

# Washington Law Review

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Volume 89 | Number 2

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6-1-2014

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### Recommended Citation

Emily Toler, Comment, "*Without Good Cause*": *The Case for a Standard-Based Approach to Determining Worker Qualification for Unemployment Benefits*, 89 Wash. L. Rev. 559 (2014).

Available at: <https://digitalcommons.law.uw.edu/wlr/vol89/iss2/10>

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# **“WITHOUT GOOD CAUSE”: THE CASE FOR A STANDARD-BASED APPROACH TO DETERMINING WORKER QUALIFICATION FOR UNEMPLOYMENT BENEFITS**

Emily Toler\*

*Abstract:* Under Washington’s Employment Security Act, workers who voluntarily quit their jobs are qualified to receive unemployment benefits only if they establish “good cause” for leaving work. For forty years, the agency that administers the statute and the courts had substantial discretion to find good cause under the statute’s flexible, standard-based approach. However, beginning in 1977, the legislature began to restrict the scope of that discretion by moving toward a rule-based approach. This trend reached its apex in 2009, when the legislature stripped the agency and the courts of all discretion and limited good cause to eleven reasons enumerated in the statute. This Comment argues that Washington should restore administrative and judicial discretion and return to a standard-based approach to determining whether claimants have good cause for voluntarily leaving work. First, a standard is more theoretically sound than a rule because workers’ reasons for leaving work vary significantly and because the usual rationales for rules do not justify their use in the voluntary quit statute. Second, the rule disqualifies claimants who leave work for reasons consistent with the purpose of the Act. Finally, a standard is necessary to advance the purpose of the Act and of unemployment compensation generally.

## **INTRODUCTION**

Unemployment benefits provide a critical buffer against the social and economic consequences that can befall people who are out of work. Despite the important role these benefits play, not all unemployed people are eligible to receive them. In Washington, workers who voluntarily leave their jobs must establish “good cause” for quitting to qualify for benefits.<sup>1</sup> For forty years after Washington first provided unemployment benefits, the “voluntary quit” statute provided a flexible, standard-based definition of good cause. However, in the 1970s, the legislature began to narrow the definition of good cause and restrict the discretion that decision-makers had to determine whether workers established good cause. This trend ultimately transformed the voluntary quit statute from a flexible standard to a rigid rule that has disqualified

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1. WASH. REV. CODE § 50.20.050(2)(a) (2012).

thousands of people, even those who left work for reasons consistent with the purpose of Washington's Employment Security Act.<sup>2</sup>

Part I of this Comment briefly summarizes the history of unemployment compensation in Washington and outlines the basic structure and procedure of a claim for unemployment benefits. Part II summarizes the differences between rules and standards, discusses the legal contexts in which each approach is more appropriate, and explains the importance of this distinction. Part III reviews the history of good cause for leaving work and traces the evolution of the voluntary quit statute. Part IV argues that the current rule-based approach to making good cause determinations is inappropriate because a standard-based approach is more theoretically sound and is necessary to promote both the goals of the Employment Security Act and of unemployment compensation generally. Finally, Part V proposes standard-based language to amend the voluntary quit statute and restore administrative and judicial discretion to find good cause for leaving work.

## I. UNEMPLOYMENT COMPENSATION IN WASHINGTON

### A. *Historical Context and Background*

Before the 1930s, no state provided unemployment compensation.<sup>3</sup> However, as the Great Depression ground on, the national unemployment rate remained stubbornly high, reaching its peak of 25.2% in 1933 and remaining above 15% for virtually the entire decade.<sup>4</sup> Many people seeking work were chronically or “hard-core”<sup>5</sup> unemployed: they had been jobless for a year or more, and employers—for reasons as varied as skepticism about their skills to outright racism—refused to hire them.<sup>6</sup> This “irreversible structural unemployment”<sup>7</sup> effectively barred “10 percent of the labor force”<sup>8</sup> from finding work.<sup>9</sup> Other marginalized people, including older, nonwhite, and unskilled

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2. *Id.* §§ 50.01.05–50.98.110.

3. See Edwin E. Witte, *Development of Unemployment Compensation*, 55 *YALE L.J.* 21, 25–29 (1945).

4. Richard J. Jensen, *The Causes and Cures of Unemployment in the Great Depression*, 19 *J. INTERDISC. HIST.* 553, 557 (1989).

5. *Id.* at 555–56.

6. *Id.*

7. *Id.* at 556.

8. *Id.*

9. *Id.*

workers, were far more likely to be unemployed.<sup>10</sup> Many people found work only through the New Deal's work relief programs<sup>11</sup> and were unable to find private employment until World War II.<sup>12</sup>

Despite this crisis, and despite a "rapidly growing interest in unemployment insurance throughout the country,"<sup>13</sup> the states remained reluctant to enact unemployment compensation legislation.<sup>14</sup> To induce the states to adopt such laws, Congress introduced a cooperative federal-state system to administer unemployment compensation<sup>15</sup> as part of the Social Security Act of 1935.<sup>16</sup> The strategy proved successful, and in just two years, every state had passed unemployment compensation laws.<sup>17</sup>

Washington was by no means among the first states to act,<sup>18</sup> but in 1937, the legislature passed the Unemployment Compensation Act.<sup>19</sup> In the Act's statement of purpose, the legislature recognized that "economic insecurity due to unemployment is a serious menace to the health, morals and welfare of the people of this state,"<sup>20</sup> and enacted the legislation "to prevent its spread and to lighten its burden which now so often falls with crushing force upon the unemployed worker and his family."<sup>21</sup> The Act was to protect unemployed people "against this

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10. *See id.* at 567–71; Robert A. Margo, *Employment and Unemployment in the 1930s*, 7 J. ECON. PERSP. 41, 53–54 (1993) (noting the exacerbating effects of long-term unemployment).

11. Robert A. Margo, *The Microeconomics of Depression Unemployment*, 51 J. ECON. HIST. 333, 337–39 (1991).

12. *See id.* at 339.

13. Witte, *supra* note 3, at 26.

14. *See id.* at 25–29. For example, in 1931, twenty-three bills were introduced in state legislatures, but none was passed. *Id.* at 26. In 1933, "68 bills were introduced in 25 states," but none was made law. *Id.* at 27. States were also reluctant to adopt unemployment compensation programs because they worried about "handicapp[ing their] employers in interstate markets by burdening them with costs their competitors in other states were not required to meet." *Id.* at 28.

15. *Id.* at 22, 32.

16. Social Security Act of 1935, Pub. L. No. 74-271, 49 Stat. 620 (codified as amended at 42 U.S.C. §§ 301–1397jj (2006)).

17. Witte, *supra* note 3, at 34.

18. *See id.* at 33 (discussing the states that enacted unemployment compensation laws before or soon after the federal bill's passage).

19. Unemployment Compensation Act, ch. 162, 1937 Wash. Sess. Laws 574 (codified as amended at WASH. REV. CODE §§ 50.01.05–50.98.110 (2012 & Supp. 2013)). In 1953, the Act was renamed and given its current title, the Employment Security Act. Employment Security Act, ch. 8, sec. 24, § 1, 1953 Wash. Sess. Laws 1st Ex. Sess. 884, 904 (codified as amended at WASH. REV. CODE §§ 50.01.05–50.98.110).

20. Unemployment Compensation Act § 2, 1937 Wash. Sess. Laws at 574.

21. *Id.* at 574–75.

greatest hazard of our economic life,”<sup>22</sup> and it was to “be liberally construed for the purpose of reducing involuntary unemployment and the suffering caused thereby to the minimum.”<sup>23</sup>

Notwithstanding this sweeping language, national debates about unemployment compensation had already made it clear that benefits would not be available to all workers. Instead, they would be available only to workers who (in addition to other eligibility criteria) had not committed some disqualifying act:

Whatever the plan, such [unemployment] insurance is based upon the assumption that society and industry bear a responsibility for the failure of the economic system to provide men with an opportunity to support themselves by their own work. For those who, on the other hand, are unemployed because they prefer idleness to labor, the insurance measures accept no responsibility. The problem of framing a practical scheme to separate the wheat from the chaff thus centers in a definition of compensable unemployment.

If a man voluntarily leaves a job without reasonable cause, or is discharged for misconduct, his unemployment presents the clearest kind of case for which no social responsibility is assumed.<sup>24</sup>

Washington’s Unemployment Compensation Act reflected those same concerns. The Act disqualified claimants who received certain other public benefits (e.g., social security),<sup>25</sup> were out of work because of a labor dispute,<sup>26</sup> failed to search for or accept suitable work without good cause,<sup>27</sup> were discharged for work-connected misconduct,<sup>28</sup> or voluntarily left work without good cause.<sup>29</sup>

The current statute retains these disqualification provisions<sup>30</sup> and adds disqualifications for misrepresentation,<sup>31</sup> attending school,<sup>32</sup> and failing

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22. *Id.* at 575.

23. *Id.*

24. *The Definition of Unemployment in Unemployment Insurance Measures*, 44 HARV. L. REV. 285, 286 (1930) (footnotes omitted) (summarizing trends in proposed unemployment compensation legislation).

25. Unemployment Compensation Act § 5(f), 1937 Wash. Sess. Laws at 582.

26. *Id.* § 5(e), at 581–82.

27. *Id.* § 5(d), at 580–81.

28. *Id.* § 5(b), at 580.

29. *Id.* § 5(a), at 580.

30. *See generally* WASH. REV. CODE §§ 50.20.044–50.20.090 (2012).

31. *Id.* § 50.20.070.

to attend a mandatory “job search workshop” or other training course.<sup>33</sup>

Most of the current disqualification provisions are substantially the same as their 1937 counterparts.<sup>34</sup> However, the legislature has enacted significant changes to two of the provisions: discharge for work-connected misconduct<sup>35</sup> and voluntarily leaving work without good cause.<sup>36</sup> This Comment focuses on the disqualification for voluntarily leaving work without good cause.<sup>37</sup>

### *B. The Basic Structure and Procedure of a Claim for Unemployment Benefits in Washington*

The Employment Security Department (ESD) is the agency that administers the Employment Security Act.<sup>38</sup> The ESD is, in turn, administered by a Commissioner<sup>39</sup> who has the authority to delegate various ESD functions as necessary.<sup>40</sup>

A worker who is separated from a job may apply for unemployment benefits by filing a claim with the ESD.<sup>41</sup> The ESD then contacts the claimant and the claimant’s former employer to determine why the job

32. *Id.* § 50.20.095. If claimants can prove that they are actually available for work, despite attending school, they may not be disqualified. *Id.* § 50.20.095(3).

33. *Id.* § 50.20.044.

34. *Compare* Unemployment Compensation Act, ch. 162, § 5(e), 1937 Wash. Sess. Laws 574, 581–82 (codified as amended at PIERCE’S WASH. CODE ANN., tit. 6233, § 305(e) (1939)), *with* WASH. REV. CODE § 50.20.090 (disqualifying claimants who are unemployed because of a strike or lockout).

35. *Compare* Unemployment Compensation Act, ch. 162, § 5(b), 1937 Wash. Sess. Laws 574, 580 (codified as amended at PIERCE’S WASH. CODE ANN., tit. 6233, § 305(b) (1939)) (standard-based statute), *with* WASH. REV. CODE § 50.04.294 (rule-based statute).

36. *Compare* Unemployment Compensation Act § 5(a), 1937 Wash. Sess. Laws at 580 (standard-based statute), *with* WASH. REV. CODE § 50.20.050(2)(b) (rule-based statute).

37. The misconduct disqualification has undergone significant revision and is primarily based on rules rather than standards. In 2003, the legislature replaced the previous definition (“an employee’s act or failure to act in willful disregard of his or her employer’s interest where the effect of the employee’s act or failure to act is to harm the employer’s business”) with a list of rules. Act of June 20, 2003, ch. 4, sec. 5, § 1, 2003 Wash. Sess. Laws 2d Spec. Sess. 2782, 2787 (codified at WASH. REV. CODE § 50.04.294). This change has had important effects on worker qualification for benefits. *See, e.g.*, Daniels v. Emp’t Sec. Dep’t, 168 Wash. App. 721, 731, 281 P.3d 310, 314–15 (2012) (noting the differences between the statutes in denying the claimant benefits). However, discussing the effects of both disqualification provisions is beyond the scope of this Comment.

38. WASH. REV. CODE § 50.08.010.

39. *Id.*

40. *Id.* § 50.12.020.

41. *Id.* § 50.20.140; *see also* WASH. ADMIN. CODE § 192-110-005 (2010) (explaining how claimants can apply for benefits).

ended.<sup>42</sup> After finishing its investigation, the ESD sends both parties an initial determination notice that explains whether the claimant will receive benefits.<sup>43</sup>

To be eligible for benefits, claimants must have worked at least 680 hours in their base years<sup>44</sup> in qualifying employment.<sup>45</sup> Claimants must also show that they are able to work, available to accept work, and actively seeking suitable work,<sup>46</sup> and that their jobs did not end for a disqualifying reason.<sup>47</sup> Disqualifying reasons include discharge for misconduct<sup>48</sup> and voluntarily leaving work without good cause.<sup>49</sup>

Any party that disagrees with the ESD's initial determination has the right to appeal<sup>50</sup> and to appear at a hearing in front of an Administrative Law Judge (ALJ).<sup>51</sup> The ALJ conducts the hearing and issues an initial order.<sup>52</sup> The initial order can be appealed to the Commissioner's Review Office,<sup>53</sup> which issues final agency decisions.<sup>54</sup> The Commissioner can choose to publish some decisions, which gives them precedential value with the Commissioner's Review Office and makes them binding on ALJs.<sup>55</sup> All Commissioner's decisions are subject to judicial review under Washington's Administrative Procedure Act.<sup>56</sup>

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42. WASH. ADMIN. CODE § 192-130-080 (2010); *id.* §§ 192-120-030, -040 (2004).

43. WASH. REV. CODE §§ 50.20.140, 50.20.150, 50.20.180.

44. *Id.* § 50.04.030; *see also id.* § 50.04.020 (generally defining "base year" as "either the first four of the last five completed calendar quarters or the last four completed calendar quarters").

45. *See id.* § 50.04.100 (defining "employment"). The Employment Security Act contains a general test for excepted employment. *Id.* § 50.04.140. It also excludes from coverage certain types of work. *See id.* §§ 50.04.148–50.04.275 (2012 & Supp. 2013) (excluding, for example, certain musicians, barbers, outside salespeople, newspaper carriers, and amateur sports officials). Part-time work is generally qualifying employment. *See id.* § 50.04.100 (2012).

46. *Id.* § 50.20.010.

47. *Id.* §§ 50.20.066, 50.20.050.

48. *Id.* § 50.20.066; *see also id.* § 50.04.294 (defining "misconduct").

