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SUPREME COURT OF THE STATE OF WASHINGTON

LINDA DARKENWALD,

Petitioner,

v.

STATE OF WASHINGTON EMPLOYMENT
SECURITY DEPARTMENT,

Respondent.

**EMPLOYMENT SECURITY DEPARTMENT'S RESPONSE TO
BRIEFS OF AMICI CURIAE**

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I. INTRODUCTION

The Brief Of Amici Curiae Northwest Justice Project And Legal Voice And Washington Employment Lawyer Association (NJP Brief) focuses on WAC 192-150-150 (the “layoff rule”). That rule determines if an employee’s separation after refusing a change in work conditions can be treated like a layoff, where an employee can refuse an unsuitable different job, rather than like a voluntary quit, where an employee must show good cause. The amici mischaracterize the layoff rule because they do not inform the Court that the rule defines a substantial change in working conditions. Under that definition, the rule would not apply to the working conditions offered to Darkenwald. Moreover, amici ignore the fact that Darkenwald did not raise the rule before the agency or the lower courts, which creates two separate barriers to addressing the theory for the first time in this Court. *See* RCW 34.05.554; RAP 2.5(a).

In those instances where the NJP Brief addresses the issues presented by the petition, amici’s arguments confirm that the Department and the Court of Appeals were correct. First, the NJP Brief confirms Darkenwald did not meet the disability good cause statute. *See infra* Part A. Second, amici virtually concede that RCW 50.20.119 is not, as argued by Darkenwald, a separate good cause for quitting. Amici’s concession is implicit in their argument that Darkenwald could make use

of section 119 if her decision to quit was treated as a layoff under WAC 192-150-150. Moreover, they agree that section 119, as written, allows certain job-seekers to decline full-time work without losing benefits. *See infra* Part B.¹

Review of amici's layoff rule argument is barred by statute, RCW 34.05.554, and court rules, RAP 2.5(a) and RAP 13.7. But if the Court were to consider the layoff rule raised for the first time by amici, the Court should reject their argument. Darkenwald cannot meet the rule because her employer did not offer a "substantial change in working conditions" as defined by the rule. Specifically, the NJP Brief fails to show—and the record cannot support—that Dr. Yamaguchi's request that Darkenwald return to a three-day-a-week schedule changed her job into conditions not generally prevailing in the relevant labor market. Nor did Darkenwald claim or prove that her employment contract did not allow this change. These are the requirements of WAC 192-150-150 for claiming a voluntary quit in the face of changed work conditions was a layoff.

¹ Amicus Curiae Association of Washington Businesses (AWB Brief) concurs in the Department's arguments on the two issues presented by Darkenwald. The AWB Brief is correct where it explains that good cause is defined by statute, that good cause must be shown when an employee quits, that Darkenwald did not meet disability good cause, and that RCW 50.20.119 does not apply. The Department strongly disagrees with AWB's argument that the Employment Security Act is "narrowly construed" because that would be contrary to legislative intent and case law. But while the Act is liberally construed, it cannot be rewritten. Darkenwald's two arguments are legally wrong and inconsistent with the findings, and the AWB's narrow construction point is immaterial.

II. ARGUMENT

Before addressing the NJP Brief's argument that Darkenwald's quit fits WAC 192-150-150, the Court should first review how the brief supports the Department on the two issues Darkenwald actually raised in her Petition For Review and briefs. Amici confirm that the quit does not meet the disability good cause and amici make no showing that RCW 50.20.119 creates an independent good cause to quit.

A. **The Northwest Justice Project Brief Confirms Darkenwald Does Not Meet Disability Good Cause for Quitting**

Darkenwald claims she had "good cause" to quit under RCW 50.20.050(2)(b)(ii) due to disability or illness. Pet. at 9; Suppl. Br. of Pet'r at 15. But the findings did not show a disability necessitated quitting. Rather, Darkenwald ended her employment for personal reasons that did not provide a disability good cause. AR at 89 (FF 15), 90 (FF 17), 92 (CL 9). And Darkenwald never informed her employer a medical condition prevented her from working additional hours and never pursued alternatives to quitting as required to show good cause. AR at 89 (FF 15), 90 (FF 17); Suppl. Br. of Dep't at 12-18.

