

No. 35710-1-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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CHARLOTTE KING,

Appellant,

v.

EMPLOYMENT SECURITY DEPARTMENT,  
STATE OF WASHINGTON,

Respondent.

**ORIGINAL**

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**BRIEF OF APPELLANT**

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## A. INTRODUCTION

Ms. Charlotte King worked as a caregiver for George Henry Bartell, Jr. for four and a half years, from April 2001 to September 30, 2005. CP Comm. Rec. 76<sup>1</sup> (Findings of Fact “FF” 1).<sup>2</sup> Mr. Bartell was an elderly man who was suffering from dementia. CP Comm. Rec. 77 (FF 4). In June of 2005, Mr. Bartell held a knife towards Ms. King. CP Comm. Rec. 77 (FF 5). Mr. Bartell’s condition deteriorated and he became increasingly prone to anger and confusion and became increasingly agitated and aggressive. CP Comm. Rec. 77 (FF 4, 5). On September 13, 2005, Mr. Bartell struck Ms. King in the chest with his fist. CP Comm. Rec. 77 (FF 4). No longer feeling safe at work, Ms. King submitted her two-week notice and resigned on September 16, 2005. CP Comm. Rec. 77 (FF 5).

The ESD and an ALJ denied benefits to Ms. King because in their opinion Ms. King did not have “good cause” to quit her job.

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<sup>1</sup> Thurston County Superior Court has transmitted the Administrative Record, aka Certified Appeals Board Record, aka Commissioner’s 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.

<sup>2</sup> The statement of facts that follows is based largely on the ALJ’s findings of fact. Ms. King specifically assigns error to Finding of Fact 2 and to any findings of the commissioner that can be interpreted as findings of fact to the extent that those findings are not based on substantial evidence.

CP Comm. Rec. 47, 77. Review Judge Teresa M. Morris of the Commissioner's Review Office ("the Commissioner") affirmed the denial finding Ms. King had not shown "that her workplace safety deteriorated." CP Comm. Rec. 91. The Thurston County Superior Court affirmed. CP 39-41. This appeal timely followed. CP 42-46.

## **B. ASSIGNMENTS OF ERROR**

1. The Commissioner erred in failing to find that Ms. King quit her job for "good cause" when her worksite safety deteriorated.

2. Ms. King is entitled to fees and costs at both the administrative and judicial review levels when the Commissioner's Order is reversed.

### **ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. When unchallenged findings of fact state that Ms. King's employer "struck the claimant in the chest with his fist," and on another occasion during which he "had a knife which he was holding" demanded that Ms. King return his car keys, and state that the employer was "aggressive," "agitated," and "experiencing dementia," did Ms. King have "good cause" to quit her job based on concerns for her safety? (Issue Pertaining to Appellant's Assignment of Error 1).

2. Upon this court's reversal of the Commissioner's Order in this case, should attorney fees and costs be awarded to counsel for Ms. King for work on this case at both the administrative and judicial review levels so long as the fees and costs are reasonable? (Issue Pertaining to Appellant's Assignment of Error 2).

### **C. STATEMENT OF THE CASE**

#### **1. Substantive Facts: Job Separation.**

##### **a. Ms. King was a caregiver to a person suffering from dementia, Mr. Bartell.**

Ms. Charlotte King worked as a caregiver for George Henry Bartell, Jr. for four and a half years, from April of 2001 to September 30, 2005. CP Comm. Rec. 76 (Findings of Fact "FF" 1). She said that although she provided care to Mr. Bartell, essentially as a certified nurse's assistant, the actual employer was the "Bartell Trust." CP Comm. Rec. 12. She provided Mr. Bartell with "daily care," including "stimulation, both mental and physical," "doctors' appointments; medicines, shopping; meal preparation, making sure all the medical supplies were stocked for both nebulizer and colostomy," and making "sure that the car was maintained . . . ." CP Comm. Rec. 12.

Mr. Bartell was an elderly man who was suffering from dementia. CP Comm. Rec. 13, 77 (FF 4).

**b. Mr. Bartell became increasingly aggressive and Ms. King informed his family of this.**

Over the years Ms. King cared for Mr. Bartell, he had become increasingly aggressive. She described an incident that occurred about a year and four months prior to Ms. King quitting in which Mr. Bartell for the first time had demonstrated aggressiveness toward a female co-worker by pushing her against a wall. Ms King testified that she “did make the family aware of this, I had a meeting with both Jean and George.” CP Comm. Rec. 14. She said that the employer was “shocked” by Mr. Bartell’s behavior and made adjustments so that only males worked at night with Mr. Bartell. CP Comm. Rec. 14. The employer agreed that it had made changes based upon this incident. CP Comm. Rec. 32.

Ms. King described other aggressive incidents when Mr. Bartell had “taken a swing” at another of Ms. King’s co-workers, Jason Stevens. CP Comm. Rec. 15. She said there were several incidents between Mr. Bartell and Mr. Stevens: “I know of at least three incidences where George [Bartell] grabbed the steering wheel

out of his [Mr. Stevens'] hand while driving down the freeway, putting him into another land." CP Comm. Rec. 15.

