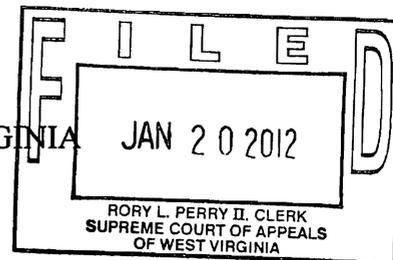


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 11-1425



VERIZON SERVICES CORP.,

Respondent Below, Petitioner

v.

LORETTA K. EPLING,

Petitioner Below, Respondent.

Appeal from a Final Order of the
Circuit Court of Kanawha County
(Civil Action No. 10-AA-134)

PETITIONER'S BRIEF

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I. ASSIGNMENTS OF ERROR

1. The Circuit Court erred in awarding unemployment compensation benefits to Ms. Epling by holding that she left her employment with Verizon Services Corp. for good cause involving fault on the part of Verizon.

II. STATEMENT OF THE CASE

Petitioner Verizon Services Corp. (“Verizon”) appeals an Order of the Circuit Court of Kanawha County, West Virginia, reversing the decision of the Board of Review of WorkForce West Virginia, which held that Respondent Loretta Epling (“Epling”) was disqualified from receiving unemployment compensation benefits because she voluntarily quit her employment with Verizon after her work hours were changed in accordance with the agreed upon terms of her employment.

1. Epling’s employment with Verizon.

Epling was hired as a Business Consultant by Verizon and worked from June 8, 2008, until March 15, 2010, when she voluntarily quit her employment. (App. 001, 010.) While Epling claims that she was hired to work day shift, she was notified prior to the beginning of her employment with Verizon that she was not guaranteed any specific shift or hours and that her work hours were subject to change at any time. (App. 005-007, 012-019.)

Epling’s job offer was expressly conditioned on her acceptance of the requirement that her work hours could be changed at any time, and she was aware that she was not guaranteed a specific shift or schedule when she accepted employment with Verizon. Over two weeks prior to beginning her employment, Epling received several documents from Verizon, by electronic mail, including two documents which clearly outlined the terms of her job offer and the conditions of her employment. (App. 012-019.) Specifically, Epling received a document

entitled “Loretta Epling’ Job Offer Confirmation” and a document entitled “Statement of Understanding.” (App. 014-018.)

The Job Offer Confirmation letter expressly informed Epling that her offer was “contingent upon the conditions” discussed in the letter. (App. 014.) In this regard, the very first condition set forth in the letter informed Epling that she was not entitled to receive any guaranteed work schedule and her work hours were subject to change based on Verizon’s business needs. Specifically, the letter indicated that “[y]our work schedule is determined by your supervisor based on the needs of the business. This may include evenings, nights, weekends, overtime, and overnight stays when required.” (Id.) (Emphasis added.) She was also informed that the terms of her employment with Verizon may be covered under the terms of a collective bargaining agreement. (App. 015.)

Similarly, the Statement of Understanding document Epling received prior to working at Verizon unequivocally informed her that she “she may be scheduled to work any days/hours from Monday through Friday, and may be required to work occasional weekends and Holidays as needed.” (App. 016.) (Emphasis added.) This document further provided that “[t]ours of duty are currently scheduled between the hours of 8:00 a.m. and 6:00 p.m. You also understand that tours of duty are *subject to change at any time* based on the needs of the business, and that they are scheduled based on seniority.” (App. 017.) (Emphasis in original.) This document further stated that by accepting the offer of employment, Epling understood and agreed that if hired, she accepted and could meet the conditions of employment contained in the document. (App. 016.)

While employed by Verizon, Epling was a member of the Communication Workers of America Union (“Union”). (App. 006.) As a Union member, the terms and

conditions of Epling's employment, including her work hours, were the product of a negotiated agreement between her Union and Verizon. (App. 021-037.) The negotiated terms were reduced to writing in a Collective Bargaining Agreement ("CBA") and under those terms, an employee's work hours were not guaranteed, but were in fact subject to change based upon the needs of Verizon's business. (App. 011-012, 022-026.) Specifically, Article 25, Section 1 of the parties' CBA provided as follows:

Work schedules shall be established by the Company for Category I, II, III, A and B employees. These schedules shall show the time the employee's normal tour starts and ends on each day of the normal work week, **provided that such schedules may be changed by the Company at any time in order to meet work requirements and service conditions** subject, however, to Sections 2 and 3 of this Article. Work schedules shall be posted by 6:00 P.M. of the Monday of the preceding week in advance of the first day of the employee's first normal work week shown on such schedules.

