

32509

**IN THE WEST VIRGINIA SUPREME COURT OF APPEALS**

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

**Appellants,**

**v.**

**No. 041722**

**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.**

**REPLY BRIEF ON BEHALF OF APPELLANTS,  
CINDY L. ADKINS, CYNTHIA S. COOPER, AND BILLIE J. GILL**

**I. INTRODUCTION**

Appellants submit this reply brief to respond to the theories advanced by Appellees City of Hinton and Sanitary Board (collectively referred to hereafter as "Appellee"). Boiled down to its essence, Appellee's theory is that lawless lawyering, resulting in an admittedly erroneous lawless judicial process below, should be affirmed by this Court because the Circuit Court nevertheless "got it right" in its ultimate ruling. As the following discussion will demonstrate, Appellee's apologia for lawlessness must be rejected and the decision by the Circuit Court below reversed.

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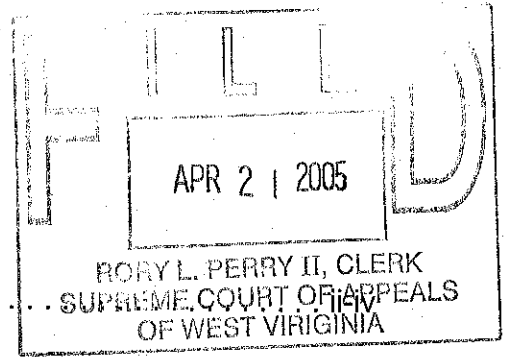


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## II. LEGAL ARGUMENT

### A. THE CIRCUIT COURT ERRED BY ADMITTING AND CONSIDERING APPELLEE'S AFFIDAVITS.

Interestingly, Appellee does not seriously dispute (nor could it) that the Circuit Court committed legal error by its flawed process below. Rather, Appellee submits that "[i]f there was any error committed, such error was harmless and would not have effected [sic] the outcome of this case." Appellee's Brief, p. 13. To support this absurd proposition, Appellee suggests that the Circuit Court's admission into evidence, and consideration of, Affidavits which (a) were objected to promptly and strenuously,<sup>1</sup> and (b) never were subject to cross examination, amounted to no reversible error because "...Judge King did not rely on these affidavits in reversing the decisions of the Board of Review and ALJ." Appellee's Brief, p. 12. To this, Appellants simply reply that Judge King explicitly stated in his Final Order, "...[Appellee's] submitted affidavits, which are not part of the record, **will be taken into consideration.**" Final Order, p. 2 (bold added for emphasis).<sup>2</sup> Obviously, by its own admission, the Circuit Court did "consider" the Affidavits offered, albeit for the first time on appeal, by Appellee. This was clear and prejudicial error by the Circuit Court, and contrary to this Court's well-settled standard of review for unemployment compensation appeals.<sup>3</sup> Nor, as noted previously, can

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<sup>1</sup>Appellants immediately filed a motion to strike the Affidavits as soon as they were tendered to the Court below by Appellees.

<sup>2</sup>Under Appellee's convoluted and lawless logic, it apparently is impertinent of Appellants to ask, why would the Affidavits (which were not part of the record until the Circuit Court made them such) be admitted into evidence if the Circuit Court did not consider them?

<sup>3</sup>See, e.g., Syl. Pt. 3, Adkins v. Gatson, 192 W.Va. 561, 453 S.E.2d 395 (1994). See also, Patton v. Gatson, 530 S.E.2d 167, 167, 207 W.Va. 168, 168 (1999); Ohio Valley Medical Center, Inc. v. Gatson, 505 S.E.2d 426, 427, 202 W.Va. 507, 507 (1998); Ohio Valley Medical Center, Inc. v. Gatson, 496 S.E.2d 181, 182, 201 W.Va. 231, 232 (1997); Private Industry Council of Kanawha County v. Gatson, 483 S.E.2d

Appellee's Affidavits be justified as "new evidence."<sup>4</sup> The information contained therein could or should have been presented during the hearing before the ALJ.

**B. THE CIRCUIT COURT ERRED BY RULING THAT APPELLANTS DID NOT LEAVE THEIR JOBS WITH GOOD CAUSE INVOLVING FAULT ON THE PART OF THEIR EMPLOYER.**

Appellee also urges that, despite an admittedly flawed process, the Circuit Court's legal analysis of this case was correct and therefore its decision nevertheless should be affirmed. However, Appellants have proven that they left their jobs with good cause involving fault on the part of their employer, W.Va. Code §21A-6-3(1), and therefore are not disqualified from unemployment benefits. See also, Curry v. Gatson, 180 W.Va. 272, 376 S.E.2d 166 (1988) (sexual or racial harassment may constitute good cause for quit). As noted previously, this Court has recognized that workplace violence is an unfortunate reality of contemporary life, and women disproportionately bear its burden. Fairmont Specialty Services v. WVHRC, 206 W.Va. 86, 106, 522 S.E.2d 180, 200 (1999) (Starcher, J., concurring).

