

COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

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No. 39574-6-II

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

MICHELLE L. KENNEDY,

Appellant,

v.

EMPLOYMENT SECURITY DEPARTMENT,
STATE OF WASHINGTON,

Respondent.

ORIGINAL

BRIEF OF APPELLANT

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A. INTRODUCTION

Ms. Kennedy's fiancé was in the military and deployed to Iraq. Though they had planned to marry in July 2007, those plans were delayed because his deployment to Iraq was extended to September 2007. CP Comm. Rec. 60, Finding of Fact ("FF") 2.¹

When he returned from Iraq, Ms. Kennedy, her fiancé, and her daughter resided together in their Tacoma home until late February 2008, when her fiancé received orders to report to Kentucky, which he did on March 10, 2008. CP Comm. Rec. 60, FF 3. "[S]olely because her fiancé had relocated to Kentucky," Ms. Kennedy "informed the employer to expect she would soon be quitting. She did give notice to quit, and quit March 13, 2008." CP Comm. Rec. 56; 60, FF 4. On March 18, she applied for unemployment benefits and arrived in Kentucky on March 27. The couple was married on April 25, 2008. CP Comm. Rec. 44; 60, FF 6. She was reemployed on June 1, 2008. CP Comm. Rec. 60, FF 5.

¹ The "Commissioner's Record" is the record on review in this case, as it was on review at the Superior Court. That record bears its own pagination. Although appellant's Designation of Clerk's Papers designated the Commissioner's Record as a portion of the file to be sent to this court, the Thurston County Superior Court's Index to Clerk's Papers merely states that the "Administrative Record is being transmitted concurrently herewith." Therefore, references in this brief to the Commissioner's Record will appear as "CP Comm. Rec. " followed by the page number as it appears in the original Commissioner's Record itself.

On September 4, 2008, an ALJ denied Ms. Kennedy benefits for the period she was unemployed, March 13 to May 31, because Ms. Kennedy “was not a military spouse at the time she quit.” CP Comm. Rec. 61, Conclusion of Law 6. The ESD’s Commissioner affirmed, holding that “because she was not married at the time she quit” she had not established good cause to quit. CP Comm. Rec. 76. The Thurston County Superior Court affirmed. CP 54 – 56. This appeal timely followed. CP 57 – 61.

B. ASSIGNMENTS OF ERROR

Assignments of Error

1. The Commissioner’s² Order erred in concluding that Ms. Kennedy quit her job without good cause. CP Comm. Rec. 76-77 (Commissioner’s Order).
2. Ms. Kennedy is entitled to attorney’s fees and costs upon this court’s reversal of the Commissioner’s Order in this case.

² While the final decision maker is actually a Commissioner’s Review Judge, sometimes referred to as the “Commissioner’s Delegate,” who is appointed by the Commissioner’s Review Office of the Employment Security Department, for simplicity sake the Order under review will be referenced in this brief merely as the Commissioner’s Order.

Issues Pertaining to Assignments of Error

1. Should Ms. Kennedy have qualified for benefits when the Washington Supreme Court in *Spain* interpreted the voluntary quit provisions of the Employment Security Act to be a non-exclusive list of “good cause” reasons and cited cases holding that “compelling personal reasons” such as quitting to follow a spouse constitutes “good cause” for quitting and qualifying for benefits under the Act? (Issue Pertaining to Assignments of Error 1)
2. Should Ms. Kennedy have qualified for benefits when the “emergency rule” promulgated after *Spain*, interpreted by the Commissioner as confining “good cause” only to work-connected factors, would put that rule outside the statutory authority of the agency? (Issue Pertaining to Assignments of Error 1)
3. Should Ms. Kennedy have qualified for benefits when the plain language of the Employment Security Act, which is to be liberally construed and which has related regulations that give broad definition to “family and household members,” does not require that a worker who quits due to the military

transfer of his or her spouse be married *at the time of the quit?* (Issue Pertaining to Assignments of Error 1)

4. Should attorney fees and costs be awarded upon reversal of the Commissioner's Order? (Issue Pertaining to Assignment of Error 2).

C. STATEMENT OF THE CASE

1. JOB SEPARATION

Ms. Kennedy began work as a reservation agent for Holland America Line in November 2003. CP Comm. Rec. 59, Finding of Fact ("FF") 1.

She and her daughter, nine years old at the time, lived with Ms. Kennedy's fiancé and had done so for three years. Ms. Kennedy's fiancé was in the military and was deployed to Iraq. Though they had planned to marry in July 2007, those plans were delayed because his deployment to Iraq was extended to September 2007. CP Comm. Rec. 60, FF 2.

When he returned from Iraq, Ms. Kennedy, her daughter, and her fiancé resided together in their Tacoma home until late February 2008, when he received orders to report to Kentucky. He

left in late February to meet his report date of March 10, 2008. CP Comm. Rec. 60, FF 3.

“[S]olely because her fiancé had relocated to Kentucky, claimant informed the employer to expect she would soon be quitting. She did give notice to quit, and quit March 13, 2008.” CP Comm. Rec. 56; 60, FF 4.

After packing the family’s belongings, Ms. Kennedy left Washington on March 24 to drive to Kentucky, where she arrived on March 27. Her fiancé had already lined up job prospects for her and her first work search occurred the next day, March 28. CP Comm. Rec. 60, FF 4.

Being unemployed because she had quit her job to relocate to Kentucky with her fiancé, she applied for unemployment benefits.

The couple was married on April 25, 2008. CP Comm. Rec. 44; 60, FF 6.

She was reemployed on June 1, 2008. CP Comm. Rec. 60, FF 5.

2. ADMINISTRATIVE DECISIONS

On August 5, 2008, the ESD denied Ms. Kennedy unemployment benefits for the period she had been unemployed:

It is determined that you quit work on March 13, 2008 to relocate to be with your fiancé who received a military transfer before you were married on April 25, 2008. Because you were not married at the time you quit your job, good cause for quitting to follow a military spouse has not been established.

CP Comm. Rec. 31. Ms. Kennedy appealed to the Office of Administrative Hearings, which affirmed the denial of benefits:

6. One of the eleven factors for which a claimant will not be disqualified for leaving work is when the claimant moves because a military spouse was transferred. Claimant is not eligible for that provision, because she was not a military spouse at the time she quit. For reasons satisfactory to claimant and her fiancé, they chose not to marry after he returned from Iraq and instead were married six weeks after this job ended.

7. The *Spain* decision cited above determined that in addition to the eleven main factors for which a worker will not be disqualified, there may be other reasons for good cause for quitting work. *Spain*, and the cases cited therein, referred to personally compelling factors which constitute unreasonable hardship, which were work-related. Here, claimant has established personally compelling reasons to relocate, but those reasons are not connected to her work. Accordingly, she has not established work-connected good cause for leaving under RCW 50.20.050(2).

CP Comm. Rec. 61 – 61, Conclusions of Law 6 & 7.

The Commissioner affirmed on Ms. Kennedy's further appeal adopting all of the ALJ's findings and conclusions:

To establish good cause pursuant to RCW 50.20.050(2)(b), a claimant must show that he or she quit for one of the eleven reasons listed at conclusion No. 3. Here, the claimant quit to relocate because of the mandatory

military transfer of her boyfriend, not her spouse. Because she was not married at the time she quit, the claimant has not established good cause for quitting pursuant to RCW 50.20.050(2)(b)(iii).

To establish good cause pursuant to WAC 192-150-170, a claimant must show that he or she quit because of a substantial involuntary deterioration of the work, or because continuing in employment would work an unreasonable hardship on him or her or interfere with commissioner-approved training.

To establish good cause because of a substantial involuntary deterioration of the work or because continuing in employment would work an unreasonable hardship, a claimant must show that he or she left work primarily for reasons connected with the employment, the reasons must have been of such a compelling nature that a reasonably prudent person would have left work, and he or she must have exhausted all reasonable alternatives prior to quitting, unless it is show that pursuing such attempts would have been futile.

As set forth in the administrative law judge's decision, claimant did not leave work primarily for reasons connected with the employment. As such, she has not established good cause for quitting pursuant to WAC 192-150-170.

CP Comm. Rec. 76 – 77.

D. ARGUMENT

1. MS. KENNEDY SHOULD HAVE QUALIFIED FOR BENEFITS BECAUSE THE WASHINGTON SUPREME COURT'S DECISION IN *SPAIN v. ESD* HELD THE STATUTORY LIST OF "GOOD CAUSES" IS NOT EXCLUSIVE OF OTHER GOOD CAUSES AND CITED TWO PRIOR "QUIT TO FOLLOW" CASES AS DEMONSTRATING COMPELLING PERSONAL REASONS TO QUIT ONE'S WORK.

