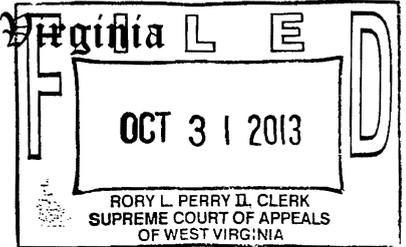


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In the Supreme Court of Appeals of West Virginia

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

REPLY BRIEF OF APPELLANT WOMEN'S HEALTH CENTER OF WEST VIRGINIA

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STATEMENT OF THE CASE

Appellant Women's Health Center of West Virginia ("Appellant" or "WHC") appeals the ruling of the Circuit Court of Kanawha County that reversed the WorkForce West Virginia Board of Review and declared Appellee Nicole Parsons ("Appellee" or "Ms. Parsons") not disqualified from receiving unemployment compensation benefits. The Circuit Court disregarded the clear record evidence supporting the finding of the Board of Review that Ms. Parsons is disqualified for having resigned her employment without fault on the part of WHC.

As WHC showed in its Appeal Brief, the record here is replete with evidence establishing that Ms. Parsons declined to return to work on the scheduled given to her by her employer, and she made clear, unequivocal statements that she would not work on the days she was scheduled to work. Accordingly, the Board of Review's finding that she quit her employment was correct and based on substantial evidence. The Circuit Court, then, exceeded its authority in overturning the Board of Review's decision.

Ms. Parsons's own statements establish her unwillingness to work her designated schedule. Ms. Parsons, however, has continually attempted to obscure the record in this matter by claiming that her own statements cannot be viewed as statements of *fact*, but rather as mere statements of "intention" that never were confirmed. Ms. Parsons wants this Court to agree that her words were empty – that despite her statements before and after quitting that she could work only Mondays and Fridays, she would have reported to work on Tuesdays and Wednesdays if just given the chance.

Ms. Parsons's mischaracterizations cannot be squared with the law of this State. Her intentions and statements of intent did indeed matter, and her employer had every right to rely upon them. When Ms. Parsons repeatedly stated that she was not going to work on Tuesdays and Wednesdays, WHC was entitled to view those statements as confirming that she voluntarily

quit her job, which had a Monday-to-Wednesday schedule. The Board of Review recognized this and correctly denied unemployment benefits to Ms. Parsons.

ARGUMENT

I. The record contains ample evidence that Ms. Parsons knew her post-leave schedule was Monday-to-Wednesday, the same as before her maternity leave, and that she refused to return to work on that schedule.

Ms. Parsons's Response seeks to obfuscate the simple facts of this case for this Court. Given the deferential standard of review that should have been granted to the Board of Review's findings, this Court must look to whether the Board was "clearly wrong." As established in Appellant's Appeal Brief, there is ample evidence in the record to support the Board of Review's findings, and confirm the simple facts of the case:

- Ms. Parsons's schedule prior to her leave was Monday-Wednesday, and WHC made her aware on May 10, 2012, and afterward that it expected her to return on that schedule.
- Ms. Parsons made repeated statements both before and after her departure from WHC's employ that she would not work on Tuesdays or Wednesdays and that she was only available to work on Mondays and Fridays.
- WHC has no obligation to alter the schedule of an employee, so Ms. Parsons's repeated statements that she was unavailable to work her pre-leave schedule constituted a voluntary resignation of her position.

WHC's Appeal Brief laid out the ample evidence in the record supporting the findings of the Board of Review. Given the insistence of the Appellee in distorting or ignoring record evidence, however, Appellant feels compelled to examine a few of her misstatements in detail below.

