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SUPREME COURT OF THE STATE OF WASHINGTON

LINDA DARKENWALD,

Petitioner,

v.

STATE OF WASHINGTON EMPLOYMENT
SECURITY DEPARTMENT,

Respondent.

**SUPPLEMENTAL BRIEF OF THE
EMPLOYMENT SECURITY DEPARTMENT**

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I. INTRODUCTION

The Commissioner of the Employment Security Department determined that Darkenwald did not qualify for unemployment benefits because she quit her job as a dental hygienist for personal reasons related to her work schedule, not for good cause. Darkenwald asks the Court to rule that she could quit in order to preserve status as a part-time worker. As a matter of law, that is not a good cause basis to quit or a basis for eligibility for benefits under the Employment Security Act.

Darkenwald also asks this Court to rule that she quit because of a disability. But the findings and evidence did not support her claim that a disability necessitated quitting. The findings and evidence showed that she decided to end her employment for personal reasons, which disqualified her for benefits. Furthermore, Darkenwald never informed her employer that a medical condition prevented working additional hours or pursued reasonable alternatives to quitting. Applying the review standards of the Administrative Procedure Act, the Court should affirm the Commissioner and the judgment of the Court of Appeals.

II. STATEMENT OF THE CASE

Ms. Darkenwald worked as a dental hygienist for Dr. Yamaguchi for many years. On August 2, 2010, she quit her job. App. at 9 (AR at 114). The Commissioner found that Darkenwald quit after Yamaguchi

“wanted [her] to work more hours.” App. at A-2, A-33 (AR at 89-90 (FF 14-17, CL 3)). The Commissioner specifically found that Darkenwald quit voluntarily and without good cause. App. at A-3 (AR at 90 (FF 16-17)), A-5 (AR at 92 (CL 9)), AR at 114. In particular, Darkenwald “was unwilling to consider working for employer more than two days per week.” App. at A-2 (AR at 89 (FF 15)). She “was quite upset at being asked to work three days per week *and decided to stop working for employer* effective August 2, 2010.” App. at A-3 (AR at 90 (FF 17)) (emphasis added). Darkenwald had “personal reasons *for quitting her job* as she did not want to work more than two days per week,” and those reasons do not constitute good cause to quit and collect unemployment benefits. App. at A-5 (AR at 92 (CL 9)) (emphasis added); *see Darkenwald v. Emp’t Sec. Dep’t*, 182 Wn. App. 157, 173-74, 328 P.3d 988 (2014) (CL 9 is a finding).¹

III. ARGUMENT

A. **Darkenwald Quit, And To Receive Unemployment Benefits She Must Show Good Cause For Quitting**

The Employment Security Act provides benefits for persons unemployed through no fault of their own. RCW 50.01.010. As

¹ The Commissioner adopted the findings and conclusions of the Administrative Law Judge described above and made additional findings: “Claimant was not discharged, but chose to leave employment. The employer continued to schedule her for work. Claimant stated at the hearing that she couldn’t bear to return to work, and that ‘it had to end there.’” App. at A-7 (AR at 114).

explained below, an employee who voluntarily quits remains eligible for benefits only if he or she had good cause as defined by the legislature. RCW 50.20.050. The Commissioner correctly denied unemployment benefits to Darkenwald because she quit without good cause.

Darkenwald's petition does not ask the Court to review the findings or conclusions determining that Darkenwald quit. *See Safeco Ins. Cos. v. Meyering*, 102 Wn.2d 385, 390, 687 P.2d 195 (1984) (properly characterizing a job separation presents a mixed question of law and fact). Her first issue presented argues for benefits whether she was discharged or quit. *See* Pet. at 2 (arguing with regard to an employee who "quits or is discharged"); Pet. at 6 ("It matters not . . . whether Mrs. Darkenwald was fired or quit . . ."); Pet. at 9 (accepting lower court's conclusion she "left her job"). Darkenwald's second issue accepts that she quit. Thus, the unchallenged findings that she quit are verities. *Tapper v. Emp't Sec. Dep't*, 122 Wn.2d 397, 407, 858 P.2d 494 (1993).

The record, moreover, provides substantial evidence to support the findings that Darkenwald quit. RCW 34.05.570(3)(e) (findings reviewed for substantial evidence). Darkenwald agrees that Yamaguchi asked her on July 28, 2010, to begin working three days per week and that she refused. AR at 22, 26-27. Darkenwald testified she was scheduled to work until August 23, 2010 (AR at 24), but "it was just so emotional and so

upsetting” that she “needed to end it then.” AR at 34. She wrote to Yamaguchi on August 2, 2010, declining to work through August 23, 2010. AR at 61. Yamaguchi responded by stating Darkenwald was not fired and he did not consider her to be fired. AR at 26, 62. He hoped she would continue working even if she chose not to work three days per week. AR at 27, 62. This is substantial evidence, particularly in light of the determination that Yamaguchi’s testimony and demeanor was logical and persuasive. App. at A-3 (AR at 90 (CL 1)); App. at A-7 (AR at 114) (adopting ALJ credibility finding). *See Fred Hutchinson Cancer Research Ctr. v. Holman*, 107 Wn.2d 693, 713, 732 P.2d 974 (1987) (court does not reweigh credibility or examine whether conflicting evidence supports other interpretations).

