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NO. 67666-1-I

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

NGUYET TANG,

Appellant,

v.

EMPLOYMENT SECURITY DEPARTMENT,
STATE OF WASHINGTON

Respondent.

RESPONDENT'S BRIEF

ROBERT M. MCKENNA
Attorney General

Anthony Pasinetti
WSBA #34305
Assistant Attorney General
Attorneys for Respondent
800 Fifth Avenue, Suite 2000
Seattle, WA 98104
Phone: (206) 464-7676
Fax: (206) 389-2800
E-mail: LALSeaEF@atg.wa.gov

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TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	COUNTERSTATEMENT OF THE ISSUES	2
	A. Does substantial evidence support the Commissioner’s finding that Tang was motivated to quit because she disagreed with her general manager’s commission decision from a car deal and not because of illegal activities?	2
	B. Under RCW 50.20.010(1)(c), unemployment benefits are available if a claimant remains available for work in any trade, occupation, profession, or business for which he or she is reasonably fitted. Did the Commissioner properly remand the issue of Tang’s availability when she testified she had not been applying for any jobs in car financing despite seven years experience in that profession?.....	2
III.	COUNTERSTATEMENT OF THE CASE	2
IV.	STANDARD OF REVIEW.....	11
V.	ARGUMENT	15
	A. Substantial evidence supports the Commissioner’s finding that Tang “quit because she disagreed with the employer regarding the payment of a commission.”	17
	B. Tang failed to establish she was the “target of racial discrimination” or that the Employer’s commission decision was “premised on retaliation.”	19
	C. Tang failed to establish she had good cause to quit because of illegal activities in her worksite.	21
	D. Tang should not be permitted to litigate her discrimination claims in her unemployment benefits proceeding.....	25

E. The Commissioner properly remanded the work search
issue to the Department for further consideration.....28

VI. CONCLUSION29

TABLE OF AUTHORITIES

Cases

<i>Alsip v. Klosterman Baking Co.</i> , 113 Ohio App. 3d 439, 680 N.E.2d 1320 (Ohio Ct. App. 1 Dist. 1996).....	27
<i>Cowles Publ'g Co. v. Dep't of Emp't Sec.</i> , 15 Wn. App. 590, 550 P.2d 712 (1976).....	16
<i>Davis v. Dep't of Labor & Indus.</i> , 94 Wn.2d 119, 615 P.2d 1279 (1980)	13
<i>Eggert v. Emp't Sec. Dep't</i> , 16 Wn. App. 811, 558 P.2d 1368 (1976).....	13, 14
<i>Employees of Intalco Aluminum Corp. v. Emp't Sec. Dep't</i> , 128 Wn. App. 121, 114 P.3d 675 (2005).....	12
<i>Fred Hutchinson Cancer Research Ctr. v. Holman</i> , 107 Wn.2d 693, 732 P.2d 974 (1987).....	13
<i>Haney v. Emp't Sec. Dep't</i> , 96 Wn. App. 129, 978 P.2d 543 (1999).....	26, 27
<i>Heinmiller v. Dep't of Health</i> , 127 Wn.2d 595, 903 P.2d 433 (1995).....	13
<i>Hussa v. Emp't Sec. Dep't of State of Wash.</i> , 34 Wn. App. 857, 664 P.2d 1286 (1983).....	23, 24
<i>Marquis v. City of Spokane</i> , 130 Wn.2d 97, 922 P.2d 43 (1996).....	25
<i>Martinez v. New Mexico Eng'r Office</i> , 129 N.M. 413, 9 P.3d 657 (N.M. Ct. App. 2000).....	27
<i>Martini v. Emp't Sec. Dep't</i> , 98 Wn. App. 791, 990 P.2d 981 (2000).....	21, 23, 25

<i>Riehl v. Foodmaker, Inc.</i> , 152 Wn.2d 138, 94 P.3d 930 (2004).....	28
<i>Safeco Ins. Companies v. Meyering</i> , 102 Wn.2d 385, 687 P.2d 195 (1984).....	26
<i>Safeco Ins. Cos. v. Meyering</i> , 102 Wn.2d 385, 687 P.2d 195 (1984).....	11
<i>Smith v. Emp't Sec. Dep't</i> , 155 Wn. App. 24, 226 P.3d 263 (2010).....	passim
<i>Spain v. Emp't Sec. Dep't</i> , 164 Wn.2d 252, 185 P.3d 1188 (2008).....	16
<i>Tapper v. Emp't Sec. Dep't</i> , 122 Wn.2d 397, 858 P.2d 494 (1993).....	12, 13, 14, 15
<i>Terry v. Dep't of Emp't Sec.</i> , 82 Wn. App. 745, 919 P.2d 111, 114 (1996).....	14
<i>Verizon NW, Inc. v. Emp't Sec. Dep't</i> , 164 Wn.2d 909, 194 P.3d 255 (2008).....	14
<i>Wallace v. Emp't Sec. Dep't</i> , 51 Wn. App. 787, 755 P.2d 815 (1988).....	16
<i>Washington Water Power Co. v. Human Rights Comm'n</i> , 91 Wn.2d 62, 586 P.2d 1149 (1978).....	25
<i>William Dickson Co. v. Puget Sound Air Pollution Control Agency</i> , 81 Wn. App. 403, 914 P.2d 750 (1996).....	13

