THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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CHRISTINA GADDY

Respondent Below, Petitioner

v. **Case No.: 23-658**

WORKFORCE WEST VIRGINIA

Petitioner Below, Respondent

BRIEF ON BEHALF OF PETITIONER CHRISTINA GADDY

MATTHEW JIVIDEN
Counsel for Christina Gaddy
Legal Aid of West Virginia
WVSB No.: 12113
301 W. Burke St, Ste. B
Martinsburg, WV 25401
304.263.8871x2817
mjividen@lawv.net

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STATEMENT OF THE CASE

Christina Gaddy worked at American Public University [APU] as a Senior Financial Aid Advisor from September 16, 2013 to March 22, 2021. Her job involved fielding calls about student loans. [Appx 6]. Ms. Gaddy suffers from severe anxiety predating the COVID-19 pandemic.

At the outset of the COVID pandemic, Ms. Gaddy transitioned to remote work. Working without the support and infrastructure of an office made her job more difficult and increased her per-existing anxiety. [Appx 6]. During this time Ms. Gaddy's work also significantly increased in volume and intensity. [Appx 6] During the pandemic many people returned to school after being laid off, and many more people were attempting to utilize student loans in lieu of lost wages because of the pandemic. [Appx 6]. Over time, this began to overwhelm Ms. Gaddy and exacerbate her anxieties.

Throughout 2020 Ms. Gaddy sought further medical treatment for her increasing anxiety. She was prescribed additional medication which made it hard to perform her detail-oriented job.

[Appx 6]. Her employer was aware of Ms. Gaddy's condition and was generally supportive. Ms. Gaddy got through 2020 utilizing various leave and making use of accommodations from her employer – including use of FMLA. [Appx 48].

The record contains a Certification of Health Care Provider for Employee Serious Health Condition form pursuant to the Family and Medical Leave Act [FMLA] made on February 10, 2021 (approximately a month-and-a-half before Ms. Gaddy separated from work). [Appx. pp. 8 – 11]. Dr. Rauf Cheema, M.D., a psychiatrist in Winchester, Virginia, was the health care provider who completed this form on behalf of the Respondent. Dr. Cheema indicated that Ms. Gaddy had, "a chronic serious health condition" that "continues over an extended period of time" and "may cause episodic incapacity." [Appx 9]. The form indicated that Dr. Cheema had discussed the necessary functions of Ms. Gaddy's job, and contained Dr. Cheema's medical opinion that Ms. Gaddy was unable to fulfill at least one of the necessary functions of her job due to anxiety.

This form allowed Ms. Gaddy to continue to utilize FMLA time to mitigate her anxiety. Dr. Cheema requested intermittent leave at a rate of three times a week and one day per episode in this document for the Respondent. [Appx 10].

In February of 2021, Ms. Gaddy and three of her children contracted COVID-19. She was still employed at APU, but received unemployment compensation for the week of February 26th, 2021, continuing until she and the children were no longer COVID positive. Prior to this, her babysitter had also been diagnosed with COVID, which eliminated the sporadic childcare Ms. Gaddy previously had. Over the course of the pandemic, though especially during the time preceding her separation from work, Ms. Gaddy was drawing down her limited FMLA for *both* childcare needs and for her own mental health reasons. Ms. Gaddy had three school-aged

children who were all in remote learning and one three-year-old child that that would have been in daycare during the relevant time. [Appx 33-37; 47].

On or around March 22, 2021, Ms. Gaddy was scheduled to return to work, but her mental state had deteriorated to the point that she was unable to do so. She'd also run out of leave – including FMLA – as she had drawn it down to cover childcare and for her own mental health reasons. [Appx 18]. Ms. Gaddy separated from work. She characterizes the separation in her appeal of the Deputy decision, writing that she "loved" her job and that leaving was "the hardest decision I have had to make, which was truly out of my control." [Appx 6]

March 22, 2021 remains an important date in this case because, according to our statute, this begins Ms. Gaddy's 30-day window to submit a physician's note to WorkForce in order to qualify for *consideration* of a non-disqualifying medical separation from work under the unemployment compensation statute. See W. Va. Code § 21A-6-3(1).

