11-1425

FILED
2011 SEP 19 PM 3:10

IN THE CIRCUIT COURT OF KANAWHA COUNTY
STATE OF WEST VIRGINIA

LORETTA K. EPLING,
PETITIONER,

v.

CIVIL ACTION NO. 10-AA-134
Bd. of Review Case No. R-2010-1652
Judge Paul Zakaib, Jr.

BOARD OF REVIEW, WORKFORCE WEST VIRGINIA, MIKE JONES, Chairman, and **JAMES G. DILLON** and **CAROLE A. L. BLOOM,** members; and **VERIZON SERVICES CORP.,** Employer,
RESPONDENTS.

FINAL ORDER

Pending before the Court is a the "Petition of Loretta K. Epling Appealing From A Final Decision Of The Board Of Review Of Workforce West Virginia" ("Petition for Appeal"), filed on August 20, 2010, by the Petitioner, Loretta K. Epling ("Ms. Epling" or "the Petitioner"). Ms. Epling appeals from the Final Decision, mailed to the Petitioner on July 23, 2010, of the Board of Review of WORKFORCE West Virginia ("Board of Review"), which ruled that Ms. Epling was disqualified from receiving unemployment benefits, after finding that she did not have good cause to leave work voluntarily involving fault on the part of the employer. Ms. Epling appealed that decision and argued that the Board of Review should be reversed because (1) Ms. Epling did not leave work voluntarily and (2) in the alternative, if the Court found that Ms. Epling did leave work voluntarily, then she did so with good cause involving fault on the part of the employer.

These issues have been fully briefed by the parties. The Petitioner filed an opening brief on December 3, 2010. Verizon Services Corp. ("the employer" or "the Respondent") filed a

response brief on January 10, 2011. The Petitioner then filed a reply brief on January 25, 2011. Accordingly, the matter is now ripe for decision. Upon reviewing the underlying record, the parties' legal memoranda, and the applicable law, the Court hereby finds, for the reasons detailed below, that the change in Ms. Epling's shift assignment by the employer constituted good cause involving fault on the part of the employer for Ms. Epling to leave her employment.

Procedural History and Standard of Review

The Petitioner filed a claim for unemployment benefits with the WORKFORCE West Virginia office in Logan, West Virginia, on March 21, 2010. The WORKFORCE Deputy, on April 1, 2010, ruled that the "claimant left work voluntarily with good cause involving fault on the part of the employer. The claimant is not disqualified." Accordingly, the Deputy entered a decision in favor of the Petitioner based on the employer's unilateral change to the Petitioner's work hours. The employer filed an appeal. The Administrative Law Judge, Truman L. Sayre, Jr., heard testimony on the matter and affirmed the decision of the Deputy. Judge Sayre held: "The claimant left work voluntarily with good cause involving fault on part of the employer. The claimant is not disqualified."

The employer then requested review by the Board of Review. Following review of all documents and the transcript of the hearing, the Board of Review reversed the decision of the Administrative Law Judge. In its decision, the Board of Review held that the claimant did not have good cause to leave work voluntarily involving fault on the part of employer; and, accordingly, was disqualified from receiving benefits. The Petitioner appealed the final decision of the Board of Review, pursuant to West Virginia Code § 21A-7-17.

In reviewing decisions of the Board of Review, the Court gives substantial deference to the factual findings below, unless those factual findings are clearly erroneous. Dailey v. Bd. of Rev., 214 W. Va. 419, Syl. Pt. 1 (2003); Adkins v. Gatson, 192 W. Va. 561, Syl. Pt. 3 (1994). Questions of law, however, are reviewed *de novo* and no deference is given to the Board of Review. Dailey v. Bd. of Rev., 214 W. Va. 419, Syl. Pt. 1 (2003); Adkins v. Gatson, 192 W. Va. 561, Syl. Pt. 3 (1994).

