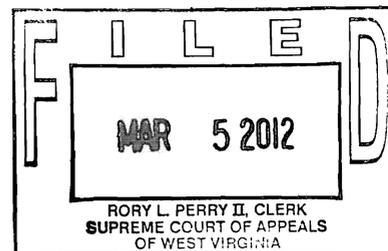


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 11-1425



VERIZON SERVICES CORP.,
Respondent Below, Petitioner,

vs.) No. 11-1425

Appeal from a final order of
the Circuit Court of Kanawha
County (10-AA-134)

LORETTA K. EPLING,
Petitioner Below, Respondent.

RESPONDENT'S BRIEF

Counsel for Respondent, Loretta K. Epling,

Kevin Baker (WV Bar No. 10815)
Robert S. Baker (WV Bar No. 218)
Baker & Brown, PLLC
120 Capitol Street
Charleston, West Virginia 25301
phone: 304-344-5400
fax: 304-344-5401
kevin@bakerandbrownlaw.com
bob@bakerandbrownlaw.com

TABLE OF CONTENTS

Statement of the Case 1

 Procedural History 1

 Standard of Review and Facts 2

Summary of Argument 5

Statement Regarding Oral Argument and Decision 6

Argument 7

 I. THE CIRCUIT COURT DID NOT ERR WHEN IT CONCLUDED
 THAT MS. EPLING LEFT HER EMPLOYMENT WITH GOOD
 CAUSE INVOLVING FAULT ON THE PART OF THE EMPLOYER 7

 II. EVEN IF THE COURT ERRED WHEN IT CONCLUDED THAT
 MS. EPLING LEFT HER EMPLOYMENT WITH GOOD CAUSE
 INVOLVING FAULT ON THE PART OF THE EMPLOYER, IT IS
 HARMLESS ERROR BECAUSE MS. EPLING DID NOT LEAVE
 HER EMPLOYMENT VOLUNTARILY 17

Conclusion 22

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<u>Adams v. Harding Mach. Co., Inc.</u>	10
56 Ohio App. 3d 150, 565 N.E2d 858 (Ohio App. 3 Dist. 1989)	
<u>Adkins v. Gatson</u> ,	2, 3, 7, 18
192 W. Va. 561, 453 S.E.2d 395 (1994)	
<u>Bartles v. Hinkle</u>	2
196 W. Va. 381, 472 S.E.2d 827 (1996)	
<u>Beard v. State Dept. of Commerce, Div. of Employment Secur.</u>	14, 15
369 So. 2d 382 (Dist. Ct. App. Fl., 2d Dist. 1979)	
<u>Bliley Electric Co. v. Unemployment Compensation Bd. of Rev.</u>	19, 20, 21
158 Pa. Super. 548, 45 A.2d 898 (1946)	
<u>Bowen v. Roy</u>	9
476 U.S. 693 (1986)	
<u>California v. Java</u>	7, 20, 22
481 U.S. 537 (1987)	
<u>Chrystal R.M. v. Charlie A.L.</u>	18
194 W. Va. 138, 459 S.E.2d 415 (1995)	
<u>Dailey v. Bd. of Rev.</u> ,	2, 3, 18
214 W. Va. 419, 589 S.E.2d 797 (2003)	
<u>Davenport v. Gatson</u>	7
192 W.Va. 117, 451 S.E.2d 57 (1994)	
<u>Davis v. Hix</u>	20
140 W. Va. 398, 84 S.E.2d 404 (1954)	
<u>Employment Div., Dep't of Human Resources of Oregon v. Smith</u>	9
494 U.S. 872 (1990)	
<u>Forrest Park Sanitarium v. Miller</u>	12
233 Iowa 1341, 11 N.W.2d 582 (1943)	

<u>Gibson v. Rutledge</u>	18, 19, 20, 21
171 W. Va. 164, 298 S.E.2d 137 (1982)	
<u>Lee-Norse Co. v. Rutledge</u>	19
170 W. Va. 162, 167, 291 S.E.2d 477, 482 (1982)	
<u>May v. Chair and Members, Board of Review</u>	11
222 W. Va. 373, 664 S.E.2d 714 (2008)	
<u>Martin v. Review Bd.</u>	12
421 N.E.2d 653 (Ind. App. 1981)	
<u>Miners in General Group v. Hix</u>	19
123 W. Va. 637, 646, 17 S.E.2d 810, 815 (1941)	
<u>Mitchell v. Jewel Food Stores</u>	10
142 Ill.2d 152, 568 N.E.2d 827 (1990)	
<u>Murray v. Rutledge</u>	11, 12
174 W.Va. 423, 327 S.E.2d 403 (1985)	
<u>Ratzlaf v. United States</u>	22
510 U.S. 135, 143 (1994)	
<u>Ross v. Rutledge</u>	7-8, 12
175 W. Va. 701, 338 S.E.2d 178 (1985)	
<u>Sherbert v. Verner</u>	9
374 U.S. 398 (1963)	
<u>Sonterre v. Job Service North Dakota</u>	14, 15
379 N.W.2d 281 (N.D. 1985)	
<u>State v. Hix</u>	19
132 W. Va. 516, 54 S.E.2d 198 (1949)	
<u>Thomas v. Rutledge</u>	15, 16, 22
167 W. Va. 487, 280 S.E.2d 123 (1981)	