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550, 551, 199 W.Va. 204, 205 (1997); Smittle v. Gatson, 465 S.E.2d 873, 876, 195 W.Va. 416, 419 (1995); Davis v. Gatson, 464 S.E.2d 785, 786, 195 W.Va. 143, 144 (1995). See also, W.Va. Code §21A-7-21.

<sup>4</sup>The BOR's procedural rules permit motions to present additional evidence not offered before the ALJ only if specific criteria establishing "good cause" are satisfied. See, e.g., 84 CSR 84-1-5.8 (1999). The Circuit Court gave no consideration to this rule, nor to whether Appellee City of Hinton had satisfied its heavy burden to justify submitting additional evidence on appeal.

Appellee cannot show that the additional evidence was "not available" previously, or that it did not know, nor reasonably could have known, of the evidence in question at the time, as required by 84 CSR 84-1-5.8 (1999). The three affidavits submitted by Appellee City of Hinton, and admitted into evidence by the Circuit Court, were from Mayor Mathews (who actually testified at the ALJ hearing); City Council member Larry Meador (who could have testified at the ALJ hearing but was not called by Appellee); and Melvin "Rex" Cyphers (who could have testified at the ALJ hearing but was not called by Appellee).

Appellee's theory as to why Appellants lacked good cause to quit is that there were no "actual threats" (Appellees' Brief, p. 6), directed by Cyphers against the Appellants specifically. This theory is incorrect, both factually and legally. Initially, it must be recalled that although Cyphers was introduced to Appellants by Mayor Mathews as an "administrator," he was *armed with a handgun in a shoulder holster*.<sup>5</sup> Of course, Cyphers remained so armed throughout his brawl with City Council member Bobby Wheeler, a man who was much older, sicker,<sup>6</sup> and of considerably smaller stature, than Cyphers. When Appellant Gill physically intervened to try to prevent Cyphers from "...bust[ing] Bobby [Wheeler]'s head up against the wall," Cyphers snarled, "Get your hands off me, you bitch. You're under arrest." Appellee apparently views this verbiage and behavior by Cyphers as something other than "threat[ening]." Appellant Cooper witnessed the foregoing events first-hand, and frantically called the West Virginia State Police to stop the brawl Cyphers began with Wheeler. Appellant Adkins returned to City Hall (after attending to a brief family matter) to find Cyphers, whom she already feared because he had sexually harassed her as a teenager, handcuffed by Hinton Police Officers and on the floor in the hallway of City Hall. Thus, Appellee's theory that Appellants did not experience threatening and intimidating behavior and statements by Cyphers simply is not accurate factually.

Legally, Appellants submit that Appellee misreads the West Virginia statute and caselaw. There is nothing in either the West Virginia statute or caselaw here or elsewhere requiring that "actual threats" or violence against only the direct victim of an

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<sup>5</sup>If Cyphers did not plan on patrolling a police beat, for what purpose would he be armed, if not for intimidation?

<sup>6</sup>Wheeler has had two heart attacks.

assault or battery qualify as good cause to quit.<sup>7</sup> Rather, the test is whether the employee(s) who quit, regardless of whether they were the victim, reasonably feared that her/their physical safety was in jeopardy. In re Gardiner, 707 N.Y.S.2d 533 (App.Div.3d Dept. 2000).<sup>8</sup> In this case, the fact-finder who actually heard the witnesses testify, the ALJ (and Deputy, both of whom were affirmed by the BOR), concluded that Appellants' fears for their safety in the aftermath of the Cyphers brawl were reasonable. The reasonableness of Appellants' fears is confirmed by the action of Hinton City Council,<sup>9</sup> establishing police protection for them at City Hall to enable them to return to

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<sup>7</sup>The absurdity of Appellee's position is illustrated by the following hypothetical: Employee A enters the workplace with a semi-automatic gun and brandishes it in the immediate presence of Employee B. Employees C and D witness the assault or its immediate aftermath and quit, reasonably fearing that Employee A may return to the workplace and do the same or worse to them. Under Appellee's (as well as Judge King's) theory, Employees C and D are disqualified from unemployment compensation. This simply is not the law.

<sup>8</sup>Moreover, the caselaw is clear that an employee who fears workplace violence need not stay on the job until it explodes into an actual, physical attack. Taylor v. Board of Review, 20 Ohio App.3d 297, 485 N.E.2d 827 (1984) ("an employee cannot be expected to remain on the job until an actual physical assault takes place"); Condo v. Board of Review, 158 N.J.Super. 172, 385 A.2d 920 (1978) (threats of harm by co-worker, short of actual attack, furnished good cause); Coleman v. Employment Security Department, 25 Wash.App. 405, 607 P.2d 1231 (1980) (verbal assault sufficient basis for quitting; no disqualification).

