranty Co.*, 77 Wn.2d 785, 788, 466 P.2d 515 (1970).

Accordingly, appellate courts defer to factual determinations made below. In the instant case, Division II opined that the second prong of the “quit to follow” statute, the “reasonable” prong, had not been satisfied. Slip op. 7. To the contrary, the Superior Court held that “Both prongs of quit to follow were met.” CP Comm. Rec. 37.

“A trial court’s finding of reasonableness is a factual determination that will not be disturbed on appeal when

supported by substantial evidence." *Howard v. Royalty Specialty Underwriting, Inc.*, 121 Wash. App. 372, 380, 89 P.3d 265 (2004).

Allowing the published Court of Appeals decision by Division II in this case to stand without review will allow a reported decision to remain as "law" that once again fails to consider the liberal construction to be accorded the statute, that misconstrues the statute's prong regarding reasonableness, and that makes a finding on "reasonableness" that appellate courts typically do not engage in. The decision in this case contradicts decades of case law and is of vital public interest for that reason alone.

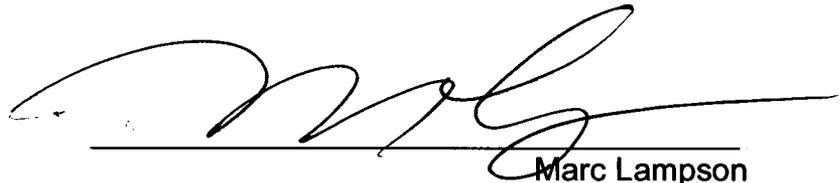
Review should therefore be granted under RAP 13.4(b) because it conflicts with prior case law and it is a matter of vital public interest.

E. CONCLUSION

Therefore, Mr. Campbell petitions the Washington Supreme Court to review the Court of Appeals decision in his case because it conflicts with prior decisions and is a matter of vital public interest.

Dated this 25th day of April 2013.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'ML', is written over a horizontal line. The signature is fluid and cursive.

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

FILED
COURT OF APPEALS
DIVISION II

2013 MAR 26 AM 9:27

STATE OF WASHINGTON

BY _____
DEPUTY

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

ROBERT CAMPBELL,

Respondent,

v.

STATE OF WASHINGTON DEPARTMENT
OF EMPLOYMENT SECURITY,

Appellant.

No. 42631-5-II

PUBLISHED OPINION

QUINN-BRINTNALL, J. — Robert Campbell left his full-time job as a teacher at the University Place School District (the District) because his wife received a four-month Fulbright grant to teach and research in Finland. Campbell resigned from his position at the end of the 2009-2010 school year, seven months prior to the temporary relocation to Finland. Campbell applied for unemployment benefits under the “quit to follow” statute, RCW 50.20.050(2)(b)(iii). The Employment Security Department (ESD) denied his claim. The Office of Administrative Hearings and the ESD commissioner affirmed ESD’s decision. Campbell appealed and the superior court reversed. ESD now appeals to this court.

RCW 50.20.050(2)(b)(iii) requires that Campbell prove he had good cause to quit by showing that (1) he relocated for his spouse’s employment, and (2) he stayed employed as long as reasonable. Campbell did not satisfy the requirements of the “quit to follow” statute because

No. 42631-5-II

he failed to remain employed as long as reasonable prior to the move, therefore we affirm the commissioner's decision denying Campbell's claim for unemployment benefits.

FACTS

Campbell was employed as a teacher for the District from August 2004 until June 2010. During the 2009-2010 school year, Campbell's wife, Sarah Applegate, received a Fulbright grant to research and teach in Finland from February to May 2011.

Campbell requested a leave of absence for the spring semester of the 2010-2011 school year to accompany his wife and daughter to Finland. The District denied Campbell's leave request. Campbell then requested a leave of absence for the entire 2010-2011 school year. The District denied Campbell's second leave request. Ultimately, Campbell resigned from his position effective June 21, 2010.

Campbell applied for unemployment benefits. On his voluntary quit statement, Campbell gave the following statement about the main reason he decided to quit:

I asked for a leave of absence for the 2010-11 school year to accompany my wife and care for our young daughter from Feb 2011-June 2011. [The District] refused to grant me a leave. My wife received a Fulbright grant to study schools in Finland.

