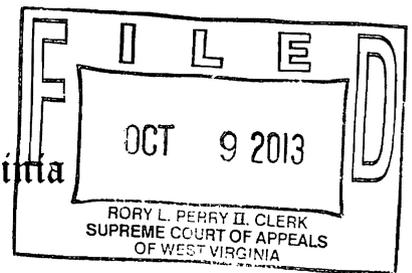


In the Supreme Court of Appeals of West Virginia

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.*

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

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**RESPONSE BRIEF OF APPELLEE NICOLE PARSONS**

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**Counsel for Appellee Nicole Parsons**

**Kathy A. Brown, (WV Bar # 8878)**

*Counsel of Record*

Kathy Brown Law, PLLC

P.O. Box 631

Charleston, WV 25322

304-720-2351- Phone

304-720-2352- Fax

[kathybrownlaw@gmail.com](mailto:kathybrownlaw@gmail.com)

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## STATEMENT OF THE CASE

The only issues before this Court are whether the Court below correctly found that Nicole

Parsons:

(1) never communicated an intention to resign from her position instead she was sent a “termination” letter; and

(2) was “terminated” from her position for failing to report to one day of work when her employee handbook stated three consecutive absences would be treated as voluntarily resigning employment.

### **I. Procedural Background**

The Circuit Court of Kanawha County found Appellee Nicole R. Parsons (“Appellee” or “Parsons”) eligible for unemployment compensation benefits as she was terminated and did not voluntarily quit.

Parsons was terminated from her employment at the Women’s Health Center of West Virginia (“WHC” or “Appellant”) by WHC Director Sharon Lewis over the telephone on June 4, 2012. Parsons applied for unemployment benefits on June 6, 2012. WORKFORCE West Virginia granted Parsons compensation in a decision dated June 13, 2012 by Deputy Andy Osborne. The employer appealed the Deputy’s decision. A hearing was held on July 27, 2012 wherein the employer advanced two theories 1) that Parsons committed gross misconduct and 2) that Parsons voluntarily quit. After a hearing in front of Administrative Law Judge Truman J. Sayre, Jr., Parsons prevailed. In a decision issued July 30, 2012 ALJ Sayre wrote:

The claimant was discharged. The claimant was absent beginning May 14, 2012, due to her daughter’s illness. The employer and the claimant agreed that the claimant would begin work June 4, 2012, subsequent to her maternity leave, but the claimant was absent June 4, 2012, due to her daughter’s illness. The claimant was then discharged because she failed to report to work as scheduled at 12 noon on June 4, 2012. The claimant provided a doctors excuse regarding the June 4, 2012 absence. The claimant’s absence due to her daughter’s illness would not involve deliberate disregard of the employer’s interest, so the claimant’s June 4, 2012 absence does not constitute misconduct. Accordingly, it is held the claimant **was discharged** but not for misconduct. The claimant is not disqualified.

*Appendix 69 of ALJ Decision at Appendix 67-69.*

The employer appealed that decision to the Board of Review. This hearing was to take no new testimony or evidence and was held on September 5, 2012. The claimant, who was *pro se*, did not appear. The Board of Review overturned the ALJ's decision and held that Parsons should be denied unemployment benefits for a **different** reason than what was given by the ALJ. The Board ruled that Parsons voluntarily quit:

When the claimant went on maternity leave, she worked Monday through Wednesday. At the end of the maternity leave, the employer expected her to resume the same schedule. The claimant was unable to do so. The claimant 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. 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.

*Appendix 85 and 86 of Board of Review Decision at Appendix 84-88.*

The above decision of the Board of Review was appealed to the Kanawha County Circuit Court. On April 24, 2013, the Circuit Court ruled:

In the present case, it is undisputed, based on testimony adduced before Administrative Law Judge Sayre that the Petitioner never communicated an intention to resign from her position to her employer. Furthermore, the employer sent her the letter stating that she was "terminated" from her position subsequent to her failure to report back to work on Monday, June 4, 2012, when she called in to advise that her baby was ill and that she would be unable to work.

