

No. 32509

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

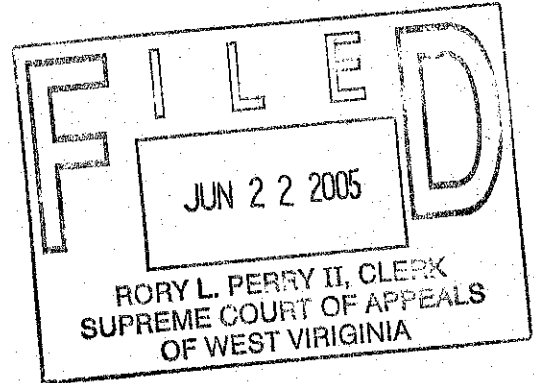
CINDY L. ADKINS,  
CYNTHIA S. COOPER and  
BILLIE J. GILL,

Appellants,

v.

CATHY S. GATSON, Clerk of the  
Circuit Court of Kanawha County;  
BOARD OF REVIEW, WEST VIRGINIA  
BUREAU OF EMPLOYMENT PROGRAMS;  
COMMISSIONER, Bureau of Employment  
Programs; CITY OF HINTON,

Appellees.



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BRIEF OF BOARD OF REVIEW

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I.

PROCEEDINGS BELOW

This appeal arises from an Order reversing the West Virginia Bureau of Employment Programs Board of Review's ("Board") final review and determination that the Appellants are entitled to unemployment benefits. It is from this reversal, rendered April 27, 2005, by the Honorable Charles E. King, Jr., Circuit Court of Kanawha County, that the Appellants now appeal.

## II.

### STATEMENT OF FACTS

On October 9, 2002, Appellants Cooper and Gill filed for unemployment benefits, and on October 10, 2002, Appellant Adkins file for unemployment benefits. The matters were heard before a West Virginia Bureau of Employment Programs ("BEP") Deputy Commissioner ("Deputy") and decisions, dated October 25, 2002, were sent to Employer Appellee City of Hinton ("Employer" or "City") in each matter. The Deputy determined that all three claimants were subjected to violence and harassment in the workplace and further noted that the "employer has failed to respond to requests for information regarding the claimant[s] separation." See Deputy's Decisions. The final date of appeal was November 2, 2002. The Employer did not timely appeal.

By letter dated January 17, 2003, Counsel for the City of Hinton, Michael E. Froble, notified Greenbrier Valley Unemployment that the City did not receive the Deputy's decisions and that it intended to appeal. See letter dated 1/17/03. A hearing on the appeal was held on April 15, 2003, before Chief Administrative Law Judge Marcella Townsend. See Notice of Hearing issued 4/2/03.

At the conclusion of the consolidated hearing in which the parties presented testimony and tendered exhibits, Chief ALJ Townsend affirmed, in separate orders, the Deputy's decisions finding that the claimants left work voluntarily with good cause involving fault on the part of the employer.<sup>1</sup> See Hearing Transcript ("HT") and Order dated 4/18/03.

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<sup>1</sup>A review of the Order reflects that the memorandum referenced in paragraph 15 of the findings of fact is dated October 1, 2002, which is the day before the Mayor removed police officers from their duty at City Hall.

In sum, the Appellants, who worked at City Hall, and the Mayor of Hinton testified that following her election in July, 2001, the working environment at City Hall was hostile.<sup>2</sup>

See HT at 41,<sup>3</sup> Mayor's testimony at p. 149 of HT. Likewise, just as the Appellants testified that they felt like they were being harassed, the Mayor testified that she felt like she was being harassed. See HT at 34-35, 92, 95, 105, 115, 175-176.