Statutes

West Virginia Code § 21A-6-3	7, 8, 10, 15, 18, 19, 21, 22
--	---------------------------------

West Virginia Code § 21A-7-17 2

Other Authorities

Black’s Law Dictionary 1568 (8th ed. 2004) 13, 14
definition of “unilateral”

STATEMENT OF THE CASE

This case is an appeal by Verizon Services Corp. (hereinafter “Verizon” or “the employer”) of a decision by Judge Zakaib of the Circuit Court of Kanawha County, West Virginia, reversing the Board of Review of WorkForce West Virginia and reinstating the decision of the Administrative Law Judge that Loretta K. Epling (hereinafter “Ms. Epling” or “claimant”) was not disqualified from receiving unemployment compensation benefits when she was forced to leave her employment after her employer unilaterally changed the hours she was to work in a manner that would result in Ms. Epling having to leave her young children unattended.

A. Procedural History

Ms. Epling filed a claim for unemployment benefits with the WORKFORCE West Virginia office in Logan, West Virginia, on March 21, 2010. (App. 001-002.) 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." (App. 002.) The employer filed an appeal and the Administrative Law Judge, Truman L. Sayre, Jr., heard testimony on the matter on May 13, 2010. (App. 003-011.) After considering all testimony presented and making determinations as to credibility, Judge Sayre made findings of fact as stated below and affirmed the decision of the Deputy. (App. 038-040.) In particular, Judge Sayre held: "The claimant left work voluntarily with good cause involving fault on part of the employer. The claimant is not disqualified." (App. 039.)

The employer then appealed to the Board of Review. Following review of all documents and the transcript of the hearing, but without hearing any testimony from the interested parties, the Board of Review reversed the decision of the Administrative Law Judge on July 23, 2010.

(App. 041-043.) In its decision, the Board of Review held that Ms. Epling did not have good cause to leave work voluntarily involving fault on the part of employer; and, accordingly, was disqualified from receiving benefits. (*Id.*) Ms. Epling then appealed from the final decision of the Board of Review, pursuant to West Virginia Code § 21A-7-17. (App. 044-047.) Following briefing of the issues, review of all documents and the transcript of the hearing, but without hearing any testimony from the interested parties, the Circuit Court reversed the Board of Review. (See generally App. 052-105.) In particular, Judge Zakaib stated his reasoning in a letter to counsel dated August 26, 2011: “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 employer filed the instant appeal thereafter and the parties have since followed this Court’s scheduling order.

B. Standard of Review and Facts

In reviewing decisions of the Board of Review, this Court must give substantial deference to the factual findings below, unless those factual findings are clearly erroneous. Dailey v. Bd. of Rev., Syl. Pt. 1, 214 W. Va. 419, 589 S.E.2d 797 (2003); Adkins v. Gatson, Syl. Pt. 3, 192 W. Va. 561, 453 S.E.2d 395 (1994). The prevailing theory behind this deference is that the finder of fact who heard testimony in a matter is the person best positioned to make credibility determinations and resolve disputed facts. Therefore, in almost every type of case imaginable, it is the longstanding precedent of this Court to give deference to fact-finders, especially with regard to credibility determinations. See, e.g., Bartles v. Hinkle, 196 W. Va. 381, 389, 472 S.E.2d 827, 835 (1996) (“A trial court's factual findings may not be set aside unless they are clearly erroneous. In

particular, a trial court's credibility determinations are entitled to special deference.”) Questions of law, however, are reviewed *de novo* and no deference is given to the Board of Review. Dailey, Syl. Pt. 1, 214 W. Va. at 421, 589 S.E.2d at 799; Adkins, Syl. Pt. 3, 192 W. Va. at 563, 453 S.E.2d at 397.