The same day, Ms. Gaddy was informed by an automatically generated notice on the Workforce website of a non-specific issue with her claim which would cause her benefits to be put on hold. Thus started Ms. Gaddy's long process of trying to contact Workforce to remedy the problem.

Due to the pandemic, all local Workforce offices were closed to the public. Ms. Gaddy, like tens-of-thousands of other West Virginias, attempted to get through on the statewide hotline. Ms. Gaddy estimates she spent more than a dozen hours calling or on hold while attempting to reach Workforce over a several week period. (*See* Ms. Gaddy's letter to the Board of Review [Appx 33-36])

Approximately a month later, April 19, 2021, the WorkForce Deputy requested a Fact Finding statement wherein Ms. Gaddy (an unrepresented, lay-claimant) reported that she "not having enough FMLA" to protect her job. [Appx 18]. She also cited lack of childcare as a contributing factor that had depleted her FMLA. [Appx 18]. It should be noted that Ms. Gaddy had still not been made aware of the requirement to produce a physician's note.

Ms. Gaddy grew increasingly desperate without income and continued to call the WorkForce hotline. On May 5th, she finally managed to reach a live person in the Summersville area. The worker informed her that there has been a decision made on April 30 which deemed her ineligible because she had voluntarily separated from work. The worker informed her the decision was in the mail, though Ms. Gaddy had not yet received it. The worker also emailed Ms. Gaddy the decision. [Appx 5-7].

During this conversation with the WorkForce employee, Ms. Gaddy mentioned that her separation from work was medically related. In response, the WorkForce employee told her generally about the physician's note requirement. [*See* Ms. Gaddy's letter to the Board of Review [Appx 33-36]] The following day, March 6, 2023, Ms. Gaddy got a note from her physician, Dr. Cheema, which stated, "Ms. Christina Gaddy is under my care for her illness. She was stressed at work which contributed to her anxiety and panic attacks. Due to her severe anxiety she has left her position." [Appx 29]. This letter was submitted on May 7, 2021 with Ms. Gaddy's appeal of the Deputy Decision. [Appx 5-7].

Coincidentally, the Deputy's decision would arrive in the mail the following day, May 8, 2021. Importantly, this decision contained the first written instruction that Ms. Gaddy was required to produce a physician's note within thirty days of separation – notwithstanding the notice was received well outside that thirty-day window. [Appx 14].

In anticipation of the ALJ hearing, Ms. Gaddy submitted several dozen pages of medical documentation to the Board of Review. The transcript of the Administrative Law Judge hearing clearly indicates the ALJ received and reviewed these documents – including the physician's note. [Appx 47; Transcript 11]. Several of these documents are referenced in the hearing. However, it does not appear they were officially added to the record during that hearing. [Appx47; Transcript 11].

The ALJ hearing was held on June 25th, 2021 before Administrative Law Judge Carl E. Hostler. During the hearing, American Public University's Human Resources officer testified regarding Ms. Gaddy's medical condition and efforts to look for another position that she could perform as a reasonable accommodation but found none available. [Appx 49; Transcript 17]. Ms. Gaddy testified that her separation from work was medically related, and that she only learned of the physician's note requirement after the 30-day deadline had run. [Appx 45-50; Transcript *generally*].

During the hearing, the ALJ clearly acknowledged Ms. Gaddy's valid medical reasons for separation from work:

> I'm happy to accept this true [sic], the fact that you left your job for medical reasons. I don't doubt that in any way shape or form. I believe you completely…It's just I have to follow the rules to try to get your benefits. [Appx 50; Transcript 21]

It appears the ALJ would have approved Ms. Gaddy's claim if he was not bound (or believed himself to be bound) by the hard thirty-day deadline:

> The statute itself said that it must be within 30 days. I don't know if I have any way of gettin' [sic] around that. Well, in fact, I don't think I do." [Appx 47; Transcript 12].

Ultimately, the ALJ upheld the Deputy's decision. In his decision, the ALJ found that Ms. Gaddy:

> …was unable to continue work combination of her own health and lack of childcare for her children. She provided medical certification that her job worsened her health condition. Unfortunately, it was provided more than 30 days after her resignation. This Administrative Law Judge has no discretion to avoid the statutory requirement that says such certification must be provided to the employer within thirty days of leaving the job…Therefore, the claimant failed to meet her burden of proof that she had good cause due to health reasons to leave her employment. [Appx31].

