BEFORE THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

SCA EFiled: Mar 22 2024
04:52PM EDT
Transaction ID 72588694

CHRISTINA GADDY,

PETITIONER (Respondent Below),

v. **No. 23-658**
No. 22-ICA-110

WORKFORCE WEST VIRGINIA,

RESPONDENT (Petitioner Below),

&

AMERICAN PUBLIC UNIVERSITY SYSTEM, Inc.,

RESPONDENT (Employer Below),

&

WORKFORCE WEST VIRGINIA BOARD OF REVIEW,

RESPONDENT.

BRIEF FILED ON BEHALF OF RESPONDENTS WORKFORCE WEST VIRGINIA AND WORKFORCE WEST VIRGINIA BOARD OF REVIEW

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STATEMENT OF THE CASE

- **Identification of the Parties**

The Petitioner, Christina Gaddy, was the claimant below and is the Petitioner in the current proceeding. American Public University System, Inc., located in Charles Town, West Virginia, was the Petitioner's former Employer and is a Respondent in this proceeding. WorkForce West Virginia, Respondent, is an agency of the State of West Virginia and is the statutory administrator of the state unemployment compensation system and its Acting Commissioner, Scott A. Adkins, is a necessary party pursuant to W. Va. Code §21A-7-17 (1967). The WorkForce West Virginia Board of Review is also a necessary party to this action pursuant to W. Va. Code §21A-7-20 (1936).

- **Procedural History**

Petitioner applied for unemployment compensation benefits on March 12, 2021, and her unemployment benefit year was made effective on February 28, 2021. The Petitioner began receiving unemployment compensation benefits for the week ending March 6, 2021. The Petitioner subsequently resigned from her employment with the American Public University System, Inc., on March 22, 2021.[1] In a decision dated and mailed April 30, 2021, a WorkForce deputy found that the Petitioner had "quit due to a lack of childcare and not having the paid time off to cover it any longer."[2] The deputy held that the Petitioner was disqualified beginning March 21, 2021, from the receipt of unemployment benefits until she had returned to covered employment and had been employed at least thirty (30) working days pursuant to W. Va. Code §21A-6-3(1) (2020). The Petitioner appealed this decision to the Board of Review via an email dated May 6, 2021, to a WorkForce local office.[3] In this email dated May 6, 2021, the Petitioner described her job duties as receiving and answering telephone calls and emails with students and departments within the University regarding financial aid questions. "This involved speaking with highly escalated students regularly…."[4]

In a subsequent email dated July 6, 2021, the Petitioner stated that she had not received a mailed paper copy of the deputy's decision, which included a copy of the relevant portion of W. Va. Code §21A-6-3(1) (2020), until May 8, 2021, which could have caused a late appeal by the Petitioner.[5] However, the Petitioner's appeal was

[1] Appx. p. 18
[2] Appx. pp. 3 - 4
[3] Appx. pp. 5 - 7
[4] Appx. pp. 5 -7
[5] Appx. pp. 33 - 36

determined to be timely filed and was assigned Case No: R-2021-1773 by the Board of Review.[6]

The parties were notified of the scheduling of a hearing before an administrative law judge to take place on June 25, 2021, by notice mailed June 11, 2021.[7] The hearing took place on the scheduled date and the administrative law judge Carl E. Hostler issued a decision dated and mailed June 30, 2021, affirming the decision of the deputy.[8]

The Petitioner appealed this decision to the three-member panel Board of Review via correspondence dated July 6, 2021, and received on or about July 13, 2021.[9] The Board of Review considered Petitioner's appeal and the record before it on September 9, 2021.[10] The Board affirmed the decision of the administrative law judge by order dated and mailed September 10, 2021.[11] The Petitioner filed an appeal of the decision from the Board of Review to the Circuit Court of Kanawha County on October 12, 2021, pursuant to W. Va. Code §21A-7-17 (1967).[12] Judge Joanna I. Tabit entered an order on August 19, 2022, reversing the decisions of the administrative law judge and Board of Review, holding that the "Petitioner's production of her physician's note was timely as a matter of law under the doctrine of equitable estoppel" and ruling that the Petitioner was "eligible for receipt of unemployment compensation benefits;".[13] Respondent WorkForce West Virginia filed an appeal in the Intermediate Court of Appeals of West Virginia on September 18, 2022. After submission of briefs by the

[6] Appx. p. 2
[7] Appx. p. 28
[8] Appx. pp. 30 - 32
[9] Appx. pp. 33 - 36
[10] Appx. p. 59
[11] Appx. pp. 60 - 62
[12] Appx. pp. 64 - 89
[13] Appx. 91 - 100

parties, the Intermediate Court of Appeals issued its decision on September 5, 2023, holding that the Petitioner had left her employment without good cause involving fault on the part of the employer, citing lack of child care as the initial reason for her separation from employment; the Petitioner's medical certification was not sufficient to meet the requirements of W. Va. Code §21A-6-3(1) (2020); and equitable tolling was not an appropriate remedy in the instant case as the statute is quite clear regarding the time-frames for submission of the medical certification. The mandate in this case was issued by the Court on October 6, 2023. The instant appeal was filed in this Court on November 6, 2023.