Ms. Epling worked as a business consultant for the employer from June 2, 2008 until March 15, 2010. (App. 038, Findings of Fact ¶ 3; App. 020.) 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 the employer. (App. 038, Findings of Fact ¶ 3; App. 005 pp 9-10; App. 007 pp 19-20.) 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. (App. 005 pp 9-10; App. 007 pp 19-20.) Ms. Epling chose the position in the business office because it fit within time constraints regarding her children’s daycare services. (Id.) Ms. Epling has two children, who were 5 and 7 years old, respectively, at the time of the hearing, and who were both released from school at 3:30 p.m. (App. 039, Findings of Fact ¶ 5; App. 005 pp 11-12.) Ms. Epling arranged for daycare for her two children beginning after school and until 6:00 p.m. when the daycare center closed. (Id.) Ms. Epling’s husband worked the evening shift at his job and was unable to pick the children up before 6:00 p.m. (Id.) After the employer chose to change her hours, 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. (App. 005 pp 12.) Accordingly, Ms. Epling had no option but to pick her children up from daycare no later than 6:00 p.m. (App. 039, Findings of Fact ¶ 5; App. 005 pp 12.)

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. (App. 039, Findings of Fact ¶ 4; App. 005 pp 10-11.) Ms. Epling offered to work part-time or continue working another position at day shift. (App. 039, Findings of Fact ¶ 6; App. 005-006 pp 9, 12-13.) Ms. Epling informed her 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. (App. 039, Findings of Fact ¶ 6; App. 005-006 pp 9, 12-13.) 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. (App. 039, Findings of Fact ¶ 6; App. 007 pp 20.) As Ms. Epling stated in her resignation letter, “I love[d] my job and the people I work[ed] with, however with the new hours that have been assigned to me I will no longer be able to work for Verizon.” (App. 020.)

In the decision entered after the appeal of Judge Sayre’s decision, the Board of Review noted that Ms. Epling is a member of the Communication Workers of America, AFL-CIO, which has a written labor agreement with the employer. (App. 041-042.) The Board of Review stated that the “contract specifically states that the employer does have a right to set the hours of work for its employees as far as starting and quitting times are concerned.” (*Id.*) The Board of Review held that change in hours were not unilateral because the union contract was negotiated by Ms. Epling’s union prior to Ms. Epling’s employment with the employer. (*Id.*) In reviewing the decision of the Board of Review, the Circuit Court concluded that the change in hours was a material unilateral change and, therefore, returned the decision to that found by the original fact-finder, Judge Sayre. (App. 094.)

SUMMARY OF ARGUMENT

The purpose of unemployment benefits is to provide assistance to persons who lose their employment due to no fault of their own. Although the West Virginia Code creates a number of potential disqualifications from receiving unemployment benefits, this Court has consistently held that those provisions are to be liberally construed in a manner to reach the remedial purposes of unemployment by providing benefits to those who leave the workforce due to no fault of their own. The undisputed facts show that the only reason Ms. Epling left her job was because she could not obtain childcare services for her two young children if she worked the evening shift hours that her employer was requiring of her. Although 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, framing the issue in such a manner misses the key to unemployment benefits entirely. The issue, therefore, is not whether the employer had the authority to change Ms. Epling's hours, but instead whether changing those hours and the resulting complications it caused for Ms. Epling either gave Ms. Epling good cause involving fault on the part of the employer to leave her job or resulted in a situation wherein Ms. Epling did not leave her job voluntarily.

This Court's precedent is clear on unemployment cases and, as detailed below, the facts of this case show that the Circuit Court did not err in concluding that Ms. Epling left her job with good cause involving fault on the part of the employer. Ms. Epling had good cause involving fault on the part of the employer to leave her job because the employer's unilateral change in Ms. Epling's shift hours in combination with Ms. Epling's childcare problems left her no choice but to leave her job or leave her children unattended. While the employer argues that this was not

unilateral because it was consistent with the union contract, the fact remains that the employer made the choice to change Ms. Epling's hours without any input from Ms. Epling and without any concern for the issues raised by Ms. Epling. Stated simply, Ms. Epling had absolutely no part in her employer's decision to change her hours. Furthermore, even if the Court holds that the Circuit Court erred in making such a conclusion, this error was harmless because the undisputed facts show that Ms. Epling left her job involuntarily due to the same shift change and childcare issues. If the Court determines that Ms. Epling did not leave her job voluntarily, then the Circuit Court's decision should be affirmed regardless of whether Ms. Epling left with good cause involving fault on the part of the employer.

For all these reasons, the Circuit Court's decision should be affirmed and Mrs. Epling should be deemed not disqualified from receiving benefits.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The legal arguments contained in this appeal do not involve legal issues of first impression for this Court; rather, this is a fact-driven case. The Respondent does not believe that oral argument is necessary because the law is clear and the decisional process would not be significantly aided by oral argument, as the facts and legal arguments are adequately presented in the briefs and record on appeal. If the Court desires oral argument for clarification of any issues, then the Respondent respectfully requests oral argument for such clarification. Accordingly, the Respondent states that the Court may declare that oral argument is not necessary, pursuant to Rev. R.A.P. 18(a) or, in the alternative, the Court may declare oral argument necessary under Rev. R.A.P. 19(a)(1), if clarification of any issue is necessary.