**c. His condition worsening, Mr. Bartell, while pointing a knife at Ms. King, demanded that she give him the car keys.**

In June of 2005, Mr. Bartell threatened Ms. King with a knife. CP Comm. Rec. 77 (FF 5). Ms. King said that she "had gotten some boxes in the mail, and I got a steak knife out to open the box. And he [Mr. Bartell] *took the knife and pointed at me and demanded his car keys.*" CP Comm. Rec. 16. She said she had to spend 10 or 15 minutes calming him down and "talking him to giving me the knife . . . ." CP Comm. Rec. 16. She said she did not report this incident to the Bartell Trust or Jean, Mr. Bartell's daughter, because all the employees "passion" was "to keep her [the daughter] father at home as long as possible." CP Comm. Rec. 17.

Mr. Bartell's condition subsequently deteriorated and he became increasingly prone to anger and confusion and became increasingly agitated and aggressive. CP Comm. Rec. 77 (FF 4, 5).

Ms. Jean Barber, Mr. Bartell's daughter and a "principal" contact for the Bartell Trust for the care giving provided her father,

stated that she knew “from hearsay that he [Mr. Bartell] was getting more aggressive.” CP Comm. Rec. 29. She said that aggressiveness “is a typical side effect of dementia.” CP Comm. Rec. 30. But she said “I hadn’t been told that this was happening a lot, or anything else, therefore I felt at the time I had done all we could.” CP Comm. Rec. 30. She did note that she knew of an incident in which Mr. Bartell had taken “a swing” at one of his male caregivers, Jason Stevens. CP Comm. Rec. 31. She also agreed that “starting in August, his dementia did take a turn for the worse.” CP Comm. Rec. 34.

Ms. King stated that Mr. Bartell had initially been a very kind and gentle person, that originally the situation had been “totally different,” but that after the pushing incident with her co-worker “his condition had changed.” CP Comm. Rec. 22-23.

**d. Finally, Mr. Bartell punched Ms. King in the chest with his fist while she was attempting to change his colostomy bag.**

On September 13, 2005, Mr. Bartell struck Ms. King in the chest. CP Comm. Rec. 77 (FF 4). On that day she was attempting to change Mr. Bartell’s colostomy bag:

And he just became more and more aggressively agitated. And I finally – I mean, it was to the point where it was going to burst, so I finally said George, we need to get this done or

we're going to have a mess we need to clean up, or something to that effect. And he just got up very agitated and he started swinging and he punched me in the chest with his fist.

CP Comm. Rec. 13. Regarding the blow she said "it set me back, but I didn't go on the floor . . . ." CP Comm. Rec. 13. Ms. King notified the family of this incident through an email sent the next day, September 14. CP Comm. Rec. 18. She had hoped the family would respond with other options as it had in the past by perhaps a different sedation regimen, or having two caregivers work at once, or "putting a male in my place ... I'm only 4 foot 10, so it's, you know, it's very easy for George to look down on me . . . ." CP Comm. Rec. 19.

Realizing that her safety was in danger and that she no longer felt "safe at work," Ms. King submitted her two-week notice and resigned on September 16, 2005. CP Comm. Rec. 18, 24, 77 (FF 5). She concluded: "So I just wasn't feeling safe." CP Comm. Rec. 24.

In responding to Ms. King's emailed resignation, the employer recognized Ms. King's legitimate safety concern:

You have taken incredible care with both of our parents and we have relied on you explicitly . . . I would not

want any physical harm to come to you at the hand of my father.

CP Comm. Rec. 60.

**2. Procedural Facts**

**a. The ESD denied unemployment benefits to Ms. King.**

The ESD initially denied benefits because “a substantial deterioration of working conditions has not been shown.” CP Comm. Rec. 47.

**b. An ALJ affirmed the denial, finding that while Mr. Bartell had struck Ms. King her safety was not jeopardized because the blow did not knock her down or cause her to seek medical attention.**

When Ms. King appealed, Administrative Law Judge Craig Davenport denied benefits. CP Comm. Rec. 90. He found that while the employer had indeed “struck” Ms. King “in the chest . . . [t]he blow did not knock the claimant down nor cause any injury more than transient and passing pain” and that Ms. King “did not seek medical attention as a result.” CP Comm. Rec. 90 (FF 4).

The ALJ also found that the employer had indeed had a knife while demanding that Ms. King return his car keys to him, but “he made no attempt to strike her or harm her in any way with it.”

CP Comm. Rec. 77 (FF 5). Therefore, the ALJ concluded Ms. King did not have good cause to quit her job because the ALJ did “not find the claimant was in fact in jeopardy or in danger such that her circumstances constituted an emergency.” CP Comm. Rec. 77 (Conclusion of Law “CL” 4).

**c. The Commissioner agreed.**

Adopting all of the ALJ’s findings and conclusions, the Commissioner concluded that Ms. King did not have good cause to quit her job because she “did not meet her burden to show that her workplace safety deteriorated, that she reported such safety deterioration to the employer, and the employer failed to correct the hazards within a reasonable period of time . . . .” CP Comm. Rec. 90-91.