(App. 024.) (Emphasis added.) Furthermore, Verizon and the Union clearly contemplated that all Union employees would be required to work evening and night shifts because they negotiated pay increases (shift differentials) into their CBA for employees who worked during those hours.

(App. 022.)

As explained by Ms. Epling's immediate supervisor, Christina Elswick, these terms were not modified at any time during Epling's employment with Verizon:

Q. During the time that Ms. Epling worked at Verizon did you ever make any representations to her that she would only be assigned to work the dayshift 8:30 to 5:00 Monday through Friday?

A. No.

Q. Are you aware of Ms. Epling having this type of agreement with anyone at Verizon that she would only have to work the dayshift 8:30 to 5:00 Monday through Friday.

A. No.

Q. Did you ever make any representations to Ms. Epling that her schedule of dayshift would never be changed?

A. No.

Q. Is it common for Verizon to change the shifts of employees in positions like the one that Ms. Epling held?

A. Yes.

Q. Do you know if it's Verizon's practice to enter into any type of verbal agreements with the employees regarding what shifts they will work?

A. No. We - it's by their contract.

(App. 008-009, 011.)

Consistent with Ms. Epling's testimony, neither Verizon nor the Union's employees or representatives were permitted to alter the written terms of the parties' CBA through verbal or unwritten agreements or representations. The parties' CBA included an integration or "zipper" clause which precluded any such agreements or representations:

This Agreement sets forth all of the understandings and commitments existing between the parties, and it is agreed that the parties shall not be bound by any understandings or commitments not included herein, except that written Agreements modifying the provisions of this Agreement, or covering conditions not contained in this Agreement, shall be binding on the parties, but only if such Agreements are signed by the authorized representatives of the parties.

(App. 035.)

In March 2010, Verizon became aligned with another company and the needs of the business required Verizon to reassign many of their employees to different shifts, in accordance with the negotiated terms of the parties' CBA. (App. 001, 005.) Epling was told that her shift would change from the current hours of 8:30 a.m. to 5:00 p.m. for five days per week, to

the hours of noon until 8:00 p.m. three days a week, and 1:00 p.m. to 9:00 p.m. for the remaining two days. (App. 004-005.) As a result of this change in hours, she would receive increased pay in accordance with the shift differentials negotiated between her Union and Verizon. (App. 022.)

When Epling was notified of this change in hours, she asked to remain on the day shift, or in the alternative, to be switched to a part-time position because of child care issues. (App. 005-006.) Verizon looked into whether Epling could be reassigned, but since the parties' CBA requires that shifts, reassignments and transfers be based on seniority, Verizon was unable to accommodate her request. (App. 005-007, 027-029.) After being informed that she could not remain on day shift or switch to part-time status, Epling submitted a resignation letter indicating that she was unable to work her assigned shift due to child care issues. (App. 022.)

2. Procedural overview.

One week after resigning her employment with Verizon, Epling filed a claim for unemployment compensation benefits with WorkForce West Virginia. (App. 001.) At the first step of the administrative process, a Deputy determined that Epling left her employment for good cause involving fault on the part of Verizon and was not disqualified from receiving unemployment benefits. (App. 002.) Verizon then appealed and the Deputy's decision was upheld by an Administrative Law Judge after an evidentiary hearing. (App. 038-039.) Thereafter, Verizon appealed the Administrative Law Judge's decision to the Board of Review, and following a hearing and review of the evidentiary record, the Board reversed the Administrative Law Judge's decision and found that Epling was disqualified from receiving benefits under the following rationale:

The facts of this case demonstrate that the claimant left work voluntarily due to a change in her working hours. She has failed to show any fault on the part of the employer causing her to quit. The union and the employer negotiated a contract which sets forth the

rights and responsibilities of each party. The contract allows the employer to change the employees' working hours, as needed based on the needs of the business. This Collective Bargaining Agreement was negotiated between Verizon and the CWA Union. Therefore, the employer was acting within the terms of the contract. There may have been a change in the claimant's work hours, but it was not a unilateral change as the contract was negotiated by both the union and the employer. The claimant has failed to show that the employer in any way breached the employment contract. She has failed to show good cause involving fault on the part of the employer causing her to quit. She is therefore disqualified from receiving benefits.

(App. 041-042.)