A. Ms. Parsons was aware that WHC expected her to return on her pre-leave schedule on May 10, 2012.

The record is clear that Ms. Parsons's schedule both before and after maternity leave was Mondays through Wednesdays. In her response, Ms. Parsons claims that she accurately testified that "neither she nor her employer had addressed what her work schedule would be coming back from maternity leave" (Resp. Br. at 3.), but that is inaccurate. Later in her brief, Ms. Parsons states that she was "told in the letter dated May 29, 2012 that she would work Monday, Tuesday and Wednesday beginning on June 4, 2012." (Resp. Br. at 7.) And that was not the first time WHC informed her of her post-leave schedule.

Ms. Parsons discussed her schedule upon her return from maternity leave with WHC. (Resp. Br. at 4.) On May 10, 2012, Ms. Parsons spoke with Ms. Meyers about her return to work. (Employer's Ex. 4 to ALJ H'rg, A.R. 54.) During that conversation, Ms. Parsons attempted to tell Ms. Meyers that she would bring in a "note" with her "new availability" on it. (*Id.*) WHC did not request such a note, and had no plans to alter Ms. Parsons's pre-leave schedule. Rather, Ms. Meyers informed Ms. Parsons that WHC was "going to use the same availability schedule" that Ms. Parsons was on "prior to her leave." (*Id.*) After some hesitation, Ms. Parsons assented to the use of her pre-leave schedule. (*Id.*) Accordingly, Ms. Meyers asked her to report on Tuesday, May 15, 2012 for work, and Ms. Parsons agreed to do so. (*Id.*¹) WHC again confirmed that she was to return on her pre-leave schedule in the May 29th letter which was noted above. (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."))

¹ Ms. Parsons did not object to the introduction of this memo at the hearing, and she had no basis to do so. (ALJ DQ Hr'g Tr. at 64, A.R. 37.) Ms. Parsons also did not deny this conversation occurred or that she was asked to return on her pre-leave schedule. (ALJ DQ Hr'g Tr. at 26, A.R. 28.)

The record is clear that Ms. Parsons was well aware of her schedule upon her return from leave, and that she was to work the same schedule as before her maternity leave: Mondays, Tuesdays and Wednesdays. She cannot contend that she was surprised or confused about the position of WHC with regard to her schedule, nor can she now claim that she was kept in the dark about when she was to work. Perhaps most importantly, all of this is an attempt to misdirect focus from the real issue – that WHC had the right to set her schedule as it pleased, and her refusal to comply with that schedule is of her *own making*.

B. WHC was allowed to set Ms. Parsons’s schedule, so her refusal to work the schedule offered by her employer can only be a voluntary departure from employment.

Employers are allowed to set their employee’s work schedules within the bounds of applicable laws. If an employee desires or requests a different work schedule, an employer is under no obligation to accommodate that request. Here, Ms. Parsons never requested a schedule change,² but even if she had requested a change to work only Mondays and Fridays, WHC was under no obligation to grant her request. WHC set her schedule – originally adjusting it to part-time to accommodate Ms. Parsons’s request, and WHC wished her to remain on that schedule. Her *choice* to not work the schedule WHC set for her cannot be used as a basis for entitlement to unemployment compensation benefits.

Only when an employer makes a misrepresentation or substantial unilateral changes in the terms of employment is there “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.” Syl. Pt. 2, *Murray v. Rutledge*, 174 W.Va. 423, 327

² Although Ms. Parsons asserts in her response that her “request” to change schedules was denied (Resp. Br. at 3), she never made any such request. Her assertion that her statement that she was available only on Mondays and Fridays constituted a request for a schedule change is nothing more than an inaccurate *post hoc* rationalization.

S.E.2d 403 (1985). This Court recently decided *Verizon Services v. Epling*, 2013 W. Va. LEXIS 180, 739 S.E. 2d. 290 (2013) (*per curiam*), which establishes that an employer does not have to alter an employee's schedule to accommodate the employee's childcare constraints over which the employer has no control.³

In this case, there was not even any change to Ms. Parsons's schedule. WHC asked her to return to the *exact same position at the exact same rate of pay, on the exact same schedule*. Ms. Parsons's circumstances changed through no fault of WHC. Her refusal to show up for work when scheduled cannot be attributed to any action on the part of WHC. WHC changed nothing about the terms of her employment – it only asked that she show up to work. She declined, and declared that she would not do so on the days proffered by her employer. Based on these established facts, the Board of Review correctly concluded that she quit her employment.