In August 2002, following a council meeting where the Mayor believed that the Chief of Police displayed disruptive behavior, the Mayor hired Melvin Cyphers to deal with police issues. See HT at 141, 149-150. On Mr. Cyphers' first day of work, a physical altercation occurred at City Hall between himself and a council member, a magistrate judge, two city police officers and Appellant Gill, which resulted in criminal charges being brought against Mr. Cyphers. See HT at 153. Appellants testified that immediately prior to the altercation, Mr. Cyphers, who was wearing a gun in a side holster, was harassing the Appellants and trying to find out the whereabouts of the Chief of Police, who was off on leave attending to his sick brother. See HT at 15-18, 82, 84, 87, 123-125. When the council member questioned Mr. Cyphers about harassing the Appellants, Mr. Cyphers began beating the council member against the wall. HT at 20 and 85. While the Municipal Judge and Appellant Gill tried to pull Mr. Cyphers off the council member, Mr. Cyphers called Appellant Gill a "bitch", told her to get her hands off him and that she was under arrest. HT at 86.

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<sup>2</sup>Appellant Cooper testified first, followed by Appellant Gill and Adkins. Appellant Gill testified that she agreed with the testimony given by Appellant Cooper, and Appellant Adkins testified that she agreed with the testimony given by Appellants Cooper and Gill.

<sup>3</sup>Appellant Cooper testified that her problems with the Mayor did not begin until July 2002.

Appellant Cooper likewise saw the council member being held in a choke hold and the Judge trying to pull Mr. Cyphers off him. HT at 20. When the City police arrived and tried to handcuff Mr. Cyphers, he kick one officer in the groin and attempted to choked the other. HT at 22. Both officers and the council member were treated at the hospital following the altercation. HT at 22. Mr. Cyphers' gun was removed by the city police after he was handcuffed. HT at 26.

Appellant Adkins did not witness the physical altercation because she had left work to take medication to her son. HT at 124. When she returned Mr. Cyphers was on the floor in handcuffs and everyone was upset. HT at 124. Although Appellant Adkins did not see Mr. Cyphers choke and beat the council member against the wall and kick and attempt to choke the city police officers, she testified that on a previous occasion Mr. Cyphers made vulgar comments to her. HT at 125. All three Appellants testified that following the physical altercation they learned from family members and former employees of the State Police that Mr. Cyphers had a reputation of being violent and vindictive. HT at 23-25, 90-92, 125-127.

City Hall was closed for the remainder of the day on the 5<sup>th</sup> of September and the next and did not open until the following Monday, the 9<sup>th</sup> of September, when an emergency council meeting was scheduled to address the situation with Mr. Cyphers. HT 31 and 101. In the meantime another council member informed Appellant Cooper that police protection would be provided if the Appellants returned to work. HT at 27. When the Mayor and a third council member did not attend the emergency meeting, another meeting was scheduled for the next day but was later postponed. HT at 32. The situation with Mr. Cyphers was never addressed at a council meeting. HT at 65 and 107.

On October 1, 2002, the Appellants sent the Mayor a letter asking about the status of Mr. Cyphers' employment with the City and their concerns regarding the working environment. See Claimants' Exhibit 1 to HT. Instead of responding to the Appellants' request for information, the Mayor directed the Chief of Police to remove the city police from their duty at City Hall. See Claimants' Exhibit 2 attached to HT. In the same memorandum the Mayor stated that "Mr. Cyphers was injured on September 5 and will not return for at least three months." Before ALJ Townsend the Mayor testified that "[her] memo is poorly stated. It doesn't say what I meant. That that was it. [Mr. Cyphers] wasn't coming back because he was to be a three-month employee and he was on Workers' Compensation for three months." HT at 151. However, no information was provided to the Appellants, who believed that Mr. Cyphers would be returning. HT at 28, 133. On two occasions following the physical altercation, Mr. Cyphers returned to City Hall. HT at 151. Appellant Cooper testified that she felt intimidated by Mr. Cyphers because of the way acted when he was there. HT at 59.

