

BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS

DEBORAH K. MAY,

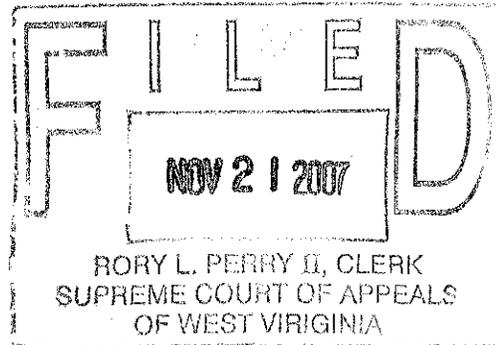
Appellant,

v.

Appeal No. 072216

CHAIR and MEMBERS, Board of Review;
COMMISSIONER, West Virginia Bureau of
Employment Programs; and
MATE CREEK SECURITY, INCORPORATED,
Employer,

Appellees.



BRIEF OF APPELLANT, DEBORAH K. MAY

Prepared on behalf of Appellant
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I. KIND OF PROCEEDING AND NATURE OF RULING BELOW

When the appellant, Deborah K. May, was compelled to quit her job on November 18, 2005, as personal maid to Mr. Don Blankenship because of unilateral changes in her job instigated solely by her employer, she filed a claim for unemployment benefits.

On December 5, 2005, Ms. May's unemployment claim was denied by the deputy who found that Ms. May had left employment voluntarily without good cause involving fault on the part of the employer. The deputy's decision was appealed. On January 12, 2006, Chief Administrative Law Judge Marcella Townsend affirmed the ruling of the deputy. An appeal to the Board of Review was prosecuted and, on March 1, 2006, the Board of Review affirmed the ruling of Chief Administrative Law Judge Townsend.

Further appeal to the Circuit Court of Kanawha County resulted in a summary one page Order, entered January 19, 2007, which affirmed the Board of Review's denial of unemployment benefits.

II. STANDARD OF REVIEW

Upon review by this Court, findings of fact made by the Board of Review should be set aside when plainly wrong. *W. Va. Code* § 21A-7-21. Conclusions of law are subject to *de novo* review. *See, e.g., Ohio Valley Medical Center, Inc. v. Gatson*, 201 W. Va. 231, 496 S.E.2d 181 (1997).

III. STATEMENT OF FACTS

Deborah K. May was employed by Mate Creek Security, Inc., on May 4, 2001. Tr. 9.¹ At

¹All references to the transcript and to ALJ Exhibits and Claimant's Exhibits refer to the evidentiary hearing conducted before the ALJ.

the time of her hire, she accepted a job as a personal maid at a three story home owned by Rawl Sales in Sprigg, West Virginia.² Tr. 11. The specific duties assigned to her at the time of her hire included maintaining and cleaning that home, as well as laundry, shopping and other personal chores for the executive, Mr. Don Blankenship, who occupied the home. Tr. 10-11. The duties assigned at the time of hire were capable of being performed during a normal eight hour work day. Id. There is no evidence that she was told she would be required to work overtime on a regular basis. In fact, Ms. May testified that "... I worked an eight hour day for a long time and never had to work any overtime because I had even time to do everything I had to do." Tr. 11.

After performing those duties for about 20 months, her employer unilaterally changed her assigned duties in a significant manner.

In December 2002, Mr. Blankenship decided to move from Sprigg, West Virginia, to two cabins in Kentucky described as fairly large "business complex cabins." Tr. 11-12. Mr. Blankenship's son remained in residence at the Sprigg home. Tr. 12. Because the maid previously assigned to clean these two large cabins had been fired, Ms. May was asked to take on the additional duties of cleaning the two-cabin complex as well as continuing to be responsible for the Sprigg home. Tr.11. Ms. May was also asked to "move them over there." She moved them and she performed the additional duties as directed. Tr. 12. She also took on additional duties, such as cleaning and laundry, related to guests who stayed at the cabins. Tr. 13.

In June 2003, Ms. May moved Mr. Blankenship back to the Sprigg house. After that move, she was required to continue cleaning the cabin complex. Tr. 13.

²Mate Creek Security, Inc. and Rawl Sales are companies related to Massey Energy. Don Blankenship, chief executive officer of Massey Energy, was Ms. May's ultimate supervisor during the entire time she worked as an employee of Mate Creek Security.