49. *Id.* § 50.20.050.

50. *Id.* § 50.32.020.

51. *Id.* § 50.32.010.

52. *Id.* § 50.32.060; WASH. ADMIN. CODE § 192-04-150 (2013).

53. WASH. REV. CODE § 50.32.070. The Commissioner delegates the authority to consider petitions for review to the Commissioner's Review Office. *See id.* § 50.12.020 (authorizing the Commissioner to "delegate . . . the right to decide matters placed in the commissioner's discretion under this title"). For simplicity, and consistent with the practice of Washington courts, this Comment refers to decisions from the Commissioner's Review Office as Commissioner's decisions.

54. *Id.* § 50.32.090.

55. *Id.* § 50.32.095.

56. *Id.* § 34.05.570 (2012).

## II. RULES AND STANDARDS

The American legal system is caught between two opposing views: one that “places a high premium on the creation and application of general rules,”<sup>57</sup> and one that favors standards and “places a high premium on . . . case-by-case decisions, narrowly tailored to the particulars of individual circumstances.”<sup>58</sup> Rule-based laws are arguably the more popular of the two.<sup>59</sup> But for all its vogue, an “extravagantly rule-bound conception of the rule of law”<sup>60</sup> ignores an important point about due process and justice: individual people with unique cases and circumstances deserve an opportunity to be heard.<sup>61</sup>

This Part summarizes the differences between rules and standards. It also explains why rules are preferable in some legal contexts, while standards are preferable in others. Finally, it explains that the choice between rule- and standard-based laws reflects fundamental beliefs and important policy decisions about the proper roles of individuals, society, and the law.

### A. *The Differences Between Rules and Standards*

Rules and standards are often compared as opposites. Rules are “hard and fast,” while standards are “open-ended.”<sup>62</sup> Rules are “bright line[s],” while standards are “flexible.”<sup>63</sup> Rules “specif[y] in advance” a legal response to an action, while standards allow an after-the-fact legal determination about whether the action is appropriate, under the circumstances.<sup>64</sup> Two classic examples come from traffic laws: “do not

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57. Cass R. Sunstein, *Problems with Rules*, 83 CALIF. L. REV. 953, 956 (1995).

58. *Id.* at 956–57.

59. *Id.* at 957 (discussing the “pervasive social phenomenon” of the fascination with rules). *See generally* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989) (discussing the value of rules in the context of judge-made law).

60. Sunstein, *supra* note 57, at 957.

61. *Id.* at 958 (“[P]eople are entitled to argue that they are relevantly different from those that have come before, and that when their case is investigated in all its particularity, it will be shown that special treatment is warranted.”). This concept is discussed in *infra* Part IV.A.2.

62. Sunstein, *supra* note 57, at 959.

63. Pierre Schlag, *Rules and Standards*, 33 UCLA L. REV. 379, 379 (1985). Professor Schlag believes thinking of rules and standards as a simple dialectic is unsatisfactory. *See id.* at 399–426. However, for the purposes of this Comment, the simple distinction is sufficient.

64. Eric A. Posner, *Standards, Rules, and Social Norms*, 21 HARV. J.L. & PUB. POL’Y 101, 101 (1997). Of course, rules cannot perfectly “specify [all] outcomes before particular cases arise,” because “no approach to law is likely to avoid allowing at least *some* legal judgments to be made in the context of deciding actual cases.” Sunstein, *supra* note 57, at 961 (emphasis in original).



drive more than 60 miles per hour” is a rule, while “do not drive unreasonably fast” is a standard;<sup>65</sup> “stop and look” at every railroad crossing is a rule, while “act with reasonable caution” is a standard.<sup>66</sup>

Rules are advantageous when they are used to govern similar behavior that occurs in similar situations and that occurs very frequently.<sup>67</sup> This frequency is the critical distinction: “the greater the frequency with which a legal command will apply, the more desirable rules tend to be relative to standards.”<sup>68</sup> Examples of laws applied with frequency include traffic laws and the income tax code, both of which govern billions of incidents and transactions every year.<sup>69</sup> However, frequency refers not to the absolute number of incidents, but to the “frequency of behavior *with the relevant common elements*.”<sup>70</sup> Therefore, even for transactions that occur many times each year, a rule is not necessarily preferable unless the transactions are almost identical.

Additionally, rules may be preferable if they are designed to promote a particular set of perceived virtues and discourage a set of perceived vices.<sup>71</sup> If policymakers determine that a law should promote “certainty, uniformity, stability, and security,”<sup>72</sup> or neutrality, efficiency, and autonomy,<sup>73</sup> a rule may serve those interests more suitably than a standard.

However, rules are not well suited to meet every legal need. Instead, rules may be inappropriate because they promote intransigence, regimentation, and rigidity,<sup>74</sup> or sclerosis, punitiveness, and compulsiveness.<sup>75</sup> Rules are also bound to be over- and under-inclusive,

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65. *Id.* at 959.

66. Schlag, *supra* note 63, at 379.

67. See Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 563 (1992) (“To illustrate the analysis, consider the problem of regulating the disposal of hazardous substances. For chemicals used frequently in settings with common characteristics—such as dry cleaning and automotive fluids—a rule will tend to be desirable.”).

68. *Id.* at 577.

69. See *id.* at 563–64.

70. *Id.* at 600 (emphasis added).

71. See Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1710 (1976) (listing examples of “[t]he different values that people commonly associate with the formal modes of rule and standard”); Schlag, *supra* note 63, at 399 (explaining that “the most common view of the rules v. standards dialectic ascribes one set of virtues and vices to rules and another set of virtues and vices to standards,” but noting that, in his opinion, that view is unsatisfactory).

72. Schlag, *supra* note 63, at 400.

73. See Kennedy, *supra* note 71, at 1710.

74. Schlag, *supra* note 63, at 400.

75. Kennedy, *supra* note 71, at 1710.

as well as unable to adapt to new circumstances.<sup>76</sup> They also deprive decision-makers of the legitimate need for discretion and may unfairly or disproportionately affect particular social groups.<sup>77</sup> In addition to these conceptual shortcomings, rules may fail as a practical matter because of “unanticipated developments” or because “they run up against intransigent beliefs about how particular cases should be resolved.”<sup>78</sup>

Standards, by contrast, are more suitable when the law must address behavior that occurs “in settings that vary substantially,”<sup>79</sup> or when a law applies to “heterogeneous behavior.”<sup>80</sup> The classic example is the law of negligence: because it must govern “a wide array of . . . scenarios, many of which are materially different from each other,”<sup>81</sup> its legal principles are standard-based (e.g., due care and reasonableness).<sup>82</sup>

Standards also promote a particular set of virtues.<sup>83</sup> Standards enable flexibility, evolution, tolerance, empathy, and equity,<sup>84</sup> as well as “individuali[sm], open-endedness, and dynamism.”<sup>85</sup> In addition to promoting these values, standards also allow individualized adjudications and give effect to the essential principle that “[c]ase-by-case decisions are an important part of legal justice.”<sup>86</sup>

Of course, like rules, standards are not perfect. Enabling flexibility and discretion does lead to risks of “the abusive exercise of discretion, lack of predictability or of the capacity to form expectations, high costs of decisions, [and] failure of political accountability.”<sup>87</sup> And unbound, pure case-by-case decision-making is both undesirable and impossible.<sup>88</sup> But standards are neither hopelessly open-ended nor arbitrary; instead,

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76. Sunstein, *supra* note 57, at 992–94. *But see* Kaplow, *supra* note 67, at 586–96 (discussing the problem of inclusiveness and concluding that standards may not inherently be more effective at considering all relevant factors).

77. Sunstein, *supra* note 57, at 992–96.

78. *Id.* at 957.

79. Kaplow, *supra* note 67, at 563.

80. *Id.* at 564.

81. *Id.*

82. *See, e.g.,* Kennedy, *supra* note 71, at 1688 (listing examples of standards, including “good faith, due care, fairness, unconscionability, unjust enrichment, and reasonableness”).

83. Schlag, *supra* note 63, at 400.

84. Kennedy, *supra* note 71, at 1710.

85. Schlag, *supra* note 63, at 400.

86. Sunstein, *supra* note 57, at 957.

87. *Id.* at 958.

88. *See, e.g., id.* at 957 (“Few if any judgments about particular cases are entirely particular. . . . Case-by-case particularism is not a promising foundation for law.”). *See generally* Scalia, *supra* note 59 (discussing the limitations of discretionary decision-making).

“standards will receive a degree of specification as they are interpreted, since officials may generate categories of cases that, under the standard, receive predictable treatment.”<sup>89</sup>

*B. A Legislature’s Choice Between Rules and Standards Reflects Important Policy Decisions About the Proper Relationship Between Individuals, Society, and the Law*

The distinction between rules and standards is not just abstract or academic.<sup>90</sup> Instead, it is both pervasive and important: “[t]he controversy arises in every area of law; it often involves fundamental liberties.”<sup>91</sup> When choosing whether to adopt a rule or a standard, legislators must consider the economic effects of their choice,<sup>92</sup> including how to allocate costs and benefits.<sup>93</sup> Legislators must also respond to social norms, whether by embracing or rejecting those norms.<sup>94</sup>

Perhaps more importantly, choosing whether to adopt a rule or a standard requires legislators to take sides in a fundamental conflict about the proper relationship between individuals, society, and the law—a conflict “between irreconcilable visions of humanity and society, and between radically different aspirations for our common future.”<sup>95</sup> Professor Duncan Kennedy described this conflict as one between individualism and altruism<sup>96</sup>—between self-interest and “self-reliance”<sup>97</sup> (often expressed by rules)<sup>98</sup> on the one hand, and “sharing and

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89. Sunstein, *supra* note 57, at 965.

90. Kennedy, *supra* note 71, at 1712 (“Thus the pro-rules and pro-standards positions are more than an invitation to a positivist investigation of reality. They are also an invitation to choose between sets of values and visions of the universe.”); *id.* at 1713–22 (describing how the rules-standards debate reflects a fundamental conflict between individualism and altruism).

91. Sunstein, *supra* note 57, at 957 (footnotes omitted).

92. *See generally* Kaplow, *supra* note 67 (analyzing the economic implications of rule- and standard-based laws).

93. *See* Colin S. Diver, *The Optimal Precision of Administrative Rules*, 93 YALE L.J. 65, 73–74 (1983) (identifying “[r]ate of [c]ompliance,” “[o]ver- and [u]nder-[i]nclusiveness,” “[c]osts of [r]ulemaking,” and the “[c]ost of [a]pplying a [r]ule” as “four principal subcategories of potential costs and benefits”).

94. *See* Posner, *supra* note 64, at 107–13 (discussing the development of social norms and theoretical explanations for why and how legislators respond to those norms).

95. Kennedy, *supra* note 71, at 1685.

96. *See id.* at 1713–24.

97. *Id.* at 1713.

98. *See id.* at 1710 (listing values that rules promote, including “[s]elf-reliance”).

sacrifice”<sup>99</sup> (often expressed by standards)<sup>100</sup> on the other.

In sum, the choice matters because it reflects fundamental beliefs about how society should be ordered—and about whether and how the law should intervene in that order.

### III. THE EVOLUTION OF GOOD CAUSE FOR LEAVING WORK

The Employment Security Act has always disqualified claimants who voluntarily leave work without good cause from receiving unemployment benefits.<sup>101</sup> However, the definition of good cause evolved significantly during the last seventy years. The 1937 Act was a quintessential standard that provided no definition of good cause<sup>102</sup> and gave the agency and the courts broad discretion to interpret the phrase.<sup>103</sup> But as the legislature revised the statute, it consistently limited the circumstances that can constitute good cause and restricted administrative and judicial discretion to find it.<sup>104</sup>

This Part traces the evolution of the voluntary quit statute through three main historical periods: 1945–1977, 1977–2003, and 2003–present. For each period, it summarizes relevant administrative and judicial decisions, describes the statutory language at the time, identifies important amendments to the statute, and discusses the effects of the amendments. Most importantly, it explains how the amendments redefined good cause, transforming a broad, flexible standard into a narrow, rigid rule.

#### A. *The Era of the Standard: 1945–1977*

The 1937 Act did not define good cause.<sup>105</sup> However, in 1945, the legislature amended the Act and directed the agency to consider a number of factors when determining whether a claimant had good cause for leaving work:<sup>106</sup> “the degree of risk involved to [the claimant’s]

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99. *Id.* at 1717.

100. *See id.* at 1710 (listing values that standards promote, including “[e]mpathy,” “[t]olerance,” and “[c]ommunity”).

101. Unemployment Compensation Act, ch. 162, § 5(a), 1937 Wash. Sess. Laws 574, 580 (codified as amended at WASH. REV. CODE § 50.20.050 (2012)).

102. *Id.*

103. *See infra* Part III.A.

104. *See infra* Parts III.B–C.

105. Unemployment Compensation Act § 5(a), 1937 Wash. Sess. Laws at 580 (codified as amended at PIERCE’S WASH. CODE ANN., tit. 6233, § 305(a) (1939)).

106. Act of Mar. 7, 1945, ch. 35, § 78, 1945 Wash. Sess. Laws 76, 116 (codified at WASH. REV.

health, safety, and morals, his physical fitness and prior training, . . . the distance of the available work from his residence,”<sup>107</sup> and—importantly—“such other factors as the Commissioner may deem pertinent.”<sup>108</sup> This language granted the agency and the courts broad discretion to find good cause.

The Commissioner’s first published decision interpreting good cause, *In re Hurd*,<sup>109</sup> concerned the scope of that discretion. Earl Hurd left work in order to accept a new job.<sup>110</sup> After Hurd quit, he learned that the new job was no longer available and filed a claim for unemployment benefits.<sup>111</sup> The Commissioner noted that the circumstances that led Hurd to leave work were “elements not specifically described” in the statute.<sup>112</sup> However, the Commissioner concluded that those circumstances were the sort of “other factors” the agency had discretion to consider.<sup>113</sup>

The Commissioner<sup>114</sup> and the courts<sup>115</sup> also accepted that “*certain personal reasons* advanced by the particular claimant [can rise] to the stature of ‘good cause.’”<sup>116</sup> To establish good cause, claimants had to show a “compelling personal reason”<sup>117</sup> for leaving work. The Commissioner defined a compelling personal reason as “a predicament [in which the claimant] had no alternative but to *immediately* sever [the] employer-employee relationship,”<sup>118</sup> or “circumstances of such a nature that left [the claimant] no alternative but to leave . . . employment.”<sup>119</sup>

Through 1976, the agency and the courts had considerable discretion to find that a claimant quit for a compelling personal reason, and found good cause when the claimant left work:

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CODE § 50.05.11 (1946)). The Commissioner used these same factors to determine whether work was suitable for a claimant. *Id.*

107. *Id.*

108. *Id.*

109. Hurd, Emp’t Sec. Comm’r Dec. No. 114 (Wash. Emp’t Sec. Dep’t 1954), 1954 WL 46417.

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. Zemek, Emp’t Sec. Comm’r Dec. No. 326 (Wash. Emp’t Sec. Dep’t 1956), 1956 WL 58119.

