

In the Supreme Court of Appeals of West Virginia

Docket No. 13-0519

**WOMEN'S HEALTH CENTER OF WEST VIRGINIA, JACK CANFIELD,
Commissioner, Workforce West Virginia, and BOARD OF REVIEW,
WORKFORCE WEST VIRGINIA, Respondents Below,**

Appellants,

v.

NICOLE PARSONS, Petitioner Below,

Appellee.

THE HONORABLE JENNIFER BAILEY, JUDGE
CIRCUIT COURT OF KANAWHA COUNTY
CIVIL ACTION No. 12-AA-125

BRIEF OF APPELLANT WOMEN'S HEALTH CENTER OF WEST VIRGINIA

Counsel for Appellant Women's Health Center of West Virginia

Russell D. Jessee (W. Va. Bar No. 10020)

Daniel D. Fassio (W. Va. Bar No. 11661)

Counsel of Record

Steptoe & Johnson PLLC

P.O. Box 1588

Charleston WV 25326-1588

Telephone: (304) 353-8000

Facsimile: (304) 353-8180

TABLE OF CONTENTS

Table of Contents.....	i
Table of Authorities.....	ii
Assignment of Error	1
Statement of the Case	1
I. Introduction	1
II. Factual Background.....	2
III. Procedural Background.....	5
Summary of Argument	6
Statement Regarding Oral Argument and Decision	6
Argument.....	7
I. The Circuit Court erred in substituting its own judgment for that of the WorkForce West Virginia Board of Review	7
A. The record is replete with statements by Ms. Parsons declaring her unavailability for work on Tuesdays and Wednesdays	8
B. Ms. Parsons' position that her statements were a "misunderstanding" has no support in the record	11
Conclusion.....	13
Certificate of Service	144

TABLE OF AUTHORITIES

Cases

<i>Adkins v. Gatson</i> , 192 W. Va. 561, 453 S.E.2d 395 (1994)	7
<i>Gino’s Pizza of West Hamlin v. West Virginia Human Rights Comm’n</i> , 418 S.E. 2d 758, (W.Va. 1992)	7
<i>Frank’s Shoe Store v. West Virginia Human Rights Comm’n</i> , 365 S.E. 2d 251, (W.Va. 1986).....	7
<i>CDS Inc. v Campler</i> , 438 S.E. 2d. 570, 573 (W.Va. 1993)	7
<i>In re Queen</i> , 196, W. Va. 442, 446, 473 S.E.2d 483, 487 (1996)	7
<i>Verizon Services v. Epling</i> , 2013 W. Va. LEXIS 180, 739 S.E. 2d. 290 (2013).....	9
<i>Tabor v. Gatson</i> , 207 W. Va. 424, 533 S.E.2d 356 (2000)	11

Statutes

Statutes W. Va. Code § 21A-6-3(1)	5
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ASSIGNMENT OF ERROR

The Kanawha County Circuit Court's ruling that Ms. Parsons never communicated an intention to resign from her position is contrary to the law and the evidence – impermissibly substituting the circuit court's judgment for that of the WorkForce West Virginia Board of Review – and should be reversed by this Court.

STATEMENT OF THE CASE

I. Introduction

Appellant Women's Health Center of West Virginia ("Appellant" or "WHC") appeals the ruling of the Circuit Court of Kanawha County declaring Appellee Nicole Parsons ("Appellant" or "Parsons") not disqualified from receiving unemployment compensation benefits. The Circuit Court incorrectly reversed the factual findings of the WorkForce West Virginia Board of Review.

WHC employed Ms. Parsons on a part-time basis as a licensed practical nurse on a Monday-through-Wednesday schedule. In March 2012, Ms. Parsons took maternity leave. After the birth of her child, her physician released her to return to work without restriction in mid-May. Ms. Parsons, however, refused to return to her previous part-time position with a Monday-through-Wednesday schedule. After the birth of her child, Ms. Parsons was available only Mondays and Fridays, and not Tuesdays and Wednesdays. When Ms. Parsons failed to report to work on June 4 as WHC required, she voluntarily quit.

