

NO. 42250-6

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

HEATHER COURTNEY

Appellant,

v.

STATE OF WASHINGTON, DEPARTMENT OF EMPLOYMENT
SECURITY,

Respondent.

BRIEF OF RESPONDENT

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I. INTRODUCTION

When an employee fails to report for work despite her employer having work available for her, she quits her job without good cause. The Employment Security Act requires an individual to take reasonable steps to preserve employment before leaving work and applying for unemployment benefits. Here, the Respondent, Employment Security Department, denied the benefits application of Appellant, Heather Courtney, because she failed to return to work despite having a job available to her. This failure caused her separation from employment such that she voluntarily terminated her employment.

The Department correctly determined Ms. Courtney did not establish good cause for voluntarily quitting her work and therefore properly denied her unemployment benefits. Because substantial evidence supports the Commissioner's findings of fact, and the conclusion that Ms. Courtney voluntarily quit her employment without good cause is free of error, the Department respectfully requests that this Court affirm the Commissioner's decision denying Ms. Courtney unemployment benefits.

II. ISSUES PRESENTED

1. Did the Commissioner properly conclude Ms. Courtney voluntarily quit her employment when she failed to report for work despite her employer having work available for her?
2. Did the Commissioner properly conclude Ms. Courtney did not establish good cause for leaving work when work was available to

her, but she failed to report to her workplace and therefore voluntarily quit?

III. COUNTERSTATEMENT OF THE CASE¹

Ms. Courtney worked for The Manor, Inc. (employer) from November 1, 2007 until April 28, 2010 as a full-time event manager. Commissioner's Record (Comm'r Rec.) at 16, 92 (Finding of Fact (FF) 1).² Ms. Courtney was on a scheduled vacation when on May 2, 2010, she was contacted by her manager Douglas Zhan. Comm. Rec. at 17, 92-93 (FF 2). Mr. Zahn was 50% owner of The Manor. Comm. Rec. at 14, 29. Francesca Cohn was the other 50% owner. Comm. Rec. at 20, 40.

Mr. Zahn informed Ms. Courtney there had been a family dispute and he had been removed from his position with the employer but that he was contesting his removal. Comm. Rec. at 17, 42, 93 (FF 2). He also "suggested/directed" Ms. Courtney not report to work until further notice and not have contact with The Manor's other owners. Comm. Rec. at 17, 28, 93 (FF 2).

After her conversation with Mr. Zahn, Ms. Courtney went to The Manor's business location to pick up her paycheck. Comm. Rec. at 17-18,

¹ Ms. Courtney's statement of the case cites to the administrative record regardless of whether the point in the record is reflected in a finding of fact. *See* Br. Appellant at 5-12. The Department provides this counterstatement of the case to present the facts as found by the Commissioner, which are the basis for this Court's review.

² For ease of reference, the certified administrative record is referred to as "Comm. Rec." as the Appellant has designated it in her brief. The number in parentheses represents either specific findings of fact (FF) or conclusions of law (CL) made by the Administrative Law Judge or the Commissioner.

93 (FF 2). While at the business location, Mr. Zahn's two sisters, Carmela Mabbutt (corporate president and manger) and Ms. Cohn (the other owner), told Ms. Courtney that nothing had changed regarding her employment, her job was safe and that the new management wanted her to continue working. Comm. Rec. at 15, 19, 29, 42, 93 (FF 2). Ms. Courtney told the sisters she needed "a few days" to consider the matter and the sisters agreed. Comm. Rec. at 19-21, 93 (FF 2).

Four days passed and Ms. Courtney did not go to work or contact her employer regarding whether she would continue working. Comm. Rec. at 22, 43, 93 (FF 3). On May 7, 2010, Ms. Mabbutt telephoned Ms. Courtney. Comm. Rec. at 24, 93 (FF 3). Ms. Courtney was home but chose not to answer her phone and instead waited and listened to the message her employer left. Comm. Rec. at 25, 93 (FF 3). Ms. Mabbutt's message informed Ms. Courtney that since Ms. Courtney had not contacted the employer, the employer considered Ms. Courtney as having resigned and the employment relationship terminated. Comm. Rec. at 24, 93 (FF 3). Despite this message, Ms. Courtney did not return Ms. Mabbutt's phone call or otherwise contact the employer. Comm. Rec. at 93 (FF 3). On May 8, 2010, Ms. Mabbutt sent Ms. Courtney a letter stating the employment relationship was terminated. Comm. Rec. at 28, 48, 112.

Ms. Courtney applied for unemployment benefits but her application was denied on grounds she voluntarily quit her employment without good cause. Comm. Rec. at 55-59. Ms. Courtney requested a hearing to contest the Department's determination. Following the hearing before the Office of Administrative Hearings (OAH), the Administrative Law Judge (ALJ), issued an Initial Order affirming the Department's decision. Comm. Rec. at 93-96. Ms. Courtney petitioned the Commissioner of the Department for review of the ALJ's decision. Comm. Rec. at 100-103. The Commissioner affirmed the Initial Order denying Ms. Courtney unemployment benefits. Comm. Rec. at 108-109. Ms. Courtney petitioned the superior court for judicial review and the superior court affirmed the Commissioner's Decision. Clerk's Papers (CP) at 4-9. This appeal followed.

IV. STANDARD OF REVIEW

Ms. Courtney seeks judicial review of the administrative decision of the Commissioner of the Employment Security Department. Judicial review of such decisions is governed by the Washington Administrative Procedures Act (APA) pursuant to RCW 34.05.510 and RCW 50.32.120. The court of appeals sits in the same position as the superior court on review of the agency action under the APA and applies the APA standards

directly to the administrative record. *Smith v. Emp't Sec. Dep't*, 155 Wn. App. 24, 32, 226 P.2d 263 (2010).

The Commissioner's decision is considered prima facie correct and the burden of demonstrating its invalidity is on the appellant. RCW 50.32.150; RCW 34.05.570(1)(a); *Smith*, 155 Wn. App. at 32. The court should only grant relief if "it determines that a person seeking judicial relief has been substantially prejudiced by the action complained of." RCW 34.05.570(1)(d).

A. Review of factual matters

Judicial review of disputed issues of fact must be limited to the agency record. RCW 34.05.558. Unchallenged findings of fact are verities on appeal. RAP 10.3(g); *Tapper v. Emp't Sec. Dep't*, 122 Wn.2d 397, 407, 858 P.2d 494 (1993). The court must uphold an agency's findings of fact must if they are supported by substantial evidence. *Wm. Dickson Co. v. Puget Sound Air Pollution Control Agency*, 81 Wn. App. 403, 411, 914 P.2d 750, 755 (1996). Substantial evidence is evidence that is "sufficient to persuade a rational, fair-minded person of the truth of the finding." *In re Estate of Jones*, 152 Wn.2d 1, 8, 93 P.3d 147 (2004). Evidence may be substantial enough to support a factual finding even if the evidence is conflicting and could lead to other reasonable interpretations. *Fred Hutchinson Cancer Research Ctr. v. Holman*, 107

Wn.2d 693, 713, 732 P.2d 974 (1987). The reviewing court should “view the evidence and the reasonable inferences therefrom in the light most favorable to the party that prevailed” at the administrative proceeding below. *Tapper*, 122 Wn.2d at 407.

B. Review of questions of law

Questions of law are subject to de novo review. *Id.* However, where an agency has expertise in a particular area, the court should accord substantial weight to the agency’s decision. *Markam Group, Inc. v. Dep’t of Emp’t Sec.*, 148 Wn. App. 555, 561, 200 P.2d 748 (2009); *Wm. Dickson Co.*, 81 Wn. App. at 407.