Ms. Kennedy's quitting to follow her fiancé after he was transferred by the military was "good cause" because a "quit to follow" has been good cause either by case law or by statute for decades in Washington as recently demonstrated by the Washington Supreme Court's June 2008 decision which relied on two of its prior decisions that held "quit to follow" was good cause. *Spain v. ESD*, 164 Wn.2d 252, 185 P.3d 1188 (2008); see, *Ayers v. Dep't of Employment Sec.*, 85 Wn.2d 550, 553, 536 P.2d 610 (1975); *In re Bale*, 63 Wn.2d 83, 385 P.2d 545 (1963).

The *Spain* case arose because after the Legislature amended the Employment Security Act (ESA) in 2003, the Employment Security Department began narrowly interpreting the voluntary quit provisions of the ESA as providing "good cause" to quit for only ten reasons enumerated in the statute. In *Spain* the Washington Supreme Court unanimously ruled that the ESD's interpretation was mistaken and that "good cause" could be proved

for reasons not enumerated in the statute. *Spain v. ESD*, 164 Wn.2d 252, 185 P.3d 1188 (2008).

Therefore, Ms. Kennedy had “good cause” to leave her job for compelling personal reasons when her fiancé was transferred by the military to Kentucky and Ms. Kennedy had to quit to keep her family together.

Under *Spain*, a claimant is not confined to proving “good cause” under only the ten (or eleven, starting in 2008) reasons enumerated in the Employment Security Act’s provisions regarding “good cause” for voluntarily leaving one’s work:

We must decide whether the statutory list of reasons that *do not* disqualify an individual from benefits is also an exhaustive list of good cause reasons *to* voluntarily leave a job without losing benefit eligibility. We conclude it is not.

Spain v. ESD, 164 Wn.2d at 254-5 (emphasis in original).

And later in that same opinion a unanimous court wrote as follows:

We ... conclude that the statutory list of nondisqualifying reasons for voluntarily leaving a job does not do double duty as an exclusive list of good cause reasons to leave a job.

Spain v. ESD, 164 Wn.2d at 260.

or her weekly benefit amount.

RCW 50.20.050(2)(a) (emphasis added).

The phrase “has left work voluntarily without good cause” has remained the same in the statute since at least 1947. For instance, the Washington Supreme Court found “good cause” for quitting for spousal transfers under the following language:

An individual shall be disqualified for benefits for the calendar week in which he **has left work voluntarily without good cause** and for the five calendar weeks which immediately follow such week.

RCW 50.20.050 (as it was written in 1963) (emphasis added) as cited in *In re Bale*, 63 Wn.2d 83, , 385 P.2d 545 (1963).

The *Bale* court held that the quoted language contemplated awarding unemployment benefits to those who voluntarily left work *with good cause* “whether or not the cause is ‘attributed to or connected with the employment.’” *In re Bale*, 63 Wn.2d at 87. The *Bale* court also recounted the long and complicated legislative history of the statute regarding “good cause quits.” See, *In re Bale*, 63 Wn.2d at 87-89. In doing so, it found that in the statute that the court was charged with interpreting in that case, the legislature had removed prior provisos restricting “good cause” quits to work-related reasons:

[W]e conclude that the legislature intended to remove, as a disqualification for the receipt of unemployment compensation benefits, the limitation provided by the 1943 amendment that good cause be “for reasons related to the work in question” and not “for a personal reason not connected with or related to his work”

In re Bale, 63 Wn.2d at 89.

Similarly, the “good cause” statute as it pertained to voluntarily leaving work for claims filed *prior to 2004* contained a limiting proviso at RCW 50.20.050(c), which allowed the commissioner to consider only “work connected factors” in determining good cause. This proviso, *in 2004 and after*, was removed, just as virtually the same proviso had been removed prior to *Bale* interpreting “good cause” in 1963. The *Bale* court concluded that “good cause for termination of employment, under the statute, may include compelling personal reasons.” *In re Bale*, 63 Wn.2d at 90. The court then had little trouble in deciding that a claimant having to leave work to relocate because of a spouse’s work-related relocation proved a compelling personal reason that qualified as a “good cause” for leaving work. *In re Bale*, *id.* at 91.

In *Ayers*, Mr. Ayers quit his job in Richland to join his wife in Olympia who had secured permanent employment with the State of

Washington. *Ayers*, 85 Wn.2d at 551. The Court, quoting *Bale* concluded quitting to follow one's spouse was "good cause":

"[W]e hold 'good cause' for termination of employment, under the statute, may include compelling personal reasons." Further, in the same opinion, the court said at page 91: "The claimant in the instant case, having terminated her employment because of compelling personal reasons, did so with 'good cause' under RCW 50.20.050."

Ayers, 85 Wn.2d at 552.

The Court then applied this law to the husband's leaving work in the case before it:

Many factors may enter into the decision of a family as to where they shall live and work. It is often a substantial factor to be considered that ***it is desirable for numerous reasons to keep the family together. If employment for the husband and for the wife are not available in the same area, it is a compelling personal reason and, therefore, good cause for one of the spouses to leave employment and go to the place of employment of the other spouse*** in order to keep the family together. The decision as to which place of employment should be accepted must not be governed by any arbitrary rule, but should be decided upon a consideration of all relevant factors. It is generally a decision which the spouses should make for themselves, subject to the need to make a reasonable decision.

Id. (emphasis added). Finding the husband's decision to relocate "reasonable," the Court held in *Ayers* that a "quit to follow" was "good cause" to quit and that he therefore qualified for unemployment benefits.

In sum, the *Spain* court's citation to *Bale* and *Ayers*, which held that "compelling personal reasons" were sufficient "good cause," indicate that those cases are still "good law." In these cases, leaving work to relocate to a spouse's work-related transfer is a compelling personal reason to leave work and good cause to qualify the unemployed spouse for unemployment benefits. It follows that quitting to follow one's fiancé, to whom one is married during the pendency of one's unemployment claim, is likewise a compelling personal reason sufficient to qualify for benefits.

The Commissioner's decision to the contrary in the instant case was therefore an error of law and should be reversed.

2. IF THE COMMISSIONER'S INTERPRETATION OF THE ESD'S EMERGENCY RULE, WAC 192-150-170, IS CORRECT THEN THE RULE IS OUTSIDE THE AGENCY'S STATUTORY AUTHORITY AND IT SHOULD BE INVALIDATED.

In Ms. Kennedy's case the Commissioner relied upon an "emergency rule" that the ESD promulgated in response to the decision in *Spain*. This rule – if it is interpreted as the Commissioner interprets it - runs directly counter to the statute as it was amended in 2003 and as it was interpreted by the Washington Supreme Court in *Spain*.

In the instant case, the Commissioner held as follows:

To establish good cause pursuant to WAC 192-150-170, a claimant must show that he or she quit because of a substantial involuntary deterioration of the work, or because continuing in employment would work an unreasonable hardship on him or her or interfere with commissioner-approved training.

To establish good cause because of a substantial involuntary deterioration of the work or because continuing in employment would work an unreasonable hardship, a claimant must show that he or she left work primarily for reasons connected with the employment, the reasons must have been of such a compelling nature that a reasonably prudent person would have left work, and he or she must have exhausted all reasonable alternatives prior to quitting, unless it is shown that pursuing such attempts would have been futile.

As set forth in the administrative law judge's decision, claimant did not leave work primarily for reasons connected with the employment. As such, she has not established good cause for quitting pursuant to WAC 192-150-170.

CP Comm. Rec. 76 – 77.

If the Commissioner's interpretation of WAC 192-150-170 is correct, then the rule directly contradicts how the voluntary quit provisions of the Employment Security Act were interpreted in *Spain*. The decision therefore is not only an error of law but the regulation upon which it relies, as interpreted by the Commissioner, should be invalidated under the Administrative Procedure Act because it is outside the ESD's statutory authority.

The APA allows this Court to invalidate such a rule:

(2) Review of rules. (a) ***A rule may be reviewed*** by petition for declaratory judgment filed pursuant to this

subsection or ***in the context of any other review proceeding under this section.*** In an action challenging the validity of a rule, the agency shall be made a party to the proceeding.

* * *

(c) In a proceeding involving review of a rule, ***the court shall declare the rule invalid*** only if it finds that: The rule violates constitutional provisions; the ***rule exceeds the statutory authority of the agency***; the rule was adopted without compliance with statutory rule-making procedures; or the rule is arbitrary and capricious.