Epling appealed the Board of Review's decision to the Circuit Court of Kanawha County, contending that the Board erred in reversing the decision of the Administrative Law Judge. (App. 044-046.) The Circuit Court reversed the Board's decision thereby reinstating Epling's unemployment compensation benefits. (App. 094-104.) By letter dated August 26, 2011, the Court issued the following ruling: "[T]his Court is of the opinion the final decision of the Board of Review should be reversed as the change in Ms. Epling's shift assignment by the employer constituted a material unilateral change in the terms or conditions of her employment constituting good cause for Ms. Epling to leave her employment." (App. 094.) The Circuit Court also directed Epling's counsel to prepare an Order containing findings of fact and conclusions of law in support of the Court's ruling. (Id.) This Order was entered by the Court on September 19, 2011. (App. 104.)

Verizon seeks relief from the Circuit Court's September 19, 2011 Order, and requests this Court to reverse the Circuit Court's ruling and reinstate the Board of Review's finding that Epling voluntarily quit her employment without good cause involving fault on the

part of Verizon, and therefore is disqualified from receiving unemployment compensation benefits.

III. SUMMARY OF ARGUMENT

The issue in this appeal is whether an unemployment claimant who voluntarily quits their employment due to a change in hours can demonstrate good cause involving fault on the part of their employer where the claimant was informed prior to their employment that their work hours were subject to change at any time based on their employer's business needs and this term of employment was a product of negotiation between the claimant's union and employer.

The Circuit Court erred in awarding unemployment benefits to Ms. Epling by holding that she left her employment for good cause involving fault on the part of Verizon. First, the Court neglected to conduct a proper analysis of the operative disqualification provision contained in West Virginia Code § 21A-6-3(1). Specifically, the Court did not even address whether Epling voluntarily quit her employment with Verizon. Nevertheless, that issue is not in dispute as Epling testified that she voluntarily quit her employment with Verizon. Second, after declining to address whether Epling voluntarily quit her job, the Court concluded that by changing her work hours, Verizon made a material unilateral change to the terms or conditions of her employment, which in turn constituted good cause for Epling to leave her employment. This finding, however, was erroneous as the Court failed to consider the undisputed facts that Verizon informed Epling, in writing, prior to the beginning of her employment that she was not guaranteed any specific schedule, her work hours would be set according to Verizon's business needs, and her employment was conditioned on her acceptance of those terms.

In addition, Epling's work schedule was actually the subject of negotiation and agreement between Verizon and her Union, and was set forth in the parties' written labor agreement. In this regard, the parties agreed that Union employees, like Epling, were not guaranteed any specific work schedule and would be required to work whatever shift or schedule was necessary to meet Verizon's business needs. Accordingly, there was no substantial unilateral change in the terms of Epling's employment and she failed to prove any "fault" on the part of Verizon for acting in accordance with the terms of her employment, which were provided to her prior to the beginning of her employment and were actually negotiated between her, through her Union, and Verizon.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Although the ultimate issue in this appeal is narrow and relatively straightforward, the legal principles and public policy issues underlying the ultimate issue are such that oral argument would significantly aid the Court's decisional process. This is an important case which addresses whether an employer should be subjected to unemployment liability for managing its workforce in accordance with written employment terms which are communicated to employees prior to their employment. This case is also important because the Circuit Court's decision subjects an employer to unemployment liability for establishing work schedules that are negotiated with and agreed to by its union employees. Under these circumstances and contrary to the Circuit Court's Order, there can be no substantial unilateral change in the terms of employment constituting "fault" on the part of an employer.

Accordingly, this appeal is appropriate for Rule 20 argument.

V. STANDARD OF REVIEW

This Court has previously held that the following standard of appellate review applies to unemployment compensation claim decisions:

The findings of fact of the Board of Review of ... [WorkForce West Virginia] are entitled to substantial deference unless a reviewing court believes the findings are clearly wrong. If the question on review is one purely of law, no deference is given and the standard of judicial review by the court is *de novo*.

Syl. Pt. 3, Adkins v. Gatson, 192 W. Va. 561, 453 S.E.2d 395 (1994). Moreover, this Court has also held that it is appropriate to “apply a *de novo* standard of review to the Board of Review’s legal conclusion that the [claimant] quit her job ‘voluntarily without good cause involving fault on the part of the employer’ within the meaning of West Virginia Code § 21A-6-3(1).” May v. Chair and Members, Board of Review, 222 W. Va. 373, 376, 664 S.E.2d 714, 718 (2008).

