

42250-6-II
No. 42550-6-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

HEATHER COURTNEY,
Appellant,

v.

EMPLOYMENT SECURITY DEPARTMENT,
STATE OF WASHINGTON,

Respondent.

11/10/11 2:12:02 PM
BY: [Signature]
CLERK OF COURT

REPLY BRIEF OF APPELLANT

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

pm 11/10/11

TABLE OF CONTENTS

A. INTRODUCTION..... 1

B. ISSUE IN REPLY2

C. STATEMENT OF THE CASE IN REPLY.....2

 1. Substantive Facts: Job Separation.....2

 a. Doug Zahn, the owner of the company, who alone had hired and managed Ms. Courtney, told her not to return to the job, a fact mischaracterized in the ESD’s brief.2

 b. The “new” managers of the successor employer stated on at least three different occasions that they had fired Ms. Courtney, something the ESD’s brief ignores.5

 2. Procedural Facts6

 The ESD’s Commissioner held Ms. Courtney had “quit” because she had given a “temporizing answer” and an “implied promise.”6

D. ARGUMENT IN REPLY7

 MS. COURTNEY WAS FIRED AND ON THREE OCCASIONS THE NEW MANAGERS OF THE SUCCESSOR EMPLOYER STATED THEY HAD FIRED HER; NO LEGAL FICTION OR CONSTRUCTION CAN TRANSFORM THOSE FACTS INTO A “QUIT,” WHICH REQUIRES AN AFFIRMATIVE ACT - NOT A FAILURE TO ACT - DEMONSTRATING AN INTENT TO QUIT.....7

E. CONCLUSION13

TABLE OF AUTHORITIES

Table of Cases

Washington Cases

<i>Bauer v. E.S.D.</i> , 126 Wn. App. 468, 108 P.3 rd 1240 (2005)	11, 12
<i>Korte v. E.S.D.</i> , 47 Wn. App. 296, 734 P.2d 939 (1987)	9, 10, 11
<i>Safeco Ins. Co. v. Meyering</i> , 102 Wn.2d 385, 687 P.2d 195 (1984)	8, 9
<i>Vergeyle v. ESD</i> , 28 Wn. App. 399, 623 P.2d 736 (1981)	15, 16, 20

Other Authorities

<i>Black's Law Dictionary</i> (Pocket ed. 1996)	10
Bryan A. Garner, <i>A Dictionary of Modern Legal Usage</i> (1987).....	11

A. INTRODUCTION

The “moving party” in Ms. Courtney’s job separation was her employer: The owner and sole manager of “The Manor, Inc.,” Douglas Zahn, repeatedly over several days told his employees, including Ms. Courtney, to not return to the jobsite because other parties had illegally taken over the business. CP Comm. Rec. 17; 68; 92, Finding of Fact (“FF”) 1; 93, FF 2.¹

The successor employer was also a “moving party” in the job separation when those who had taken over the business by physical force 1. sent Ms. Courtney a termination letter stating that she had been “dismissed” for absenteeism, 2. told the Employment Security Department that Ms. Courtney had been “discharged” for absenteeism, and 3. testified under oath that they “let[] her go” due to absenteeism. CP Comm. Rec. 28, 40, 86, 112. When the employer is the moving party in a job separation, it is treated as a discharge. Consequently, the ESD’s decision holding that Ms. Courtney “quit” her job and was not entitled to unemployment benefits was an error of law and the decision should be reversed.

¹ Thurston County Superior Court has transmitted the Administrative Record, aka Certified Appeals Board Record, in this matter as a single, stand-alone document; that Record is separately paginated so references in this brief to that record will appear as “CP Comm. Rec.,” meaning “Clerk’s Papers Commissioner’s Record.”

B. ISSUE IN REPLY

Was Ms. Courtney fired without proof of misconduct, making her eligible for unemployment benefits, when the owner who hired her and managed her work told her not to return to the job, when the successor employer's termination letter to her stated she was "discharged" for "repeated unexcused absenteeism," and when the successor employer's administrator testified the employer had fired Ms. Courtney as it had a "right" to do?

C. STATEMENT OF THE CASE IN REPLY

1. Substantive Facts: Job Separation.

- a. Doug Zahn, the owner of the company, who alone had hired and managed Ms. Courtney, told her not to return to the job, a fact mischaracterized in the ESD's brief.**

Douglas Zahn hired Ms. Courtney and was her manager as well as a 50% owner of the business. Comm. Rec. 93, FF 2. Ms. Courtney testified that he called her on May 2, 2010:

I received a voice mail [from Doug Zahn] saying that there was a family takeover and **to not go in to work until further notice.**

Comm. Rec. 17(emphasis added).