The NJP Brief confirms that Darkenwald did not meet the statutory requirements for quitting based on a disability. First, the NJP Brief agrees that "a worker who voluntarily quits a job because of an illness or disabil-

ity must provide a physician's statement to support any restrictions on the type or hours of work she may perform." NJP Br. at 18. Amici agree this requirement ensures that employers can accommodate an employee before a quit. NJP Br. at 18. Amici agree that Darkenwald did not notify her employer or provide a physician statement showing a need to quit. NJP Br. at 19 (conceding the "absence of medical evidence"). Similarly, amici agree with the Court of Appeals that good cause for illness or disability must be the "primary" reason for quitting and do not dispute the findings that Darkenwald's primary reason for quitting was not disability. NJP Br. at 19. Finally, the amici agree that the findings do not meet the disability good cause statute when they invoke the layoff rule (WAC 192-150-150) to bypass the disability good cause statute. NJP Br. at 18-19.

B. The NJP Amici Brief Recognizes that RCW 50.20.119 Applies to Job-Seekers, Confirming Darkenwald is Wrong When She Argues that the Statute Defines a Good Cause for Quitting

Darkenwald argues that RCW 50.20.119 should be considered as a "good cause" for a worker to quit despite a separate statutory provision listing exclusive "good cause" reasons to quit. Suppl. Br. of Pet'r at 13 (the Court should "constru[e] RCW 50.20.119 as deeming a part-time worker's refusal to accept full time work in order to preserve her part-time worker status as a 'quit for good cause'"). Under Darkenwald's theory, section 119 provides good cause to quit because: (1) she worked two days

a week during recent years; and (2) her employer asked her to return to working three days a week. Suppl. Br. of Pet'r at 15.

The NJP Brief shows why the Court should reject Darkenwald's argument stretching section 119 to excuse her quit. Amici agree that "most claimants are disqualified from unemployment benefits if they do not apply for or accept full-time work" and that section 119 was adopted so part-time workers seeking new work would not lose benefits on that basis. NJP Br. at 1-2. Amici also agree that section 119 allows unemployed part-time workers to decline offers for full-time work without imperiling benefits. In order to trigger section 119, the NJP Brief then argues that Darkenwald is an employee who refused work under WAC 192-150-150. Thus, with regard to Darkenwald's theory that section 119 defines good cause to quit, the NJP Brief does not contradict the Department. Section 119 applies to unemployed part-time employees who qualify for benefits; it is not a good cause to quit.

C. Darkenwald Did Not Raise or Preserve a Claim that her Quit was a Refusal of Work Under WAC 192-150-150

Darkenwald's administrative appeal did not assert a refusal of work under WAC 192-150-150, and the Commissioner's findings do not establish her quit met the factual requirements of that rule. Accordingly, the Court should conclude, first, that it will not decide an issue raised only

by amicus. *State v. Eriksen*, 172 Wn.2d 506, 515 n.6, 259 P.3d 1079 (2011) (“We need not address issues raised only by amici.”). Second, Darkenwald waived the issue by failing to raise it to the agency as required by RCW 34.05.554. Third, she again waived the issue by failing to raise it in the lower courts as required by RAP 2.5(a).

1. The Administrative Procedure Act bars review of a claim based on the layoff rule because it was not raised to the agency

The Administrative Procedure Act defines the review and error correction power for judicial review. Under RCW 34.05.554(1): “Issues not raised before the agency may not be raised on” judicial review. As this Court recognizes, this “is more than simply a technical rule of appellate procedure; instead, it serves an important policy purpose in protecting the integrity of administrative decisionmaking.” *King County v. Boundary Review Bd. for King County*, 122 Wn.2d 648, 668, 860 P.2d 1024 (1993). RCW 34.05.554 furthers important purposes by:

- (1) discouraging the frequent and deliberate flouting of administrative processes;
- (2) protecting agency autonomy by allowing an agency the first opportunity to apply its expertise, exercise its discretion, and correct its errors;
- (3) aiding judicial review by promoting the development of facts during the administrative proceeding; and
- (4) promoting judicial economy by reducing duplication, and perhaps even obviating judicial involvement.