Nonetheless, Ms. Parsons then applied for unemployment compensation benefits, and in doing so confirmed that she was not available to work on Tuesdays and Wednesdays. Ultimately, the Board of Review concluded that Ms. Parsons voluntarily quit, because she would not work her pre-leave schedule. Ms. Parsons then appealed the Board of Review's disqualification decision to the Kanawha County Circuit Court.

Despite the straightforward nature of the evidence in the matter showing that Ms. Parsons refused to return to her pre-leave schedule and the deferential standard of review to that factual finding of the Board of Review, the Circuit Court erroneously concluded that the Board of Review's findings were clearly wrong. Even though Ms. Parsons repeatedly stated to WHC, to WorkForce West Virginia, and to ALJ Truman Sayre that she was not available to work on Tuesdays and Wednesdays, the Circuit Court found that there was not substantial evidence in the record that Ms. Parsons voluntarily quit when she refused to return to her pre-leave schedule. Based on this erroneous reversal of the Board of Review's factual finding, the Circuit Court reversed the Board's disqualification decision. In basing its conclusion on facts directly contrary to the record, the Circuit Court exceeded its authority under the law and incorrectly substituted its own judgment for that of the Board of Review.

II. Factual Background

Ms. Parsons, formerly a licensed practical nurse, worked a part-time schedule for WHC, a women's reproductive services clinic, before going on maternity leave on March 26, 2012. (ALJ Decision Regarding Disqualification, A.R. 67.) Ms. Parsons' schedule was Mondays, Tuesdays, and Wednesdays. (ALJ Hr'g Tr. at 17, A.R. 26; Bd. of Rev. DQ Dec. at 2, A.R. 85 ("The claimant worked Mondays, Tuesdays and Wednesdays.")) Ms. Parsons' part-time schedule was the result of WHC accommodating her request so that she could attend further schooling. (ALJ Hr'g Tr. at 17, A.R. 26.)

Ms. Parsons requested maternity leave from WHC's Executive Director, Sharon Lewis, and stated that she wanted "to return to work upon release from my physician."¹ (Employer's Ex. 2.) Although the Court's Order states, at 1, that "[b]eginning March 26,2012, she began an

¹ Ms. Parsons knew that Ms. Lewis was the only person at WHC with the authority to authorize leave and, thus, to authorize extensions of leave. (ALJ Hr'g Tr. at 29-31, A.R. 29.)

extended a maternity leave due to a complicated pregnancy and a sick baby,” nowhere in the record is that Ms. Parsons’ pregnancy was “complicated” or that her maternity leave was “extended.”

WHC expected Ms. Parsons to return to her pre-leave schedule of Monday through Wednesday, once she was released to return to work. (*See, e.g.*, Employer’s Ex. 4 to ALJ H’rg, A.R. 54 (notes of May 10, 2012 conversation with Ms. Parsons informing her she would be on her pre-leave schedule); Employer’s Ex. 8 to ALJ DQ Hr’g, A.R. 58 (“You are expected to resume the same duties and schedule prior to going on leave.”); ALJ DQ Hr’g Tr. at 77, A.R. 41 (same).) Thus, the Court’s factual finding that “there was some dispute whether she would work Mondays and Fridays or Mondays, Tuesdays and Wednesdays,” is not supported by the record.

Ms. Parsons’ physician released her to return to work as of May 14, 2012. (ALJ Dec. on Disq, A.R. 67; Employer’s Ex. 3 to ALJ DQ Hr’g, A.R. 51-53 (dated by physician April 27, 2012).) Ms. Parsons, however, did not return to work at WHC on May 14, 2012. In fact, she never returned to work at WHC. Instead, she clearly told WHC that she was not willing to return to work on her previous schedule of Monday through Wednesday, because she was available only Mondays and Fridays.