She also told of a meeting she and other Manor employees had with Mr. Zahn a few days later:

Doug Zahn and his wife Chris met with us to discuss the details of the *"hostile takeover"* and the future of the business with Doug as the 50% owner and manager. . . .
We were under his direction the entire time.

Comm. Rec. 68 (italics in original; bold added).

Ms. Courtney testified that during the period of time she had not come to work, it was her understanding that Mr. Zahn had told her not to come to work.

Question: And was it in your understanding during the time period that **Mr. Zahn told you not to come in to work?**

Ms. Courtney: **Yes it was.**

Comm. Rec. 28 (emphasis added).

The ESD's brief in this case mischaracterizes these facts by stating Zahn "suggested/directed" that Ms. Courtney not report to work. ESD Brief, p. 2. The quoted phrase is from an ALJ's "findings of fact" that the Commissioner adopted. Comm. Rec. 93, FF 3.

The ESD's brief fails to cite to anywhere in the record where the word "suggested," rather than "directed," is merited. In fact, the word "suggested" is a creation of the ALJ as the testimony given above shows. Neither Ms. Courtney nor Mr. Zahn, the only two

with knowledge of what was said between the two, used the word “suggested.”

Further, Ms. Courtney’s opening brief assigned error to the ALJ’s lengthy, meandering, muddled, and confused findings of fact 2 and 3 where the “suggested/directed” construction appears. Courtney Opening Brief, p. 11. Because Ms. Courtney has assigned error to those findings of fact it is necessary to cite other portions of the record that demonstrate why the findings are in error. The ESD’s brief complains that Ms. Courtney’s opening brief “cites to the administrative record regardless of whether the point in the record is reflected in a finding of fact,” stating this as its reason for giving a “counterstatement” of the case. ESD Brief, p. 2, n. 1. The ESD’s brief then goes on to do exactly the same thing: citing to the record regardless of “whether the point in the record is reflected in a finding of fact.”

Finally, Ms. Courtney testified that she had no intention to quit and had never told anyone that she had quit. Comm. Rec. 27. The ESD’s brief fails to mention this critical fact, critical especially because the ESD agrees that the intent of the employee is the key factor in determining the nature of a job separation. (“The question of whether a claimant has quit or been discharged must be

resolved on the basis of the employee's intent." [citation omitted]

ESD's Brief, p. 11.

- b. The "new" managers of the successor employer stated on at least three different occasions that they had fired Ms. Courtney, something the ESD's brief ignores.**

Carmella Mabbutt, the other owner of the business and one of Doug Zahn's sisters, signed the "Discharge Questionnaire" she filed with the Employment Security Department; it stated that "the final incident that caused the claimant to be **discharged**" was "continued unexcused absenteeism." Comm. Rec. 86 (emphasis added).

Michael Cohn, the employer's "General Administrator" after the "takeover," argued it was the "right" of the employer "to hire and to terminate employees as it deems necessary" and that his wife, Francesca Cohn, and her sister, Carmella Mabbutt, had fired Ms. Courtney:

[T]hey ended up letting her go for repeated unexcused absenteeism.

Comm. Rec. 40 (emphasis added).

Further, Ms. Mabbutt signed and sent a termination letter to Ms. Courtney that stated that "The Manor, Inc. **has dismissed you** as of May 8, 2010, for Repeated Unexcused Absenteeism."

Comm. Rec. 28, 112 (emphasis added). These facts are omitted from the ESD's "Counterstatement of the Case." ESD Brief, p. 2-4.

2. Procedural Facts

The ESD's Commissioner held Ms. Courtney had "quit" because she had given a "temporizing answer" and an "implied promise."

When Ms. Courtney appealed for unemployment benefits, an ALJ concluded in part as follows:

1. An employment separation will be adjudicated as a quit or as a discharge depending in large measure upon on [sic] whose initiative this separation occurs. This separation should be adjudicated as a voluntary quit as it **occurred at the initiative of the claimant who gave a temporizing answer** to new management's request that the claimant stay in employment, **then fails [sic] to follow-up on her implied promise** to respond within two days, or thereabouts, and lastly refused to take the telephone call from the corporate president or to respond to the message given by the corporate president in that telephone call.

Comm. Rec. 93, Conclusion of Law 1.

Adopting this conclusion, among others, the ESD's Commissioner affirmed the denial of benefits. Comm. Rec. 108-109. This conclusion, like the ESD's brief in this case, focuses entirely on Ms. Courtney's alleged failures to act as demonstrating an intent to quit. The law, however, requires an affirmative act demonstrating an intent to quit; such an act never occurred.

