IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 1999 Term

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No. 25814

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ALICE R. PATTON, ET AL.,
Appellants,

v.

CATHY S. GATSON, CLERK OF THE CIRCUIT COURT
OF KANAWHA COUNTY, THE BOARD OF REVIEW
OF THE WEST VIRGINIA BUREAU OF EMPLOYMENT
PROGRAMS, and SEXTON CAN COMPANY, INC.,
Appellees.

Appeal from the Circuit Court of Kanawha County
Honorable Charles E. King, Jr., Judge
Civil Action 97-AA-18

AFFIRMED

Submitted: May 11, 1999
Filed: July 14, 1999

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The Opinion of the Court was delivered PER CURIAM.

CHIEF JUSTICE STARCHER dissents and reserves the right to file a dissenting opinion.

JUSTICE DAVIS concurs and reserves the right to file a concurring opinion.

JUSTICE McGRAW dissents and reserves the right to file a dissenting opinion.

SYLLABUS OF THE COURT

1. "The findings of fact of the Board of Review of the West Virginia Department of Employment Security 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.*" Syllabus Point 3, *Adkins v. Gatson*, 192 W.Va. 561, 453 S.E.2d 395 (1994).

2. "Unemployment compensation statutes, being remedial in nature, should be liberally construed to achieve the benign purposes intended to the full extent thereof." Syllabus Point 6, *Davis v. Hix*, 140 W.Va. 398, 84 S.E.2d 404 (1954).

Per Curiam:

In this appeal from the Circuit Court of Kanawha County, we are asked to examine the circumstances of a group of claimants who were denied unemployment compensation benefits because they filed their claims for benefits 9 1/2 months after they returned to work. The claimants claim they have shown "good cause" for the late filing of their claims.

On appeal, an administrative law judge made findings of fact to the effect that the claimants had failed to show good cause, and affirmed the rejection of their claims for benefits. The Board of Review and the circuit court similarly affirmed the administrative law judge's factual determination.

After a review of the briefs of the parties and all matters of record, we conclude that the administrative law judge was not clearly wrong. Accordingly, as set forth below, we affirm the circuit court's decision.

I.

The appellants in this case are 44 employees of the appellee, Sexton Can Company, Inc. ("Sexton"). In early May 1995, these employees went on strike against Sexton.

On or about May 31, 1995, seven of these employees visited the Martinsburg, West Virginia office of the appellee West Virginia Bureau of Employment

Programs ("Bureau"), also known as the "unemployment office." When these employees requested information on the filing of a claim for unemployment compensation benefits, an employee of the Bureau allegedly told the employees that they were not eligible for benefits because they were on strike.

The strike against Sexton officially ended on January 21, 1996, but because Sexton had altered its operations during the strike, it openly stated that it could not hire back all of the striking employees until February 15, 1996.

Separate from this action several Sexton union members (apparently none of whom are appellants in this action) previously applied for unemployment benefits to cover the period between January 22 and February 15, 1996; one union member, however, sought benefits for the entire period of the strike, beginning on May 3, 1995. In that action the Bureau ruled that the union members were not disqualified and were eligible for benefits. Sexton appealed the ruling. Following a hearing, on October 24, 1996 an administrative law judge issued an order finding that although there was a labor dispute, there was no "work stoppage" that would disqualify the union members from receiving benefits. Importantly, the administrative law judge also concluded that the union members were eligible to receive unemployment compensation benefits from May 3, 1995 through January 22, 1996, that is, during the entire period of the strike.

After learning of the October 24, 1996 decision of the administrative law judge, the 44 appellants in the instant action filed their own applications for unemployment benefits in early November 1996. A claims deputy examined the

applications, and on November 27, 1996 issued a decision rejecting each appellant's claim stating that each appellant "did not inquire nor attempt to file a valid claim for benefits during a labor dispute prior to November 8, 1996."

The appellants objected to the deputy's determination, and a hearing was held before an administrative law judge. The appellants, acting collectively without the assistance of an attorney, argued that they had been misled by a Bureau employee in May 1995, who told them they were ineligible for unemployment benefits while on strike. The appellants argued that they filed for benefits in November 1996 as soon as they learned of their eligibility, and learned that several other union members were able to recover unemployment benefits for the entire period of the strike.

At the hearing, a supervising employee of the Bureau testified that no one in the Martinsburg office would have told a worker on strike that they were ineligible for benefits. The supervisor stated that she had "obtained statements from people who work here regarding the fact that they know that everyone has the right to file and would never have told someone they could not file during a strike."[1]

[1]After the hearing before the administrative law judge had concluded, several of the appellants allegedly confronted this Bureau supervisor. One appellant, Sheila Benner, apparently volunteered to identify the Bureau employee who told her she could not file for unemployment benefits during a strike. The supervisor allegedly responded that "she already knew who had told Ms. Benner that she could not file for unemployment during a strike."

After the administrative law judge issued an order affirming the denial of unemployment benefits to the appellants, several of the appellants signed affidavits attesting to their conversation with the Bureau supervisor. Counsel for the appellants, however, never filed a motion to add these affidavits to the record, or acted in any way to

bring these affidavits to the attention of the Bureau or Board of Review; instead they were attached to an appeal brief filed with the Board of Review. The Board of Review, apparently exercising its discretion, did not consider the affidavits in its review of the administrative law judge's decision.

On January 3, 1997, the administrative law judge issued a decision affirming the rejection of the appellants' claims for unemployment benefits as not having been timely filed. The administrative law judge made a specific finding of fact that "[t]he claimants were not advised by any employee in the local unemployment office in Martinsburg, West Virginia, that they could not receive benefits during a strike." The administrative law judge went on to conclude that because the appellants were not "misadvised by the local office" concerning their right to benefits, they could not "backdate" their application for benefits. The decision of the administrative law judge was affirmed by the Bureau's Board of Review on February 21, 1997.