C. Ms. Parsons made repeated statements that she was available to work on only Mondays and Fridays.

Ms. Parsons claims erroneously that there is “absolutely no evidence” of her intention to work on only Mondays and Fridays, and that there is no evidence in the record that she would not come to work on Tuesdays or Wednesdays. (Resp. Br. at 10.) That Ms. Parsons continues to cling to these contentions defies logic. As established in Appellants Brief, there were no fewer than *four separate occasions* when Ms. Parsons herself confirmed that she would work only on Mondays and Fridays:

- Ms. Parsons stated in her May 25, 2012 text to WHC that she was available Mondays and Fridays;

³ In that case, the Plaintiff sought unemployment benefits as the employer made changes to her schedule which would impede her ability to arrange for childcare. However, because the employer had made the employee aware of the possibility of a changing schedule at the time of hire, there was no unilateral change in the terms of her employment. *Id.* at 293.

- 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.)

Ms. Parsons, however, would have this Court believe that all of those repeated statements were merely of “intent,” and had no actual value in determining what she would or would not actually *do*. Essentially, Ms. Parsons wishes this Court to believe her words and sworn testimony are of no value, and *cannot* be relied upon – i.e., Board of Review’s erred in denying unemployment benefits to her by *crediting her testimony*.⁴

Perhaps the most inaccurate statement in her Response is Ms. Parsons’s claim that she was “never asked by anyone” what her intentions were with regard to working on Tuesdays and Wednesdays. In reality, ALJ Sayre posed *that very question* to her during the disqualification hearing, asking,

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

Ms. Parsons testified,

⁴ As was discussed in WHC’s Appeal Brief, Ms. Parsons is simply incorrect that intentions don’t matter – they do, because they can be relied upon by other parties. *See Tabor v. Gatson*, 207 W. Va. 424, 533 S.E.2d 356 (2000) (*per curiam*) (employee eligible when employer’s statements to employee could have reasonably been construed as signaling employee’s termination).

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).) Ms. Parsons testified under oath that she wanted to work Mondays and Fridays, and was not going to work on Tuesdays and Wednesdays. To claim that there is “[n]o evidence in the record” that Ms. Parsons would not work on Tuesdays or Wednesdays (Resp. Br. at 10) is simply false.

CONCLUSION

The Circuit Court in this case exceeded the narrow scope of its review powers. Syl. Pt. 3, *Adkins v. Gatson*, 192 W. Va. 561, 453 S.E.2d 395 (1994); *see also In re Queen*, 196, W. Va. 442, 446, 473 S.E.2d 483, 487 (1996). The Board of Review considered all the facts in the record and concluded that Ms. Parsons had resigned her position by refusing to work the schedule offered by WHC. Despite the ample evidence in the record supporting the Board of Review's finding, the Circuit Court simply substituted its own misinterpretation of evidence in this matter and ignored the basis for the Board of Review's determination.

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.

Respectfully submitted this 30th day of October, 2013.

**WOMEN'S HEALTH CENTER OF WEST
VIRGINIA,**

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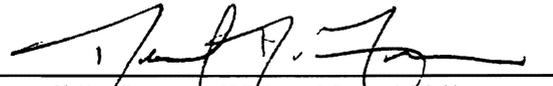
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CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of October, 2013, I served the foregoing **REPLY BRIEF OF APPELLANT WOMEN'S HEALTH CENTER OF WEST VIRGINIA** upon all counsel of record, by depositing a true copy thereof in the United States mail, postage prepaid, in an envelope addressed as follows:

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