In July 2003, Ms. May asked for an increase in wages. Tr. 12. She pointed out that she was driving further and had taken on additional responsibilities related to the cabins. Tr. 13. Despite the significant changes in her duties and additions to her duties, no raise was awarded.

Additional unilateral changes in her duties occurred in 2004 when Mr. Blankenship purchased a "big coach bus" which was outfitted with a living room, kitchen, bedroom, laundry facilities and so on. Tr. 13-14. Ms. May was required to clean the bus, usually on a weekly basis, and also was required to keep the bus stocked with beverages and snacks as needed. Tr. 15. Despite the significant changes in her duties and additions to her duties, no raise was awarded.

Further unilateral changes occurred in her duties when, on January 1, 2005, a four story house "on top of a humongous hill" was added to Ms. May's responsibilities. Tr. 14. Despite the significant changes in her duties and additions to her duties, no raise was awarded.

Throughout the time of her employment, Ms. May's employment assignments were made by Mr. Blankenship directly or by his subordinates, such as his secretary. As her duties increased, whether due to additional homes to be cleaned or additional duties such as those related to Mr. Blankenship's pets, Ms. May's workload became such that she could not keep everything accomplished to the satisfaction of her employer. As Ms. May testified:

"I couldn't keep up with anything and it got to the point where I was unhappy and sick, and I went to the hospital in October [2005]. I thought I was having a heart attack. I was just so stressed out." Tr. 14.

Ms. May testified that the stress resulted from an increase in duties as well as from the behavior of her employer.

At the time her employment terminated on November 18, 2005, Ms. May was paid \$8.86 per hour. During her four and a half years of employment with Mate Creek Security, she had

received one raise of \$0.30 per hour. That raise was awarded after she had been employed for one year, prior to the time that the many unilateral changes in the terms and conditions of her work duties occurred.

IV. ASSIGNMENT OF ERROR

The circuit court erred as a matter of law in concluding that Ms. May voluntarily quit her job without good cause on the part of her employer, thereby disqualifying her from receiving unemployment benefits.

V. DISCUSSION OF THE LAW

A. AN UNQUESTIONABLE, SUBSTANTIAL AND UNILATERAL INCREASE IN DUTIES AMOUNTS TO "GOOD CAUSE INVOLVING FAULT ON THE PART OF THE EMPLOYER"

The issue before the Court is whether the claimant, Ms. May, is disqualified from receiving unemployment compensation benefits for voluntarily leaving her job "without good cause involving fault on the part of the employer." *W. Va. Code* § 21A-6-3(1). The administrative law judge made no specific finding of fact as to whether the admitted unilateral changes in the terms and conditions of Ms. May's employment were substantial or whether such changes were insubstantial.

Nonetheless, the ALJ did find that Ms. May quit her job "primarily due to the fact that she was asked to take on additional work responsibilities yet did not receive an increase in her salary. She also felt it was difficult to please Mr. Blankenship." The ALJ also found that Ms. May, after providing notice that she was quitting, was asked to reconsider and was asked what she would require to continue in the job. Ms. May sought an increase in pay "to \$12.00 per hour, a company vehicle and medical insurance to cover her children. That request was denied." The

ALJ further found that there was “no fault on the part of the employer.”

Ms. May was not represented by counsel at the evidentiary hearing conducted by the ALJ. Nonetheless, Ms. May capably set forth the reasons why she quit the job in the claim documents filed with the Bureau of Employment Programs, in the hearing conducted by the ALJ, and in the submission Ms. May made to the Board of Review.

The written claim Ms. May provided to the Bureau of Employment Programs when she filed for unemployment benefits states: “I quit because I was not given a pay raise and over the years **my job duties kept increasing**. The last pay raise I received was in 2002. During my employment at least 5 times I asked for pay increases that were denied.” ALJ Ex. 2 (emphasis added). She further explained that the “final incident” relative to the continuation of increasing duties occurred when Mr. Blankenship advised that he would be bringing a “German police attack dog into the house,” a dog she would be required to care for. ALJ Ex. 2.