Ms. Gaddy filed a *pro se* appeal to the Board of Review on September 10th, 2021 in a petition which clearly lays out the issues, including: that the 30 day deadline had been applied to her unfairly as she did not have any notice (despite considerable efforts) and a rebuttal of the notion her separation from work was solely related to childcare. [Appx 33-36]. The Board of Review, in a relatively perfunctory order, affirmed the Administrative Law Judge's decision. [Appx 60-61]. That was then appealed to the circuit court of Kanawha County.

Judge Tabit of the Kanawha County Circuit Court overturned the Board's decision on two grounds. First, the thirty-day deadline to produce the physician's note was deemed tolled due to excessive delays, the absence of legally required notice, lack of prejudice to other parties and Ms. Gaddy's diligent efforts to comply with the requirements. Additionally, Judge Tabit incorporated the substance of the factual findings from the administrative law judge expressing complete belief in Ms. Gaddy's valid medical separation from employment, and found that once the physician's note was considered timely, she unequivocally qualified for unemployment compensation. [Appx 91-100]. Notably, Workforce was made a party to this appeal and was served with all relevant pleadings, but did not participate in this appeal.

WorkForce then appealed that decision to the West Virginia Intermediate Court of Appeals, who reversed citing deference to the ALJ's decision, finding that equitable tolling was not an appropriate remedy and citing potential issue with the adequacy of the physician's note. [Appx 155-160].

This appeal follows.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Ms. Gaddy submits that this case may be appropriate for oral argument under Rule 20. The case involves dispositive issues which have not been authoritatively decided. The case involves issues concerning fundamental public importance and inconsistencies among the decisions of lower tribunals.

SUMMARY OF ARGUMENT

Ms. Gaddy raises four key points of contention in this appeal.

First, the ICA's assertion that our administrative hearing officer had inherent equitable powers to toll the deadline in the administrative hearing is erroneous. This assumption led to unwarranted deference to the ALJ's non-decision to exercise such power, despite the ALJ's own belief that he lacked the authority to exercise equitable remedies. The appellant argues that administrative agencies, lacking general common law powers, cannot extend remedies like equitable tolling.

Second, the ICA erred in replacing the substance of the ALJ's findings with the naked legal conclusions of the ALJ, disregarding the broader context of the case. The appellant asserts that the ICA misunderstood Ms. Gaddy's separation from work, neglecting the ALJ's determination of a valid medical quit. This argument contends that the ICA's judgment

contradicts the circuit court's nuanced consideration of the ALJ's fact-finding, particularly after the application of equitable tolling.

Third, ICA's ruling was incorrect in finding equitable tolling was not appropriate in this case. The ICA's decision overlooks the exceptional circumstances during a global health pandemic, where Ms. Gaddy faced challenges in accessing information and the agency failed to provide timely notice. Unemployment compensation statutes, designed to be remedial and serve the public good, are well-suited for equitable remedies, making the rejection of equitable tolling in this case an error.

Lastly, the Appellant argues that the ICA should have applied 'plain error' doctrine to analyze the issues raised by WorkForce West Virginia. This stems from WorkForce's failure to participate or raise any concerns before the lower tribunal, the Circuit Court of Kanawha County. The Appellant maintains that the plain error doctrine, reserved exclusively for egregious circumstances, should have been invoked given WorkForce's absence in the circuit court proceedings, highlighting the need for fairness, integrity, and the public interest in the judicial process.

STANDARD OF REVIEW

"The standard of review used by this Court on a question of fact resolved by an ALJ is necessarily one of deference. We have consistently held that [a] reviewing court cannot assess witness credibility through a record. The trier of fact is uniquely situated to make such determinations and this Court is not in a position to, and will not, second guess such determinations." "Further, the ALJ's credibility determinations are binding unless patently without basis in the record." (internal citations omitted) *Alcan Rolled Products Ravenswood, LLC, v. McCarthy,* 234 W.Va. 312; 765 S.E.2d 201 (W. Va. 2014).