115. *In re Bale*, 63 Wash. 2d 83, 385 P.2d 545 (1963) (holding that a claimant had good cause when she left work to join her husband, who had accepted a job in a different city).

116. Zemek, Emp’t Sec. Comm’r Dec. No. 326 (emphasis added).

117. Morse, Emp’t Sec. Comm’r Dec. No. 157 (Wash. Emp’t Sec. Dep’t 1955), 1955 WL 47633.

118. Tuai, Emp’t Sec. Comm’r Dec. No. 162 (Wash. Emp’t Sec. Dep’t 1955), 1955 WL 47638 (emphasis in original).

119. Jones, Emp’t Sec. Comm’r Dec. No. 964 (Wash. Emp’t Sec. Dep’t 1973), 1973 WL 166598.

- to preserve a marriage in the face of divorce,<sup>120</sup> as long as there was a “serious threat to the marital relationship;”<sup>121</sup>
- when both spouses could not be employed in the same area<sup>122</sup> (although women were more likely than men to establish good cause, under the theory that wives had a duty to follow their husbands, but not vice versa);<sup>123</sup>
- to marry, if the fiancé/e was employed far from the claimant;<sup>124</sup>
- to avoid suppression of “free expression of thought” about union activities;<sup>125</sup>
- because the distance to the workplace from the claimant’s home was unreasonable<sup>126</sup> or would result in hardship;<sup>127</sup>

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120. Haskins, Emp’t Sec. Comm’r Dec. No. 512 (Wash. Emp’t Sec. Dep’t 1962), 1962 WL 76374; Seeley, Emp’t Sec. Comm’r Dec. No. 165 (Wash. Emp’t Sec. Dep’t 1955), 1955 WL 47641.

121. Susinski, Emp’t Sec. Comm’r Dec. No. 1170 (Wash. Emp’t Sec. Dep’t 1974), 1974 WL 177539 (disqualifying the claimant because he left work to “insure the happiness and tranquility of his family, rather than to preserve the marriage”).

122. *Ayers v. Dep’t of Emp’t Sec.*, 85 Wash. 2d 550, 552–53, 536 P.2d 610, 611–12 (1975) (“If employment for the husband and for the wife are not available in the same area, it is a compelling personal reason and, therefore, good cause for one of the spouses to leave employment and go to the place of employment of the other spouse in order to keep the family together. The decision as to which place of employment should be accepted . . . is generally a decision which the spouses should make for themselves, subject to the need to make a reasonable decision.”). *But see* Beckmeyer, Emp’t Sec. Comm’r Dec. 2d No. 178 (Wash. Emp’t Sec. Dep’t 1976), 1976 WL 183403 (holding that the claimant lacked good cause for leaving work to accompany a spouse when the move was voluntary, rather than as a result of a choice between competing offers of employment).

123. Balcom, Emp’t Sec. Comm’r Dec. 2d No. 249 (Wash. Emp’t Sec. Dep’t 1976), 1976 WL 183474 (“The claimant protests what he feels to be the application of a ‘double standard,’ in that if the situation were reversed and his wife had quite [sic] her job to follow him to Chicago where he had a better job, benefits would be allowed to her. This is probably true . . . . There is, however, no corresponding duty on the part of a husband to accompany his wife and live at the home she has selected.” (citing *In re Bale*, 63 Wash. 2d 83, 91, 385 P.2d 545, 549 (1963))); *see also* Dickey, Emp’t Sec. Comm’r Dec. 2d No. 293 (Wash. Emp’t Sec. Dep’t 1977), 1977 WL 191836 (claimant, who left work to move with her husband, had good cause because “[t]he *Bale* rule does not encompass ‘reasonableness’ but only that a wife has a compelling personal reason to leave her employment to move with her husband to the home of his choice.”).

124. Pedersen, Emp’t Sec. Comm’r Dec. No. 811 (Wash. Emp’t Sec. Dep’t 1970), 1970 WL 118071. However, leaving work for marriage alone was not good cause. *Id.*

125. Bittle, Emp’t Sec. Comm’r Dec. No. 320 (Wash. Emp’t Sec. Dep’t 1956), 1956 WL 58113.

126. Leaving work due to distance was good cause when other circumstances weighed in favor of that conclusion. *See, e.g.,* Stokesberry, Emp’t Sec. Comm’r Dec. No. 980 (Wash. Emp’t Sec. Dep’t 1973), 1973 WL 166614 (holding that claimant had good cause because his long commute was damaging his family relationships); Hatch, Emp’t Sec. Comm’r Dec. No. 331 (Wash. Emp’t Sec. Dep’t 1956), 1956 WL 58124 (holding that claimant had good cause because his move in order to lead a religious congregation rendered his commute unreasonable). Sometimes distance alone was enough to establish good cause. *See* Hutchins, Emp’t Sec. Comm’r Dec. No. 222 (Wash. Emp’t Sec. Dep’t 1955), 1955 WL 47697. *But see* Emmons, Emp’t Sec. Comm’r Dec. No. 1134 (Wash. Emp’t

- because of illness<sup>128</sup>—including illnesses such as stress and anxiety<sup>129</sup>—if the claimant first made “reasonable efforts to preserve” the job<sup>130</sup> and provided medical documentation;<sup>131</sup>
- because of the illness of a spouse<sup>132</sup> or other family members,<sup>133</sup> but only if it was *necessary* for the claimant to leave work and a leave of absence or other accommodation was unreasonable;<sup>134</sup>
- after a union decertification election, rather than forfeit health and pension benefits;<sup>135</sup>

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Sec. Dep’t 1974), 1974 WL 177502 (holding that a claimant who lived in Tacoma did not have good cause for leaving work in Seattle because he possessed “an occupational skill unique to the aircraft industry,” which made work at Boeing’s Seattle location suitable). Eventually, the Commissioner identified four patterns of quit-due-to-distance cases and provided a framework for adjudicating each type. *See* Chitwood, Emp’t Sec. Comm’r Dec. 2d No. 305 (Wash. Emp’t Sec. Dep’t 1977), 1977 WL 191848.

127. Watson, Emp’t Sec. Comm’r Dec. No. 121 (Wash. Emp’t Sec. Dep’t 1954), 1954 WL 46424 (holding that claimant had good cause because his job was transferred to San Francisco and continuing work would lead to “extended absences from his family,” which would be an abandonment of his “domestic obligations”).

128. *See, e.g.,* Luby, Emp’t Sec. Comm’r Dec. No. 1155 (Wash. Emp’t Sec. Dep’t 1974), 1974 WL 177524 (holding that claimant, who worked in Alaska, had good cause because the climate caused him to suffer severe nosebleeds). A claimant who left work due to illness, or risk of illness, was generally required, “if the risk is one borne by all those employed in the occupation . . . to show that he was affected to a greater extent than the other workers in the same or similar occupation.” Yost, Emp’t Sec. Comm’r Dec. No. 1210 (Wash. Emp’t Sec. Dep’t 1975), 1975 WL 175236 (disqualifying claimant for failure to show additional effect).

129. Martin, Emp’t Sec. Comm’r Dec. No. 2d 265 (Wash. Emp’t Sec. Dep’t 1976), 1976 WL 183490.

130. Pitsaroff, Emp’t Sec. Comm’r Dec. No. 1209 (Wash. Emp’t Sec. Dep’t 1975), 1975 WL 175235 (disqualifying claimant who left work due to risk of illness because he “did not make a reasonable effort to preserve his [employment] relationship by requesting consideration for a transfer”).

131. Mallen, Emp’t Sec. Comm’r Dec. No. 1212 (Wash. Emp’t Sec. Dep’t 1975), 1978 WL 175238 (“[T]he severity and effect of medical and/or emotional problems are best judged on the basis of competent medical evidence.”). *Luby*, Emp’t Sec. Comm’r Dec. No. 1155, was an exception to the general rule that claimants must provide medical documentation advising them to leave work before they quit.

132. Buxton, Emp’t Sec. Comm’r Dec. No. 799 (Wash. Emp’t Sec. Dep’t 1969), 1969 WL 102130.

133. Hopper, Emp’t Sec. Comm’r Dec. No. 990 (Wash. Emp’t Sec. Dep’t 1973), 1973 WL 166624.

134. Johnson, Emp’t Sec. Comm’r Dec. No. 1105 (Wash. Emp’t Sec. Dep’t 1974), 1974 WL 177473 (disqualifying claimant who left work to assist his ailing grandparents because he knew other relatives were coming to assist and, therefore, should have asked for a leave of absence until they arrived).

135. *Matson v. Hutt*, 85 Wash. 2d 836, 839–40, 539 P.2d 852, 854 (1975) (recognizing as “compelling” the “jeopardy to [the claimants’] health and welfare benefits . . . [and] pension benefits,” and rejecting a categorical rule that would “deny[] benefits where the claimant’s personal

- to preserve a relationship with children<sup>136</sup> or to provide child care, as long as the claimant tried to make other arrangements and leaving work was a last resort;<sup>137</sup> and
- because of a reasonable belief that a new job was available.<sup>138</sup>

However, even if claimants established a compelling personal reason, they were still required to “do everything possible to retain the employer-employee relationship”<sup>139</sup> before quitting. Often, they had to inform their employers about the personal reason and provide them an opportunity to address it.<sup>140</sup> Claimants were also generally expected to “exhaust, or . . . at least explore all other avenues prior to quitting,”<sup>141</sup> unless no alternatives were reasonably available.<sup>142</sup>

Compelling personal reasons were not the only way claimants could establish good cause. The Commissioner also found good cause for many work-related reasons not specifically addressed in the statute:

- when a claimant’s work violated her moral or religious beliefs;<sup>143</sup>

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reasons for terminating unemployment are union related”).

136. Wright, Emp’t Sec. Comm’r Dec. No. 1173 (Wash. Emp’t Sec. Dep’t 1974), 1990 WL 10049283.

137. Odanovich, Emp’t Sec. Comm’r Dec. No. 1202 (Wash. Emp’t Sec. Dep’t 1974), 1974 WL 177570 (holding that claimant had good cause when she tried to, but could not, resolve her child care problem); *see also* Rogers, Emp’t Sec. Comm’r Dec. No. 1204 (Wash. Emp’t Sec. Dep’t 1974), 1974 WL 177572 (disqualifying claimant because he did not make “every reasonable effort to resolve the problem prior to summarily quitting his job”). *But see* Christie, Emp’t Sec. Comm’r Dec. 2d No. 262 (Wash. Emp’t Sec. Dep’t 1976), 1976 WL 1838487 (holding that claimant had good cause when a new schedule created child care problems, even when she did not report those problems to her employer, because she was given an ultimatum: accept the new schedule or quit).

138. Edquist, Emp’t Sec. Comm’r Dec. 2d No. 188 (Wash. Emp’t Sec. Dep’t 1976), 1976 WL 183413.

139. Courtright, Emp’t Sec. Comm’r Dec. No. 552 (Wash. Emp’t Sec. Dep’t 1963), 1963 WL 67420 (although domestic problems were a compelling personal reason, claimant lacked good cause because she did not give the employer an opportunity to preserve her job).

140. *See, e.g., id.* However, the Commissioner rejected a categorical application of this rule, recognizing that, under some circumstances, claimants were not required to notify the employer or do everything possible to preserve the job. *See, e.g.,* Conner, Emp’t Sec. Comm’r Dec. No. 759 (Wash. Emp’t Sec. Dep’t 1968), 1968 WL 95764 (holding that claimant was not required to “do everything in his power to correct” his employer’s failure to pay him the minimum wage before leaving work).

141. Jones, Emp’t Sec. Comm’r Dec. No. 964 (Wash. Emp’t Sec. Dep’t 1973), 1973 WL 166598.

142. Cuvreau, Emp’t Sec. Comm’r Dec. No. 993 (Wash. Emp’t Sec. Dep’t 1973), 1973 WL 166627 (claimant whose employer likely had no other work available had good cause for leaving work that aggravated his health condition, even though he did not request a transfer).

143. Peters, Emp’t Sec. Comm’r Dec. 2d No. 377 (Wash. Emp’t Sec. Dep’t 1978), 1978 WL 209141 (disqualifying the claimant, who left work because she could not afford union dues, but observing that claimants had established good cause in “case[s] involving a sincere bonafide [sic] religious, personal, moral or secular belief of a clearly established and compelling nature”);



- when an employer refused to honor the terms of a contract;<sup>144</sup>
- when a claimant's hours were substantially reduced;<sup>145</sup>
- when working conditions caused a claimant to suffer substantial embarrassment<sup>146</sup> or frustration;<sup>147</sup> and
- for financial reasons, such as when the claimant had "substantial grounds for believing his wages will not be paid him when they are due,"<sup>148</sup> when the employer did not pay minimum wage,<sup>149</sup> or when there was a "manifest discrepancy" between the claimant's wages and the prevailing wage.<sup>150</sup>

The Commissioner and the courts also exercised discretion to identify a number of reasons for leaving work that did not constitute good cause:

- a claimant's desire to retire<sup>151</sup> or collect social security benefits;<sup>152</sup>
- a claimant's desire to seek work with more favorable

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Holtzman, Emp't Sec. Comm'r Dec. No. 408 (Wash. Emp't Sec. Dep't 1958), 1958 WL 59433 (holding that a claimant whose religion prevented him from joining a labor organization had good cause for leaving a job that required him to join a union). The Commissioner did not analyze these cases as "compelling personal reasons" cases because the Act provided that work risking or violating a claimant's morals could be unsuitable. *See* Act of Mar. 7, 1945, ch. 35, § 78, 1945 Wash. Sess. Laws 76, 116 (codified as amended at WASH. REV. CODE § 50.20.100 (2012) ("In determining whether work is suitable for an individual, the commissioner shall also consider the degree of risk involved to the individual's health, safety, and morals . . .")).

144. Johnson, Emp't Sec. Comm'r Dec. No. 504 (Wash. Emp't Sec. Dep't 1958), 1958 WL 59352.

145. Edquist, Emp't Sec. Comm'r Dec. 2d No. 188 (Wash. Emp't Sec. Dep't 1976), 1976 WL 183413.

146. Wageman, Emp't Sec. Comm'r Dec. No. 1020 (Wash. Emp't Sec. Dep't 1973), 1973 WL 166654 (holding that claimant had good cause after quitting due to the employer's "unprovoked outburst of profanity directed at the [claimant] under circumstances resulting in public embarrassment [sic] and humiliation").

