

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 REPLY BRIEF

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I. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioner Verizon Services Corp. (“Verizon”) incorporates by reference its request for Rule 20 oral argument as set forth in the Petitioner’s Brief due to the significant legal and public policy issues presented in this appeal.

II. ARGUMENT

Verizon respectfully submits the foregoing reply to supplement its original brief and to respond to notable misstatements of fact and law in Respondent Loretta K. Epling’s (“Epling”) response brief.

- 1. The Circuit Court committed reversible error by failing to consider whether Epling voluntarily quit her employment under W. Va. Code § 21A-6-3(1). If the Circuit Court had conducted such an analysis, it would have been compelled to conclude that Epling voluntarily quit her employment with Verizon for two reasons: (1) Epling admitted this fact under oath when she testified at the hearing before the Administrative Law Judge; and (2) Epling admitted this fact in the Petition she filed with the Circuit Court below, which constitutes a binding judicial admission.**

As explained in Verizon’s initial brief, the reversible error committed by the Circuit Court begins with its failure to properly consider the disqualification provisions contained in W. Va. Code § 21A-6-3(1). In contravention of this Court’s decision in Childress v. Muzzle, 222 W. Va. 129, 663 S.E.2d 583 (2008), the Circuit Court failed to make a finding as to whether Epling voluntarily quit her employment with Verizon. (App. 099.) In her brief, Epling concedes (as she must) that the Circuit Court did not conduct a proper analysis under § 21A-6-3(1), as required by Childress.¹ So, while *both* parties agree that the Circuit Court committed error by failing to properly consider the disqualification issue pertaining to Epling’s unemployment compensation claim, Epling argues that the Court only committed harmless error.

¹ “As the employer stated in its opening brief, the Circuit Court did not address the first question as to whether Ms. Epling left her work voluntarily.” (Respondent’s Brief, p. 17.)

Specifically, Epling argues that the Circuit Court's error was harmless because she did not voluntarily quit her employment with Verizon, and devotes approximately five pages of her brief to this argument. (Respondent's Brief, pp. 17-22.)

Epling's contention on appeal that she did not voluntarily quit her employment is simply not accurate because she unequivocally admitted, on *two* separate occasions in the below proceedings, that she did voluntarily quit her employment with Verizon. First, Epling testified under oath at the hearing before the Administrative Law Judge that she voluntarily quit her employment. 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.)

In an effort to avoid the consequences of her sworn testimony, Epling now argues that her testimony should not be accorded any legal significance. Apparently, she wants to have her testimony credited on some points but ignored on other points. Epling should not be allowed to "cherry pick" which testimony she wants this Court to accept. She provided sworn testimony that she voluntarily quit her employment with Verizon and should be held to her admission.

In addition to her testimonial admission, Epling also admitted that she voluntarily quit her employment with Verizon in her appeal to the Circuit Court below. In paragraph 10 of the "Petition of Loretta K. Epling Appealing From a Final Decision of the Board of Review of WorkForce West Virginia," she made the following representation to the Circuit Court:

10. **Petitioner contends that she left work voluntarily**, but that she had good cause to do so involving fault on the part of the employer; and that, therefore, the disqualification was imposed erroneously. The evidence as adduced clearly shows that petitioner had good cause to leave work voluntarily and that the good cause involved fault on the part of the employer within the meaning of the West Virginia Code.

(App. 045) (emphasis added).

This contention, which again is set forth in Epling's Petition - the initial document setting forth her position and the grounds for her appeal to the Circuit Court below - constitutes a judicial admission which is binding against her in this appeal. See In re Cesar L., 221 W. Va. 249, 262, 654 S.E.2d 373, 386 (2007), and Wheeling-Pittsburgh Steel Corp. v. Rowing, 205 W. Va. 286, 302, 517 S.E.2d 763, 779 (1999) (quoting and accord, Keller v. U.S., 58 F.3d 1194, 1198 n. 8 (7th Cir. 1995)) ("Judicial admissions are formal concessions in the pleadings, or stipulations by a party or its counsel, that are binding upon the party making them. They may not be controverted at trial or on appeal."); Frazier v. Texas Farm Bureau Mut. Ins. Co., 4 S.W.3d 819, 825 (Tex. Ct. App. 1999) (holding that when a party makes a judicial admission it is prohibited from making a contradictory argument on appeal). Based on the judicial admission contained in Epling's Petition, where she "contends that she left work voluntarily," she is now prohibited from contending before this Court that she did not voluntarily quit her employment.

In summation, the Circuit Court committed reversible error by failing to consider whether Epling voluntarily quit her employment under § 21A-6-3(1). Nevertheless, it is undisputed that Epling voluntarily quit her employment with Verizon because she admitted this fact on two occasions - once under oath and a second time when she filed her Petition with the Circuit Court below. Having made these binding admissions, Epling is prohibited from making a contradictory argument before this Court.