"In addition to affording deference to the ALJ on credibility determinations, a reviewing court is not permitted to decide the factual issues de novo or to reverse an ALJ's decision simply because it would have weighed the evidence differently. As we explained in *Wirt,* in applying the clearly erroneous standard to the findings of a [lower tribunal] sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues de novo. Indeed, if the lower 10 tribunal's conclusion is plausible when viewing the evidence in its entirety, the appellate court may not reverse even if it would have weighed the evidence differently if it had been the trier of fact." *Board of Education of the County of Mercer v. Wirt,* 192 W. Va. 538, at 578-579; 453 S.E.2d 402 (W. Va. 1994); *Alcan Rolled Products Ravenswood, LLC, v. McCarthy*, 234 W.Va. 312; 765 S.E.2d 201 (W. Va. 2014).

"This Court has also acknowledged that the "legal conclusion that [an employee] quit her job "voluntarily without good cause involving fault on the part of the employer" within the meaning of West Virginia Code §21A-6-3(1) is subject to a de novo standard of review." *Verizon Services Corp. v. Epling*, 230 W.Va. 439, 739 S.E.2d 290 (2013), (per curiam); quoting, *May v. Chair and Members*; Bd. of Review, 222 W.Va.373, 376, 664 S.E.2d 714, 718 (2008) (per curiam). See also West Virginia Code §21A-7-21 which states in its entirety, "[i]n a judicial proceeding to review a decision of the board, the findings of fact of the board shall have like weight to that accorded to the findings of fact of a trial chancellor or judge in equity procedure."

ARGUMENT

ASSIGNMENT OF ERROR ONE: The Intermediate Court's decision commits an initial error in suggesting that administrative hearing officers possess equitable powers, and then affording misplaced deference based on that error.

The ICA's decision heavily relies on a flawed premise: "[a]dministrative boards are quasi-judicial and have the ability to apply equitable remedies in certain cases." This assumption permeates the decision and contributes to subsequent errors. The ICA suggests that the ALJ had

the authority to provide Ms. Gaddy with an equitable remedy during the administrative hearing, and the ALJ's deliberate choice not to use that power is then given significant deference by the ICA. The result subverts both the correct legal analysis and objective factual determinations made by our ALJ.

First, even if the ICA is correct that the ALJ had the power to afford an equitable remedy, it is evident that the ALJ did not *believe* he possessed that authority when he rendered his decision. The ALJ wrote he had, "no discretion to avoid the statutory requirement that says such certification must be provided to the employer within thirty days". Therefore, even if the ICA's interpretation is accurate, a legal error nonetheless occurred as the ALJ failed to exercise a power he deemed appropriate due to a mistaken belief that he lacked such authority.

While we agree that administrative decisions are often *subject* to equitable remedies, we dispute that the WorkForce Administrative Law Judge himself possessed the power to afford such a remedy. The ICA decision cites *Walter v. Ritchie, Comm'r*, 156 W. Va. 98 (1972) and *Hudkins v. Pub. Retirement Bd*., 220 W. Va. 275 (2007) (among others) in support of its position, though none of the cited cases involve application of common law or equitable remedies *by* an administrative hearing officer; all the cases involve application of equitable remedies *to* a decision of an administrative hearing officer by an appellate court. And that's precisely what happened in this case before the ICA erroneously reversed the circuit court.

Fundamentally, the ICA is incorrect that administrative agencies (and hearing officers appointed by those agencies) have powers to extend common law remedies like equitable tolling in an administrative setting. Administrative agencies have no general or common law powers and may only act within the scope of the authority conferred on them. *State Human Rights Commission v. Pauley,* 158 W.Va. 495, 212 S.E.2d 77 (1975). An agency's power, therefore,

must be found statutorily either expressly or by implication. *Walter v. Ritchie*, 156 W. Va. 98, 191 S.E.2d 275 (1972); *Mountaineer Disposal Serv. Inc. v. Dyer*, 156 W. Va. 766, 197 S.E.2d 111 (1973); *W. Va. Public Employees Ins. Bd. v. Blue Cross Hosp. Service. Inc.*, 174 W.Va. 605, 328 S.E.2d 356 (1985).

In this particular instance, the legislature specified that a claimant must submit a physician's note within a thirty-day timeframe to be eligible for a medical quit in the unemployment system. There is no exception in the statute for late production (e.g. good cause). The statute does not explicitly mention specific powers (equitable or otherwise) afforded to the agency to alter this deadline, nor is such a power suggested in a general sense.