The final straw for Appellants Cooper and Gill came on October 8, 2002, after charges were dropped against yet another council member for his inappropriate behavior toward Appellant Gill. Both resigned on October 9, 2002. The Appellants testified that they believed that the harassment would not stop. HT at 68-69, 105 and 131. Likewise believing that she was totally alone, that no one was going to help her and not knowing whether Mr. Cyphers would show up at City Hall, Appellant Adkins felt she had no other option but to also leave. HT at 131 and 133-134. All three Appellants testified that they were afraid of Mr. Cyphers. HT at 56, 109 and 132.

From ALJ Townsend's Order, the Employer appealed to the Board of Review and a de novo review hearing was noticed for June 3, 2003. See Notices dated 5/22/03 and 6/27/03. In the Notice of Hearing, all parties were informed that the hearing would include a review of the record and that the parties could present oral arguments or written briefs. *Id.* Likewise, the Notice directed that additional evidence would not be taken unless good cause was shown for not presenting the same before the ALJ but that upon receipt of the Notice, a written request to present additional evidence needed to be sent to the Board, "showing the nature of such evidence to be offered, an assertion of the pertinence of such evidence to the issues in the case and the reasons alleged to exist for failure to offer the evidence at the hearing before the Administrative Law Judge." *Id.*

On May 27, 2003, the review hearing scheduled for June 3, 2003, was rescheduled due to claimants' counsel's unavailability. The review hearing was held on July 15, 2003. See Notice of Hearing dated 6/27/2003. The Board reviewed all the documents in the matter, found that ALJ Townsend made a proper ruling and adopted her findings in their entirety. See Board's Order dated 7/16/03. On August 25, 2003, the Employer appealed to the Circuit Court of Kanawha County. By letter dated December 9, 2003, Allyson Hilliard Griffith, Law Clerk for the Honorable Charles E. King, Jr., provided the parties with a briefing scheduling, further advising that "[t]his action shall be submitted for decision on briefs and proposed orders with findings of facts and conclusions of law." See Griffith letter dated 12/9/03. On April 27, 2004, a Final Order was issued that reversed the decisions of the deputy, the ALJ and the Board of Review. This appeal followed.

### III.

#### STANDARD OF REVIEW

West Virginia Code § 21A-7-27 mandates that appeals from circuit court unemployment compensation judgments to this Court are governed by West Virginia Code § 29A-6-1. This Court has previously held that it is bound by the statutory standards applicable to circuits courts and reviews questions of law presented de novo. Findings of fact by the administrative officer are accorded deference unless the reviewing court believes the findings to be clearly wrong. W. Va. Code §§ 29A-5-4(g) and 29A-6-1. *Wheeling-Pittsburg Steel Corp. v. Rowing*, 205 W. Va. 286, 517 S.E.2d 763 (1999); *Muscatell v. Cline*, 196 W.Va. 588, 474 S.E.2d 518 (1996).

### IV.

#### RESPONSE TO ASSIGNMENTS OF ERROR

A writ of certiorari is not the proper method for reviewing a Board of Review decision in an unemployment compensation case. An appeal first to the Circuit Court of Kanawha County and then to this Court is the statutorily mandated judicial review process. A reviewing court should not set aside the Board's findings of fact unless such findings are plainly wrong; however, the plainly wrong doctrine does not apply to conclusions of law. *Tabor v. Gatson*, 207 W. Va. 424, 533 S.E.2d 356 (2000); *Patton v. Gatson*, 207 W. Va. 168, 530 S.E.2d 167 (1999); *University of West Virginia Bd. of Trustees/West Virginia University v. Aglinsky*, 206 W. Va.180, 522 S.E.2d 909 (1999); *Summers v. Gatson*, 205 W. Va. 198, 517 S.E.2d 295 (1999); *Ohio Valley Medical Center, Inc. v. Gatson*, 202 W. Va. 507, 505 S.E.2d 426 (1998); *Glass v. Gatson*, 200 W. Va. 181, 488 S.E.2d 456