Findings of Fact

The Petitioner worked as a business consultant for the employer from June 2, 2008 until March 15, 2010. Ms. Epling was hired to work a full-time day shift from 8:30 a.m. until 5:00 p.m. and worked those hours, in addition to required training and overtime hours, throughout her employment with Verizon. When Ms. Epling was hired she was given the opportunity to work either a residential position requiring some evening hours or a business position in the business office, which was open between 8:30 a.m. and 5:00 p.m. Ms. Epling chose the position in the business office because it fit within time constraints regarding her children's daycare services. Ms. Epling has two children, ages 5 and 7, who are released from school at 3:30 p.m. Ms. Epling arranged for daycare for her two children beginning after school and until 6:00 p.m. when the daycare center closes. Ms. Epling's husband works the evening shift at his job and is unable to pick the children up before 6:00 p.m. Ms. Epling looked for alternative daycare options in her community, but the daycare she used was the only local daycare that could pick the children up from school. Accordingly, Ms. Epling had no option but to pick her children up from daycare no later than 6:00 p.m.

In March 2010, the employer told Ms. Epling that her shift would be changed from day shift to evening shift, wherein she would work from noon to 8:00 p.m. or 1:00 p.m. to 9:00 p.m. Ms. Epling offered to work part time or continue working another position at day shift. Ms. Epling informed the employer that she needed to conclude her work day by 5:00 p.m. in order to pick up her children from daycare, but the employer was firm that Ms. Epling would be assigned to the evening shift beginning March 15, 2010. Because Ms. Epling could not work within her newly assigned schedule and care for her children appropriately, Ms. Epling was forced to quit her job. Ms. Epling is a member of the Communication Workers of America, AFL-CIO, which has a written labor agreement with the employer.

Conclusions of Law

Because I find that Ms. Epling left her job with good cause involving fault on the part of the employer, I need not address the Petitioner's argument that she did not leave her employment voluntarily. Accordingly, I will only address the Petitioner's alternative argument and I make the following conclusions of law.

The Unemployment Compensation benefits program was established by the United States Congress. "The objective of Congress was to provide a substitute for wages lost during a period of unemployment not the fault of the employee." California v. Java, 402 U.S. 121, 130 (1971). West Virginia Code § 21A-6-3(1) provides that an individual shall not be disqualified from receiving unemployment compensation benefits for the week in which she left her most recent work voluntarily with good cause involving fault on the part of the employer and until she has been reemployed for at least 30 days. When a claimant leaves a job voluntarily, she bears the burden of proving that the disqualifications do not apply to her.

First, I conclude as a matter of law that the labor agreement attached to the Board of Review's decision gives the employer the ability to change the hours of employment that an employee must work. The relevant question, however, is not whether the employer could change Ms. Epling's hours, but rather whether the change in her hours constituted fault on the part of the employer causing Ms. Epling to leave her job with good cause. The Board of Review incorrectly held that because Ms. Epling could not show a breach of the employment contract, she had therefore failed to show she left her job for good cause involving fault on the part of the employer. In order to obtain unemployment benefits after voluntarily leaving her job, however, a claimant is not required to prove that the employer breached the employment contract, but instead must show that she had good cause involving fault on the part of the employer for leaving employment. See, e.g., Mitchell v. Jewel Food Stores, 142 Ill.2d 152, 172 (1990) (concluding that a successful claim for unemployment compensation does not bar a breach of contract claim because the definitions applied in breach of contract cases are different than those applied in unemployment cases); Adams v. Harding Mach. Co., Inc., 56 Ohio App. 3d 150, 157 (Ohio App. 3 Dist. 1989) (concluding that "the term 'just cause' as used in [unemployment statutes], has a different meaning than 'just cause' as that term is used in an employment contract").