D. ARGUMENT IN REPLY

MS. COURTNEY WAS FIRED AND ON THREE OCCASIONS THE NEW MANAGERS OF THE SUCCESSOR EMPLOYER STATED THEY HAD FIRED HER; NO LEGAL FICTION OR CONSTRUCTION CAN TRANSFORM THOSE FACTS INTO A "QUIT," WHICH REQUIRES AN AFFIRMATIVE ACT - NOT A FAILURE TO ACT - DEMONSTRATING AN INTENT TO QUIT.

Quitting one's job for purposes of unemployment benefits requires *an affirmative act demonstrating an intent to quit*. The ESD's brief in this case tries and tries to make Ms. Courtney's alleged "intentional *failures to act*" into the required affirmative acts demonstrating an intent to quit. Such an attempt must fail.

If "intentional *failures to act*" were to constitute a quit, then every job separation that would otherwise be adjudicated a discharge could be treated as a quit, leading to absurd results.

If an employee *fails* to get to work on time, then rather than calling the job separation a discharge due to tardiness, it could be called a quit for failure to arrive at work on time; if an employee *fails* to come to work at all, then rather than calling a job separation a discharge due to repeated unexcused absences, it could be called a quit for an intentional failure to come to work; if an employee *fails*

to follow an employer's order, then rather than calling the job separation a discharge due to insubordination, it could be called a quit for an intentional failure to follow orders; if an employee fails to exercise due care on the job and injures someone, then rather than calling it a job separation due to gross negligence, it could be called a quit for failure to exercise reasonable care.

These absurd results are why the law requires that a "quit" be proved by an affirmative act demonstrating an intent to quit, rather than a series of alleged failures to act. "A voluntary termination requires a showing that an employee **intentionally terminated** her own employment." *Safeco Ins. Co. v. Meyering*, 102 Wn.2d 385, 393, 687 P.2d 195 (1984) (emphasis added).

The affirmative act demonstrating an intent to quit in the *Safeco Ins. Co.* case was the claimant unilaterally and voluntarily submitting her written resignation to her supervisors.

Another affirmative act demonstrating an intent to quit was demonstrated in *Vergeyle v. ESD*, 28 Wn. App. 399, 623 P.2d 736 (1981). In that case the claimant stated she would not come to work during the time she had originally been scheduled for a vacation and she signed a document – an affirmative act demonstrating an intent to quit – that stated as follows: "I will not

report for work beginning 9-2-77 thru 10-2-77. I understand termination of employment will result.” *Vergeyle v. ESD*, 28 Wn. App. 399, 401, 623 P.2d 736 (1981). The court found there that claimant “quit” because signing the document was “the commission of an act **which the employee knowingly intended to result in his discharge**” 28 Wn. App. at 402 (emphasis added).

Another affirmative act demonstrating an intent to quit, similar to the act in *Vergeyle*, was an employee’s explicit refusal to sign a written contract of employment, something that had never been required of her before. *Korte v. E.S.D.*, 47 Wn. App. 296, 734 P.2d 939 (1987). The contract was presented to the claimant as nonnegotiable and as a condition of her continued employment, which she had to sign within 72 hours. The claimant “refused and asked to continue negotiations.” 47 Wn. App. at 298. The court there held the intentional, affirmative act was that the claimant “intentionally rejected the condition[of signing a written contract]” and thus quit her job. *Id.* at 301.

The ESD’s brief in the current case attempts to transform Ms. Courtney’s alleged failure to answer the phone or failure to return a phone call or failure to return to the job site (“Ms. Courtney’s failure to report to her available job was a sufficient

intentional act such that the obvious result was that she voluntarily quit her employment.” ESD Brief, p. 16) as the equivalent of the affirmative acts in *Safeco Ins. Co., Vergelye*, and *Korte*, but the analogy fails. First, she did not submit a resignation letter, as in *Safeco*; second, she did not sign a document stating she understood that by her failure to come to work on certain days she was terminating her employment, as in *Vergelye*; and third, she did not refuse to sign a written contract of employment, as in *Korte*.²

In fact, the only way the Commissioner could transform the facts in Ms. Courtney's case into a quit would be to “construct” or to “construe” from her acts an alleged intent to quit. This is exactly what the ESD’s brief does as well – to take a set of facts in which Ms. Courtney testifies she had no intent to quit, in which the employer said repeatedly that it had fired her, and in which ESD imagines a series of alleged “failures to act” – and to create from those facts an alleged “intent to quit.”

The word “constructive” has a special meaning in the law and it applies exactly to what the Commissioner has done here:

² The ESD’s reliance on a Commissioner’s Decision, *In re Milholland*, Emp. Sec. Comm’r Dec. 1272 (1975), is unavailing, as are its reliance on other such decisions, since all of the Commissioner’s Decisions the ESD relies upon preceded the prevailing case law, *Safeco*, *Vergelye*, and *Korte*, by several years and preceded significant changes to the statute in 2004, 2009, and 2010.