B. Increasing A Worker’s Hours Does Not Provide Good Cause To Quit, And RCW 50.20.119 Does Not Apply To Darkenwald

1. The Plain Language Of RCW 50.20.050(2) Requires A Quitting Employee To Show Good Cause As Listed In Subsection (b) Of That Statute, And RCW 50.20.119 Does Not Modify Or Eliminate This Obligation

To be eligible for benefits after quitting, Darkenwald must show good cause. “An individual seeking to collect unemployment benefits must demonstrate he left work voluntarily *and with good cause*. *See* 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) (emphasis added); *see, e.g., Townsend v.*

Emp't Sec. Dep't, 54 Wn.2d 532, 534, 341 P.2d 877 (1959) (burden is on claimant to establish right to benefits and this burden never shifts); *see also* RCW 34.05.570(1) (person challenging agency decision must show error). In particular, Darkenwald had to show she quit because of one of the good cause reasons recognized by the legislature in RCW 50.20.050(2)(b).

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

RCW 50.20.050(2)(a) (emphasis added). For separations on or after September 6, 2009, “[g]ood cause reasons to leave work *are limited to* reasons listed in (b) of this subsection.” RCW 50.20.050(2)(a) (emphasis added). As this Court recently recognized, “the legislature has set forth *an exhaustive list of reasons* that qualify as good cause to leave work.” *Campbell*, 180 Wn.2d at 572, ¶ 7 (emphasis added).²

Good cause reasons are quite varied. They include certain disabilities (discussed in Part C below), following a spouse (discussed in *Campbell*), 25 percent reduction in compensation or hours, protection from domestic violence, certain changes to the worksite, and more. *See*

² *Spain v. Employment Security Department*, 164 Wn.2d 252, 260, 185 P.3d 1188 (2008), examined a prior statute to hold that a list of good causes was not exhaustive. *Campbell* recognized that *Spain* was “superseded” by the 2009 amendments to RCW 50.20.050, which explicitly created an exclusive list of good cause reasons for quitting. *Campbell*, 180 Wn.2d at 572 n.2 (citing Laws of 2009, ch. 493, § 3).

RCW 50.20.050(2)(b)(i)-(xi). Darkenwald, however, argues for a reason that is not on this list. She claims that because she had been working 17 or less hours per week at the time she quit, her employer's request to work a third day a week gave her good cause to quit. Pet. at 2 (Issue 1), 9 (arguing that she could "quit" "due to the fact that she refused to increase her days of work").

Admitting her reason is not found in the list of good causes, Darkenwald relies on RCW 50.20.119 (section 119). Her construction of section 119 cannot be reconciled with the plain language of RCW 50.20.050(2)(a) and *Campbell* because it proposes a reason for quitting not recognized by the legislature. For that reason alone, the Court should reject the claim that section 119 provides a good cause reason to quit.

The text of RCW 50.20.119(1) also disproves Darkenwald's arguments. The statute states in relevant part:

[A]n otherwise eligible individual may not be denied benefits for any week because the individual is a part-time worker³ and is available for, seeks, applies for, or accepts only work of seventeen or fewer hours per week *by reason of the application* of RCW 50.20.010(1)(c), 50.20.080, or

³ A "part-time worker" is an individual who did not work more than 17 hours per week in the year in question. RCW 50.20.119(2).

50.22.020(1) relating to availability for work and active search for work, or failure to apply for or refusal to accept suitable work.

RCW 50.20.119(1) (emphasis added). Read naturally, section 119 does not make preservation of part-time status a reason to quit. Rather, the statute applies when “application of RCW 50.20.010(1)(c), 50.20.080, or 50.22.020(1) relating to availability for work and active search for work, or failure to apply for or refusal to accept suitable work” is the “reason” benefits are denied to “otherwise eligible individuals.” RCW 50.20.119(1) (emphasis added). This phrase confirms that section 119 concerns disqualification of an unemployed, but eligible, recipient—a person who is required to show continually that “[h]e or she is able to work, and is available for work in any trade, occupation, profession, or business for which he or she is reasonably fitted.” RCW 50.20.010(1)(c). Thus, section 119 protects certain job seekers from losing benefits. This construction of section 119 is confirmed by the fact that the requirements addressed by section 119—to seek, be available for, and apply for suitable work—are imposed solely on unemployed individuals receiving benefits.

