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COURT OF APPEALS  
DIVISION II

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NO. 35710-1

STATE OF WASHINGTON  
BY *[Signature]*

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

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CHARLOTTE L. KING,

Appellant,

v.

STATE OF WASHINGTON, EMPLOYMENT SECURITY  
DEPARTMENT,

Respondent.

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**RESPONDENT'S SUPPLEMENTAL BRIEF**

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**ORIGINAL**

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## I. INTRODUCTION

This supplemental brief is provided in response to this Court's October 16, 2007, ruling calling for additional briefing in light of the Washington Supreme Court's decision in *Spain v. Empl. Sec. Dep't*, 185 P.3d 1188 (2008).

During the pendency of this appeal, the Supreme Court of Washington decided *Spain v. Empl. Sec. Dep't*, which substantially altered the prevailing interpretation of the Employment Security Act's (Act) voluntary quit provisions. *Spain*, 185 P.3d at 1192. Specifically, the Court determined that in addition to the specifically enumerated, or *per se*, "good cause" factors in RCW 50.20.050(2)(b)(i)-(x), the Commissioner had discretion under the preceding subsection, RCW 50.20.050(2)(a), to find "good cause" on a case-by-case basis. *Id.* While the court's decision in *Spain* has thus added an additional basis for claiming general "good cause" for voluntarily quitting, that decision has no effect on this case. Ms. King has consistently maintained she is entitled to benefits under one of the *per se* "good cause" factors in the voluntary quit statute. She had not made, nor preserved, any argument that she had good cause under any other reading of the statute. To the extent Ms. King now claims that, in light of *Spain*, she had general "good cause" for quitting under

RCW 50.20.050(2)(a), her failure to raise this argument below precludes this Court from entertaining her claim. *See* RCW 34.05.544.

## II. STATEMENT OF THE ISSUE

Does the Supreme Court's decision in *Spain* have any effect on the outcome of Ms. King's appeal?

## III. ARGUMENT

### A. The Supreme Court's Decision In *Spain* Has No Effect On This Case, As Ms. King Relies On One Of The Enumerated "Good Cause" Factors In RCW 50.20.050(2)(b)

Ms. King failed to meet her burden of proving the elements of "worksite safety deterioration," which was her sole legal and factual argument. Specifically, Ms. King failed to show that, prior to quitting, (1) the safety of her worksite deteriorated, (2) that she reported such deterioration to her employer, and (3) that her employer failed to correct the situation within a reasonable amount of time. *See* RCW 50.20.050(2)(b)(viii). Accordingly, the Department respectfully requests this Court affirm the Commissioner's decision.

Under the Act, voluntary quit claims with an effective date after January 4, 2004, are governed by RCW 50.20.050(2)(a). Ms. King filed her unemployment claim in November 2005. Commissioner's Record (CR) at 46. Her claim is therefore governed by the voluntary quit provisions of RCW 50.20.050(2)(a). That section provides that:

[a]n individual shall be disqualified from benefits beginning with the first day of the calendar week in which he or she has left work voluntarily without good cause . . .

RCW 50.20.050(2)(a). The next subsection, RCW 50.20.050(2)(b), sets out eleven specific, factual situations that constitute “good cause” for quitting. *See* RCW 50.20.050(2)(b).

Prior to the Supreme Court’s decision in *Spain*, our courts had construed RCW 50.20.050(2)(b) to be an *exclusive* list of “good cause” reasons for voluntarily quitting one’s job; if one’s factual scenario did not fit neatly within one of the eleven factors, “good cause” could not, as a matter of law, be established. *See Starr v. Empl. Sec. Dep’t.*, 130 Wn. App 541, 123 P.3d 513 (2005), review denied 157 Wn.2d 1019, 142 P.3d 607 (2006). However, *Starr* was overruled by *Spain*. *Spain* 185 P.3d at 1192.

In *Spain*, two unemployment claimants, Sarah Spain and Kusum Batey, were denied unemployment benefits because the factual scenarios leading up to their respective job separations did not fall neatly into one of the (then) ten “good cause” factors under RCW 50.20.050(2)(b). *Spain* at 1189. Both claimants argued that they voluntarily quit their jobs for reasons outside the ten *per se* good cause factors. *Id.* Since their factual situations did not meet one of the ten “good cause” factors, and the list of “good cause” factors was considered an exclusive list under *Starr*,

the Commissioner found that as a matter of law, “good cause” could not be established. *Id.* The Supreme Court disagreed with the Commissioner’s *Starr*-based interpretation of the statute, overruled *Starr*, and remanded the cases to the Commissioner to determine whether the claimants had “good cause” to quit independent of the ten factors laid out in RCW 50.20.050(2)(a). *Id.* at 1192-1193.