Statutes

RCW 34.05	2, 11, 15
RCW 34.05.558	12
RCW 34.05.570(1)(a)	15

RCW 34.05.570(3).....	12
RCW 49.60	25
RCW 49.60.050	27
RCW 49.60.120(3)-(4).....	27
RCW 49.60.140	27
RCW 49.60.230	28
RCW 49.60.250	28
RCW 50.01.010	15
RCW 50.08.010	26
RCW 50.08.020	26
RCW 50.12.010	26
RCW 50.20.010(1)(c)	2, 28, 29
RCW 50.20.050	24, 26
RCW 50.20.050(1).....	16, 24
RCW 50.20.050(2)(a)	16
RCW 50.20.050(2)(b)	14
RCW 50.20.050(2)(b)(i)-(xi).....	16
RCW 50.20.050(2)(b)(ix)	21
RCW 50.32.010-.110	26
RCW 50.32.150	12, 13, 16

Other Authorities

Laws of 2009,
ch. 493, § 3..... 16

Rules

RAP 10.3(h)..... 15
RAP 9.7(c) 2

Regulations

WAC 192-150 16
WAC 192-150-135(1)..... 21
WAC 192-150-135(3)..... 21
WAC 192-150-135(4)..... 22
WAC 192-150-145(1)..... 21
WAC 192-150-145(2)..... 22

I. INTRODUCTION

Nguyet Tang, a finance consultant with Lexus of Bellevue, became “really heated” after the general manager credited the commission from a car deal to which she thought she was entitled to another employee. The general manager looked into the situation and determined that the vehicle sale was a separate deal and that Tang was not entitled to the commission from that deal. Still, Tang believed “it was a matter of principle” that she was entitled to the commission—she “worked hard for it” and “[did not] want to share it with anybody.” She asked the general manager to reconsider his decision several times, but he stood by his decision.

Until that decision, Tang had felt 150% committed to her Employer. Afterward, she did not feel comfortable going back to work and quit. Once unemployed, Tang did not make herself available for any jobs in the car finance industry, although she had worked in that profession for the previous seven years. She filed for unemployment benefits.

The Commissioner of the Employment Security Department found Tang quit her job over the disagreement about the commission, concluding she was disqualified from unemployment compensation because her reason for quitting did not amount to good cause to voluntarily quit employment under the Employment Security Act, Title 50 RCW. The

Commissioner also remanded the issue of Tang's availability for work to the Department based on her failure to apply for any jobs in the car finance industry.

Tang seeks judicial review of the Commissioner's decision under the Administrative Procedure Act, Chapter 34.05 RCW. Because substantial evidence supports the Commissioner's findings, and the decision is in accordance with the employment security law, the decision should be affirmed.

II. COUNTERSTATEMENT OF THE ISSUES

- A. Does substantial evidence support the Commissioner's finding that Tang was motivated to quit because she disagreed with her general manager's commission decision from a car deal and not because of illegal activities?
- B. Under RCW 50.20.010(1)(c), unemployment benefits are available if a claimant remains available for work in any trade, occupation, profession, or business for which he or she is reasonably fitted. Did the Commissioner properly remand the issue of Tang's availability when she testified she had not been applying for any jobs in car financing despite seven years experience in that profession?

III. COUNTERSTATEMENT OF THE CASE

Nguyet T. Tang was employed as one of Lexus of Bellevue's (Employer's) four finance and leasing consultants. Commissioner's Record¹ (CR) at 25. Consultants are paid commission based on completed

¹ The Commissioner's Record (CR) is a Certified Record of Administrative Adjudicative Orders as defined by RAP 9.7(c). The Superior Court transmitted the CR in

vehicle sales and “took turns” completing paperwork as sales occurred. CR at 12-14, 25, 119-120. As a consultant, Tang made between \$140,000 and \$160,000 per year, an average of \$12,000 a month. CR at 13, 119.

The Employer valued and “looked out for” Tang as an employee. CR at 46, 120. Tang always met the employer’s sales quota objectives. CR at 14, 120. She was even promoted to Finance Director, a position she held for two and a half years before she voluntarily resigned in order to return to the position of finance consultant. CR at 46, 120.

On Wednesday, July 28, 2010, Tang spent several hours with a customer preparing finance documents for the sale of an uncertified pre-owned car. CR at 23, 120; CR at 100, Finding of Fact (FF) 3. In addition to the purchase price, the customer spent \$3,800 dollars for a dealership warranty because the car was not certified pre-owned and no longer carried the factory warranty. CR at 23, 30-31, 120. Tang worked two hours past the end of her scheduled shift to complete the sale. CR at 23; CR at 100, FF 3. Leaving work that evening, Tang was “150% committed” to her Employer. CR at 89.

On the morning of Thursday, July 29, 2010, the same customer who bought the uncertified pre-owned car and dealership warranty the day before returned to the Employer and voiced extreme dissatisfaction with

its entirety and did not repaginate it. Thus, rather than including a Clerk’s Papers citation, this brief refers to the CR according to its original pagination.

his purchase. CR at 57-58. He had felt “shortchanged” because he later found a certified pre-owned vehicle with a factory warranty at the Employer’s Tacoma dealership that would not have required the dealership warranty he had purchased. CR at 23, 57-58, 120.

Given the customer’s dissatisfaction, the Employer, following established protocol, found a certified pre-owned car for the customer at the Bellevue dealership that was equivalent to the car in Tacoma. CR at 57, 120. The Employer, pursuant to protocol, then unwound the July 28 sale involving Tang, rendering that sale “dead,” and sold the customer the certified pre-owned vehicle with a factory warranty. CR at 58, 120.