The Court of Appeals’ reasoning explains this point well. The statutory language, context, and agency rules each confirmed that section 119 does not apply to determining whether a person has good cause to

voluntarily quit. Rather, section 119 applies only as an exception to protect certain already unemployed workers⁴ who reject full-time jobs:

[T]o be “available for work,” a claimant must be “willing to work full-time, part-time, and accept temporary work during all of the usual hours and days of the week customary for your occupation.” WAC 192-170-010(1)(a). But the requirement to be available for full-time work does not apply “[i]f you are a part-time eligible worker as defined in RCW 50.20.119.” WAC 192-170-070(1). Under those circumstances, the worker “may limit [his or her] availability for work to 17 or fewer hours per week. [He or she] may refuse any job of 18 or more hours per week.” WAC 192-170-070. *Therefore, RCW 50.20.119 operates to protect an unemployed part-time worker seeking benefits from being disqualified if that worker refuses to accept full-time employment opportunities.*

Darkenwald, 182 Wn. App. at 177-78 (emphasis added) (first alteration ours). Before section 119, individuals who previously worked part-time were disqualified from benefits if they did not seek and apply for part-time *and* full-time work. RCW 50.20.010(1)(c), .080; WAC 192-170-010.

In summary, *Darkenwald*’s reliance on section 119 defies the plain language in RCW 50.20.050(2)(a), which requires one who voluntarily quits to show one of the eleven good causes in RCW 50.20.050(2)(b). Her argument contradicts the Court’s recent statement that the list in

⁴ Certain persons who earn limited wages are also treated as “unemployed” and may also be eligible to receive benefits. *See* RCW 50.04.310(1) (defining “unemployed” individuals to include persons who in any week perform less than full-time work if the remuneration paid is less than one and one-third the individual’s weekly benefit amount plus five dollars). For ease of reference, this brief refers to persons to whom section 119 provides protection from disqualification for benefits as “unemployed” individuals.

RCW 50.20.050(2)(b) is “exhaustive.” *Campbell*, 180 Wn.2d at 572. And, it contradicts plain language in section 119 because Darkenwald is not being denied benefits “by reason of” the statutes listed in section 119 related to accepting suitable work. The Court should reject Darkenwald’s argument as a matter of law.⁵

2. Darkenwald’s Policy Argument Should Be Directed To The Legislature

Darkenwald openly asks this Court to make policy, arguing that she “*should be* entitled to preserve her part-time status” Pet. at 5 (emphasis added). Her apparent policy proposal is to allow a part-time employee to quit after an employer’s request for additional hours, because an unemployed part-time worker is allowed to limit a job search to part-time work under section 119. The Court, however, need not engage in a policy debate because the statutory language precludes Darkenwald’s argument. But if the Court is concerned with Darkenwald’s analogy, numerous reasons justify the legislature’s distinction between defining

⁵ The petition’s two other arguments about section 119 warrant little attention. At pages 7-8, the petition criticizes the Court of Appeals citation to *Bauer v. Employment Security Department*, 126 Wn. App. 468, 108 P.3d 1240 (2005), saying that case preceded section 119. But the lower court’s opinion merely cites *Bauer* for statutory construction principles. *Darkenwald*, 182 Wn. App. at 178. At page 5, the petition relies on a simplistic assertion that Darkenwald “is a part-time worker” and section 119 uses that present tense phrase. But section 119 has to be read as a whole, and it applies to “otherwise eligible” persons who would be disqualified “by reason of” specific statutes that concern certain job searching duties. The use of the present tense is not inconsistent with this plain language.

what is good cause to quit and defining an exception to an unemployed individual's duty to seek full-time work.

For example, the policy change proposed by Darkenwald would chill employers from offering additional hours to part-time workers for fear that the offer would trigger good cause to quit. Moreover, Darkenwald's policy proposal would be unworkable because it depends solely on an employee's subjective decision to quit, with no requirement to pursue reasonable alternatives to quitting.⁶ Darkenwald's arguments also ignore the fact that job seekers are in a much different situation than a quitting employee. A job seeker has no current employment to preserve. And, without section 119, a job seeker would have to choose between losing critical benefits and taking a full-time job that he or she cannot sustain. Thus, there are numerous reasons to disqualify workers who quit like Darkenwald, while limiting section 119 to certain unemployed job seekers.

Darkenwald's analogy between her decision to quit and an unemployed person being offered full-time work does not withstand

⁶ In contrast to Darkenwald's proposal, the Act typically encourages employees to preserve employment relationships by making good cause contingent on the employee taking certain actions. *E.g.*, RCW 50.20.050(2)(b)(ii)(A) (disability only if the employee "pursued all reasonable alternatives to preserve" employment); .050(2)(b)(iii) (following a spouse only if employee "remained employed as long as was reasonable prior to the move"); .050(2)(b)(viii), (ix) (unsafe or illegal workplace is cause only if an employee reports the problem and the employer fails to correct it within a reasonable time).

scrutiny. In any event, the legislature did not adopt her policy choice when it adopted the list of good causes for quitting.