RCW 34.05.570(2)(emphasis added).

The Commissioner is statutorily empowered as follows:

(1) The commissioner shall administer this title. ***He shall have the power and authority to adopt, amend, or rescind such rules and regulations,*** to employ such persons, make such expenditures, require such reports, make such investigations, and take such other action as he deems necessary or suitable to that end. Such rules and regulations shall be effective upon publication and in the manner, ***not inconsistent with the provisions of this title,*** which the commissioner shall prescribe.

RCW 50.12.010.

An ESD regulation that would limit “good cause” to work-connected factors in contradiction to the statute and how the statute has been interpreted by the Washington Supreme Court “would exceed ESD’s rule making authority.” *Delagrave v. ESD*, 127 Wn. App. 596, 611, 111 P.3d 879 (2005). In *Delagrave* a claimant had sought a waiver of an overpayment from the ESD. In ruling in his

favor, the Court there cited the equity and good conscience statute, RCW 50.20.190(2), finding that the “statute does not limit the circumstances under which the commissioner may find that a waiver is warranted.” *Id.* at 610. In that case, the commissioner had denied waiver in part because the commissioner found waiver limited to only the four circumstances set out in WAC 192-28-115.

The *Delagrave* court found this limitation to be “an error of law” because interpreting a regulation to limit the statutory waiver allowed in the equity and good conscience statute essentially, and impermissibly, amended or changed the legislative enactment:

“An agency may not promulgate a rule that amends or changes a legislative enactment.” [cites omitted]. Under such a ruling, the provisions of the regulation would limit the effect of RCW 50.20.190 *by limiting the circumstances under which ESD would allow a waiver when there is no such limitation in the statute. This would exceed ESD’s rule making authority.*

Delagrave, 126 Wn. App. at 611 (emphasis added).

The exact same reasoning applies in the instant case concerning Ms. Kennedy. The ESD cannot promulgate a regulation that confines “good cause” to work-connected factors because the statute itself does not limit “good cause” to work-connected factors as demonstrated by the amendments in 2003 that removed the

“work-connected factors” portion of the statute and as demonstrated by the *Spain* decision as discussed above.

As noted in the prior section, the “good cause” statute as it pertained to voluntarily leaving work for claims filed *prior to 2004* contained a limiting proviso at RCW 50.20.050(c), which allowed the commissioner to consider only “work connected factors” in determining good cause. This proviso, *in 2004 and after*, was removed, just as virtually the same proviso had been removed prior to *Bale* interpreting “good cause” in 1963. The *Bale* court concluded that “good cause for termination of employment, under the statute, may include compelling personal reasons.” *In re Bale*, 63 Wn.2d at 90. The court then had little trouble in deciding that a claimant having to leave work to relocate because of a spouse’s work-related relocation proved a compelling personal reason that qualified as a “good cause” for leaving work. *In re Bale, id.* at 91.

Thus, the ESD cannot on its own re-enact the “work-connected factors” portion of the statute, which was removed by the Legislature in 2003, in the guise of a regulation in 2008. To do so is outside the ESD’s statutory authority and the regulation should therefore be invalidated. Moreover, it contradicts the liberal construction to be afforded the statute.

The purpose of unemployment compensation is to reduce involuntary unemployment and ease the suffering caused thereby. RCW 50.01.010. To achieve this purpose, the Employment Security Act must be liberally construed in favor of the unemployed worker. *Id.* When the legislature mandates liberal construction in favor of the worker, courts should not narrowly interpret provisions to the worker's disadvantage when the statutory language does not suggest that such a narrow interpretation was intended. *Delagrave*, 126 Wn. App. at 609.

The ESD rule that the Commissioner interprets as confining "good cause" to work-connected factors has no basis in the statute because the "work-connected factors" provision was removed from the statute in 2004 by the Legislature and in fact an ESD regulation that re-introduces such a limitation – in light of *Spain* and in light of the Legislature's actions in 2004 in removing this limitation - is directly contrary to the Legislature's intent.

The courts will uphold an agency's interpretation of a regulation only if "it reflects a plausible construction of the language of the statute and is not contrary to the legislative intent." *Seatoma Convalescent Ctr. v. Dep't of Soc. & Health Servs.*, 82 Wn. App. 495, 518, 919 P.2d 602 (1996).

“In determining legislative intent, we interpret the language at issue within the context of the entire statute.” *In re Sehome Park Care Ctr, Inc.*, 127 Wn.2d 774, 778, 903 P.2d 443 (1995), as cited in *Safeway, Inc. v. Dep’t of Revenue*, 96 Wn. App. 156, 160, 978 P.2d 559 (1999). If the agency’s interpretation of the law conflicts with an applicable statute, the statute controls. *Id.*

In this case, the agency’s promulgation of a rule that, at least as the Commissioner contends, limits “good cause” to work-connected factors was outside the agency’s statutory authority and the rule must be invalidated as well as the decision in this case that relied upon that rule. The rule should therefore be invalidated under the APA, RCW 34.05.570(2) & (2)(c) and the Commissioner’s Order reversed under the APA, RCW 34.05.570(3)(d) because it misinterprets and misapplies the law.

3. MS. KENNEDY SHOULD HAVE QUALIFIED FOR BENEFITS WHEN SHE QUIT TO FOLLOW HER FIANCE, WHOM SHE THEN MARRIED, TO KENTUCKY AFTER HE WAS GIVEN A MANDATORY MILITARY TRANSFER.

The Employment Security Act provides that a worker has “good cause” to quit and qualifies for unemployment benefits, for claims effective after July 2006, when

(B) . . . he or she (I) Left work to relocate for the spouse's employment that, **due to a mandatory military transfer**, is

outside the existing labor market area; and (II) remained employed as long as was reasonable prior to the move;

RCW 50.20.050(2)(b)(iii) (emphasis added).

- a. **Ms. Kennedy should have qualified for benefits because the plain language of the military transfer provision of the voluntary quit provisions of the ESA do not require that a worker be a “spouse” at the time of quitting, but only that the worker leave work “to relocate for the spouse’s employment.”**

In reading the statute above, there is nothing that would require that Ms. Kennedy be married to her fiancé at the time she quit, but only that she quit “to relocate for the spouse’s employment.” Her spouse today had to relocate due to a mandatory military transfer in March 2008. The couple was married in April 2008. The ALJ and Commissioner denied Ms. Kennedy benefits in September and October 2008 because she had not been married when she quit and moved. Neither cited to any authority for this alleged requirement because there is none. Ms. Kennedy therefore should have qualified for benefits under the plain language of the military transfer statute when she had to relocate after her spouse was transferred.

- b. **Ms. Kennedy should have qualified for benefits because she and her fiancé must be considered “spouses” to give effect to the Act’s stated purposes.**

The ESD's own regulations give a broad definition to the concept of family or household member. For instance, for purposes of the domestic violence good cause provisions of the voluntary quit statute, the ESD's regulation states that a "family or household member" means a broad range of relationships:

(i) Spouses and former spouses,

(ii) Persons who have a child in common regardless of whether they have been married or have lived together at any time,

(iii) Adult persons related by blood or marriage,

(iv) Adult persons who are presently residing together or who have resided together in the past,

(v) Persons sixteen years of age or older who are presently residing together or who have resided together in the past and who have or have had a dating relationship,

(vi) Persons sixteen years of age or older with whom a person sixteen years of age or older has or has had a dating relationship, and

(vii) Persons who have a biological or legal parent-child relationship, including stepparents, stepchildren, grandparents, and grandchildren.

WAC 192-150-112 (emphasis added).

The Washington Legislature has recently incorporated both a broad definition of familial relationships and a broad qualification

for good cause for "quitting to follow" one's spouse or domestic partner for job separations that occur on or after September 6, 2009:

(iii) The claimant: (A) Left work to relocate for the employment of a spouse or domestic partner that is outside the existing labor market area; and (B) remained employed as long as was reasonable prior to the move;

SSB 5963 (available online at

<http://www.leg.wa.gov/pub/billinfo/2009->

[10/Pdf/Bills/Session%20Law%202009/5963-S.SL.pdf](http://www.leg.wa.gov/pub/billinfo/2009-10/Pdf/Bills/Session%20Law%202009/5963-S.SL.pdf)) (attached to this brief).

Because the plain meaning of "spouse" today encompasses domestic partners such as Ms. Kennedy and her fiancé, and because ESD regulations in effect at the time of Ms. Kennedy's job separation included within the meaning of "family or household member" people residing together, though unmarried, this Court should find Ms. Kennedy eligible for benefits when she left work to reside with her fiancé in Kentucky.