- **Statement of Facts**

The Petitioner was employed as a Senior Financial Aid Advisor by the Employer from September 16, 2013, until her resignation on March 22, 2021. The Petitioner began receiving unemployment benefits from the Petitioner for the week ending March 6, 2021. In her initial application for unemployment compensation benefits, the Petitioner responded that she had the Covid-19 virus and the "symptoms are preventing me from being able to work" to the question, "Explain the reason that you are not working full-time hours at this time."[14] The Petitioner subsequently resigned from her employment with American Public University System, Inc., on March 22, 2021, after she began receiving unemployment compensation benefits from Respondent WorkForce West Virginia. A Request for Separation Information was mailed to American Public University System, Inc., on March 15, 2021. The Employer completed and dated this

[14] Appx. pp. 19 - 27

Request on April 2, 2021, and returned it to the Respondent WorkForce West Virginia. This completed Request asked the former Employer the following questions:

> Did you have continuing work available for this claimant at the time of separation? The response was "yes".
>
> Do you have work for the claimant at this time? The response was "yes".
>
> …
>
> The reason for the claimant's separation was: Use reverse side if necessary-Give full details. The former employer ticked a box marked "Quit" - What was the reason the claimant gave for quitting? The response was "personal".[15]

The Petitioner subsequently gave a Fact Finding Statement on April 19, 2021, to WorkForce West Virginia. The Petitioner stated in part, "I quit my job on March 22, 2021, due to not having enough FMLA to protect my job. My kids are learning remotely and my babysitter become (sic) sick."[16]

The record contains a Certification of Health Care Provider for Employee Serious Health Condition form pursuant to the Family and Medical Leave Act (FMLA).[17] Dr. Rauf Cheema, M.D., a psychiatrist in Winchester, Virginia, was the health care provider who completed this form on behalf of the Petitioner. For the period of time from February 9, 2020, to February 9, 2021, Dr. Cheema requested intermittent leave at a rate of three times a week and one day per episode in this document for the Petitioner and noted that the Petitioner suffered from a "chronic serious health condition", which is described as "[a]ny period of incapacity or treatment for such incapacity due to a chronic serious health condition which continues over an extended period of time" and "may

[15] Appx. p. 17
[16] Appx. p. 18
[17] Appx. pp. 8 - 11

cause episodic incapacity"[18]. The Petitioner completed this form on February 8, 2021, and Dr. Cheema dated his portion of this form on February 10, 2021, although Dr. Cheema wrote that the start date of the FMLA request was February 9, 2020.[19]

Former President Trump issued an emergency declaration on March 13, 2020, and Governor Jim Justice issued a proclamation of a state of emergency in West Virginia on March 16, 2020, due to the Covid-19 pandemic.[20] After the declaration of the state of emergency in March 2020, by the Governor, the Employer shifted to remote work. The Petitioner began working at home. Her children were also at home at this time since schools in West Virginia were closed due to the state of emergency. In the Petitioner's email dated May 6, 2021, the Petitioner described the increase in call and email volume and that she sought medical assistance for the "overwhelming anxiety I experienced by working from home. My job enforced all employees having to work from home and during this time, all three school age children were learning from home remotely. My three year old was also home due to his child care provider closing. This was the beginning of my condition which affected me both mentally and physically.[21]

The Petitioner requested 80 hours of emergency paid sick leave from her Employer on April 21, 2020, and had exhausted that leave on July 13, 2020.[22] She then used personal leave from July 13, 2020, to August 14, 2020, due to childcare needs.[23] The Petitioner returned to work on August 17, 2020. In December 2020, the Petitioner was approved to use FMLA leave on an intermittent basis through November 2021.[24]

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[18] Appx. p. 9
[19] Appx. p. 10
[20] Governor's Proclamation; March 16, 2020
[21] Appx. pp. 5 - 7
[22] Appx. pp. 45 - 50; pp. 12 & 15
[23] Appx 45 - 50; p. 15
[24] Appx. 45 - 50; p. 16

The Petitioner submitted a request for FMLA leave on or about March 2, 2021, to March 12, 2021.[25] The Petitioner did not return to work on the 12th, but rescheduled to return to work on the 15th of March 2021. The Petitioner did not return to work on March 15th, but rescheduled to return to work on March 22, 2021. The Petitioner subsequently resigned from her employment on March 22, 2021, when her FMLA leave was apparently exhausted or would exhaust soon.[26]

In February 2021, the Petitioner apparently contracted the Covid-19 virus, which resulted in the filing of the claim for unemployment compensation benefits from the Petitioner.[27] The Petitioner filed a claim on March 12, 2021, for the benefit week beginning on March 7, 2021, and received weekly unemployment compensation benefits in the amount of $724.00 for the weeks ending March 6, 2021; March 13, 2021; and March 20, 2021.

A hold was placed on the Petitioner's claim by Respondent WorkForce West Virginia due to Petitioner's resignation on March 22, 2021, from employment so that issue could be investigated and referred to one of Petitioner's deputies for a decision. The Petitioner was asked to provide a statement on this issue. The Petitioner subsequently gave a Fact Finding Statement on April 19, 2021, to WorkForce West Virginia. In her Fact Finding Statement dated April 19, 2021, the Petitioner reported that her leave under the Family and Medical Leave Act would end soon and that she "was needing to take more time off." She also reported that her children were learning remotely and her babysitter became sick. The Petitioner stated in this Fact-Finding

[25] Appx. 45 - 50; p. 16
[26] Appx. 45 - 50; p. 16
[27] Appx. 52 - 58; ALJ Exhibit 2

Statement that she was “able, available and seeking full-time work during the evening shift”.[28]

Dr. Cheema subsequently prepared a letter dated May 6, 2021, which stated, in its entirety, “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.”[29] It is unclear when Dr. Cheema’s letter was submitted to WorkForce West Virginia, although it was in the record for the administrative law judge to consider at the hearing on June 25, 2021. It does not appear that Dr. Cheema’s letter had been submitted to the Employer as of the hearing date on June 25, 2021, as Jessica McIntosh, a Human Resources generalist for the Employer, testified in response to a question from the administrative law judge of whether she was “aware of any sort of doctor’s writing being anywhere in the file that would say that, look, Christina’s job is aggravating or worsening a health condition. Is there anything like that in the file that you’d be aware of?” Ms. McIntosh testified, “No, sir. I haven’t seen anything that designated that.”[30] At the hearing before the administrative law judge, the Petitioner responded, “I was – I quit.”, when asked whether she had “quit this job or were you discharged?”[31]