As the July 29 sale occurred before Tang came in to work that day (she was scheduled to begin work at 2:00 p.m.), Nick Wilcox, the Employer’s Sales Manager on duty at the time of the sale, followed the Employer’s established protocol and had another finance consultant complete the paperwork for the sale:

She (Tang) was not on shift, was not in the building at that time, and so our job is to take care of the customer, they’re here and we have to put another person on that deal to work that deal.

CR at 26-27, 59, 120; CR at 100, FF 5. As it turned out, the other consultant sold a few products that Tang was not successful in selling to the customer the day before. CR at 30-31, 59.

Given the sequence of events, the Employer considered the July 28 and July 29 deals to be separate, not “switched,” vehicle purchases. CR at 22-23, 28, 30-31, 58, 120-21. Consequently, the salesperson and the other finance consultant, who completed the July 29 deal, were entitled to and got credit for the commission from the sale of the certified pre-owned vehicle. CR at 23, 27-28, 58, 120-21. Had Tang been on site when the July 29 sale occurred, the Employer would have allowed her to complete the financing for that sale, and she would have received the commission. CR at 59. Unfortunately, her opportunities for a commission from the July 28 sale “went away with the unwind.” CR at 58-59.

When informed about the unwound July 28 sale and the new July 29 sale, Tang became upset, believing she had earned and should have received credit for the commission from the second sale even though a different consultant prepared a whole new set of finance documents and sold different products to the customer for the certified pre-owned vehicle:

[T]he car deal should have come back to me. It was a matter of principle.

...

Nick Wilcox basically took the car deal away from me. And I should get it because I worked until 10:30 the next – that night [July 28]. And the next day [July 29] that car deal should have been mine no matter what

...

And if it's my car deal I would want it, I don't want to share with anybody. Why would I want to do that, because

I worked hard for it, you know, and so I just felt treated unfairly in that way.

CR at 22-23, 26, 33, 121; CR at 100, FF 6.

On July 29, Tang spoke to Mark Babcock, the Employer's General Manager, about the situation and asked him to "reconsider" Wilcox's decision to give the other finance consultant the commission from the July 29 sale. CR at 22, 29, 51; CR at 100, FF 6. Babcock determined Wilcox had complied with the Employer's established procedure regarding sales and commissions and stood by Wilcox's decision. CR at 58-59, 121; CR at 100, FF 7. According to Babcock, the July 29 sale was not Tang's because she did not sell any finance products on that car. CR at 29. Furthermore, if a car deal goes south like the July 28 deal, both the finance consultant *and* sales person lose the commission from that sale. CR at 58-59; CR at 121.

On the morning of Friday, July 30, 2010, Tang spoke at length with Babcock once more about the commission issue after an unrelated manager's meeting.² CR at 22, 31-32, 51-52, 77; CR at 100, FF 8. Babcock stood by his decision. CR at 52, 58-60. Tang remained upset about the Employer's decision, feeling Babcock unfairly sided with

² The ALJ listed the date of this meeting as July 29, 2010, in her Initial Order. CR at 100, FF 8. However, both Tang and the Employer testified to July 30, 2010, being the correct date of the meeting. CR at 31, 52.

Wilcox. CR at 33, 45, 60. Later that day, July 30, Tang was a no call/no show for her 2:00 p.m. shift. CR at 51, 77, 94, 121; CR at 100, FF 9.

Due to Tang's absence from work on July 30, the Employer and Tang then began corresponding by email and text messaging "about the car deal." CR at 32. First, the Employer's Human Resources Manager, Nina Hunt, sent Tang an email asking her if she planned on returning to work for her next scheduled shift on Saturday, July 31. CR at 33-34, 89. Tang replied by email that she did not know how she felt about returning, giving no definitive indication whether she would be showing up for her Saturday shift. CR at 33-34, 89. She added she "felt completely 150% committed to [the Employer] until today (July 30) . . . I feel I'm treated so unfairly there by Nick (Wilcox) and Mark (Babcock)." CR at 89.

Tang also texted Babcock on July 30:

It is a matter of principle. I presented the car deal across the board . . . Please reconsider the case. I'm *really heated about this since yesterday* and don't think I'm useful to produce for [the Employer] today.

. . .
I'm sorry Mark but I feel I'm treated unfairly. As of now, I don't feel comfortable coming back to work.

CR at 29, 54, 60, 90 (emphasis added).

In response, Babcock sent Tang an email on Friday evening (July 30) cautioning her that her services were essential and that her absence burdened her coworkers. CR at 34, 87, 121; CR at 100, FF 10. Tang was

further cautioned that if she did not return to work the following day (July 31), the Employer would consider the employment relationship terminated. CR at 34, 87, 121; CR at 100, FF 10.

Tang did not show for her scheduled shifts on Saturday and Sunday (July 31 and August 1, 2010) and did not call her Employer to inform them she would not be coming in. CR at 34, 36, 61, 121; CR at 100, FF 11. On Monday, August 2, 2010, Hunt, the Employer HR Manager, tried to contact Tang to no avail. CR at 63.

But for her belief that she had been unfairly denied a commission, Tang would have reported for work. CR at 80, 89, 121. And Tang knew if she did not show up for work, she would no longer have a job. CR at 34, 36, 87; CR at 100, FF 11. Accordingly, she made the voluntary choice to leave her job by not reporting for her scheduled shifts. CR at 100, FF 11.