Id. at 669 (quoting *Fertilizer Inst. v. U.S. Env'tl. Prot. Agency*, 935 F.2d 1303, 1312-13 (D.C. Cir. 1991)). Each of these purposes is relevant to amici's attempt to add a new claim not raised to the agency.

First, the Commissioner was not asked to apply WAC 192-150-150. As discussed below, that rule requires factual showings that were not made. The rule does not, as the NJP Brief would have it, simply allow Darkenwald to refuse a change to a three-day schedule because she had recently worked two days a week. Second, by raising the layoff rule now, the agency was not given a chance to apply the rule and, if needed, correct its agency action. Third, judicial review of the agency's application of the rule is impossible, because there are no findings on the prerequisites for the rule, such as whether the change in working conditions resulted in conditions not prevailing in the local labor market. WAC 192-150-150(4). And judicial review is grossly inefficient if this matter is remanded now to develop the facts. Fourth, by raising the layoff rule in an amicus brief to the Supreme Court, the NJP Brief defies judicial economy. Thus, for every reason given by this Court in the *King County* case, RCW 34.05.554(1) bars review of the layoff rule issue raised by amici.

2. RAP 2.5(a) bars review of the layoff rule issue because it was not raised to the lower courts

An appellate court does not normally decide issues not first presented to the superior court. RAP 2.5(a) (“The appellate court may refuse to review any claim of error which was not raised in the trial court.”). Similarly, this Court does not decide issues not presented in a petition for review. RAP 13.7(b) (“If the Supreme Court accepts review of a Court of Appeals decision, the Supreme Court will review only the questions raised in the motion for discretionary review”); *Ongom v. Dep’t of Health*, 159 Wn.2d 132, 137 n.3, 148 P.3d 1029 (2006), *overruled on other grounds by Hardee v. Dep’t of Soc. & Health Servs.*, 172 Wn.2d 1, 256 P.3d 339 (2011). Both rules apply here.

RAP 2.5(a) ensures “fairness due both the trial judge or agency and a litigant’s adversary, [and] a sense that one’s opponent should have a chance to defend, explain, or rebut some challenged ruling[.]” *See generally State v. Bertrand*, 165 Wn. App. 393, 406, 267 P.3d 511 (2011) (Quinn-Brintnall, J., concurring) (quoting Frank M. Coffin, *On Appeal: Courts, Lawyering, and Judging* 84-85 (1994)). “[I]f appellate courts were to consider some unpreserved issues . . . [it] would be an incentive for game-playing by counsel, for acquiescing through silence when risky rulings are made, and, when they can no longer be corrected at the trial

level, unveiling them as new weapons on appeal.” *Id.* at 406-07 (quoting Coffin). RAP 2.5(a) reflects Washington’s recognition of “the fundamental fairness of requiring parties to preserve issues they wish to present to the appellate courts for review.” *Id.* at 407. Darkenwald did not raise issues concerning the layoff rule to the superior court or Court of Appeals, and this Court should decline amici’s invitation to add the issue.

D. Darkenwald Did Not Prove and the Findings Do Not Show a De Facto Layoff Under WAC 192-150-150

If the Court looks into the layoff rule, it must start with the principle that Darkenwald has the burden to prove eligibility by showing she was offered substantially changed working conditions as defined under the rule. *Jacobs v. Office of Unemployment Comp. & Placement*, 27 Wn.2d 641, 651, 179 P.2d 707 (1947) (“burden of proof to establish a claimant’s rights to benefits under the act rests upon the claimant”). It must also start with the corollary rule that “the absence of a finding of fact in favor of the party with the burden of proof as to a disputed issue is the equivalent of a finding against the party on that issue.” *Yakima Police Patrolmen’s Ass’n v. City of Yakima*, 153 Wn. App. 541, 562, 222 P.3d 1217 (2009).