It was established that, under the employee handbook that the Petitioner signed and agreed to, three consecutive absences would be treated as voluntarily resigning employment. *Hearing Transcript p. 46-47*. The Petitioner was absent one day of work prior to receiving the termination letter from the Respondent. Had the Petitioner remained absent for the next two days, and had the respondent not sent the letter, she may very well be considered as having left her employment without good cause involving fault on the part of the employer. However, the Petitioner had not yet taken the final action to resign her job when she received the termination letter.

*Circuit Court Order, Appendix 166-167.*

Following this Order, Parsons was awarded partial back pay from WorkForce West Virginia.

## II. Facts of the Case

Parsons, a licensed practical nurse, worked for WHC, a medical clinic, part-time before taking maternity leave on March 26, 2012. She was fired, over the telephone, on June 4, 2012 before she could come back to work following the maternity leave. *See ALJ Hr'g. Tr. of July 27, 2012 at 53, Appendix 35.* Parsons had a difficult pregnancy and a sick baby. *Id. at 48-50 Appendix 33-34, At 86 Appendix 43.* Prior to her coming back to work Parsons was asked, by her employer, to provide days when she would be **available** to work. *Id. at 35, Appendix 30.* Parsons also testified that neither she nor her employer had addressed what her work schedule would be when she came back from maternity leave. *See id. at 42, Appendix 32.* Parsons testified that she talked to the front office manager, Marci Meyers, on May 14, 2012 and told her she would not be able to return to work for another two weeks and that Ms. Myers told her that would not be a problem. *ALJ transcript, page 27-28, Appendix 28.* After May 14, 2012 Parsons did not hear from WHC. She received no telephone calls, no text messages, and no letters. *ALJ transcript page 31, Appendix 29.* On May 25, Parsons let WHC know she was coming back to work. Still having no written information about what her work schedule would be, Parsons sent a text message stating she could start back to work on Monday's and Friday's. *See Employer Exhibit #6 attached to July 27, 2012 transcript, Appendix 56.* On May 29, 2012 Parsons submitted to her employer a facsimile that stated she would be available to work on Mondays and Fridays. *See Employer Exhibit #7 attached to July 27, 2012 transcript, Appendix 57.* Despite Parsons' requests to work on Mondays and Fridays, those requests were denied. That same date, Executive Director of WHC, Sharon Lewis sent a letter to Parsons, putting in writing for the first time her schedule. The schedule would be Monday (12:00 p.m. to 5 p.m.), Tuesday (8:30 a.m. to 5:00 p.m.), and Wednesday (12:00 to 5:00 p.m.) *See Employer Exhibit #8 attached*

to July 27, 2012 transcript, Appendix 58. This letter arrived May 30, 2012. Parsons was to report to work five days later and work a schedule she was just now given.

The May 29, 2012 letter sent by Ms. Lewis further stated to Parsons that “[i]f you fail to report for work on Monday, June 4, 2012, your employment will be terminated pursuant to Policy No. 502 set forth in the Women’s Health Center Employee Handbook.” See *id.*, Appendix 58. WHC’s policy manual states “employees who are absent from work for three consecutive days **without giving proper notice** to the Center will be considered to have voluntarily resigned.” See *Employer Exhibit #1 to July 27, 2012 hearing, Appendix 48 (emphasis added)*.