#### **D. ARGUMENT**

- 1. MS. KING LEFT HER JOB DUE TO CONCERNS FOR HER PERSONAL SAFETY AND SHE THEREFORE SHOULD HAVE QUALIFIED FOR BENEFITS BECAUSE THERE WERE UNCONTESTED FINDINGS OF FACT THAT SHE HAD BEEN HIT IN THE CHEST BY HER EMPLOYER, HER EMPLOYER HAD BRANDISHED A KNIFE IN HER DIRECTION, AND HER EMPLOYER HAD BECOME INCREASINGLY AGITATED AND AGGRESSIVE.**

Ms. King was physically abused by her employer. Prior to the 2004 amendments to the Employment Security Act and prior to this Court's decision in *Starr v. Employment Security Department*, 130 Wn. App. 541, 123 P.3d 513 (2005), *rev. denied* 157 WN.2d 1019 (2006), it is likely she would have qualified for unemployment benefits because her job had "substantially deteriorated" and that was "good cause" to quit and qualify for benefits. Subsequent to the 2004 amendments and *Starr*, she was left with one provision, "worksite safety," to qualify for benefits. The ALJ's and Commissioner's interpretation of the worksite safety provision that seems to require that Ms. King have been actually knocked down or hurt sufficiently to seek medical attention is a bogus interpretation. It has no basis in any legal authority and none was

cited by either the ALJ or the Commissioner. Ms. King asks this Court to reverse.

The Employment Security Act provides benefits as its preamble states to those workers who are out of work “*through no fault of their own.*” RCW 50.01.010 (emphasis added). Ms. King’s unemployment was through no fault of her own, but the fault of her employer. That it was not her fault was demonstrated by the ALJ’s findings of fact.

Specific findings of fact in this case prove that Ms. King had legitimate safety concerns. Her employer “struck the claimant in the chest with his fist,” and on another occasion during which he “had a knife which he was holding” demanded that Ms. King return his car keys, and the employer was “aggressive,” “agitated,” and “experiencing dementia.” Furthermore, there was evidence that the situation had deteriorated over the four years Ms. King worked for Mr. Bártell. Finally, there was evidence that the employer was aware of these safety concerns and had taken some, but not sufficient, steps to ensure Ms. King’s and others’ safety.

The Employment Security Act provides that a person will qualify for unemployment benefits when that person quits a job due to safety issues:

(b) An individual is not disqualified from benefits under (a) of this subsection when:

\* \* \*

(viii) The individual's worksite safety deteriorated, the individual reported such safety deterioration to the employer, and the employer failed to correct the hazards within a reasonable period of time;

RCW 50.20.050 (2)(b)(viii).

The regulation pertaining to this statute requires the worker who quits because of safety concerns tell the "employer" – defined as the "individual who could reasonably be expected to have authority to correct the safety condition at issue" – about the safety concern:

(1) At the time of hire, you can reasonably expect that your worksite complies with applicable federal and state health and safety regulations. If, after beginning work or accepting the job offer, you become aware of a safety issue that was not previously disclosed by your employer, the department will consider the safety of the worksite to have deteriorated.

(2) To establish good cause for quitting work under this section, you must *notify your employer* of the safety issue and *give your employer a reasonable period of time to correct the situation*. For purposes of this section:

(a) "*Employer*" means your supervisor, manager, or other individual who could reasonably be expected to have authority to correct the safety condition at issue;

(b) "*Reasonable period of time*" means the amount of time a *reasonably prudent person would have remained at the worksite* or continued working in the presence of the

condition at issue. In addition:

(i) For health or safety issues that present imminent danger of serious bodily injury or death to any person, your employer must take immediate steps to correct the situation;

\* \* \*

(c) "Serious bodily injury" means bodily injury which creates a probability of death, or which causes serious permanent disfigurement, or which causes a significant loss or impairment of the function of any bodily part or organ whether permanent or temporary.

WAC 192-150-130.

Ms. King satisfied all the above requirements regarding "good cause" for quitting due to worksite safety deterioration, particularly because despite the ALJ's and Commissioner's apparent assumption that the danger must be both "imminent" and threatening "serious bodily injury," neither is *required* by the statute. The Commissioner's Order should therefore be reversed.

- a. **Ms. King's worksite safety deteriorated over the four years she provided care to Mr. Bartell, a man diagnosed with dementia.**

Deterioration of worksite safety occurs under the statute when a worker "after beginning work or accepting the job offer," becomes "aware of a safety issue that was not previously disclosed

by your employer”; in that instance, the ESD considers “the safety of the worksite to have deteriorated.” RCW 50.20.050(2)(b)(viii).

Ample testimony from both Ms. King and the employer proved that the worksite safety deteriorated at Mr. Bartell’s home.