147. Markholt, Emp't Sec. Comm'r Dec. 2d No. 361 (Wash. Emp't Sec. Dep't 1977), 1977 WL 191904 (holding that claimant had good cause when she "was given a certain degree of high responsibility without the concomitant control and authority to carry it out" and "was harassed by co-workers and not afforded opportunity for an uninterrupted lunch break").

148. Hilker, Emp't Sec. Comm'r Dec. No. 173 (Wash. Emp't Sec. Dep't 1955), 1955 WL 47648.

149. Conner, Emp't Sec. Comm'r Dec. No. 759 (Wash. Emp't Sec. Dep't 1968), 1968 WL 95764.

150. Schully, Emp't Sec. Comm'r Dec. No. 213 (Wash. Emp't Sec. Dep't 1955), 1955 WL 47688.

151. Taylor, Emp't Sec. Comm'r Dec. No. 862 (Wash. Emp't Sec. Dep't 1971), 1971 WL 129518.

152. Wagner, Emp't Sec. Comm'r Dec. No. 1141 (Wash. Emp't Sec. Dep't 1974), 1974 WL 177509.

- wages<sup>153</sup> or hours;<sup>154</sup>
- a claimant's dissatisfaction with working conditions<sup>155</sup> or simple boredom;<sup>156</sup>
- a claimant's desire to attend school;<sup>157</sup>
- a claimant's desire to be self-employed;<sup>158</sup>
- a claimant's belief that he or she would be replaced,<sup>159</sup> discharged,<sup>160</sup> or laid off;<sup>161</sup> and
- a claimant's personality conflicts with a supervisor.<sup>162</sup>

In sum, good cause determinations through 1976 were fact-specific and standard-based, and every case required the agency or the courts to exercise considerable discretion. However, beginning in 1977, the legislature began to restrict the scope of that discretion by moving toward an increasingly rule-based statute.

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153. *Cowles Publ'g Co. v. Emp't Sec. Dep't*, 15 Wash. App. 590, 595–97 550 P.2d 712, 716–17 (1976) (disqualifying claimant who left work because of “low wages and lack of promotional opportunity”).

154. *Pavlick, Emp't Sec. Comm'r Dec. No. 665* (Wash. Emp't Sec. Dep't 1966), 1966 WL 88855 (disqualifying claimant who quit because of “her personal desire to retire in order to seek work which would entail less [sic] nighttime hours”).

155. *Johnson, Emp't Sec. Comm'r Dec. No. 1259* (Wash. Emp't Sec. Dep't 1975), 1975 WL 175283 (disqualifying claimant who quit because he believed that a more senior employee was “interfer[ing] with his job duties”); *Dietz, Emp't Sec. Comm'r Dec. No. 1060* (Wash. Emp't Sec. Dep't 1973), 1973 WL 166694 (disqualifying claimant who quit because of “dissatisfaction over working conditions and his feeling that the supervision was inadequate”); *Hayner, Emp't Sec. Comm'r Dec. No. 1013* (Wash. Emp't Sec. Dep't 1973), 1973 WL 166647 (disqualifying claimant who quit because of dissatisfaction with having too little work); *Sculati, Emp't Sec. Comm'r Dec. No. 1039* (Wash. Emp't Sec. Dep't 1973), 1973 WL 166673 (“Nor do we consider that a failure to promote or transfer, coupled with a ‘hard’ job, is good cause for quitting . . .”).

156. *Dinoia, Emp't Sec. Comm'r Dec. No. 1115* (Wash. Emp't Sec. Dep't 1974), 1974 WL 177483.

157. *Stewart, Emp't Sec. Comm'r Dec. No. 948* (Wash. Emp't Sec. Dep't 1973), 1973 WL 166582. Under the current Act, claimants who leave work to attend an approved “apprenticeship program” are not disqualified. WASH. REV. CODE § 50.20.050(2)(b)(xi) (2012).

158. *Noble, Emp't Sec. Comm'r Dec. No. 345* (Wash. Emp't Sec. Dep't 1957), 1957 WL 56218.

159. *Malinowski, Emp't Sec. Comm'r Dec. No. 655* (Wash. Emp't Sec. Dep't 1966), 1966 WL 88845.

160. *Smith, Emp't Sec. Comm'r Dec. No. 1055* (Wash. Emp't Sec. Dep't 1973), 1973 WL 166689.

161. *Washburn, Emp't Sec. Comm'r Dec. 2d No. 148* (Wash. Emp't Sec. Dep't 1976), 1976 WL 183373.

162. *Trumbull, Emp't Sec. Comm'r Dec. 2d No. 245* (Wash. Emp't Sec. Dep't 1976), 1976 WL 183470.

B. *Increased Legislative Intervention, but Broad Discretion Remains: 1977–2003*

1. *The 1977 Amendments*

In 1977, the legislature amended the Act. The amendments codified some of the Commissioner's decisions, but also restricted the scope of administrative and judicial discretion to find good cause under some circumstances.

In section 2(a), the legislature codified the Commissioner's decisions holding that claimants who left work in reliance on a "bona fide job offer"<sup>163</sup> had good cause.<sup>164</sup> Similarly, in section 2(b),<sup>165</sup> the legislature codified the Commissioner's framework governing claimants who left work for medical reasons.<sup>166</sup> Claimants had good cause for leaving work because of their own illnesses or disabilities, or those of their immediate family.<sup>167</sup> Section 2(b) generally required claimants to pursue all reasonable alternatives before leaving work,<sup>168</sup> but the Commissioner continued to recognize that they did not have to do so when it would have been futile—for example, when the work that caused the illness was the only work available to the claimant from the employer.<sup>169</sup>

Sections 2(a) and (b) were the first *rules* that defined good cause. But the legislature did not abandon the standard-based approach. Instead, in section 3, the legislature retained the language granting the

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163. Act of May 16, 1977, ch. 33, sec. 4, § 73, 1977 Wash. Sess. Laws 1st Ex. Sess. 229, 231 (codified as amended at WASH. REV. CODE §§ 50.20.050(1)(b)(i), 50.20.050(2)(b)(i) (2012)).

164. *See, e.g.*, Edquist, Emp't Sec. Comm'r Dec. 2d No. 188 (Wash. Emp't Sec. Dep't 1976), 1976 WL 183413 (holding that claimant had good cause and noting the relevance of her belief that she had been offered a new job, based on her conversations and interviews with the prospective employer). Self-employment was not a bona fide job offer. Lewis, Emp't Sec. Comm'r Dec. 2d No. 563 (Wash. Emp't Sec. Dep't 1979), 1979 WL 202705.

165. Act of May 16, 1977, sec. 4, § 73, 1977 Wash. Sess. Laws 1st Ex. Sess. at 231.

166. *Id.*; *see also supra* notes 128–34 and accompanying text.

167. Act of May 16, 1977, sec. 4, § 73, 1977 Wash. Sess. Laws 1st Ex. Sess. at 231; *see also* Frank, Emp't Sec. Comm'r Dec. 2d No. 457 (Wash. Emp't Sec. Dep't 1978), 1978 WL 209231 (refusing to require a need "to provide constant care" to a family member because the statute did not require it); Bergman, Emp't Sec. Comm'r Dec. 2d No. 455 (Wash. Emp't Sec. Dep't 1978), 1978 WL 209229 (discussing the various requirements to establish good cause, including medical documentation).

168. Act of May 16, 1977, sec. 4, § 73 1977 Wash. Sess. Laws 1st Ex. Sess. at 231.

169. *See, e.g.*, Frasier, Emp't Sec. Comm'r Dec. 2d No. 546 (Wash. Emp't Sec. Dep't 1979), 1979 WL 202688 (holding that claimant, who suffered a "nervous breakdown" as a result of teaching "groups of maladjusted students," had good cause because the employer had no other work available that "would foreseeably be less stressful and less likely to produce a recurrence of his illness").

Commissioner discretion,<sup>170</sup> but limited that discretion to considering “other work connected factors.”<sup>171</sup> Section 3 also limited the scope of the Commissioner’s discretion to find good cause when claimants left work because of distance.<sup>172</sup>

However, section 3 did leave intact the agency’s and the courts’ discretion to find good cause when “other related circumstances would work an unconscionable hardship on the individual” or when there was a “substantial involuntary deterioration of the work.”<sup>173</sup> The Commissioner exercised this discretion by disqualifying claimants for reasons not specifically enumerated in the statute<sup>174</sup> and by finding good cause under circumstances not specifically enumerated—as long as the factors were work-connected.<sup>175</sup>

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170. Act of May 16, 1977, sec. 4, § 73, 1977 Wash. Sess. Laws 1st Ex. Sess. at 231–32.

171. *Id.* at 232; *see also* Lewis, Emp’t Sec. Comm’r Dec. 2d No. 563 (Wash. Emp’t Sec. Dep’t 1979), 1979 WL 202705 (discussing some of the limitations on “good cause” imposed by the 1977 amendments).

172. Act of May 16, 1977, sec. 4, § 73, 1977 Wash. Sess. Laws 1st Ex. Sess. at 232 (“Good cause shall not be established for voluntarily leaving work because of its distance from an individual’s residence where the distance was known to the individual at the time he or she accepted the employment . . .”). Even so, the Commissioner still found good cause in some limited circumstances. *See* Hargrove, Emp’t Sec. Comm’r Dec. 2d No. 580 (Wash. Emp’t Sec. Dep’t 1979), 1979 WL 202722 (when a claimant relied on public transportation and left work because her assigned shifts would require her to leave work when no public transportation was available), *aff’d*, No. 291408 (Wash. Super. Ct. Jan. 30, 1981); Thelbert, Emp’t Sec. Comm’r Dec. 2d No. 528 (Wash. Emp’t Sec. Dep’t 1979), 1979 WL 202671 (when a claimant’s only means of transportation (a car) developed problems, and he was unable to repair it); Smith, Emp’t Sec. Comm’r Dec. 2d No. 406 (Wash. Emp’t Sec. Dep’t 1978), 1978 WL 209180 (when a claimant was to be transferred from Tacoma to Seattle and had “no reasonable alternatives to terminating her employment”); Cook, Emp’t Sec. Comm’r Dec. 2d No. 389 (Wash. Emp’t Sec. Dep’t 1978), 1978 WL 209163 (when a claimant was transferred from Bremerton to Seattle, which would have “require[d] substantial commuting costs and additional commuting time by ferry and car”).

173. Act of May 16, 1977, sec. 4, § 73, 1977 Wash. Sess. Laws 1st Ex. Sess. at 232.

174. Hadley, Emp’t Sec. Comm’r Dec. 2d No. 553 (Wash. Emp’t Sec. Dep’t 1979), 1979 WL 202695 (disqualifying claimant who believed supervisor was incompetent because any incompetence did not “create[] adverse conditions which a reasonably prudent person could not abide”); Sprout, Empl. Sec. Comm’r Dec. 2d 512 (1979) (disqualifying claimant who was dissatisfied with supervisor and wanted different work); Mulitauaopele, Emp’t Sec. Comm’r Dec. 2d No. 511 (Wash. Emp’t Sec. Dep’t 1979), 1979 WL 202654 (disqualifying claimant who wished to join the ministry).

175. *See, e.g.,* Alexander, Emp’t Sec. Comm’r Dec. 2d No. 638-1 (Wash. Emp’t Sec. Dep’t 1980), 1980 WL 344316 (holding that claimant who suffered racially motivated harassment had good cause); Atkinson, Emp’t Sec. Comm’r Dec. 2d No. 621 (Wash. Emp’t Sec. Dep’t 1980), 1980 WL 344299 (holding that claimant who suffered hazardous working conditions had good cause); Knutson, Emp’t Sec. Comm’r Dec. 2d No. 620 (Wash. Emp’t Sec. Dep’t 1980), 1980 WL 344298 (holding that claimant had good cause when her forty-hour-per-week position was reduced to forty-eight hours in a six-week period); Price, Emp’t Sec. Comm’r Dec. 2d No. 547 (Wash. Emp’t Sec. Dep’t 1979), 1979 WL 202689 (holding that claimant facing a pay cut of thirty percent had good cause); Ritter, Emp’t Sec. Comm’r Dec. 2d No. 510 (Wash. Emp’t Sec. Dep’t 1979), 1979 WL

Finally, the legislature added section 4, which disqualified claimants “whose marital status or domestic responsibilities caused [them] to leave employment.”<sup>176</sup> This rule disqualified many claimants who might well have qualified under the previous standard. For example, section 4 disqualified claimants who:

- left work “due to marital difficulties and to follow his wife to Oregon”;<sup>177</sup>
- left work because it “required long absences away from her home, which was disquieting to her husband, and rendered it impossible for her to properly care for their daughter”;<sup>178</sup>
- left work because her mother died;<sup>179</sup>
- received one day’s notice that she had to pick up her new adopted child, and left work to care for the baby after her requests for leave were refused;<sup>180</sup>
- left work, as a single father of four, to provide guidance for his children, some of whom had experienced trouble in school or been arrested;<sup>181</sup>
- had joint custody of her children—at least one of whom was “having emotional problems because of the separation from her mother”—and left work to be closer to them;<sup>182</sup>
- moved because her ex-husband, against whom she had filed assault charges, had repeatedly threatened her and her children;<sup>183</sup> and

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202653 (holding that claimant who left work after his supervisor “made slanderous statements about him and impugned his honesty” by falsely accusing him of stealing tools had good cause); Norris, Emp’t Sec. Comm’r Dec. 2d No. 439 (Wash. Emp’t Sec. Dep’t 1978), 1978 WL 209213 (holding that claimant who suffered sex discrimination had good cause); Groulx, Emp’t Sec. Comm’r Dec. 2d No. 431 (Wash. Emp’t Sec. Dep’t 1978), 1978 WL 209205 (holding that an employer’s “fail[ure] to fulfill [sic] the terms of the contract of hire” was good cause).

176. Act of May 16, 1977, sec. 4, § 73, 1977 Wash. Sess. Laws 1st Ex. Sess. at 232.

177. Dwyer, Emp’t Sec. Comm’r Dec. 2d No. 411 (Wash. Emp’t Sec. Dep’t 1978), 1978 WL 209185.

178. Alex, Emp’t Sec. Comm’r Dec. 2d No. 416 (Wash. Emp’t Sec. Dep’t 1978), 1978 WL 209190.

179. Smith, Emp’t Sec. Comm’r Dec. 2d No. 487 (Wash. Emp’t Sec. Dep’t 1979), 1979 WL 202630.

180. Rhoades, Emp’t Sec. Comm’r Dec. 2d No. 552 (Wash. Emp’t Sec. Dep’t 1979), 1979 WL 202694.

181. Pierpont, Emp’t Sec. Comm’r Dec. 2d No. 573 (Wash. Emp’t Sec. Dep’t 1979), 1979 WL 202715.

182. Cox, Emp’t Sec. Comm’r Dec. 2d No. 614 (Wash. Emp’t Sec. Dep’t 1980), 1980 WL 344292.

183. Hopkins, Emp’t Sec. Comm’r Dec. 2d No. 648 (Wash. Emp’t Sec. Dep’t 1980), 1980 WL 344326, *dismissed*, No. 22710 (Wash. Super. Ct. Apr. 9, 1982).