The record contains multiple statements by Ms. Parsons that she would not work on Tuesdays and Wednesdays, as follows:

On May 25, 2012, Ms. Parsons sent a text message regarding her availability to Susan Patton, RN, a charge nurse at WHC, who forwarded it to Sharon Lewis, WHC’s Executive Director. In that text message, Ms. Parsons clearly states that she “can start back beginning

Monday [May 28], on *Monday's and Friday's*.”² (Employer's Ex. 6 to ALJ DQ Hr'g, A.R. 56 (emphasis added).)

On May 29, 2012, Ms. Parsons again stated in a fax to Ms. Lewis:

Beginning the week of 5/28/12 I will be available to work from maternity leave on *Monday[s] and Fridays* 8:30 to 5:00 PM.

(Employer's Ex. 7 to ALJ DQ Hr'g, A.R. 57 (emphasis added).)

On June 6, 2012, Ms. Parsons stated in the fact finding for her unemployment compensation application that she was not available for all shifts and days but, rather was available only “Sunday, Monday, Friday and Saturday day shift *only*.” (ALJ Ex. 2 to ALJ Elig. Hr'g. (July 27, 2012), A.R. 11 (emphasis added).)

At the ALJ Hearing on July 27, 2012, Ms. Parsons testified consistent with these written statements. In response to the question from ALJ Sayre,

What were your intentions concerning continued employment with Women's Health Center?

Ms. Parsons testified,

To work *Mondays and Fridays* [Because of childcare issues,] *Mondays and Fridays was what I was available*

(ALJ DQ Hr'g Tr. at 70-71, A.R. 39 (emphasis added).)

After Ms. Parsons did not report to work on Monday, June 4, 2012, as required, she had voluntarily quit, because she had made it clear that she was unwilling to return to working her pre-leave schedule. The Court's Order mischaracterizes these facts when it finds, at 1-2, that “[a]s a result [of Ms. Parson's not reporting to work solely because of a sick child], the

² Ms. Patton informed Ms. Parsons by reply text that “[y]ou need to communicate with Sharon Lewis about this.” (ALJ Hr'g. Tr. at 66, A.R. 38.) Then, later on May 25, Ms. Parsons spoke with Ms. Lewis, who said that because Monday, May 28, was a holiday, Ms. Parsons should start back to work on Monday, June 4. (*Id.* at 76, A.R. 40.)

Respondent sent a letter to the petitioner advising her that her “employment has been terminated.” (A.R. 164-5.)

III. Procedural Background

A deputy initially found Ms. Parsons ineligible but not disqualified from receiving unemployment compensation benefits. (ALJ Ex. 1 to ALJ Elig. Hr., A.R. 10; ALJ Ex. 1 to DQ Hr., A.R. 46.) WHC appealed the non-disqualification, and Ms. Parsons appealed her ineligibility decision. ALJ Sayre held hearings for both appeals on July 27, 2012. (ALJ Elig. and DQ Hr. Trs., A.R. 1-62.) With regard to the disqualification issue, ALJ Sayre affirmed the decision of the deputy. (ALJ DQ Dec. at 1-5, A.R. 67-71.) WHC appealed that decision to the Board of Review.

Based on the factual record, as described above, the WorkForce West Virginia Board of Review concluded:

[Ms. Parsons] effectively quit her job when she indicated she could only work Mondays and Fridays. The claimant missed work on June 4, 2012, because her daughter was ill. This absence would have been excused under normal circumstances.³ Nevertheless, the claimant had no plans to work the following days of that week, Tuesday and Wednesday. Accordingly, it is found that the claimant quit her job. She has failed to show any fault on part of the employer causing her to quit.

(Bd. of Rev. DQ Dec. at 2, A.R. 85 (emphasis added).) The Board thus concluded that Ms. Parsons was disqualified from receiving unemployment compensation benefits.⁴ (*Id.*)

³ At the ALJ hearing, the parties gave conflicting testimony about whether Ms. Parsons told WHC on June 4, 2012 that she had a doctor’s appointment for her child. (*See* ALJ DQ Hr’g Tr. at 79-80, A.R. 41 (Ms. Lewis stating Ms. Parsons did not say anything about a doctor’s appointment for her daughter); Employer’s Ex. 11 to ALJ DQ Hr., A.R. 61.) Ms. Parsons produced a doctor’s excuse only at the July 27, 2012 hearing. (ALJ DQ Hr’g Tr. at 88, A.R. 43.) Nonetheless, whether or not Ms. Parsons’ absence on June 4 should or would have been legitimately excused is moot in light of the Board’s correct factual finding that Ms. Parsons was not willing to return to a Monday through Wednesday schedule.