Parsons called the Women’s Health Center on the morning of June 4, 2012 to report that she could not come to work because her baby was sick. See *ALJ transcript p. 48, Appendix 33*. The baby had an allergy and her little body was covered with blisters. See *ALJ transcript, p. 49-50, Appendix 34*. The receptionist, Susan Patton, took a note dated June 4, 2012 and timed at 8:39 a.m. which stated that Nicole Parsons had called stating “I can’t come in because I have to take Carlee to the doctor.” See *Employer’s Exhibit #9 attached to July 27, 2012 transcript, Appendix 59*. Parsons spoke with Ms. Lewis later that day to make sure Ms. Lewis knew she would not be coming to work. See *A.L. J. transcript, at p. 53, Appendix 35*. Ms. Lewis testified that she did indeed speak to Parsons and told her that she had sent the May 29, 2012 letter and that because she was not coming to work on June 4, 2012, she should refer to that letter which told her she would be terminated if she failed to report to work. See *ALJ transcript at 78 and 79, Appendix 41*. Ms. Lewis testified “Well, if that’s what the letter stated then that’s what it means.” *Id. at 79*. Therefore, Parsons was effectively terminated from employment on that day, June 4, 2012.

Ms. Lewis sent a letter dated June 6, 2012 stating that Parsons was indeed terminated. *See Employer's Exhibit #10, attached to the July 27, 2012 transcript, Appendix 60.* "The purpose of this letter is to advise you that your employment with the Women's Health Center of West Virginia was **terminated**, effective June 5, 2012 as a result **of your failure to report to work** for your scheduled shift starting at 12:00 noon on June 4, 2012." *Id. (emphasis added), Appendix 60.* The letter further states "[y]our absences since May 28, 2012 have been unapproved and unexcused. As a result, your employment has been **terminated.**" *Id. (emphasis added), Appendix 60.* This letter says nothing about Parsons' failure to make plans to work Tuesdays and Wednesdays.

#### SUMMARY OF ARGUMENT

The Circuit Court was correct in its ruling that the Board of Review was "clearly wrong." Parsons never communicated an intention to resign from her position. In fact, she took steps to keep her employer informed of her baby's health and when she could return to work. Parsons had nothing in writing about what her schedule would be upon her return. Parsons believed she was given an extension to her maternity leave when she spoke with her supervisor Marci Meyers on May 14, 2012. WHC sent a letter on May 29, 2012, for the first time outlining in writing what her schedule would be upon Parsons' return from maternity leave. That schedule would be June 4, 2012, (12:00 p.m. to 5:00 p.m.), Tuesday (8:30 a.m. to 5:00 p.m.), and Wednesday (12:00 p.m. to 5:00 p.m.). Yet when she called to give notice, pursuant to the handbook, that she could not come to work on June 4, 2012, she was fired and then told that her absences from May 28, 2012 had been unapproved and unexcused. Parsons was not scheduled to work the week of May 28, 2012. She was, pursuant to Lewis' letter, told to report to work on June 4, 2012. The Circuit Court is correct that if Parsons had failed to come to work the next two days without notice she

would have voluntarily left her job. The way it was handled by WHC, Parsons was terminated and the letter she received on June 6, 2012 said exactly that.

## STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Appellee believes that oral argument is necessary and would help the Court understand the issues.

### ARGUMENT

#### Standard of Review

Appeals of 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 the [West Virginia Bureau of Employment Programs] are entitled to substantial deference unless a reviewing court believes the findings are clearly wrong.

Syl. Pt. 3, *Adkins v. Gatson*, 192 W. Va. 561, 453 S.E.2d 395 (1994). Further, the Court is guided by the consistent recognition that “unemployment compensation statutes should be liberally construed in favor of the claimant[.]” *Mercer County Board of Education v. Gatson*, 186 W. Va. 252, 412 S.E.2d 249 (1991).

#### **I. The Circuit Court was correct when it found Appellee never communicated an intention to resign and she was sent a “termination” letter.**

Nicole Parsons wanted to come back to work after giving birth to her baby. She had a difficult pregnancy and a sick baby, but she needed to continue working. She called her workplace, sent text messages and even sent a facsimile letting WHC know she planned to come back to work. Parsons believed she had been granted a two week extension to her maternity leave from May 14, 2012 to May 28, 2012. She called on May 25, 2012 to tell WHC that she was ready to come back to work the following week. She did request to work Mondays and Friday.