During the evidentiary hearing Ms. May testified about the changes in her work duties. Having been hired to clean one house in Sprigg and to keep that home stocked with specific provisions and meet very specific requirements of Mr. Blankenship, her job then expanded as similar duties at the two cabin complex in Kentucky, some distance from the Sprigg house, were added to her workload. Cleaning and stocking a large coach bus and later the similar duties at the house on the “humongous” hill were added. She was provided no additional help. Her original assigned duties could be performed within a regular forty hour work week. As duties were added, her work hours became longer and longer. One payroll slip she submitted at the evidentiary hearing reveals that she worked 33 hours of overtime in one week; she noted on that exhibit that she had worked “excessive overtime due to more responsibilities added by

employer.” Claimant’s Ex. 1.

The extraordinary breadth of her duties is set forth in a nine page hand-written summary which Ms. May provided during the evidentiary hearing. Claimant’s Ex. 3. The required performance of all of those duties, most of which were added to her workload since the time her original duties were assigned, resulted in a substantial change in the terms and conditions of her work as did the treatment she received from Mr. Blankenship.

On two different occasions, Mr. Blankenship physically grabbed Ms. May. Tr. 15. Once, while trying to stock the coach bus after a last minute notice to do so, Mr. Blankenship grabbed her arm, pulled her towards him, and told her to leave the bus. Tr. 16. Ms. May found that treatment to be embarrassing since many of Mr. Blankenship’s guests were on the bus when the incident occurred. Id. On another occasion, Mr. Blankenship sent her to McDonald’s to purchase breakfast for him and his interior decorator. Ms. May placed the order, accepted the food and returned to the Blankenship home. As she unpacked the food, Mr. Blankenship discovered that McDonald’s filled the order incorrectly; Mr. Blankenship started slinging the food and he grabbed Ms. May’s wrist, telling her “Any time I want you to do exactly what I tell you to do and nothing more and nothing less.” Tr. 18-19.

As another example of his strident behavior, Ms. May testified that Mr. Blankenship directed, through his secretary, that Ms. May write him an explanation of why there was no ice cream in the freezer at one of the houses. Tr. 21. He believed she was mocking him by failing to purchase the ice cream he wanted. Tr. 21-22. Ms. May did write an explanation on July 11, 2005. Claimant’s Ex. 4. She pointed out that he did not seem to realize “the magnitude and heavy volume of work that has been put in my lap since I began working here, with only one

\$.30 cent raise in the last four years. Today you have crushed me.” Id. She apologized and asked that he tell her if he did not want her to work any longer. Id. Mr. Blankenship sent back a hand-written note acknowledging that she was under a lot of stress and that his comments added to her stress. Claimant’s Ex. 5. He acknowledged her financial difficulty and proceeded to advise that she was well paid in comparison to others in West Virginia and Kentucky and explained that folks working for him sometimes decreased his comfort level. Id. In an explanation apparently intended to be critical of the food purchases she had made for the house, he gave an example related to low carb foods.³ Id. However, he did not fire Ms. May.

On or about July 12, 2005, Ms. May forgot to leave a coat hanger out for Mr. Blankenship to hang his coat. Tr. 27. Mr. Blankenship’s reaction was to tear the coat hanger and tie rack out of the closet. Tr. 27-28. He left her a note explaining that she would get a call explaining why he tore it out. Claimant’s Ex. 5, p. 2. He wrote her that he “had 3 dogs stolen in 9 days, mines robbed, people complain incessantly, all of them want more money. None of them do what their (sic) asked.” Id. Mr. Blankenship’s secretary spoke to Ms. May and explained that “he tore the coat hanger and rack and stuff all out...that if I had to fix it and repair it and put everything back, it would be a good reminder that I was not to forgot (sic) that hanger in the future.” Tr. 28.

Other examples are in the record. As Ms. May testified, there was no single thing that caused her to conclude that she could no longer work under the changed terms and conditions of her employment. Instead, she testified, “[I]t’s verbal stuff that has went on over the years. It’s

³Ms. May testified that there was ice cream in the freezer but it apparently was not what Mr. Blankenship wanted. Tr. 21. She was not provided a shopping list. Id.

not just really one big thing. It's just many things. It's added work on top of work, on top of work, on top of work that one person cannot physically do." Tr. 36.

Ms. May's testimony, as well as the exhibits she introduced, were not contradicted in any manner. The employer chose not to call any witnesses at the hearing. No other witness rebutted any of the specific testimony given by Ms. May.