3. Darkenwald Has Waived Or Failed To Prove Arguments That She Was Facing A Reduction In Hours Or Would Have Been Discharged

Darkenwald's arguments tend to reargue the facts found at hearing. For example, she implies that Yamaguchi's request for more work meant she was fired. But that suggestion is contradicted by the findings and, as explained above at page 3, the petition abandoned claims that Darkenwald was discharged. Similarly, Darkenwald has speculated that she faced a future reduction in hours if she accepted Yamaguchi's alternative request that she work on-call, which would have provided good cause to quit under RCW 50.20.050(2)(b)(vi) (25 percent reduction in hours is good cause). This argument is also contradicted by the findings and evidence; Yamaguchi made it clear that Darkenwald could have worked three days a week or as a temp/on-call hygienist. Darkenwald cannot quit by assuming that a future reduction in hours would have given her cause to quit. Moreover, the record showed it was "plausible" that "Yamaguchi would have allowed Darkenwald to exclusively fill the temporary hygienist position, resulting in her hours not being reduced by more than 25 percent." *Darkenwald*, 182 Wn. App. at 176, ¶ 39.

In summary, Darkenwald quit voluntarily. RCW 50.20.050(2)(a) required her to show good cause from the reasons listed in .050(2)(b)(i)-(xi). Preserving part-time worker status is not among the exclusive list of good causes to quit. RCW 50.20.119 does not eliminate the obligation to show good cause, or provide an alternative basis to qualify for benefits. Darkenwald's reliance on section 119 fails as a matter of law.

C. Darkenwald Did Not Demonstrate Good Cause To Quit For Illness Or Disability

Darkenwald's second issue challenges the Commissioner's ruling that she did not quit because of a disability. At the adjudicative proceeding, Darkenwald claimed that she quit because of a pre-existing neck and back injury prevented her from working additional hours.

Illness or disability can provide good cause to quit because, unlike a refusal to increase hours, it is among the good causes to quit listed in RCW 50.20.050(2)(b). But the statutory good cause requires two showings, which Darkenwald did not make. First, quitting must be a "necessary" response to a disability and caused by the disability. RCW 50.20.050(2)(b)(ii). Second, the employee must "pursue[] all reasonable alternatives to preserve" employment and notify the employer of the reasons for needing to be absent. RCW 50.20.050(2)(b)(ii)(A). These two requirements are found on the face of RCW 50.20.050(2):

(2) With respect to separations that occur on or after September 6, 2009:

...

(b) An individual has good cause . . . *only* under the following circumstances:

...

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

(A) *The claimant pursued all reasonable alternatives to preserve his or her employment status by requesting a leave of absence, by having promptly notified the employer of the reason for the absence, and by having promptly requested reemployment when again able to assume employment. . . .*

RCW 50.20.050(2)(b) (emphasis added).⁷

Darkenwald's second issue fails because it cannot overcome the findings. This Court does not reweigh evidence on judicial review; it affirms findings that are based on substantial evidence, even when evidence is conflicting and could support other reasonable interpretations. *Holman*, 107 Wn.2d at 713. As shown next, substantial evidence supports

⁷ The Department's implementing regulation is similar and requires proof that:

(a) [She] left work *primarily because of* such illness, disability, or death; and

(b) The illness, disability, or death *made it necessary* for [her] to leave work; and

(c) [She] first *exhausted all reasonable alternatives* prior to leaving work

WAC 192-150-055(1) (emphasis added).

the Commissioner's findings that Darkenwald failed to show that quitting was necessitated by a disability.

1. Findings And Substantial Evidence Confirm That Darkenwald's Decision To Quit Was Not Necessitated By A Disability

The Commissioner concluded that Darkenwald did not "establish[] that her medical condition was the reason she was not able to work" App. at A-5 (AR at 92 (CL 9)). The Commissioner found that Darkenwald "was quite upset at being asked to work three days per week *and decided to stop working for employer* effective August 2, 2010." App. at A-3 (AR at 90 (FF 17)) (emphasis added). Darkenwald "was unwilling to consider working for employer more than two days per week." App. at A-2 (AR at 89 (FF 15)). Thus, rather than a disability, Darkenwald had "personal reasons" for quitting. App. at A-5 (AR at 92 (CL 9)); *see also Darkenwald*, 182 Wn. App. at 173-74 (Conclusion 9 contains a finding of fact supported by substantial evidence).

Substantial evidence supports these findings that Darkenwald did not prove that her neck and back impairment made it necessary to quit. For example, in her contemporaneous written communications to Yamaguchi, Darkenwald did not mention that a disability made it necessary to quit and

did not state that neck or back impairment prevented her from increasing to three days. AR at 22, 28, 61, 63. In her application for benefits she said she was discharged and did not mention quitting because of a neck or back disability. AR at 53-58. Yamaguchi testified that Darkenwald explained her decision to quit based on a personal objection to lengthening her workweek and a desire to preserve her lifestyle and time with her family. AR at 25, 62. The evidence also showed Darkenwald worked for three and four days per week for eight years following her 1998 Department of Labor and Industries (L&I) determination. AR at 20-21; App. at A-1 to A-2 (AR at 88-89 (FF 2)). Darkenwald failed to show what was limiting her ability to work more than two days per week.