Once unemployed, Tang did not apply for positions in the auto-finance industry, despite the fact that her most recent seven years of work experience was limited to auto-finance and that, according to her former general manager, there were numerous employment opportunities consistent with her experience in her labor market area. CR at 20, 69, 119.

Tang filed a claim for unemployment benefits, which the Department denied. CR at 79-83. Tang then appealed the Department's decision to the Office of Administrative Hearings. CR at 73-76, 77-78.

At an administrative hearing, Tang attributed her decision not to return to work to a "matter of principle"—she was "angry" about not getting the finance consultant's commission from the July 29 sale. CR at 22, 32, 45, 90, 121.

Tang also felt her decision to quit was due in part to being harassed or discriminated against in the workplace because of her race; however, she did not go into detail at the hearing. CR at 44. Nor did she inform her Employer at the time she quit that harassment or race discrimination was the reason she was quitting. Rather, in explaining her reason for not returning to the Employer, Tang focused solely on the July 29 car deal and Employer's decision to give the commission from that deal to another finance consultant. CR at 32.

To the extent Tang did address discrimination at the hearing, she testified she reported to several general managers, including Babcock, that Wilcox had been making "racial remarks" in the workplace. CR at 37-38, 119. She claimed she went to Babcock "numerous times" in August 2009 to report Wilcox's comments. CR at 37-38. She also claimed she spoke to Babcock again in January 2010 about one of his own racial remarks

regarding a “black” applicant; however, Babcock did not have any recollection of what she was speaking about. CR at 38, 49. The last time she spoke to Babcock about the subject was at the end of May 2010 “because [Wilcox] made racial remarks against . . . an Asian customer.” CR at 38-39. She did not report or file a formal complaint about any of the “racial remarks” with Human Resources, even though the Human Resources Director’s office was at Tang’s workplace. CR at 39, 48-49, 120. The Employer, on the other hand, “very much disagree[d] with [Tang’s] statements of a threatening workplace.” CR at 60.

After the administrative hearing, an administrative law judge (ALJ) issued an Initial Order that sustained the Department’s determination that Tang did not have good cause to voluntarily quit her job. CR at 102, Conclusion of Law (CL) 6; CR at 100, FF 11-12.

Tang filed a petition for review by the Department’s Commissioner, who affirmed the ALJ’s Initial Order. CR at 108-110. The Commissioner adopted (with modifications) the ALJ’s findings and conclusions, except Finding of Fact 2 and Conclusion of Law 7, which were instead replaced with new findings and conclusions. CR at 118-122. The Commissioner did not disturb the ALJ’s implicit credibility finding, reflected in the ALJ’s findings of fact, that “the Employer’s case was more persuasive than [Tang’s] version of events.” CR at 119.

The Commissioner found, based upon all of the evidence in the record, that Tang quit because she disagreed with her former Employer regarding the payment of a commission from one car sale. CR at 100, FF 9, 11; CR at 102, CL 6; CR at 121. Tang did not establish she was the target of racial discrimination or was otherwise retaliated against such that it could be said she quit because of illegal activities in the workplace. CR at 106, CL 6; CR at 121-22. Rather, the Commissioner found the Employer followed its established procedure with the commission in question and did not unfairly deny Tang that commission. CR at 121. All things considered, for purposes of unemployment benefit eligibility, the Commissioner concluded Tang had not established good cause to quit her job. CR at 122.

Tang petitioned the superior court for judicial review. The Honorable Cheryl Carey affirmed the Commissioner's decision. This appeal followed.

IV. STANDARD OF REVIEW

The standard of review is particularly relevant in this appeal, a matter on judicial review of the Commissioner's Decision under chapter 34.05 RCW, the Washington Administrative Procedure Act (APA). *See Safeco Ins. Cos. v. Meyering*, 102 Wn.2d 385, 389, 687 P.2d 195 (1984). Although Tang appeals from the superior court order affirming the

Commissioner’s decision, an appellate court “sits in the same position as the superior court” and reviews the Commissioner’s decision, applying the APA standards “directly to the record before the agency.” *Tapper v. Emp’t Sec. Dep’t*, 122 Wn.2d 397, 402, 858 P.2d 494 (1993); *Employees of Intalco Aluminum Corp. v. Emp’t Sec. Dep’t*, 128 Wn. App. 121, 126, 114 P.3d 675 (2005) (“The appellate court reviews the findings and decisions of the commissioner, not the superior court decision or the underlying ALJ order.”); RCW 34.05.558. The court reviews the decision of the Commissioner, not the underlying decision of the ALJ—except to the extent the Commissioner’s decision adopted any findings and conclusions of the ALJ’s order. *Smith v. Emp’t Sec. Dep’t*, 155 Wn. App. 24, 32, 226 P.3d 263 (2010); *Tapper v. Emp’t Sec. Dep’t*, 122 Wn.2d 397, 406, 858 P.2d 494 (1993). This is of particular importance in this case because the Commissioner adopted most and modified or replaced some of the ALJ’s findings and conclusions. It is the Commissioner’s decision that is reviewed by this Court.

The APA directs the court to affirm the Commissioner’s decision if supported by substantial evidence and in accord with the law. RCW 34.05.570(3). The Commissioner’s decision is *prima facie* correct, and the burden of demonstrating its invalidity is on the appellant. RCW 50.32.150; see *Eggert v. Emp’t Sec. Dept.*, 16 Wn. App. 811, 813,

558 P.2d 1368 (1976) (recognizing that the Court's jurisdiction is "further limited by RCW 50.32.150"). Thus, upon review of the entire record, the court, in order to reverse, must be left with the definite and firm conviction that a mistake has been made. *Eggert*, 16 Wn. App. at 813.