Administrative Record (AR) at 40. ESD denied Campbell's request for benefits because it determined Campbell did not have good cause to quit.

Campbell appealed ESD's decision denying unemployment benefits. A hearing was held before an administrative law judge (ALJ) on September 28, 2010. The ALJ affirmed ESD's decision. The ALJ entered the following relevant findings of fact:

2. Sometime in April, 2010, claimant told employer that his wife had been accepted to the Fulbright Program. Claimant asked his employer at that time for a leave of absence so that he could travel with his wife and family to Finland in

No. 42631-5-II

February, 2011. Claimant's wife will be teaching and researching under the Fulbright grant from [sic] four months, February to May, 2011.

....
5. On or about June 15, 2010 claimant quit his job so that he could travel with his wife and family to Finland for his wife's work under the Fulbright grant.

AR at 53. Based on its findings of fact, the ALJ concluded that Campbell had not met the statutory requirements for good cause to quit and, therefore, was not eligible for unemployment benefits.

Campbell appealed to the ESD commissioner. The commissioner adopted the ALJ's findings of fact. The commissioner concluded that to be eligible for unemployment benefits, Campbell would have to establish good cause for voluntarily quitting his job. "Good cause to quit is established when a claimant relocate[s] for the employment of his spouse outside the existing labor market area." AR at 66; RCW 50.20.050(2)(b)(iii). RCW 50.20.050(2)(b)(iii) also requires that the claimant remain employed as long as reasonable prior to the move. The commissioner determined that Campbell failed to establish that the Fulbright grant was employment. The commissioner also decided that Campbell quit his job prematurely and affirmed the ALJ's decision.

Campbell appealed to Thurston County Superior Court. The superior court reversed the commissioner's decision. ESD timely appeals.

ANALYSIS

Campbell argues that the commissioner erred by concluding that (1) the Fulbright grant was not employment and (2) Campbell did not remain employed as long as reasonable. Because the commissioner's conclusion that Campbell quit prematurely was based on substantial

No. 42631-5-II

evidence, was a proper application of the law, and was consistent with the commissioner's precedent, we affirm the commissioner's decision.¹

Judicial review of a final decision by an ESD commissioner is governed by the Washington Administrative Procedure Act (APA), ch. 34.05 RCW. *Smith v. Emp't Sec. Dep't*, 155 Wn. App. 24, 32, 226 P.3d 263 (2010) (citing *Verizon Nw., Inc. v. Emp't Sec. Dep't*, 164 Wn.2d 909, 915, 194 P.3d 255 (2008)). "We sit in the same position as the superior court and apply the APA standards directly to the administrative record." *Smith*, 155 Wn. App. at 32 (citing *Verizon*, 164 Wn.2d at 915). Therefore, we review the commissioner's decision, not the underlying decision of the ALJ or the subsequent decision of the superior court. *See Smith*, 155 Wn. App. at 32.

The party seeking relief bears the burden of demonstrating the invalidity of the agency action. RCW 34.05.570(1)(a). We grant relief only if the party seeking relief demonstrates the agency erroneously interpreted or applied the law, the order is not supported by substantial evidence, or the order is arbitrary and capricious. RCW 34.05.570(3)(d), (e), (i).

We review findings of fact for substantial evidence. *Smith*, 155 Wn. App. at 32. Unchallenged findings of fact are verities on appeal. *Smith*, 155 Wn. App. at 33 (citing *Fuller v. Emp't Sec. Dep't*, 52 Wn. App. 603, 605, 762 P.2d 367 (1988)). We review conclusions of law de novo. *Smith*, 155 Wn. App. at 32 (citing *Everett Concrete Prods., Inc. v. Dep't of Labor & Indus.*, 109 Wn.2d 819, 823, 748 P.2d 1112 (1988)). When addressing a mixed question of law

¹ Because Campbell must meet both requirements of the "quit to follow" statute to qualify for unemployment benefits, we do not address whether Applegate's four-month Fulbright grant is employment for the purposes of qualifying for unemployment benefits under the statute.

No. 42631-5-II

and fact, we (1) establish the relevant facts, (2) determine the applicable law, and (3) apply the law to the facts. *Tapper v. Emp't Sec. Dep't*, 122 Wn.2d 397, 403, 858 P.2d 494 (1993).