- left work to follow her husband, who was employed outside her labor market.<sup>184</sup>

However, despite section 4, the Courts of Appeals decided that the 1977 amendments did not abrogate the prior definition of good cause.<sup>185</sup> In 1980, in *Coleman v. Department of Employment Security*,<sup>186</sup> Division One of the Court of Appeals observed that the amendment limiting discretion to work-connected factors had no effect because “the key operative words” in the statute remained the same.<sup>187</sup> Therefore, the court held that a claimant who left work after a co-worker assaulted her had a compelling personal reason and was not disqualified.<sup>188</sup>

The next year, in *Vergeyle v. Employment Security Department*,<sup>189</sup> the same court held that a claimant who left work in response to “the unreasonable conduct of the employer” had good cause.<sup>190</sup> The court cited *Coleman* and explained that, “Washington case law has long recognized that good cause for leaving employment is *not limited to work-connected factors* . . . . This court recently held that the judicial definition of good cause was not abrogated by the [1977] amendments to the statute.”<sup>191</sup>

Division Three of the Court of Appeals agreed. In *Yamauchi v. Department of Employment Security*,<sup>192</sup> the court determined that a claimant who left work to marry her fiancé was disqualified—not because of section 4, but because she was not married when she left work.<sup>193</sup> The court noted that the judicial definition of good cause included compelling personal reasons,<sup>194</sup> then explained that, in its view, “[Section 4] was enacted by the legislature . . . to clarify compelling personal reasons which would qualify as good cause for voluntary

184. Courmyer, *Emp’t Sec. Comm’r Dec. 2d No. 651* (Wash. Emp’t Sec. Dep’t 1980), 1980 WL 344329.

185. See *Vergeyle v. Dep’t of Emp’t Sec.*, 28 Wash. App. 399, 623 P.2d 736 (1981), *review denied*, 95 Wash. 2d 1021 (1981); *Yamauchi v. Dep’t of Emp’t Sec.*, 28 Wash. App. 427, 624 P.2d 197 (1981), *rev’d*, 96 Wash. 2d 773, 638 P.2d 1253 (1982); *Coleman v. Dep’t of Emp’t Sec.*, 25 Wash. App. 405, 607 P.2d 1231 (1980).

186. 25 Wash. App. 405, 607 P.2d 1231.

187. *Id.* at 409 nn.1–2, 607 P.2d at 1233 nn.1–2.

188. *Id.* at 409–10, 607 P.2d at 1233–34.

189. 28 Wash. App. 399, 623 P.2d 736.

190. *Id.* at 404, 623 P.2d at 739.

191. *Id.* at 403, 623 P.2d at 739 (emphasis added) (citing *Coleman*, 25 Wash. App. 405, 607 P.2d 1231).

192. 28 Wash. App. 427, 624 P.2d 197 (1981), *rev’d*, 96 Wash. 2d 773, 638 P.2d 1253 (1982).

193. *Id.* at 432–34, 624 P.2d at 199–201.

194. *Id.* at 430–31, 624 P.2d at 199.

termination of employment.”<sup>195</sup> The court reasoned that, because “[t]he legislature is presumed to have in mind decisions of our Supreme Court when enacting statutes,” the 1977 amendments did not abrogate the prior definition of good cause.<sup>196</sup>

Although the Washington State Supreme Court declined to review *Vergeyle*,<sup>197</sup> it waded into the fray after *Yamauchi*.<sup>198</sup> The Court reversed, in part because the Court of Appeals erred in holding that section 4 “must be read in light of prior judicial decisions.”<sup>199</sup> The Court rejected the Court of Appeals’ characterization of the 1977 amendments:

Section 4 . . . does not “clarify” good cause; it is an exception to good cause. The new statute is markedly different from its predecessor. It confines good cause to sections 1 through 3 . . . . By creating [section 4] the legislature provided for different treatment of persons who voluntarily leave work for reasons of “marital status or domestic responsibilities”, such as the circumstances presented in *Bale* and *Ayers* that were previously treated as good cause cases.<sup>200</sup>

Importantly, the Court’s decision in *Yamauchi* acknowledged that the 1977 amendments had limited the scope of good cause.<sup>201</sup>

## 2. *The 1980 Amendments*

In 1980, the legislature amended the statute again. The legislature amended section 2(b), which already provided that claimants had good cause for leaving work because of illness or disability, or that of an immediate family member,<sup>202</sup> to provide that the death of an immediate family member also established good cause.<sup>203</sup> The legislature also amended the second part of section 2(b), which required claimants to try to preserve a job before quitting because of illness or disability,<sup>204</sup> to provide that they did not have to do so if it would have been futile.<sup>205</sup>

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195. *Id.* at 432, 624 P.2d at 200.

196. *Id.*

197. 95 Wash. 2d 1021 (1981).

198. 95 Wash. 2d 1026 (1981) (order granting review).

199. *Yamauchi v. Dep’t of Emp’t Sec.*, 96 Wash. 2d 773, 773, 776, 638 P.2d 1253, 1254 (1982).

200. *Id.* at 776–77, 638 P.2d at 1255 (footnote omitted).

201. *See id.*

202. WASH. REV. CODE § 50.20.050(2)(b) (1979).

203. Act of Mar. 6, 1980, ch. 74, sec. 5, § 73, 1980 Wash. Sess. Laws 170, 174 (codified as amended at WASH. REV. CODE §§ 50.20.050(1)(b)(ii), 50.20.050(2)(b)(ii) (2012)).

204. WASH. REV. CODE § 50.20.050(2)(b) (1979).

205. Act of Mar. 6, 1980, sec. 5, § 73, 1980 Wash. Sess. Laws at 174 (codified as amended at

The 1980 amendments also modified the “quit-due-to-distance” provision.<sup>206</sup> Once again, the legislature restricted the scope of good cause: claimants had to show that “the distance [was not] customarily traveled by workers”<sup>207</sup> in similar occupations.

Finally, the amendments directed the Commissioner to determine not whether a work-connected factor leading a claimant to quit was an “unconscionable” hardship,<sup>208</sup> but whether the hardship was “unreasonable.”<sup>209</sup>

### 3. *The 1981–1982 Amendments*

The 1981 amendments continued this trend of limiting discretion. Although the Act already specified that claimants had good cause if they left work “to accept a bona fide job offer,”<sup>210</sup> the amendments added a list of factors the Commissioner was to consider in determining whether a job offer was in fact bona fide.<sup>211</sup>

The next year, in 1982, the legislature further circumscribed the definition of good cause. Before the 1982 amendments, section 3 directed the Commissioner to “consider the degree of risk involved to the individual’s health, safety, and morals, the individual’s physical fitness, the individual’s ability to perform the work, and such other work connected factors as the commissioner may deem pertinent.”<sup>212</sup> The 1982 amendments, however, directed the Commissioner to “*only*

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WASH. REV. CODE §§ 50.20.050(1)(b)(ii)(A), 50.20.050(2)(b)(ii)(A) (2012)); *see also* Christie, Emp’t Sec. Comm’r Dec. 2d No. 262 (Wash. Emp’t Sec. Dep’t 1976), 1976 WL 183487 (discussing the futility exception).

206. Act of Mar. 6, 1980, sec. 5, § 73, 1980 Wash. Sess. Laws at 174.

207. Act of Mar. 6, 1980, sec. 5, § 73, 1980 Wash. Sess. Laws at 174.

208. WASH. REV. CODE § 50.20.050(3) (1979).

209. Act of Mar. 6, 1980, sec. 5, § 73, 1980 Wash. Sess. Laws at 175. The Commissioner found unreasonable hardship when, for example, a claimant was required to “perform additional duties without pay,” Wright, Emp’t Sec. Comm’r Dec. 2d No. 814 (Wash. Emp’t Sec. Dep’t 1990), 1990 WL 10049283; when a claimant’s customary work in Bremerton was transferred to Texas, Wheat, Emp’t Sec. Comm’r Dec. 2d No. 665 (Wash. Emp’t Sec. Dep’t 1981), 1981 WL 394831; and when a claimant was required to do the work of two employees, Vickers, Emp’t Sec. Comm’r Dec. 2d No. 657 (Wash. Emp’t Sec. Dep’t 1981), 1981 WL 394823.

210. WASH. REV. CODE § 50.20.050(2)(a) (Supp. 1980).

211. Act of Apr. 20, 1981, ch. 35, sec. 4, § 73, 1981 Wash. Sess. Laws 132, 135–36 (codified as amended at WASH. REV. CODE § 50.20.050(1)(a) (2012)) (directing the commissioner to consider factors including “the duration of the work,” “the extent of direction and control by the employer over the work,” and “the level of skill required for the work in light of the individual’s training and experience” when determining whether a job offer was bona fide). The new work could not be “a mere sham to qualify for benefits.” *Id.* at 135.

212. WASH. REV. CODE § 50.20.050(3) (1981).



consider *work-connected factors*.”<sup>213</sup> This amendment made it clear that only work-connected factors could establish good cause.<sup>214</sup>

#### 4. *The 1993, 2000, and 2002 Amendments*

Between 1977 and 1993, the legislature struggled to decide whether claimants who left work because of their spouse’s employment had good cause.<sup>215</sup> In 1993, the legislature amended the statute to provide that leaving work to move for a spouse’s employment is good cause.<sup>216</sup> However, the 2000 amendments restricted the scope of that “quit-to-follow” rule and provided that claimants who quit to follow a spouse could only establish good cause if “the spouse’s employment [was] due to an employer-initiated mandatory transfer.”<sup>217</sup>

Unlike the 2000 amendments, the 2002 amendments expanded the scope of circumstances that could constitute good cause.<sup>218</sup> The legislature added a new section providing that claimants who left work to protect themselves or their families “from domestic violence . . . or stalking” had good cause.<sup>219</sup>

#### 5. *Conclusions*

The voluntary quit statute evolved significantly from the open-ended 1937 standard to the more rule-based approach that existed in 2000. Although a few of the amendments to the statute expanded the scope of administrative and judicial discretion, most narrowed it, as the legislature increasingly codified good cause. That trend culminated in 2003, when the legislature enacted, for the first time, an enumerated list

213. Act of Apr. 2, 1982, ch. 18, sec. 6, § 73, 1982 Wash. Sess. Laws 1st Ex. Sess. 1090, 1096 (emphasis added) (codified at WASH. REV. CODE § 50.20.050(3) (Supp. 1982)).

214. See *Davis v. Dep’t of Emp’t Sec.*, 108 Wash. 2d 272, 276, 737 P.2d 1262, 1265 (1987).

215. Compare *Cournyer, Emp’t Sec. Comm’r Dec. 2d No. 651* (Wash. Emp’t Sec. Dep’t 1980), 1980 WL 344329 (no good cause), with *Ayers v. Emp’t Sec. Dep’t*, 85 Wash. 2d 550, 536 P.2d 610 (1975) (good cause).

216. Act of May 17, 1993, ch. 483, § 8, 1993 Wash. Sess. Laws 2017, 2022 (codified as amended at WASH. REV. CODE § 50.20.050(2)(b)(iii) (2012)). The amendment established three requirements: the claimant must have left work “to relocate for the spouse’s employment”; the spouse’s employment must have been “outside the existing labor market area”; and the claimant must have “remained employed as long as was reasonable prior to the move.” *Id.*

217. Act of Feb. 7, 2000, ch. 2, sec. 12, § 8, 2000 Wash. Sess. Laws 4, 16 (codified as amended at WASH. REV. CODE § 50.20.050(1)(b)(iii)) (requiring that the claimant’s spouse be relocated because of a “mandatory military transfer”).

218. Act of Mar. 12, 2002, ch. 8, sec. 1, § 12, 2002 Wash. Sess. Laws 32, 33 (codified at WASH. REV. CODE §§ 50.20.050(1)(b)(iv), 50.20.050(2)(b)(iv)).

219. *Id.*

of good cause reasons.

C. *The Ascendance, Demise, and Resurrection of the Rule: 2003–Present*

By the early 2000s, the good cause framework was well established:

To have good cause for severing employment so as to be eligible for benefits, an employee must leave work primarily because of work-connected factors of such compelling nature as to cause a reasonably prudent person to leave, after exhausting all reasonable, non-futile alternatives. The commissioner must consider only work-related factors brought about by the employer.<sup>220</sup>

However, in 2003, the legislature enacted a major revision to the Employment Security Act.<sup>221</sup> As part of an effort to keep major employers in Washington,<sup>222</sup> the legislature passed a bill that altered many important provisions of the Act: it removed the “liberal construction” language from the preamble,<sup>223</sup> codified (for the first time) a largely rule-based definition of disqualifying misconduct,<sup>224</sup> and (also for the first time) removed the language granting the Commissioner discretion to find good cause.<sup>225</sup> Instead, the legislature replaced that language with an enumerated list of reasons that could constitute good cause.<sup>226</sup> The new statute specified just ten reasons that would constitute good cause for leaving work:

1. to “accept a bona fide offer of bona fide work”;<sup>227</sup>
2. “because of the illness or disability of the claimant or the death, illness, or disability of a member of the claimant’s immediate family”;<sup>228</sup>

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220. *Emps. of Intalco Aluminum Corp. v. Emp’t Sec. Dep’t*, 128 Wash. App. 121, 130, 114 P.3d 675, 680 (2005).

221. Act of June 20, 2003, ch. 4, 2003 Wash. Sess. Laws 2d Spec. Sess. 2782 (codified as amended in scattered sections of WASH. REV. CODE §§ 50.01.05–50.98.110 (2012)).

222. For an overview of the political context surrounding the 2003 amendments—particularly Boeing’s involvement in and effect on the legislation—see Deborah Maranville, *Unemployment Insurance Meets Globalization and the Modern Workforce*, 44 SANTA CLARA L. REV. 1129, 1139–46 (2004).

223. Act of June 20, 2003, sec. 1, § 2, 2003 Wash. Sess. Laws 2d Spec. Sess. at 2782–83.

224. *Id.* sec. 5, § 1, at 2787; *id.* sec. 6, at 2787–88.

225. *Id.* sec. 4, § 1 at 2784–87.