ARGUMENT

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). As this Court has consistently held, “unemployment compensation statutes should be liberally construed in favor of the claimant[.]” Adkins, 192 W. Va. at 564-65, 453 S.E.2d at 398-99 (quoting Davenport v. Gatson, 192 W.Va. 117, 119, 451 S.E.2d 57, 59 (1994) and citing numerous other decisions). Ms. Epling became unemployed due to circumstances beyond her control; namely, a change in shift hours made at the whim of her employer, contrary to the hours she was promised upon hire, and through no fault of her own. Accordingly, Ms. Epling should have been allowed to receive unemployment benefits pursuant to the remedial purpose of Unemployment Compensation and as further shown in the argument points below.

I. THE CIRCUIT COURT DID NOT ERR WHEN IT CONCLUDED THAT MS. EPLING LEFT HER EMPLOYMENT WITH GOOD CAUSE INVOLVING FAULT ON THE PART OF THE EMPLOYER

The Circuit Court correctly concluded that the employer’s decision to change Ms. Epling’s shift hours gave Ms. Epling good cause involving fault on the part of the employer to terminate her work. West Virginia Code § 21A-6-3(1) provides that an individual shall be disqualified from receiving unemployment compensation benefits for the week in which she left her most recent work voluntarily without good cause involving fault on the part of the employer and until she has been reemployed for at least 30 days. Furthermore, “[t]he determination of whether there is ‘good cause’ for ceasing employment . . . is a question of law which must be answered in relation to the particular facts of each case.” Ross v. Rutledge, 175 W. Va. 701, 704,

338 S.E.2d 178, 181 (1985). In addition, 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). When a claimant leaves a job voluntarily, she bears the burden of proving that the disqualifications do not apply to her.

Although there are no factual disputes involving the reasons Ms. Epling left her job, there is a clear difference of legal interpretation regarding the impact of the labor agreement between the Communication Workers of America, AFL-CIO and Verizon. In fact, the difference between Judge Zakaib’s decision and the Board of Review’s decision is only regarding the relevance of the labor agreement. Judge Zakaib and Judge Sayre did not give the labor agreement any weight in deciding whether Ms. Epling was entitled to unemployment benefits, while the Board of Review relied exclusively on the labor agreement in reaching its decision that Ms. Epling was not entitled to unemployment benefits. Therefore, the Circuit Court and Judge Sayre concluded that the employer’s act of changing Ms. Epling’s work hours after she was hired specifically for those hours constituted fault on the part of the employer. On the other hand, the Board of Review concluded that the labor agreement gave the employer the power to unilaterally change an employee’s work hours and, therefore, the employer did not breach the employment contract. The Board of Review then declared that Ms. Epling failed to show good cause involving fault on the part of the employer because she could not show a breach of the employment contract. After the Circuit Court determined that the terms of the labor agreement did not preclude Ms. Epling from receiving unemployment benefits, the employer now relies solely on that argument before the Court in this appeal. The employer’s insistence that the terms of the labor agreement

preclude a court from finding actions consistent with the agreement to also constitute fault on the part of the employer is simply misplaced.

It is without question that the labor agreement at issue 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, combined with the specific facts of Ms. Epling's circumstances, constituted fault on the part of the employer causing Ms. Epling to leave her job with good cause. The United States Supreme Court has consistently held that "a distinctive feature of unemployment compensation programs is that their eligibility criteria invite consideration of the particular circumstances behind an applicant's unemployment[.]" Employment Div., Dep't of Human Resources of Oregon v. Smith, 494 U.S. 872, 884 (1990) (citing Bowen v. Roy, 476 U.S. 693, 708 (1986); Sherbert v. Verner, 374 U.S. 398, 401, n.4 (1963)). In other words, the Court must look beyond the face of the paper determining the employment or unemployment and instead look to the specific details of the individual's circumstances. The 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. In order to obtain unemployment benefits after voluntarily leaving her job, a claimant does not have 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, thus fitting with the United States Supreme Court's decisions regarding unemployment benefits. Were Ms. Epling bringing a breach of contract claim against the employer, then the question would be whether the employer breached the employment contract, but when addressing an unemployment case in this posture

the Court must only consider whether Ms. Epling left her job voluntarily with good cause involving fault on the part of the employer. C.f. Mitchell v. Jewel Food Stores, 142 Ill.2d 152, 172, 568 N.E.2d 827, 835-36 (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, 565 N.E.2d 858, 864 (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). The undisputed facts clearly show that Ms. Epling had good cause to leave her job. In particular, 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 was hired to work a shift for the employer that ended at 5:00 p.m. daily, thus allowing her to fulfill her familial obligations. Ms. Epling worked such a shift during the duration of her employment at Verizon, 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. Despite Ms. Epling’s requests to remain on day shift or to 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. Accordingly, 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. This undoubtedly constitutes good cause for leaving a job, as the legislature clearly would not intend that Ms. Epling work the evening shift and cause her children to be neglected or unsupervised every evening.