SUMMARY OF ARGUMENT

The Petitioner voluntarily resigned from her employment, and as a consequence, she was disqualified from receiving unemployment compensation benefits from the date

[28] Appx. p. 18
[29] Appx. p. 41
[30] Appx. pp. 45 - 50; pp. 17 - 18
[31] Appx. pp. 45 - 50; p. 9

of her resignation. Petitioner's attempt to bring herself within the exception in W. Va. Code §21A-6-3(1) (2020) that allows employees who voluntarily leave their employment for health-related reasons if their work aggravated, worsened, or will worsen the employee's health issue(s) was fatally flawed for several reasons. She did not notify her employer of the reason for her resignation or provide written medical certification of that reason within the time period set forth in the statute. Further, the statement from Petitioner's physician, Dr. Rauf Cheema, M.D., is insufficient to meet the requirements of W. Va. Code §21A-6-3(1) (2020).

The Intermediate Court of Appeals did not give misplaced deference to the decision of the Administrative Law Judge because it believed that the Administrative Law Judge had the authority to apply equitable doctrines. The Intermediate Court of Appeals gave the appropriate deference to the Administrative Law Judge's findings of fact. This deference is required by a long line of cases in West Virginia. The Intermediate Court of Appeals correctly applied a *de novo* standard when reviewing the legal conclusions of the administrative law judge.

Equitable tolling does not excuse Petitioner's failure to provide written certification on the basis of the doctrine of equitable tolling because that doctrine should not be applied to statutory time periods required to qualify a claimant for the "health-related" exception. Further, even assuming the doctrine of equitable tolling applies to those types of time limits, the two factors required for its application, excusable ignorance of the part of the party asserting the doctrine and lack of prejudice to the other parties, is not present. The Circuit Court failed to give deference to the findings of fact of the WorkForce West Virginia Board of Review and substituted its own

judgment as a "trier of fact" to consider an equitable remedy. The Intermediate Court of Appeals was correct in reversing the circuit court's decision.

Finally, Respondent WorkForce West Virginia was and continues to be a party to this litigation. The fact that it did not participate in the proceedings before the circuit court did not prevent it from appealing the decision of the circuit court to the Intermediate Court of Appeals nor restrict it from addressing the critical issues in the case. The Petitioner did not seek to dismiss the Respondent's appeal to the Intermediate Court of Appeals and only mentioned the doctrine of clear error to restrict the issues Respondent could raise in the appeal in a very brief and cursory fashion in her brief.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioner believes that oral argument is not necessary pursuant to Rules of Appellate Procedure, Rule 18(a)(4), as the facts and legal arguments are adequately presented in the briefs and record on appeal and the decisional process would not be significantly aided by oral argument.

ARGUMENT

- **Standard of Review**

In Bd. of Educ. of Webster County. v. Hanna, 234 W.Va. 196, 764 S.E.2d 356 (W. Va. 2014), the West Virginia Supreme Court of Appeals held:

"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).

"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 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 W. Va Code §21A-7-21 (1943) 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."

- **The Respondents contend that the Intermediate Court of Appeals correctly determined that the Petitioner voluntarily resigned from her employment and is disqualified from receiving unemployment benefits from March 21, 2021, and its decision should be affirmed.**

W. Va. Code §21A-6-3 (2020) states in pertinent part:

> Upon the determination of the facts by the commissioner, an individual is disqualified for benefits:
> (1) For the week in which he or she left his or her most recent work voluntarily without good cause involving fault on the part of the employer and until the individual returns to covered employment and has been employed in covered employment at least 30 working days.
>
> For the purpose of this subdivision, an individual has not left his or her most recent work voluntarily without good cause involving fault on the part of the employer if the individual leaves his or her most recent work with an employer and if he or she in fact, within a 14-day calendar period, does return to employment with the last preceding employer with whom he or she was previously employed within the past year prior to his or her return to work, and which last preceding employer, after having previously employed the individual for 30 working days or more, laid off the individual because of lack of work, which layoff occasioned the payment of benefits under this chapter or could have occasioned the payment of benefits under this chapter had the individual applied for benefits. It is the intent of this paragraph to cause no disqualification for benefits for an individual who complies with the foregoing set of requirements and conditions. Further, for the purpose of this subdivision, an individual has not left his or her most recent work voluntarily without good cause involving fault on the part of the employer, 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 30 days of leaving the job that his or her work aggravated, worsened, or will worsen the individual's health problem.

It is undisputed that the Petitioner resigned from her most recent employment with the American Public University System, Inc. It is also clear that she voluntarily left employment without good cause involving fault on the part of the employer. The Petitioner contends that it should not have been determined that she had left "work voluntarily without good cause involving fault on the part of the employer" because she was "compelled to leave … her work for … her own health-related reasons…."[32] However, this statutory exception requires that the claimant must notify "the employer ***prior to leaving the job*** or ***within two business days or as soon as practicable after leaving the job***." There is also a requirement that a claimant must present "written certification from a licensed physician within 30 days of leaving the job that his or her work aggravated, worsened, or will worsen the individual's health problem."