(1997); *Raleigh County Bd. of Educ. v. Gatson*, 196 W. Va. 137 468 S.E.2d 923 (1996); *Federoff v. Rutledge*, 175 W. Va. 389, 332 S.E.2d 855 (1985); *Belt v. Rutledge*, 175 W. Va. 28, 330 S.E.2d 837 (1985); *Butler v. Rutledge*, 174 W. Va. 752, 329 S.E.2d 118 (1985); *Mizell v. Rutledge*, 174 W. Va. 639, 328 S.E.2d 514 (1985); *Perfin v. Cole*, 174 W. Va. 417, 327 S.E.2d 396 (1985); *Lough v. Cole*, 172 W. Va. 730, 310 S.E.2d 491 (1983); *Kisamore v. Rutledge*, 166 W. Va. 675, 276 S.E.2d 821 (1981); W. Va. Code § 21A-7-21.

## V.

### ARGUMENT

#### A. A WRIT OF CERTIORARI IS NOT THE PROPER MEANS OF OBTAINING JUDICIAL REVIEW OF A BOARD OF REVIEW DECISION

In her dissenting opinion, Justice Davis, in *Scott v. Stewart*, 211 W. Va. 1, 6, 560 S.E.2d 260, 265 (2001), reiterated the proper application of a writ of certiorari:

The writ of certiorari may only be used when *no* mechanism for review of a judicial or quasi-judicial proceeding is provided for by law. This proposition has stood firm and unshakable from the beginning of this state's creation. See *Welch v. County Court*, 29 W.Va. 63, 73, 1 S.E. 337 (1886) ("[T]he writ of certiorari ought not to issue but should be denied, where there is other adequate remedy[.]"); Syl. pt. 5, in part, *Beasley v. Town of Beckley*, 28 W.Va. 81 (1886) ("Where a party aggrieved can obtain redress by appeal or writ of error, he will not be allowed the extraordinary writ of certiorari."). The majority opinion has, in effect, overruled precedent followed for over one hundred years without even acknowledging that it has done so.

In *Scott* the majority determined that judicial review of an decision issued by the State Superintendent of Education by way of a writ of certiorari was available because the Administrative Procedures Act ("APA") was amended in 1988 to remove the exemption of

the State Board of Education. *Scott v. Stewart*, 211 W.Va. 1, 4, 560 S.E.2d 260, 263 (2001). Applying the authority of the APA, the Court concluded that "nothing in [the] chapter shall be deemed to prevent other means of review, redress or relief provided by law." *Id.*

1. THE LAW PROVIDES FOR A MECHANISM FOR REVIEW OF THE BOARD OF REVIEW'S DECISIONS.

Unlike the Board of Education in the *Scott* case, the Board of Review remains exempt from the APA. Even the circuit court concluded that "[the] West Virginia Administrative Procedures Act does not apply to contested cases involving the bureau of employment programs." Circuit Court Order dated 4/27/04.

The process for judicial review on Board of Review decisions is specifically provided by statute. W. Va. Code § 21A-7-17. There is no statutory authority for a party to challenge a Board of Review decision through an extraordinary writ. *Scott v. Stewart*, 211 W.Va. 1, 4, 560 S.E.2d 260, 263 (2001).

2. NO SUBSTANTIAL RIGHTS ARE ALLEGED TO HAVE BEEN VIOLATED.

Moreover, in order for a writ of certiorari to lie from an inferior tribunal, substantial rights must be alleged to have been violated. The defendants below made absolutely no claim of any violation of substantial rights. Likewise, despite receiving two Notices of Hearings before the Board of Review, advising as to its right and the procedure for having

additional evidence entered into the record,<sup>4</sup> the City of Hinton failed to request an opportunity to present such evidence.

3. THE EVIDENCE OUTSIDE THE RECORD THAT WAS CONSIDERED BY THE CIRCUIT COURT WAS NOT RELATED TO A VIOLATION OF SUBSTANTIAL RIGHTS.