The Court reviews the Commissioner's findings of fact for support by substantial evidence. *William Dickson Co. v. Puget Sound Air Pollution Control Agency*, 81 Wn. App. 403, 407, 411, 914 P.2d 750 (1996). Evidence is substantial if sufficient to "persuade a fair-minded person of the truth of the declared premises." *Heinmiller v. Dep't of Health*, 127 Wn.2d 595, 607, 903 P.2d 433 (1995). Evidence may be substantial enough to support a factual finding even if the evidence is conflicting and could lead to other reasonable interpretations. *Fred Hutchinson Cancer Research Ctr. v. Holman*, 107 Wn.2d 693, 713, 732 P.2d 974 (1987). The reviewing court should "view the evidence and the reasonable inferences therefrom in the light most favorable to the party that prevailed" at the administrative proceeding below, which was the Department. *Tapper*, 122 Wn.2d at 407. Additionally, the court may not substitute its judgment for that of the agency on the credibility of the witnesses or the weight to be given to conflicting evidence. *Smith*, 155 Wn. App. at 35; *Davis v. Dep't of Labor & Indus.*, 94 Wn.2d 119, 124, 615 P.2d 1279 (1980). Unchallenged findings are treated as verities on appeal. *Id.*

A court reviews the law *de novo* under the clear error standard. *Verizon NW, Inc. v. Emp't Sec. Dep't*, 164 Wn.2d 909, 915, 194 P.3d 255 (2008). It accords substantial weight to an agency's interpretation of a law within the agency's area of expertise. *Id.* Indeed, the courts may not reverse the Commissioner's decision simply by weighing the evidence differently than the Commissioner or disagreeing with his conclusions. *Eggert*, 16 Wn. App. at 813.

The Commissioner determined Tang was ineligible for unemployment benefits because she quit her job for a personal reason, her dissatisfaction with the Employer's decision to credit another finance consultant with the commission from a July 29 car deal, not for one of the eleven exclusive circumstances that constitute good cause to quit under RCW 50.20.050(2)(b). CR at 122. Whether a claimant had good cause to quit is a mixed question of law and fact. *Terry v. Dep't of Emp't Sec.*, 82 Wn. App. 745, 748, 919 P.2d 111, 114 (1996). When reviewing a mixed question of law and fact, the court must make a three-step analysis. *Tapper*, 122 Wn.2d at 403. First, the court determines which factual findings below are supported by substantial evidence. *Id.* Second, the court makes a *de novo* determination of the correct law, and third, it applies the law to the facts. *Id.*

On appeal, it is Tang’s burden to establish the Commissioner’s decision was in error.³ RCW 34.05.570(1)(a); *Smith*, 155 Wn. App. at 32. Tang must therefore show there is insufficient evidence in the record to support the Commissioner’s finding that she quit her job over the disagreement about the vehicle sale commission and that Commissioner’s conclusion that this did not amount to good cause to voluntarily quit her job was a clear error of law.

V. ARGUMENT

This Court should affirm the Commissioner’s decision because substantial evidence supports the findings of fact, and there are no errors of law. The Commissioner appropriately determined that a preponderance of the evidence suggested Tang voluntarily quit her job because she was upset over the way the car transaction was handled—that this was the precipitating factor that led to her job separation.

The Employment Security Act was enacted to provide compensation to individuals who are “involuntarily” unemployed “through no fault of their own.” RCW 50.01.010; *Tapper*, 122 Wn.2d at 408. That Act requires that the reason for the unemployment be external and apart from the claimant. *Cowles Publ’g Co. v. Dep’t of Emp’t Sec.*, 15

³ Under RAP 10.3(h), Tang, as “respondent who is challenging an administrative adjudicative order under RCW 34.05[,] . . . shall set forth a separate concise statement of each error which a party contends was made by the agency issuing the order, together with the issues pertaining to each assignment of error.”

Wn. App. 590, 593, 550 P.2d 712, 715 (1976). Accordingly, a person is ineligible to receive unemployment benefits when she leaves her employment voluntarily without good cause. RCW 50.20.050(1).

If an individual left work voluntarily, RCW 50.20.050(2)(b)(i)-(xi) sets out an exclusive list of eleven factual circumstances that constitute good cause, and WAC 192-150 sets out what must be established to demonstrate that one of those provisions apply.⁴ The employee bears the burden of establishing facts amounting to “good cause” by a preponderance. *See* RCW 50.32.150; *Wallace v. Emp’t Sec. Dep’t*, 51 Wn. App. 787, 790, 755 P.2d 815 (1988). Failure to show good cause results in disqualification of benefits. RCW 50.20.050(2)(a).

Tang argues that one of the eleven exclusive factual circumstances applies in her case, asserting that she quit due to workplace discrimination and not because of the Employer’s commission decision. Appellant’s Br. at 5. In doing so, she asks the Court to reweigh the evidence and find, contrary to the Commissioner, that she left work because of illegal activities—workplace discrimination and “whistleblower”-type retaliatory treatment after reporting such activities—in the worksite. However, that is not the

⁴ Tang incorrectly cites to *Spain v. Emp’t Sec. Dept.*, 164 Wn.2d 252, 260-61, 185 P.3d 1188 (2008), for the proposition that the list of good cause circumstances is not exhaustive. Appellant’s Br. at 12. The Legislature amended the voluntary quit statute after *Spain* to explicitly make the good cause circumstances set out in the statute an exhaustive list with respect to job separations after September 6, 2009. Laws of 2009, ch. 493, § 3. Tang quit in July 2010. *Spain* is therefore inapplicable to her case.