The next question, therefore, is whether Ms. Epling left her job due to some fault on the part of the employer. The Court has often viewed this question hand-in-hand with whether the employee had good cause to terminate the employment and the facts of this case show that Ms. Epling left her job with good cause involving fault on the part of the employer. In particular, 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. This Court has previously recognized that "substantial changes in working hours may justify employee resignation." May v. Chair and Members, Board of Review, 222 W. Va. 373, 377, 664 S.E.2d 714, 718 (2008) (quoting Murray v. Rutledge, 174 W.Va. 423, 428, 327 S.E.2d 403, 408 (1985)). 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 before 5:00 p.m. (See App. 38; App. 007 pp 19-20 (wherein Ms. Epling stated, "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 expressed a clear interest and reason for working a shift that ended at 5:00 p.m. and, but for the actions of her employer, she would have continued to work a shift that ended at 5:00 p.m.

As noted above, this Court 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, Syl. Pt. 2, 174 W. Va. at 424, 327 S.E.2d at 404. 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, 327 S.E.2d at 408. 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, 11 N.W.2d 582, 582-83 (1943)). In addition, in addressing whether an employee should receive benefits after voluntarily quitting when a job was relocated, this Court stated in Ross 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, 338 S.E.2d at 183. 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 Bd., 421 N.E.2d 653 (Ind. App. 1981)). Similarly, the change of 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 change in the terms of her employment. In addition, with respect to Ms. Epling’s personal situation, the change constituted an even more substantial change in the terms of employment than it would to an employee who did not have childcare concerns to the same degree as Ms. Epling. The impossibility of obtaining sufficient childcare

for her children, made the changes in the shift times impractical and impossible for Ms. Epling to complete. Accordingly, the changes in the hours that Ms. Epling would work were a substantial change to the terms of her employment.

In addition, the substantial change to Ms. Epling's work hours was a unilateral change by the employer. The employer argues that the change in hours was not unilateral because the labor agreement allows the employer to change employee hours. Nevertheless, the labor agreement does not play any role in analyzing whether the change was unilateral. The mere fact that a contract governed the terms of employment does not take away the fact that Ms. Epling had no input into her change in hours. Ms. Epling could do nothing, despite her best efforts, to have any effective input into the unilateral decision by her employer to change her employment hours. As stated previously, this case does not involve an allegation that the employer breached the labor agreement, but it is instead about whether an employee who was forced to leave her job should be precluded from receiving unemployment benefits. The question is not whether the employer had the authority to change an employee's hours, but rather whether the employer exercised its authority to change the employee's hours unilaterally, which would constitute a substantial unilateral change in the terms of employment and constitute "good cause involving fault on the part of the employer" for the Ms. Epling to resign, when viewed in combination with the specific circumstances of Ms. Epling's childcare considerations.

Black's Law Dictionary defines "unilateral" as "[o]ne-sided; relating to only one of two or more persons or things[.]" Black's Law Dictionary 1568 (8th ed. 2004). Although the union was able to negotiate the terms of the labor agreement on behalf of all employees, the decisions as to when certain employees work is 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. See id. Furthermore, because the labor agreement was negotiated before Ms. Epling was a member of the union or an employee of the employer, she had no role in the negotiations. Stated simply, the actions taken, which resulted in the substantial change to the terms of Ms. Epling's employment, were taken solely by the employer. Ms. Epling even tried to work with her employer within her options by requesting to stay on day-shift in the same or a different position or move to part-time employment. The employer held all the power and instead insisted that Ms. Epling work the evening shift. Therefore, the substantial unilateral change to Ms. Epling's work hours constituted a change in the terms of employment furnishing "good cause involving 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, namely her childcare conundrum, shows that Ms. Epling should not have been disqualified from receiving unemployment compensation benefits.

The employer cites to two cases from other jurisdictions as persuasive authority, but the facts of those cases and the language of the unemployment statutes in those states make the cases distinguishable and inapplicable to this case. See Beard v. State Dept. of Commerce, Div. of Employment Secur., 369 So. 2d 382 (Dist. Ct. App. Fl., 2d Dist. 1979); Sonterre v. Job Service North Dakota, 379 N.W.2d 281 (N.D. 1985). The facts of those cases show that, after changes to their working hours, the claimants did not even attempt to find supervision for their children before leaving their jobs. See Beard, 369 So. 2d at 383; Sonterre, 379 N.W.2d at 282. Thus, the Florida court concluded that "[a] mother's unwillingness to leave her children in the care of others at night is certainly good cause for her to resign but it is not good cause which can be