The Employment Security Act, Title 50 RCW, addresses “involuntary unemployment” by providing benefits for persons “unemployed through no fault of their own.” RCW 50.01.010. A person who voluntarily quits without good cause is disqualified from receiving unemployment benefits. RCW 50.20.050(2)(a) (as amended by LAWS OF 2009, ch. 493, § 3).² If the job separation occurred after September 6, 2009, the statute sets out 11 reasons that provide good cause to voluntarily quit. RCW 50.20.050(2)(b)(i)-(xi). Under RCW 50.20.050(2)(b)(iii) (“quit to follow” statute), a person has good cause to voluntarily quit if he or she (1) left work to relocate for the employment of a spouse or domestic partner that is outside the existing labor market area, and (2) remained employed as long as reasonable prior to the move. RCW 50.20.050(2)(b)(iii), was enacted in 2009, and appellate courts have not yet interpreted the statute.

Prior to the 2009 amendments to RCW 50.20.050(2)(b), the listed statutory reasons were considered a nonexclusive list of reasons that established good cause to quit. *See Spain v. Emp't Sec. Dep't*, 164 Wn.2d 252, 258, 185 P.3d 1188 (2008). When the legislature amended RCW 50.20.050(2)(b) in 2009, it made clear that good cause to quit was limited to the listed statutory reasons. RCW 50.20.050(2)(a). To be eligible for unemployment benefits, the claimant must meet the statute’s plain language requirements. *See Starr v. Dep't of Emp't Sec.*, 130 Wn. App. 541, 546, 123 P.3d 513 (2005), *review denied*, 157 Wn.2d 1019 (2006), *overruled on other*

² RCW 50.20.050 was amended twice in 2009 with neither amendment referencing the other. LAWS OF 2009, ch. 247, § 1; LAWS OF 2009, ch. 493, § 3. Under RCW 1.12.025, each amendment is given effect to the extent that they do not conflict with each other.

No. 42631-5-II

grounds by Spain, 164 Wn.2d 252. Therefore, under RCW 50.20.050(2)(b)(iii), Campbell must show that he left work to relocate for the employment of a spouse and that he remained employed as long as reasonable prior to the move. If Campbell cannot satisfy both requirements, he is not entitled to unemployment benefits.

Here, the commissioner concluded that “[Campbell] quit several months before his spouse’s four month trip to Finland, and thus quite prematurely.” AR at 67. Campbell argues that his actions were reasonable because he quit at the end of the school year out of consideration for his employer. In other words, Campbell asserts that although it was possible for him to continue working until February 2011, his decision to leave at the end of the 2010 school year was reasonable because the decision was ethical and professional. But under the statute’s plain language, “reasonable” does not equate to considerate, understandable, commendable, or ethical as Campbell suggests.

The statute requires that the claimant “remained employed as long as was reasonable prior to the move.” RCW 50.20.050(2)(b)(iii)(B) (emphasis added). Therefore, we evaluate the reasonableness of Campbell’s decision in relation to the time of the move. *In re Keith A. Bottcher*, No. 02-2010-39007, 2011 WL 8129801 (Wash. Emp’t Sec. Dep’t Comm’r Dec. No. 963, 2d Series Feb. 18, 2011),³ demonstrates the appropriate analysis for determining whether the decision to quit was reasonable in relation to the time of the move.

In *Bottcher*, Bottcher’s wife received a job transfer that required her to relocate from Washington to Ohio. Because the couple was unable to sell their Bothell home prior to Bottcher’s wife relocating to Ohio, Bottcher stayed in Washington until he sold their home. As a

³ The ESD commissioner may designate certain decisions as precedential and publish those decisions under RCW 50.32.095. Precedential decisions of the commissioner are binding on the agency and are considered persuasive authority for this court.

No. 42631-5-II

condition of completing the sale, Bottcher was required to perform certain repairs. Bottcher resigned from his employment on September 30 and worked continuously on the home repairs for the period of time he was unemployed. Ultimately, the home was sold and Bottcher relocated to Ohio on December 5. The commissioner determined that because the repairs were necessary to complete the move, it was reasonable for Bottcher to resign two months prior to relocating. *Bottcher*, 2011 WL 8129801.