⁴ An individual who leaves work “voluntarily without good cause involving fault on the part of the employer” is disqualified indefinitely. W. Va. Code § 21A-6-3(1).

Ms. Parsons appealed the finding of the Board of Review to the Circuit Court of Kanawha County. Ms. Parsons' appeal to the Circuit Court specifically challenged the Board's factual finding that she was unavailable for work on Tuesdays and Wednesdays. She asserted that "[n]o evidence is in the record to indicate that [she] would not come to work on June 5 or June 6 or any of the following Tuesdays or Wednesdays." (Appellee's Cir. Ct. Br. at 6, A.R. 94.) Despite substantial evidence in the record that shows that Ms. Parsons refused to work any Tuesday or Wednesday and the deferential standard of review, the Circuit Court erroneously overturned the Board of Review's decision. WHC now appeals the Circuit Court's decision.

SUMMARY OF ARGUMENT

The Circuit Court erred by failing to adhere to the limited scope of its review of the Board's factual findings. Instead, the Circuit Court impermissibly substituted its own judgment for that of the Board of Review. The Board of Review had substantial evidence in the record on which to base its finding that Ms. Parsons effectively quit her position at WHC by making repeated statements that she was unavailable to work on her pre-leave schedule. Moreover, the record is clear that Ms. Parsons continued to take that position. Thus, the Circuit Court had no basis to find that the Board was "clearly wrong." The Circuit Court's conclusion, at 3-4, that "it is undisputed, based on the testimony adduced before Administrative Law Judge Sayre that the Petitioner never communicated an intention to resign from her position to her employer," cannot be squared with the record. (A.R. 166-7.) That factual finding by the Circuit Court, then, is itself clearly wrong.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Because oral argument would not further assist in presenting the issues in this matter, Appellant believes that oral argument should not be necessary.

ARGUMENT

Appeals from decisions of the WorkForce West Virginia Board of Review are subject to the following standard of review:

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). As the Circuit Court states in its Order:

The scope of review is “extremely limited” and the reviewing court must be careful to avoid substituting its own judgment for that of the decision makers. *Gino’s Pizza of West Hamlin v. West Virginia Human Rights Comm’n*, 418 S.E. 2d 758, 763 (W.Va. 1992); *Frank’s Shoe Store v. West Virginia Human Rights Comm’n*, 365 S.E. 2d 251, 254 (W.Va. 1986); *CDS Inc. v Campler*, 438 S.E. 2d 570, 573 (W.Va. 1993). The Supreme Court has also noted that “if an administrative agency’s factual finding is supported by substantial evidence, it is conclusive.” *In re Queen*, 196, W. Va. 442, 446, 473 S.E.2d 483, 487 (1996).

Generally speaking, a factual determination made by the Board of Review, WORKFORCE West Virginia will not be overturned unless it is clearly wrong. *Adkins v. Gatson*, 192 W.Va. 561, 565,453 S.E.2d 395, 399 (1994).

(Circuit Court Order at 3-4, A.R. 166-7.)

I. The Circuit Court erred in substituting its own judgment for that of the WorkForce West Virginia Board of Review.

This Court has held that courts reviewing the decisions of the WorkForce West Virginia Board of Review must give deference to factual findings. The Circuit Court’s Order acknowledges this. But despite this acknowledgment of the proper standard, the Circuit Court failed to apply it. The Circuit Court did exactly what it said it shouldn’t – “substituting its own judgment for that of the decision makers.” In doing so, the Circuit Court made findings actually

contrary to the substantial evidence in the record that Ms. Parsons had voluntarily quit by refusing to return to her pre-leave schedule.