Court's role. Rather, the Court reviews only the findings actually made by the Commissioner and determines whether those findings are supported by substantial evidence. Furthermore, Tang's unemployment benefits case is not the proper forum for her to litigate her discrimination claims against her former Employer.

A. Substantial evidence supports the Commissioner's finding that Tang "quit because she disagreed with the employer regarding the payment of a commission."

Substantial evidence supports the Commissioner's finding that Tang voluntarily quit her job because she disagreed with her Employer's business decision to pay the commission from a July 29 car deal to another finance consultant. CR at 102, CL 6; CR at 121. As discussed, substantial evidence is evidence that is "sufficient to persuade a rational, fair-minded person of the truth of the finding." *Smith*, 155 Wn. App. at 35.

Tang's own testimony supports that she quit due to dissatisfaction with her employer's business decision. "[U]ntil [July 30]," Tang "felt completely 150% committed to [the Employer.]" CR at 89. Her commitment changed when, in her mind, the general manager, Mark Babcock, and the sales manager, Nick Wilcox, "basically took the [July 29] car deal away" from her. CR at 23, 33.

To Tang, "It was a matter of principle." CR at 22, 88. She "presented the car deal across the board" to the customer on July 28 and

felt she “worked hard” for the commission from the July 29 car deal. CR at 30, 88. She “[did not] want to share it with anybody.” CR at 33. Thus, the general manager’s commission decision made her “really heated.” CR at 88. She “just felt treated unfairly in that way” after she “worked hard for [the commission].” CR at 33, 88. She asked the general manager, Mark Babcock, to “reconsider” his decision several times to no avail. CR at 22, 30, 88. She even corresponded “about the car deal” by email and text messaging but Babcock stood by his decision. CR at 22, 87-90.

Still “heated,” Tang informed Babcock “[she] did not feel comfortable coming back to work.” CR at 90. She was then a no call/no show for her next three shifts after Babcock told her that her services were needed, choosing to quit her employment out of principle over the general manager’s commission decision. CR at 34, 36, 61, 121.

The timing of the job separation also supports the Commissioner’s finding that the vehicle transaction was the motivating factor in Tang’s decision to quit. Tang sold the vehicle to the buyers on July 28, 2010, and the buyers returned the next day, July 29, 2010, dissatisfied with the transaction, when Tang was not working. CR at 23, 57-58. The Employer “unwound” the transaction and sold a different vehicle to the buyers that day. CR at 26-27, 59. Later that day, Tang learned of the “unwound” transaction and that she would not be receiving a commission for the prior

day's sale, and she became upset. CR at 22-23, 26, 33. Tang then did not show up for her next three scheduled shifts on July 30, July 31, and August 1. CR at 34, 36, 51.

Therefore, there is substantial evidence in the record to support the Commissioner's factual finding that Tang quit because she disagreed with her Employer's commission decision from the July 29 car deal.

B. Tang failed to establish she was the “target of racial discrimination” or that the Employer’s commission decision was “premised on retaliation.”

The Commissioner properly found Tang did not establish that she was the target of racial discrimination or that the Employer's July 29 commission decision was premised on retaliation. CR at 121-22. Tang had the burden of proving these factual issues, and the Commissioner found she failed to carry that burden on both counts: the “Employer's case was more persuasive than [Tang's] version of events.” CR at 119.

When asked at the hearing if she believed she had been discriminated against by her Employer because of her race, Tang answered “Yeah, that's correct,” but then stated, “I won't go in (sic) detail.” CR at 44.

To the extent Tang provided details, she only recounted two vague “racial remarks” she allegedly overheard in the workplace months before she quit. She claimed the general manager, Mark Babcock, made the first

comment about a “black” applicant in January 2010. CR at 38. However, Babcock did not have any recollection of what Tang was speaking about. CR at 49.

She also claimed the sales manager, Nick Wilcox, made “racial remarks” with the final comment about an “Asian customer” coming at the end of May 2010 and that she reported those comments to the general managers, including Babcock, numerous times in August 2009. CR at 37-39. She did not, however, testify that any of those remarks were targeted toward her or that, except for the last comment two months before she quit, Wilcox’s other remarks were about Asian-Americans. CR at 37-39.

Finally, none of the alleged discriminatory comments involved earlier unfavorable commission decisions. Nor did Tang ever inform the human resources manager, who Tang corresponded with at the time she quit, that she felt she was being targeted or retaliated against because of her race. CR at 39, 48-49, 89. Rather, Tang felt Babcock’s July 29 commission decision was unfair, but before that decision, she “felt completely 150% committed to [the Employer].” CR at 89.

Thus, the Commissioner appropriately determined that Tang failed to prove, as it was her burden to do, that she was the target of race discrimination or that the July 29 commission decision was based on retaliation.