In overruling *Starr*, the Supreme Court held that the list of “good cause” factors set for in RCW 50.20.050(2)(b) was *not* an exclusive list of reasons under which one could qualify for benefits after voluntarily quitting. *Spain*, 185 P.3d at 1191. Rather, the Court found that under RCW 50.20.050(2)(a), the Department’s Commissioner had discretion to decide whether “good cause” existed, on a case-by-case basis, independent of the ten factual scenarios set forth in RCW 50.20.050(2)(b). *Id.*

The *Spain* decision has no application to this case because Ms. King has consistently maintained that she quit due to “worksite safety deterioration,” one of the *per se* “good cause” factors under RCW 50.20.050(2)(b). CR at 40, 66, 85-87. From the moment she filed her initial application for benefits until her most recent submission in this Court, Ms. King has maintained that she voluntarily quit her job for one of the enumerated, or *per se*, reasons in the voluntary quit statute. *See* Commissioner’s Record (CR) 66-71; *see also* Appellant’s Brief at 10.

On appeal to this court, Ms. King again stated that she was entitled to benefits under the “worksite safety deterioration” prong of the voluntary quit statute, as she had “satisfied all the requirements” for benefits under that provision of the Act. Appellant’s Brief at 13. Since Ms. King’s factual scenario is governed by one of the *per se* “good cause” factors, there was no need for the Commissioner to look to RCW 50.20.050(2)(a) and exercise discretion in determining whether “good cause” exists independent of the reasons specifically contemplated by the Legislature in RCW 50.20.050(2)(b). Thus, the issue before this Court is whether the Commissioner properly found that Ms. King did not prove that she quit due to a worksite safety deterioration under RCW 50.20.050(2)(b).

The *Spain* decision, therefore, does not alter the governing law in this case. The Commissioner correctly determined that Ms. King failed to meet her burden of proving the elements of a “worksite safety deterioration” under RCW 50.20.050(2)(b)(viii), and that decision is supported by substantial evidence.

**B. To The Extent This Court Find That The Principles Announced in *Spain* Apply To This Case, The Proper Remedy Would Be A Remand To The Department For A Determination Of Whether “Good Cause” Exists Under RCW 50.20.050(2)(a)**

The only way *Spain* would be relevant is if Ms. King made an argument based on general “good cause” under RCW 50.20.050(2)(a), and

demonstrated that she could raise such an argument for the first time in this court. If she did, and if the Court concluded that she could raise a *Spain* argument, the proper remedy under the Administrative Procedure Act (APA) would be the same as in *Spain* - a remand to the Department to address that new “good cause” determination under RCW 50.20.050(2)(a).<sup>1</sup> See *Spain* at 1192-1193; see also RCW 34.05.574(1) (“In reviewing matters within agency discretion, the court shall limit its function to assuring that the agency has exercised its discretion in accordance with law, and shall not itself undertake to exercise the discretion that the legislature has placed in the agency.” See *Washington Public Emp. Ass’n v. Community College Dist. 9*, 31 Wn. App. 203, 642 P.2d 1248 (1982).

#### IV. CONCLUSION

Based on the foregoing, the Department respectfully requests this Court affirm the Commissioner’s decision denying benefits to Ms. King.

RESPECTFULLY SUBMITTED this 3 day of November, 2008.

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<sup>1</sup> If this court is inclined to decide the case under the new status of the law, it is noted that in light of *Spain*, the Commissioner has promulgated a regulation pursuant to his authority to administer the Act. RCW 50.12.110. WAC 192-150-170 provides, *inter alia*, that a claimant can show “good cause” if he or she can prove that, (1) the separation arose primarily for reasons connected with his or her employment, (2) those work-connected reasons were of such a compelling nature that they would have caused a reasonably prudent person to leave work, and (3) he or she first exhausted all reasonable alternatives before quitting, unless exhaustion would prove futile. WAC 192-150-170. Since Ms. King tendered her two-week notice on the same day in which the punching incident occurred, she likely failed to “exhaust all reasonable alternatives before quitting.” See WAC 192-150-170.

ROBERT M. MCKENNA  
Attorney General

A handwritten signature in black ink, appearing to read 'Pedro Bernal IV', written over the printed name below.

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Assistant Attorney General  
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**COURT OF APPEALS FOR DIVISION II  
STATE OF WASHINGTON**

CHARLOTTE L. KING,  
Petitioner,

v.

STATE OF WASHINGTON  
EMPLOYMENT SECURITY  
DEPARTMENT,  
Respondent.

DECLARATION  
OF SERVICE BY  
ABC LEGAL  
MESSENGER

I, JENNIFER PONICSAN, declare as follows:

1. That I am a citizen of the United States of America, a resident of the State of Washington, over the age of eighteen (18) years, and not a party to the above-entitled action.

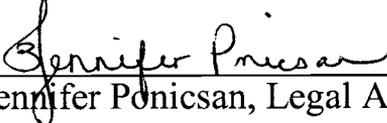
2. That on the 3<sup>d</sup> day of November, 2008, I caused to be served by ABC Legal Messenger a true and correct copy of Respondent's Supplemental Brief, to:

MARCUS LAMPSON  
UNEMPLOYMENT LAW PROJECT  
1904 THIRD AVE., SUITE 604  
SEATTLE, WA 98101

**ORIGINAL**

I DECLARE UNDER PENALTY OF PERJURY  
UNDER THE LAWS OF THE STATE OF WASHINGTON  
that the foregoing is true and correct.

Dated this 3<sup>rd</sup> day of November, 2008, in Seattle,  
Washington.

  
\_\_\_\_\_  
Jennifer Ponicsan, Legal Assistant