2. **Epling’s argument does not comport with the meaning of “good cause” as this Court defined that term in Childress v. Muzzle, 222 W. Va. 129, 663 S.E.2d 583 (2008). Furthermore, there was no good cause involving fault on the part of Verizon where the parties’ collective bargaining agreement provided that there was no guaranteed work schedule and that work hours would be scheduled according to business needs, and these negotiated conditions of employment were communicated to Epling, in writing, *prior* to the start of her employment with Verizon.**

In addition to contradicting her prior binding admissions as to whether she voluntarily quit her employment with Verizon, Epling attempts to have this Court improperly analyze the “good cause” provision of § 21A-6-3(1). Specifically, she states that “[i]n 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....’” (Respondent’s Brief, at p. 10.) This statement, however, is not a correct statement of law. In Syllabus Point 4 of Childress, *supra*, this Court plainly 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.”

It is clear that Epling’s decision to stray from this Court’s holding in Childress, by improperly interposing her personal family situation into this analysis, is a transparent effort to divert this Court from focusing on whether any “fault” was committed by Verizon. Epling’s diversion is understandable because there was no good cause involving fault on the part of Verizon causing her to voluntarily quit her employment. 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.² Furthermore, Epling's work schedule was actually the subject of negotiation and agreement between Verizon and her Union, and 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.³ Accordingly, there was no substantial unilateral change in the terms of Epling's employment when her work schedule was modified, and she failed to prove any "fault" on the part of Verizon.

3. Epling misstates the issue to be decided by this Court and the effect of the parties' collective bargaining agreement on her unemployment compensation claim, as set forth in Petitioner's Brief.

There are two additional misstatements in Epling's brief which require a response by Verizon. These misstatements relate to Epling's efforts to re-cast Verizon's position on the issue to be decided by this Court on appeal, along with the effect of the parties' collective bargaining agreement ("CBA") on her unemployment claim.

First, Epling plainly misstates the issue presented in Verizon's brief by claiming that "the employer attempts to frame this issue as one solely about whether the employer had the authority to change Ms. Epling's hours based on the union contract" (Respondent's Brief, p. 5.) This characterization is simply not accurate. On page seven of the Petitioner's Brief, Verizon set forth the issue for this Court as follows:

² As explained by Verizon in its initial brief, these facts are undisputed and no credibility determination was necessary to reach this determination.

³ Epling claims that Verizon unilaterally made the decision to switch hours which resulted in a substantial, unilateral change in the terms and conditions of her employment. This assertion is misplaced because Verizon and Epling, through her Union, agreed that there was no guaranteed schedule and that work hours would be set as necessitated by work requirements. It is axiomatic that a negotiated agreement does not constitute unilateral action. While Epling may not have been employed with Verizon when the terms of the CBA were negotiated, it is clear that an employee who becomes employed with a unionized employer must accept the terms of a CBA as a condition of employment. See, e.g., Schneider v. Stokes Vacuum, Inc., 1994 WL 408247, at *1 (E.D. Penn. Aug. 3).

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.

As explained in much greater detail in the Petitioner's Brief, the issue to be decided in this appeal requires this Court to address whether a change in work hours constitutes good cause involving fault on the part of an employer when: (1) an employer and union negotiate a CBA that provides that there is no guaranteed work schedule and work hours will be scheduled according to the employer's business needs; and (2) this negotiated term of employment was communicated to the employee, in writing, *prior* to the start of her employment and her employment was conditioned on this term.

Epling's second misstatement asserts that "[t]he employer, therefore, incorrectly argues that because Ms. Epling could not show a breach of the employment contract, she also cannot show she quit her job for good cause involving fault on the part of the employer." (Id., p. 9.) This assertion likewise is inaccurate and simply misses the point. Verizon is not claiming that Epling must prove a breach of the parties' CBA in order to avoid being disqualified from receiving unemployment compensation benefits. Instead, Verizon's position is that there was no substantial, unilateral change to Epling's employment when her work hours were changed. This is because Epling, through her Union, and Verizon actually negotiated a term of employment that did not guarantee her any specific work schedule and indicated that employees would be required to work whatever schedule was necessary to meet Verizon's business needs. Accordingly, both

parties, Verizon and Epling, through her Union, actually negotiated a work schedule that was not guaranteed and was to be set according to Verizon's business needs.

III. CONCLUSION

For the foregoing reasons, in addition to the reasons set forth in the Petitioner's Brief, Verizon respectfully requests that this Court reverse the Circuit Court's ruling and hold that Epling voluntarily quit her employment without good cause involving fault on the part of Verizon, and is therefore disqualified from receiving unemployment compensation benefits.

Respectfully submitted this 26th day of March, 2012.

VERIZON SERVICES CORP.

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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 Reply Brief**" has been served this 26th day of March, 2012, by United States mail, postage pre-paid, upon the following persons:

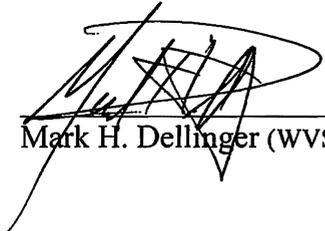
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