C. Tang failed to establish she had good cause to quit because of illegal activities in her worksite.

As mentioned, Tang argues that the “illegal activities” good cause reason—one of the eleven exclusive circumstances that constitute good cause for quitting a job—applies in her case:

(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).⁵

To meet the requirements of RCW 50.20.050(2)(b)(ix), Tang was required to establish, as a threshold matter, the existence of a “clear statutory violation” of civil or criminal law. *Martini v. Emp’t Sec. Dep’t*, 98 Wn. App. 791, 798, 990 P.2d 981 (2000) (finding the facts of the case presented a clear violation of the Washington Minimum Wage Act when Employer admitted at the administrative hearing that employee was not guaranteed a minimum wage); WAC 192-150-135(1).

The Department has interpreted the “illegal activities” good cause provision to require a “change in working conditions.” *See* WAC 192-150-145(1). Thus, if an individual quits work due to a change in working conditions that meets the requirements of RCW 50.20.050(2)(b)(ix), the

⁵ “Employer” means the employee’s supervisor, manager, or other individual who could reasonably be expected to have authority to correct the illegal activity at issue. WAC 192-150-135(3).

Department will not deny benefits on the basis that she continued working for a *brief period of time* following the change. *Id.* However, the individual “must demonstrate to the Department that the change in working conditions was *the motivating factor* for quitting work” despite the brief passage of time. *Id.* (emphasis added). The Department has defined “brief period of time” consistently with its definition of “reasonable period of time” to mean the amount of time a reasonably prudent person would have continued working after the change in circumstances. WAC 192-150-145(2); WAC 192-150-135(4).

Here, Tang failed to establish the existence of a clear statutory violation of law that would have provided her with good cause to quit her job. First, Tang did not prove the Employer violated any laws by giving another financing consultant the commission from the July 29 sale after her July 28 sale was unwound and rendered “dead.” CR at 58. Rather, the Employer made a business decision in line with its established procedures for sales and commissions after reviewing the situation and discussing the matter with Tang on several occasions. CR at 52, 59-60, 122. Moreover, the Employer credibly testified that had Tang been working at the time of the July 29 sale, she would have been given the opportunity to complete the finance paperwork and would have received the commission from the sale of any “products” to the customer related to that vehicle. CR at 59.

Thus, even if the Employer's commission decision was unfair or not in accordance with the Employer's established procedures, that did not mean that it was a clear violation of law. It was Tang's burden to make such a showing, and she failed to do so.

Second, Tang also failed to prove a clear violation of law based on racial discrimination in the workplace. As previously argued in section V. B. above, Tang's allegations of workplace discrimination were not clear, and evidence to establish those allegations was not offered. Where the employer in *Martini* actually admitted at the administrative hearing that it was not paying Mr. Martini a guaranteed minimum wage, there was no such admission by Tang's former Employer in her case. *Martini*, 98 Wn. App. at 798. Rather, the Employer's general manager strongly denied any wrongdoing. CR at 60, 69. Moreover, the Commissioner found Tang's allegations about discrimination not credible, and when Tang had the opportunity, she failed to provide details, instead testifying, "I won't go in (sic) detail." CR at 44.

Tang cites *Hussa v. Emp't Sec. Dept. of State of Wash.*, 34 Wn. App. 857, 664 P.2d 1286 (1983), for the proposition that victims of sexual harassment in the workplace can have good cause for leaving employment even where the employee has not reported the harassment to her employer. Appellant's Br. at 13. *Hussa* involved an earlier version of the voluntary

quit statute, RCW 50.20.050(1). Moreover, as in *Martini*, where the employer admitted to not paying Mr. Martini a guaranteed minimum wage, “that sexual harassment exist[ed] in [*Hussa*] [was] not disputed.” *Hussa*, 34 Wn. App. at 862. *Hussa* is therefore inapplicable to Tang’s case where the Employer refuted the allegations of workplace discrimination, and the Commissioner resolved the conflicting testimony in favor of the Employer.

Even if Tang had established clear illegal activities in the workplace, she nevertheless failed to prove those illegal activities were the motivating factor for quitting. Instead, Tang decided to quit as “a matter of principle” when the general manager would not credit her with the commission from the July 29 car deal. CR at 90. Prior to that decision, Tang “felt completely 150% committed to [the Employer].” CR at 89. Following that decision, Tang “did not feel comfortable coming back to work” because she believed the general manager’s decision was unfair. CR at 90.

Therefore, the Commissioner properly concluded Tang’s reason for quitting did not fall within the exclusive list of eleven good cause reasons set out in RCW 50.20.050. CR at 122. She did not have good cause for leaving her job and was not entitled to unemployment benefits.

D. Tang should not be permitted to litigate her discrimination claims in her unemployment benefits proceeding.

It appears that Tang has attempted to litigate a workplace discrimination claim in her unemployment benefits case. Absent a showing of a “clear” violation of law, as required by *Martini*, unemployment benefit proceedings are not the appropriate forum for employees to litigate their non-unemployment benefit claims. *Martini*, 98 Wn. App. at 798; *see also Smith*, 155 Wn. App. at 41 (finding Smith’s whistleblower/retaliation claim was a subject for a jury to determine in a wrongful termination action and was not relevant to Court’s review of the agency decision before it). The Court should therefore reject Tang’s apparent attempt to interject the Washington Law Against Discrimination (WLAD), Chapter 49.60 RCW, into the Employment Security Act (ESA), Title 50 RCW, for purposes of determining benefit eligibility.