C. Review of mixed questions of law and fact

Ms. Courtney’s argument that the Commissioner erred in concluding she did not quit voluntarily but was discharged raises a mixed question of law and fact because it involves the meaning of the terms “voluntary quit” and “discharge” as applied to the facts found in this case. The manner in which an individual’s employment is terminated is a matter of fact. *In re Bauer*, Empl. Sec. Comm’r Dec.2d 220 (1976).³ A determination that the facts show a quit or discharge is a question of law. *Safeco Ins. Co. v. Meyering*, 102 Wn.2d 385, 390, 687 P.2d 195 (1984).

³ Under RCW 50.32.095, the Commissioner may designate certain Commissioners’ decisions as precedent, which serve as persuasive authority for this Court. See *Martini v. Emp’t Sec. Dep’t*, 98 Wn. App. 791, 795, 990 P.2d 981, 984 (2000).

When reviewing mixed questions of law and fact, the court must (1) determine which factual findings are supported by substantial evidence; (2) make a de novo determination of the correct law; and (3) apply the law to the applicable facts. *Tapper*, 122 Wn.2d at 403.

As with review of pure issues of fact, the court does not reweigh credibility or demeanor evidence when reviewing factual inferences made by the Commissioner before interpreting the law. *Wm. Dickson Co.*, 81 Wn. App. at 411. In addition, the court is not free to substitute its judgment of the facts for that of the agency. *Tapper*, 122 Wn.2d at 403. Accordingly, with respect to the question of whether Ms. Courtney voluntarily quit or was discharged, the court reviews factual findings to assess whether they are supported by substantial evidence in the record and then applies the law de novo to the facts as found by the Commissioner.

V. ARGUMENT

Ms. Courtney had employment available to her at The Manor. She was invited and urged to continue in her position with the employer by the new managers of the business. Despite these facts, she did not report to work or otherwise contact her employer. Under these circumstances, the Commissioner properly treated Ms. Courtney's separation from employment as a voluntary quit under the Employment Security Act and

correctly held that she did not qualify for benefits because she had not established good cause for quitting. This Court should affirm the Commissioner's decision because substantial evidence supports the findings of fact and there are no errors of law.

Ms. Courtney challenges the nature of her separation from employment with The Manor, Inc., claiming she was discharged and did not voluntarily quit. The primary issue before this Court is therefore whether Ms. Courtney quit or was fired.

The Employment Security Act "shall be liberally construed for the purpose of reducing *involuntary unemployment* and the suffering caused thereby to a minimum." RCW 50.01.010 (emphasis added). As such, the burden is on the claimant to establish her right to benefits under the Act, and this burden of proof never shifts during the course of proceedings. *Townsend v. Emp't Sec. Dep't*, 54 Wn.2d 532, 534, 341 P.2d 877 (1959); *In re Anderson*, 39 Wn.2d 356, 365, 235 P.2d 303 (1951). The Act requires that the Department analyze the facts of each case to determine what actually caused the employee's separation. *Safeco*, 102 Wn.2d at 390. Liberal construction of the Act does not require payment of benefits to a claimant who was responsible for her own separation from employment because she intentionally failed to return to work despite the employer expressly assuring the claimant her position was safe and the

employer wanted her to return. *See* Comm. Rec. at 15, 19, 29, 42, 93 (FF 2).

Even if this Court determines Ms. Courtney did not quit but was discharged, she may still be ineligible for benefits because she abandoned her position which was insubordination and an inexcusable absence. These acts amount to misconduct. *See* RCW 50.04.294. If the Court concludes Ms. Courtney was in fact discharged, the appropriate remedy is a remand to the Commissioner's Review Office for application of the law governing misconduct. *See* RCW 34.05.574(1).

A. Ms. Courtney voluntarily quit her employment.

There is substantial evidence in the record to support all of the Commissioner's findings, including the Commissioner's characterization of how the job separation occurred. It is important to emphasize that, "evidence may be substantial enough to support a factual finding even if the evidence is conflicting and could lead to other reasonable interpretations." *Fred Hutchinson Cancer Research Ctr.*, 107 Wn.2d at 713. The record establishes that after returning from a vacation, Ms. Courtney discovered there had been a dispute among the owners of The Manor. Comm. Rec. at 17, 42, 93 (FF 2). When she went to her workplace, one of The Manor's owners (Ms. Cohn) and its corporate president/manager (Ms. Mabutt) confirmed that Mr. Zahn was no longer

an acting manager. Comm. Rec. at 19, 29, 42, 93 (FF 2). They also specifically informed her that they wanted her to continue working. Comm. Rec. at 19, 29, 42, 93 (FF 2).

The crucial fact here is that Ms. Courtney never then returned to work or followed up with the employer regarding whether she would be returning to work despite her own testimony that she understood Ms. Cohn and Ms. Mabbutt were the new managers, that nothing else had changed, and that she had a job. CR at 19-22, 93 (FF 2). Even after Ms. Mabbutt phoned Ms. Courtney to let her know they considered her as having resigned, she never contacted the employer. Comm. Rec. at 24-25, 93 (FF 3). Instead, Ms. Courtney maintained contact only with Mr. Zahn even though The Manor, not Mr. Zahn, was her employer, her paychecks came from The Manor, and Mr. Zahn was no longer the acting manager. Comm. Rec. at 19-22, 29, 93 (FF 2). On these facts, the Commissioner properly concluded Ms. Courtney voluntarily quit.

The Act sets aside unemployment funds for the benefit of “persons unemployed through no fault of their own.” RCW 50.01.010. For a claimant to receive benefits, “the act requires that the reason for the unemployment be external and apart from the claimant.” *Safeco*, 102 Wn.2d at 392. A person is disqualified from receiving unemployment

benefits if she “left work voluntarily without good cause.” RCW 50.20.050(2)(a).

How a job separation is initially characterized, either as a voluntary quit or a discharge, will trigger which statutory section, and which analytical inquiry, will appropriately apply to the facts at issue. *Safeco*, 102 Wn.2d at 389. Whether RCW 50.20.050 (voluntary quit) or RCW 50.20.066 (discharge for misconduct) applies to a claim depends upon the event that caused the unemployment. *Id.*

“The terms ‘left work voluntarily’ in RCW 50.20.050 and ‘discharged’ in RCW 50.20.060 are legal terms, and the facts of a case determine which section controls.” *Read v. Emp’t Sec. Dep’t*, 62 Wn. App. 227, 233, 813 P.2d 1262 (1991), citing *Safeco*, 102 Wn.2d at 390. How the parties characterize the separation is not determinative because the facts that caused the unemployment control which law applies. *See id.* To leave work “voluntarily” requires “showing that an employee intentionally terminated her own employment.” *Id.* at 393. The question of whether a claimant has quit or been discharged must be resolved on the basis of the employee’s intent. *Korte v. Emp’t Sec. Dep’t*, 47 Wn. App. 296, 301, 734 P.2d 939 (1987); *see also In re Eickmeyer*, Empl. Sec. Comm’r Dec. 2d 670 (1981). While Ms. Courtney repeatedly points to the portions of the record in which the employer used the word dismissed,

discharged or misconduct (Br. Appellant at 11-12, 17),⁴ how the parties characterize a separation, while a factor to be considered, is not determinative of whether the separation was a quit or a discharge. *See Safeco*, 102 Wn.2d at 390-391.