Here, Campbell has offered no evidence establishing that he required seven months to prepare for the temporary four-month trip to Finland. The explanation for his decision to resign at the end of the school year involved ethical and professional concerns for his employer. Campbell's decision to quit at the end of the school year had no relation to the timing of the temporary relocation to Finland. Therefore, Campbell failed to show that he remained employed as long as reasonable. Thus, Campbell failed to prove that his voluntary termination met both prongs of the "quit to follow" statute. Accordingly, the commissioner's decision that Campbell was disqualified from receiving unemployment benefits was correct. RCW 50.20.050(2)(b)(iii).

Campbell has requested attorney fees, payable from the unemployment compensation fund, under RCW 50.32.160. RCW 50.32.160 provides for reasonable attorney fees if we reverse or modify a decision of the commissioner. Because we affirm the commissioner's decision, Campbell is not entitled to attorney fees.

No. 42631-5-II

Accordingly, we affirm the commissioner's decision, and deny Campbell's request for attorney fees.

Quinn-Brintnall, J.
QUINN-BRINTNALL, J.

We concur:

Van Deren, J.
VAN DEREN, J.

Worswick, C.J.
WORSWICK, C.J.

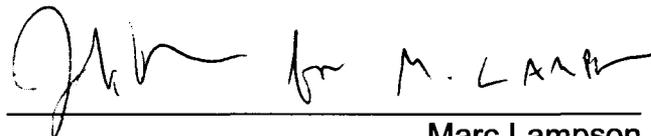
**SUPREME COURT
OF THE STATE OF WASHINGTON**

FILED
COURT OF APPEALS
DIVISION II
2013 APR 30 AM 11:38
STATE OF WASHINGTON
BY _____
DEPUTY

<p>ROBERT CAMPBELL,</p> <p style="text-align: right;">Petitioner,</p> <p style="text-align: center;">vs.</p> <p>STATE OF WASHINGTON DEPARTMENT OF EMPLOYMENT SECURITY,</p> <p style="text-align: right;">Respondent.</p>	<p>Court of Appeals Cause No. 42631-5-II</p> <p style="text-align: center;">CERTIFICATE OF SERVICE</p>
--	---

Counsel for petitioner Robert Campbell certifies that on April 25, 2013, the attached petition for discretionary review was filed in Division II of the Court of Appeals (by filing with Division I as permitted by court rule) and that copies of the attached petition for discretionary review were personally served at the office of Matthew Tilghman-Havens, Counsel for the Employment Security Department, at the Office of the Attorney General, Licensing & Administrative Law Division, 800 Fifth Avenue, Suite 2000, Seattle, WA 98104-3188.

Dated this 25th day of April 2013.



Marc Lampson
WSBA #14998
Attorney for Petitioner, Mr. Robert Campbell
Unemployment Law Project
1904 Third Ave., # 604
Seattle, WA 98101
206.441.9178 ext. 115

Unemployment Law Project

1904 Third Avenue
Suite 604
Seattle, WA 98101

unemploymentlawproject.org
Toll Free: 1 888.441.9178
206.441.9178
Fax: 206.727.4819

April 25, 2013

Richard D. Johnson, Clerk of the Court
Division I, Court of Appeals
One Union Square
600 University St
Seattle, WA 98101-1176

RECEIVED
APR 30 2013

CLERK OF COURT OF APPEALS DIV II
STATE OF WASHINGTON

**RE: Robert Campbell, Petitioner, v. Employment Security
Department, Respondent.**

DIVISION II CAUSE NO.: 42631-5-II

FOR FILING WITH DIVISION II OF THE WASHINGTON COURT OF APPEALS

Dear Mr. Johnson,

Enclosed for filing with Division II of the Washington Court of Appeals is Petitioner's Petition for Discretionary Review of that court's decision in the case named above. A certificate of service is attached as the final page of the Petition.

Thank you for your assistance.

Sincerely,


Marc Lampson
WSBA # 14998
Attorney for Petitioner, Mr. Robert Campbell

2013 APR 25 PM 3:57
COURT OF APPEALS
STATE OF WASHINGTON
DIV I