First, the ALJ in this case specifically made a finding that the worksite safety deteriorated. The ALJ stated that Mr. Bartell’s condition subsequently deteriorated and he became increasingly prone to anger and confusion and became increasingly agitated and aggressive. CP Comm. Rec. 77 (FF 4, 5). The Commissioner adopted this finding. CP Comm. Rec. 90. However, the Commissioner then concludes that Ms. King “did not meet her burden to show that her workplace safety deteriorated . . . .” CP Comm. Rec. 90-91. This is a contradiction that betrays both a misapplication and misinterpretation of the statute and betrays a lack of substantial evidence in support of the Order.

Second, Ms. Jean Barber, Mr. Bartell’s daughter and a “principal” contact for the Bartell Trust for the care giving provided her father, stated that she knew “from hearsay that he [Mr. Bartell] was getting more aggressive.” CP Comm. Rec. 29. She said that aggressiveness “is a typical side effect of dementia.” CP Comm. Rec. 30. She testified that she knew of an incident in which Mr.

Bartell had taken “a swing” at one of his male caregivers, Jason Stevens. CP Comm. Rec. 31. She also agreed that “starting in August, his dementia did take a turn for the worse.” CP Comm. Rec. 34. So from the employer’s own testimony it was proved that the situation had deteriorated.

Finally, Ms. King stated that Mr. Bartell had initially been a very kind and gentle person, that originally the situation had been “totally different,” but that after the pushing incident with her co-worker “his condition had changed.” CP Comm. Rec. 22-23. Therefore, the employees obviously knew that the worksite safety had deteriorated.

- b. Ms. King’s employer was aware of the increasing aggressiveness of Mr. Bartell and of prior incidents involving physical contact between Mr. Bartell and his caregivers.**

The regulation pertaining to the deterioration of work site safety requires that the employer know about the safety issue and be given a reasonable time to correct the situation. WAC 192-150-130(2). Ms. King satisfied both prongs.

Ms. King testified to an incident that occurred about a year and four months prior to her quitting in which Mr. Bartell for the first time had demonstrated aggressiveness toward a female co-worker

by pushing her against a wall. Ms King testified that she “did make the family aware of this, I had a meeting with both Jean and George.” CP Comm. Rec. 14. She said that the employer was “shocked” by Mr. Bartell’s behavior and made adjustments so that only males worked at night with Mr. Bartell. CP Comm. Rec. 14.

And the testimony was not just from Ms. King: the employer, Jean Barber, agreed that the family had made changes based upon this incident. CP Comm. Rec. 32.

Consequently, Ms. King satisfied the notice prong of the good cause to quit for worksite safety provisions of the ESA and the Commissioner’s Order to the contrary was an error of law and was not based on substantial evidence.

- c. Ms. King had first notified the employer 1 year and 4 months prior to her quitting of safety concerns and the employer was therefore aware of these concerns.**

The statute defines a “reasonable period of time” to allow for a safety concern to be remedied as the time a “reasonably prudent person would have remained at the worksite or continued working in the presence of the condition at issue.” WAC 192-150-130.

As noted in the prior section, Ms. King described an incident that occurred about a year and four months prior to Ms. King

quitting that involved physical aggression towards another employee and Ms. King testified without contradiction that she “did make the family aware of this, I had a meeting with both Jean and George.” CP Comm. Rec. 14. Furthermore, there were incidents with Jason Stevens that the employer testified she was aware of involving physical aggression from Mr. Bartell. CP Comm. Rec. 15, 30-31. Moreover, Mr. Bartell’s daughter acknowledged that physical aggression is a side effect of dementia, and she was fully aware her father suffered from dementia. CP Comm. Rec. 30. Further, there is no doubt that Ms. King notified the family of the final punching incident *and provided them a two-week notice* in which the employer could have taken additional remedial action but did not do so. CP Comm. Rec. 18, 24, 77 (FF 5). Finally, Mr. Bartell’s daughter knew the situation should have been remedied:

If I were to hire a new person today I would request that that person be male.

CP Comm. Rec. 35.

Therefore, the Commissioner’s Order that concludes that Ms. King had not provided sufficient time to the employer to remedy the situation misinterpreted and misapplied the statute and was not

based on substantial evidence. As a result, the Order should be reversed.

The Commissioner's Order and the ALJ's Order both seem to be premised on the ludicrous proposition that because Ms. King had not been harmed, there was no safety concern. The law does not require an employee to remain long enough to get injured in order to have "good cause" to quit arising from safety concerns.

For instance, the ALJ found that while the employer had indeed "struck" Ms. King "in the chest . . . [t]he blow did not knock the claimant down nor cause any injury more than transient and passing pain" and that Ms. King "did not seek medical attention as a result." CP Comm. Rec. 90 (FF 4). The ALJ also found that the employer had indeed had a knife while demanding that Ms. King return his car keys to him, but "he made no attempt to strike her or harm her in any way with it." CP Comm. Rec. 77 (FF 5). The Commissioner's Order adopted these findings and echoes these findings' disregard for Ms. King's safety when the commissioner writes pejoratively that the "claimant experienced an incident *that she claims jeopardized her safety . . .*" CP Comm. Rec. 91.