In determining whether a job separation amounts to a quit or a discharge, the Department looks to identify who was the moving party in the separation. *In re Millholland*, Empl. Sec. Comm'r Dec. 1272 (1975). The Department also looks to the immediate cause for the job separation in determining whether it was a voluntary quit or a discharge. *In re Hensley*, Empl. Sec. Comm'r Dec.2d 636 (1980).

Here, the Commissioner correctly concluded Ms. Courtney initiated or was the moving party in her separation from employment because she chose not to go to work despite having a job. Comm. Rec. at 93 (CL 1). Ms. Courtney's employer made it clear that Ms. Courtney had a job available to her and the employer wanted her to return to that job. Comm. Rec. at 15, 19, 29, 42, 93 (FF 2). Instead of returning to work, Ms. Courtney chose not to report to the office or contact the employer,

⁴ Notably, the record establishes the employer also used words *consistent* with the separation being a voluntary quit such as selecting "quit" as the reason for Ms. Courtney's discharge on its statement to the Department (Commr. Rec. at 85), responding to the Department's fact-finding by stating Ms. Courtney voluntarily quit (Commr. Rec. at 89), telling Ms. Courtney verbally they thought she resigned (Commr. Rec. at 24), and stating in its separation letter that it was Ms. Courtney who "decided not to work" (Commr. Rec. at 112).

even failing to return the employer's phone call. These were intentional acts of job abandonment with the predictable result being that Ms. Courtney was no longer employed by The Manor. Since it was Ms. Courtney's intentional acts that resulted in her job separation, the Commissioner properly determined that she voluntarily quit.

Because the employer had work for Ms. Courtney, her separation from employment arose from her own refusal to go to work. It is contrary to the purpose of the Employment Security Act to grant benefits to someone who is no longer working due to their own decision not to accept available and suitable work. *See Tapper*, 122 Wn.2d at 407-08 ("The chief purposes of unemployment compensation are to minimize the disruption caused by involuntary inability to obtain unemployment and to provide support for unemployed workers as they seek new jobs."), citing RCW 50.01.010.

While Ms. Courtney did not specifically state she was quitting her job, she failed to contact her employer as she had agreed and failed to call her employer back when she received the telephone message from the employer explaining that her absence from work and non-communication was viewed as a resignation. Comm. Rec. 19, 24, 25, 42. It is hard to imagine what other result she would expect to occur other than a separation from her employment when she knew her employer had a

position for her but she did not report to work or otherwise contact the employer. *See Nordlund v. Dep't of Emp't Sec.*, 135 Wn. App. 515, 144 P.3d 1208 (2006) (where employee, among other failures, failed to seek permission for extended absence from work, employment separation was decided as voluntary quit). Because Ms. Courtney, by her own choice, stopped coming to work and stopped performing her regular duties, her separation was properly characterized as a voluntary quit.

The Commissioner's conclusion that Ms. Courtney initiated the job separation and therefore voluntarily terminated her employment is consistent with well settled case law. For example, in *Safeco*, an employee submitted her letter of resignation to her employer indicating she was giving them her two-week notice. *Safeco*, 102 Wn.2d at 386. However, the same day the employee turned in her letter of resignation, the employer informed her that she did not have to work during her notice period, but that she would still be paid for that time. *Id.* at 387. In finding the employee was not discharged but voluntarily quit, the court in *Safeco* noted "she unilaterally and voluntarily submitted her resignation to her supervisors, informing them that she was quitting." *Id.* at 393. Furthermore, the court emphasized the "employer had no intention of letting [the employee] go and only did so because the employee quit." *Id.*

Similarly here, the employer had no intention of letting

Ms. Courtney go prior to her failure to report to her available job. To the contrary, Ms. Mabutt and Ms. Cohn expressly informed Ms. Courtney her job was safe and they wanted her to keep working. Comm. Rec. at 15, 19, 29, 42, 93 (FF 2). It was only after Ms. Courtney intentionally failed to report to work or contact The Manor that the employer considered her as having quit.

In *Vergeyle v. Emp't Sec. Dep't*, 28 Wn. App. 399, 402, 623 P.2d 736 (1981), *overruled on others grounds by Davis v. Emp't Sec. Dep't*, 108 Wn.2d 272, 737 P.2d 1262 (1987), an employee who acknowledged in writing that her unauthorized absence would result in her discharge was held to have voluntarily terminated her employment. However, neither *Vergeyle* nor the Employment Security Act requires that an employee make such a written acknowledgment in order for the separation to be considered a voluntary quit. Rather, it is a voluntary quit if the claimant, "by his or her own choice, intentionally of his or her own free will, terminated the employment." *Id.* at 402 (*quoting Allen v. CORE Target City Youth Program*, 275 Md. 69, 79, 338 A.2d 237 (1975)).

Ms. Courtney implies that in order to voluntarily quit, an employee must submit a resignation letter, as in *Safeco*, or take similar action, as in *Vergeyle*. Therefore, she argues that since she did not submit a letter or otherwise state that she quit, the Commissioner erred in concluding she

voluntarily quit. This is incorrect. RCW 50.20.050 does not require the claimant to have taken any specific action or uttered any specific words in order for her claim to be properly adjudicated as a voluntary quit. Rather, to leave work voluntarily requires that the employee intentionally terminated her own employment. *Safeco*, 102 Wn.2d at 393. 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.

When an employer has expressed the willingness to retain an employee if she meets a particular condition, an employee who expressly and intentionally fails to meet that condition has voluntarily quit. *See Korte*, 47 Wn. App. at 301. In *Korte*, a noncontract worker, who was directed to leave her keys on her desk if she did not sign the employer's proposed contract, turned in her keys, and sought unemployment compensation. *Id.* at 297-99. In determining the nature of the separation, the court held the worker voluntarily quit her employment given that the employer was willing to retain the worker as an employee, subject to a condition, but the worker intentionally rejected the condition. *Id.* at 301. Similarly, here the employer was willing to retain Ms. Courtney as an employee despite the employer's management changes. Ms. Courtney was specifically informed she could have continued in her employment.

However, she intentionally failed to return to work and thereby voluntarily quit her employment.

In *Millholland*, the employee worked in Sekiu, Washington, but travelled to Seattle to purchase a new car when his car broke down. *Millholland*, Empl. Sec. Comm'r Dec. 1272. The employee was unable to procure a car over the weekend and called his employer to report that he would be unable to return to work for three days because of a lack of transportation. On the third day, the employee heard from his sister, whose husband worked for the employer, that he had been fired. *Id.* Believing he had been fired, the employee filed for unemployment benefits and requested his final paycheck. *Id.* Based on this information, the employer believed the employee had abandoned his job and sent him termination papers. Based on these facts, the Commissioner concluded that the employee was the moving party in the job separation. Although the employee may have believed that he had been fired, his belief was unfounded and not based on information supplied to him by the employer. Therefore, the job separation was deemed a quit.

Similar to *Millholland*, Ms. Courtney was the moving party in the job separation. She knew the employer had a job for her, wanted her to work and expected her to contact them. Yet Ms. Courtney, by her own

choice, failed to let the employer know when and if she was returning to work and never returned to work.

The Commissioner's findings that Ms. Courtney refused to return to available employment support the conclusion that Ms. Courtney was the moving party in terminating her employment. Comm. Rec. at 93 (CL 1). The Court should therefore uphold the Commissioner's conclusion that Ms. Courtney initiated the separation and therefore voluntarily quit her employment.