It has long been the law in West Virginia that "[s]ubstantial unilateral changes in the terms of employment furnish 'good cause involving fault on the part of the employer' which justify employee termination of employment and preclude disqualification from the receipt of unemployment compensation benefits." Syllabus Point 2, in part, *Murray v. Rutledge*, 174 W. Va. 423, 327 S.E.2d 403 (1985); Syllabus, *Brewster v. Rutledge*, 176 W.Va. 265, 342 S.E.2d 232 (1986); Syllabus Point 1, *Wolford v. Gatson*, 182 W. Va. 674, 391 S.E.2d 364 (1990). Here, the administrative finding of fact, affirmed by the circuit court, that Ms. May left work without good cause involving fault on the part of the employer is clearly wrong and should be set aside. The ALJ made no specific finding as to whether substantial unilateral changes in the terms of Ms. May's employment had occurred despite the evidence that such unilateral changes caused her to leave her employment.

Murray v. Rutledge, supra, established the rule of law now before this Court: "substantial unilateral changes in the terms of employment furnish 'good cause involving fault on the part of the employer' which justify employee termination of employment and preclude disqualification from the receipt of unemployment compensation benefits." In *Murray*, the claimant had been employed as a full-time restaurant manager. A few months later, the claimant was assigned additional duties of working in the kitchen. Her work hours increased significantly

and her compensation was not increased. This Court held she justified her resignation from employment and that she was entitled to unemployment benefits.

Since *Murray*, this Court has continued to apply that rule and has given some quantitative guidance as to the meaning of “substantial” unilateral changes sufficient to constitute good cause.

For example, in *Wolford, supra*, an employee was found entitled to benefits when she suffered a 25% reduction in her work hours and was assigned the additional duties of cleaning her employer’s home. This Court, affirming the circuit court, determined that such unilateral changes were sufficient to constitute good cause involving fault on the part of the employer; and this Court disagreed with the circuit court’s ruling that the employee had to speak to her employer regarding the reason or reasons she was being “forced” to leave work prior to quitting.⁴ Here, Ms. May’s workload increased from a job she could perform in a forty hour work week to a job that required a substantial amount of overtime to complete the additional duties assigned. From an assignment of cleaning one house to an assignment of cleaning four houses and a coach bus, one can safely conclude that her work load had increased by more than 25%; clearly she meets the *Wolford* threshold.

The ALJ found that “[t]he claimant quit her job primarily due to the fact that she was asked to take on additional work responsibilities yet did not receive an increase in her salary. She also felt it was difficult to please Mr. Blankenship.” Thus the ALJ recognized that there had been a unilateral change in terms and conditions of employment but the ALJ failed to analyze in any manner whether such unilateral changes were substantial and amounted to “good cause” as

⁴Ms. May gave a two week notice prior to quitting. She also indicated she would stay if she were provided an increase in compensation, a company vehicle and health insurance for her children.

recognized in our jurisprudence. Instead, the ALJ merely concluded that “[t]here is no fault on the part of the employer causing the claimant to quit.” The ALJ failed to assess the significant and substantial quantitative increase in Ms. May’s duties. The ALJ failed to assess Ms. May’s increasing level of stress related to her employer’s behavior—even though the employer had acknowledged his awareness that he was adding to her stress by his less than understandable, and, on occasion, seemingly childish behavior.

Both the type and scope of Ms. May’s duties had changed. She was asked to take on an ever increasing workload, was required to travel and use her personal vehicle in order to clean homes in another state, and was working well beyond a standard forty hour work week. The work load was more than she could handle; the stress from being unable to keep up with the ever increasing workload sent her to the hospital with symptoms she thought suggested a heart attack just weeks before she finally concluded she had to leave her employment. Tr. 14.

Ms. May testified that she was not given any increase in pay or benefits despite the increasing work load except for a thirty cent per hour raise she received at the end of her first year of employment.⁵ True enough, she was paid for the overtime she worked. Claimant’s Ex. 1. But the workload which was expected to be accomplished far exceeded the scope of the duties which she was assigned when she accepted the position. Mays spoke to her “supervisor”⁶ and explained that she had gone to the doctor because of stress and, *before she quit*, told him she was

⁵Mate Creek asserts that Mr. Blankenship was not responsible for paying her even though he clearly directed the duties she performed. One is left to assume that Mr. Blankenship was provided personal maid service as a corporate benefit and that the value of the same has been attributed to him as personal income.