Much is made by the ALJ and by extension the Commissioner of Mr. Bartell's age and height, insinuating that no harm could come from such a person.

Two things are wrong with this insinuation: it neglects that Mr. Bartell had grabbed the steering wheel of cars, endangering the drivers, it neglects that he brandished a knife, and it neglects that Ms. King herself was only 4 foot 10 inches! CP Comm. Rec. 15, 19, 77 (FF 5). Therefore, the Commissioner's Order based on these assumptions that Mr. Bartell was harmless, that because Ms. King had not been completely knocked down or cut she was not in danger, and based as well on errors of law and little evidence, must be reversed.

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

Issues of law are the responsibility of the judicial branch. *Tapper v. Employment Security*, 66 Wn. App. 448, 451, 832 P.2d 449 (1992), *rev'd on other grounds*, 122 Wn.2d 397, 858 P.2d 494 (1993). Therefore, when reviewing legal questions the court is

allowed to substitute its judgment for that of the administrative agency. *Franklin County Sheriff's Office v. Sellers*, 97 Wn.2d 317,324-325, 646 P.2d 113 (1982) *cert. denied*, 459 U.S. 1106 (1983). Pure questions of law are reviewed *de novo*. *Id.* In resolving a mixed question of law and fact, the court first establishes the relevant facts, determines the applicable law, and applies it to the facts. *Tapper*, 122 Wn.2d at 403. While deference is granted to the agency's factual findings, the agency's application of the law is reviewed *de novo*. *Dermond v. Employment Security Department*, 89 Wn. App. 128, 132, 947 P.2d 1271 (1997).

Furthermore, an agency's order can be reversed when it does not rest on substantial evidence and evidence is only "substantial when viewed in light of the whole record before the court, which includes the agency record for judicial review, supplemented by any additional evidence received by the court under this chapter. . . ." RCW 34.05.570(3)(e); *Olmstead v. Department of Health*, 61 Wn. App. 888, 812 P.2d 527 (1991).

"Substantial evidence" exists only if the record contains evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise. *Bering v. Shaw*, 106

Wn.2d 212, 721 P.2d 918 (1986), *cert. denied*, 479 U.S. 1050 (1987).

An appellate court will reverse factual findings of the trier of fact if those findings are not supported by substantial evidence.

*Mood v. Banchemo*, 67 Wn.2d 835, 410 P.2d 776 (1966).

Ample evidence in the record proves that Ms. King's worksite safety deteriorated, that she provided notice of this to the employer a year and four months prior to her quitting, and that the employer therefore had ample time to remedy the situation. The Commissioner's legal conclusion that Ms. King had not satisfied the "good cause" provisions of the statute is therefore an error of law and should be reversed. And to the extent that the Commissioner's Order can be read as positing findings of fact rather than conclusions of law, Ms. King specifically assigns error to those findings because those findings were not based on substantial evidence and should therefore provide the basis for reversing the Order.

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

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

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

RCW 50.32.160 (emphasis added). The fees and costs contemplated in this statute are stated in mandatory terms: "such fee and the costs *shall* be payable out of the unemployment compensation administration fund." *Id.*

The law with regard to those fees and costs is discussed below to demonstrate that such a request is 1. Reasonable in

relation to similar administrative and judicially decided public benefits appeals cases in 2004-05 in Western Washington and going back some ten years; 2. Commensurate with the time and labor required as well as the experience and ability of the lawyers performing the services; and 3. Consistent with statutes and case law that allow attorney fees for work performed both in administrative and judicial arenas.

- a) **An Hourly Rate Of \$225 Is Reasonable Because The Fee Is Similar To Attorney Fee Rates In Recent Administrative And Judicial Proceedings In Western Washington, Including Others In Which Present Counsel Has Been Awarded Fees.**

Objective measures indicate that \$225.00 is a reasonable hourly fee for the attorney fee in this case. Determining a “reasonable attorney fee” is sometimes difficult because both sides in an attorney fee dispute are “interested parties,” so affidavits from other attorneys in the offices of the interested attorneys are unlikely to carry much weight. To complicate matters, few reported cases specify an exact dollar amount to provide an “objective” indication of a “reasonable” attorney fee.

However, a recent decision from February 2004 involving an administrative agency hearing and a public interest law firm in

Seattle provides an objective measure. In *Gutierrez v. Regents of the University of California* (retrieved initially on July 1, 2004, at [http://www.oalj.dol.gov/public/arb/decsn2/99\\_116b.erap.pdf](http://www.oalj.dol.gov/public/arb/decsn2/99_116b.erap.pdf)) (attached), attorneys were awarded \$200 and \$250 hourly fees as a result of a hearing before the federal Administrative Review Board, for a total of \$19,294.55. The *Gutierrez* case is a more objective statement of a reasonable attorney fee in administrative cases this year in Seattle than an affidavit from an interested attorney.