Finally, even if a writ of certiorari were to lie, the circuit court "is authorized to take evidence, independent of that contained in the record of the lower tribunal, to determine if [violations of substantial rights] have occurred." *Board of Educ., Lincoln County v. MacQueen*, 174 W.Va. 338, 325 S.E.2d 355 (W.Va. 1984). The City admitted in its brief to this Court as follows:

The affidavit submitted by Rex Cyphers essentially stated that he was not at fault for the confrontation, and that the charges against him were dropped . . . The affidavits of Mayor Mathews and Larry Meador were simply meant to bolster the argument that there was no fault on the part of the employer by showing that the Mayor and Council men attempted to meet with the Appellants concerning their fears.

City of Hinton Brief at p. 11. The City has never asserted claims that its substantial rights were violated and the affidavits considered by the Circuit Court do not present evidence about violations of substantial rights.

Therefore, because the Circuit Court utilized a writ of certiorari and allowed additional evidence to be considered upon the review of the Board of Review's decision,

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<sup>4</sup>Title 84, Procedural Rule Board of Review, Series 1, governs the initiation and conduct of hearings in contested unemployment claims before the Board of Review and its subordinate tribunals. Section 15.8 provides that motions to present additional evidence will be granted upon appeal to the board for good cause shown.

the decision of the Circuit Court should be reversed, allowing the Appellants to be eligible for unemployment benefits.

**B. THE BOARD OF REVIEW'S FINDINGS OF FACTS ARE ENTITLED TO SUBSTANTIAL DEFERENCE, SUPPORTING ITS CONCLUSIONS THAT THE APPELLANTS LEFT WORK VOLUNTARILY WITH GOOD CAUSE INVOLVING FAULT ON THE PART OF THE EMPLOYER.**

A finding is clearly wrong if there is no substantial evidence in the record to support it or, after a review of the record, the court is left with a definite and firm conviction that a mistake has been made. *Hanlon v. Logan County Board of Education*, 201 W.Va. 305, 496 S.E.2d 447 (1997). In *Morris Memorial Convalescent Nursing Home, Inc. v. West Virginia Human Rights Comm'n*, 189 W.Va. 314, 431 S.E.2d 353 (1993), this Court defined "substantial evidence" as:

such relevant evidence, on the whole record, as a reasonable mind might accept as adequate to support a finding; it must be enough to justify a refusal to direct a verdict, if the factual matter were tried to a jury. 'This is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence.' The reviewing court is not entitled to reverse the finding of the trier of the facts simply because the reviewing court is convinced that it would have weighed the evidence differently if it had been the trier of the facts. *Id.* at 316, 431 S.E.2d at 355 (quoting *Brammer v. West Virginia Human Rights Comm'n*, 183 W. Va. 108, 111, 394 S.E.2d 340, 343 (1990)).

*Fairmont Specialty Services v. West Virginia Human Rights Com'n*, 206 W. Va. 86, 90, 522 S.E.2d 180, 184 (1999).

In the case at bar, the Circuit Court of Kanawha County erred by reversing the Board of Review's decision because it improperly substituted its judgment for that of (1) the

deputy who initially heard the matter; (2) Chief ALJ Townsend who established the record; and (3) the Board of Review, which reviewed the record de novo. *Summers v. Gatson*, 205 W. Va. 198, 203, 517 S.E.2d 295, 300 (1999). In contrast to the Board of Review's findings of fact, which are supported by the evidence in the record, findings made by the Circuit are not supported by the evidence:

1. No witness was questioned regarding whether Mr. Cyphers' gun was loaded or not. See paragraph 8 of Circuit Court's Findings of Fact.

2. There is no evidence in the record developed from the tribunal below that the charges against Mr. Cyphers were dropped; this information was submitted to the reviewing court by way of an affidavit that was not subject any examination by the Appellants. See Paragraph 9 of Circuit Court's Findings of Fact.