VI. ARGUMENT

1. **The Circuit Court erred in finding that Epling left her employment for good cause involving fault on the part of Verizon.**

This Court has recognized that West Virginia's statutory eligibility and disqualification provisions concerning the receipt of unemployment compensation benefits is a two step process. The first step involves determining whether an individual is eligible to receive unemployment benefits and the second step requires a determination as to whether the individual is disqualified. Ohio Valley Med. Ctr., Inc. v. Gatson, 202 W. Va. 507, 510, 505 S.E.2d 426, 429 (1998). Only the second step of this two part process is at issue in this appeal.

Somewhat recently, in Childress v. Muzzle, this Court also provided the following guidance on how the provisions of West Virginia’s unemployment statute should be construed:

While we have held that unemployment compensation statutes, being remedial in nature, should be liberally construed to achieve the benign purposes intended to the full extent thereof, we believe that it is also important for the Court to protect the unemployment compensation fund against claims by those not entitled to the benefits of the Act. Also, we believe that the basic policy and purpose of the Act is advanced both when benefits are denied to those for whom the Act is not intended to benefit, as well as when benefits are awarded in proper cases. Additionally, we believe that the Act was clearly designed to serve not only the interest of qualifying unemployed persons, but also the general public.

Id., 222 W. Va. 129, 133, 663 S.E.2d 583, 587 (2008) (internal citations and quotations omitted).

With these concepts in mind, the operative provision of the unemployment statute which applies in the instant case is West Virginia Code § 21A-6-3(1), which provides, in pertinent part, that “an individual shall be disqualified for benefits ... [f]or the week in which he left his most recent work voluntarily without good cause involving fault on the part of the employer and until the individual returns to covered employment and has been employed in covered employment at least thirty working days.” This statutory provision expressly requires that there be some fault on the part of an employer in order to overcome the statutory bar to benefits for an individual who voluntarily quits their job.

In Childress, this Court indicated that the disqualification provision contained in § 21A-6-3(1) requires an analysis of whether a claimant left their employment voluntarily, and if so, whether the claimant left for good cause involving fault on the part of the employer. Id., 222 W. Va. at 133, 663 S.E.2d at 587. In conducting such an analysis, this Court noted that the word “voluntarily” was not defined in the unemployment statute, but held “that the word voluntarily as used in *W.Va. Code*, 21A-6-3(1) means the free exercise of the will.” Id. This Court went on to note that the term “good cause” is likewise not defined in the unemployment compensation

statute. Id. After analyzing that term, this Court held “that the term ‘good cause’ as used in *W.Va. Code*, 21A-6-3(1) means cause involving fault on the part of the employer sufficient to justify an employee’s voluntarily leaving the ranks of the employed and joining the ranks of the unemployed.” Id.

The reversible error committed by the Circuit Court in this case begins with its failure to fully and properly consider the disqualification provision set forth in § 21A-6-3(1). In contravention of this Court’s decision in Muzzle, the Circuit Court inexplicably refused to make a finding as to whether Epling voluntarily quit her employment with Verizon. (App. 099.) Instead, the Circuit Court simply skipped that part of the analysis and proceeded to address the “good cause” portion of § 21A-6-3(1). (Id.)¹

Regardless of the Circuit Court’s failure to address this issue, there is no dispute that Epling voluntarily quit her employment with Verizon. At the hearing before the Administrative Law Judge, Epling testified on this point as follows:

Q. And it was your decision to voluntarily quit your position with Verizon; is that right?

A. Yes.

(App. 008.) Therefore, the only remaining matter is whether Epling left her employment for good cause involving fault on the part of Verizon.

“[T]he determination of whether there is ‘good cause’ for ceasing employment within the meaning of West Virginia Code § 21A-6-3(1) is a question of law which must be answered in relation to the particular facts of each case” and the employee that voluntarily abandoned their employment bears the burden of proving that good cause attributable to their

¹ At page four of the Court’s September 19, 2011 Order, the Circuit Court indicated as follows: “Because I find that Ms. Epling left her job with good cause involving fault on the part of the employer, I need not address [Epling’s] argument that she did not leave her employment voluntarily.” (App. 099.)

employer exists. Ross v. Rutledge, 175 W. Va. 701, 704, 338 S.E.2d 178, 181 (1985). While the determination of good cause is to be made on a case by case basis, this Court has clearly delineated between circumstances constituting good cause and circumstances, such as those in the instant case, which fall short. For instance, an employee who quits their employment due to “[c]ustomary working conditions not involving deceit or other wrongful conduct on the part of the employer” does not quit for good cause involving fault on the part of the employer. Syl. Pt. 1, Amherst Coal Co. v. Hix, 128 W. Va. 119, 35 S.E.2d 733 (1945); see also, Denney v. Rutledge, 174 W. Va. 820, 329 S.E.2d 893 (1985). Likewise, no good cause is shown where an employee quits their employment due to an unpopular business decision that was not arbitrary, retaliatory or unlawfully discriminatory. Private Industry Council of Kanawha Co. v. Gatson, 199 W. Va. 204, 483 S.E.2d 550 (1997).