While West Virginia Code §21A-4-9 grants WorkForce, "such additional powers as may be necessary for the proper conduct of a system of administrative review of disputed claims," this limited delegation is unlikely to encompass broad equitable powers. More importantly, WorkForce has not claimed such power(s) - specifically or generally - through the administrative rulemaking process.

In West Virginia, our circuit courts explicitly hold common law powers and jurisdiction to adjudicate cases in both equity and law, as outlined in West Virginia Code § 51-2-2 and Rule 1 of The West Virginia Rules of Civil Procedure. These statutory and procedural provisions distinctly empower the circuit courts, allowing them to navigate and decide cases across both legal and equitable domains when extraordinary instances arise.

Accordingly, our ALJ correctly acknowledged that he was obligated by this explicit 30-day requirement. Our circuit court corrected the injustice that would have continued but for the appropriate equitable relief. In reversing that decision, the ICA ignored the substance of the

ALJ's factual determinations and instead upheld the conclusion our ALJ reluctantly backed into by default despite those observed facts and the manifest injustice it seemed to perpetuate.

ASSIGNMENT OF ERROR TWO: The ICA's misplaced deference to the ALJ creates errors by replacing the substance of the ALJ's findings only with the legal conclusions of the ALJ without consideration of the record as a whole. The result subverts substantial justice and the actual observations of our ALJ.

The Intermediate Court emphasizes a series of cases requiring deference to factual findings made by an administrative law judge and underscoring the prohibition against a circuit court substituting its judgment for that of the hearing examiner. See *Keatley v. Mercer Cnty. Bd. of Educ.*, 200 W. Va. 487, 490, 490 S.E.2d 306, 309 (1997); Syl. Pt. 1 of *Cahill v. Mercer Cnty. Bd. of Educ.*, 208 W. Va. 177, 539 S.E.2d 437 (2000). These are correct statements of the law, but the Intermediate Court's application here ignores the unique circumstance of this case and the actual factual findings of the administrative law judge.

In general, individuals voluntarily separating from work are ineligible for unemployment benefits with some narrow exceptions. Accordingly, 'voluntary separation without good cause on the fault of the employer' serves as the default determination unless a claimant falls into one of those exceptions. In this specific case, Ms. Gaddy found herself in that default category solely due to the untimeliness of her note.

Our statute dictates a claimant is eligible for unemployment, "if the individual was compelled to leave his or her work for his or her own health-related reasons and notifies the employer prior to leaving the job or within two business days after leaving the job or as soon as practicable and presents written certification from a licensed physician within thirty days of leaving the job that his or her work aggravated, worsened or will worsen the individual's health problem." W. Va. Code § 21A-6-3.

Accordingly, The Administrative Law Judge's inquiry was two pronged regarding Ms. Gaddy's unemployment eligibility in relation to her medical separation from work. Firstly, was Ms. Gaddy's compelled to leave work for health-related reasons? The record unequivocally indicates the ALJ's belief in the affirmative. Secondly, the ALJ has to make determinations as to the claimant's timeliness in documenting that medical separation from work. Here, the question was whether she met the thirty-day deadline to produce a doctor's note. It's undisputed she did not. Accordingly, the ALJ reasoned that he was required to deny unemployment compensation to Ms. Gaddy.

After the circuit court permitted equitable tolling to extend the deadline, the note was deemed timely filed as a matter of law. Subsequently, the circuit court looked to the substance of the ALJ decision and ascertained that the ALJ clearly thought Ms. Gaddy separated from work as a result of her medical condition.

Evidence includes the ALJ's comments during the hearing: "I'm happy to accept this true [sic], the fact that you left your job for medical reasons. I don't doubt that in any way shape or form. I believe you completely." ALJ also wrote, "[Ms. Gaddy] provided medical certification that her job worsened her health condition" and that, "[s]he was stressed at work which contributed to her anxiety and panic attacks." [Appx41].

The ICA's decision, on the other hand, suggests Ms. Gaddy's separation from work was totally related to childcare. While childcare was a factor she raised with her employer and WorkForce West Virginia representatives, it was merely one factor contributing to her well documented anxiety. Ms. Gaddy had sought medical treatment for anxiety prior to the COVID pandemic. She'd requested accommodations on that basis before her separation from work. At

work Ms. Gaddy faced the demands of working from home and managing a higher caseload while dealing with increasingly desperate individuals.