3. The Circuit Court found that Mr. Cyphers did not intimidate the claimants when he returned to work on September 12<sup>th</sup> despite the fact that the Mayor testified that Mr. Cyphers came back on the 5<sup>th</sup>, which the Appellants testified was a Thursday, and the following Monday, which the Mayor testified was the 9<sup>th</sup> of September. See Paragraph 10 of Circuit Court's Findings of Fact.

4. The Circuit Court found that the Mayor's letter only suggested that Mr. Cyphers was injured and would not return for at least three months. The Mayor's letter specifically stated that Mr. Cyphers' return would not occur for at least three months. Appellants testified that they did not know when Mr. Cyphers would return and that it was exactly this information that they sought from the Mayor as a means to alleviate their fears and feelings of harassment. See Paragraph 12 of Circuit Court's Findings of Fact.

5. At the hearing before ALJ Townsend the Mayor refused to identify the employment status of Mr. Cyphers, stating that she was uncomfortable identifying whether Mr. Cyphers was a contract worker or an employee of the City of Hinton. See HT at 171.

6. The Circuit Court found that the Appellants Cooper and Gill voluntarily resigned ONLY because of the physical altercation on September 5<sup>th</sup> despite their extensive testimony regarding the violent reputation of Mr. Cyphers and the admitted harassment and hostility in the work place. Likewise, the Circuit Court failed to address Appellant Adkins' encounters with Mr. Cyphers or her knowledge about his general reputation in the community.

7. The Circuit Court erroneously found the physical altercation "did not involve Claimants." Paragraph 16 of Circuit Court's Findings of Fact. Mr. Cyphers not only threatened Appellant Gill but she physically tried to pull Mr. Cyphers off the council member he was attempting to choke and beating against the wall. Appellant Cooper was a first hand witness and became hysterical as result of the altercation.

8. The Circuit Court found that Appellant Gill willingly and freely put her hands on Mr. Cyphers and did not sustain any injuries or harm. See Paragraph 18 of Circuit Court's Findings of Fact. Appellant Gill put her hands on Mr. Cyphers in an attempt to pull him off the council member who was being beat by Mr. Cyphers, a man who had a gun strapped to his side.

9. The Circuit Court found that Mr. Cyphers did not engage in any unwelcome physical conduct or contact with the Appellants. See Paragraph 20 of Circuit Court's Findings of Fact. Appellant Gill testified that she pulled Mr. Cyphers' hair and the back of

his shirt to get him off the council member and that Mr. Cyphers said, "Get your hands off me, you bitch. You're under arrest." This testimony does support the Court's conclusion that Mr. Cyphers did not engage in an unwelcome interaction with Appellant Gill. The Circuit Court further found that Mr. Cyphers did not engage in unwelcome contact with anyone other than the council member. Testimony in the record established that both the police officers who subdued Mr. Cyphers were treated at the hospital following the altercation.

10. Despite Appellants' testimony that Mr. Cyphers' presence made them feel threatened because of the physical altercation and his reputation for being violent, the Circuit Court found he "made absolutely no threats or intimidating remarks towards (sic) the [Appellants]" and further that he did not display hostility toward the Appellants. Paragraphs 21 and 26 of Circuit Court's Findings of Fact.

11. Despite the Appellants' uncontradicted testimony regarding their fears of Mr. Cyphers and the admitted hostility at the workplace, the Circuit Court found as a matter of fact that Appellants did not "assert a reasonable, good-faith and honest explanation for their fear." See Paragraph 22 of Circuit Court's Findings of Fact. It was ALJ Townsend who had the opportunity to observe the demeanor of the Appellants who testified, the demeanor of the Mayor and to judge their credibility. *Patton v. Gatson*, 207 W.Va. 168, 171, 530 S.E.2d 167, 170 (1999). "The credibility of witnesses ... [are] for the hearing examiner to determine." *Fairmont Specialty Services v. West Virginia Human Rights Com'n*, 206 W.Va. 86, 90, 522 S.E.2d 180, 184 (1999) quoting *Westmoreland Coal Co. v. West Virginia Human Rights Comm'n*, 181 W.Va. 368, 373, 382 S.E.2d 562, 567 n. 6

(1989); see also *Martin v. Randolph Bd. of Educ.*, 195 W.Va. 297, 304, 465 S.E.2d 399, 406 (1995) (stating that "ALJ's credibility determinations are binding unless patently without basis in the record").