In other circumstances, this Court has held that “substantial unilateral changes in the terms of employment may furnish ‘good cause involving fault on the part of the employer’ which justifies employee termination of employment and precludes disqualification from the receipt of unemployment compensation benefits.” Syl. Pt. 2, in part, Murray v. Rutledge, 174 W. Va. 423, 327 S.E.2d 403 (1985). Good cause is typically found only in situations where there is clearly bad behavior on the part of the employer, where an employer’s decisions unfairly affected employee compensation, and where job duties were substantially and unilaterally changed from the duties associated with the position that the employee was initially hired to

perform.² Importantly, however, this Court, unlike the Circuit Court below, has *never* found good cause involving fault on the part of an employer where the employer acted consistently with written terms of employment that were both communicated to an employee prior to employment and were the product of a negotiated labor agreement with the employee's union. That is the situation presented in the instant case.

2. Verizon did not make a substantial, unilateral change to the terms and conditions of Epling's employment; therefore, she failed to meet her burden of proving "fault" on the part of Verizon.

Epling failed to meet her burden of proving that she voluntarily quit her employment for good cause involving fault on the part of Verizon. The change in her hours was a not a substantial, unilateral change to the terms and conditions of her employment with Verizon. First, Epling was notified in writing and *prior* to coming to work with Verizon that she was not guaranteed any specific work schedule, her schedule was subject to change at any time based on Verizon's business needs, and her employment with Verizon was conditioned on her acceptance of that term of employment. Secondly, Epling actually negotiated the terms of her work schedule with Verizon, through her Union, and therefore the parties understood and agreed that there was no guaranteed work schedule and that work hours would be assigned to employees

² See, e.g., May v. Chair and Members, Board of Review, 222 W. Va. 373, 376, 664 S.E.2d 714, 718 (2008) (finding substantial unilateral changes in terms of employment where claimant quit her employment of performing personal maid services after the quantity of her workload increased substantially, she was required to routinely work overtime hours and her compensation was never increased); Wolford v. Gatson, 182 W. Va. 674, 391 S.E.2d 364 (1990) (finding claimant not disqualified from receiving benefits where a change in hours resulted in a 25% reduction in pay and an increase in regular duties to include cleaning storeowner's home); Hunt v. Rutledge, 177 W. Va. 523, 354 S.E.2d 619 (1987) (finding claimant no disqualified from receiving benefits where claimant was hired as an orderly, but employer changed job assignment to that of nursing assistant, which involved skills that claimant did not possess, did not carry increase in pay, and employer did not attempt to train claimant for new role); Brewster v. Rutledge, 176 W. Va. 265, 342 S.E.2d 232 (1986) (good cause shown where claimant's pay decreased from \$3.35 an hour to \$2.25 an hour, and was subsequently required to perform janitorial work in addition to his previous duties as night watchman without an accompanying increase in pay.).

as necessary to meet Verizon's business needs. Accordingly, for these reasons, there was no unilateral change to Epling's work schedule.

- a. **There was no substantial, unilateral change to Epling's employment where she was not guaranteed any specific work schedule and her work hours were subject to change at any time as was communicated to her, in writing, prior to the start of her employment with Verizon.**

The Circuit Court erroneously held that Epling had reason to believe that she would be working from 8:30 a.m. until 5:00 p.m. for "the duration of her employment" with Verizon. (App. 105.) In so holding, the Circuit Court utterly failed, in the entirety of its Order, to consider, much less address the fact that Epling was informed, in writing and prior to accepting the position with Verizon, that her work hours were not guaranteed for any specific shift and were subject to change at any time.