B. The Commissioner's decision does not rely on a theory of "constructive quit".

Ms. Courtney claims the Commissioner's conclusion that she voluntarily quit is an improper application of the "constructive quit" theory of job separation. Br. Appellant at 18-24. However, the Commissioner did not apply a "constructive quit" theory as discussed in *Bauer v. Emp't Sec. Dep't*, 126 Wn. App. 468, 108 P.3d 1240 (2005), which is thus distinguishable. There, a commercial driver was terminated from his job after his commercial driver's license was suspended for committing serious traffic infractions. *Id.* at 471-72. The Commissioner determined that because the driver failed to "maintain his license, a requisite of his job, he effectively quit his employment." *Id.* at 472 (quotation omitted). The court disagreed and held that the driver's

termination-triggering conduct—i.e., traffic violations that resulted in the loss of his commercial driving privilege—did not amount to a “voluntary” quit, especially because one of the violations was expressly found not to be intentional. *Id.* The *Bauer* court held that the driver did not voluntarily quit because he did not undertake intentional acts with knowledge that he would lose his job. The court indicated that, where circumstances demonstrate that a claimant undertakes affirmative and/or intentional acts with knowledge of the consequences, the claimant may be deemed to have voluntarily quit. *Id.* at 478.

Here, Ms. Courtney’s choice to refuse the offered job assignment was not an accidental driving violation as in *Bauer*, but an intentional decision freely made that she knew or should have known would lead to her separation from employment. Given that the acting managers of The Manor expressly advised Ms. Courtney that Mr. Zahn was no longer in charge and that Ms. Courtney had continued employment available, when Ms. Courtney decided to not report for work, she knew or should have known that termination would follow as a consequence. *See Bauer*, 126 Wn. App. at 478.

Ms. Courtney relies on language from *Brousseau v. Maine Emp’t Sec. Comm’n*, 470 A.2d 327 (Me. 1984), a decision of the Supreme Court of Maine, to support the proposition that a voluntary quit can only be

found when the employee takes the affirmative act of resigning. Br. Appellant at 19-20. However, neither *Bauer* nor *Brousseau* supports that proposition. On the facts, *Brousseau* is distinguishable in the same way as *Bauer*: the employee in *Brousseau* was a truck driver who was terminated from his position because he was convicted of DUI and thus lost his commercial driver's license. *Brousseau*, 470 A.2d at 328. Thus, the driver's act of losing his driver's license was not intentional and could not support a finding that he voluntarily terminated his position. *Id.* at 330.

Bauer quotes the following language from *Brousseau*:

[A]n individual leaves work 'voluntarily' only when freely making an affirmative choice to do so. The clear import of the statute is that it is the intentional act of leaving employment rather than the deliberate commission of an *antecedent act* which disqualifies an individual from eligibility for benefits.

Bauer, 126 Wn. App. at 476–77, quoting *Brousseau*, 470 A.2d at 330 (emphasis added). Based on this reasoning, acts that are not intentional limitations by the employee on his availability for work but traffic infractions committed off the job did not meet the statutory standard for voluntarily leaving work. *Bauer*, 126 Wn. App. at 476.

In contrast to *Brousseau*, Ms. Courtney failed to report to work or otherwise contact her employer regarding her continued employment. This is not an "antecedent act" committed off the job with consequences

for employment, nor an unintentional act that resulted in her being unavailable for work. Rather, Ms. Courtney agreed to work for this employer and then did not appear for work that was available for her.

C. Ms. Courtney has not established good cause to quit under RCW 50.20.050.

A person is generally ineligible to receive unemployment benefits when she leaves employment voluntarily, unless she had good cause to quit. RCW 50.20.050(2). A claimant can only establish good cause for quitting if she quit for one of the eleven enumerated factual scenarios in RCW 50.20.050(2)(b). The burden of establishing good cause to quit is on the claimant. *Townsend v. Emp't Sec. Dep't*, 54 Wn.2d 532, 534, 341 P.2d 877 (1959). Ms. Courtney does not argue in her brief that she had good cause to quit. It is the claimant's burden to establish eligibility for benefits and here Ms. Courtney fails to do so. RCW 50.32.150; *Leibbrand v. Emp't Sec. Dep't*, 107 Wn. App. 411, 417, 27 P.3d 1186 (2001). Therefore, she cannot establish good cause to quit and the Commissioner properly concluded Ms. Courtney should be denied benefits.

D. If this Court determines Ms. Courtney did not quit but was discharged, the appropriate remedy is a remand to the Commissioner's Review Office for the determination of additional issues.

Should the Court conclude Ms. Courtney did not quit but was discharged by her employer, the Department respectfully requests a

remand to the Department. *See* RCW 34.05.574(1). Ms. Courtney may still be ineligible for unemployment compensation if she was discharged for misconduct under RCW 50.20.066. Remand is appropriate so as to afford the Commissioner the opportunity to determine whether her conduct rose to the level of disqualifying misconduct. *See Safeco*, 102 Wn.2d at 394-395. In *Safeco*, the employment separation was initially decided as a discharge. On appeal however, the Court determined the employee voluntarily quit and remanded the matter to the Commissioner to determine if the employee could establish good cause to quit. *Id.* Since the Commissioner had previously applied the incorrect law, remand was the appropriate remedy so as to allow application of the correct law. *Id.*

Because the Commissioner concluded Ms. Courtney quit without good cause, he did not apply the misconduct statute. Accordingly, those determinations are not before this Court on review, and the appropriate remedy—should the Court conclude Ms. Courtney was discharged—is a remand to the Commissioner’s Review Office for a determination of that issue.

E. An award of attorney fees is only allowable if the Court reverses or modifies the decision of the Commissioner.

The Act provides for an award of attorney fees and court costs to a claimant only if the decision of the Commissioner is reversed or modified.

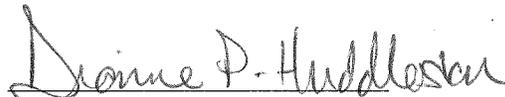
RCW 50.32.160. Only a reasonable attorney fee may be charged under the statute. *Id.* Here, the Court should refuse Ms. Courtney's request for attorney fees if it affirms the decision of the Commissioner. *See id.* If the Court reverses or modifies the Commissioner's decision, the Department reserves the right to present argument regarding the reasonableness of attorney fees granted.

VI. CONCLUSION

For the foregoing reasons, the Department respectfully requests that the Commissioner's decision be affirmed. Alternatively, should the Court find that Ms. Courtney did not quit but was discharged, the proper remedy would be a remand to the Commissioner for a determination of whether he was discharged for misconduct.

RESPECTFULLY SUBMITTED this 20th day of September, 2011.

ROBERT M. MCKENNA
Attorney General



Dionne Padilla-Huddleston
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ATTACHMENT

In Re Bauer, Empl. Sec. Comm'r Dec.2d 220

**Washington State
Employment Security Department
Precedential Decisions of Commissioner**

WEST[Home](#)**IN RE MILO D. BAUER PETITIONER**

Empl. Sec. Comm'r Dec.2d 220

August 31, 1976

◀ Term ▶

Empl. Sec. Comm'r Dec.2d 220, 1976 WL 183445 (WA)

Commissioner of the Employment Security Department
State of Washington

IN RE MILO D. ←BAUER→ PETITIONER

August 31, 1976

Case No.

220

Review No.

24896

Docket No.