12. The Circuit Court concluded as a matter of fact that the Appellants' fear was not reasonable and that their continued presence at work further supported such a finding. See Paragraphs 23 and 24 of Circuit Court's Findings of Fact. Before ALJ Townsend the Appellants testified about the violent physical interaction between Mr. Cyphers, the council member, the judge, Appellate Gill and two city police officers. Likewise, each Appellant testified about their personal interactions with Mr. Cyphers and his reputation for being violent. Additional evidence establishes the seriousness of the situation with Mr. Cyphers in that City Hall was closed for a number of days following the altercation, that it was a council member who offered to provide the Appellants with police protection so that they would return to work and that a number of emergency council meetings were scheduled to address the situation. A month after the physical altercation, the Appellants clearly still were fearful and memorialized their fears in a memorandum to the Mayor.

In addressing whether a claimant was disqualified for misconduct because he refused to drive a truck all night where he was exhausted and had previously become violently ill under the same circumstances, fearing for his safety at that of others, this Court stated

A claimant for unemployment compensation benefits is not guilty of disqualifying "misconduct" when the claimant refuses to perform a job assignment because he or she reasonably and in good faith believes that performance of the job assignment would jeopardize the claimant's own health or safety or the health or safety of others. See *Amador v. Unemployment Insurance Appeals Board*, 35 Cal. 3d 671, 200 Cal. Rptr.

298, 677 P.2d 224 (1984); *Smallwood v. Florida Department of Commerce*, 350 So.2d 121 (Fla. Dist. Ct. App.1977) (refusal to drive a truck); *Webster v. Potlatch Forests, Inc.*, 68 Idaho 1, 187 P.2d 527 (1947); *Ferguson v. Department of Employment Services*, 311 Minn. 34, 247 N.W.2d 895 (1976); *McLean v. Unemployment Compensation Board of Review*, 476 Pa. 617, 383 A.2d 533 (1978) (refusal to drive a truck); *Kuhn v. Department of Employment Security*, 134 Vt. 292, 357 A.2d 534 (1976). *Amador v. Unemployment Insurance Appeals Board*, 35 Cal. 3d 671, 200 Cal. Rptr. 298, 677 P.2d 224 (1984), *supra*, contains this perceptive remark:

It can no longer be maintained that a 'diligent' worker is one who blindly follows his or her employer's orders regardless of the potential consequences. The health [or safety] hazards of the modern work environment-- to employees, consumers, and the population at large--are serious and widespread, and the record of employers in controlling those hazards does not inspire such confidence that a reasonable worker can be expected to trust invariably his or her employer's judgment. 35 Cal. 3d at 683, 200 Cal. Rptr. at 305, 677 P.2d at 231.

In this context the unemployment compensation claimant must show that his or her fears that harm will result from performing the job assignment are not merely subjective but are objectively based upon his or her experience or the experience of other workers under similar circumstances. See, e.g., *Moore v. Unemployment Insurance Appeals Board*, 169 Cal.App.3d 235, 244, 215 Cal. Rptr. 316, 321 (1985), *review denied*, Sep. 11, 1985; *McLean v. Unemployment Compensation Board of Review*, 476 Pa. 617, 623, 383 A.2d 533, 537 (1978). "[O]ne cannot [properly] determine whether an employee's action is misconduct within the humanitarian purpose of the unemployment compensation statutes without judging the reasonableness of his act from his standpoint in the light of the circumstances facing him and the knowledge possessed by him at the time." *City of Dallas v. Texas Employment Commission*, 626 S.W.2d 549, 551 (Tex. Ct. App.1981). [FN4]

*Peery v. Rutledge*, 177 W.Va. 548, 551-552, 355 S.E.2d 41, 44-45 (1987) (footnote omitted). The Appellants personal experiences with Mr. Cyphers, the information that the Appellants received about Mr. Cyphers' previous acts of violence after the physical altercation, and the lack of information about the resolution of their working environment concerns are objective facts that establish Appellants' reasonable fear of harm.