226. *Id.*

227. *Id.* at 2786 (codified at WASH. REV. CODE § 50.20.050(2)(b)(i) (2012)).

228. *Id.* (codified at WASH. REV. CODE § 50.20.050(2)(b)(ii)). Claimants still had to “pursue[] all reasonable alternatives to preserve his or her employment status . . . [unless that] would have been a

3. “to relocate for the spouse’s employment . . . due to a mandatory military transfer”;<sup>229</sup>
4. “to protect the claimant or the claimant’s immediate family members from domestic violence . . . or stalking”;<sup>230</sup>
5. because of a reduction in usual compensation of at least 25%;<sup>231</sup>
6. because of a reduction in usual hours of at least 25%;<sup>232</sup>
7. because of a change in worksite that “caused a material increase in distance or difficulty of travel”;<sup>233</sup>
8. because the “worksite safety deteriorated”;<sup>234</sup>
9. because of “illegal activities in the . . . worksite”;<sup>235</sup> and
10. because the usual work “was changed to work that violates the individual’s religious convictions or sincere moral beliefs.”<sup>236</sup>

The revised statute did not, however, state whether the new list was the exclusive list of reasons that could establish good cause.<sup>237</sup> After these amendments, the Commissioner declined to decide whether the agency or the courts retained any discretion to find good cause for other reasons.<sup>238</sup> And, as two cases<sup>239</sup> wound their way through the agency and the courts, it became clear that the courts were also unsure.

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futile act.” *Id.*

229. *Id.* (codified as amended at WASH. REV. CODE § 50.20.050(2)(b)(iii)).

230. Act of June 20, 2003, sec. 4, § 1, 2003 Wash. Sess. Laws 2d Spec. Sess. at 2786 (codified at WASH. REV. CODE § 50.20.050(2)(b)(iv)).

231. *Id.* (codified at WASH. REV. CODE § 50.20.050(2)(b)(v)).

232. *Id.* (codified at WASH. REV. CODE § 50.20.050(2)(b)(vi)).

233. *Id.* (codified at WASH. REV. CODE § 50.20.050(2)(b)(vii)). This subsection also required that the post-change “commute was greater than is customary for workers in the individual’s job classification and labor market.” *Id.*

234. *Id.* (codified at WASH. REV. CODE § 50.20.050(2)(b)(viii)). The subsection required that the claimant “reported such safety deterioration to the employer, and the employer failed to correct the hazards within a reasonable period of time.” *Id.*

235. *Id.* (codified at WASH. REV. CODE § 50.20.050(2)(b)(ix)). This subsection also required that the claimant “reported such activities to the employer, and the employer failed to end such activities within a reasonable period of time.” *Id.*

236. *Id.* at 2787 (codified at WASH. REV. CODE § 50.20.050(2)(b)(x)).

237. *See id.*

238. *See* Krimbel, Emp’t Sec. Comm’r Dec. 2d No. 904 (Wash. Emp’t Sec. Dep’t 2005), 2005 WL 5438407 (holding that claimant had good cause because she left work for medical reasons, but declining to explain whether the ten reasons were exclusive).

239. *Spain v. Emp’t Sec. Dep’t*, 164 Wash. 2d 252, 185 P.3d 1188 (2008); *Starr v. Emp’t Sec. Dep’t*, 130 Wash. App. 541, 123 P.3d 513 (2005), *review denied*, 157 Wash. 2d 1019, 142 P.3d 607 (2006), *overruled by Spain*, 164 Wash. 2d 252, 185 P.3d 1188.

### 1. *Starr Sounds the Death Knell of Discretion*

The courts first grappled with the 2003 amendments in 2005, when Division Two of the Court of Appeals decided *Starr v. Employment Security Department*.<sup>240</sup> The court confronted an important question: whether the amended statute's "list of non-disqualifying reasons for voluntarily leaving employment" was exclusive, or whether the Commissioner retained any discretion to find good cause for another reason.<sup>241</sup>

In July 2003, Dennis Starr left his job to go to Alaska, where his daughters and grandchildren lived.<sup>242</sup> One of his daughters had been in a "serious car accident" and was incarcerated; the other had been arrested and imprisoned for allegedly murdering her children's father.<sup>243</sup> Starr and his wife went to Alaska to take custody of their grandchildren.<sup>244</sup>

When Starr filed his claim for unemployment benefits, the agency found he lacked good cause and disqualified him.<sup>245</sup> As his case proceeded through the courts, his benefits were consistently denied because he left work for a reason not specifically listed in the statute.<sup>246</sup> When his case reached the Court of Appeals, the court affirmed and held that the amended statute "provides the exclusive list of good cause reasons for voluntarily quitting employment that will not disqualify a claimant from receiving unemployment compensation benefits."<sup>247</sup>

The Washington State Supreme Court denied Starr's petition for review.<sup>248</sup> Therefore, after *Starr*, claimants had good cause for leaving work only when they left for one of the ten reasons listed in the statute.<sup>249</sup>

### 2. *Spain Revives the Possibility of Discretion*

While Dennis Starr's case was pending, another case presenting the same question—whether the statute provided an exclusive list of good

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240. *Starr*, 130 Wash. App. 541, 123 P.3d 513.

241. *Id.* at 542–43, 123 P.3d at 515.

242. *Id.* at 543, 123 P.3d at 515.

243. *Id.*

244. *Id.*

245. *Id.* at 543–44, 123 P.3d at 515.

246. *Id.* at 544, 123 P.3d at 515.

247. *Id.* at 551, 123 P.3d at 519.

248. *Starr v. Emp't Sec. Dep't*, 157 Wash. 2d 1019, 142 P.3d 607 (2006) (order denying review).

249. *See Grater v. Emp't Sec. Dep't*, 137 Wash. App. 1013 (2007) (unpublished) (citing *Starr*, 130 Wash. App. at 546, 123 P.3d at 519).

cause reasons—was proceeding through the courts.<sup>250</sup>

Sara Spain quit her job in June 2004 because she “found [her employer] unbearable.”<sup>251</sup> Her employer scolded her for “being too slow”;<sup>252</sup> her employer subjected her and her co-workers to “verbal abuse . . . on a daily basis”<sup>253</sup> (abuse which included profanity and being called “retards”<sup>254</sup>); and her employer would “kick [shelves] and throw things,”<sup>255</sup> including boxes of nails and tools.<sup>256</sup> On one occasion, dissatisfied with work her co-workers had performed, the employer forced Spain and her co-workers to stand outside “in the freezing cold for [about] three hours while he” berated them, telling them he “[hoped] it does rain so you guys can get soaked and miserable” and that he “[didn’t] give a shit . . . how you guys feel.”<sup>257</sup>

The agency denied Spain benefits.<sup>258</sup> However, the superior court reversed, holding that the list of reasons was *not* exclusive and that Spain had good cause.<sup>259</sup> The agency appealed to Division Two of the Court of Appeals—the same court that, less than two years earlier, decided *Starr*.<sup>260</sup> The court, citing *Starr*, reversed.<sup>261</sup> Spain filed a petition for review in the Washington State Supreme Court,<sup>262</sup> which the Court granted.<sup>263</sup>

250. *See* *Spain v. Emp’t Sec. Dep’t*, 162 Wash. 2d 1010, 178 P.3d 936 (2008) (order granting review).

251. *Id.* at 255, 185 P.3d at 1189.

252. Brief of Respondent at 4, *Spain*, 164 Wash. 2d 252, 185 P.3d 1188 (No. 79878-8). Although Spain was the petitioner in the Washington State Supreme Court, she was the respondent in the Court of Appeals. The same briefs were filed in both cases, and the party designations were not changed on the briefs. *See id.* at i.

253. *Id.* at 2.

254. *Id.*

255. *Id.* at 3.

256. *Id.*

257. *Id.* at 3.

258. *Spain v. Emp’t Sec. Dep’t*, 137 Wash. App. 1005, 1005 (2007) (unpublished), *rev’d*, *Spain*, 164 Wash. 2d 252, 185 P.3d 1188 (2008).

259. *Id.*

260. *Starr v. Emp’t Sec. Dep’t*, 130 Wash. App. 541, 123 P.3d 513 (2005), *review denied*, 157 Wash. 2d 1019, 142 P.3d 607 (2006), *overruled by Spain*, 164 Wash. 2d 252, 185 P.3d 1188.

261. *Id.*

262. *See Spain v. Dep’t of Emp’t Sec.*, 162 Wash. 2d 1010, 178 P.3d 936 (2008) (order granting review).

263. *Id.* *Spain* was consolidated with another case, *Batey v. Emp’t Sec. Dep’t*, 137 Wash. App. 506, 154 P.3d 266 (2007), *aff’d on other grounds sub nom. Spain*, 164 Wash. 2d 252, 185 P.3d 1188. Kusum Batey was another claimant denied unemployment benefits; she challenged the constitutionality of the 2006 amendments under Washington’s “subject-in-title” requirement. *See* WASH. CONST. art. II, § 19.

Before the Court, the ESD argued that the 2003 amendments “removed discretion to determine good cause on a case-by-case basis” and that “[t]he Legislature established, in place of discretion, a discrete list of criteria that constitute good cause.”<sup>264</sup> Spain argued that the list of good cause reasons in previous statutes had never been considered an exclusive list, so the new list should not be considered exclusive, either.<sup>265</sup> Spain also emphasized the legislature’s mandate that the Act be given a liberal construction,<sup>266</sup> arguing that “[r]eading the statute as permitting ten and only ten good causes for quitting one’s job is just the sort of pinched reading the legislature”<sup>267</sup> had rejected in the past.<sup>268</sup>

The Court unanimously agreed with Spain. Noting that the “statute is not a model of clarity,”<sup>269</sup> the Court observed that the plain language did not limit the qualifying reasons to those enumerated in the statute.<sup>270</sup> The Court also rejected allegations about the legislature’s purpose<sup>271</sup> and found support for both positions in the legislative history.<sup>272</sup> Ultimately, the decision turned on the plain language of the statute: the legislature simply did not make the list of reasons exclusive<sup>273</sup>—which, as the Court noted, would have been quite easy.<sup>274</sup>

The decision overruled *Starr* and authorized the agency and the courts to continue exercising what little discretion they retained after the 2003 amendments. But the legislature disagreed, and the next year, it revisited the disqualification statute.

### 3. *The Legislature Strikes Back: The Abrogation of Spain*

The Washington State Supreme Court issued its decision in *Spain* on

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264. Appellant’s Brief at 6, *Spain*, 164 Wash. 2d 252, 185 P.3d 1188 (No. 79878-8).

265. Brief of Respondent, *supra* note 256, at 18.

266. *Id.* at 22–25.

267. *Id.* at 22–23.

268. See Act of Apr. 22, 2005, ch. 133, sec. 2, § 1, 2005 Wash. Sess. Laws 376, 377 (codified at WASH. REV. CODE § 50.01.010 (2012)) (restoring the mandate that the statute be “liberally construed”).

269. *Spain*, 164 Wash. 2d at 257, 185 P.3d at 1190.

270. *Id.* at 257–59, 185 P.3d at 1190–91.

271. *Id.* at 259, 185 P.3d at 1191 (rejecting the assertion “that the statutory list was intended to be exclusive and that exclusivity was the finishing stroke of a multi-year public policy compromise between business and labor over the nature of the Unemployment Insurance system” (internal quotation marks omitted)).

272. *Id.* at 259, 185 P.3d at 1191–92.

273. *Id.* at 258–60, 185 P.3d at 1191–92.

274. *Id.* at 259, 185 P.3d at 1191.

June 19, 2008.<sup>275</sup> Less than three months later, Lehman Brothers collapsed and ushered in the global financial crisis of 2008.<sup>276</sup> As the crisis unfolded, a series of other major banks imploded, and global “markets ground to a terrifying halt.”<sup>277</sup> Unemployment also skyrocketed.<sup>278</sup> In Washington, the unemployment rate rose almost 2%, from 5.1% to 7.0%, in the last three months of 2008 alone.<sup>279</sup> Through 2009, the unemployment rate continued to rise: it hovered around 9% for most of the year, but by December 2009, it had reached 10.3%.<sup>280</sup> Despite these catastrophic effects, the legislature’s agenda for 2009 included a bill to abrogate *Spain* and remove the last vestiges of discretion.<sup>281</sup>

In February 2009, thirteen state senators introduced Senate Bill 5963.<sup>282</sup> The bill, among other things,<sup>283</sup> proposed an amendment to the voluntary quit statute.<sup>284</sup> This amendment would specify that the reasons enumerated in the statute were the *only* reasons that could constitute good cause for leaving work.<sup>285</sup>

Both the House Committee on Commerce & Labor and the Senate Committee on Labor, Commerce & Consumer Protection held public hearings on the proposed legislation.<sup>286</sup> The business community argued

275. *Id.* at 252, 185 P.3d at 1188.

276. *See, e.g.*, Thomas Ferguson & Robert Johnson, *Too Big to Bail: The “Paulson Put,” Presidential Politics, and the Global Financial Meltdown: Part I: From Shadow Financial System to Shadow Bailout*, 38 INT’L J. POL. ECON. 3, 4 (2009).

277. *Id.*

278. *See, e.g.*, James Marschall Borbely, *U.S. Labor Market in 2008: Economy in Recession*, MONTHLY LAB. REV., March 2009, at 3–4.

279. *Local Area Unemployment Statistics*, U.S. DEP’T OF LABOR, <http://data.bls.gov/cgi-bin/dsrv?la> (select “Washington” and click “Next form”; then select “Statewide” and click “Next form”; select “Washington” and click “Next form”; select “unemployment rate” and click “Next form”; select “Not Seasonally Adjusted” and click “Next form”; then click “Retrieve data”) (last visited at Apr. 30, 2014).

280. *Id.*

281. *See* Substitute S.B. 5963, 61st Leg., Reg. Sess. (Wash. 2009). Its companion bill was House Bill 2204. *See* H.B. 2204, 61st Leg., Reg. Sess. (Wash. 2009).

282. Substitute S.B. 5963.

283. The bill also aimed to bring Washington law into conformity with federal requirements, to modify how employers’ unemployment insurance taxes are charged, and to modify the quit-to-follow provision to allow a claimants to establish good cause if they quit because of a spouse or domestic partner’s work outside their labor market area. *See id.*

284. *Id.* (“Good cause reasons to leave work are limited to reasons listed in (b) of this subsection.”).