While much of the ICA's decision cites the need for deference to the ALJ's finding of fact, here it merely substitutes its own judgement in finding her separation was due to childcare. The ALJ clearly saw Ms. Gaddy's separation from work as a valid medical quit – and not a ruse to stay home and watch her children. Contrary to the ICA's insistence on according a high degree of deference to the ALJ's factual determinations, it was the circuit court that granted this deference by looking at the substance of the ALJ's fact finding. The ICA merely affirmed the ALJ's decision without consideration of the underlying factual circumstances, especially after equitable tolling was applied.

The same can be said of the ICA's suggestion that Ms. Gaddy's physician's note does not meet all the technical requirements of the statute. This is in direct contradiction to the ALJ's determination that she, "provided medical certification that her job worsened her health condition." [Appx 31]. This also ignores other medical documentation – such as the February 2021 FMLA paperwork from Dr. Cheema which substantially says the same or the additional medical paperwork submitted by Ms. Gaddy to the ALJ (which, unfortunately, did not make it into the record). Considering the purpose of the requirement, this also ignores that the medical basis for separation was well known to the employer and had been an ongoing issue for more than a year by the time it landed in the unemployment system. It's disheartening that the ICA would prohibit Ms. Gaddy, a lay claimant, from collecting unemployment based on such a legalistic application of the statute, while simultaneously ignoring the failures of the state agency tasked with administering the system of unemployment.

Coincidentally, after discussion of the above issues, the ICA's decision additionally suggests that equitable tolling was not an appropriate remedy in the present case. That is an error as well.

ASSIGNMENT OF ERROR THREE: Intermediate Court erred in determining equitable tolling of the doctor's note deadline was not appropriate.

While the ICA's decision acknowledged that equitable tolling is available in cases such as this, it determined that equitable tolling was not an appropriate remedy in this instance. In truth, however, this is a textbook case for equitable tolling. It took place during the extraordinary circumstances of a global health pandemic. It involves a diligent claimant that made her best efforts to comply with requirements that were not made known to her. It involves an agency that was overwhelmed with applications, facing exceedingly long delays in processing applications and holding hearings. It involves the failure of the agency to timely provide statutorily required notice that would have made Ms. Gaddy aware of the requirement at issue here. None of the parties were prejudiced because of the late production of the note.

Unemployment compensation statutes are among those that are most ripe for equitable remedies. Our caselaw dictates two types of statutes should be construed "liberally" and "according to their equity." *Davis v. Hix*, 140 W. Va. 398, 417 (1954). Namely, those that are remedial in nature and those that concern the public good or the general welfare. *Id.* The unemployment compensation statute meets both criteria. The West Virginia Employment Compensation Statute is not only remedial in its nature, but its purpose is to conserve the public good and preserve the general welfare. See Headnote 13 in *Davis v. Hix*, 140 W. Va. 398 (1954). Along the same lines, Headnote seven of *Lee-Norse Co. v. Rutledge*, 170 W. Va. 162 (1982) dictates unemployment statutes may be carried *beyond the natural import of the words* when essential to answer the evident purpose of the act.

In order for equitable tolling to apply to a deadline, two requirements exist: (1) excusable ignorance of the limitations period and (2) a lack of prejudice to the defendants. *Independent Fire Co. No. 1 v. West Va. Human Rights Comm'n*, 376 S.E.2d 612, 614-615 (W. Va. 1988); Franklin D. Cleckley, Robin Jean Davis & Louis J. Palmer, Jr., *Litigation Handbook on West Virginia Rules Of Civil Procedure* § 3.2(b), at 49-50 (4th ed. 2012)). Ms. Gaddy meets both requirements.

A. Ms. Gaddy's ignorance of the physician's note requirement excusable

Ms. Gaddy navigated the unemployment process without legal representation until her Circuit Court appeal, marking her initial exposure to this complex system. Prior to May 2021, WorkForce West Virginia failed to furnish Ms. Gaddy with any information regarding the doctor's note requirement, despite a statutory obligation they were mandated to fulfill. This oversight is particularly disconcerting, given Ms. Gaddy explicitly communicated her exhaustion of Family Medical Leave Act (FMLA) leave to the WorkForce Deputy, a detail reiterated at nearly every stage of the unemployment process.