WAC 192-150-150 provides that it implements RCW 50.20.110 and 26 U.S.C. § 3304(a)(5). The rule explains that the purpose of those laws is to ensure:

[Y]ou cannot be denied benefits if you refuse to accept new work when the wages, hours, or other working conditions are substantially less favorable *than those prevailing for similar work in your local labor market.*

WAC 192-150-150(1) (emphasis added). The employer's request that Darkenwald return to working three days a week does not involve "substantially less favorable" wages, hours, or working conditions "than those prevailing for similar work in your local labor market."²

Amici claim that Darkenwald would "almost certainly" have been eligible for benefits under WAC 192-150-150. NJP Br. at 8. But amici urge the wrong conclusion only because their brief stops short of reviewing the requirements of the rule. In subsection (3), the rule explains the framework for analysis if a person claims to have "resign[ed] rather than accept changes in working conditions."

(a) If the changes in working conditions are not substantial, the department will consider you to have voluntarily quit work.

² Similarly, federal law does not aid Darkenwald's claim. It prevent states from denying unemployment benefits "for refusing to accept new work under any of the following conditions":

(A) if the position offered is vacant due directly to a strike, lockout, or other labor dispute;

(B) if the wages, hours, or other conditions of the work offered are substantially less favorable to the individual than those prevailing for similar work in the locality;

(C) if as a condition of being employed the individual would be required to join a company union or to resign from or refrain from joining any bona fide labor organization[.]

26 U.S.C. § 3304(a)(5). These conditions are not implicated by Darkenwald's quit.

(b) If there is a substantial change in working conditions so as to constitute an offer of new work and the change is not authorized or implied by the original employment agreement, the department will treat the separation as a layoff due to lack of work and adjudicate the refusal of new work under RCW 50.20.080.

WAC 192-150-150(3). The NJP Brief then relies on the first sentence of the definition of “substantial change in working conditions,” which requires “a material change that is significant in terms of amount, degree, or impact as opposed to a change that is relatively minor or trivial.” WAC 192-150-150(4)(d). The NJP Brief omits, and fails to apply, the second sentence of the definition, which expressly defines circumstances that are “not substantial” changes:

A change in working conditions is not substantial if the conditions prevailing after the change are those generally prevailing for other workers performing the same or similar work in your local labor market area.

WAC 192-150-150(4)(d) (emphasis added); *see* 26 U.S.C. § 3304(a)(5)(B) (hours or other working conditions must be “substantially less favorable to the individual than those prevailing for similar work in the locality”).

The NJP Brief cannot (and does not even attempt to) show that the Commissioner could have found that three-day-a-week dental hygienist work was not a generally prevailing condition for other workers performing the same work in the local labor market. There are no findings that a three-day-a-week part-time job is not a condition generally

prevailing for dental hygienists. That missing (and unlikely) fact alone defeats reliance on the rule, and perhaps explains amici's failure to address the total definition. But Darkenwald also failed to show that "the change is not authorized or implied by the original employment agreement," required by WAC 192-150-150(3)(b).³

If the plain language of the rule were not enough, the two amici briefs outline sound policy reasons why this Court should not interpret the rule to conclude that an employer's request to increase work to three days a week triggers a unilateral right to quit. As noted by the NJP Brief, many workers are underemployed and desire more work. NJP Br. at 1 ("Many . . . workers would prefer to work full-time, and would happily accept an increase to full-time hours[.]"). But as explained by the AWB Brief, businesses will rethink whether to offer part-time work if part-time schedules are so unalterable that a request to work three days a week triggers a right to quit and obtain benefits. AWB Br. at 8.