attributed to her employer.” Beard, 369 So. 2d at 385. Similarly, the North Dakota court stated that “[the claimant] did not establish in the record that she attempted to find a baby-sitter” and, therefore, the court rejected the claimant’s argument that most clearly mirrors Ms. Epling’s argument because the facts did not support it. Sonterre, 379 N.W.2d at 284. In the instant case, on the other hand, the undisputed facts are that Ms. Epling attempted to find care for her children, but was unable to do so. In other words, the choice was between leaving her employment due to the hours change or leaving her young children unattended for multiple hours a day. Furthermore, the Florida and North Dakota statutes do not require a showing of “good cause *involving* fault on the part of the employer” but instead requires a showing of “good cause *attributable* to the employer.” Beard, 369 So. 2d at 383; Sonterre, 379 N.W.2d at 283 (emphasis added). The Florida court relied heavily on the Florida legislature’s addition of the word “attributable”; a word that indicates the employer must be completely responsible for the separation of employment, rather than the separation simply involving fault on the part of the employer. Accordingly, the decisions from the Florida lower court of appeals and the North Dakota Supreme Court are inapposite to this case and should not be followed.

In addition, Ms. Epling’s reasoning for leaving her job did not fit within the statutory language of West Virginia Code § 21A-6-3(6). That section states that an individual is disqualified from 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). The so-called “marital quit” section addresses employees who choose to leave a job in order to perform a family duty. See Thomas v. Rutledge, 167 W. Va. 487, 492, 280 S.E.2d 123, 127 (1981). 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, 280 S.E.2d at 128.

The Thomas Court stated that “the rationale advanced by the [Board of Review] . . . [was] the only possible justification for the [marital quit] classification[.]” Id. Accordingly, the marital quit disqualification only applies when an employee leaves employment with the intention to withdraw from the workforce. 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. As Ms. Epling stated throughout, she would not have quit her job if she could have continued to work a shift that allowed her to leave at 5:00 p.m. and she sought new employment that would fit her schedule, thus indicating an intent to remain in the workforce. In other words, Ms. Epling did not leave her job to perform a family duty, but instead left her job because of a change in her hours. Ms. Epling did not voluntarily leave the workforce, but was instead forced to leave due to the decisions of her employer. Thus, the Circuit Court did not err in awarding Ms. Epling all back unemployment as though she had received unemployment without interruption from the date she first applied and this Court should affirm that decision.

II. EVEN IF THE COURT ERRED WHEN IT CONCLUDED THAT MS. EPLING LEFT HER EMPLOYMENT WITH GOOD CAUSE INVOLVING FAULT ON THE PART OF THE EMPLOYER, IT IS HARMLESS ERROR BECAUSE MS. EPLING DID NOT LEAVE HER EMPLOYMENT VOLUNTARILY

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. Although the employer asserts that it was error not to address the question of whether Ms. Epling left voluntarily, that would only be reversible error if the Circuit Court had held that she was disqualified without addressing whether she left voluntarily. By holding that she was not disqualified, the determination as to whether or not Ms. Epling left voluntarily or not was inconsequential to the Circuit Court's determination. Despite the Circuit Court's decision to rely on the conclusion that Ms. Epling had good cause involving fault on the part of the employer to leave her job, Ms. Epling asserts that she did not leave voluntarily, as that term is defined by precedent. The employer relies on Ms. Epling's affirmative answer to the question "[a]nd it was your decision to voluntarily quit your position with Verizon; is that right?" at the hearing as a conclusive determination that Ms. Epling voluntarily quit her job. Such a conclusion is improper due to the fact that voluntarily is a term of art in unemployment matters and Ms. Epling was unrepresented at the hearing and she did not know of the legal definition for voluntarily in this context. Because Ms. Epling did not voluntarily leave her employment, if this Court determines that Ms. Epling's good cause to leave her job did not involve fault on the part of the employer, the Court should still affirm the Circuit Court decision due to the involuntary nature of her separation from employment.

There is not a factual dispute in this case with regard to the reason Ms. Epling left her job. Taking the facts as stated with regard to Ms. Epling's child care concerns and inability to provide the necessary care to her children if she worked the hours that her employer insisted

upon, Ms. Epling asserts that she did not leave her job with the employer voluntarily. The definition of “voluntarily” is a question involving statutory interpretation, which, as a question of law, is reviewed by this Court *de novo*. See Chrystal R.M. v. Charlie A.L., Syl Pt. 1, 194 W. Va. 138, 459 S.E.2d 415 (1995) (“Where the issue on an appeal from the circuit court is . . . involving an interpretation of a statute, we apply a *de novo* review.”); see also Dailey, Syl. Pt. 1, 214 W. Va. at 421, 589 S.E.2d at 799; Adkins, Syl. Pt. 3, 192 W. Va. at 563, 453 S.E.2d at 397. If the Court concludes that Ms. Epling did not leave her employment voluntarily, then it would not even need to address whether she left with good cause involving fault on the part of the employer.