To understand the issue, it's valuable to understand how the unemployment system functioned prior to the COVID pandemic. In the pre-COVID era, a recently unemployed individual would visit a WorkForce office or apply over the phone. Following a brief fact-finding process, a WorkForce Deputy would usually issue an initial decision within days, occasionally within hours. This decision, along with written notices and information about the process (including the crucial first notice to a claimant that separation from work required a doctor's note within thirty days) would be mailed to the individual. During this time, a claimant could easily visit a local office or make a phone call to get any information she desired.

This system proved effective when these decisions and notices were dispatched promptly, enabling claimants to timely document a medical separation from work. Unfortunately, this was not the case for Ms. Gaddy. She did not receive her deputy decision, including information about a medical quit, until more than thirty days after her separation from work. This significant delay was a pivotal factor supporting equitable tolling, a factor that was essentially overlooked by the Intermediate Court.

And it's clear that the legislature does not expect a claimant to simply discover the requirement for a physician's note on her own. West Virginia Code § 21A-7-2 dictates, "an employer shall post and maintain in places readily accessible to individuals in his service the claim procedure regulations prescribed by the commissioner. At the time any such individual becomes unemployed, an employer shall furnish such individual with a copy of the regulations." Most notably, the legislature mandates that "the [WorkForce West Virginia] commissioner shall provide an employer copies of the regulations without cost." This refers to the Workforce West Virginia 'benefits poster,' a familiar sight in almost every workplace across the state.

While this notice contains comprehensive information about eligibility and disqualifying provisions, it omits the thirty-day doctor's notice requirement or information related to medical resignation entirely. Notwithstanding, Ms. Gaddy was not in the workplace due to COVID anyway, and the record does not indicate she was provided with this information by the employer upon her termination. It wasn't until May 8th, 2021 that WorkForce informed her of the physician's note requirement - forty-seven days after her separation from work and seventeen days after the thirty-day window had closed.

It was WorkForce that failed to fulfill its legislative mandate to inform Ms. Gaddy of her rights, yet the Intermediate Court's decision has allowed WorkForce to totally abdicate this responsibility and placed blame on Ms. Gaddy.

Furthermore, Ms. Gaddy encountered difficulties accessing a WorkForce office in person due to COVID-19 closures. Instead, she relied on calling a statewide hotline for information about her claim. Persistently, Ms. Gaddy consistently attempted to reach WorkForce from when she provided information to the Deputy until she spoke to a representative in early May. Despite facing dropped calls and spending hours on hold, Ms. Gaddy eventually reached a WorkForce representative who informed her about the requirement to produce a doctor's note. Subsequently, Ms. Gaddy obtained a doctor's note the following day and submitted it to WorkForce.

Under these extraordinary circumstances, Ms. Gaddy meets the first requirement as her ignorance of the requirement is wholly excusable.

B. Late production of the physician's note did not materially prejudice any other party.

None of the other parties were prejudiced by Ms. Gaddy's late production of her doctor's note. Ms. Gaddy's doctor's note was produced at a point in the process that allowed for ample time for all parties to review and, if necessary, contest any facts surrounding Ms. Gaddy's medical quit prior to the Administrative Law Judge hearing.

Ms. Gaddy's employer was certainly aware she was struggling with severe anxiety as early as March 2020; multiple human resources representatives from American Public University testified the employer was cooperating with Ms. Gaddy to make accommodations for the year leading up to her separation. The employer also had a physician's note from Dr. Cheema from February 10, 2021 stating the same.

Similarly, Workforce was not prejudiced in any significant manner. Workforce had Ms. Gaddy's doctors note more than seven weeks prior to the Administrative Law Judge hearing. The Administrative Law Judge clearly considered the letter (and additional information provided by Ms. Gaddy prior to the hearing) to determine it was a factually valid medical quit.

In this context, seven weeks is far longer than the notice period a claimant, employer or WorkForce would usually receive before an ALJ hearing. When Ms. Gaddy produced her doctor's note, the Administrative Law Judge hearing had not even been scheduled. The rules promulgated by WorkForce only require a hearing notice be *mailed* to the parties ten days prior to a hearing. See West Virginia Code Rules. See WV Code R. §84-1-3.5. That mailing then directs claimants to send any evidence to be used in the hearing to the Board of Review. In this case, by virtue of extreme administrative delay, the parties had an additional extra month-and-a-half to consider (and contest if necessary) Ms. Gaddy's medical evidence.