Naturally, the Department agrees a part-time employee can rely on WAC 192-150-150 and demonstrate that a separation occurred after an

³ Two precedential decisions of the Commissioner confirm the rule is not applicable to a resignation based on a subjective preference for a particular part-time schedule. *In re Conchie*, No. 05-2011-09113 (Wash. Dep't of Emp't Sec. Dec. No 968, 2d Series Apr. 29, 2011) (examining particular facts of employment to determine that job had changed to an "on call" job that was not "prevailing" for consultants in that industry); *In re Eichelberg*, No. 02-2010-21620 (Wash. Dep't of Emp't Sec. Dec. No 946, 2d Series Sept. 17, 2010) (applying "substantially less favorable" standard to examine whether allegedly "new work" met rule). Courts treat precedential Commissioner decisions as persuasive. *Martini v. Emp't Sec. Dep't*, 98 Wn. App. 791, 795, 990 P.2d 981 (2000).

employer changed working conditions to conditions that do not generally prevail in the local market. But the rule is not a broad right to quit after a change to a work schedule. Rather, the rule applies if an employee shows his or her work exceeded an employment contract and that new conditions do not generally prevail in the local labor market. Darkenwald did not claim or prove either factual prerequisite.

E. The Employment Security Act Provides Numerous Protections that Serve Part-Time Employees

The NJP Brief argues that because the legislature codified the many good causes for quitting, the Employment Security Act “provide[s] virtually no flexibility[.]” NJP Br. at 11. To ameliorate this perceived shortcoming, amici suggest the Court should revisit its jurisprudence on what is a voluntary quit. NJP Br. at 13. Again, the NJP Brief raises an issue not raised in the petition, which did not ask the Court to review findings and conclusions that Darkenwald voluntarily quit. It is inappropriate for amici to smuggle that issue into a case, without notice to other citizens who might be interested in such a broad issue, without briefs by parties, and without lower court rulings on those theories.

The NJP Brief’s concerns also ignore how the Act does protect interests peculiar to part-time employees. For example, an employee with some of the compelling needs described by amici, but who is discharged

after being unable to work a different schedule, can qualify for benefits. Benefits could be denied only if an employer shows such an employee's inability to change a schedule was misconduct as defined by RCW 50.04.294. *Nelson v. Dep't of Emp't Sec.*, 98 Wn.2d 370, 374-75, 655 P.2d 242 (1982). Losing a job under some of the scenarios presented by amici is unlikely to be judged misconduct.

The findings here, however, showed Darkenwald responded to a request to work a three-day part-time schedule by quitting; she was not discharged. Even if the proposed change in a work schedule was personally objectionable to Darkenwald, the law does not sanction her choice to quit abruptly. Nor is the answer to speculate that future events might have qualified Darkenwald for benefits (e.g., if she were terminated in the future, or if in the future her hours were reduced 25 percent or more). She is responsible for quitting in a situation where she was asked to continue in the same job, and where three days a week are within prevailing conditions for that job. *See* AR at 89 (FF 3) ("Claimant is the only 'regular' staff dental hygienist who was only working two days per week for employer."). Under WAC 192-150-150(4)(d), if the alleged changed conditions prevail in the labor market, there has not been a substantial change in working conditions. And "[i]f the changes in

working conditions are not substantial, the department will consider you to have voluntarily quit work.” WAC 192-150-150(3)(a).

III. CONCLUSION

The Court should continue to hold that, to be eligible for benefits after deciding to quit, Darkenwald had to show good cause under RCW 50.20.050(2)(a). *Campbell v. Emp’t Sec. Dep’t*, 180 Wn.2d 566, 571-72, ¶ 7, 326 P.3d 713 (2014). The good cause reasons are found in RCW 50.20.050(2)(b). Here, the Commissioner properly rejected the disability good cause claim under that statute, and RCW 50.20.119 does not provide a good cause reason to quit. Finally, the Court should decline to address the NJP Brief’s reliance on WAC 192-150-150 because the issue is raised too late. But if the Court reaches that rule, it should affirm the Commissioner because Darkenwald did not show the required change in working conditions to trigger that rule.

RESPECTFULLY SUBMITTED this 5th day of February 2015.

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