However, after she requested work days of Monday and Friday those dates were denied. She was told in the letter dated May 29, 2012 that she would work Monday, Tuesday and Wednesday beginning on June 4, 2012. She was not told to come to work the week of May 28, 2012. On June 4, 2012, when her baby was covered with blisters, she called to say she could not come to work that day. That is when she was fired.

Unemployment compensation statutes are to be liberally construed in favor of the claimant. *Mercer County Board of Education v. Gatson*. In *Mercer County Board of Education* two professors were terminated from their positions with the Board. They were mental health professionals and the work in Mercer County was limited for them. The Board of Review denied unemployment benefits based on the fact that they did not take work offered to them, when in fact the work offered to them was less hours with no benefits. *Id.* 186 W. Va. at 253. The Circuit Court reversed the Board of Review and the Supreme Court upheld the Circuit Court decision. The case at bar is similar in that the Circuit Court interpreted the facts differently from the Board of Review to in fact favor the claimant pursuant to case law. The two professors were offered work, however the work was not the same as the job they had before. In the case at bar, Parsons believed she was on her extended maternity leave, did not miss three days in a row and yet was terminated. WHC believed, from the termination letter sent on June 6<sup>th</sup>, 2012, that Parsons had missed work without notice and used that reasoning to fire her.

Parsons believed she had been given an extended maternity leave until May 28, 2012. She called on May 25, 2012 to let WHC know she would be able to report to work the following Monday. She was told that was a holiday and then in written communication was told to report to work June 4, 2012 or else. The letter stated she would be fired pursuant to the WHC handbook that pointed out three consecutive absences, without reporting to your employer that you would

not be at work, would mean you voluntarily resign. So on June 4, 2012 when Parsons baby was sick she called to report she would not be able to come to work. Parsons did what she was supposed to do. In her mind this would be her first missed day of work and she did report in.

Parsons wanted to come back to work; she had no intention to resign. Therefore, the law should work in her favor and provide her with unemployment compensation. The Circuit Court was correct in its ruling and must be upheld.

Further, Parsons did receive a “termination” letter from WHC. Following the over-the-phone firing on June 4, 2012 Sharon Lewis sent a letter to outline what had happened. “The purpose of this letter is to advise you that your employment with the Women’s Health Center of West Virginia was **terminated**, effective June 5, 2012 as a **result of your failure to report to work for your scheduled shift starting at 12:00 noon on June 4, 2012.**” The letter did not say you are voluntarily quitting because you do not plan to show up on Tuesdays and Wednesdays. In fact, the letter said “[y]our absences since May 28, 2012 have been unapproved and unexcused. As a result, your employment has been **terminated.**” Parsons was not scheduled to work the week of May 28, 2012. She had been told in writing to report June 4, 2012.

When it is clear that the factual findings of the Board of Review are not supported by the evidence, Circuit Courts are instructed to reverse the decision of the Board of Review. *See May v. Chair and Members, Board of Review*, 222 W. Va. 373, 664 S.E.2d 714 (2008).

Parsons received a termination letter. The letter did not say she was fired because she could not work on Tuesdays and Wednesdays. The letter did not say she voluntarily resigned for missing more than three days without giving notice to WHC. The letter said you are terminated for not working a week when you were not scheduled to work.

The Board of Review's decision was not supported by the evidence. The Circuit Court correctly ruled that the letter meant what it said; Parsons was **terminated**. The Circuit Court ruling must stand.

**II. Nicole Parsons was “terminated” from her position for failing to report to one day of work when her employee handbook stated three consecutive absences would be treated as voluntarily resigning employment.**

The WHC employee handbook outlined that the only way that firing would turn into voluntary resignation was if an employee missed work for three consecutive days without giving proper notice. Parsons had not been absent for three consecutive days without giving notice. In fact, she was diligent about communicating with WHC. Parsons tried to get clarification from Sharon Lewis, but was only told that the letter sent on May 29, 2012 advising that she would be fired if she didn't come to work on June 4, 2012 said what she meant – if Parsons did not show up on June 4, 2012 she would be terminated. And that's what happened. Parsons was terminated over the telephone on June 4, 2012.