The "plain meaning" rule of statutory or regulatory construction requires examining "the statute in which the provision at issue is found, as well as related statutes or other provisions of the same act in which the provision is found," to determine

"whether a plain meaning can be ascertained." *City of Seattle v. Allison*, 148 Wn.2d 75, 81, 59 P.3d 85 (2002) (citing *Dep 't of Ecology v. Campbell & Gwinn, L.L. C.*, 146 Wn.2d 1, 10, 43 P.3d 4 (2002); *CJ C. v. Corp. of the Catholic Bishop of Yakima*, 138 Wn.2d 699, 708-09, 985 P.2d 262 (1999)). "A term in a regulation should not be read in isolation but rather within the context of the regulatory and statutory scheme as a whole." *Allison*, 148 Wn.2d at 81.

Courts must give effect to legislative intent. See *Whatcom County v. City of Bellingham*, 128 Wn.2d 537, 546, 909 P.2d 1303 (1996). "The meaning of a particular word in a statute "is not gleaned from that word alone, because [the court's] purpose is to ascertain legislative intent of the statute as a whole." *Id.*

The Employment Security Act (Title 50 RCW) (the "Act") must be construed to give effect to its stated policy of protecting against the economic hardships of unemployment, and the meaning of "immediate family" must be construed liberally in light of this purpose. The stated purpose of the Act is to provide a measure of protection against "*economic insecurity due to unemployment.*" RCW 50.01.010 (emphasis added). The legislature sought "*to prevent its spread and to lighten its burden which now so often falls*

with crushing force upon the unemployed worker and his family."

RCW 50.01.010 (emphasis added). The Washington State Court of Appeals has recently emphasized that the purpose of unemployment compensation statutes is to relieve the "harsh economic, social and personal consequences resulting from unemployment." *Gaines v. ESD*, 140 Wn. App. 791, 797, 166 P.3d 1257 (2007) (quoting Norman J. Singer, *Sutherland Statutory Construction* § 74.7, at 921-23 (6th ed. 2003)).

Even while expressing its intent to protect families, the legislature did not express any preference for a particular form of family or family structure. The Act does not even contain a definition of "family," let alone limit the definition of one to those who are joined by legal marriage. Instead, the legislature provided *"that this title shall be liberally construed for the purpose of reducing involuntary unemployment and the suffering caused thereby to the minimum."* RCW 50.01.010 (emphasis added). Relieving the negative effects of unemployment requires a liberal construction of the statutes. *Gaines*, 140 Wn. App. at 798.

The Washington Legislature in recent years has reinserted into the preamble of the Act the mandate that

Consequently, under explicit statutory authority, case law, and scholarly analysis, the Act is to be liberally interpreted. The term "spouse" must therefore be construed liberally under the Act to include Ms. Kennedy and her fiancé, now spouse.

c. Ms. Kennedy should have qualified for benefits because the regulatory definition of "family or household member" is inclusive, not exclusive.

To effectuate the broad policy mandate of the Act, the regulatory definition of "family or household member" must be interpreted as inclusive, not exclusive, of all of those who might share a family household or be financially dependent on the employee and not just pertaining to the domestic violence provisions of the Act. The definition of "family or household member" found in WAC 192-150-112, while not specifically mentioning domestic partners, defines that phrase extremely broadly and easily encompasses Ms. Kennedy's relationship with her fiancé and then spouse. This definition includes "(v) Persons sixteen years of age or older who are presently residing together or who have resided together in the past and who have or have had a dating relationship, . . ." *Id.*

Thus the regulatory definition of "family or household member" is not limited to just those persons who may be part of a traditional nuclear family defined by marriage. An agency rule should be interpreted in a manner that "give[s] effect to [the statute's] underlying policy and intent." *Department of Licensing v. Connor*, 147 Wn.2d 41, 50 P.3d 627 (2002). The underlying policy of the Act is clear: to protect individuals and families against the economic hardships caused by unemployment, not to favor one form of family over another. Consistent with the purpose of the Act, the regulatory definition focuses on others who might be economically and emotionally dependant upon the employee.

Here, the legislature's intent is clear: to protect employees and families, not to favor one kind of family over another. The regulatory definition of "family or household member" must be read to include Ms. Kennedy and her fiancé and present spouse.

- d. **Ms. Kennedy should have qualified for benefits because other statutory provisions and the common law support interpreting the Employment Security Act to include Ms. Kennedy's fiancé, now spouse, as a "spouse" under the military transfer provisions of the Act.**

Recognizing Ms. Kennedy's fiancé, now spouse, as a spouse at the time of her quit is consistent with Washington law,

including the equitable doctrines of committed intimate relationships³ and de facto parentage and legislation establishing a domestic partner registry.

Washington courts have recognized inclusive concepts of "family" when appropriate to protect the economic and emotional security of the members of those families. The equitable doctrines of committed intimate relationships and de facto parentage are examples of this. These doctrines recognize that immediate family is often broader than the bounds of marriage or biology.

For example, individuals who have parented a child, even if they are biologically unrelated to the child may still be recognized as de facto parents, when doing so is in the best interest of the child. See, e.g., *In re Parentage of L.B.*, 155 Wn.2d 679, 711-12, 122 P.3d 161 (2005). Further, the doctrine of committed intimate relationships establishes equitable rights to joint property of persons in committed intimate relationships at the end of those relationships. See, e.g., *Olver v. Fowler*, 161 Wn.2d 655, 168 P.3d 348 (2007). This equitable doctrine acknowledges that many Washingtonians create financially mutually dependant families

³ Our state Supreme Court has indicated its preference for this term over the pejorative term "meretricious relationships." See *Olver v. Fowler*, 161 Wn.2d 655, 657 n. 1, 168 P.3d 348 (2007).

outside of marriage and that jointly owned property should be divided equitably between them when those relationships dissolve or one partner dies. *Olver*, 161 Wn.2d at 669-670. The doctrine applies regardless of whether the partners can legally marry. *Vasquez v. Hawthorne*, 145 Wn.2d 103, 104-05, 33 P.3d 735 (2001); *see also Gormley v. Robertson*, 120 Wn. App. 31, 83 P.3d 1042 (2004) (law of committed intimate relationships applied to division of property of same-sex, cohabiting couple). These doctrines are instructive because they highlight the fact that Washington courts have recognized that families form, grow, and prosper outside the context of marriage.

A court would have likely recognized that Ms. Kennedy and her spouse were in a committed intimate relationship prior to their marriage if their relationship had dissolved and either one had asked for an equitable division of their jointly owned property. Non-exclusive factors that courts consider in determining whether such a relationship exists include "continuous cohabitation, duration of the relationship, purpose of the relationship, pooling of resources and services for joint projects, and the intent of the parties." *Connell v. Francisco*, 127 Wn.2d 339, 346, 898 P.2d 831 (1995). Ms. Kennedy and her spouse shared a home for 3 years, shared

resources, and were for all intents and purposes married as they are today.

The doctrines of de facto parentage and of committed intimate relationships are both applied by courts to recognize and protect the economic and emotional security of all families and the individuals who are in them, regardless of whether those families are defined by marriage. These doctrines indicate that Washington law would certainly recognize Ms. Kennedy and her fiancé as members of one another's family if their relationships ended. The Department's narrow construction of the term "spouse" under the Act to exclude Ms. Kennedy from the Act's protections is directly contrary to the recognition of more broadly defined "families" under these equitable doctrines and should be rejected.

4. THE COMMISSIONER'S ORDER SHOULD BE REVERSED BECAUSE IT IGNORES THE LIBERAL INTERPRETATION TO BE ACCORDED THE STATUTE.

Ms. Kennedy and her fiancé, now husband, were domestic partners prior to their marriage. Domestic partners in 2009 now qualify for benefits under the "quit to follow" provisions of the Employment Security Act (ESA). There was no reason they should not have qualified prior to 2009, both under *Spain* and under the

liberal interpretation to be given to the ESA in favor of granting benefits to unemployed workers.

This “liberal construction” has historically been true in Washington since the Act’s inception in 1937 and it remains true today:

The legislature, therefore, declares that in its considered judgment the public good, and the general welfare of the citizens of this state require the enactment of this measure, under the police powers of the state, for the compulsory setting aside of unemployment reserves to be used for the benefit of persons unemployed through no fault of their own, and that **this title shall be liberally construed for the purpose of reducing involuntary unemployment and the suffering caused thereby to the minimum.**

RCW 50.01.010.