5-12738

DECISION OF COMMISSIONER

MILO D. ←BAUER→ duly petitioned the undersigned Commissioner to review a Decision of an Appeal Tribunal entered in this matter on the 8th day of December, 1975. Having now completed a thorough examination of the record and files herein, thereby being fully advised in the premises, the Commissioner does hereby enter the following Findings of Fact and Conclusions.

FINDINGS OF FACT**I**

The interested employer timely appealed a Determination Notice holding that the petitioner was separated from employment but not for a disqualifying reason. On November 5, 1975, a hearing was held by the State of Montana at which the petitioner presented testimony. Thereafter, on November 19, 1975, the employer's testimony was taken in Olympia, Washington. The Decision of the Appeal Tribunal found that the petitioner had voluntarily left the employment without good cause. The Petition for Review here under consideration resulted.

II

The petitioner began working for the interested employer in April, 1972, and last worked on July 31, 1975. He customarily worked a 40-hour week, and at separation his rate of pay was \$800 per month. The petitioner was hired to do maintenance and custodial work. Several months after he began, he was registered by the Washington State Department of Motor Vehicles, Professional Licensing Division, as an apprentice embalmer and funeral director, a registration which the employer testified he routinely obtains for his employees. The petitioner understood that after two years' employment with this firm, the employer would send him to school to become a mortician; the employer denied making such a promise.

III

The petitioner testified that on July 31, 1975, the employer handed him a paycheck and told the petitioner, "I don't want you around, find another job." When asked by the Appeal Tribunal if he had made such a statement, the employer replied, "I don't remember that." The Tribunal then asked, "You would deny saying anything like that?", and the employer replied, "Not to my recollection." The petitioner contended that he was discharged because the employer did not want to provide mortician's schooling. The petitioner was satisfied with the pay and hours. The employer contended that if he had discharged the petitioner, he would only have done so after giving two weeks' notice and two weeks' pay. The employer admitted that he had previously told the petitioner that he did not seem suited to the work, and that if he found another job, to let the employer know.

IV

The petitioner thereupon left immediately for Canada to seek a teaching position (he held a Washington teaching certificate). He returned to the employer's place of business some five days later to turn in his key. The petitioner and the employer conversed. The petitioner testified that the employer asked where he had been and inquired why he had not been at work over the weekend, to which the petitioner replied that he had been directed to find another job and thought he was through. The employer's version of this conversation conflicts within itself: At one point he testified that he made it very clear to the petitioner that continued employment was available; at another point, he testified that, "I did not tell him he did not have one [a job]." And, "I was very careful to be sure to tell him he had a job because I did not want to go into this unemployment deal."

V

We find as a fact that the petitioner was discharged from this employment on July 31, 1975.

From the foregoing Findings of Fact, the Commissioner frames the following:

ISSUE

Was the petitioner discharged from this employment for reasons constituting misconduct connected with the work and therefore subject to disqualification under RCW 50.20.060?

From the Issue as framed, the Commissioner draws the following:

CONCLUSIONS

I

The Appeal Tribunal designated the job separation as a conclusion. The manner in which an individual's employment is terminated is clearly a matter of fact. In re Ross, 3 Comm. Dec. 337 (1956). For the reasons more fully set forth below, we must respectfully disagree that the petitioner voluntarily left this employment, but was involuntarily separated by the employer. The Administrative Law Judge was greatly hampered in arriving at his Decision, since he did not have both parties before him and thus was unable to judge the parties on the basis of credibility. We feel that on this point, an extensive quotation from a prior Commissioner's decision is helpful. That case, as here, involved a direct conflict in the testimony of the claimant and the former employer, but in a situation where both parties were before the Tribunal.

"There is, of course, no question concerning the fact that the Commissioner bears the ultimate responsibility for determining the facts of any case brought before her on a Petition for Review. As a guideline to fulfilling this responsibility, the Commissioner has utilized the same rules applied by a Superior Court when the latter reviews a Commissioner's Decision on appeal. On appeal to Court, the findings of fact of the Commissioner may only be overcome if there is no room for a difference of opinion and there is no substantial evidence upon which the Commissioner's findings could have been based. (See In re St. Paul & Tacoma Lumber Co., 7 Wn. (2d) 580). We are not saying that the Commissioner is bound by the Appeal Tribunal's Findings of Fact to the same extent that a Superior Court is bound by the Commissioner's findings; only that the rule adhered to by the Superior Court in reviewing Commissioner's findings, is a persuasive guideline for the Commissioner to invoke when reviewing the evidentiary support for an

Appeal Tribunal's Findings of Fact.

"When, as in the instant case, an Appeal Tribunal's Finding of Fact is determined upon a sharp conflict in the evidence, and the Tribunal has resolved the conflict in substantial part on the basis of credibility of the witnesses appearing before it, the Commissioner will accord great weight to the Appeal Tribunal's Finding of Fact, having in mind that the Appeal Examiner, not the Commissioner, had immediate and personal confrontation with the witnesses and was, therefore, in the advantaged position of judging their capacity for candor. While we recognize that we have the right to reverse the Appeal Tribunal's Finding of Fact, even though it rests principally upon a question of credibility, we find nothing in the present record which would dictate such a course of action: For this reason, we concur with the Appeal Tribunal . . ." In re Clarke, 6 Comm. Dec. 697 (1967).

II

The employer contended that the petitioner abandoned his employment by not returning between July 31, 1975, and some five days later. However, we are confronted with the petitioner's positive testimony that he was told he was not wanted and to find another job, versus the employer's lack of recall in face of the direct question of whether he did so state to the petitioner. We believe that the balance of the testimony by the parties lends substantial support to a finding that the petitioner was discharged on July 31, 1975.

III

It must then be determined whether the petitioner was discharged for misconduct connected with the work within the meaning of RCW 50.20.060. The statute is hereafter quoted, followed by the definition of misconduct set forth in Boynton Cab Co. v. Neubeck, 237 Wis. 249, 296 N.W. 636 (1941), as approved by the Washington Court of Appeals in Willard v. E.S.D., 10 Wn.App. 437, 517 P.2d 973, 977-78 (1974).

"50.20.060 Disqualification for unemployment due to misconduct. An individual shall be disqualified from benefits beginning with the first day of the calendar week in which he has been discharged or suspended for misconduct connected with his work and thereafter until he has obtained work and earned wages of not less than his suspended weekly benefit amount in each of five calendar weeks: Provided, That disqualification under this section shall not extend beyond the tenth calendar week following the week in which such individual was discharged or suspended."

"The intended meaning of the term 'misconduct,' . . . is limited to conduct evincing such wilful or wanton disregard of an employer's interests as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee, or in carelessness or negligence of such degree or recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to his employer. On the other hand mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good faith errors in judgment or discretion are not to be deemed 'misconduct' within the meaning of the statute." Willard v. E.S.D., supra.

IV

At this point, we believe it pertinent to note that RCW 18.39.040, Business and Professions, requires, among other things, that in order to obtain a license as an embalmer, the applicant must have completed a two-year course of training under a licensed embalmer in this state, in addition to a prescribed course of instruction in an embalming school. It is apparent that a misunderstanding arose between the parties in that somehow the petitioner must have believed that after the aforesaid statutory requirement of two years' training, mortician's schooling was promised him by the employer. Whether it was this misunderstanding or the fact that the employer felt the petitioner was not suited for the work, or some other reason not made apparent by the employer, it is clear that the employer no longer desired the services of the petitioner. We find nothing to indicate that the petitioner's acts constituted misconduct connected with the work, and he thus may not be disqualified from unemployment benefits. Accordingly,

IT IS HEREBY ORDERED that the Decision of the Appeal Tribunal entered in this matter on the 8th day of December, 1975, shall be SET ASIDE. The petitioner is not subject to disqualification pursuant to either the provisions of RCW 50.20.050 or RCW 50.20.060,

and benefits are accordingly allowed, provided he is otherwise qualified and eligible therefor.