285. *See id.*

286. *See An Act Relating to Unemployment Insurance: Hearing on S.B. 5963 Before the S. Comm. on Labor, Commerce & Consumer Protection*, 61st Leg. Sess. (Wash. 2009),

that the bill would simply “recodif[y] the agreement that was made in 2003 and has been thrown out by the courts,”<sup>287</sup> while worker advocates explained that, because of the sheer variety of circumstances that lead people to leave work, the agency and the courts needed discretion to find good cause for reasons not enumerated in the statute.<sup>288</sup>

Notwithstanding those advocates’ concerns, the legislature passed the bill on April 26, 2009.<sup>289</sup> Since the law took effect on September 6, 2009, Washington workers can only establish good cause for voluntarily leaving work for the eleven reasons listed in the statute<sup>290</sup>—no matter how compelling the circumstances, no matter how unreasonable the hardship.

#### IV. WASHINGTON SHOULD RETURN TO A STANDARD-BASED APPROACH TO DETERMINE GOOD CAUSE FOR LEAVING WORK

This Comment argues that Washington should adopt a standard-based approach to finding good cause for leaving work. This Part advances three arguments: (A) in the context of work and of Washington’s unemployment compensation laws, a standard is more theoretically sound; (B) the rule has disqualified workers who left work for reasons consistent with the Employment Security Act; and (C) a standard is necessary to give effect to the purpose of the Act and of unemployment compensation generally.

##### A. *In the Context of Work and Unemployment Compensation, a Standard Is More Theoretically Sound than a Rule*

As Part II explained, rules are better suited to governing homogenous, repetitive behavior with little variation.<sup>291</sup> By contrast, standards are better suited to governing circumstances that vary significantly and

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[http://www.tvw.org/index.php?option=com\\_tvwplayer&eventID=2009021169](http://www.tvw.org/index.php?option=com_tvwplayer&eventID=2009021169).

287. *See, e.g., id.* (statement of Trent House, State Manager of Government Relations for the Boeing Company).

288. *See, e.g., id.* (statements of Pam Crone, Northwest Women’s Law Center, and Bob Abbott, Washington and Northern Idaho District Council of Laborers).

289. Substitute S.B. 5963, 61st Leg., Reg. Sess. (Wash. 2009), Act of May 14, 2009, ch. 493, 2009 Wash. Sess. Laws 2622 (codified at WASH. REV. CODE § 50.20.050 (2012)).

290. *See* WASH. REV. CODE § 50.20.050(2)(b). Although the 2003 amendments specified just ten reasons that constitute good cause, the legislature added an eleventh reason—leaving work to enroll in an approved training program—in 2008. Act of April 1, 2008, ch. 323, sec. 1, § 2, 2008 Wash. Sess. Laws 1690, 1693 (codified at WASH. REV. CODE § 50.20.050(2)(b)(xi)).

291. *See supra* Part II.A.



cannot often or reliably be anticipated in advance.<sup>292</sup> Because employment relationships (and the reasons they end) vary significantly, the agency and the courts can make fair decisions about good cause only if they can make individualized, fact-specific determinations. Additionally, because the usual rationales for rules do not justify their use in Washington's unemployment compensation system, a standard is more theoretically sound in this context.

*1. Workers' Reasons for Leaving Work Vary Significantly and Require Individualized, Fact-Specific Determinations*

As any worker can attest, every job is different—and workers' reasons for leaving a job vary significantly. For example, in just two years, the Commissioner confronted a variety of reasons leading claimants to leave work:<sup>293</sup>

- quitting as a term of an agreement settling the claimant's lawsuit against the employer, alleging harassment, discrimination, retaliation, and wrongful termination;<sup>294</sup>
- quitting to follow a spouse, a certified Swiss watchmaker, to Montana, where he would be the only certified Swiss watchmaker;<sup>295</sup>
- quitting after the employer failed to provide a paycheck, despite the claimant's repeated requests;<sup>296</sup>
- quitting to move from Massachusetts to join a new spouse who was employed in Bremerton;<sup>297</sup>
- quitting to move to Phoenix to support and protect a daughter who was having legal problems and who was being abused by her boyfriend;<sup>298</sup> and

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292. *See supra* Part II.A.

293. These examples are from Commissioner's Decisions published in 2010 and 2011. However, in these two years, the Commissioner received 2,618 appeals in voluntary quit cases—each of which undoubtedly presented its own unique circumstances. E-mail from Robert Page, Public Records Officer, Wash. State Emp't Sec. Dep't, to author (Mar. 13, 2013, 4:46 PM PDT) (on file with author) [hereinafter E-MAIL FROM ROBERT PAGE].

294. McPherson, Emp't Sec. Comm'r Dec. 2d No. 978 (Wash. Emp't Sec. Dep't 2011), 2011 WL 8129813.

295. Mapelli, Emp't Sec. Comm'r Dec. 2d No. 975 (Wash. Emp't Sec. Dep't 2011), 2011 WL 8129812.

296. Lauzon, Emp't Sec. Comm'r Dec. 2d No. 958 (Wash. Emp't Sec. Dep't 2010), 2010 WL 6795724.

297. Gray, Emp't Sec. Comm'r Dec. 2d No. 955 (Wash. Emp't Sec. Dep't 2010), 2010 WL 6795721.

298. Rivera, Emp't Sec. Comm'r Dec. 2d No. 959 (Wash. Emp't Sec. Dep't 2010), 2010 WL

- quitting because an employer required the claimant to begin purchasing his own work supplies, which he could not afford.<sup>299</sup>

The cases discussed in Part III<sup>300</sup> also demonstrate that a person may leave work for an almost endless list of reasons.

Determining whether those reasons constitute good cause is necessarily fact-intensive and case-specific. Recognizing this reality, before the 2003 amendments, neither the agency nor the courts had ever applied a *rule* to determine whether good cause existed.<sup>301</sup> Instead, they recognized that such determinations could only be fairly resolved by applying standards.<sup>302</sup> As the Washington State Supreme Court explained, “Good cause . . . is not susceptible of an exact definition. Rather, the meaning of these words must be determined in each case from the facts of that case.”<sup>303</sup> That rationale is still justified today. Employment relationships and job separations are every bit as varied as they were when the agency and the courts were free to exercise discretion to find good cause. The rule, which eliminates that discretion, is not theoretically sound.

Moreover, because rules cannot respond effectively to individual cases, the rule-based statute threatens claimants’ due process rights. Every claimant is already entitled to a hearing to explain how the law should apply to the facts of his or her case.<sup>304</sup> But that modicum of procedural justice does not adequately protect a claimant’s right to due process.<sup>305</sup> Instead, there is another concept that animates due process:

people should be allowed not merely to test the application of law to fact, but also to urge that their case is different from those that have gone before, and that someone in a position of

6795725.

299. Eichelberg, *Emp’t Sec. Comm’r Dec. 2d No. 946* (Wash. *Emp’t Sec. Dep’t* 2010), 2010 WL 6795712.

300. *See supra* Part III.

301. *See, e.g.,* *Matison v. Hutt*, 85 Wash. 2d 836, 839, 539 P.2d 852, 854 (1975) (refusing to apply a rule to determine good cause, noting that “[s]uch inflexibility would be unreasonable” and lead to unfair anomalies).

302. *See, e.g.,* *Nielsen v. Emp’t Sec. Dep’t*, 93 Wash. App. 21, 42, 966 P.2d 399, 409 (1998) (“The proper test is what a reasonably prudent person would do in similar circumstances.”); *Hussa v. Dep’t of Emp’t Sec.*, 34 Wash. App. 857, 863, 664 P.2d 1286, 1289–90 (1983) (“Generally, good cause for leaving employment requires a person meet the test of what an ordinarily prudent person would have done under the circumstances.”).

303. *Matison*, 85 Wash. 2d at 838–39, 539 P.2d at 853–54 (quoting *Saulls v. Emp’t Sec. Agency*, 377 P.2d 789, 793 (Idaho 1963)).

304. WASH. REV. CODE § 50.32.020 (2012).

305. *See* Sunstein, *supra* note 57, at 995.

authority ought to be required to pay heed to the particulars of their situation.<sup>306</sup>

The United States Supreme Court recognized this concept in its “irrebuttable presumption doctrine,” which the Court applied to prohibit legislative classifications that are over- or under-inclusive, unless the affected group has the opportunity to rebut the presumption that it is actually within the scope of the classification.<sup>307</sup> The Court relied, at least in part, on that doctrine to invalidate a variety of statutes that denied people the opportunity to explain that they were not properly encompassed by the rules that had been applied to them.<sup>308</sup> For example, a state could not categorically deny unwed fathers custody of their children without providing them an opportunity to explain that, despite the rule presuming they were unfit parents, they were—in their individual cases—capable of parenting.<sup>309</sup> In the context of the voluntary quit statute, this understanding of due process requires that claimants have the opportunity to argue that, even if their reasons for leaving work are not expressly contemplated by the rule, those reasons nevertheless constitute good cause—that the rule, as applied to them, is unfairly under-inclusive.<sup>310</sup>

This Comment does not argue that Washington’s current rule-based statute is unconstitutional.<sup>311</sup> However, the concept of due process reflected by the irrebuttable presumption doctrine does suggest that, when people are governed by rigid rules, they have an important interest in proving that those rules do not adequately address their situations. The

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306. *Id.* at 996.

307. *See, e.g.*, Laurence H. Tribe, *Structural Due Process*, 10 HARV. C.R.-C.L. L. REV. 269, 285–89 (1975).

308. *See, e.g.*, *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 647–48 (1974) (holding unconstitutional administrative regulations that automatically prohibited teachers from working after a fixed month of pregnancy); *Bell v. Burson*, 402 U.S. 535, 542–43 (1971) (holding unconstitutional a statute that automatically suspended a driver’s license after an accident without giving the driver the opportunity to prove he was not at fault); Tribe, *supra* note 307, at 285 n.49 (collecting cases).

309. *Stanley v. Illinois*, 405 U.S. 645, 656–58 (1972).

310. The fact that claimants have the right to a hearing, *see* WASH. REV. CODE § 50.32.020 (2012), is not enough. To protect claimants’ due process rights, hearing officers and other adjudicators must have the authority to find that claimants’ circumstances constitute good cause—authority the current rule precludes. *See id.* § 50.20.050(2)(a) (“Good cause reasons to leave work are limited to reasons listed in (b) of this subsection.”).

311. The Court has declined to extend the irrebuttable presumption doctrine. *See Weinberger v. Salfi*, 422 U.S. 749, 768–74 (1975) (distinguishing the previous cases relying on the doctrine and questioning its applicability); Sunstein, *supra* note 57, at 996 n.156 (noting the doctrine was “short-lived”). However, the cases relying on the doctrine have not been overruled. *See Weinberger*, 422 U.S. at 768–74 (distinguishing, but not overruling, cases).

current rule precludes any decision-maker from vindicating that interest.<sup>312</sup> Particularly in the context of unemployment compensation, where individual circumstances vary wildly and the need for benefits is often acute, it is theoretically unsound and fundamentally unfair to deny claimants the right to a truly individualized adjudication.

2. *Many of the Usual Rationales for Rules Do Not Justify Their Use in Washington's Voluntary Quit Statute*

Defenders of rules invoke many rationales. Some of these rationales are that rules minimize the cost of making decisions in individual cases,<sup>313</sup> have “simplifying effects,”<sup>314</sup> and reduce the likelihood of arbitrary or biased decision-making.<sup>315</sup> However, the current rule-based approach to good cause does not advance those purposes; instead, it is often at odds with them.

First, the rule does not minimize costs. One reason rules may limit costs in some contexts is that they reduce the need to “compil[e] information.”<sup>316</sup> But that rationale is inapplicable in the context of Washington’s unemployment compensation system. Every time a claimant files for unemployment benefits after quitting a job, the ESD must determine whether he or she had good cause.<sup>317</sup> The ESD must offer both the claimant and the employer the opportunity to be interviewed about the job separation.<sup>318</sup> That was true before the 2003 amendments,<sup>319</sup> and it remains true now.<sup>320</sup> The rule did not reduce the costs of compiling information.

Second, if a rule actually has “simplifying effects,”<sup>321</sup> it will presumably reduce the need for extensive adjudication.<sup>322</sup> But the current rule does not reduce that need. Aggrieved parties, whether claimants or employers, are entitled to appeal every level of agency

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312. See WASH. REV. CODE § 50.20.050(2)(a) (“Good cause reasons to leave work are limited to reasons listed in (b) of this subsection.”).

313. Kaplow, *supra* note 67, at 570; Sunstein, *supra* note 57, at 972–74.

314. Sunstein, *supra* note 57, at 972.

315. *Id.* at 974–75.

316. *Id.* at 973.

317. See WASH. ADMIN. CODE § 192-120-030 (2004).

318. *Id.* § 192-130-080 (2010); *id.* §§ 192-120-030, -040 (2004).

319. See *id.* §§ 192-120-030, -040 (2001).

320. See *id.* § 192-130-080 (2010); *id.* §§ 192-120-030, -040 (2004).

321. Sunstein, *supra* note 57, at 972.

322. See *id.* at 973.

decision about whether a claimant has good cause for leaving work.<sup>323</sup> The rule has not reduced the need for the Commissioner to review appeals in voluntary quit cases. Data from the ESD show that roughly the same percentage of appeals were filed before and after the 2003 amendments:<sup>324</sup>

Year	Total number of voluntary quit claims	Voluntary quit appeals to Commissioner	Percentage of claims appealed
2000	35,099	535	1.52%
2001	46,721	901	1.93%
2002	53,915	1340	2.49%
2003	50,276	1203	2.39%
2004	46,384	1095	2.36%
2005	41,850	944	2.26%
2006	41,162	792	1.92%
2007	41,456	711	1.72%
2008	43,606	587	1.35%
2009	52,821	1065	2.02%
2010	55,818	1486	2.66%
2011	44,798	1132	2.53%
2012	40,119	977	2.44%

Although there was a slight reduction in appeals after the 2003 amendments, any such reduction disappeared by 2009.<sup>325</sup> If the rule actually provided clarity, as proponents of rules suggest, it would have reduced the need for appeals.<sup>326</sup> These data show that it did not.

Third, the rule does not inherently reduce the risk of arbitrary or biased decision-making. Instead, by requiring the agency and the courts to focus on just eleven reasons that can constitute good cause, the rule requires them to ignore other factors that would prompt a reasonable person to leave work. That is, the rule “make[s] irrelevant features of cases that might turn out, on reflection by people making particular judgments, to be relevant indeed.”<sup>327</sup> By prohibiting the agency and the

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323. WASH. REV. CODE § 50.32.020 (2012).

324. E-MAIL FROM ROBERT PAGE, *supra* note 293.

325. *Id.*

326. *See* Sunstein, *supra* note 57, at 973.

327. *Id.* at 975.

courts from considering all the circumstances related to a claimant's decision to leave work, the rule requires them to make determinations based on imperfect or incomplete information. That prohibition creates a certain amount of arbitrariness.