The *Gutierrez* case states as follows:

We find that an hourly rate of \$200 to be appropriate for Mrs. Gold. We find an hourly rate of \$250 appropriate for Mr. Sheridan and Mr. Taylor based upon their years of practice and expertise.

*Gutierrez*, at 3. This case is analogous to the current case because *Gutierrez* involved administrative law, it involved a government agency, and the attorneys who were awarded attorneys' fees were working for a public interest law firm, the Government Accountability Project with offices in Seattle.

The attorneys in *Gutierrez* had fewer years of experience than counsel in the present case. Attorney Jack Sheridan (admitted to WSBA in 1992, Bar No. 21473) in *Gutierrez*, is a

Washington State attorney and he was awarded \$250.00 per hour attorneys' fees; attorney Dana Gold (admitted to WSBA 1995, Bar No. 25219) is a Washington State attorney and she was awarded \$200.00 per hour in attorney's fees.

Similarly, nearly ten years ago the Washington Court of Appeals upheld an award of attorney fees at an hourly rate of \$225 for an attorney with 20 years practice in *Absher Construction Co. v. Kent School District*, 79 Wn. App. 841, 917 P.2d 1086 (1995), where the court held that "[w]e conclude that the hourly rates requested are reasonable in the absence of evidence that they are not." *Id.* at 848.

Further, counsel has received this fee in prior fee awards from the Superior Courts in Washington in cases involving unemployment benefits.

Therefore, the attorney fee hourly rate in the instant case is reasonable based upon *Gutierrez*, *Absher*, and prior awards to counsel. Counsel in the instant case was admitted to practice law in Washington in 1985, 20 years ago, and has worked for a personal injury firm, Evergreen Legal Service's Institutional Legal Services Project, the Washington Appellate Defender Association, the Unemployment Law Project, and as a contract attorney for

numerous firms; he has taught legal writing, research, pretrial litigation, oral advocacy, and appellate advocacy in 11 plus years of teaching at Seattle University School of Law and Basic Legal Skills for two quarters at the University of Washington School of Law, and has taught in many paralegal programs in the Seattle and Tacoma areas. His practice experience has included practicing in trial and appellate courts, in federal and state courts, and in both the civil and criminal arenas.

The Unemployment Law Project, similar to the Government Accountability Project in *Gutierrez*, is a public service “not for profit” law firm founded in 1984. It represents unemployed citizens of Washington in their applications for unemployment benefits and is funded largely by donations. Its attorneys, paralegals, and volunteers represent on average 1000 claimants a year.

Further, while not determinative, the Rules of Professional Conduct, specifically RPC 1.5(a), provide some guidance for “reasonable” attorney fees, and the State often uses 1.5 in its opposition to fees in these matters. The pertinent factors in 1.5 are (1) the time and labor required, the novelty and difficulty of the questions involved, the skill requisite to perform the legal service properly; (2) the fee customarily charged in the locality for similar

legal services; and (3) the experience, reputation, and ability of the lawyer or lawyers performing the services.

“The fee customarily charged in the locality for similar legal services” is best provided by an objective source such as *Gutierrez*, and other similar awards in similar cases in Western Washington. Regarding the “difficulty” of the issue, it was apparently sufficiently difficult to create contradictory decisions from the ALJ and the Commissioner, both of whom applied different tests. Finally, the work done in this case by counsel is sufficient for the court to judge “the ability, reputation, and experience of the lawyers involved,” and thus, under RPC 1.5, as well as the other considerations discussed above, an hourly fee of \$225 here is reasonable.

- b) **The Hours Spent In Writing The Superior Court and Court of Appeals Briefs In This Case Were Reasonable Because Writing Included Reading The Commissioner’s Record, Doing Legal Research, Writing The Brief, Revising It, Cite-Checking The Law Cited, And Otherwise Finalizing The Brief For Filing.**

Good writing takes time. The time expended on the briefs in this case was reasonable, and the best evidence is the final product. It can be reasonably anticipated that the State will argue that the time spent on the case was not reasonable. To the

contrary, the time spent was consistent with the product produced:  
a successful appeal.

Counsel for the petitioner has been writing appeal briefs since the beginning of his legal career as a paralegal in 1980, writing arbitration appeal briefs for a labor-side labor law firm. As an attorney he has handled civil appeals and specialized in appeals when working for the Washington Appellate Defender Association and writing and contributing to several editions of the *Washington Appellate Practice Deskbook*. Additionally, he has taught legal writing and advocacy for over twelve years and has taught and supervised appellate advocacy clinics. This work has revealed at least one firm lesson: good writing takes time.

Further, the hours spent in “writing” include various tasks such as reading the record, and re-reading the record, and legal research, and additional legal research for the Court of Appeals brief, and more writing of the Court of Appeals brief, and cite-checking and doing time-consuming tasks such as generating a Table of Authorities. The numbers of hours spent therefore were reasonable.