“An administrative agency is limited in its powers and authority to those which have been specifically granted by the legislature.” *Washington Water Power Co. v. Human Rights Comm’n*, 91 Wn.2d 62, 65, 586 P.2d 1149 (1978); *Marquis v. City of Spokane*, 130 Wn.2d 97, 111, 922 P.2d 43 (1996). The Legislature established the Department under the Employment Security Act to implement that act, granting the Commissioner power to make rules and adjudicate unemployment benefit

claims pursuant to that act. RCW 50.08.010; 50.08.020; 50.12.010; 50.32.010-.110.

The voluntary quit statute, RCW 50.20.050, does not define the eleven exclusive good cause circumstances in connection with the WLAD. The Department lacks the power and expertise necessary to rule on a potential claim arising under those other laws. The Department is “endowed with quasi-judicial functions” because of its “expertise in [the employment security] field.” *Safeco Ins. Companies v. Meyering*, 102 Wn.2d 385, 687 P.2d 195 (1984).

Each law serves a different purpose and provides for different remedies. Indeed, interjecting the “discrimination claim” analysis into the employment security law would result in confusion and unintended adjudication of the anti-discrimination law issues by the state agency entrusted with employment security.

This Court has previously declined to apply National Labor Relations Act principles to unemployment cases. In *Haney v. Employment Security Department*, 96 Wn. App. 129, 138 n.2, 978 P.2d 543 (1999), this court was presented with but declined to decide the issue of whether a protected activity under the National Labor Relations Act (NLRA) can constitute disqualifying misconduct under the Act when the claimant conceded that her conduct at issue was not protected under the NLRA.

This Court stated: “[I]nterjecting NLRA principles into unemployment compensation cases involving individual claimants not covered under the NLRA would not further the purposes of the NLRA or the [Act], and would inevitably lead to unnecessary confusion regarding what does or does not constitute disqualifying misconduct under the [Act].” *Haney*, 96 Wn. App. at 137. *See also Martinez v. New Mexico Eng’r Office*, 129 N.M. 413, 9 P.3d 657, 662-64 (N.M. Ct. App. 2000) (the state’s personnel board lacks power to adjudicate ADA issues, which rest on EEOC and the state’s human rights commission); *Alsip v. Klosterman Baking Co.*, 113 Ohio App. 3d 439, 680 N.E.2d 1320, 1325 (Ohio Ct. App. 1 Dist. 1996) (“Federal labor law does not apply and confuses the relevant focus of the [state employment security bureau’s] inquiry: ‘Are the employees unemployed through no fault of their own?’”).

The Human Rights Commission and Equal Employment Opportunity Commission are state agencies specifically entrusted with the implementation of the state’s anti-discrimination laws. The Legislature created the Human Rights Commission under WLAD granting it power to make rules, investigate, and rule on complaints alleging discrimination as defined by the statute. RCW 49.60.050; 49.60.120(3)-(4); RCW 49.60.140; *Riehl v. Foodmaker, Inc.*, 152 Wn.2d 138, 147 n.3, 94 P.3d 930

(2004) (“The legislature created a state agency, the Human Rights Commission, to prevent and eliminate discrimination in employment.”).

Tang had an opportunity to file a complaint with the Human Rights Commission and seek relief, including reinstatement, back pay, and damages. RCW 49.60.230, .250. She had an opportunity to file such a complaint with either the state or federal Equal Employment Opportunity Commission. Whether or not she did so and the outcome of such cases is not before this Court. Thus, this Court should decline to consider Tang’s “discrimination claim” in her unemployment benefits case.

E. The Commissioner properly remanded the work search issue to the Department for further consideration.

To qualify for unemployment benefits, a claimant must be “available for work in any trade, occupation, profession, or business for which he or she is reasonably fitted.” RCW 50.20.010(1)(c).

Tang testified she was primarily looking for work in the finance department at the Boeing Company. CR at 16. Tang further testified that she had not been applying for any financial positions in the automotive industry, despite seven years experience holding such a position. CR at 20. The Commissioner determined that, because Tang had not sought a position in the industry with which she has extensive experience, her compliance with RCW 50.20.010(1)(c) may be inadequate. CR at 122.

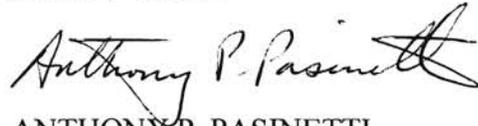
As a result, the Commissioner ordered that the question of whether such jobs are available and whether Tang should be applying for them be remanded for further consideration. CR at 122. Tang has argued in her appeal that the Commissioner improperly relied on the Employer's general manager's testimony that such jobs were available in the area. Appellant's Br. at 14-15. However, Tang herself testified that she had seven years experience in the automotive finance industry, yet she had not been seeking a position in that area after she voluntarily quit her position with the Employer. CR at 16, 20. So the Commissioner relied in part on Tang's own testimony for the remand. Moreover, the Commissioner did not find as fact that jobs were available in the automotive finance industry for which Tang should have been applying. He simply remanded the matter for additional fact finding on that question to determine whether Tang was in compliance with RCW 50.20.010(1)(c). CR at 122. As such, the Commissioner's decision to remand this question was proper.

VI. CONCLUSION

For the foregoing reasons, the Department respectfully requests that the Court affirm the Commissioner's decision denying Tang's unemployment benefits.

RESPECTFULLY SUBMITTED this 15 day of May, 2012.

ROBERT M. MCKENNA
Attorney General

A handwritten signature in black ink, appearing to read "Anthony P. Pasinetti". The signature is written in a cursive style with a large, stylized initial "A".

ANTHONY P. PASINETTI
Assistant Attorney General
WSBA No. 34305
Attorneys for Respondent