In the Petitioner's "Fact-Finding" Statement dated April 19, 2022, the Petitioner did not reference her stress and anxiety and that these conditions caused her to leave her employment.[33] She stated that she did not have enough FMLA leave. She also stated that her children were learning remotely and that her babysitter had become ill. The Petitioner stated that her reason for leaving her employment was "Covid-19 related". The Petitioner also stated that she was "able, available, and seeking full-time work during the evening shift." (Emphasis added). However, the Petitioner did not state that she was seeking employment that did not involve work with the public. This Fact-Finding Statement was given prior to the issuance of the deputy's decision and her conversation with one of Respondent WorkForce West Virginia's representatives on or about May 5, 2021, who advised the Petitioner about the medical exception in W, Va,

[32] W. Va. Code §21A-6-3(1) (2020)
[33] Appx. p. 18

Code §21A-6-3(1) (2020). If the Petitioner's stress and anxiety were so severe that it caused her to leave her employment, it stands to reason that the Petitioner would have explained the difficulties that she was having and the medical treatment that she was receiving for her medical conditions, but this statement is silent on this issue. It is also difficult, if not impossible, to reconcile that the Petitioner's anxiety and stress were severe enough to cause her to leave her employment, but she was "able, available, and seeking full-time work during the evening shift[]" and did not state that she was seeking employment that did not involve work with the public due to her medical conditions. This Fact-Finding statement was probably the most reliable statement about the motivations and circumstances provided by the Petitioner pertaining to her resignation from employment. The Petitioner was probably stressed and anxious about working remotely, her young children participating in remote learning at home, and an ill babysitter, but so were millions of other individuals during the pandemic who did not voluntarily leave their employment. The Petitioner was also aware that her FMLA leave had been exhausted or would exhaust soon and she would be required to return to her job duties, in addition to the responsibilities pertaining to her children who were at home instead of in school or with the babysitter. In light of this information, the Petitioner elected to resign rather than return to work.

As defined by the West Virginia Supreme Court of Appeals, the term "voluntarily" as used in W. Va. Code §21A-6-3(1) (2020) "means the free exercise of the will." State v. Hix, 132 W.Va. 516, 54 S.E.2d 198 (1949), Syl. Pt. 3, Childress v. Muzzle, 222 W.Va. 129, 663 S.E.2d 583, 587 (2008). The term "good cause" as used in W. Va. Code §21A-6-3(1) (2020) "means cause involving fault on the part of the employer sufficient to

justify the employee's voluntarily leaving the ranks of the employed and joining the ranks of the unemployed." Syl. Pt. 4, *Id.* "While the circuit court was correct in asserting that both good cause and fault have to be demonstrated, it is also imperative to note that the statutory language does not simply list these two separate elements of the inquiry; rather, it links them in a significant and meaningful fashion. It requires good cause *involving* fault on the part of the employer." Verizon Services Corp. v. Epling, 230 W.Va.439, 739 S.E.2d 290, 298 (2013) (per curiam). In the instant matter, there has been no allegation of good cause involving fault on the part of the Employer whatsoever and there is, in fact, none. The Petitioner simply elected to voluntarily leave her employment due to other factors, not solely due to her medical conditions. The Employer was not responsible that Petitioner was required to work from home; the increase of call and email volume; and the closure of businesses, schools, and childcare centers. In the instant appeal, the Petitioner is asserting that her medical conditions required her to voluntarily leave her employment, yet she reported that she was "able and available for evening shift work."

The Verizon, Id., decision is instructive. In this *per curiam* decision, the claimant's working hours were unilaterally changed from a day-shift position to an afternoon/evening shift. The new work hours presented a conflict as the claimant was unable to pick up her children at the designated time from the childcare facility and her search for alternative arrangements was unsuccessful. The claimant therein subsequently resigned from her employment with Verizon and filed a claim for unemployment compensation benefits. She asserted that the change in working hours combined with her childcare difficulties as a result of the change in working hours

constituted fault by Verizon. This Court found otherwise, finding that the claimant had failed to prove fault on the part of the employer, that the claimant had voluntarily resigned from her employment, and therefore was disqualified from the receipt of benefits.

Petitioner's primary reason for quitting her job with American Public University System, Inc., was due to difficulties in providing consistent childcare while working from home. Verizon, id., indicates that difficulty finding childcare does not constitute good cause involving fault on the part of the employer.

- **The Petitioner has erred in asserting that the decision of the Intermediate Court of Appeals should be reversed on the grounds "in suggesting that administrative hearing officers possess equitable powers, and then affording displaced inference based on that error."**

The Petitioner contends that the decision of the Intermediate Court of Appeals should be reversed on the grounds that the Intermediate Court of Appeals "suggest[ed] that administrative hearing officers possess equitable powers" and "ignored the substance of the ALJ's factual determination and instead upheld the conclusion our ALJ reluctantly backed into by default despite those observed facts…."[34]

The Respondents initially contend that the Petitioner has disregarded language in the Intermediate Court's opinion to support her contention of a displaced inference. The Intermediate Court specifically noted that the State Supreme Court of Appeals "notes there is a high standard for equitable remedies" and it has held that "statutes of limitations are favored in the law and cannot be avoided unless the party seeking to do

[34] Petitioner's Brief; pp. 14 -15

so brings himself strictly within some exception." Adkins v. Clark, 247 W. Va. 128, 875 S.E.2d 266 (2022).