In fact, in some cases, the rule actually *requires* arbitrary decision-making. For example, the rule provides that claimants who quit because their hours are reduced by at least 25% have good cause for leaving work.<sup>328</sup> Under this rule, claimants who quit because their hours are reduced by 24% are disqualified—even though a reduction of just 1% more would be good cause.<sup>329</sup> That is the hallmark of arbitrariness, but it is what the rule requires.

Additionally, the current rule actually *creates* bias against at least one social group: women. As required by Washington's then-governor Gary Locke, who expressed "concerns . . . about the unforeseeable nature of some of the practical effects of [the 2003] amendments,"<sup>330</sup> the ESD studied the effects of those amendments.<sup>331</sup> The studies showed, among other findings discussed below in Part IV.B, that women were disproportionately disqualified under the new law.<sup>332</sup> Women were denied benefits 12% more frequently than they had been under the standard.<sup>333</sup> The study noted that women were often denied after leaving work because of "domestic or marital responsibilities," including "losing child care; relocating because of a spouse's job transfer; [and] relocating to marry."<sup>334</sup> This disproportionate burden on women is a result of the 2003 amendments, as the rules simply forbid the agency and the courts from considering factors that are often of particular significance to

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328. WASH. REV. CODE § 50.20.050(2)(b)(vi).

329. *See id.*

330. Letter from Gary Locke, Governor, State of Wash., to the Senate of the State of Wash. (June 20, 2003), *available at* <http://apps.leg.wa.gov/documents/billdocs/2003-04/Pdf/Bills/Vetoes/Senate/6097.VTO.pdf>.

331. WASH. STATE EMP'T SEC. DEP'T, VOLUNTARY QUIT DECISIONS IN THE UNEMPLOYMENT INSURANCE PROGRAM: BEFORE AND AFTER IMPLEMENTATION OF SECOND ENGROSSED SENATE BILL 6097, at 9–10 (2005) [hereinafter 2005 ESD STUDY], *available at* <http://www.leg.wa.gov/JointCommittees/UITF/Documents/12-01VoluntaryQuitStudy.pdf>; WASH. STATE EMP'T SEC. DEP'T, VOLUNTARY QUILTS: DECEMBER 2006 (2006) [hereinafter 2006 ESD STUDY], *available at* <http://www.esd.wa.gov/newsandinformation/legresources/uistudies/vol-quits-2006.pdf>.

332. *See* 2006 ESD STUDY, *supra* note 331, at 4.

333. *Id.* at 3. (from July 1, 2004 through June 30, 2005, almost 2000 women were denied benefits under the new rule, even though they would have qualified under the old standard).

334. *Id.* at 4.

women.<sup>335</sup> In this way, the rule actually produces, rather than eliminates, bias.

*B. The Rule Disqualifies Claimants Who Leave Work for Reasons Consistent with the Purpose of the Employment Security Act*

The rule-based statute is also inappropriate because it disqualifies workers who, in standard-based adjudications, would be able to establish good cause because they left work for reasons consistent with the purpose of the Employment Security Act.<sup>336</sup> The study required by then-governor Locke shortly after the 2003 amendments demonstrates that the amendments' primary effect was to reduce the number of claimants who qualified for benefits.<sup>337</sup> The ESD provided two studies: one focused on 16,825 claims filed between July and December 2004 ("the 2005 Study");<sup>338</sup> the other focused on 31,162 claims filed between July 1, 2004 and June 30, 2005 ("the 2006 Study").<sup>339</sup>

The 2005 Study concluded that, under the new rule, 73% of claimants who voluntarily quit were found to lack good cause; under the old standard, that number would have been 61%—a difference of 12%.<sup>340</sup> That is, 1,989 claimants who would otherwise have received benefits were disqualified because of the rule.<sup>341</sup> This burden, as discussed in Part IV.A.2, fell disproportionately on women: almost 14% more women were disqualified because of the rule, while less than 10% more men were disqualified.<sup>342</sup>

The 2005 Study also described the circumstances of some claimants who would have qualified under the standard but were disqualified under the new rule.<sup>343</sup> The following are representative examples:<sup>344</sup>

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335. *See id.* ("This may be explained by the fact that domestic and marital responsibilities predominantly fall to women in a household and when these responsibilities do not constitute good cause under voluntary quit laws, women stand to be denied at a greater rate than men." (emphasis omitted)).

336. 2005 ESD STUDY, *supra* note 331, at 8–10.

337. *Id.* at 7 ("1,989 decisions denied UI benefits to individuals for reasons that would have been allowed under the old law"); 2006 ESD STUDY, *supra* note 331, at 3 ("10.5 percent more people would have been granted benefits under the old law").

338. 2005 ESD STUDY, *supra* note 331, at 1.

339. 2006 ESD STUDY, *supra* note 331, at 5.

340. 2005 ESD STUDY, *supra* note 331, at 1.

341. *Id.*

342. *Id.* at 6.

343. *See id.* at 9–10.

344. *See id.*

- a claimant whose wages or hours were reduced by less than 25%, even though that reduction still imposed an “unreasonable hardship” and was a “substantial involuntary deterioration” of the claimant’s work;<sup>345</sup>
- abusive workplace conditions, such as profane language and bullying, that were not decent but were not actually illegal;<sup>346</sup>
- a claimant whose employer required him to drive 150 miles every day; initially, the claimant was given a company vehicle, but the employer ultimately told the claimant to drive his own vehicle and did not compensate him for wear and tear;<sup>347</sup>
- claimants who quit to relocate because of a spouse’s transfer, if the spouse was not employed by the military;<sup>348</sup> and
- claimants who quit to care for children for any reason other than illness or disability, including losing child care or trying to help a child avoid expulsion from school.<sup>349</sup>

The 2006 Study substantially corroborated these findings.<sup>350</sup> Of the roughly 31,000 people who filed claims after voluntarily leaving work, 75.2% were found to lack good cause under the new rule; just 64.7% would have been disqualified under the standard.<sup>351</sup> This difference of 10.5% meant that around 3300 unemployed people were denied benefits as a result of the new rule, even though they left work for reasons consistent with the purpose of the Employment Security Act.<sup>352</sup> Older claimants, aged fifty-five years and older, were affected more seriously than other age groups: they were denied benefits around 11% more frequently than they would have been under the standard.<sup>353</sup> Similarly, women were more seriously affected than men.<sup>354</sup> They were denied 12% more frequently, while men were denied around 9% more frequently than they would have been under the standard.<sup>355</sup>

There is no mistaking the data. The 2003 amendments reduced the

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345. *Id.* at 9.

346. *Id.*

347. *Id.*

348. *Id.*

349. *Id.*

350. *See* 2006 ESD STUDY, *supra* note 331, at 3.

351. *Id.* at 3.

352. *Id.*

353. *Id.* at 11.

354. *Id.* at 3.

355. *Id.* at 3, 11.



number of workers who could establish good cause, even though they left work for reasons consistent with the purpose of the Act. By replacing the standard with the rule, the amendments denied benefits to almost 3300 people who would otherwise have received benefits, at least initially.<sup>356</sup> Stranding more than three thousand workers without the aid of unemployment benefits does not advance the purpose of the Act.<sup>357</sup> Instead, the rule thwarts that purpose. By denying the agency and the courts discretion to interpret good cause, the new rule deprives people of the benefits they need to survive during periods of unemployment—even though their reasons for leaving work were consistent with the purpose of the Act.

*C. A Standard Is Necessary to Advance the Purpose of the Employment Security Act and the Remedial Purpose of Unemployment Compensation Generally*

The preamble to the Employment Security Act explains both the consequences of unemployment and the importance of ameliorating its effects.<sup>358</sup> The purpose of the Act is to protect and assist “persons unemployed through no fault of their own, and [the Act is to] be liberally construed for the purpose of reducing involuntary unemployment and the suffering caused thereby to the minimum.”<sup>359</sup> The current rule-based statute frustrates, rather than advances, that purpose.

As discussed in Part II.B, rules and standards tend to express certain social values and discourage others.<sup>360</sup> Rules, at their best, promote precision, efficiency, order, and stability.<sup>361</sup> However, they also express rigidity, conformity, indifference, punitiveness, stinginess, and sclerosis.<sup>362</sup> None of those values are consistent with the remedial purpose of the Act or of unemployment compensation generally.

The Act is part of an unemployment compensation program that serves a broad remedial purpose. It protects not only against the loss of income, but also against the attendant social consequences of losing a

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356. *Id.* at 3. The study focused only on the initial action that ESD would have taken, and it is impossible to know how those cases would ultimately have been resolved. *See* 2005 ESD STUDY, *supra* note 331, at 5 (“Insufficient time has passed since the study period to accurately determine the outcomes of the appeal processes.”).

357. *See* WASH. REV. CODE § 50.01.010 (2012).

358. *Id.*

359. *Id.*

360. *See supra* Part II.B.

361. Kennedy, *supra* note 71, at 1710.

362. *Id.*

job.<sup>363</sup> A rigid application—that is, a rule-based application—of the statute that purports to advance those goals cannot possibly achieve them. The rigidity and stinginess<sup>364</sup> often associated with rules prevent such a system from providing an adequate remedy in this context.

Moreover, the Act is to be “liberally construed” for the benefit of unemployed people.<sup>365</sup> Liberal construction of statutes “allows more latitude for drawing inferences from statutory language” and “gives a statute more elbow room for the sake of achieving statutory purposes and goals.”<sup>366</sup> But the current rule does precisely the opposite: it eliminates (not just restricts) an adjudicator’s discretion to use “elbow room” to help protect people who are involuntarily unemployed. This is inconsistent with liberal construction.

Standards, by contrast, more effectively advance the remedial goals of unemployment compensation and of the Act. Standards promote flexibility, individualization, equity, evolution, generosity, and empathy.<sup>367</sup> These virtues are consistent with the goals of unemployment compensation: not just to provide income to unemployed people, but also to protect them more broadly during periods of unemployment.<sup>368</sup> Additionally, restoring discretion in a standard-based statute would allow the kind of flexibility that is critical to liberal construction.<sup>369</sup> A standard would therefore more effectively advance the purpose of the Act and of unemployment compensation generally.

In short, the rule-based disqualification not only fails to advance the purpose of the Employment Security Act, but also significantly frustrates that purpose. That result is inconsistent with the statutory text<sup>370</sup> and

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363. Eveline M. Burns, *Unemployment Compensation and Socio-Economic Objectives*, 55 YALE L.J. 1, 10 (1945) (“Finally, the popularity of unemployment insurance, and its administrative convenience as a device for assuring a continuous flow of income during substantial periods of unemployment, coupled with a failure to devise socially acceptable and more obviously appropriate methods of providing security for those excluded, have everywhere led to a broadening of the functions of the unemployment insurance program.”).

364. See Kennedy, *supra* note 71, at 1710.

365. WASH. REV. CODE § 50.01.010 (2012). Although the legislature removed this language in 2003, see Act of June 20, 2003, ch. 4, sec. 1, § 2, 2003 Wash. Sess. Laws 2d Spec. Sess. at 2782–83 (codified at WASH. REV. CODE § 50.01.010 (Supp. 2003)), it restored the language in 2006. See Act of Apr. 22, 2005, ch. 133, sec. 2, § 1, 2005 Wash. Sess. Laws 376, 377 (codified at WASH. REV. CODE § 50.01.010 (2012)).

366. Morell E. Mullins, Sr., *Coming to Terms with Strict and Liberal Construction*, 64 ALB. L. REV. 9, 38 (2000).

367. Kennedy, *supra* note 71, at 1710.

368. See Burns, *supra* note 363, at 15.

369. See Mullins, *supra* note 366, at 38.

370. See *id.*

with the remedial goals of unemployment compensation more generally.<sup>371</sup> A rule that so seriously compromises the goals of the underlying statute is unjustifiable.

## V. PROPOSED REVISED STATUTORY TEXT

To cure (or at least ameliorate) the serious problems with the current rule, Washington should amend its voluntary quit disqualification<sup>372</sup> and restore standard-based language that allows the agency and the courts to exercise discretion when determining whether a claimant had good cause for leaving work.

First, the language of section 2(a) should be amended.<sup>373</sup> The current statute contains language restricting good cause to the enumerated reasons of section 2(b).<sup>374</sup> That language should be removed, and the revised statute should read:

An individual shall be disqualified from benefits beginning with the first day of the calendar week in which he or she has left work voluntarily without good cause and thereafter for seven calendar weeks and until he or she has obtained bona fide work in employment covered by this title and earned wages in that employment equal to seven times his or her weekly benefit amount.

There is no theoretical problem with retaining section 2(b)'s enumerated list of good cause reasons.<sup>375</sup> In fact, retaining those examples of good cause could provide useful guidance to the agency and the courts.<sup>376</sup> However, an additional subsection should be added to the statute to explain that other, non-enumerated reasons may also be good cause. Section 2(b) should be amended to include the following subsection:

(xii) The individual left work for other good cause. Good cause includes:

(A) Work-connected factors, such as the degree of risk involved to the individual's health, safety, and morals, the individual's physical fitness for the work, the individual's ability to perform

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371. *See* Burns, *supra* note 363, at 15.

372. WASH. REV. CODE § 50.20.050 (2012).

373. *Id.* § 50.20.050(2)(a).

374. *Id.* ("Good cause reasons to leave work are limited to reasons listed in (b) of this subsection.").

375. *Id.* § 50.20.050(2)(b).

376. *See, e.g.,* Kennedy, *supra* note 71, at 1710 (observing that rules can promote uniformity, precision, certainty, and stability).

the work, a substantial deterioration in the work or workplace, and such other work-connected factors as the commissioner may deem pertinent; and

(B) Compelling personal reasons that would cause a reasonably prudent person to leave work.

Striking the last sentence of section 2(a) would, in conjunction with the proposed revision to section 2(b), restore the administrative and judicial discretion necessary for a fair application of the Act. These revisions would return the voluntary quit statute to a more theoretically sound, and more fundamentally just, standard.

## CONCLUSION

For almost seventy years, the ESD and the courts had substantial discretion to determine whether a claimant had good cause for leaving work. Over the years, the legislature did somewhat restrict the scope of that discretion. But until 2003 discretion played an important role in ensuring that people who left work for reasons consistent with the purpose of the Employment Security Act received the unemployment benefits to which they were entitled. By allowing holistic, fact-specific, individualized determinations, the standard-based statute ensured that the Act served its purpose: to protect and assist people who were unemployed through no fault of their own. But the 2003 and 2009 amendments—which removed all discretion and replaced it with a short, exclusive list of good cause reasons—undermined the efficacy of the Act. To give effect to the Act’s purpose, to reduce the suffering of unemployed people, and to ensure the fundamental fairness of good cause determinations, Washington should restore discretion to the statute and return to a standard: “without good cause.”