<sup>9</sup>Appellee erroneously suggests it was Mayor Mathews who established police protection. It was not; rather it was done by order of a majority of City Council. The Circuit Court adopted this error, mistakenly stating that police protection was provided "...the day after the altercation," and that "Mayor Mathews acted swiftly to provide a secure working environment for Claimants." Final Order, p. 9. In fact, Appellants did not return to work (and City Hall effectively was closed) until the Wednesday after the altercation, which took place on Thursday of the preceding week. T., 27. Further, it was Councilman Meador, not the Mayor, who devised the solution of police protection to encourage Appellants to return to work. T., 27.

work.<sup>10</sup> Appellants respectfully submit that Judge King's contrary finding of fact based on an erroneously de novo review of (a) a cold transcript, and (b) affidavits which never should have been considered, must be reversed.

Appellee has suggested that Appellants quit because of the dismissal of the charges in the Magistrate Court case of State v. Stone, not because of any fear of Cyphers and workplace violence. Appellant Cooper aptly summarized her rationale for quitting as follows: "I think [Cyphers] was actually hired to terrorize us, to scare us and get us out of the building, make us move." T., 37. Appellant Cooper went on to state:

I think it's a very frightening situation when you have an altercation right in front of you. Any of us could have been hurt. If [Cyphers] would have pulled that gun, I would just hate to think.

T., 48. When pressed further, the following colloquy occurred on cross examination:

Q: ...by witnessing an altercation, that made you quit your employment?

A: For fear of my life, yes.

Q: Why were you fearful for your life if you weren't involved in the altercation?

A: ...it was after the altercation that everybody started telling us about Mr. Cyphers' reputations. [sic] Retired State Troopers who worked with him had had their lives threatened<sup>11</sup> and told us, 'He will get you. He will hide in an alley and get you.' I mean we were terrified.

T., 53. Simply put, the workplace hardships faced by these Appellants were at least as arduous and/or dangerous as those faced by the claimants in many decisions by this Court holding them to have quit their jobs with good cause involving fault on the part of

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<sup>10</sup>Appellant Cooper testified that, at a September 9, 2002 meeting, City Councilman Larry Meador said, "...he couldn't tell [Billie Gill] to come to work because he was in fear for her life. Councilman [Pat] Jordan agreed, as did Councilman [Bobby] Wheeler." T., 34. See also, T., 27.


<sup>11</sup>The record also reflects that Cyphers previously had threatened the life of a former Assistant Prosecuting Attorney in Summers County, Richard M. Gunnoe (erroneously noted as "Figlio" in the transcript), Esq. T., 24-26.

their employer.<sup>12</sup>

### III. CONCLUSION

In accordance with the foregoing discussion, the Appellants respectfully renew their request that the decision by the Circuit Court be reversed, and the prior decisions by the BOR, ALJ, and Deputy awarding benefits in each case, be reinstated.

CINDY L. ADKINS;  
CYNTHIA S. COOPER;  
and BILLIE J. GILL;  
Appellants / Claimants,  
By Counsel

  
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<sup>12</sup>See, e.g., Glass v. Gatson, 200 W.Va. 181, 488 S.E.2d 456 (1997) (per curiam) (temporary reassignment of 1/3 of a deceased mail clerk's duties to an escrow clerk was a substantial unilateral change in working conditions justifying her quitting); Wolford v. Gatson, 182 W.Va. 674, 391 S.E.2d 364 (1990) (per curiam) (25% reduction in hours and requirement that an employee clean her employer's home as part of her job justified a quit); Hunt v. Rutledge, 177 W.Va. 523, 354 S.E.2d 619 (1987) (per curiam) (unilateral change from working as an orderly to a nursing assistant, with newly-attendant patient care duties justified quit); Brewster v. Rutledge, 176 W.Va. 265, 342 S.E.2d 232 (1986) (reduction in pay of \$1.10 per hour and addition of janitorial duties to night watchman's job was good cause for a quit); Ross v. Rutledge, 175 W.Va. 701, 338 S.E.2d 178 (1985) (20-mile relocation of plant, and attendant commuting hardships, was good cause for quit); Rhodes v. Rutledge, 174 W.Va. 486, 327 S.E.2d 466 (1985); (wife of an enlisted military husband who "quit" her job on a military base when his assignment in the Philippines ended was held to have good cause for leaving) Murray v. Rutledge, 174 W.Va. 423, 327 S.E.2d 403 (1985) (employer's misrepresentations about the terms of employment provided good cause for quit).

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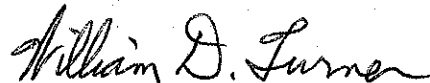
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WEST VIRGINIA BUREAU OF EMPLOYMENT PROGRAMS;  
COMMISSIONER, BUREAU OF EMPLOYMENT P  
PROGRAMS; CITY OF HINTON,

Respondents.

CERTIFICATE OF SERVICE

I, William D. Turner, counsel for the Appellants, Cindy L. Adkins, Cynthia S. Cooper,  
and Billie J. Gill, do hereby certify that on this, the 20<sup>th</sup> day of April 2005, a copy of the *Reply  
Brief on Behalf of Appellants, Cindy L. Adkins, Cynthia S. Cooper, and Billie J. Gill* has been  
sent to counsel for the Respondents via United States, first class mail, postage prepaid from  
Lewisburg, WV, addressed as follows:

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