The record establishes that the shift scheduling provision at issue was an original term of Epling's employment, and that Epling knowingly and willingly agreed to the terms of her employment when she accepted employment with Verizon. It is undisputed that Epling received the Statement of Understanding and Job Offer Confirmation letter two weeks *before* she began her employment with Verizon. Both documents unequivocally notified Epling that her shift could be changed by Verizon at any time in order to meet work requirements. Epling had over two weeks to consider this employment term before coming to work at Verizon. An individual, like Epling, who accepts employment knowing the terms and conditions thereof cannot later invoke those conditions to demonstrate good cause for leaving their employment. See, e.g., In re Epps, 715 N.Y.S.2d 89 (2000) (holding that an employee who quit her job due to a long commute in order to take care of her children after school was disqualified from receiving

unemployment benefits because she was aware of the commuting requirement before she took the job).

Rather than consider these facts, the Circuit Court adopted Epling's assertion that by choosing a job that was currently on the day shift, Epling had reason to believe that her work hours would never change. This assertion is wholly unsupported by the evidence and is little more than *post hoc* rationalization by Epling in an attempt to impute fault to Verizon. Clearly, Verizon never told Epling that her shift would remain constant and tellingly, Epling does not assert that anyone ever explicitly made her such a promise. Indeed, Epling's assertion is contrary to all of the written terms of employment provided to her before she even started her employment with Verizon.³

In conclusion, because Epling was aware that her work hours were not guaranteed and could be changed at any time before she came to work at Verizon, it is clear that Verizon's decision to change her work hours was not a substantial, unilateral change in the terms of her employment. Accordingly, the Circuit Court's decision to ignore this dispositive fact was clearly erroneous.

³ Indeed, no one at Verizon would even be able to make such a representation because it would be contrary to the written terms of the parties' CBA and is expressly barred by the integration/"zipper" clause contained in the parties' labor contract. Pleasantview Nursing Home, Inc. v. N.L.R.B., 351 F.3d 747, 754 (6th Cir. 2003) (holding that a purported verbal modification of a collective bargaining agreement is ineffective where the agreement contains "an express zipper clause prohibiting modification except by written agreement"); Bozetarnik v. Mahland, 195 F.3d 77, 83 (2d Cir. 1999) (finding that integration/no oral modification clause contained in collective bargaining agreement preclude the incorporation into agreement of implied terms that are inconsistent with the agreement).

- b. **There was no substantial, unilateral change to Epling’s employment where Epling, through her Union, and Verizon actually negotiated a term of employment that did not guarantee her any specific work schedule and required her to work whatever shift or schedule was necessary to meet Verizon’s business needs.**

Perhaps the most glaring error committed by the Circuit Court was its finding that Epling had “no input into the substantial change to the terms of her employment, they were on-sided and, hence, unilateral.” (App. 102.) This finding is plainly not supported by the undisputed evidence in the record. Epling, through her Union, actually negotiated this very term of employment (i.e., her work schedule) with Verizon, which she now claims was somehow a substantial, unilateral change to the terms of her employment. (App. 024-026.)⁴

As a member of the Union, Epling and her co-employees received the benefit of actually negotiating their employment terms unlike at-will employees. Having negotiated the term of employment concerning her work hours, Epling now wants to try and ignore the CBA in her attempt to obtain unemployment benefits.

While Epling attempts to distance herself from the CBA, she was clearly bound by the terms of employment that were negotiated and agreed upon between Verizon and the Union. Those terms of employment were clearly explained in her CBA and provided that “schedules may be changed by the Company at any time in order to meet work requirements and service conditions.” (App. 044.) Epling voluntarily quit her employment after refusing to accept a schedule that involved different work hours than what she wanted to work. By joining the Union, Epling made it the exclusive bargaining unit over the terms and conditions of employment and accordingly, the Union negotiated, on her behalf, terms of employment which

⁴ It is well settled that working hours are actually a mandatory subject of collective bargaining. See, e.g., Beverly Health and Rehabilitation Services, Inc. v. N.L.R.B., 297 F.3d 468, 479 (6th Cir. 2002).

included her hours of work. See, e.g., Efkamp v. Iowa Dept. of Job Service, 383 N.W.2d 566, 567 (Iowa 1986) (holding that an employee, who was a member of a union and quit his employment after a collective bargaining agreement was renegotiated and lowered his wages, was disqualified from receiving unemployment benefits because he was bound by the agreement reached between his union and employer); Beaman v. Aynes, 393 P.2d 152 (Ariz. 1964).

Despite its earlier finding, the Circuit Court actually acknowledged both the existence of the parties' CBA and the validity of the shift scheduling provisions when it concluded as a matter of law that "the labor agreement...gives the employer the ability to change the hours of employment that an employee must work." (App. 102.) However, the Circuit Court then inexplicably concluded that "the fault on the part of the employer was the employer's insistence on changing Mrs. Epling's work hours and refusal to work within Mrs. Epling's request for a work schedule that she could complete...." (Id.) Simply put, the Circuit Court concluded that Verizon *could* change Epling's work hours to meet its business needs, but then found them to be at fault because they did so and would not violate the seniority provisions of its CBA to displace more senior Union employees to accommodate Epling's request.