The follow-up letter then made it clear that she was terminated. It did not say you have failed to show up three days in a row without giving us notice. The letter said [y]our absences since May 28, 2012 have been unapproved and unexcused. As a result, your employment has been terminated.” Parsons was not scheduled to work the week of May 28, 2012 pursuant to the letter she received on May 29, 2012 directing her to come back to work on June 4, 2012.

Once again the Board of Review's decision must be overturned if not supported by the evidence. *See May v. Chair and Chambers*.

The Circuit Court was correct in finding that Parsons “was absent on one day of work prior to receiving the termination letter. Had Parsons remained absent for the next two days she may very well be considered to have left her employment.” *Circuit Court Order, Appendix 167*.

Once again the Board of Review was clearly wrong in calculating that Parsons voluntarily quit. Therefore, the Circuit Court ruling must stand.

The Board Had No Evidence of Whether Parsons  
Would Work Tuesday and Wednesday

No evidence is in the record to indicate that Parsons would not come to work on June 5<sup>th</sup> or June 6<sup>th</sup> or any of the following Tuesdays or Wednesdays. Appellant claims that because Parsons told WHC workers and Ms. Lewis that she was **available** on Mondays and Fridays, prior to her having written confirmation of her schedule, means she would not come to work on Tuesdays and Wednesday. However, at the ALJ hearing, no one even asked her that question. Parsons was never asked by anyone if she planned to not show up on Tuesdays and Wednesdays.

The Board states “the fact remains that the claimant had no intention to return to work her pre-leave schedule of Monday through Wednesday.” There is absolutely no evidence of this intention. Parsons stated her preferences as to what days she would like to work, but was fired before she was able to resume a schedule.

Further, what Parsons did after she was terminated is not relevant to her intentions prior to her termination. Parsons did state in another unemployment hearing that she was available for work on Friday, Saturday, Sunday and Monday<sup>1</sup>. This has nothing to do with whether she was “planning” to work on Tuesdays and Wednesdays for WHC. That information should not be used against her as it would go against the liberal construction of the unemployment compensation statutes.

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<sup>1</sup> The Board of Review ruled that she was available for work and therefore qualified to receive benefits on that issue. *See Appendix 79-83.*

**CONCLUSION**

Therefore, Appellee Nicole Parsons respectfully requests that the Court **DENY** Appellant's appeal, and **UPHOLD** the decision of the Circuit Court in this matter that allows her to be granted benefits from June 5, 2012 to her date of re-employment on February 12, 2013.

**NICOLE PARSONS,**

By Counsel

A handwritten signature in cursive script, reading "Kathy A. Brown", is written over a horizontal line.

Kathy A. Brown, Esquire  
(WV Bar ID No. 8878)  
KATHY BROWN LAW, PLLC  
P.O. Box 631  
Charleston, WV 25322  
(304) 720-2351

**CERTIFICATE OF SERVICE**

I, Kathy A. Brown, hereby certify this 9<sup>th</sup> day of October, 2013, that true and accurate copies of the foregoing *Response Brief of Appellee Nicole Parsons* was served on the following by placing a true and exact copy thereof in the United States Mail, postage prepaid:

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

Russell Frye  
Acting Director  
Capitol Complex, Bldg. 4, Room 609  
112 California Avenue  
Charleston, WV 25305

Russell D. Jessee, Esquire  
Daniel D. Fassio, Esquire  
STEPTOE & JOHNSON, PLLC  
P. O. Box 1588  
Charleston, WV 25326-1588  
*Counsel for Appellant/Respondent  
Central West Virginia Aging Services, Inc.*

  
\_\_\_\_\_  
Kathy A. Brown, Esquire  
(WV Bar ID No. 8878)  
KATHY BROWN LAW, PLLC  
P.O. Box 631  
Charleston, WV 25322  
(304) 720-2351