“[C]osts and a *reasonable* attorneys’ fee for administrative or court proceedings are to be awarded to a claimant in the event that

the decision of the commissioner shall be reversed or modified.”  
*Gibson v. Employment Security Department*, 52 Wn. App. 211,  
220-221, 758 P.2d 547 (1988) (attached). Because the time  
expended was “reasonable” on this case, fees and costs are  
respectfully requested in the amounts set forth in the accompanying  
cost bill.

c) **Time And Costs Expended In Both  
Administrative And Judicial Proceedings  
Are Compensable Because The  
Employment Security Act And Cases  
Interpreting It Permit Attorney Fees For  
Work In Both Arenas And There Is No  
Logical Reason Not To Award Them,  
Particularly When An Order Is Reversed  
And Remanded.**

Case law allows an award of attorney’s fees for attorney  
hours spent in both administrative and judicial proceedings in  
unemployment benefits cases. In the State’s opposition to attorney  
fees in other cases, the State frequently quotes a sentence from a  
case that appears to mandate to the contrary – but the quote is  
taken out of the context of the three sentences that precede it:

We believe the purpose of the statutes when read together is  
to provide for regulation of attorney fees incurred *in relation  
to administrative or court proceedings*. Furthermore, when  
the commissioner erroneously denies unemployment  
compensation, the subsequent fees and costs incurred in  
court proceedings are compensable from state funds. Since  
there is no evidence in the record showing how the superior

court determined the fees allowed, we must remand this case for a determination as to *what would constitute reasonable attorney fees at both the administrative level and in the superior court.*

*Ancheta v. Daly*, 77 Wn.2d 255, 266-267, 461 P.2d 531 (1969), (emphasis added). The sentence the State quotes follows these three sentences and apparently pertains to the facts in that particular case, not to all cases on appeal from unemployment benefits orders.

In fact, *Ancheta*, has been cited by later cases precisely for the proposition that attorney fees are payable for both administrative and judicial proceedings:

We further remand this case to the Superior Court for a determination of reasonable attorney's fees "*at both the administrative level and in the superior court*" in accordance with *Ancheta v. Daly, supra* at 266.

*Vergeyle v. Employment Security Department*, 28 Wn. App. 399, 405, 623 P.2d 736 (1981) (emphasis added).

Similarly, *Ancheta* was again used to stand for the proposition that *both* administrative and court proceedings are considered in awarding attorney's fees:

Under RCW 50.32.160, costs and a reasonable attorneys' fee *for administrative or court proceedings are to be awarded to a claimant in the event that the decision of the*

*Commissioner shall be reversed or modified. Ancheta, 77 Wn.2d at 265-66.*

*Gibson v. Employment Security, 52 Wn. App. 211, 220-221, 758 P.2d 547 (1988) (emphasis added).*

These judicial interpretations allowing attorney fees for both court and administrative proceedings are based as they must be on the plain language of the statute, which states in part as follows:

*In the allowance of fees the court shall give consideration to the provisions of this title in respect to fees pertaining to proceedings involving an individual's application for initial determination, claim for waiting period credit, or claim for benefits. In other respects the practice in civil cases shall apply.*

RCW 50.32.160 (emphasis added). The other "provisions" in the Employment Security Act pertaining to fees contemplate that fees may be granted for administrative hearings:

**Costs.** In all proceedings provided by this title prior to court review involving dispute of an individual's initial determination, or claim for waiting period credit, or for benefits, the fees of all witnesses attending such proceedings pursuant to subpoena shall be paid at the rate fixed by such regulation as the commissioner shall prescribe and such fees and all costs of such proceedings otherwise chargeable to such individual, except charges for services rendered by counsel or other agent representing such individual, shall be paid out of the unemployment compensation administration fund. In all other respects and in all other proceedings under this title *the rule in civil cases as to costs and attorney fees shall apply. Provided, That cost bills may be served and filed and costs shall be taxed in*

accordance with such regulation as the commissioner shall prescribe.

RCW 50.32.100. (emphasis added except "Provided" emphasized in original). Specifically with regard to attorney fees, the "other provisions" of the ESA *explicitly* allow counsel to receive a reasonable attorney fee:

**Fees for administrative hearings.** No individual shall be charged fees of any kind in any proceeding involving the individual's application for initial determination, or claim for waiting period credit, or claim for benefits, under this title *by the commissioner or his representatives, or by an appeal tribunal, or any court, or any officer thereof.* Any individual in any such proceeding *may be represented by counsel or other duly authorized agent* who shall neither charge nor receive a fee for such services in excess of an amount found reasonable by the officer conducting such proceeding.

RCW 50.32.110 (emphasis added)(attached). This statute prohibits the ESD or the courts from charging a fee, *not* counsel, and in fact anticipates that counsel *may* receive a fee so long as it is found to be reasonable.

Thus, fees and costs incurred at both the administrative and judicial levels are compensable in light of this case law and the plain language of the pertinent statutes that allow for attorney fees for *both* administrative and court proceedings. It is simply illogical that counsel and the other attorneys and staff of the public interest

law firm for which counsel works should not receive a fee for work on the administrative level, work that employs the same legal skills employed on the judicial level: analysis, research, and advocacy – both written and oral. Moreover, the statutes allow counsel to *charge* a client a fee on the administrative level and it is therefore logical that counsel can *receive* fees for work done on the administrative level.