In sum, the undisputed evidence is that Epling, through her Union, actually negotiated the term of employment with Verizon. It is also undisputed that Verizon complied with the assignment of work hours that was negotiated between the parties and reduced to writing in their CBA. Accordingly, it is plain that there was no "fault" on the part of Verizon for assigning Epling to a work schedule that the parties agreed to as part of their labor contract.

3. This Court's holdings in Murray and Ross are not controlling when applied to the facts in the case at bar.

The Circuit Court erred in finding that this Court's holdings in Murray v. Rutledge, 174 W. Va. 423, 327 S.E.2d 403 (1985) and Ross v. Rutledge, 175 W. Va. 701, 338 S.E.2d 178 (1985), support the conclusion that “[s]ubstantial changes to the time of day when employment services are to be performed may justify employee resignation from employment.” (App. 105.) As an initial matter, neither case addresses the issue before this Court -- whether Epling is entitled to receive unemployment benefits after a change was made to her work hours based upon terms that were negotiated and agreed to by her Union and Verizon, and were communicated to her before the start of her employment. Moreover, the facts in both cases are clearly distinguishable from the case at bar.

In Murray, this Court based its finding of good cause on the fact that the employer made substantial misrepresentations and unilateral changes to the employee's job duties and work hours, with no increase in compensation. Id., 174 W. Va. at 425, 429-30, 327 S.E.3d at 404-05, 409. So the facts in that case evidenced a complete “bait and switch” as there was a tremendous difference between the job that the claimant accepted and the job that the claimant actually received.

Similarly, the factual circumstances in Ross are also distinguishable from the instant case. Ross dealt specifically with transportation issues resulting from an employer's move to another state and the affect that this had on the claimants' pay. In that case, this Court noted that its decision was based upon the fact that “[a] consideration common to all of the appellants was that the added time and expense of travel made the practicality of the jobs questionable in view of the fact that they were only guaranteed a five-hour workday.” Id., 175 W. Va. at 703, 338 S.E.2d at 180. The Court weighed heavily the fact that the employer did not

offer the employees a salary increase to offset the cost, and since the employees were only guaranteed five hours of work per day, the increased transportation costs dwarfed the pay that the employees would bring home. Id.

In the instant case, the Circuit Court cited *dicta* from Ross wherein the Court noted that “in some instances” the increased burden and expense of child care costs of the Ross claimants provided “further justification” for a finding that remaining with the employer was impracticable. Not only was this commentary *dicta*, but it must also be considered in the context of this Court’s ruling in Ross. The ruling was based on the substantial reduction in post-expense compensation as a result of the increased transportation costs associated with the move. Clearly, in that context, an additional child care cost would compound this income reduction. The Court in no way indicated, in *dicta* or otherwise, that child care issues alone constitute good cause involving fault on the part of the employer, and in the instant case, the lower court erred in expanding the Ross holding beyond the intent of that case.

Simply put, in Ross, just as in Murray, the fact that the employees would not be receiving compensation to offset their increased travel costs or job duties (as well as the clear employer misrepresentations in Murray) were persuasive to this Court. The instant case is wholly inopposite to those cases. In Epling’s situation, there were no misrepresentations or “bait and switch” tactics. Epling was provided with the terms of her employment two weeks prior to beginning work and was aware that she was not guaranteed to work any specific work schedule, and in fact, that her work hours were subject to being changed at any time to meet Verizon’s business needs. Moreover, Epling would have received a pay increase as a result of the evening pay differential contained in the parties’ CBA and it is undisputed that her job title and all other aspects of her employment would have remained the same.

Unemployment compensation cases from other jurisdictions with analogous facts to Epling's situation have concluded that claimants are disqualified from receiving benefits. In Beard v State Dept. of Commerce, Div. of Employment Secur., 369 So.2d 382 (1979), a correctional officer worked from 2:00 p.m. to midnight for seven months and then worked on the 8:30 a.m. to 4:30 p.m. shift for the following year. Id., 369 So.2d at 383. After a year on the 8:30 a.m. to 4:30 p.m. shift, she was notified that her new working hours would be from 11:45 p.m. until 7:45 a.m. The claimant requested leave in order to arrange night time supervision for her two children. Id. When her request for leave could not be accommodated, the claimant resigned and filed an unemployment claim citing the inability to secure night time supervision for her children because of the schedule change. Id. The court found that the claimant was disqualified from receiving benefits because when the legislature added the phrase "attributable to the employer" to the good cause requirement for voluntary termination, it "intended to remove domestic obligations as a good cause for voluntary termination." Id. at 384. The court expressed sympathy for the claimant's predicament, but held that while the claimant's unwillingness to leave her children in the care of others overnight is certainly good cause for her to resign, it is not good cause that can be attributed to her employer. Id. at 385.