A. The record is replete with statements by Ms. Parsons declaring her unavailability for work on Tuesdays and Wednesdays.

Ms. Parsons could not and did not dispute in her appeal to the Circuit Court that WHC correctly expected her to return to her pre-leave Monday-to-Wednesday schedule.⁵ She did contend, however, that there was record evidence she was not willing to work on two of those three days – Tuesdays and Wednesdays. In her Circuit Court appeal, Ms. Parsons essentially asked the Circuit Court to endorse the counterfactual possibility that if she had not been terminated on Monday, June 4, 2012, she would have gladly returned to work on Tuesday, June 5th. This was simply not the case. There was ample evidence in the record to establish that she would not work on *any* Tuesday or Wednesday. The Board of Review recognized this evidence of her unwillingness to adhere to her pre-leave schedule. That factual finding was due deference by the Circuit Court unless “plainly wrong.” Nothing in the record even suggests that it was wrong, much less establishes that it was *plainly* wrong.

Ms. Parsons’ physician released her to return to work as of May 14, 2012. Because of multiple excuses, Ms. Parsons had not returned to work by the end of the month. Accordingly, WHC gave her an ultimatum to return by Monday, June 4, 2012. On that day, Ms. Parsons came up with yet another excuse and refused to return to work. Thus, the record is clear that Ms. Parsons never worked at WHC after her maternity leave.

⁵ Ms. Parsons asserts that she and WHC had not “addressed what her work schedule would be when she came back from maternity leave.” (Appellee’s Cir. Ct Br. at 2-3, A.R..) Thus, Ms. Parsons had no basis to assume that it would be anything other than her pre-leave schedule. In any event, WHC informed her on May 10, 2012, four days before her physician’s release-to-work date of May 14, 2012, that her schedule would be the same as pre-leave.

As the Board of Review recognized, the reason that Ms. Parsons never returned to work following maternity leave is that she would not work on Tuesdays and Wednesdays. This factual circumstance is reflected multiple times in the record:

- Ms. Parsons stated in her May 25, 2012 text to WHC that she was available Mondays and Fridays;
- She reiterated in her May 29, 2012 fax to WHC that she was available only Mondays and Fridays;
- She stated to WorkForce West Virginia on June 6, 2012, two days after her termination, that she was not available on all days but, rather, on only Mondays, Fridays, Saturdays, and Sundays; and
- She testified before ALJ Sayre on July 27, 2012, that she wished to work at WHC on only Mondays and Fridays because of childcare concerns.

((Employer's Ex. 6 to ALJ DQ Hr'g Tr., A.R. 56; Employer's Ex. 7 to ALJ DQ Hr'g Tr., A.R. 57; Local Office Ex. 1 to ALJ Elig. Hr'g Tr. (July 27, 2012), at 2, A.R. 13; ALJ DQ Hr'g Tr. at 70-71, A.R. 39.) Accordingly, Ms. Parsons' assertions to the Circuit Court that "[s]he never testified that she *would not* work on Tuesdays and Wednesday[s]" (emphasis in original) and that "[n]o one ever asked her if she 'intended' to honor [a Monday to Wednesday] schedule" and similar assertions (Appellee's Cir. Ct. Br. at 6, A.R. 94), are all incorrect and misstate the evidence in the record.⁶

⁶ It is particularly misleading for Ms. Parsons to have stated to the Circuit Court that she "was never asked by anyone if she planned to not show up on Tuesdays and Wednesdays." (Appellee's Cir. Ct. Br. at 6, A.R. 94.) ALJ Sayre specifically asked her the open-ended question, "What were your intentions concerning continued employment with Women's Health Center?," and she replied she intended to work Mondays and Fridays because those were the days she was available (ALJ DQ Hr'g Tr. at 70-71, A.R. 39).