Darkenwald's administrative appeal relied on a 1998 determination by L&I. But that twelve-year old L&I determination and Darkenwald's testimony did not convince the fact finder. Nor does that evidence undermine the substantial evidence showing that quitting was, in fact, not necessitated by that neck and back impairment. As the Court of Appeals determined, "[t]he fact that she had a permanent impairment does not necessarily mean that she was unable to work three days a week." *Darkenwald*, 182 Wn. App. at 175. Persons with impairments typically continue to work, as Darkenwald did for years.

In addition, Darkenwald failed to present a physician statement to show that her disability made it necessary to quit. Under WAC 192-150-060(2), a claim that a disability necessitates quitting must be supported by a physician's statement. Darkenwald did not satisfy this obligation but now claims it is burdensome. Pet. at 10. If the Court reaches this additional reason for affirming the Commissioner, it should reject her argument. First, she did not challenge the rule validity. Second, the rule is not at all burdensome. WAC 192-150-060(2) permits either a physician's testimony or written statement to demonstrate necessity. Health care providers routinely provide statements to insurers, employers, and government agencies verifying limitations caused by illness or injury.

Darkenwald failed to meet RCW 50.20.050(2)(b)(ii) and prove that quitting was necessary for illness or disability. She also failed to meet WAC 192-150-055 and -060, and show that physician's statement confirming that the disability necessitates quitting. For either reason, Darkenwald failed to show illness or disability caused her to quit.

2. Darkenwald Lacked Good Cause To Quit Because She Failed To Communicate That A Disability Necessitated Quitting And Failed To Pursue Reasonable Alternatives

The Court may also affirm the Commissioner's decision because Darkenwald did not notify her employer that a disability was causing her to quit and did not pursue reasonable alternatives to quitting. The Court of

Appeals found it unnecessary to reach this additional reason. *Darkenwald*, 182 Wn. App. at 175 n.3. However, it provides an independent legal basis reflected in the Commissioner's decision. *See* App. at A-2 (AR at 89 (FF 15)), A-5 (AR at 92 (CL 9)).

With regard to disabilities, the legislature made good cause contingent on certain actions by the employee. In particular, a claimant must show that he or she "pursued all reasonable alternatives to preserve his or her employment status . . . by having promptly notified the employer of the reason for the absence" RCW 50.20.050(2)(b)(ii)(A).

Or, as stated by regulation, an individual

must notify your employer *about your disabling condition before the date you leave work* or begin a leave of absence. Notice to the employer shall include *any known restrictions on the type or hours of work* you may perform.

WAC 192-150-060(1) (emphasis added). "If your employer offers you alternative work or otherwise offers to accommodate your disability, you must demonstrate good cause to refuse the offer." WAC 192-150-060(4).

Darkenwald "did not explain to [her] employer that she was unable to work more than two days per week because of her medical condition." App. at A-2 (AR at 89 (FF 15)). This demonstrated that she failed to show she pursued reasonable alternatives to quitting as required by RCW 50.20.050(2)(b)(ii)(A).

Darkenwald has argued previously that Yamaguchi already knew of her limitation. But there is no such finding nor does the evidence suggest that Yamaguchi knew or was notified. He responded to Darkenwald's quitting letter by writing:

You stated at this period of your life that an increase to three days would not be possible. . . . Over the past years you have requested and I have accommodated to reduced number of days per week. From four, to three, and now two days. This had worked for both of us, allowing you to spend time and balance for your family and grand children.

AR at 62. This does not support he knew she was quitting because of a disability. The suddenness of quitting also confirms Darkenwald did not pursue reasonable alternatives to preserve her employment relationship by informing her employer of a medical need.

Darkenwald also argued previously that Yamaguchi reduced her to two days a week in 2006 *because* of a disability. Again, there is no such finding and no evidence to support one. Rather, Yamaguchi said that Darkenwald previously reduced her workload to two days for personal, family reasons. AR at 62. This confirms that Darkenwald did not notify her employer or pursue alternatives. It also shows that notice would not have been futile, given Yamaguchi's past accommodations of various requests.

Darkenwald's failure to meet the requirements to show that a disability gave her good cause to quit were confirmed by reasoned findings, supported by substantial evidence. The Commissioner's order on this point should be affirmed.

D. Liberal Construction Of The Employment Security Act Does Not Support Granting Benefits To Darkenwald

Throughout the petition, Darkenwald argues that the liberal construction given to the Employment Security Act supports her claim. Pet. at 7. No provision of the Act, liberally construed, avoids the fact that she quit for personal reasons and did not show good cause. Liberal construction cannot avoid the explicit statutory conditions that define when a disability becomes good cause to quit. Liberal construction cannot rewrite section 119 to create a new good cause for quitting.