The Intermediate Court of Appeals applied the correct standard of review to both the facts and the legal analysis of those facts in its opinion. The Intermediate Court of Appeals did not give deference to the administrative law judge's alleged failure to create an equitable remedy. The Petitioner ultimately admits that the administrative law judge's decision is correct, but then contends that the 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 reluctantly backed into by default despite those observed facts and the manifest injustice it seemed to perpetuate."[35]

The Petitioner relies heavily on a comment made by the administrative law judge in the hearing held on June 25, 2021, in which the administrative law judge states in its entirety:

> "Judge: I'm happy to accept this true, 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.
>
> ….
>
> Judge: It's just I have to follow the rules to try to get your benefits."[36]

[35] Petitioner's Brief; pp. 14 - 15
[36] Appx. pp. 45 - 50; p. 21

The Petitioner asserts that this comment was a factual determination made by the administrative law judge. In truth, the administrative law judge made five factual findings which were:

"1. Claimant worked as a senior financial aid advisor from September 16, 2013, to March 22, 2021, and earned $23.41 per hour.

2. The employer operates a university.

3. On May 6, 2021, Dr. Rauf Cheema, MD, submitted a letter under signature that stated "[claimant] 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 left her position.

4. Dr. Cheema had also signed authorization for intermittent absences on February 10, 2021, pursuant to FMLA leave.

5. By March 23, 2021, the claimant had exhausted all leave available to her and chose to resign due to her own illness and lack of childcare."[37]

It is the last finding of fact that is most critical to this inquiry. The administrative law judge determined that the Petitioner "chose to resign due to her own illness and lack of childcare. In other words, the Petitioner voluntarily decided to separate from her employment not solely due to illness, but also due to lack of childcare. The administrative law judge determined as a conclusion of law that the Petitioner had failed to present the medical certification to Respondent WorkForce West Virginia within 30 days as required by W. Va. Code §21A-6-3(1) (2020). The Intermediate Court of

[37] Appx. pp. 30 - 32

Appeals did not "ignore the substance of the ALJ's factual determinations…" and the Petitioner has failed to establish this assertion.

- **The Petitioner has failed to prove that the decision of the Intermediate Court of Appeals created "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 Respondents contend that the Intermediate Court of Appeals did not "ignore the actual factual findings of the administrative law judge." The Petitioner erroneously states that the administrative law judge had made a factual finding that the Petitioner's separation from employment was due to her employment causing an aggravation, worsening, or would worsen the individual's health problem. This allegation is incorrect. The administrative law judge made a factual finding that the Petitioner "chose to resign due to her own illness and lack of childcare." The Intermediate Court of Appeals did not "substitute its own judgment in finding [the Petitioner's] separation was due to childcare." The Petitioner's statement that the "ALJ clearly saw the Petitioner's separation from work as a valid medical quit - and not a ruse to stay home and watch her children" is simply wrong. The factual finding as discussed, *supra*, joins both the Petitioner's illness and lack of childcare. While the administrative law judge may have expressed his empathy to the Petitioner during the hearing, the administrative law judge clearly acknowledged his awareness of the requirements of W. Va. Code §21A-6-3(1) (2020). Further, it is well-established that "[a] court of record speaks only through its orders [.]" State ex rel. Erlewine v. Thompson, 156 W.Va. 714, 718, 207 S.E.2d 105, 107 (1973). The Petitioner's argument is unsupported by the record as a whole as she has cherry-picked fragments of the record in an effort to support her argument.

- **The Respondents contend that the Intermediate Court of Appeals correctly held that Petitioner's statement from her physician, Dr. Rauf Cheema, M.D., is insufficient to meet the requirements of W. Va. Code §21A-6-3(1) (2020) and the Petitioner had failed to meet the statutory requirements by providing notice to the employer prior to or within two business days of leaving employment and providing written certification by a licensed physician within thirty days of leaving employment.**

The Petitioner's physician, Dr. Rauf Cheema, M.D., prepared a two-line statement dated May 6, 2021, which states in its entirety: "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." It is unclear when Dr. Cheema's letter was submitted to Respondent WorkForce West Virginia, although the earliest date that it could have been submitted was May 6, 2021, the date that it was written by Dr. Cheema. It was in the record for the administrative law judge to consider at the hearing on June 25, 2021.

Respondent WorkForce West Virginia contends that this written letter from her physician is insufficient as a matter of law to meet the requirements of W. Va. Code §21A-6-3(1) (2020). It merely states that stress at work contributed to Petitioner's "anxiety and panic attacks". The letter does not indicate the factors in her position that caused the stress, how that stress was manifested, or whether it was solely the work that made the anxiety and panic worse or whether other factors were responsible.

The history of Dr. Cheema's treatment of the Petitioner is not provided. Dr. Cheema does not state when he began to treat the Petitioner. Based on the content of the letter, it appears that Dr. Cheema merely accepted the Petitioner's report that work was stressful without any explanation and that her employment was the sole cause of her anxiety and panic attacks. It is also important to note that Dr. Cheema does not

state that he recommended that the Petitioner resign from her employment, only that the Petitioner had left her position due to her severe anxiety. Dr. Cheema also does not address the issue that the Petitioner's medical conditions apparently did not improve although the Petitioner took 80 hours of emergency leave, 1 month of personal leave, and had exhausted or was on the verge of exhausting her FMLA leave in March 2021, although the Petitioner had identified her employment as the cause of her medical conditions. Most importantly, there is no information in this letter that would confirm that the Petitioner's work "aggravated, worsened, or will worsen the individual's health problem", as required by W. Va. Code §21A-6-3(1) (2020).