DATED at Olympia, Washington, AUG 31 1976

Norward J. Brooks
Commissioner

Empl. Sec. Comm'r Dec.2d 220, 1976 WL 183445 (WA)

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 Doc 6 of 8 

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ATTACHMENT

In Re Eickmeyer, Empl. Sec. Comm'r Dec.2d 670

Washington State
Employment Security Department
Precedential Decisions of Commissioner

WEST[®][Home](#)**IN RE EICKMEYER, CLIFF G. PETITIONER**

Empl. Sec. Comm'r Dec.2d 670

May 15, 1981

◀ Term ▶

Empl. Sec. Comm'r Dec.2d 670, 1981 WL 394835 (WA)

Commissioner of the Employment Security Department
State of Washington

IN RE ◀EICKMEYER▶, CLIFF G. PETITIONER

May 15, 1981

Case No.

670

Review No.

38230

Docket No.

0-14792

DECISION OF COMMISSIONER

CLIFF G. ◀EICKMEYER▶, having duly petitioned the Commissioner for a review of a Decision of an Appeal Tribunal entered in this matter on the 19th day of January, 1981, and the undersigned, having carefully reviewed the entire record, thereby being fully advised in the premises, does hereby enter the following.

FINDINGS OF FACT**I**

Petitioner worked for the interested employer as a maintenance mechanic apprentice from October 25, 1978, until June 20, 1979, earning \$4.71 per hour. He was injured on the job on June 18, 1979, and on June 20, he went on a medical leave of absence which, according to the employer's personnel policy, was to continue so long as his physician certified his inability to work. On June 25, a physician certified that petitioner should remain off work from one to two weeks. In late July or early August, petitioner visited the offices of the employer, where his continued status as an employee was confirmed, at which time he was reminded that he must provide a statement from his physician as to his continuing disability. Petitioner promised to obtain such a statement. On August 29, having heard no more from petitioner, the employer wrote him a letter advising that if he had not responded by September 7, 1979, his status as an employee would be terminated. Petitioner never responded, and was terminated by the employer on the appointed date.

From the foregoing Findings of Fact, the undersigned frames the following.

ISSUE

Is petitioner subject to disqualification pursuant to the provisions of RCW 50.20.050 or RCW 50.20.060?

From the Issue framed, the undersigned draws the following.

CONCLUSIONS

RCW 50.20.050 imposes a disqualification of indefinite duration upon an individual who has voluntarily left work without good cause, such disqualification to begin with the first day of the calendar week during which the separation occurred. RCW 50.20.060 imposes a like disqualification upon an individual who has been discharged for misconduct connected with the work. A threshold consideration is whether petitioner's termination should be characterized as a voluntary quit or a discharge. The resolution of that aspect of the matter resides in the evidenced intent of the parties, if any; or the behavior of the parties taken in the light of the circumstances.

It is clear from the evidence adduced in this case that the employer had no intention of getting rid of petitioner, and that petitioner was terminated only as a consequence of his remaining absent and incommunicado, which rendered his continued status as an employee a mere fiction, and inconsistent with the employer's personnel policy. Petitioner has not explained for the record why he failed to produce a doctor's certificate of his continuing disability, as he promised in late July or early August; nor why he remained permanently absent and incommunicado after he made that promise. The most reasonable and logical conclusion to be drawn from the evidence is that petitioner's separation from subject employment was in the nature of a voluntary quit by abandonment, and the undersigned so concludes. Compare In re Ponti, Comm. Dec. (2nd) 270 (1977).

The next essential consideration is whether petitioner quit with good cause. The above cited quit status is paraphrased and amplified, in pertinent part, by WAC 192-16-013, as follows:

"General Rule. In order for an individual to establish good cause within the meaning of RCW 50.20.050(2)(b) for leaving work voluntarily because of his or her illness or disability or the illness, disability, or death of a member of his or her immediate family it must be satisfactorily demonstrated:

- (a) that he or she left work primarily because of such illness, disability, or death; and
- (b) that such illness, disability, or death necessitated his or her leaving work; and
- (c) that he or she first exhausted all reasonable alternatives prior to termination; including but not limited to:
 - (i) promptly notifying the employer of the reason for the absence; and (ii) prior to the time of separation, requesting reemployment when again able to return to work. (A request for reemployment made after the date of termination is not required to establish good cause within RCW 50.20.050(2)(b)).

(2) Exception. Notwithstanding the provisions of subsection (1) (c) above the individual asserting good cause may establish in certain instances that the otherwise reasonable alternatives would have been a futile act, thereby excusing the failure to exhaust such reasonable alternatives.

(3) Definitions. As used in subsection (1) above:

(a) 'disability' means the temporary or permanent loss of an individual's former capacity or capacities due to physical, mental or emotional impairment; and . . ."

Where the disabling effect of an accident or malady is not obvious by ordinary inspection, the best evidence of illness or disability is the statement of a physician. See In re Beraman, Comm. Dec. (2nd) 455 (1978).

Having provided no medical evidence of his condition at the time of his separation, petitioner has not established that he left work primarily because of illness or disability; or that illness or disability necessitated his leaving. In view of the circumstances that petitioner remained permanently absent and incommunicado, beginning several weeks prior to his termination, there is no showing that he made any reasonable effort to negotiate with the employer any reasonable alternative to quitting. It follows that petitioner must be deemed to have voluntarily left subject employment without good cause, within the meaning of RCW 50.20.050(2)(b) and the above excerpted portion of the administrative code, and that he is subject to the disqualification by statute provided. Furthermore, any benefits which have been paid to petitioner pursuant to this claim during the pendency of such disqualification are an overpayment under RCW 50.20.190. Now, therefore,

IT IS HEREBY ORDERED that the Decision of the Appeal Tribunal entered in this matter on the 19th day of January, 1981, shall be MODIFIED. Petitioner shall be disqualified from benefits, pursuant to RCW 50.20.050, beginning September 7, 1980, and until he has obtained work and earned wages of not less than his suspended weekly benefit amount in

each of five calendar weeks. Any benefits which have been paid to petitioner pursuant to this claim during the pendency of this disqualification are an overpayment under [RCW 50.20.190](#), in respect to which this matter is remanded to the Job Service Center for appropriate action.

DATED at Olympia, Washington, MAY 15 1981

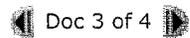
Robert E. Jackson
Commissioner's Delegate

Empl. Sec. Comm'r Dec.2d 670, 1981 WL 394835 (WA)

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ATTACHMENT

In Re Hensley, Empl. Sec. Comm'r Dec.2d 636

**Washington State
Employment Security Department
Precedential Decisions of Commissioner**

WEST®[Home](#)**IN RE CARLA R. HENSLEY PETITIONER**

Empl. Sec. Comm'r Dec.2d 636
September 12, 1980

Term 

Empl. Sec. Comm'r Dec.2d 636, 1980 WL 344313 (WA)

Commissioner of the Employment Security Department
State of Washington

IN RE CARLA R. ←HENSLEY→ PETITIONER

September 12, 1980

Case No.

636

Review No.

36563

Docket No.