Section 21A-6-3(1) of the West Virginia Code provides that an individual shall be disqualified from receiving unemployment compensation benefits for the week in which she left her most recent work voluntarily without good cause involving fault on the part of the employer. This Court has interpreted the word “voluntarily” for the purposes of West Virginia Code § 21A-6-3(1) as the “free exercise of the will.” Gibson v. Rutledge, 171 W. Va. 164, 166, 298 S.E. 2d 137, 139 (1982). If Ms. Epling did not leave her job “voluntarily,” this disqualification would not apply and she would be eligible for unemployment benefits. In other words, if Ms. Epling did not leave her job by a “free exercise of the will” then the Circuit Court’s decision must be affirmed.

In Gibson, the Court addressed the question of whether an employee who leaves work “as a result of an injury or other health-related problem” has left work voluntarily. Id. at 168, 298 S.E.2d at 141. The Gibson Court noted that the “word ‘voluntarily’ is not defined in the statute” and therefore the Court needed to interpret the word. Id. at 165, 298 S.E.2d at 139. The Gibson

Court then noted that “voluntarily” was interpreted as “the free exercise of the will” in a prior decision of this Court. Id. at 166, 298 S.E.2d at 139 (quoting State v. Hix, 132 W. Va. 516, 522, 54 S.E.2d 198, 201 (1949)). The Gibson Court then stated that it agreed with the definition of “voluntarily” but noted that the State v. Hix Court did not place much weight on the meaning or effect of the word “voluntarily.” Id. This failure to give weight to the meaning of the word “voluntarily” “ignores one of the primary purposes of the West Virginia Unemployment Compensation Act, which is to compensate individuals who are involuntarily unemployed.” Id. (citing Lee-Norse Co. v. Rutledge, 170 W. Va. 162, 167, 291 S.E.2d 477, 482 (1982); Miners in General Group v. Hix, 123 W. Va. 637, 646, 17 S.E.2d 810, 815 (1941)). The Court then decided to conduct a more thorough determination of the meaning of the word “voluntarily.” Gibson at 166, 298 S.E.2d at 140.

In analyzing the word “voluntarily” as used in West Virginia Code § 21A-6-3(1), the Gibson Court first looked to a decision by a Pennsylvania court. See Bliley Electric Co. v. Unemployment Compensation Bd. of Rev., 158 Pa. Super. 548, 556, 45 A.2d 898, 903 (1946).

The Bliley Electric Co. Court stated:

[T]he mere fact that a worker wills and intends to leave a job does not necessarily and always mean that the leaving is voluntary. Extraneous factors, the surrounding circumstances, must be taken into the account, and when they are examined it may be found that the seemingly voluntary, the apparently intentional, act was in fact involuntary. A worker's physical and mental condition, **his personal and family problems**, the authoritative demand of legal duties-these are circumstances that exert pressure upon him and imperiously call for decision and action.

When therefore the pressure of real not imaginary, substantial not trifling, reasonable not whimsical, circumstances *compel* the decision to leave employment, the decision is voluntary in the sense that the worker has willed it, but involuntary because outward pressures have compelled it. [Footnote omitted] Or to state it differently, if a worker leaves his employment when he is compelled

to do so by necessitous circumstances or because of legal or **family obligations**, his leaving is voluntary with good cause, and under the act he is entitled to benefits. The pressure of necessity, of legal duty, or family obligations, or other overpowering circumstances and his capitulation to them transform what is ostensibly voluntary unemployment into involuntary unemployment.

Gibson, 171 W. Va. at 167, 298 S.E.2d at 140 (quoting Bliley Electric Co., 158 Pa. Super at 556, 45 A.2d at 903) (emphasis added). The Gibson Court then relied upon Bliley in holding that an employee who left her job as a result of health-related problems has not freely chosen to quit the job, but instead was forced to quit for health reasons. Id.

The Gibson Court went on to reiterate that the unemployment statute should be interpreted liberally in order to meet the remedial purpose of the statute. Id. (citing Davis v. Hix, Syl. Pt. 6, 140 W. Va. 398, 84 S.E.2d 404 (1954)). As with all unemployment statutes, the West Virginia unemployment statute was established as a result of the Unemployment Compensation benefits program passed by the United States Congress. As noted previously, “[t]he objective of Congress was to provide a substitute for wages lost during a period of unemployment not the fault of the employee.” Java, 402 U.S. at 130. The Gibson Court clearly determined that an employee who was forced to quit work due to health issues did not quit the job voluntarily, but instead left work due to fault of the employer and, therefore, remained eligible to receive unemployment compensation.