Similarly, in Re: Claim for Job Ins. Ben., 379 N.W.2d 281 (1985), the court held that an employee did not leave her job for good cause attributable to her employer, when a shift change would have required her to hire a babysitter. In that case, the claimant was told that her work shift would be from 10:00 a.m. to 6:30 p.m. weekdays, and every third weekend from 3:00 p.m. to 11:30 p.m., instead of her then scheduled hours of 8:00 a.m. to 4:30 p.m., Monday through Friday. Id. 379 N.W.2d at 282. Her pay rate, job title, and the number of hours that she worked per week remained unchanged. The claimant resigned, stating that the new hours would

require her to hire a babysitter. Id. The court, in finding the employee disqualified from receiving unemployment benefits, recognized that the claimant might have been “inconvenienced” due to the shift change and further recognized that parental obligations may be a “good personal reason” for leaving one’s employment. However, the court noted that inconvenience and good personal reasons “do not empower an employee to leave employment and attribute the leaving to the fault of the employer.” Id.⁵

The factual circumstances in the foregoing cases are nearly analogous to the case at bar. As these cases demonstrate, the good cause for which a person may voluntarily quit work must involve some fault on the part of the employer. Since Epling failed to show fault on the part of Verizon, the Circuit Court’s Order is based solely on the fact that Epling had a “personal and family obligation” that rendered her unavailable for the evening shift. (App. 100.) Personal and family obligations, however compelling, do not overcome the statutory requirement that there must be good cause involving fault on the part of Verizon. As previously explained, an employer is not at “fault” for scheduling work hours according to the terms of employment that are negotiated with the union representing its workforce and communicating those terms to its employees prior to the start of their employment. The Circuit Court therefore erred in its application of Murray and Ross in the instant case.

⁵See also, Utley v. Board of Review, Dept. of Labor, 946 A.2d 1039 (N.J. 2008) (holding that if claimant quit his job for personal reasons, however compelling, he is disqualified from receiving benefits); Re: Claim of Arena, 647 NYS2d 58 (1996) (holding that employee who left her position as dental receptionist due to the job's long evening hours that required her to be away from her teenage son was disqualified from receiving benefits because she accepted the position knowing that she would be required to work late hours. In re Claim of Arena Johnson v Employment Div., 570 P.2d 425 (Ore. 1977) (holding that claimant refusing a transfer which would require evening work on the grounds that her husband worked days, was denied unemployment compensation benefits for leaving her employment without good cause. The court also affirmed the decision that the claimant's failure to pursue an alternative such as accepting the transfer and filing a grievance precluded a finding that good cause existed for her job separation.).

VII. CONCLUSION

For the foregoing reasons, Verizon respectfully requests that this Court reverse the Circuit Court's finding that Epling voluntarily quit her employment for good cause involving fault on the part of Verizon. Epling's work hours were scheduled in accordance with the terms and conditions communicated to her before she started working at Verizon and the negotiated provisions of the parties' CBA. Accordingly, Verizon did not unilaterally change the terms of Epling's employment.

Respectfully submitted this 20th day of January 2012.

VERIZON SERVICES CORP.

By Counsel



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 11-1425

VERIZON SERVICES CORP.,

Respondent Below, Petitioner,

v.

Appeal from a Final Order of the
Circuit Court of Kanawha County
(Civil Action No. 10-AA-134)

LORETTA K. EPLING,

Petitioner Below, Respondent.

CERTIFICATE OF SERVICE

I, Mark H. Dellinger, counsel for Petitioner and Respondent Below, Verizon Service Corp., do hereby certify that the foregoing “**Petitioner’s Brief**” has been served this 20th day of January, 2012, by United States mail, postage pre-paid, upon the following persons:

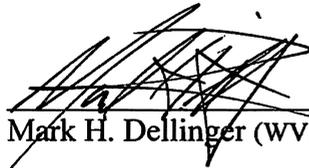
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