0-05854

DECISION OF COMMISSIONER

CARLA R. ←HENSLEY→ duly petitioned the Commissioner for a review of a Decision of an Appeal Tribunal entered in this matter on the 26th day of June, 1980, and the undersigned, having carefully reviewed the entire record, thereby being fully advised in the premises, does hereby adopt Findings of Fact Nos. 1 through 9 of the Appeal Tribunal's Decision, quoted below, and adds the below Additional Findings of Fact.

"Findings of Fact

"1. The claimant voluntarily quit a job and opened a claim for benefits on July 9, 1979, and claimed benefits for the weeks ending July 14 through July 21, 1979. She established a weekly benefit available of \$52.00. Benefits were denied, and she filed no appeal. She began working for the interested employer on September 3, 1979, and had earnings in five or more weeks with the interested employer, sufficient to purge her earlier disqualification. She continued working for the interested employer until March 21, 1980. She reopened her claim for benefits on March 25, 1980, and claimed benefits for the weeks ending March 29 through May 10, 1980. Benefits were denied, and she filed a timely appeal.

"2. The claimant had been absent from work during early March, and had not called indicating the reason for her absence. As a result, she had been counseled by her employer.

"3. On March 21, the claimant was having continued difficulties with her husband. She was due to work at about 6:30 a.m., and arrived at about that time. About five minutes later, her husband arrived at the place of work and sat in the parking lot for a while. Then he left. Beginning at about 6:45 a.m., the claimant's husband began calling, asking to speak with the claimant. Each time, the claimant indicated that she did not wish to speak to her husband, and he was so advised. He called about seven times. The message given by her husband to the person on the telephone for the claimant was that she should please come home. On the last call, the claimant spoke briefly to her husband.

"4. After the final call, the claimant remarked to her co-worker that her husband had indicated he was going to kill himself. The claimant then borrowed an automobile to see if she could find a person who might be willing to work for her. She left and returned about 7:45 a.m. She left again, and then called from her own home, saying that she was

quitting her job. She returned again to the place of business at around 9:00 a.m., saying that she did not wish to quit, but that her husband had made her say that she did. The claimant remained and worked briefly.

"5. The claimant asked a customer who had worked for the same establishment before, but not as a waitress, if the customer would be willing to work for the claimant, so that she would be able to leave. The customer agreed, and the claimant left. The customer did an excellent job as temporary waitress, and continued until she was relieved. During the interim, the owner came to the restaurant, found the customer working, found everything going satisfactorily, and proceeded to another engagement, returning later.

"6. The claimant's husband had visited the place of business on earlier occasions, and at least twice had left only at the insistence of police who had been summoned.

"7. The claimant's employer felt that claimant's husband represented a threat to the business, in that his activities would tend to cause customers to go elsewhere. During the events of the morning of March 21, there were anywhere from five to fifteen customers present. It was a busy morning.

"8. The claimant left, and stayed with a friend, until she was called by the owner at about 1:00 p.m. At the owner's request, the claimant went to the place of business. The events of the morning were discussed, and the claimant was then told that she was fired.

"9. The employer was satisfied with the claimant's work, and was only concerned with the disruption which had been caused by the claimant's husband."

ADDITIONAL FINDINGS OF FACT

Petitioner was a member of Hotel, Restaurant and Bartenders Union, Local 360, with which the employer had a collective bargaining agreement. The agreement contains a grievance procedure. That procedure requires that the employee first discuss disputes with the employer; if no resolution of the dispute results therefrom, the union representative will then discuss the matter with the employer; if no agreement is then reached the dispute then goes into "compulsory" arbitration. No timetable for the grievance steps was set forth on the record. The arbitrator's decision could result in reinstatement with back pay and back benefits. Approximately three months after petitioner began this employment, she went to the union business agent about some undisclosed matter, but no grievance was filed for undisclosed reasons. Petitioner did not file a grievance over her discharge. She was not asked directly why she did not do so, but at one point in her testimony she stated that she would not work for the employer again, and at another point she indicated that "when you work for [this employer] you don't deal with the union. . . ."

From the foregoing Findings of Fact, the undersigned frames the following.

ISSUE

Was petitioner discharged for misconduct connected with the work pursuant to RCW 50.20.060, or did petitioner voluntarily quit work with good cause pursuant to RCW 50.20.050?

From the Issue as framed, the undersigned draws the following.

CONCLUSIONS

I

Many of the points set forth in the Appeal Tribunal's Conclusions express valid concepts. We must, however, respectfully disagree with both his interpretation of the cases cited and the ultimate result reached, namely that petitioner's discharge is converted to a voluntary quit without good cause because she did not grieve the discharge through her union.

It is a basic and long held premise that we look to the immediate cause for the job separation in determining whether the voluntary quit or discharge statute is applicable. In re Nicolj, Comm. Dec. 595 (1964); In re Taggart, Comm. Dec. 602 (1964); In re Moa, Comm. Dec. 1132 (1974). It is that immediate cause of the unemployment which is

relevant.

The evidence in this case is that the employer unilaterally fired petitioner because her marital problems were interfering with her work on the job and causing disruption to the employer's business. Whether or not a claimant for unemployment benefits takes reasonable measures to preserve the employment is not relevant to the situation in which the claimant has been unilaterally terminated by the employer. This is because there is no "good cause" requirement under the discharge statute, RCW 50.20.060. There is further no requirement under that statute or in cases decided under that statute that the claimant seek union assistance in preserving the employment, although grievance proceedings pursuant to collective bargaining agreement may be instructive but not binding. See Willard v. Employment Security Dept., 10 Wash. App. 437, 517 P.2d 973 (1974).

The Appeal Tribunal cites In re Yelland, Comm. Dec. 1205 (1975) and In re Peters, Comm. Dec. (2nd) 377 (1978) as authority for its theory of voluntary quit. Both cases dealt with a termination following a failure to pay union dues. In both cases, acts by the claimant prior to separation caused that separation (although a closer reading of Yelland yields a finding that the actual reason for the separation was not shown inasmuch as there was no apparent reason for the separation occurring when it did). The facts of In re Vergeyle, Comm. Dec. (2nd) 400 (1978) show that the claimant's action in voluntarily absenting herself from work in order to take a planned vacation was the event which preceded her job separation. The evidence in that case did not show that the claimant believed she had been fired and she was the moving party in bringing about her employment separation. And finally, In re Ponti, Comm. Dec. (2nd) 270 (1977), did not deal with termination under a collective bargaining agreement but with separation from employment under the Washington Administrative Code provisions applicable to the Higher Education Personnel Board, which provided that absence from work for three consecutive days without notice by the employee would be considered as abandonment of the job. The fact that the claimant was aware of the HEPB rule, his acts of absenting himself from the job without any word to the employer, and his failure to pursue the petition process under HEPB rules in spite of notification that this process was available to him, demonstrated by a preponderance of the evidence that the claimant voluntarily quit his job. There again, the case dealt with actions of the claimant prior to separation, which acts or omissions brought about the employment separation.

In summary, we disavow the Appeal Tribunal's theory that an employer discharge could be converted to a voluntary quit simply because the discharged employee did not grieve the discharge under a collective bargaining agreement. The employment relationship ends when the employer has fired an employee and the employee's acts or omissions after the firing as a general rule cannot change the character of the job separation. To hold otherwise would be to change the usual and ordinary meaning of the language of the discharge statute.

II

As the evidence is clear that petitioner was discharged, it must then be decided whether that discharge was for misconduct connected with the work.