In the decision styled Ohio Valley Medical Center v. Gatson, 201 W.Va. 231, 496 S.E.2d 181 (1997), (per curiam), the claimant therein had filed an unemployment compensation claim after she had resigned from her employment, citing work-related stress as the reason for leaving employment. The Supreme Court of Appeals found that the claimant's letter was insufficient to prove that stress compelled the claimant to leave employment "in view of the ambiguous nature of the letter from the social worker indicating (1) no specific diagnosis of a health problem, (2) that only "some of the sessions concerned stress in the [claimant's] workplace and (3) that the [claimant] terminated the counseling "of her own volition." *Id. at page 184.* Although this decision can be distinguished from the instant case as the claimant in the Ohio Valley case obtained a letter from a social worker, not a licensed physician, this decision is still instructive as to the requirements when reviewing the contents of Dr. Cheema's letter. The Respondents contend that the Dr. Cheema's letter does not meet the requirements

of the decision in Ohio Valley, *Id.*, and is insufficient to warrant an award of unemployment compensation benefits.

Prior to 1988, the West Virginia Legislature had not recognized an exception to disqualification for voluntarily resigning from employment for health reasons. However, the Supreme Court of Appeals had recognized such an exception in the decisions in Gibson v. Rutledge, 171 W. Va. 164, 298 S.E.2d 173 (1982), and McDonald v. Rutledge, 174 W. Va. 649, 328 S.E.2d 524 (1985). In 1988, W. Va. Code §21A-6-3(1) (2020) was amended by the enactment of the following language:

> Further, for the purpose of this subdivision, an individual shall not be deemed to have left his most recent work voluntarily without good cause involving fault on the part of the employer, if such individual was compelled to leave his work for his own health-related reasons and presents certification from a licensed physician that his work aggravated, worsened, or will worsen the individual's health problem.

In 2009, the West Virginia Legislature amended W. Va. Code §21A-6-3(1) (2020) again by explicitly adding two requirements of notifying the employer prior to leaving the job or within two business days after leaving the job and the presentation of written certification from a licensed physician within thirty days of leaving the job:

> Further, for the purpose of this subdivision, an individual shall not be deemed to have left his or her most recent work voluntarily without good cause involving fault on the part of the employer, if such 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.

"A cardinal rule of statutory construction is that significance and effect must, if possible, be given to every section, clause, word or part of the statute." Syl. Pt. 3, Meadows v. Wal–Mart Stores, Inc., 207 W.Va. 203, 530 S.E.2d 676 (1999), Young v. Apogee Coal Co., 232 W.Va. 554, 753 S.E.2d 52 (W. Va. 2013)

It is clear that the intent of the legislature was to place restrictions or limitations on the health-related exception to the general rule that voluntary separation from employment disqualifies a claimant from receipt of unemployment compensation benefits. Those conditions require timely notice of the health-related condition to the employer and timely provision of a statement from a physician to WorkForce West Virginia that the health-related problem was aggravated, worsened, or would continue to worsen from the claimant's employment.

Further, exceptions to general rules are normally narrowly construed. The United States Supreme Court has made clear that statutory exceptions generally should be narrowly construed. In Comm'r of Internal Revenue v. Clark, 489 U.S. 726, 739, 109 S.Ct. 1455, 103 L.Ed.2d 753 (1989), the Court referenced its "standard approach of construing a statutory exception narrowly to preserve the primary operation of the general rule," Clark, 489 U.S. at 727, and noted that "[i]n construing provisions … in which a general statement of policy is qualified by an exception, we usually read the exception narrowly in order to preserve the primary operation of the provision." *id.* at 739 (citing A. H. Phillips, Inc. v. Walling, 324 U.S. 490, 493, 65 S.Ct. 807, 808, 89 L.Ed. 1095 (1945)).

The Petitioner has failed to meet the requirements of the statute to avail herself of the "health conditions" exception to the general rule that a claimant is not entitled to

unemployment compensation benefits if the employee voluntarily leaves his or her employment. First, the Petitioner did not provide the required notice prior to or within the two days of leaving her job. Jessica McIntosh, a Human Resources generalist with the Employer, testified that she did not recall seeing a health certification that stated the Petitioner's health had been aggravated or worsened by the Petitioner's employment with the Employer.[38]

Secondly, she did not provide "written certification from a licensed physician within 30 days of leaving the job that his or her work aggravated, worsened, or will worsen the individual's health problem." The Petitioner resigned from her employment on March 21, 2021, and did not submit the letter from Dr. Cheema until May 6, 2021, at the earliest, which is more than 30 days from her resignation. Failing to meet both of those requirements is fatal to Petitioner's claim.

- **The circuit court erred in applying the doctrine of equitable tolling to permit the Petitioner to receive unemployment compensation benefits.**

The Respondents contend the circuit court erred in applying the doctrine of equitable tolling in the instant appeal for two reasons, i.e., the doctrine is not applicable to the issue in this case and the Petitioner did not meet the requirements for application of the doctrine of equitable tolling and the doctrine of equitable tolling may not be applied to an exception to the general rule that a claimant is disqualified for unemployment compensation benefits if he or she voluntarily leaves his or her employment without good cause involving fault on the part of the employer.

[38] Appx. 45 - 50; pp. 17 -18

The circuit court contended that the doctrine of equitable tolling could be applied to this situation, citing the decision in, Independent Fire Co. No. 1 v. West Virginia Human Rights Com'n, 376 S.E.2d 612, 180 W.Va. 406 (1988). The circuit court held that the only limitation on the doctrine of equitable tolling related to filing deadlines that were jurisdictional in nature. Further, the Court held that the 30-day time period for filing medical certification was not jurisdictional in nature and therefore not exempt from application of the doctrine of equitable tolling.

The Respondents contend that the circuit court erred in finding the 30-day time limit for filing medical certification was subject to the doctrine of equitable tolling.