Even without this language, the Act should be liberally construed. The statute is a remedial statute designed “to remedy any widespread unemployment.” RCW 50.01.010. Remedial statutes are to be liberally construed. *State v. Douty*, 92 Wn.2d 930, 603 P.2d 373 (1979); *State v. Grant*, 89 Wn.2d 678, 575 P.2d 210 (1978); *Kittilson v. Ford*, 23 Wn. App. 402, 595 P.2d 944 (1979); see generally, Norman J. Singer, *Sutherland Statutes and Statutory Construction* § 60.01 (5th ed. 1992 & Supp. 2001).

“Unemployment compensation statutes were enacted for the purpose of relieving the harsh economic, social and personal consequences resulting from unemployment. If these statutes are to accomplish their purpose, *they must be given a liberal interpretation.*” 3A Norman J. Singer, *Sutherland Statutory Construction* (2001 Revision & 2003 Cumulative Supplement) § 74.7 (citing cases from 35 states, including *Employees of Pac. Maritime Ass’n v. Hutt*, 88 Wn.2d 426, 562 P.2d 1264 (1977)).

Moreover, “[p]rovisions which disqualify employees from receiving unemployment benefits must be narrowly construed.” *Sutherland* § 74.7, *supra*.

Consequently, under explicit statutory authority, case law, and scholarly analysis, the ESA is to be liberally interpreted and a liberal interpretation in Ms. Kennedy’s case mandates that he be found eligible for the benefits he was originally granted after being “replaced.”

5. ATTORNEY FEES AND COSTS IN THIS CASE ARE MANDATED BY STATUTE WHEN THE COURT REVERSES A COMMISSIONER’S ORDER.

Ms. Kennedy requests attorney fees. Under RAP 18.1(b), a party entitled to attorney fees by statute must argue for those fees in its opening brief.

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.*

Therefore, because the Commissioner's Order in this case misinterpreted and misapplied the Employment Security Act, Ms. Kennedy respectfully requests that upon reversal of the Order this

Court grant attorney fees in an amount to be determined by the filing of a cost bill.

E. CONCLUSION

Ms. Kennedy respectfully requests that the Commissioner's Order in this case be reversed and benefits be granted to her. The Order should be reversed for the following reasons:

First, under the *Spain* decision that ruled there was not a finite list of "good causes," Ms. Kennedy had "good cause" to move to join her husband after the military transferred him across the continent. This is true under *Spain* whether or not the quit was deemed one for compelling personal reasons. Further, the emergency rule as interpreted by the commissioner is a regulation that is beyond the statutory authority of the agency to promulgate.

Second, under the plain language of the statute, the military transfer provision for good cause does not limit eligibility to spouses married at the time of the transfer and should be read to include those who become spouses during the pendency of their claim.

Third, Ms. Kennedy should have received benefits because under the regulatory definition of "family or household member" at

the time of her claim, Ms. Kennedy and her future spouse qualified as spouses or domestic partners.

Fourth, under the liberal construction that is to be given the statute, Ms. Kennedy was a spouse or domestic partner who quit to follow the person who became her husband during the pendency of her claim and she therefore should have qualified for benefits.

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

Dated this 1st day of October 2009.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'ML', written over a horizontal line.

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

APPENDIX A: ADMINISTRATIVE LAW JUDGE'S ORDER

STATE OF WASHINGTON
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE EMPLOYMENT SECURITY DEPARTMENT

IN THE MATTER OF:

Michelle L. Kennedy

Claimant

DOCKET NO: 05-2008-37114

INITIAL ORDER

ID: [REDACTED]

BYE: 03/07/2009

UIO: 990

Hearing: This matter came before Administrative Law Judge Johnette Sullivan on September 02, 2008 at Yakima, Washington after due and proper notice to all interested parties.

Persons Present: the claimant-appellant, Michelle L. Kennedy; the claimant representative, John Tirpak, Attorney, Unemployment Law Project; and the employer, Holland America Line, represented by Peter Cipriano and witness Kathy Daves.

STATEMENT OF THE CASE:

The claimant filed an appeal on August 05, 2008 from a Decision of the Employment Security Department dated August 05, 2008. At issue in the appeal is whether the claimant voluntarily quit without good cause pursuant to RCW 50.20.050(2)(a), or was discharged for misconduct pursuant to RCW 50.20.066. Also at issue is whether the claimant was able to, available for, and actively seeking work during the weeks at issue.

Having fully considered the entire record, the undersigned Administrative Law Judge enters the following Findings of Fact, Conclusions of Law and Initial Order:

FINDINGS OF FACT:

1. Claimant worked for the interested employer from November 2003 until she voluntarily quit effective March 13, 2008. Claimant was a full-time Reservations Agent, earning over \$12.00 per hour. She worked from home as a telecommuter. About once monthly, she went to the employer's main office for meetings or training. Her contract required that she live within 50 miles of the employer's office.

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2. During the weeks at issue, claimant's daughter was nine years of age. She and her daughter had resided for about three years with claimant's fiancé. Claimant's fiancé is serving the country in the military, and he had been deployed to Iraq. They had planned to marry in July 2007, but those plans were delayed when his deployment was extended to September 2007.

3. Claimant's fiancé returned to western Washington in September 2007, and they resided together in their Tacoma home until late February 2008. He received orders to report to Kentucky, and left in late February to meet his report date of March 10, 2008.

4. If he had remained in Tacoma, claimant would not have left her job. However, solely because her fiancé had relocated to Kentucky, claimant informed the employer to expect that she would soon be quitting. She did give notice to quit, and quit March 13, 2008. After packing their belongings, claimant left Washington on March 24, and drove to Kentucky, arriving March 27, 2008. Her fiancé had already lined up some job prospects, so she had her first work search the next day, Friday, March 28, 2008.

5. Claimant continued to search for work, and her search was successful. She returned to full-time employment June 1, 2008.

6. Claimant and her fiancé decided to marry. They were married on Friday, April 25, 2008.

7. Claimant established a benefit year for unemployment insurance beginning the week of March 9, 2008, the same week she last worked for the employer. Her benefit year ends March 7, 2009. Claimant was first able and available to work for a Kentucky employer on March 28, 2008. Beginning that date and thereafter, she was able, available and actively searching for work.

CONCLUSIONS OF LAW:

1. The evidence establishes that the claimant quit employment. Therefore, RCW 50.20.050, WAC 192-150-085, WAC 192-150-150, WAC 192-150-170, WAC 192-320-070 and WAC 192-320-075, apply, and will be found on the attachment.

2. In a voluntary quit case, the claimant bears the burden to prove by the preponderance of the evidence that he or she had "good cause" to quit employment.

3. RCW 50.20.050(2)(a) provides that a claimant is disqualified from receiving unemployment benefits for leaving work voluntarily without good cause. RCW 50.20.050(2)(b) identifies eleven specific non-disqualifying reasons to quit work:

- (i) to accept a bona fide offer of new work;
- (ii) due to illness or disability;
- (iii) to relocate for mandatory military transfer of spouse;
- (iv) to protect self or family from domestic violence or stalking;
- (v) reduction in pay by twenty-five percent or more;
- (vi) reduction in hours by twenty-five percent or more;
- (vii) worksite change that increases commute distance or difficulty;
- (viii) unsafe worksite conditions;
- (ix) illegal activities in the worksite;
- (x) change in work duties that violates religious convictions or sincere moral beliefs;
- (xi) to enter apprenticeship program.

4. The Washington Supreme Court has held that these eleven reasons are not exclusive. *Spain v. Employment Sec. Dep't*, No. 79878-8, consolidated with No. 80309-9, Wash. June 19, 2008. WAC 192-150-170, adopted by the Employment Security Department as an emergency regulation on July 11, 2008, provides a general definition of "good cause". Good cause to quit work may also be found for other work connected circumstances if continuing the employment would work an unreasonable hardship on the claimant. For other circumstances, each of the following conditions must be met:

- (i) the employee left work primarily for reasons connected with employment; and
- (ii) these work-connected reasons were of such a compelling nature they would have caused a reasonably prudent person to leave work; and
- (iii) the employee first exhausted all reasonable alternatives, unless it would have been futile to do so. WAC 192-150-170(1)(b)(i)

5. "Unreasonable hardship" means a result that is not due to voluntary action by the claimant. Examples of circumstances in which unreasonable hardship may be found include: (i) repeated behavior by the employer or co-workers which creates an abusive working environment, or (ii) health, physical conditions, or requirements of the job have changed so that the claimant's health would be adversely affected by continuing in that employment. WAC 192-150-170(1)(b)(iv).