The appellants then petitioned the Circuit Court of Kanawha County for a writ of certiorari to review the Bureau's decision. By an order dated June 1, 1998, the circuit court affirmed the Board of Review's decision. Specifically, the circuit court found that it "cannot say that the decisions of the ALJ and the Board of Review are plainly wrong."

This appeal followed.

II.

Our standard of review in cases concerning unemployment benefits was set forth in Syllabus Point 3 of *Adkins v. Gatson*, 192 W.Va. 561, 453 S.E.2d 395 (1994):

> The findings of fact of the Board of Review of the West Virginia Department of Employment Security 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.*

The appellants in this action begin their argument by asserting that "[u]nemployment compensation statutes, being remedial in nature, should be liberally construed to achieve the benign purposes intended to the full extent thereof." Syllabus Point 6, *Davis v. Hix*, 140 W.Va. 398, 84 S.E.2d 404 (1954). *See also, Davenport v. Gatson*, 192 W.Va. 117, 119, 451 S.E.2d 57, 59 (1994); *Mercer County Bd. of Educ. v. Gatson*, 186 W.Va. 251, 412 S.E.2d 249 (1991); *Courtney v. Rutledge*, 177 W.Va. 232, 351 S.E.2d 419 (1986); *London v. Board of Review of Dept. of Employment*, 161 W.Va. 575, 244 S.E.2d 331 (1978). The appellants urge that we review their contentions "[a]gainst the background of the liberal construction of the unemployment compensation statute as a whole and the narrow construction of the statute's disqualification provisions[.]" *Smittle v. Gatson*, 195 W.Va. 416, 423, 465 S.E.2d 873, 880 (1995).

The appellants contend that they have established "good cause" for their failure to file a claim for benefits more than 9 months after the end of the strike against Sexton. They contend that the decision of the administrative law judge was "based upon

unreliable hearsay" by a supervisor for the Bureau. Arguing that we should give a liberal construction to their evidence of "good cause," the appellants argue that we should find the administrative law judge's findings to be incorrect, and award the appellants with an opportunity to pursue unemployment benefits.

The appellees, Sexton and the Bureau, argue that the appellants plainly did not timely file for benefits, as provided by statute and regulation. *W.Va. Code*, 21A-6-1 [1994] provides, in pertinent part:

> An unemployed individual shall be eligible to receive benefits only if the commissioner finds that: . . .
> (2) He has made a claim for benefits in accordance with the provisions of article seven of this chapter . . . .

W.Va. Code, 21A-7-1 [1936] gives the Commissioner of the Bureau of Employment Programs the authority to enact regulations for filing a claim for unemployment benefits, and very broadly states:

> Claims for benefit shall be made in accordance with the rules and regulations prescribed by the commissioner.

The regulation at issue in this case is 83 C.S.R. § 1.7.2, which provides that the Bureau will begin paying unemployment benefits during the week in which an unemployed individual files a claim for benefits. Conversely, an individual who applies for benefits when they are not unemployed is not eligible to receive any benefits from the Bureau. The regulation states, in pertinent part:

> An individual's week of total unemployment shall be deemed to commence only after such individual files a claim at a local unemployment claims office or officially designated itinerant

> point following his first day of unemployment. A claim filed at an officially designated itinerant point shall be effective the Sunday of the week in which the claimant was separated; provided, the separation occurred after the most recent date the itinerant point officially operated. Otherwise, a week for the purpose of benefit determinations shall be deemed to mean the first day of the calendar week in which the individual files a claim for benefits.

Sexton and the Bureau both argue that, under this regulation, because the appellants had returned to work and were not unemployed at the time they filed for benefits, they are not eligible.[2] Both appellees appear to concede that the appellants could be eligible for benefits if they could show good cause for their delayed filing for benefits 9 1/2 months after they returned to work. However, the appellees argue that the appellants failed to prove, by a preponderance of evidence, that good cause exists. We agree with the appellees' position.

The testimony offered by the appellants at the hearing before the administrative law judge lacked any specificity to establish that the appellants were prevented from filing timely claims for benefits by the staff of the Martinsburg Bureau office. Furthermore, a supervising employee of the Bureau testified that she had checked with her staff, and was told that they would not have told anyone that they could

[2]This regulation, 83 C.S.R. § 1.7.2 is by no means a model of clarity. The regulation is plainly a definition of the term "week" as it applies to the calculation and payment of unemployment benefits. The Bureau, however, argues that this regulation has been interpreted to mean that only individuals who are unemployed are entitled to unemployment compensation; when the individual returns to employment, they are no longer entitled to unemployment benefits. The appellants in this case do not challenge this interpretation.

not file a claim for benefits during a strike. The administrative law judge had the opportunity to observe the demeanor of the appellants who testified, the demeanor of the supervising employee of the Bureau, and to judge their credibility.

The findings of fact by the Bureau's Board of Review are entitled to substantial deference unless the reviewing court believes the findings to be clearly wrong. *Adkins v. Gatson, supra*. We therefore give deference to the administrative law judge's finding that no employee of the Bureau told the appellants they could not file for unemployment benefits while they were on strike.

Accordingly, because the administrative law judge and the Board of Review were not clearly wrong, the appellants failed to establish good cause for their late filing for benefits. We therefore find that the circuit court correctly affirmed the Board of Review's decision.[3]

III.

For the reasons stated above, we affirm the June 1, 1998 order of the Circuit Court of Kanawha County.

Affirmed.

[3]Appellee Sexton has cross-appealed the Bureau's determination that the striking workers could be eligible for unemployment compensation while they were on strike. We refuse to consider this issue.