“**constructive**, *adj.* Having an effect in law though not necessarily in fact; courts usually give something constructive effect for equitable reasons.” *Black’s Law Dictionary* 129 (Pocket ed. 1996).

Constructive is given a meaning in law that is unknown elsewhere; it “denotes that an act, statement, or other fact has an **effect in law** though it may not have had that **effect in fact**” (*O[xford] C[ompanion] [to] L[aw]*). Thus we have the phrases *constructive fraud* and *constructive trust* and other phrases describing legal FICTIONS, . . .

Bryan A. Garner, *A Dictionary of Modern Legal Usage* 146 (1987) (italics and capitals in original; bold added).

Indeed, the ESD’s brief agrees that the facts do not demonstrate an affirmative act of quitting: “Ms. Courtney did not specifically state she was quitting her job” ESD Brief, p. 13. Because this is true, as all agree, and because Ms. Courtney did none of the affirmative acts that demonstrated an intent to quit as those claimants in *Safeco*, *Vegeyle*, or *Korte* had done – then the only way the Commissioner can arrive at the conclusion that she quit was to construct that legal fiction. The Commissioner has “denote[d] that an act, statement, or other fact has an **effect in law** though it may not have had that **effect in fact**.” Therefore, what the Commissioner has done is construct a quit from Ms. Courtney’s alleged failures to act and constructive quits are rejected in

unemployment cases in Washington. *Bauer v. Employment Security Department*, 126 Wn. App. 468, 481, 108 P.3d 1240 (2005).

The ESD's brief in the current case attempts to distinguish *Bauer* and in so doing proves that the case is directly applicable to Ms. Courtney's case. In the ESD's discussion of *Bauer*, the ESD states that in *Bauer* the Commissioner based, mistakenly it turns out, the "quit" determination on the claimant's "failure" to do something, in that case, maintain his license. The ESD then correctly states that the Court of Appeals in *Bauer* "held that the driver did not voluntarily quit because he did not undertake intentional acts *with knowledge that he would lose his job.*" ESD's Brief, p. 18-19.

Neither did Ms. Courtney "undertake intentional acts with knowledge" that she would lose her job. She did indeed intentionally stay home because her employer and sole manager, Doug Zahn, told her and other employees to do so. But the ESD's brief argues that Ms. Courtney "quit" because she "failed" to return to work that was available for her. This was precisely the Commissioner's error in *Bauer* and in Ms. Courtney's case. Furthermore, just as in *Bauer*, as the ESD's brief agrees, neither

the claimant there nor Ms. Courtney engaged in intentional acts, knowing that they would lose their jobs.

Finally, once this Court determines that Ms. Courtney was fired and did not quit there is no reason to remand the case for further fact finding as the ESD requests in its brief. The ESD has had ample opportunity to determine the case correctly and in each instance Ms. Courtney and her representative argued that she had been fired and was entitled to benefits because there was no misconduct. CP Comm. Rec. 49, 56, 100-103. Therefore, there is no reason to remand the case for further consideration by the ESD.

E. CONCLUSION

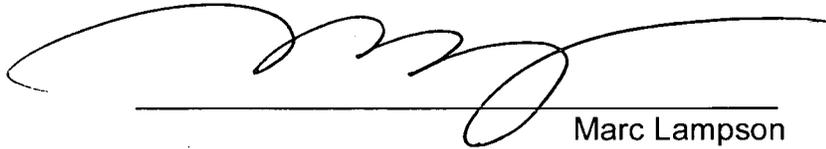
For the reasons stated above, Heather Courtney respectfully requests that this court reverse the Commissioner's Decision in this case because she did not quit her job, but was fired without proof of misconduct.

Petitioner also requests that reasonable attorney fees be awarded in an amount to be determined upon filing of a cost bill subsequent to a decision in this matter and under authority of RCW

50.32.160 that mandates attorney fees and costs be awarded upon reversal or modification of a Commissioner's Order.

Dated this 1st Day of November 2011.

Respectfully submitted,

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

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

COMM. DIVISION II
11/01/11 -2 P.11:02:12
STATE OF WASHINGTON
BY _____

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

HEATHER COURTNEY,
Appellant,
and
STATE OF WASHINGTON,
DEPARTMENT OF EMPLOYMENT
SECURITY,
Respondent.

No. 42550-6-II

CERTIFICATE OF SERVICE BY MAIL

CERTIFICATE

I certify that I emailed an electronic copy and mailed a paper copy of the Appellant's Reply Brief in this matter on November 1, 2011, to the Respondent ESD's attorney, Dionne Padilla-Huddleston, WSBA# 38356, Office of the Attorney General, PO Box 40110, Olympia, WA 98504-0110.

Dated this November 1, 2011.



Marc Lampson
WSBA # 14998
Attorney for Respondent