The Petitioner notes the holding that "[u]nemployment compensation statutes, being remedial in nature, should be liberally construed to achieve the benign purposes intended to the full extent hereof." Lee-Norse Co. v. Rutledge, 170 W. Va. 162, 291 S.E.2d 477 (1982), citing, Davis v. Hix, 140 W. Va. 398, 84 S.E.2d 404 (1954). The Respondents contend that this holding must be considered in light of subsequent holdings of this Court. It is initially important to consider the purpose of the unemployment compensation program which is "an insurance program, and not an entitlement program, and is designed to provide "a measure of security to the families of unemployed persons" [citing W. Va. Code §21A-1-1(1) (1978)] who become involuntarily unemployed through no fault of their own. "The [Act] is not intended, however, to apply to those who 'willfully contributed to the cause of their own unemployment.'" See Hill v. Board of Review, 166 W.Va. 648, 651, 276 S.E.2d 805, 807 (1981); (quoting Board of Review v. Hix, 126 W.Va. 538, 541, 29 S.E.2d 618, 619 (1944)). From our review of the Act, we believe the obligation of employees under the Act is to do whatever is

reasonable and necessary to remain employed" Childress v. Muzzle, 222 W.Va. 129, 663 S.E.2d 583, 587 (2008). It is critically important to remember that the remedial nature of unemployment compensation statutes applies to only those former employees who have involuntarily lost employment, not to those former employees who have voluntarily separated from employment "without good cause involving fault on the part of the employer".[39]

The Petitioner contends that equitable tolling should be applied to excuse her untimely filing of her written certification. Two elements that must be met before equitable tolling can be applied are "the plaintiff's excusable ignorance of the limitations period and on lack of prejudice to the defendant…" . Independent Fire Company No. 1 v. West Virginia Human Rights Com'n, 180 W.Va. 406, 376 S.E.2d 602 (1988).

- ***Excusable ignorance***

The Petitioner relies, in part, on W. Va. Code §21A-7-2 (1936) to support her allegation that her lack of knowledge is due to the Respondent WorkForce's alleged failure to comply with the requirements of this statute. Respondents point out that this statute was enacted in 1936, and has not been amended since its enactment. WorkForce West Virginia, like many public and private entities, has transitioned away from face-to-face interaction in every instance, such as going to the local office for the purpose of filing an unemployment compensation claim on paper and providing or mailing paper copies of information to providing information through its website and the filing of unemployment compensation claims through its website. At no time did the Petitioner ever testify that she had accessed and read the information provided on

[39] W. Va. Code §21A-6-3(1) (2020)

Respondent WorkForce's website as every claimant was directed to do as a condition of filing an unemployment compensation claim prior to her receipt of the deputy's decision.

The Petitioner also contends that she had communicated that her Family & Medical Leave Act of 1993, 29 U.S.C. §2601, *et seq*., (2010) (FMLA) leave was exhausted to Respondent WorkForce's staff. However, FMLA leave can also be used for reasons other than one's own physical/psychological illnesses such as to care for a family member or for the adoption or birth of a child. WorkForce staff would not have inquired as to the reasons why the Petitioner was using FMLA leave due to privacy concerns. Likewise, there is no testimony from the Petitioner in the record regarding the phone calls allegedly made by the Petitioner to WorkForce or testimony regarding the unemployment compensation poster.

The first indication to the Respondents that the Petitioner's separation from employment was due to health issues rather than childcare concerns occurred on May 6, 2021, with the letter of Dr. Cheema. It is unclear when Respondent received this letter and it appears the Employer was not made aware of it until the hearing before the administrative law judge on June 25, 2021.[40]

- ***Lack of prejudice to the defendant***

The circuit court erred in determining that Respondent WorkForce West Virginia had not been prejudiced as Dr. Cheema's letter was available for review by the administrative law judge. There were no factual findings by the court on the element of prejudice to the Respondent WorkForce West Virginia or to the Employer in Petitioner's unemployment compensation claim. However, if the circuit court's decision is

[40] Appx. 45 - 50; pp. 17 - 18.

reinstated, the Employer will be subject to charging of 100% of the benefit cost as the sole base period employer in this claim and its contribution rate may be negatively affected by the benefits charged against its experience rating account pursuant to W. Va. Code §21A-5-7(2) & (3) (2012). WorkForce West Virginia is also prejudiced if the state Unemployment Insurance Trust Fund must pay benefits to the Petitioner and similarly affected claimants who had been properly denied unemployment benefits. This does not include the impact from other claimants who would voluntarily leave work in the future due to alleged poor health allegedly worsened by their employment and subsequently file an unemployment compensation claim.

Respondents also contend that equitable tolling is not an appropriate remedy in this case. In Adkins v. Clark, 247 W. Va. 128, 875 S.E.2d 266, 271 (2022), this Court cited, "We have repeatedly found that "statutes of limitations are favored in the law and cannot be avoided unless the party seeking to do so brings himself strictly within some exception. It has been widely held that such exceptions are "strictly construed and are not enlarged by the courts upon consideration of apparent hardship." Adkins, *id*, citing, Humble Oil & Refining Co., v. Lane, 152 W. Va. 578, 583, 165 S.E.2d 379, 383 (1969).

In Perdue v. Hess, 199 W. Va. 299, 484 S.E.2d 182 (1997), Syl. Pt. 3 states: "Exceptions in statutes of limitation are strictly construed and the enumeration by the Legislature of specific exceptions by implication excludes all others." (citation omitted). In this instance, the West Virginia Legislature amended W. Va. Code §21A-6-3(1) in 2009 in order to add the requirements that a claimant notify his or her employer either prior to leaving employment or no later than two business days after leaving employment for his or her health-related reasons and providing written medical

certification from a licensed physician within 30 days of leaving the job that his or her work aggravated, worsened, or will worsen the individual's health problem. Allowing the doctrine of equitable tolling to enlarge the time-frame for the submission of this information removes, in essence, the meaning and requirement of this statute and voids the Legislature's intent in amending this statute.