6. One of the eleven factors for which a claimant will not be disqualified for leaving work is when the claimant moves because a military spouse was transferred. Claimant is not eligible for that provision, because she was not a military spouse at the time she quit. For reasons satisfactory to claimant and her fiancé, they chose not to marry after he returned from Iraq and instead were married six weeks after this job ended.

7. The *Spain* decision cited above determined that in addition to the eleven main factors for which a worker will not be disqualified, there may be other reasons for good cause for quitting work. *Spain*, and the cases cited therein, referred to personally compelling factors which constitute unreasonable hardship, which were work-related. Here, claimant has established personally compelling reasons to relocate, but those reasons are not connected to her work. Accordingly, she has not established work-connected good cause for leaving under RCW 50.20.050(2).

8. In the alternative, claimant argues that under *Spain*, any disqualification should be limited to ten weeks under RCW 50.20.050(1)(d). However, *Spain* did not revive the disqualification rules that existed for claims filed prior to January 4, 2004. Specifically, *Spain* analyzed the wording of the statute in RCW 50.20.050(2), and made a distinction between the "good cause" language and the "disqualifying factors" language.

9. The provisions of RCW 50.20.010(1)(c), RCW 50.20.100, RCW 50.20.110, WAC 192-170-050, WAC 192-180-010 and WAC 192-180-012 are applicable and will be found on the attachment.

10. To be eligible for benefits, an individual must not only be actively seeking work but must be ready, able and willing immediately to accept any offer of suitable work. This implies that an individual must be free from any restrictions on his or her availability that would seriously affect the chance of becoming employed. The work search must be active as well as realistic. The burden is on the claimant to show compliance with each eligibility requirement. *Jacobs v. Employment Security Dep't*, 27 Wn.2d 641, 179 P.2d 707 (1947).

11. For weeks claimed through March 29, 2008, claimant was not available to either Washington or Kentucky employers. If she filed claims for those three weeks, they are denied pursuant to RCW 50.20.010(1)(c). However, she meets the requirements of the statute and is able and available and actively searching for work beginning the week of March 30, 2008.

Now therefore it is ORDERED:

The Decision of the Employment Security Department under appeal is **MODIFIED**. The claimant has not established good cause for quitting. Benefits are denied pursuant to RCW 50.20.050(2)(a) for the period beginning March 09, 2008 and thereafter for seven calendar weeks and until the claimant has obtained bona fide work in covered employment and earned wages in that employment equal to seven times his or her weekly benefit amount. ("Covered employment" means work that an employer is required to report to the Employment Security Department and which could be used to establish a claim for unemployment benefits.) Benefits are denied pursuant to RCW 50.20.010(1)(c) for the period beginning March 9, 2008 through March 29, 2008.

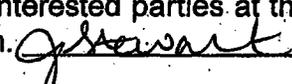
Employer: If you pay taxes on your payroll and are a base year employer for this claimant, or become one in the future, your experience rating account will not be charged for any benefits paid on this claim or future claims based on wages you paid to this individual, unless this decision is set aside on appeal. See RCW 50.29.021.

Dated and Mailed on September 04, 2008 at Yakima, Washington.



Jhnette Sullivan
Administrative Law Judge
Office of Administrative Hearings
The Liberty Building
32 N Third St Ste 320
Yakima, WA 98901-2730

Certificate of Service

I certify that I mailed a copy of this order to the within-named interested parties at their respective addresses postage prepaid on the date stated herein. 

PETITION FOR REVIEW RIGHTS

This Order is final unless a written Petition for Review is addressed and mailed to:

**Agency Records Center
Employment Security Department
PO Box 9046
Olympia, Washington 98507-9046**

and postmarked on or before **October 6, 2008**. All argument in support of the Petition for Review must be attached to and submitted with the Petition for Review. The Petition for Review, including attachments, may not exceed five (5) pages. Any pages in excess of five (5) pages will not be considered and will be returned to the petitioner. *The docket number from the Initial Order of the Office of Administrative Hearings must be included on the Petition for Review.* Do not file your Petition for Review by Facsimile (FAX). Do not mail your Petition to any location other than the Agency Records Center.

JS:mb

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APPENDIX B: COMMISSIONER'S ORDER

CERTIFICATE OF SERVICE

I certify that I mailed a copy of this decision to the
within named interested parties at their respective
addresses, postage prepaid, on October 24, 2008.

Representative, Commissioner's Review Office,
Employment Security Department

UIO: 990
BYE: 03/07/2009

**BEFORE THE COMMISSIONER OF
THE EMPLOYMENT SECURITY DEPARTMENT
OF THE STATE OF WASHINGTON**

Review No. 2008-2303

In re:

MICHELLE L. KENNEDY
SSA No. _____

Docket No. 05-2008-37114

DECISION OF COMMISSIONER

On October 3, 2008, MICHELLE L. KENNEDY, by and through John Tirpak, Attorney at Law for Unemployment Law Project, petitioned the Commissioner for review of a decision issued by the Office of Administrative Hearings on September 4, 2008. Pursuant to chapter 192-04 WAC this matter has been delegated by the Commissioner to the Commissioner's Review Office. Having reviewed the entire record and having given due regard to the findings of the administrative law judge pursuant to RCW 34.05.464(4), the undersigned adopts the Office of Administrative Hearings' findings of fact and conclusions of law, and adds the following.

A claimant who quits employment is disqualified for unemployment benefits unless her quit was with good cause. RCW 50.20.050(2)(a). On June 19, 2008 the state Supreme Court held that the list of circumstances at RCW 50.20.050(2)(b) providing good cause for quitting is not exclusive. Spain v. Employment Security Department, ___ Wn.2d ___, ___ P.3d ___ (2008). The Department promulgated WAC 192-150-170 in response to the court's decision. Consequently, good cause can be established pursuant to either RCW 50.20.050(2)(b) or WAC 192-150-170.

To establish good cause pursuant to RCW 50.20.050(2)(b), a claimant must show that he or she quit for one of the eleven reasons listed at conclusion No. 3. Here, the claimant quit to relocate because of the mandatory military transfer of her boyfriend, not her spouse. Because she was not married at the time she quit, the claimant has not established good cause for quitting pursuant to RCW 50.20.050(2)(b)(iii).

To establish good cause pursuant to WAC 192-150-170, a claimant must show that he or she quit because of a substantial involuntary deterioration of the work, or because

continuing in employment would work an unreasonable hardship on him or her or interfere with commissioner-approved training.

To establish good cause because of a substantial involuntary deterioration of the work or because continuing in employment would work an unreasonable hardship, a claimant must show that he or she left work primarily for reasons connected with the employment, the reasons must have been of such a compelling nature that a reasonably prudent person would have left work, and he or she must have exhausted all reasonable alternatives prior to quitting, unless it is shown that pursuing such attempts would have been futile.

As set forth in the administrative law judge's decision, claimant did not leave work primarily for reasons connected with the employment. As such, she has not established good cause for quitting pursuant to WAC 192-150-170.

Now, therefore,

IT IS HEREBY ORDERED that the decision of the Office of Administrative Hearings issued on September 4, 2008, is **AFFIRMED**. Claimant is disqualified pursuant to RCW 50.20.050(2)(a) beginning March 9, 2008, and thereafter for seven calendar weeks and until he or she has obtained bona fide work in employment covered by this title and earned wages in that employment equal to seven times his or her weekly benefit amount. Benefits are denied pursuant to RCW 50.20.010(1)(c) for the period beginning March 9, 2008 through March 29, 2008. *Employer:* If you pay taxes on your payroll and are a base year employer for this claimant, or become one in the future, your experience rating account will not be charged for any benefits paid on this claim or future claims based on wages you paid to this individual, unless this decision is set aside on appeal. See RCW 50.29.021.

DATED at Olympia, Washington, October 24, 2008.*

Donald K. Westfall III

Review Judge
Commissioner's Review Office

*Copies of this decision were mailed to all interested parties on this date.

RECONSIDERATION

Pursuant to RCW 34.05.470 and WAC 192-04-190 you have ten (10) days from the mailing and/or delivery date of this decision/order, whichever is earlier, to file a petition for reconsideration. No matter will be reconsidered unless it clearly appears from the face of the

petition for reconsideration and the arguments in support thereof that (a) there is obvious material, clerical error in the decision/order or (b) the petitioner, through no fault of his or her own, has been denied a reasonable opportunity to present argument or respond to argument pursuant WAC 192-04-170. Any request for reconsideration shall be deemed to be denied if the Commissioner's Review Office takes no action within twenty days from the date the petition for reconsideration is filed. A petition for reconsideration together with any argument in support thereof should be filed by mailing or delivering it directly to the Commissioner's Review Office, Employment Security Department, 212 Maple Park Drive, Post Office Box 9046, Olympia, Washington 98507-9046, and to all other parties of record and their representatives. The filing of a petition for reconsideration is not a prerequisite for filing a judicial appeal.