13. Finally, the Circuit Court found as a matter of fact that "to the extent that [the Board of Review and ALJ] find that it is solely Mayor Matthews' conduct which determines how the City of Hinton responded to the [Appellants], they are plainly wrong." Paragraphs 30 of Circuit Court's Findings of Fact. The record supports the Board of Review's conclusion that there was fault on the part of the employer because the Mayor could have but did not take any action to rectify the situation at City Hall. The Mayor did not so much as provide a courtesy response to the Appellants' detailed letter expressing sincere concern based on their previous experiences with Mr. Cyper and about violence and harassment in the workplace. The Mayor admitted that she did not discuss the hiring of a special officer with the Chief of Police and that there had been friction and a breakdown in communication. HT at 143 and 146. Near the end of the hearing the Mayor testified that she felt that she was in a hostile environment but that she "[j]ust ignored it." HT at 149.

This Court has rather consistently recognized that: "Unemployment compensation statutes, being remedial in nature, should be liberally construed to achieve the benign purposes intended to the full extent thereof." Syllabus Point 6, *Davis v. Hix*, 140 W. Va. 398, 84 S.E.2d 404 (1954)." Syllabus, *Mercer County Board of Education v. Gatson*, 186 W. Va. 251, 412 S.E.2d 249 (1991). More directly, "unemployment compensation statutes should be liberally construed in favor of the claimant[.]" *University of West Virginia Bd. of Trustees/West Virginia University v. Aglinsky*, 206 W. Va. 180, 182, 522 S.E.2d 909, 911 (1999) quoting *Davenport v. Gatson*, 192 W. Va. 117, 119, 451 S.E.2d 57, 59 (1994).

Because a liberal reading of the evidence, as required by *Davis v. Hix, id.*, objectively establishes that physical violence occurred in the workplace involving a man

who openly carried a deadly weapon and that the Mayor, as a pattern, failed to address the safety concerns of the Appellants despite her own beliefs that a hostile environment existed, Appellants had a reasonable fear that their health and safety were being jeopardized and that the Mayor was not going to reduce, much less eliminate, their ongoing concerns. A review of the record as a whole establishes that the findings of fact adopted by the Board of Review are not clearly wrong. In that the law favors the construction which does not work a disqualification, this Court should defer to the Board of Review's holding that the Appellants are not disqualified. See *Ohio Valley Medical Center, Inc. v. Gatson* 202 W. Va. 507, 510, 505 S.E.2d 426, 429 (W. Va., 1998).

VI.

**CONCLUSION**

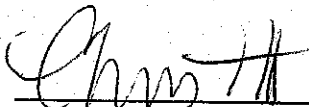
For the reasons set forth above, Appellants respectfully request that the judgment of the Circuit Court of Kanawha County be reversed by this Honorable Court.

*Respectfully submitted,*

*WV Bureau of Employment Programs,  
Board of Review*

*By Counsel*

**DARRELL V. McGRAW, JR.  
ATTORNEY GENERAL**



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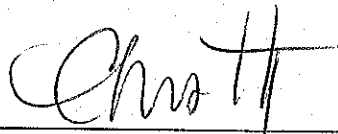
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**CERTIFICATE OF SERVICE**

I, Christie S. Utt, counsel for the West Virginia Bureau of Employment Programs Board of Review, hereby certify that on this 22<sup>ND</sup> day of June, 2005, I served a true copy of the foregoing "Brief of Board of Review" upon counsel of record, by depositing the same in United States first class mail, postage paid, addressed as follows:

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