While we do not condone petitioner's acts of March 21, 1979, of leaving the job without notifying the owner, the circumstances of her husband's actions and threat to kill himself constitute mitigating factors and misconduct will not be predicated on that basis. We can certainly understand that the employer deemed it mandatory to remove petitioner from its employ due to the disruption of its business caused by petitioner's husband. Although in any marital discord situation there is usually fault on the part of both parties, there is no showing in this case that petitioner directly caused or encouraged her husband's actions. We cannot conclude that petitioner acted in deliberate or intentional disregard of her employer's interests. Misconduct connected with the work has not been shown by a preponderance of the evidence. Accordingly,

IT IS HEREBY ORDERED that the Decision of the Appeal Tribunal entered in this matter on the 26th day of June, 1979, shall be SET ASIDE. Petitioner is not subject to the disqualifying provisions of RCW 50.20.050 or RCW 50.20.060, and benefits shall be accordingly allowed provided she is otherwise qualified and eligible therefor.

DATED at Olympia, Washington, SEP 12 1980

Patricia L. Stidham
Commissioner's Delegate

Empl. Sec. Comm'r Dec.2d 636, 1980 WL 344313 (WA)

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 Term

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ATTACHMENT

In Re Ernest Millholand, Empl. Sec. Comm'r Dec. 1272

**Washington State
Employment Security Department
Precedential Decisions of Commissioner**

WEST®[Home](#)**IN RE ERNEST MILLHOLLAND**

Empl. Sec. Comm'r Dec. 1272

June 26, 1975

Term 

Empl. Sec. Comm'r Dec. 1272, 1975 WL 175296 (WA)

Commissioner of the Employment Security Department
State of Washington

IN RE ERNEST ←MILLHOLLAND →

June 26, 1975

Case No.

1272

Review No.

22349

Docket No.

5-00800

DECISION OF COMMISSIONER

On the 13th day of March, 1975, the undersigned Commissioner issued an Order taking the above-entitled matter under advisement on his own motion for the purpose of reviewing a Decision of an Appeal Tribunal entered with respect thereto on the 3rd day of March, 1975. Having now completed a thorough examination of the record and files herein, thereby being fully advised in the premises, the Commissioner does hereby enter the following:

FINDINGS OF FACT**I**

Claimant was employed about four months by Crown Zellenbach as a rigger at the company's logging operations near Sekiu, Washington. He last worked in that employment on Friday, November 22, 1974.

II

On or about November 22, claimant's automobile broke down. On Saturday, November 23, 1974, claimant and his wife travelled to Seattle, Washington, apparently for the purpose, in part, of buying another automobile.

III

Claimant was unable to procure another automobile over the weekend of November 23 and 24, 1974. On Sunday, November 24, 1974, while still in Seattle, claimant telephoned a co-worker and requested that individual to advise the foreman that he would be unable to go to work Monday, November 25, 1974, because of a lack of transportation. (Claimant was scheduled to work November 25, 26 and 27, 1974.) The co-worker conveyed claimant's message to the foreman.

IV

Claimant did not report for work on November 25, 26 and 27, 1974. On Tuesday, November 26, he telephoned the company's personnel office from Seattle, advised that he was still without transportation, and requested a \$100 payroll advance. The personnel office forwarded the advance to claimant.

V

On or about Wednesday, November 27, 1974, claimant had a telephone conversation with his sister, who advised him that his brother-in-law had heard that he (claimant) had been fired. Claimant's brother-in-law also worked at Crown Zellerbach. The source of the brother-in-law's information on this point is unknown.

VI

Thursday and Friday, November 28 and 29, 1974, were holidays for Crown Zellerbach employees. On Friday, November 29, believing that he had been terminated, claimant filed a claim for unemployment compensation at the Seattle local office.

VII

On Monday, December 2, 1974, claimant telephoned the payroll clerk at Crown Zellerbach and requested his final paycheck. The payroll clerk advised that since claimant had not terminated his employment he would have to wait until the next regular payday for his payroll check.

VIII

On December 2, 1974, the personnel office received notice from the Seattle local office that claimant had initiated a claim for unemployment insurance. The company had expected claimant to return to work on December 2, 1974, although it had heard rumors that claimant might be quitting. Upon receiving notice of claimant's claim for unemployment compensation, the personnel office was of the understanding that claimant had abandoned his job, and thus it prepared his termination papers.

IX

Claimant had a good record with Crown Zellerbach, and the company did not intend to fire him for his absences from work.

X

Sometime after December 2, 1974, claimant returned to the Sekiu area and found the termination papers that had been mailed to him. As far as we can tell from the record, he made no further effort to contact the employer about the matter.

From the foregoing Findings of Fact, the Commissioner frames the following:

ISSUES

Did claimant leave work voluntarily or was he discharged? If he left work voluntarily, is he subject to disqualification under RCW 50.20.050?

From the Issues as framed, the Commissioner draws the following:

CONCLUSIONS

The Appeal Tribunal concluded that claimant was discharged from his employment on December 2, 1974. Having carefully reviewed the record, we find ourselves unable to agree with that characterization of the job separation.

It seems clear that the employer did not intend to discharge the claimant on December 2, 1974. In preparing the termination papers, it was simply responding to the apparent fact

that claimant had permanently abandoned his job. The previous week the claimant had indeed abandoned his job under the mistaken belief that he had been discharged. While claimant may have believed that he had been fired and thus had nothing to abandon, his belief in this regard was unfounded and was not based on information supplied to him by the employer. Although both claimant and the employer were mistaken as to the intentions of each other, it is manifest that claimant was the moving party to the severance of the employee-employer relationship. In our opinion, claimant must be held to have left work voluntarily.

Having decided that claimant left work voluntarily, the issue reduces itself to the question of whether he had good cause for doing so within the meaning of RCW 50.20.050. His reason for leaving reposed in the fact that his sister had advised him that his brother-in-law had heard that he had been fired. Claimant made no effort to confirm this advise by contacting the employer. In fact, on December 2, 1974, he received advice from the payroll clerk that he had not been terminated. In our opinion, he did not act as a reasonably prudent person in abandoning his job simply on the basis of the information he had received from his sister. We conclude that he left work voluntarily without good cause and that the job separation occurred on November 29, 1974, the day that he opened his claim for unemployment compensation. Accordingly,

IT IS HEREBY ORDERED that the Decision of the Appeal Tribunal entered in this matter on the 3rd day of March, 1975, shall be SET ASIDE. Benefits shall be denied the claimant beginning November 24, 1974, and until he has obtained work and earned wages of not less than his suspended weekly benefit amount in each of five calendar weeks: PROVIDED, the disqualification shall not extend beyond the tenth calendar week following the week in which he left his work voluntarily without good cause, or February 8, 1975, pursuant to the provisions of RCW 50.20.050.

DATED at Olympia, Washington, JUN 26 1975

Norward J. Brooks
Commissioner

Empl. Sec. Comm'r Dec. 1272, 1975 WL 175296 (WA)

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

HEATHER COURTNEY,

Appellant,

v.

STATE OF WASHINGTON,
DEPARTMENT OF EMPLOYMENT
SECURITY,

Respondent.

CERTIFICATE OF
SERVICE

I, Rain Dineen, certify that I cause a copy of **Brief of Respondent** to be served on all parties or their counsel of record via electronic mail and US Mail via Consolidated Mail service on the date below to:

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RESPECTFULLY SUBMITTED this 28th day of September 2011.


RAIN DINEEN, Legal Assistant

WASHINGTON STATE ATTORNEY GENERAL

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