Benefits are limited to the specific reasons for unemployment insured by the Act. The Act cannot be amended to address Darkenwald's personal circumstances for quitting under the guise of liberal construction. *See Senate Republican Campaign Comm. v. Pub. Disclosure Comm'n*, 133 Wn.2d 229, 243, 943 P.2d 1358 (1997) (“[A] statutory directive to give a statute a liberal construction does not require us to do so if doing so would result in a strained or unrealistic interpretation of the statutory

language.”). The Court should, therefore, decline Darkenwald’s invitation to use liberal construction to construe the Act beyond its provisions.

IV. CONCLUSION

The Court should affirm the decision of the Commissioner of Employment Security Department and the decision of the Court of Appeals and hold that Darkenwald did not demonstrate good cause for quitting her employment.

RESPECTFULLY SUBMITTED this 22nd day of December 2014.

ROBERT W. FERGUSON
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CERTIFICATE OF SERVICE

I certify, under penalty of perjury under the laws of the state of Washington, that on this date I have caused a true and correct copy of the foregoing Supplemental Brief Of The Employment Security Department to be served via electronic mail on the following:

Edward Earl Younglove, III
Younglove & Coker, PLLC
PO Box 7846
Olympia, WA 98507-7846
edy@ylclaw.com

DATED this 22nd day of December 2014, at Olympia, Washington.


WENDY R. SCHARBER
Legal Assistant

APPENDIX

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

IN THE MATTER OF:

Linda L. Darkenwald

DOCKET NO: 04-2010-31264

INITIAL ORDER

Claimant

ID: [REDACTED]

EYE: 07/30/2011

UIO: 770

Hearing: This matter came before Administrative Law Judge James Skeel on October 13, 2010 at Spokane, Washington after due and proper notice to all interested parties.

Persons Present: the claimant-appellant, Linda L. Darkenwald; George Darkenwald, claimant's husband; the claimant representative, Julie Oberbillig, attorney at law; and the employer, Dr. Gordon Yamaguchi, owner.

STATEMENT OF THE CASE:

The claimant filed an appeal on September 16, 2010 from a Decision of the Employment Security Department dated August 20, 2010.

At issue in the appeal is whether the claimant voluntarily quit without good cause pursuant to RCW 50.20.050(2)(a), or was discharged for misconduct pursuant to RCW 50.20.066.

Also at issue is whether the claimant was able to, available for, and actively seeking work during the weeks at issue.

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

FINDINGS OF FACT:

1. Claimant was employed by employer from April 1985 until August 2, 2010. Claimant worked as a dental hygienist and was paid \$48 per hour, plus benefits.
2. Claimant initially worked one day per week. For while she then worked two days per week. For a while she then worked four days per week. For a while she then began working three days

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per week.

3. For the last four years, by mutual agreement, claimant has been working on Mondays and Wednesdays, between 14 and 17 hours per week. Claimant is the only "regular" staff dental hygienist who was only working two days per week for employer.
4. Claimant ordinarily saw seven patients per day. There was a morning staff meeting and in the afternoon there was sometimes chart work to be completed as well.
- ~~5. Claimant filed an L&I claim in 1998 for problems she was having with her neck and back. Claimant was classified as having a permanent impairment.~~
6. Claimant has a serious back and neck problem which becomes more painful if she works too much. Claimant keeps her neck and back problems under control by seeing a chiropractor and a massage therapist on a regular basis.
7. A few years ago, claimant saw a specialist who prescribed some medication for her. Claimant continues to be on this medication.
8. Claimant has been satisfied to work Mondays and Wednesdays for the last four years.
9. Claimant is not interested in working on Fridays. Her husband only works a half day on Friday and her working a full day on Friday would interfere with his having a half day off.
10. Employer used to operate a dental office with four workstations. When the owner's son joined the practice, the office expanded to six workstations.
11. In 2010, employer has had to hire substitute dental technicians on 54 separate days because the regular dental technicians were unable to work all the necessary days.
12. During the first seven months of 2010, the office was open on 16 Fridays.
13. At the end of July 2010, the owner decided that he needed to have claimant work three days per week as opposed to two days per week because of the added business the practice had after a second dentist was added.
14. On July 28, 2010, the owner met with claimant and told her that the business needed her to work three days per week.
- 15. Claimant was unwilling to consider working for employer more than two days per week. At this meeting, claimant did not explain to employer that she was unable to work more than two days per week because of her medical condition.

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16. Claimant was scheduled to continue working for employer through August 23, 2010.

→ 17. Claimant was quite upset at being asked to work three days per week and decided to stop working for employer effective August 2, 2010.

18. Since her job ended, claimant has been looking for work. Claimant would like to continue working two days per week. Claimant is not interested in working on Fridays.