It is also incorrect for Ms. Parsons to state that she was requesting a schedule change. (Appellee's Cir. Ct. Br. at 8, A.R. 96.) WHC did not give Ms. Parsons the option to request a schedule change. It expected her to return to a Monday-to-Wednesday schedule. Moreover, WHC had no obligation to change Ms. Parson's schedule to accommodate her childcare concerns. See *Verizon Services v. Epling*, 2013 W. Va. LEXIS 180, 739 S.E. 2d. 290 (2013) (per curiam) (employer not at fault when employee quit as a result of not having childcare when scheduled to work).

Evidence in Ms. Parsons' companion eligibility proceeding confirms the correctness of the Board's factual finding that she would not work on Tuesdays and Wednesdays. In her companion eligibility proceeding, Ms. Parsons consistently maintained that she was not available to work Tuesdays through Thursdays.

On her application for benefits, completed only two days after her termination from WHC, Ms. Parsons wrote that she was not available for all shifts and days but, rather was available only "*Monday, Friday, Saturday & Sunday.*"⁷ (Local Office Ex. 1 to ALJ Elig. Hr'g Tr. (July 27, 2012), at 2, A.R. 13 (emphasis added).) She also told the WorkForce interviewer, "*I am only able to work Sunday, Monday, Friday and Saturday day shift only.*" (ALJ Ex. 2 to ALJ Elig. Hr'g. (July 27, 2012), A.R. 11 (emphasis added).) Ms. Parsons also told WorkForce that "she was not willing to drop or rearrange classes for suitable full-time work." (ALJ Elig. Hr'g Tr. at 11, A.R. 3.)

In the Board of Review decision regarding Ms. Parsons' eligibility for benefits, the Board found – consistent with Ms. Parsons' representations – that "[s]he is *available for work Friday, Saturday, Sunday and Monday, due to childcare concerns.*" (Bd. of Rev. Elig. Dec. at 2, A.R. 64 (emphasis added).) While the Board found that Ms. Parsons was eligible because "[i]t is customary in this occupation to work weekends," the Board never stated that Ms. Parsons was available from Tuesday through Thursday. (*Id.*) Rather, the Board specifically found that she was not.⁸ (*Id.*) Ms. Parsons never challenged that finding.

With all of this evidence before it, the Board of Review found that Ms. Parsons had resigned her position because she was not going to work on Tuesdays and Wednesdays as

⁷ WHC is not open on weekends, so it is irrelevant to her WHC employment that Ms. Parsons was available on Saturdays and Sundays.

⁸ Accordingly, although the Board found Ms. Parsons was available for work it is not the case that by having "won" that issue, Ms. Parsons established her availability on Tuesdays and Wednesdays.

scheduled by her employer. Having missed a day already, and with no plans to work, Ms. Parsons was found to have resigned her position. Rather than accept the Board's reasoning which was logical and based on substantial evidence, the Circuit Court decided to interject its own interpretation and failed to pay deference as required under the applicable precedent.

B. Ms. Parsons' position that her statements were a "misunderstanding" has no support in the record.

In her Circuit Court brief, Ms. Parsons claimed that her statements that she was unavailable on Tuesdays and Wednesday were mere statements of "intention", and that "intentions don't matter."⁹ (Appellee's Cir. Ct. Br. at 8, A.R. 96.) In essence, she claimed that her repeated declarations that she was not going to work on Tuesdays or Wednesdays resulted in a "misunderstanding" despite the fact that she made the *same statements repeatedly*. In support of her statements, Ms. Parsons cited to the case of *Tabor v. Gatson*, 207 W. Va. 424, 533 S.E.2d 356 (2000) (*per curiam*).