This Court’s analysis in Gibson is equally applicable to the facts of this case. Rather than a health issue, Ms. Epling had a personal and family obligation that, in combination with her employer’s change to her work schedule, required her to leave her job. As noted previously, 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 Verizon 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 at Verizon, 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. When the employer rejected this request, Ms. Epling was forced to quit the job that she loved.

As the Bliley Electric Co. decision stated and the Gibson Court relied upon, there are certain circumstances that can “transform what is ostensibly voluntary unemployment into involuntary unemployment.” Gibson, 171 W. Va. at 167, 298 S.E.2d at 140 (quoting Bliley Electric Co., 158 Pa. Super at 556, 45 A.2d at 903). Ms. Epling's family obligations relating to her children's daycare are precisely the type of real pressure, which substantially and reasonably compelled her to leave her job, that the Gibson Court envisioned would transform a voluntary unemployment into involuntary unemployment. Yes, Ms. Epling left her job, but she did so not because she desired to leave the workforce, but because she had no choice but to leave her job. Accordingly, the Court should hold that Ms. Epling did not leave her job voluntarily and, therefore, the disqualification listed in West Virginia Code § 21A-6-3(1) is inapplicable to her case.

In addition to the disqualification in West Virginia Code § 21A-6-3(1), the legislature also created West Virginia Code § 21A-6-3(6), which disqualifies individuals who “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” This subdivision has been interpreted by the Supreme Court of Appeals of West Virginia as being similar to § 21A-6-3(1), in that subdivision (6) is simply a “marital quit” version of subdivision (1). See generally Thomas, 167 W. Va. 487, 280 S.E.2d 123. Importantly, subdivision (6) also includes the word “voluntarily.” Compare W. Va. Code § 21A-6-3(6) with W. Va. Code § 21A-6-3(1). “A term appearing in several places in a statutory text is generally read the same way each time it appears.” Ratzlaf v. United States, 510 U.S. 135, 143 (1994). Accordingly, the analysis above relating to the word “voluntarily” in subdivision (1) of section three, article six, chapter twenty-one-a of the West Virginia Code, is equally applicable to the word “voluntarily” as used in subdivision (6). As such, it is irrelevant whether Ms. Epling left her job without good cause involving fault on the part of the employer or as part of the “marital quit” subdivision, because Ms. Epling left her job involuntarily. Therefore, if the Circuit Court erred in holding that Ms. Epling left her job with good cause involving fault on the part of the employer, this Court should still affirm the decision because the undisputed facts, as applied to the law, show that Ms. Epling did not leave her job voluntarily.

CONCLUSION

“The objective of Congress [in enacting Unemployment Compensation programs] was to provide a substitute for wages lost during a period of unemployment not the fault of the employee.” Java, 402 U.S. at 130. As discussed throughout this Response Brief, Ms. Epling was forced to leave her job due to no fault of her own, which led to a period of unemployment. Ms.

Epling is exactly the type of person that the Unemployment Compensation program was designed to assist; one who did not desire to leave the workforce, but was separated from employment without any wrongdoing of her own. Ms. Epling respectfully requests that the Court find that she left her job with good cause involving fault on the part of the employer and, therefore, affirm the decision of the Circuit Court. In the alternative, Ms. Epling respectfully requests that the Court find that she did not leave her job voluntarily and, therefore, affirm the result of the Circuit Court's decision. Under either of the arguments detailed above, Ms. Epling is entitled to unemployment benefits and she should not be deprived of those benefits simply because she was forced to leave her job in order to care for her children.

Respectfully Submitted,
Loretta K. Epling, Respondent,
By counsel,

Signed:  _____

Kevin Baker (WV Bar No. 10815)
Robert S. Baker (WV Bar No. 218)
Baker & Brown, PLLC
120 Capitol Street
Charleston, West Virginia 25301
phone: 304-344-5400
fax: 304-344-5401
kevin@bakerandbrownlaw.com
bob@bakerandbrownlaw.com
Counsel of Record for Respondent

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 11-1425

VERIZON SERVICES CORP.,
Respondent Below, Petitioner,

vs.) No. 11-1425

Appeal from a final order of
the Circuit Court of Kanawha
County (10-AA-134)

LORETTA K. EPLING,
Petitioner Below, Respondent.

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of March, 2012, true and accurate copies of the foregoing **RESPONDENT'S BRIEF** in this case were delivered by hand delivery upon the following persons:

Mark H. Dellinger
BOWLES RICE McDAVID GRAFF & LOVE
600 Quarrier Street
Charleston, WV 25325-1386

Board of Review, Workforce West Virginia
112 California Avenue
Charleston, WV 25305

West Virginia Attorney General
State Capitol Complex
Building 1, Room E-26
Charleston, WV 25305

Signed: _____



Kevin Baker (WV Bar No. 10815)
Counsel of Record for Respondent