JUDICIAL APPEAL

If you are a party aggrieved by the attached Commissioner's decision/order, your attention is directed to RCW 34.05.510 through RCW 34.05.598, which provide that further appeal may be taken to the superior court within thirty (30) days from the date of mailing as shown on the attached decision/order. If no such judicial appeal is filed, the attached decision/order will become final.

If you choose to file a judicial appeal, you must both:

- a. Timely file your judicial appeal directly with the superior court of the county of your residence or Thurston County. If you are not a Washington state resident, you must file your judicial appeal with the superior court of Thurston County. See RCW 34.05.514. (The Department does not furnish judicial appeal forms.) AND
- b. Serve a copy of your judicial appeal by mail or personal service within the 30-day judicial appeal period on the Commissioner of the Employment Security Department, the Office of the Attorney General and all parties of record.

The copy of your judicial appeal you serve on the Commissioner of the Employment Security Department should be served on or mailed to: Commissioner, Employment Security Department, Attention: Agency Records Center Manager, 212 Maple Park, Post Office Box 9046, Olympia, WA 98507-9046. To properly serve by mail, the copy of your judicial appeal must be received by the Employment Security Department on or before the 30th day of the appeal period. See RCW 34.05.542(4) and WAC 192-04-210. The copy of your judicial appeal you serve on the Office of the Attorney General should be served on or mailed to the Office of the Attorney General, Licensing and Administrative Law Division, 1125 Washington Street SE, Post Office Box 40110, Olympia, WA 98504-0110.

APPENDIX C: RCW 50.20.050 & SSB 5963 Excerpt

RCWs > Title 50 > Chapter 50.20 > Section 50.20.050

50.20.044 << 50.20.050 >> 50.20.060

RCW 50.20.050

Disqualification for leaving work voluntarily without good cause.

*** CHANGE IN 2009 *** (SEE 5804.SL) ***

*** CHANGE IN 2009 *** (SEE 5963-S.SL) ***

(1) With respect to claims that have an effective date before January 4, 2004:

(a) An 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 and thereafter for seven calendar weeks and until he or she has obtained bona fide work in employment covered by this title and earned wages in that employment equal to seven times his or her weekly benefit amount.

The disqualification shall continue if the work obtained is a mere sham to qualify for benefits and is not bona fide work. In determining whether work is of a bona fide nature, the commissioner shall consider factors including but not limited to the following:

- (i) The duration of the work;
- (ii) The extent of direction and control by the employer over the work; and
- (iii) The level of skill required for the work in light of the individual's training and experience.

(b) An individual shall not be considered to have left work voluntarily without good cause when:

- (i) He or she has left work to accept a bona fide offer of bona fide work as described in (a) of this subsection;
- (ii) The separation was because of the illness or disability of the claimant or the death, illness, or disability of a member of the claimant's immediate family if the claimant took all reasonable precautions, in accordance with any regulations that the commissioner may prescribe, to protect his or her employment status by having promptly notified the employer of the reason for the absence and by having promptly requested reemployment when again able to assume employment: PROVIDED, That these precautions need not have been taken when they would have been a futile act, including those instances when the futility of the act was a result of a recognized labor/management dispatch system;

(iii) He or she has left work to relocate for the spouse's employment that is due to an employer-initiated mandatory transfer that is outside the existing labor market area if the claimant remained employed as long as was reasonable prior to the move; or

(iv) The separation was necessary to protect the claimant or the claimant's immediate family members from domestic violence, as defined in RCW 26.50.010, or stalking, as defined in RCW 9A.46.110.

(c) In determining under this subsection whether an individual has left work voluntarily without good cause, the commissioner shall only consider work-connected factors such as the degree of risk involved to the individual's health, safety, and morals, the individual's physical fitness for the work, the individual's ability to perform the work, and such other work connected factors as the commissioner may deem pertinent, including state and national emergencies. Good cause shall not be established for voluntarily leaving work because of its distance from an individual's residence where the distance was known to the individual at the time he or she accepted the employment and where, in the judgment of the department, the distance is customarily traveled by workers in the individual's job classification and labor market, nor because of any other significant work factor which was generally known and present at the time he or she accepted employment, unless the related circumstances have so changed as to amount to a substantial involuntary deterioration of the work factor or unless the commissioner determines that other related circumstances would work an unreasonable hardship on the individual were he or she required to continue in the employment.

(d) Subsection (1)(a) and (c) of this section shall not apply to an individual whose marital status or domestic

responsibilities cause him or her to leave employment. Such an individual shall not be eligible for unemployment insurance benefits beginning with the first day of the calendar week in which he or she left work and thereafter for seven calendar weeks and until he or she has requalified, either by obtaining bona fide work in employment covered by this title and earning wages in that employment equal to seven times his or her weekly benefit amount or by reporting in person to the department during ten different calendar weeks and certifying on each occasion that he or she is ready, able, and willing to immediately accept any suitable work which may be offered, is actively seeking work pursuant to customary trade practices, and is utilizing such employment counseling and placement services as are available through the department. This subsection does not apply to individuals covered by (b)(ii) or (iii) of this subsection.

(2) With respect to claims that have an effective date on or after January 4, 2004:

(a) An 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 and thereafter for seven calendar weeks and until he or she has obtained bona fide work in employment covered by this title and earned wages in that employment equal to seven times his or her weekly benefit amount.

The disqualification shall continue if the work obtained is a mere sham to qualify for benefits and is not bona fide work. In determining whether work is of a bona fide nature, the commissioner shall consider factors including but not limited to the following:

(i) The duration of the work;

(ii) The extent of direction and control by the employer over the work; and

(iii) The level of skill required for the work in light of the individual's training and experience.

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

(i) He or she has left work to accept a bona fide offer of bona fide work as described in (a) of this subsection;

(ii) The separation was necessary because of the illness or disability of the claimant or the death, illness, or disability of a member of the claimant's immediate family if:

(A) The claimant pursued all reasonable alternatives to preserve his or her employment status by requesting a leave of absence, by having promptly notified the employer of the reason for the absence, and by having promptly requested reemployment when again able to assume employment. These alternatives need not be pursued, however, when they would have been a futile act, including those instances when the futility of the act was a result of a recognized labor/management dispatch system; and

(B) The claimant terminated his or her employment status, and is not entitled to be reinstated to the same position or a comparable or similar position;

(iii)(A) With respect to claims that have an effective date before July 2, 2006, he or she: (I) Left work to relocate for the spouse's employment that, due to a mandatory military transfer: (1) is outside the existing labor market area; and (2) is in Washington or another state that, pursuant to statute, does not consider such an individual to have left work voluntarily without good cause; and (II) remained employed as long as was reasonable prior to the move;

(B) With respect to claims that have an effective date on or after July 2, 2006, he or she: (I) Left work to relocate for the spouse's employment that, due to a mandatory military transfer, is outside the existing labor market area; and (II) remained employed as long as was reasonable prior to the move;

(iv) The separation was necessary to protect the claimant or the claimant's immediate family members from domestic violence, as defined in RCW 26.50.010, or stalking, as defined in RCW 9A.46.110;

(v) The individual's usual compensation was reduced by twenty-five percent or more;

(vi) The individual's usual hours were reduced by twenty-five percent or more;

(vii) The individual's worksite changed, such change caused a material increase in distance or difficulty of travel, and, after the change, the commute was greater than is customary for workers in the individual's job classification and labor market;

(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;

(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;

(x) The individual's usual work was changed to work that violates the individual's religious convictions or sincere moral beliefs; or

(xi) The individual left work to enter an apprenticeship program approved by the Washington state apprenticeship training council. Benefits are payable beginning Sunday of the week prior to the week in which the individual begins active participation in the apprenticeship program.

[2008 c 323 § 1; 2006 c 13 § 2. Prior: 2006 c 12 § 1; 2003 2nd sp.s. c 4 § 4; 2002 c 8 § 1; 2000 c 2 § 12; 1993 c 483 § 8; 1982 1st ex.s. c 18 § 6; 1981 c 35 § 4; 1980 c 74 § 5; 1977 ex.s. c 33 § 4; 1970 ex.s. c 2 § 21; 1953 ex.s. c 8 § 8; 1951 c 215 § 12; 1949 c 214 § 12; 1947 c 215 § 15; 1945 c 35 § 73; Rem. Supp. 1949 § 9998-211; prior: 1943 c 127 § 3; 1941 c 253 § 3; 1939 c 214 § 3; 1937 c 162 § 5.]