Further, our courts have held that fees may be awarded for time spent on legal matters by paralegals. *Absher Construction co. v. Kent School District*, 79 Wn. App. 841, 917 P.2d 1086 (1995). In that case from nearly ten years ago, the court stated that “[w]e do allow an award for [paralegal] time spent preparing the briefs and related work. In computing the time we allow for him, we will assume, absent any other evidence in the record, that the hourly rate of \$67.00 is reasonable for this type of work.” *Id.* at 845. In the instant case the paralegal, often a law clerk, prepared the claimant for the hearing, represented the claimant at the hearing, and wrote the petition for review and we have requested, ten years after *Absher*, an hourly rate of \$75.00. *See also, Missouri v. Jenkins*, 491 U.S. 274 (1989) (paralegal fees awardable in fee awards).

Finally, an award of attorney fees in the instant case is also consistent with sound public policy as it has been expressed in decisions from the Washington Supreme Court regarding attorney fees in public benefits cases. In a welfare benefits case where the claimant had been represented at no cost through both the administrative and appellate levels by a legal services office, the Court stated the policy regarding attorney fees in such cases as follows:

We conclude that the fundamental underpinning of the fee award provision is a policy at once punitive and deterrent – a corrective policy which would discipline respondent [Department of Social & Health Services] for violations of Title 74 RCW or of its own regulations, by shifting to the respondent the costs of righting its mistakes. . . . At present, it is contended, the private bar shuns welfare cases, leaving them to SCLS; the respondent thus has rarely been assessed fees where incautious, careless, or wrongful actions by its employees *have improperly denied benefits and required correction by an appellate court*. Clearly an incentive to more careful scrutiny is not out of place.

*Tofte v. Social & Health Services*, 85 Wn.2d 161, 165, 531 P.2d 808 (1975) (emphasis added). The same policy considerations pertain to improperly denied unemployment benefits as well and fees for both the administrative and judicial proceedings are proper.

d) **Counsel Is Entitled To Attorney Fees For Establishing Entitlement To And The Amount Of Attorney Fees In This Case Because Case Law Allows It And The State's Opposition To Fees Is Anticipated On Grounds That Have Been Previously Rejected.**

Counsel has invested an additional several hours of attorney time in supporting this argument for attorney fees in the context of the Court of Appeals brief. The writing has included the original draft, as well as revising, cite-checking, proofreading, copying, and arranging for service and filing. The general rule in Washington is to allow fees for this time:

The general rule is that time spent on establishing entitlement to, and amount of, a court awarded attorney fee is compensable where the fee shifts to the opponent under fee shifting statutes.

*Fisher Properties v. Arden-Mayfair*, 115 Wn.2d 364, 378, 798 P.2d 799 (1990).

Counsel therefore respectfully requests that upon reversal of the Commissioner's Order in this case, that attorney fees and costs be awarded under RAP 18.1 in an amount to be determined by subsequent filing of an affidavit of fees and expenses as required under RAP 18.1(d).

**E. CONCLUSION**

For the foregoing reasons, Ms. King respectfully requests the following relief:

First, Ms. King requests that the court reverse the Commissioner's Order holding that she did not have good cause to quit her job and award benefits.

Second, the petitioner respectfully requests that upon affirming the reversal of the Commissioner's Order in this case, that attorney fees and costs be awarded as mandated by statute.

Dated this 11<sup>th</sup> Day of March 2007.

Respectfully submitted,



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STATE OF WASHINGTON  
BY \_\_\_\_\_

DEPUTY

IN THE COURT OF APPEALS

FOR THE STATE OF WASHINGTON, DIVISION II

CHARLOTTE KING, )  
 )  
 Petitioner, )  
 )  
 and )  
 )  
 STATE OF WASHINGTON, )  
 EMPLOYMENT SECURITY )  
 DEPARTMENT, )  
 Respondent. )

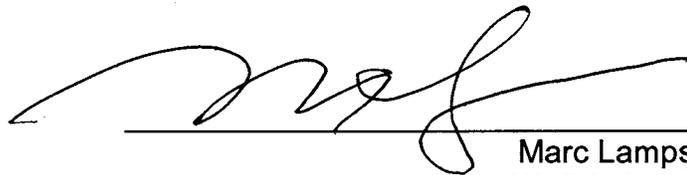
Case No.: 35710-1-II

**CERTIFICATE OF SERVICE BY MAIL**

**CERTIFICATE**

I certify that I arranged to have mailed a copy of the Appellant's Opening Brief in this matter postage prepaid, on March 12, 2007, to the Respondent ESD's attorney, John Macejunas, WSBA #37443, Asst. Attorney General, Attorney General's Office 5<sup>th</sup> Floor Highways Licenses Building, P.O. Box 40110, Olympia, WA 98504-0110.

Dated this March 12, 2007.



Marc Lampson  
 WSBA # 14998  
 Attorney for Petitioner