The Circuit Court considered whether any party was materially prejudiced as a prerequisite to granting equitable relief [See Ms. Gaddy's Petitioner and Brief before the Kanawha County Circuit Court, Appx 128], and correctly decided the matter.

ASSIGNMENT OF ERROR FOUR: The ICA erred in failing to apply the 'plain error' doctrine as the standard of review when WorkForce West Virginia failed to participate in the Circuit Court appeal.

Because of the timing of the creation of the ICA, this case has had the distinct honor of moving through the administrative process, into the circuit court, then to the ICA before landing here. WorkForce West Virginia was a party in the appeal before the Circuit Court of Kanawha County and properly served with all pleadings, but failed to participate or raise any of the issues it would eventually raise before the ICA.

West Virginia Rule of Appellate Procedure 10(c)(3) requires that if an issue was not presented to the lower tribunal,[1] the assignment of error must be phrased in such a fashion as to alert the Intermediate Court or the Supreme Court to the fact that plain error is asserted. This practice is founded upon considerations of fairness to the court and to the parties and of the public interest in bringing litigation to an end after fair opportunity has been afforded to present all issues of law and fact." *Cartwright v. McComas*, 223 W. Va. 161, 165, 672 S.E.2d 297, 301 (2008).

To overturn based on the "plain error" doctrine there must be (1) an error, (2) that is plain, (3) that affects substantial rights, and (4) seriously affects the fairness, integrity, or public reputation of the judicial proceedings. *Cartwright v. McComas*, 223 W. Va. 161, 162, 672 S.E.2d 297, 298 (2008). This doctrine is reserved for the most egregious circumstances. Headnote 16, *In the Interest of Tiffany Marie S.*, 196 W. Va. 223, 226 (1996).

Because WorkForce failed to participate or respond in the circuit court, the ICA should have utilized the plain error doctrine. Failure to do so was an error.

CONCLUSION

Up until March of 2021, Ms. Gaddy had worked for twenty-six years straight – including seven-and-a-half at APU. This marks her first interaction with the unemployment system. During those twenty-six years, Ms. Gaddy paid insurance premiums into the system that entitled her to compensation should she find herself unemployed. When she needed it, the system failed her. It did not provide her required notice regarding her claim and it was virtually impossible for Ms. Gaddy to get information from the agency. Her diligent efforts are documented as thoroughly as

[1] Rules of Appellate Procedure 'Definitions' (6) dictates "Lower Tribunal" includes the intermediate court of appeals, circuit court, family court, or administrative agency from which an appeal is taken or an original jurisdiction proceeding is prosecuted.

her medical condition and the failures of the agency. She is deserving of unemployment compensation. This court should overturn the decision of the ICA and reinstate the decision of the Circuit Court of Kanawha County.

Respectfully submitted,
Christina Gaddy,
by counsel,

MATTHEW JIVIDEN
Legal Aid of West Virginia
WVSB No.: 12113
301 W. Burke St, Ste. B
Martinsburg, WV 25401
304.263.8871x2817
mjividen@lawv.net

CERTIFICATE OF SERVICE

Counsel to the Respondent hereby certifies that I have served a true copy of the foregoing Brief and Appendix upon the following by File & ServeXpress, this the 6th day of February, 2024, to:

Casey Forbes, Clerk of Court
WV Judicial Tower
4700 MacCorkle Avenue S.E.
Charleston, WV 25304

WorkForce WV Board of Review
Bldg. 3, Suite 300
1900 Kanawha Blvd. East
Charleston WV 25305

I additionally certify that I have served a true copy of the foregoing Brief on Behalf of Respondent upon the following by the depositing of the same via First Class postage on the 7th day of February, 2024, to:

American Public University System, Inc.
111 West Congress Street
Charles Town WV 25414

_____/s/_____
MATTHEW JIVIDEN
Counsel for Christina Gaddy

Legal Aid of West Virginia
WVSB No.: 12113
301 W. Burke St, Ste. B
Martinsburg, WV 25401
304.263.8871x2817
mjividen@lawv.net