In *Tabor*, this Court concluded that an employer was bound by its statement that the employee should clean out his desk and leave. *Tabor*, 207 W. Va. at 426, 533 S.E.2d at 358. The employer's statement could "reasonably have been construed as meaning that the appellant had been fired." *Id.* Thus, when the employee did not return to work, he had not quit, despite the employer claiming it was a misunderstanding. The employee "legitimately concluded that he had been fired." *Id.*

Intentions, then, *do* matter, in that they can be construed and relied upon by another party. It is not incumbent upon the receiving party to parse the statements as statements of intent versus those of "truth." WHC and the Board of Review are entitled to take Ms. Parsons'

⁹ Even Ms. Parson's premise for this argument – that the Board was solely focused on her "intentions" – is incorrect. The Board clearly stated that "[Ms. Parsons] effectively quit her job when she *indicated* she could only work Mondays and Fridays" (Bd. of Rev. DQ Dec. at 3, A.R. 86) (emphasis added). Thus, the Board was focused on Ms. Parsons' statements, not intentions.

statements that she was “available” Mondays and Fridays to mean that she was *not available* on Tuesdays and Wednesdays. Ms. Parsons is bound by her statements and by her complete failure to state anything to the contrary. To allow her to backpedal and claim she didn’t mean what she said when she said the *same thing* repeatedly to WHC, to WorkForce West Virginia, and to the ALJ leads to the proverbial “slippery slope.” If courts accepted Ms. Parsons’ argument, individuals would have *carte blanche* to make statements without consequence – they could always claim that they were statements of “intent” rather than “fact.”

Nothing in the record shows that Ms. Parsons’ statements about her availability were anything other than clear statements that she would not work on Tuesdays or Wednesdays. Not once did she state in the record prior to her briefing to the Circuit Court that she would work Tuesdays and Wednesdays. Indeed, she has yet to say so. Rather, she makes the sophistic argument that the record *lacks* her definitively stating she would *not* come to work beginning Tuesday.

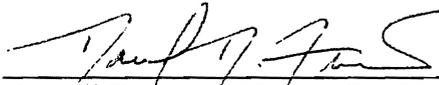
Despite the complete absence of record evidence to support her theory, the Circuit Court adopted it in its Order, finding that WHC had not waited long enough to send Ms. Parsons a letter notifying her that they considered her to have resigned. (Cir. Ct. Order at 4, A.R. 167.) Presumably, WHC would have been entitled to send the letter after Ms. Parsons failed to show on Tuesday. The Board of Review recognized this would elevate form over substance. Ms. Parsons already had said she was not coming in on Tuesday or Wednesday. In finding to the contrary, the Circuit Court ignored the substantial record evidence supporting the Board of Review’s decision. The Circuit Court instead adopted Ms. Parson’s unsubstantiated theory. This kind of wholesale disregard for the factual findings of the Board, particularly when there is *no evidence in the record* to support the contrary theory, constitutes clear error and cannot stand.

CONCLUSION

Accordingly, Appellant Women's Health Center of West Virginia respectfully requests that the Court **GRANT** its appeal, **REVERSE** the decision of the Circuit Court in this matter, and **REINSTATE** the disqualification decision of the WorkForce West Virginia Board of Review.

WOMEN'S HEALTH CENTER OF WEST VIRGINIA,

By Counsel



Russell D. Jesse (W. Va. Bar No. 10020)

Daniel D. Fassio (W. Va. Bar No. 11661)

P.O. Box 1588

Charleston, W. Va. 25326-1588

Telephone: (304) 353-8000

Fax: (304) 353-8180

Counsel to Respondent/Appellant Women's Health Center of West Virginia

STEPTOE & JOHNSON PLLC
Of Counsel

CERTIFICATE OF SERVICE

I hereby certify that on August 26, 2013, true and accurate copies of the foregoing *BRIEF OF RESPONDENT/APPELLANT WOMEN'S HEALTH CENTER OF WEST VIRGINIA*. were deposited in the U.S. Mail contained in postage-paid envelope addressed to counsel for all other parties to this appeal as follows:

Kathy A. Brown, Esq.
Kathy Brown Law, PLLC
PO Box 631
Charleston, WV 25322

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

Russell Frye, Acting Director
Workforce West Virginia
Capitol Complex, Bldg. 4, Room 609
112 California Avenue
Charleston, WV 25305-0112



Russell D. Jessee
Daniel D. Fassio
*Counsel of Record for Respondent/Appellee
Central West Virginia Aging Services, Inc.*