CONCLUSIONS OF LAW:

1. The parties' testimony conflicted on material points. In resolving these conflicts, the demeanor and motivation of the witnesses was considered, as well as the logical persuasiveness of the parties' positions. Claimant's testimony was colored by her overall argument that she was discharged from her job. She saw all the facts from only that perspective. The employer's testimony and other evidence are more logically persuasive than the claimant's. In entering this conclusion, the undersigned need not be persuaded beyond a reasonable doubt as to the true state of affairs, nor must the persuasive evidence be clear, cogent, and convincing. The trier of fact need only determine what most likely happened. *In re Murphy*, Empl. Sec. Comm'r Dec.2d 750 (1984).

2. The next issue to be determined is whether the claimant quit, was discharged from employment or was laid off from lack of work. The right to receive unemployment benefits in a quit is determined by RCW 50.20.050 and in a discharge under RCW 50.20.066. When a person is laid off from lack of work there is no issue and benefits are paid providing the claimant is otherwise eligible. It is necessary to determine which party initiated the job separation by looking to both the objective and subjective intent of the parties. *Safeco Ins. Co. v. Meyerling*, 102 Wn.2d 385, 687 P.2d 195 (1984). To make the determination, the facts in each case must be examined to determine who was the moving party in the separation. *In re Rodvelt*, Empl. Sec. Comm'r Dec.2d 521 (1979).

3. There was no lack of work. In fact, employer wanted claimant to work more hours. There is no evidence that employer intended on discharging claimant. Although claimant was essentially insubordinate when she refused to work the three days per week that employer needed her to work, employer did not discharge her but continued to schedule her for additional weeks. Claimant is considered to be the moving party in the job ending. This case will be decided under the voluntary quit statute. RCW 50.20.050.

4. The provisions of RCW 50.20.050(2), WAC 192-150-085, WAC 192-320-070, and WAC 192-320-075 are applicable.

5. An individual is disqualified from receiving unemployment benefits for leaving work voluntarily without good cause. RCW 50.20.050(2)(a).

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6. The Employment Security Act was enacted to award unemployment benefits to individuals who are unemployed through no fault of their own, RCW 50.01.010. A claimant who voluntarily resigns from employment has the burden of establishing "good cause" for quitting under the statute.

7. The Legislature amended RCW 50.20.050 for job separations occurring on or after September 6, 2009. RCW 50.20.050(2)(b) provides that an individual has good cause to quit and is not disqualified from benefits only if the individual quit for one of the eleven reasons listed below.

8. An individual is not subject to disqualification pursuant to RCW 50.20.050(2)(a) only under the following circumstances:

(i) to accept a bona fide offer of new work;

(ii) due to illness or disability;

(iii) to relocate for the employment of a spouse or domestic partner that is outside the existing labor market area if the claimant remained employed as long as was reasonable prior to the move;

(iv) to protect self or family from domestic violence or stalking;

(v) reduction in pay by twenty-five percent or more;

(vi) reduction in hours by twenty-five percent or more;

(vii) worksite change that increases commute distance or difficulty and after the change, the commute was greater than is customary for workers in the individual's job classification and labor market;

(viii) unsafe worksite conditions;

(ix) illegal activities in the worksite;

(x) change in work duties that violates religious convictions or sincere moral beliefs;

(xi) to enter apprenticeship program.

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9. Claimant had good personal reasons for quitting her job as she did not want to work more than two days per week. Claimant has not established that her medical condition was the reason she was not able to work on Fridays. Claimant has not established that employer's inquiry as to whether she would be willing to work Fridays was disingenuous. Claimant has not established good cause to quit her job and collect unemployment compensation benefits. RCW 50.20.050.

10. RCW 50.20.010(1)(c) requires each claimant to be able to, available for, and actively seeking work. Claimant's unwillingness to work on Fridays unduly restricts her availability for employment. Claimant does not meet the eligibility requirements of RCW 50.20.010(1)(c) to be eligible for unemployment compensation benefits.

Now therefore It is ORDERED:

The Decision of the Employment Security Department under appeal is MODIFIED.

Benefits are denied pursuant to RCW 50.20.010(1)(c) for the weeks claimed during the period beginning August 01, 2010 through October 9, 2010.

The claimant has not established good cause for quitting.

Benefits are denied pursuant to RCW 50.20.050(2)(a) for the period beginning August 01, 2010 and thereafter for seven calendar weeks and until the claimant has obtained bona fide work in covered employment and earned wages in that employment equal to seven times his or her weekly benefit amount. ("Covered employment" means work that an employer is required to report to the Employment Security Department and which could be used to establish a claim for unemployment benefits.)

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

Dated and Mailed on October 14, 2010 at Spokane, Washington.



James Skeel
Administrative Law Judge
Office of Administrative Hearings
221 N. Wall Street, Suite 540
Spokane, WA 99201-0826

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CERTIFICATE OF SERVICE

I certify that I mailed a copy of this decision to the
with the named interested parties at their respective
addresses, postage prepaid, on December 17, 2010.