Notes:

Conflict with federal requirements -- 2008 c 323: "If any part of this act is found to be in conflict with federal requirements that are a prescribed condition to the allocation of federal funds to the state or the eligibility of employers in this state for federal unemployment tax credits, the conflicting part of this act is inoperative solely to the extent of the conflict, and the finding or determination does not affect the operation of the remainder of this act. Rules adopted under this act must meet federal requirements that are a necessary condition to the receipt of federal funds by the state or the granting of federal unemployment tax credits to employers in this state." [2008 c 323 § 3.]

Conflict with federal requirements -- Part headings not law -- Severability -- 2006 c 13: See notes following RCW 50.20.120.

Retroactive application -- 2006 c 12 § 1: "Section 1 of this act applies retroactively to claims that have an effective date on or after January 4, 2004." [2006 c 12 § 2.]

Conflict with federal requirements -- Severability -- Effective date -- 2003 2nd sp.s. c 4: See notes following RCW 50.01.010.

Application -- 2000 c 2 §§ 1, 2, 4, 5, 8, and 12-15: See note following RCW 50.22.150.

Conflict with federal requirements -- Severability -- Effective date -- 2000 c 2: See notes following RCW 50.04.355.

Effective dates, applicability -- Conflict with federal requirements -- Severability -- 1993 c 483: See notes following RCW 50.04.293.

Severability -- Conflict with federal requirements -- 1982 1st ex.s. c 18: See notes following RCW 50.12.200.

Severability -- 1981 c 35: See note following RCW 50.22.030.

Severability -- 1980 c 74: See note following RCW 50.04.323.

Effective dates -- Construction -- 1977 ex.s. c 33: See notes following RCW 50.04.030.

Effective date -- 1970 ex.s. c 2: See note following RCW 50.04.020.

1 covered by this title and earned wages in that employment equal to
2 seven times his or her weekly benefit amount. Good cause reasons to
3 leave work are limited to reasons listed in (b) of this subsection.

4 The disqualification shall continue if the work obtained is a mere
5 sham to qualify for benefits and is not bona fide work. In determining
6 whether work is of a bona fide nature, the commissioner shall consider
7 factors including but not limited to the following:

8 (i) The duration of the work;

9 (ii) The extent of direction and control by the employer over the
10 work; and

11 (iii) The level of skill required for the work in light of the
12 individual's training and experience.

13 (b) An individual has good cause and is not disqualified from
14 benefits under (a) of this subsection only under the following
15 circumstances:

16 (i) He or she has left work to accept a bona fide offer of bona
17 fide work as described in (a) of this subsection;

18 (ii) The separation was necessary because of the illness or
19 disability of the claimant or the death, illness, or disability of a
20 member of the claimant's immediate family if:

21 (A) The claimant pursued all reasonable alternatives to preserve
22 his or her employment status by requesting a leave of absence, by
23 having promptly notified the employer of the reason for the absence,
24 and by having promptly requested reemployment when again able to assume
25 employment. These alternatives need not be pursued, however, when they
26 would have been a futile act, including those instances when the
27 futility of the act was a result of a recognized labor/management
28 dispatch system; and

29 (B) The claimant terminated his or her employment status, and is
30 not entitled to be reinstated to the same position or a comparable or
31 similar position;

32 (iii) The claimant: (A) Left work to relocate for the employment
33 of a spouse or domestic partner that is outside the existing labor
34 market area; and (B) remained employed as long as was reasonable prior
35 to the move;

36 (iv) The separation was necessary to protect the claimant or the
37 claimant's immediate family members from domestic violence, as defined
38 in RCW 26.50.010, or stalking, as defined in RCW 9A.46.110;

APPENDIX D: WAC 192-150-170

New Section

WAC 192-150-170 Meaning of Good Cause—RCW 50.20.050(2). (1) **General.** RCW 50.20.050(2) provides that you will not be disqualified from receiving unemployment benefits when you voluntarily leave work for good cause. The Washington Supreme Court in *Spain v. Employment Security Department* held that the factors listed in RCW 50.20.050(2)(b) are not the only circumstances in which an individual has good cause for voluntarily leaving work. While these are considered *per se* or stand alone good cause reasons, the court held that the department is required under RCW 50.20.050(2)(a) to consider whether other circumstances constitute good cause for voluntarily leaving work.

(a) **Stand alone good cause factors--RCW 50.20.050(2)(b).** The following circumstances are sufficient alone to establish good cause for voluntarily leaving work. They are:

- (i) Accepting a bona fide offer of work (see WAC 192-150-050);
- (ii) Due to your illness or disability or the death, illness, or disability of a member of your immediate family (see WAC 192-150-055 and WAC 192-150-060);
- (iii) Moving to accompany your transferred military spouse (see WAC 192-150-110);
- (iv) Protecting yourself or a member of your immediate family from domestic violence or stalking (see WAC 192-150-112 and WAC 192-150-113);
- (v) A reduction in your pay of twenty-five percent or more (see WAC 192-150-115);
- (vi) A reduction in your hours of twenty-five percent or more (see WAC 192-150-120);
- (vii) A change in your worksite resulting in increased distance or difficulty of travel (see WAC 192-150-125);
- (viii) Unsafe working conditions which your employer has failed to remedy (see WAC 192-150-130);
- (ix) Illegal activities at the worksite which your employer has failed to correct (see WAC 192-150-135);
- (x) Changes in your usual work that violate your sincere religious or moral beliefs (see WAC 192-150-140); and
- (xi) Entering an approved apprenticeship training program (see WAC 192-150-160).

(b) **Other factors constituting good cause—RCW 50.20.050(2)(a).** In addition to the factors above, the department may also determine that you had good cause to leave work voluntarily for reasons other than those listed in RCW 50.20.050(2)(b).

(i) For separations under subsections (ii) and (iv) below, all of the following conditions must be met to establish good cause for voluntarily leaving work:

- (A) You left work primarily for reasons connected with your employment; and
- (B) These work-connected reasons were of such a compelling nature they would have caused a reasonably prudent person to leave work; and
- (C) You first exhausted all reasonable alternatives before you quit work, unless you are able to show that pursuing reasonable alternatives would have been futile.

(ii) **Substantial involuntary deterioration of the work.** As determined by the legislature, RCW 50.20.050(2)(b), subsections (v) through (x), represent changes to employment that constitute a substantial involuntary deterioration of the work.

(iii) **Other changes in working conditions.** Changes to your working conditions other than those included in RCW 50.20.050(2)(b)(v)-(x) will be evaluated under WAC 192-150-150 to determine if they constitute a refusal of an offer of new work.

(iv) **Unreasonable hardship.** Other work-connected circumstances may constitute good cause if you can show that continuing in your employment would work an unreasonable hardship on you. "Unreasonable hardship" means a result not due to your voluntary action that would

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cause a reasonable person to leave that employment. The circumstances must be based on existing facts, not conjecture, and the reasons for leaving work must be significant.

Examples of work-connected unreasonable hardship circumstances that may constitute good cause include, but are not limited to, those where:

(A) Repeated behavior by your employer or co-workers creates an abusive working environment.

(B) You show that your health or physical condition or the requirements of the job have changed so that your health would be adversely affected by continuing in that employment.

(2) **Commissioner Approved Training.** After you have been approved by the department for Commissioner Approved Training, you may leave a temporary job you have taken during training breaks or terms, or outside scheduled training hours, or pending the start date of training, if you can show that continuing with the work will interfere with your approved training.

(3) **Redetermination.** Decisions issued by the department on or before the effective date of this rule that are denials for voluntarily leaving work without good cause and pending appeal at the Office of Administrative Hearings or pending review at the Commissioner's Review Office shall be returned to the department for redetermination under this rule.

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STATE OF WASHINGTON
BY for
DEPUTY

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

DIVISION II

MICHELLE L. KENNEDY,

Petitioner,

and

STATE OF WASHINGTON,
EMPLOYMENT SECURITY
DEPARTMENT,

Respondent.

Case No.: 39574-6-II

CERTIFICATE OF SERVICE BY MAIL

CERTIFICATE

I certify that on October 1, 2009, I filed by mail, postage prepaid, the original and one copy of the Appellant's Opening Brief in this matter and served copies of the same documents by mail, postage prepaid, to the offices of Jennifer Steele, Attorney for Respondent, at the Attorney General's Office, Licensing & Administrative Law Division, 800 Fifth Ave., Suite 2000, Seattle, WA 98104-3188.

Dated this October 1, 2009.



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