In order to prove that Ms. Epling left her job with good cause involving fault on the part of the employer, she must show that she both left the job with "good cause" and that there was "fault on the part of the employer." See W. Va. Code § 21A-6-3(1). Ms. Epling had a personal and family obligation that, in combination with her employer's change to her work schedule, required her to quit her job and constituted good cause for leaving her employment. In

particular, Ms. Epling had to pick her children up from daycare by 6:00 p.m. each evening. Ms. Epling was hired for and worked a job with the employer that ended at approximately 5:00 p.m. each day in order to allow her to get to her children at daycare before 6:00 p.m. It was imperative that Ms. Epling pick her children up from daycare by 6:00 p.m. each day because the daycare center closed at 6:00 p.m. and Ms. Epling's husband worked the evening shift, thus making it impossible for him to pick up the children from daycare. Accordingly, Ms. Epling needed a work shift that ended by 5:00 p.m. daily in order to fit within the daycare schedule. Ms. Epling worked such a shift during the duration of her employment with the employer, but beginning March 15, 2010 her shift was scheduled to change to be either noon until 8:00 p.m. or 1:00 p.m. until 9:00 p.m. Ms. Epling informed the employer that she would be unable to work such hours and sought any shift that ended at 5:00 p.m., including a part-time shift. Despite Ms. Epling's requests to remain on her shift or be given a different job, including potentially a part time job, that ended by 5:00 p.m., the employer refused to accommodate Ms. Epling. When the employer rejected this request, Ms. Epling had no choice but to leave her job in order to care for her children and ensure that they were supervised in the evenings. Such circumstances constitute good cause for leaving a job. Accordingly, the Court concludes that Ms. Epling left her employment for good cause.

The next question, therefore, is whether Ms. Epling left her job due to some fault on the part of the employer. The Supreme Court of Appeals of West Virginia has held that "substantial unilateral changes in the terms of employment furnish 'good cause involving fault on the part of the employer' which justify employee termination of employment and preclude disqualification from the receipt of unemployment compensation benefits." Murray v. Rutledge, 174 W. Va. 423,

Syl. Pt. 2 (1985). As the Murray Court held, "[s]ubstantial changes in the time of day when employment services are to be performed may justify employee resignation from employment." Id. at 428. The Murray Court then cited approvingly to a case from Iowa, which "held that an unemployment compensation claimant's refusal to accept a transfer to night shift in a violent ward of a sanitarium did not disqualify her from receiving [unemployment] benefits[.]" Id. (citing Forrest Park Sanitarium v. Miller, 233 Iowa 1341, 1343 (1943)). In addition, in Ross, the Supreme Court of Appeals of West Virginia stated that "the increased burdens and expenses associated with family obligations such as child care provided further justification for finding the relocated job impractical or impossible." 175 W. Va. at 706. The Ross Court cited with approval to Martin v. Review Board for the statement of law that a claimant's refusal to work 4:00 p.m. to midnight shift due to transport and babysitter problems constituted "good cause." Id. (citing Martin v. Review Board, 421 N.E.2d 653 (Ind. App. 1981)).

The Court concludes that changing the hours Ms. Epling worked each day from a 5:00 p.m. end time to an 8:00 p.m. or 9:00 p.m. end time constituted a substantial and material change in the terms or conditions of her employment that was made unilaterally by the employer. Because Ms. Epling had no input into the substantial change to the terms of her employment, they were one-sided and, hence, unilateral. The Court concludes that the fault on the part of the employer was the employer's insistence on changing Ms. Epling's work hours and refusal to work within Ms. Epling's request for a work schedule that she could complete without jeopardizing the care of her children. Although the labor agreement gave the employer the ability to change the working hours of employees, Ms. Epling was specifically offered a job working from 8:30 a.m. until 5:00 p.m., which she took instead of another job that did not end by