[Signature]
Representative, Commissioner's Review Office,
Employment Security Department

UIO: 770
BYE: 07/30/2011

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

Review No. 2010-5895

In re:

LINDA L. DARKENWALD
SSA No. [REDACTED]

Docket No. 04-2010-31264

DECISION OF COMMISSIONER

On November 15, 2010, LINDA L. DARKENWALD, by and through George Oscar Darkenwald, Attorney, petitioned the Commissioner for review of an Initial Order issued by the Office of Administrative Hearings on October 14, 2010. Pursuant to chapter 192-04 WAC, this matter has been delegated by the Commissioner to the Commissioner's Review Office. Having reviewed the entire record and having given due regard to the findings of the administrative law judge pursuant to RCW 34.05.464(4), the undersigned adopts the Office of Administrative Hearings' findings of fact and conclusions of law.

The record supports the decision of the Office of Administrative Hearings. Claimant was not discharged, but chose to leave employment. The employer continued to schedule her for work. Claimant stated at the hearing that she couldn't bear to return to work, and that "it had to end there." We conclude that claimant was the moving party in the job separation, did not have statutory good cause for leaving, and that benefits must therefore be denied.

Now, therefore,

IT IS HEREBY ORDERED that the decision of the Office of Administrative Hearings issued on October 14, 2010, is **AFFIRMED**. Claimant is disqualified pursuant to RCW 50.20.050(2)(a) beginning August 1, 2010, and thereafter for seven calendar weeks and until he or she has obtained bona fide work in employment covered by this title and earned wages in that employment equal to seven times his or her weekly benefit amount. The claimant was able to, available for and actively seeking work during the weeks at issue as required by RCW 50.20.010(1)(c). *Employer:* If you pay taxes on your payroll and are a base year employer for this claimant, or become one in the future, your experience rating account will not be charged.

for any benefits paid on this claim or future claims based on wages you paid to this individual, unless this decision is set aside on appeal. See RCW 50.29.021.

DATED at Olympia, Washington, December 17, 2010.*

Susan I. Buckles

Review Judge
Commissioner's Review Office

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

RECONSIDERATION

Pursuant to RCW 34.05.470 and WAC 192-04-190 you have ten (10) days from the mailing and/or delivery date of this decision/order, whichever is earlier, to file a petition for reconsideration. No matter will be reconsidered unless it clearly appears from the face of the petition for reconsideration and the arguments in support thereof that (a) there is obvious material, clerical error in the decision/order or (b) the petitioner, through no fault of his or her own, has been denied a reasonable opportunity to present argument or respond to argument pursuant WAC 192-04-170. Any request for reconsideration shall be deemed to be denied if the Commissioner's Review Office takes no action within twenty days from the date the petition for reconsideration is filed. A petition for reconsideration together with any argument in support thereof should be filed by mailing or delivering it directly to the Commissioner's Review Office, Employment Security Department, 212 Maple Park Drive, Post Office Box 9555, Olympia, Washington 98507-9555, and to all other parties of record and their representatives. The filing of a petition for reconsideration is not a prerequisite for filing a judicial appeal.

JUDICIAL APPEAL

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

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

- a. Timely file your judicial appeal directly with the superior court of the county of your residence or Thurston County. If you are not a Washington state resident, you must file your judicial appeal with the superior court of Thurston County. See RCW 34.05.514. (The Department does not furnish judicial appeal forms.) AND

- b. Serve a copy of your judicial appeal by mail or personal service within the 30-day judicial appeal period on the Commissioner of the Employment Security Department, the Office of the Attorney General and all parties of record.

The copy of your judicial appeal you serve on the Commissioner of the Employment Security Department should be served on or mailed to: Commissioner, Employment Security Department, Attention: Agency Records Center Manager, 212 Maple Park, Post Office Box 9555, Olympia, WA 98507-9555. To properly serve by mail, the copy of your judicial appeal must be received by the Employment Security Department on or before the 30th day of the appeal period. See RCW 34.05.542(d) and WAC 192-04-210. The copy of your judicial appeal you serve on the Office of the Attorney General should be served on or mailed to the Office of the Attorney General, Licensing and Administrative Law Division, 1125 Washington Street SE, Post Office Box 40110, Olympia, WA 98504-0110.

OFFICE RECEPTIONIST, CLERK

To: Scharber, Wendy R. (ATG)
Cc: edy@ylclaw.com; Geck, Jay (ATG); Sonju, Eric (ATG); Peterson, Eric (ATG)
Subject: RE: Darkenwald v. State

Received 12-22-2014

Supreme Court Clerk's Office

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Scharber, Wendy R. (ATG) [mailto:WendyO@ATG.WA.GOV]
Sent: Monday, December 22, 2014 3:55 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: edy@ylclaw.com; Geck, Jay (ATG); Sonju, Eric (ATG); Peterson, Eric (ATG)
Subject: Darkenwald v. State

Sent on behalf of: Jay D. Geck, Deputy Solicitor General WSBA 17916
360-586-2697 : jay_g@atg.wa.gov

Linda Darkenwald, Petitioner Cause No. 90544-4
v.
State Of Washington Employment Security Department, Respondent

Supplemental Brief Of The Employment Security Department

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