

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.

**BRIEF ON BEHALF OF CITY OF HINTON AND
CITY OF HINTON SANITARY BOARD**

This Response Brief on Behalf of the City of Hinton and the City of Hinton Sanitary Board, is filed in support of an April 27, 2004 Order of the Circuit Court of Kanawha County, West Virginia, (Hon. Charles E. King, Jr. presiding), which reversed the Appellants' award of unemployment compensation benefits. The Circuit Court correctly found that the Appellants did not leave their jobs with good cause involving fault on the part of their employer.

I. STATEMENT OF FACTS

Appellants Cynthia S. Cooper and Billie J. Gill were employed by the City of Hinton on September 5, 2002. Appellant Cindy Adkins was employed by the City of Hinton Sanitary Board on September 5, 2002. On that date, a special police officer hired by the City of Hinton, Melvin "Rex" Cyphers, and a Hinton City Councilman, Bobby Wheeler, became involved in a physical altercation at City Hall. (Transcript at 20).

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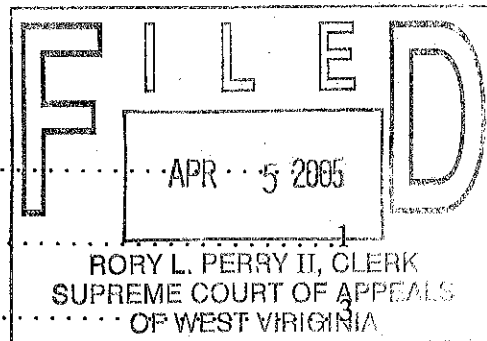


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Appellants Cooper and Gill witnessed this altercation, while Appellant Adkins did not. (Tr. at 20, 85, 124). Prior to, during and after this altercation, there is no question that Rex Cyphers did not make any threats of violence whatsoever directed toward the Appellants. (Tr. at 57, 102-103, 129-131).

After the altercation at City Hall, in order to address the Appellants' concerns, the City of Hinton arranged for the Appellants to have police protection at their employment for nearly a month. (Tr. at 27). This protection was discontinued on October 2, 2002 by Mayor Mathews, after it became known that Mr. Cyphers would not be returning to work for at least three months. (Tr. at 151).

On October 8, 2002, a trial was held in the case of State v. Stone. In that case, Appellant Billie Gill alleged that Councilman Al Stone verbally assaulted her in early 2002. (Tr. at 35, 113-116). However, the case was thrown out after the Magistrate Judge had the opportunity to hear a tape of the incident recorded by Al Stone. (Tr. at 35-36). Appellants Cooper and Gill had testified at the hearing, and after the tape was played at the trial and the case was dismissed, they were subjected to being called perjurers due to their testimony. (Tr. at 110). Mrs. Gill testified concerning the scene after the trial as follows:

A: There was other people coming in. I mean it was ongoing thing. The news media, the newspaper. I mean it was just like we were the awfulest things in the world. We were being called perjurers and everything. You have no idea.

Q: Now -

A: We were told, "Well, you all can't testify in the Cyphers case because you're two big liars." That's what they called me and Ms. Cooper. I mean -

(Tr. at 110). Appellants Cooper and Gill submitted their resignations the very next day, October 9, 2002. (Tr. at 158). Appellant Adkins submitted her resignation on October 10, 2002. *Id.* Each of them testified that the outcome of the trial of State v. Stone influenced their respective decisions to resign their employment. (Tr. at 36-37, 105, 114-115, 131).

II. LEGAL ARGUMENT

A. Even if the Circuit Court Applied the Wrong Standard of Review, A Different Result Would Not Have Been Reached Applying the Correct Standard

Appellants assert that findings of fact by the Unemployment Compensation Board are entitled to substantial deference unless a reviewing court believes the findings are “plainly wrong.” Syl.Pt.1, Kisamore v. Rutledge, 166 W. Va. 675, 276 S.E.2d 821 (1981). Nevertheless, Judge King’s Order made clear his belief that a different standard applies. His position is that a writ of certiorari in the Circuit Court of Kanawha County is the proper means for obtaining judicial review of a decision made by a state agency not covered by the West Virginia Administrative Procedures Act. Syl.Pt.3, Board of Educ., Lincoln County v. MacQueen, 174 W. Va. 338, 325 S.E.2d 355 (1984). Therefore, because the Administrative Procedures Act does not apply to contested cases involving the bureau of employment programs, the “circuit court is required to make an independent review of both law and fact in order to render judgment as law and justice may require.” Syl.Pt.3, Harrison v. Ginsberg, 169 W. Va. 162, 286 S.E.2d 276 (1982); *See* W. Va. Code § 29A-5-5.

Accordingly, Judge King purported to make an independent review of both law and fact in order to render judgment as law and justice required, instead of providing

some deference to the Board of Review's factual findings and reversing the decision only if it was "plainly wrong."

Despite the significance the Appellants place on their argument that Judge King used the wrong standard of review, such argument is ineffectual. No matter which standard of review of the Board's factual findings is correct, the Appellants' or Judge King's, the case clearly would be decided the same way regardless of the standard used.

First, there is no dispute that the circuit court does not accord special weight to the Board's conclusions of law, and the judgment of the Board will be reversed when it is based on an incorrect conclusion of law. Syl.Pt.1, Burks v. McNeel, 164 W. Va. 654, 264 S.E.2d 651 (1980). In the current situation, W. Va. Code § 21A-6-3(1) is at issue, specifically whether or not the Appellants' voluntary resignations, as a matter of law, constitute "good cause" involving fault on the part of the employer. The West Virginia Supreme Court of Appeals has found that "[t]he determination of whether there is "good cause" for ceasing employment within the meaning of West Virginia Code § 21A-6-3(1) is a question of law which must be answered in relation to the particular facts of each case." Ross v. Rutledge, 175 W. Va. 701, 704, 338 S.E.2d 178, 181 (1985) (emphasis added). In the present case, Judge King found after reviewing the record that Appellants' claim "does not constitute 'good cause' for resignation." Final Order at 8.

It is irrational and ridiculous to assert that a single altercation directed towards another is enough to constitute good cause to resign a place of employment. It is illogical to suggest that, in any work environment where an altercation ensues, other individuals can resign and collect benefits even if they were not a part of that altercation. To hold this would even suggest that those individuals who did not witness the altercation would be eligible to collect benefits. This rationale is absurd.

As such, this Court concludes that the Claimants failed to carry their burden of proving resignation for good cause involving fault of the employer. This Court must reverse the decision below. To not reverse would be clearly erroneous and contrary to law.

Id. at 9 (emphasis added). It is clear from Judge King's Final Order that he decided there was no "good cause" for Appellants to cease their employment. This is a question of law, for which no deference is afforded the Board of Review. Accordingly, no matter whether deference was properly afforded to the Board of Review's factual determinations, the claimants were disqualified from receiving benefits because the legal question of whether there was "good cause" for the Appellants to leave their employment was answered in the negative by Judge King. A judgment will not be reversed for any error committed by a circuit court, "unless such error, if it had not been committed, would have tended in some measure to produce a different result." Syllabus, Barnes v. Grafton, 61 W. Va. 408, 56 S.E. 608 (1907). In this case, no matter whether deference was given to the Board's factual findings, there would not have been a different result.

Furthermore, to the extent the Appellants argue Judge King erred in his legal conclusion that "[i]t is irrational and ridiculous to assert that a single altercation directed towards another is enough to constitute good cause to resign a place of employment", the Appellants are clearly wrong.

The Appellants cite several cases in support of their assertion that they are entitled to unemployment compensation benefits. These cases indicate that reasonable fears of workplace violence furnish good cause to quit. Taylor v. Board of Review, 485 N.E.2d 827 (Ohio.App. 1984); Condo v. Board of Review, 385 A.2d 920 (N.J.Super. 1978); Coleman v. Employment Security Department, 607 P.2d 1231 (Wash.App. 1980); Hat

Six Homes, Inc. v. Department of Employment, 6 P.3d 1287 (Wyo. 2000); In the Matter of Gardiner, 272 N.Y.S.2d 533 (App.Div.3d Dep't 2000); Stark v. Ross, 411 N.Y.S.2d 433 (1978). In fact, Judge King agreed with this proposition in his order. Final Order at 8.

However, the Appellants' reliance upon these cases to prove their entitlement to unemployment compensation benefits is misplaced. This is due to the fact that in each of these cases where a claimant received benefits, *actual threats were made toward the employee*. Taylor, 485 N.E.2d at 828 (Co-employee who had previously beat up complainant threatened, "You better have your jack ready when you get off work because I'll be waiting for you."); Condo, 385 A.2d at 922 (complainant continually threatened with physical violence by coworker); Coleman, 607 P.2d at 1232 ("you know what I'd like to do, I'd like to punch your cheek right down your throat."); Hat Six Homes, Inc., 6 P.3d at 1294 (sexual harassment along with "episodes of the vice-president throwing staplers, cellular phones, and drive way alarms about the office requiring [claimant] to duck to avoid being struck.").

This is in stark contrast to the instant case, where the Appellants admit that no threats or actions were taken toward them, or with reference to them.

This Court has recognized the types of conditions that may constitute "good cause" for leaving employment. "Customary working conditions not involving deceit or other wrongful conduct on the part of the employer are not a sufficient reason for an employee to leave his most recent work." Syl. Pt. 1, Amherst Coal Co. v. Hix, 128 W. Va. 119, 35 S.E.2d 733 (1945). Additionally, the Court has had the opportunity to recognize several instances where "good cause" for leaving employment is shown. *E.g.*,

Ross v. Rutledge, 175 W. Va. 701, 338 S.E.2d 178 (1985) (transportation hardship by virtue of employer's moving factory out of state); Murray v. Rutledge, 174 W. Va. 423, 327 S.E.2d 403 (1985) (employer misrepresentation as to terms and conditions of work); Curry, 180 W. Va. 272 (sexual and racial harassment).

Decisions from other jurisdictions interpreting "good cause" in the context of their own unemployment statutes are similar to the West Virginia requirement of showing some deceit or wrongful conduct on the part of the employer. A Louisiana appellate court has held that "[M]ere dissatisfaction with working conditions does not constitute 'good cause' for quitting employment, unless the dissatisfaction is based upon discriminatory or unfair or arbitrary treatment . . ." Curry, 180 W. Va. at 274 (quoting McGinnis v. Moreau, 149 So.2d 188, 190 (La.App.1963)).

Further, very similar to the case at issue is the decision of a New York court holding that a claimant's asserted fear for her life as a result of a conflict she had with a co-worker did not establish good cause for voluntarily leaving her employment where the record did not support claimant's contention that her physical well-being would have been jeopardized. In re Gardiner, 707 N.Y.S.2d 533 (App.Div.3d Dep't 2000). Likewise, the record in this case does not support the Appellants' contentions that their physical well-being would have been jeopardized. The incident between the administrator and the councilman did not personally involve any of the Appellants (except for claimant Gill's attack of Mr. Cyphers). Mr. Cyphers made no threats towards any of the Appellants, actual or implied. In fact, after the day of the incident, he had no contact whatsoever with any of the Appellants. Moreover, the Appellants' fear for their safety was based upon statements of reputation they heard from others.

In actuality, no deceit, wrongful conduct or discriminatory treatment has been alleged as the basis for the Appellants' resignations in this case. The closest the claimants came to asserting that their employer was responsible for their resignations was the statement that Mr. Cyphers should not have been hired. While fear for one's safety may constitute a reasonable cause for resigning, the term "good cause" should not be stretched so far to include situations where no threats or offensive contact whatsoever have occurred. This is true particularly where there has been no allegation of fault on the part of the employer other than hiring the individual in the first instance.

The Appellants cannot seriously equate witnessing one altercation that did not involve them with the threats actually directed to the employees in the above-cited cases. (In Cindy Adkins' case, she didn't even witness the altercation). This is particularly true where there has been no indication from the individual feared by the Appellants that he has any problem whatsoever with any of them.

The absurdity of Appellants' position is illustrated by the following testimony given by Cindy Cooper:

Q: And you weren't involved in that altercation, you just witnessed it?

A: Correct.

Q: Now, you're trying to tell the Judge that by witnessing an altercation, that made you quit your employment?

A: For fear of my life, yes. (Hearing Transcript at p. 53).

.....

Q: Now, I'll ask you again. Are you trying to tell me that for some reason after this incident you learned that he had a reputation and that based on that reputation, you thought that he randomly was going to come after you? Is that what you're trying to tell me?

A: Uh-huh. Yeah. (*Id.* at p. 55) (emphasis added).

The Appellants' theory simply pushes the boundaries of credibility too far. Under the theory advocated, employee A of a restaurant could witness a fight between employees B and C, subsequently hear of gossip that employee B was a dangerous person, come to the illogical conclusion that employee B was going to harm him without any statements or actions supporting such an intent, and then quit work and recover unemployment compensation benefits. As Judge King determined, this cannot be the law.

The second reason that Judge King's order should not be disturbed despite the standard of review used is that no matter which standard is used, it is clear that Judge King's decision would be the same because he determined that the decision of the Board of Review and ALJ were "plainly wrong." As previously noted, a judgment will not be reversed for any error committed by a circuit court, "unless such error, if it had not been committed, would have tended in some measure to produce a different result." Syllabus, Barnes v. Grafton, 61 W. Va. 408, 56 S.E. 608 (1907).

In this case, although Judge King purported in the beginning of his Order to give no deference to the determinations made by the Board of Review, he did in fact adhere to the "plainly wrong" standard of review enunciated in Kisamore v. Rutledge that the Appellants assert is the correct standard. 276 S.E.2d 821. This is evident upon reviewing Judge King's Order.

The Court finds that the findings of fact by the Board of Review and ALJ, to the extent that they find that the Claimants' fears were reasonable after September 5, 2002, are plainly wrong. (Final Order at 6) (emphasis added).

The Court finds that the findings of fact by the Board of Review and ALJ, to the extent that they find that it is solely Mayor Matthews conduct which determines how the City

of Hinton responded to the Claimants' fears, are plainly wrong. (Final Order at 7) (emphasis added).

After due and mature consideration of the briefs, the record, the pertinent law and the decision of the ALJ, the Court is of the opinion that a hearing on this matter is not necessary for the Court to render its decision. Subsequent to making an independent review of both law and fact, this Court finds that the ultimate decision and findings of the ALJ were plainly wrong. (Final Order at 10) (emphasis added)

It is clear that Judge King determined that the decision and findings of the Board and ALJ were "plainly wrong" within the standard advocated by the Appellants. Thus, even if Judge King enunciated the incorrect standard of review in his Final Order, it is clear that such error, if it had not been committed, would not have produced a different result.

Therefore, for the above reasons, the Final Order of Judge King determining that the Appellants were disqualified from receiving unemployment compensation benefits is proper and should be upheld. Consequently, Appellants' Appeal should be denied.

B. The Decision of the Circuit Court was not Influenced by Consideration of the Affidavits of Appellees, and Therefore a Different Result Would Not Have Been Reached in Their Absence

In their brief, Appellants assert that it was improper for Judge King to consider the affidavits submitted by the Respondent in his decision. Judge King decided that because he construed Appellants' appeal as a writ of certiorari, he was authorized to take evidence independent of that contained in the record of the lower tribunal. Final Order at 2. Nevertheless, the decision of the Court would have been the same regardless of whether the affidavits were considered.

Essentially, the material facts in the case are undisputed. There is no question that Appellants Billie Gill and Cindy Cooper witnessed a physical confrontation between Rex Cyphers and Bobby Wheeler. There is no question that Petitioner Cindy Adkins, an employee of the Sanitary Board, was not present or even in the building at the time of the confrontation. There is no question that Rex Cyphers never threatened the Appellants directly or indirectly, verbally or non-verbally. There is no question that Appellants base their fears of Rex Cyphers solely upon rumors they heard that he was a dangerous individual. There is no question Appellants continued working for over a month after the confrontation. There is no question that the City of Hinton stationed a policeman at City Hall for approximately a month after the confrontation. There is no question that at the time Appellants quit work, they were aware that if Rex Cyphers came back to work at all, it wouldn't be for months.

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. Nevertheless, Judge King stated that "[i]t must be noted that Mr. Cyphers is clearly at fault for the altercation between Mr. Wheeler and himself." Final Order at 9. Therefore, even if Cyphers affidavit was considered, it is clear that Judge King came to the same conclusion on the matter as did the Board of Review and the ALJ. Accordingly, even if the affidavit were not considered, the case would not have been decided differently.

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 Councilmen attempted to meet with the Appellants concerning their fears. Nevertheless, it is clear that Judge King did not consider this information (or consider it

relevant), because he does not mention it at all in his order. The only evidence mentioned on the issue of fault on the part of the employer is with regard to the police protection provided after the incident.

The assertion that the City or Mayor Mathews did not act properly after the altercation is misplaced due to the prompt and adequate police protection that was provided the day after the altercation. Mayor Mathews acted swiftly to provide a secure working environment for Claimants. Such prompt and adequate action cannot be construed to indicate Petitioner is at fault for not addressing concerns surrounding the altercation.

Final Order at 9. Therefore, it is clear that even if the affidavits were not admitted, the case would not have been decided differently.

It is clear from the above arguments that Judge King did not rely on these affidavits in reversing the decisions of the Board of Review and ALJ. Therefore, the case would not have been decided differently in absence of the affidavits. Consequently, the Appellants' Petition for Appeal should be denied.

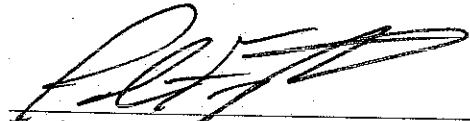
CONCLUSION

The material facts of this case are not in dispute. A review of Judge King's Order and the record proves that the facts and law point to three inescapable conclusions:

1) Appellants had no "good cause" for resigning their employment; 2) There was no fault attributable to the City of Hinton regarding Appellants' resignations; 3) The Appellants are disqualified from receiving unemployment compensation benefits. Judge King found that the findings and conclusions of the Board of Review and ALJ were "plainly wrong." Furthermore, his legal determination of what does, and what does not, constitute "good cause" for resigning employment is correct. Accordingly this case was correctly decided.

If there was any error committed, such error was harmless and would not have effected the outcome of this case. Accordingly, the Appeal should be denied.

CITY OF HINTON and CITY OF
HINTON SANITARY BOARD,
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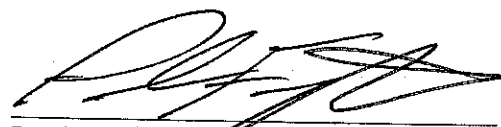
Appellees.

CERTIFICATE OF SERVICE

I, Paul L. Frampton, Jr., counsel for Appellee City of Hinton, do hereby certify that service of the "BRIEF ON BEHALF OF CITY OF HINTON AND CITY OF HINTON SANITARY BOARD" was made upon the parties listed below by mailing a true and exact copy thereof to:

William D. Turner, Esq.
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in a properly stamped and addressed envelope, postage prepaid, and deposited in the United States mail this 4th day of April, 2005.


Paul L. Frampton, Jr.