- **The Respondents contend that the Petitioner's assertion of plain error based solely on Respondents' failure to participate in the appeal before the Circuit Court of Kanawha County is erroneous.**

The Respondents contend that the Petitioner's assertion of plain error based solely on Respondents' failure to participate in the appeal before the Circuit Court of Kanawha County is erroneous. The Petitioner appears to assert that the decisions of the administrative law judge, the Board of Review, and the Intermediate Court of Appeals should be reversed on this basis alone and/or that Respondent WorkForce West Virginia should not have been permitted to file an appeal. First of all, the Petitioner should have made this contention when this case was before the Intermediate Court of Appeals by filing a motion to dismiss WorkForce West Virginia's Notice of Appeal or by asserting this issue as an error for the Intermediate Court of Appeals to decide. The Petitioner did neither. As a result, the Petitioner cannot now raise this issue before this Court on the grounds of the "raise or waive" doctrine. In State v. Gray, No. 22-0082 (W. Va. Jun 15, 2023) (memorandum decision), in which this Court stated:

> "'One of the most familiar procedural rubrics in the administration of justice is the rule that the failure of a litigant to assert a right in the trial court likely will result' in the imposition of a procedural bar to an appeal of that issue.') (citation omitted))."

However, as Petitioner observes, the fact that the current case arose during the introduction of the Intermediate Court of Appeals into West Virginia judicial structure makes this case somewhat unusual. Nevertheless, the "raise or waive" rule should apply to it. As explained by this Court in Hoover v. West Virginia Bd. of Medicine, 216 W. Va. 23, 602 S.E.2d 466 (2004):

> Our general rule is that nonjurisdictional questions ... raised for the first time on appeal, will not be considered." Shaffer v. Acme Limestone Co., Inc., 206 W.Va. 333, 349 n. 20, 524 S.E.2d 688, 704 n. 20 (1999).

In the present case, the first and appropriate forum for Petitioner to raise the question of whether Respondent could appeal to the Intermediate Court of Appeals was, in fact, the Intermediate Court of Appeals. The fact that the Petitioner did not move to dismiss the appeal before the Intermediate Court of Appeals prevents her from raising it before this Court.

Although Petitioner did not file a motion to dismiss Respondent's appeal to the Intermediate Court of Appeals, she did mention the doctrine of "plain error" in her brief. However, this reference was cursory, i.e., one sentence in the Summary of Argument and several paragraphs at pages 21 and 22 of the Petitioner's brief submitted to the Intermediate Court of Appeals. Petitioner limited herself to asserting that the "plain error" doctrine prohibited the consideration of any but the most egregious errors and that consideration of the issues upon which Respondent based its appeal would "severely affect the fairness and public repudiation of judicial proceedings". There is little or no analysis and it is unsurprising that the Intermediate Court of Appeals did not feel called upon to address the "argument" in its final order.

Respondents are clearly parties to this litigation. Respondents direct the Court's attention to W. Va. Code 21A-7-17 (1967) which states, in pertinent part, "[p]arties to the proceedings before the board shall be made defendants in such appeal; and the commissioner shall be a necessary party to such judicial review" when a party filed an appeal of a decision from the WorkForce West Virginia Board of Review to the Circuit Court of Kanawha County.

In a similar vein, W. Va. Code §21A-7-20 (1936) states, in pertinent part, that the "board [of Review] shall be made a party to every judicial action which involves its decisions." W. Va. Code §21A-7-27 (1998) states that the "judgment of the circuit court shall be final unless reversed, vacated or modified on appeal to the supreme court of appeals in accordance with the provisions of [W. Va. Code §29A-6-1 (2021)]. W. Va. Code §29A-6-1(a) (2021) states, in pertinent part, "[a]ny party adversely affected by the final judgment of the circuit court under this chapter may seek review thereof by appeal to the Supreme Court of Appeals of this state …"

References to an appeal to the Supreme Court of Appeals of West Virginia in these statutes should be interpreted as applicable to appeals to the Intermediate Court of Appeals. Due to the passage of Senate Bill 275 by the West Virginia Legislature on April 8, 2021, creating the Intermediate Court of Appeals of West Virginia and enacting W. Va. Code §51-11-1, et seq. (2021), known as the West Virginia Appellant Reorganization Act of 2021, WorkForce West Virginia was required to file an appeal to the Intermediate Court of Appeals of West Virginia rather than to the Supreme Court of Appeals of West Virginia. This Act conferred jurisdiction to the Intermediate Court of Appeals of West Virginia over "[f]inal judgments or orders of a circuit court, in civil

cases, entered after June 30, 2022. The final order from the Circuit Court of Kanawha County in this case was entered on August 19, 2022.

It is clear that the Respondents WorkForce West Virginia and WorkForce West Virginia were and remain parties to the instant appeal by operation of law and had the statutory authority to file and pursue an appeal of the circuit court's final order in the Intermediate Court of Appeals.

CONCLUSION

The Respondents have demonstrated that the decision of the Intermediate Court of Appeals should be affirmed by this Court. Respondents respectfully request an order affirming the decision of the Intermediate Court of Appeals.

WORKFORCE WEST VIRGINIA &
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BOARD OF REVIEW
By Counsel

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CERTIFICATE OF SERVICE

I, Kimberly A. Levy, Counsel to Respondents WorkForce West Virginia and WorkForce West Virginia Board of Review, hereby certify that I have served a true copy of the foregoing Brief on Behalf of Respondent WorkForce West Virginia & WorkForce West Virginia Board of Review upon the following by File & ServeXpress, this the 22nd day of March, 2024, to:

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