⁶She spoke to Mr. Osbourne, president of Lauren Land Company, a subsidiary of Massey Energy. Tr. 42.

tired of her duties increasing with no pay increase. Tr. 19-20. Mate Creek and Mr. Blankenship opted to do nothing. As Ms. May pointed out in both in exhibits and in her testimony, "...[t]he reason I left was to get away from the stress and the treatment that I've had. I mean, it's not all necessarily about pay, but I haven't got any pay raises." Tr. 44 (emphasis added).

For four and a half years she worked hard, worked overtime as she was required to accept ever-increasing duties and worked under conditions of treatment that remind one of an earlier era in our history. By misplacing the focus on the fact that Ms. May did seek pay raises which were never awarded after the first year of employment, the administrative analysis affirmed by the circuit court simply overlooks the substantial unilateral changes in duties. This Court should not support a rule of law which permits the denial of unemployment benefits and authorizes an employer to change an employee's duties as much as it wants so long as that employee has requested, and been denied, a pay raise.

Instead the Court should analyze the issue as it has in the past. How much work can an employer load onto an employee before there has been a substantial and unilateral change in working conditions which amounts to "cause" on the part of an employer? How much stress must an employee experience by over a four-fold increase in work load before there is "cause"? How much verbal and physical abuse must an employee experience before there is "cause"?

Ms. May struggled to avoid the decision to quit. She worked until she could no longer tolerate the unilateral changes. She worked until she knew that she could take no more and would have to find another job.

VI. CONCLUSION

The Court should reverse the rulings below which denied unemployment benefits to Ms. May because the uncontradicted evidence clearly establishes that substantial unilateral changes in the terms of employment occurred; those changes establish “good cause involving fault on the part of the employer” which justified her leaving her employment and preclude disqualification from the receipt of unemployment compensation benefits.

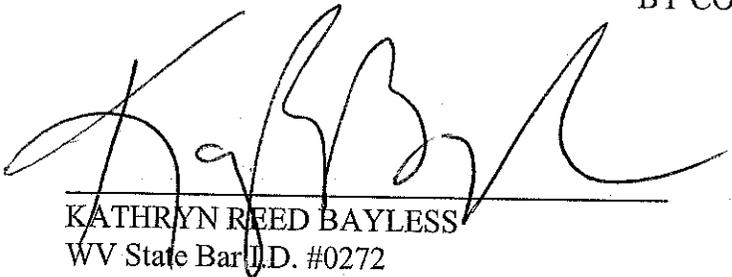
This is not a case which impacts the “at will” rule of employment. Reversal here does not mean that employers, such as Mate Creek Security, cannot continue to make unilateral changes in an employee’s duties nor does it mean that employers cannot require that overtime be worked by employees. Reversal here does mean that where **substantial unilateral changes** are made in an employee’s terms and conditions of employment, then that employee may leave that job and not be disqualified from receiving unemployment benefits while he or she looks for other employment.

Unemployment statutes are remedial in nature and it has long been held that such provisions should be liberally construed so as not to disqualify claimants from receiving benefits. *W. Va. Code* § 21A-6-3; *see, e.g., Summers v. Gatson*, 205 W. Va 198, 517 S.E.2d 295 (1999).

Ms. May has proven that she is entitled to benefits and respectfully requests this Court to so order.

Respectfully submitted,

DEBORAH K. MAY, Appellant
BY COUNSEL.

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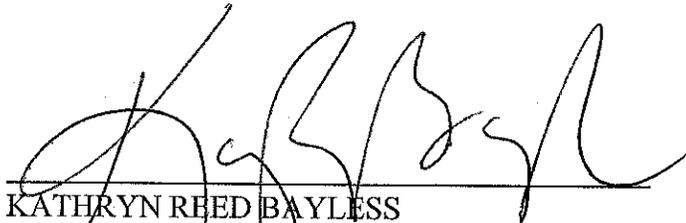
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CERTIFICATE OF SERVICE

I, Kathryn Reed Bayless, do hereby certify that a true and accurate copy of the foregoing Brief of Appellant, Deborah K. May was served upon counsel of record this 20th day of November, 2007, via United States mail, postage prepaid as follows:

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