5:00 p.m. See ALJ's Finding of Fact; ALJ Hearing at 19-20 (wherein Ms. Epling stated that "when I was hired I was offered a residential position with different hours and a business position, which the business office was only open a certain time, 8:30 to 5:00 including 30 minutes of overtime and that's what I agreed to"). Accordingly, Ms. Epling had reason to believe that she would be working a shift that ended at 5:00 p.m. for the duration of her employment. Therefore, the substantial unilateral change to Ms. Epling's work hours constituted a change in the terms of employment because of "fault on the part of the employer." Combined with the independent good cause Ms. Epling had for leaving her job after the change in her work hours, the Court concludes that Ms. Epling should not have been disqualified from receiving unemployment compensation benefits.[1]

Ruling

After carefully reviewing the memoranda of law submitted by the parties, the case record, and the relevant law the Court hereby **CONCLUDES** that the employer made substantial unilateral changes to Ms. Epling's hours of work and, combined with Ms. Epling's family obligations, this constituted good cause involving fault on the part of the employer for Ms. Epling's unemployment. Furthermore, the Court **CONCLUDES** that no other disqualifications

---

[1] In addition, Ms. Epling does not meet any of the other reasons for disqualification. The only other exception that could possibly apply, West Virginia Code § 21A-6-3(6), provides that an individual shall be disqualified from receiving unemployment when they "voluntarily quit employment to marry or to perform any marital, parental or family duty, or to attend to his or her personal business or affairs . . . ." W. Va. Code § 21A-6-3(6). Ms. Epling's reasoning for leaving her job do not fit within the statutory language of West Virginia Code § 21A-6-3(6). The so-called "marital quit" section addresses employees who choose to leave a job in order to perform a family duty. See Thomas, 167 W. Va. at 492. In the Thomas decision, the Board of Review "contend[ed] that the marital quit disqualification rationally furthers [the] legislative purpose [of limiting entitlement to unemployment compensation benefits to those persons who are genuinely attached to the labor market] because persons who voluntarily leave their employment to perform a marital duty do so with the intention to withdraw permanently from the labor force." Id. at 495. The Thomas Court stated that "the rationale advanced by the [Board of Review] . . . [was] the only possible justification for the [marital quit] classification[.]" Id. Ms. Epling clearly does not fit within this rationale. Ms. Epling did not leave her job because she got married and wanted to be a homemaker or because she had children and wanted to be a stay-at-home mother. Rather, Ms. Epling left her job because her work hours changed at the whim of her employer and the new hours conflicted with all available childcare for her children. Accordingly, the disqualification contained in West Virginia Code § 21A-6-3(6) does not apply to the Petitioner.

apply to the Petitioner. Accordingly, the Court **REVERSES** of the final decision of the Board of Review and **ORDERS** the Board of Review to enter an order in accordance with this Final Order, pursuant to West Virginia Code § 21A-7-28, and provide prompt payment to Ms. Epling for all of her back unemployment, as though she had received unemployment without interruption from the date she first applied. The objections and exceptions of the Respondents are noted for the record.

Upon this order, the pending Petition for Appeal is **GRANTED**, judgment is entered in the Petitioner's favor, all pending matters in this case are hereby resolved, and the Clerk is **DIRECTED** to remove this case from the active docket of the Court.

The Court **DIRECTS** the Clerk of the Court to distribute a true copy of this Order to all counsel of record, as follows:

Kevin Baker
Baker & Brown, PLLC
120 Capitol Street
Charleston, WV 25301

Mark H. Dellinger
Bowles Rice McDavid Graff & Love, LLP
Post Office Box 1386
Charleston, WV 25325

The Court further **DIRECTS** the Clerk of the Court to distribute a true copy of this Order to all the Board of Review, as follows:

Unemployment Compensation Board of Review
Carole A. L. Bloom, Chair
112 California Avenue
Charleston, WV 25305

ENTERED this 19th day of Sept, 2011

Honorable Paul Zakaib, Jr.
Circuit Court Judge for the 13th Judicial Circuit,
Kanawha County

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE COPY FROM THE RECORDS OF SAID COURT GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 20TH DAY OF SEPTEMBER 2011
Cathy S. Gatson CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA