

In The Supreme Court Of Appeals Of West Virginia

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No. 070863

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**CLEARON CORP.,**

*Appellant,*

v.

**BOARD OF REVIEW, WEST VIRGINIA DIVISION OF EMPLOYMENT SECURITY,  
JAMES C. DILLON, CHAIR; QUETTA MUZZLE, COMMISSIONER OF THE  
DEPARTMENT OF EMPLOYMENT SECURITY; ARTHUR C. BOGGS; AND GARY W.  
CHILDRESS,**

*Appellees.*

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**Honorable Paul Zakaib, Jr.  
Circuit Court of Kanawha County  
Civil Action No. 04-AA-80**

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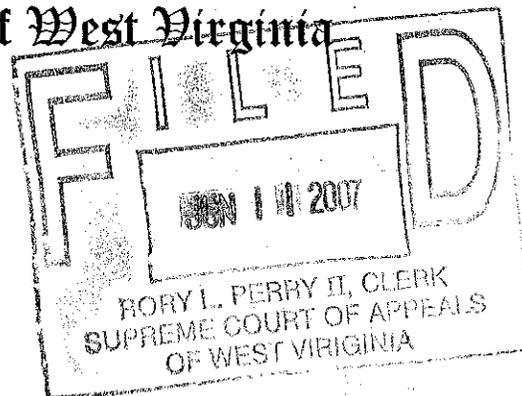
**BRIEF OF APPELLANT**

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## I. INTRODUCTION

Appellant, Clearon Corp. ("Clearon"), appeals an order of the Circuit Court of Kanawha County, West Virginia, reversing the West Virginia Bureau of Employment Programs, Board of Review (which affirmed the Administrative Law Judge's order) holding that Appellees Boggs and Childress were disqualified from receiving unemployment compensation benefits because they voluntarily quit their jobs after taking a lucrative and undisputedly voluntary early retirement package.

The circuit court erroneously held that Bureau of Employment Programs Local Office Letter 2200 applied and that Appellees were, in essence, involuntarily terminated. Accordingly, the Court should reverse the circuit court's order and hold that because Appellees voluntarily quit their jobs, they are disqualified from receiving unemployment compensation benefits.

## II. STATEMENT OF FACTS

Appellant, Clearon, located in South Charleston, West Virginia, is a small chemical manufacturer. Appellees Arthur C. Boggs and Gary W. Childress were Clearon Corp. employees.<sup>1</sup> In late 2003, Mr. Boggs was the company's fifth-most senior employee, and Mr. Childress was the company's most senior employee, having worked there since 1967.<sup>2</sup> Appellee Dillon was at the time the Chair of the

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<sup>1</sup> (See ALJ Decision ¶ 1, *In the matter of Boggs*, No. R-2004-1248 (W. Va. Bur. of Employment Programs Bd. of Review Dec'n Apr. 21, 2004) ("*Boggs* ALJ Decision"), attached as Ex. A; ALJ Decision ¶ 1, *In the matter of Childress*, No. R-2004-1074 (W. Va. Bur. of Employment Programs Bd. of Review Dec'n Apr. 21, 2004) ("*Childress* ALJ Decision"), attached as Ex. B.)

<sup>2</sup> (See Clearon Seniority List, attached as Ex. O (listing Childress as #1 out of 88 plant employees and Boggs as #5.)

Unemployment Compensation Board of Review, and Appellee Muzzle was at the time acting commissioner of the West Virginia Bureau of Employment Programs.<sup>3</sup>

Facing tremendous competition, Clearon decided to reduce costs. Rather than laying off its employees—an unattractive option, in October 2003, Clearon instead offered a voluntary early retirement package to employees who met certain qualifications (that they were at least fifty-five years old and had at least ten years of service).<sup>4</sup> The offer was quite generous and included both a \$16,000.00 cash bonus, and a waiver of certain pension vesting reductions (amounting in Childress's case to a 4% increase in his pension and in Boggs's case a 28% increase).<sup>5</sup>

The next month, November 2003, Boggs and Childress (along with twenty-seven of the fifty-five other eligible employees) both accepted Clearon's offer.<sup>6</sup> As a result, no employees were ever laid off. Indeed, as Clearon's human resources manager, Bill Konopasek, testified before the BEP, because the package was so attractive and because so many people voluntarily took advantage of it, the company never even had to face the decision as to whether any layoffs might have been necessary.<sup>7</sup> In December 2003, both Boggs and Childress voluntarily left their jobs, and both were handsomely compensated.<sup>8</sup>

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<sup>3</sup> See W. VA. CODE §§ 21A-7-17 (requiring, in pertinent part: "Parties to the proceedings before the board shall be made defendants in any such appeal [to the Circuit Court of Kanawha County]; and the commissioner shall be a necessary party to such judicial review.") & -20 ("The board shall be made a party to every judicial action which involves its decisions. . .").

<sup>4</sup> (See *Boggs & Childress* ALJ Decisions ¶ 2; W. Konopasek Tr. at 15-16, attached as Ex. N.)

<sup>5</sup> (*Boggs & Childress* ALJ Decisions ¶ 3; W. Konopasek Tr. at 15-17.)

<sup>6</sup> (*Boggs & Childress* ALJ Decisions ¶ 4; W. Konopasek Tr. at 19.)

<sup>7</sup> (See *Boggs & Childress* ALJ Decisions ¶¶ 5 & 6.)

<sup>8</sup> (See A. Boggs Tr. at 45; G. Childress Tr. at 35 ("Q: And you accepted the early retirement package? A: Yes, Sir. Q: And you received a bonus of \$16,000? A: Yes, sir. Q: And you got the

Clearon accepts, *arguendo* and purely hypothetically, that *if* a certain number of employees had *not* retired, then perhaps *some* employees *might* eventually have been laid off. But the company never even reached that decision, because it is undisputed that enough employees *did* retire.

In any event, though, this hypothetical is wholly irrelevant to Boggs's and Childress's claims, because it is likewise undisputed that *no matter what, neither Mr. Boggs nor Mr. Childress ever faced any prospect whatsoever of involuntary termination*: "[N]o, I didn't think I would have lost my job. If I lost mine, like Bill [Konopasek] said, everyone probably would have lost theirs too. There was never a threat that they were going to . . . ."<sup>9</sup>

Indeed, both testified that they took the offer primarily because it was lucrative. "Q: And why did you [accept the offer]? A: Partially because it was a good package [and partially because] some of those younger people that really needed their job . . . [a]nd like I said, it was a good package."<sup>10</sup>

Mr. Boggs and Mr. Childress then did something outlandish: Notwithstanding that they both voluntarily accepted Clearon's generous early retirement package, in March 2004, they both applied for unemployment compensation from the West Virginia Bureau of Employment Programs ("BEP").<sup>11</sup>

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enhanced pension deal, right? A: Yes."); W. Konopasek Tr. at 24 ("Q: Well, let me ask you this; are you saying if only ten people had accepted the deal instead of 29, that still, in this particular case at least, Mr. Childress or Mr. Boggs would not have been . . . . A: They would have never been laid off. We would had to have shut the facility down to get those two [laid off].")

<sup>9</sup> (A. Boggs Tr. at 48; *see also Boggs & Childress ALJ Decisions* ¶¶ 5 & 6; W. Konopasek Tr. at 20-21, 23-24.)

<sup>10</sup> (A. Boggs Tr. at 45-46.)

<sup>11</sup> *See* W. VA. CODE § 21A-7-1 (claim procedure).

Although a BEP deputy initially determined that Boggs and Childress were both eligible and qualified to receive such benefits, as those terms are used in the relevant statutes,<sup>12</sup> discussed *infra*, Clearon prevailed in its appeal before Administrative Law Judge William W. Smith.<sup>13</sup>

After an April 7, 2004 hearing, ALJ Smith held that both Boggs and Childress were disqualified from receiving benefits because they both left their jobs at Clearon voluntarily without good cause involving fault on the part of Clearon.<sup>14</sup> On June 9, 2004, both men appealed the ALJ's ruling to the BEP's Board of Review, but that Board affirmed the ALJ's decisions that they were both disqualified.<sup>15</sup>

On July 7, 2004, both men appealed the Board's decision to the Circuit Court of Kanawha County, West Virginia.<sup>16</sup> Their cases were eventually consolidated,<sup>17</sup> and on November 3, 2006, the Honorable Paul Zakaib, Jr., reversed the agency's Board, holding that Local Office Letter 2200 applied and Appellees were not disqualified from receiving unemployment compensation benefits.<sup>18</sup>

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<sup>12</sup> (A. Boggs Deputy's Decision, attached as Ex. J; G. Childress Deputy's Decision, attached as Ex. K.) See W. VA. CODE § 21A-7-3 (deputy's decision).

<sup>13</sup> See W. VA. CODE § 21A-7-7 to -8 (appeal to ALJ).

<sup>14</sup> (See *Boggs & Childress* ALJ Decisions at 2-3.)

<sup>15</sup> (See A. Boggs Bd. of Review Decision, attached as Ex. L; G. Childress Bd. of Review Decision, attached as Ex. M.) See W. VA. CODE § 21A-7-9 to -10 (appeal to Board of Review).

<sup>16</sup> See W. VA. CODE § 21A-7-17 (judicial review). (See 07/21/2004 letters from G. Dillon to Clearon, attached as Exs. C & D; Boggs Petition for Appeal, attached as Ex. E; Childress Petition for Appeal, attached as Ex. F.)

<sup>17</sup> (Nov. 12, 2004, Order (granting Appellees' Aug. 2, 2004 motion to consolidate).)

<sup>18</sup> In the response to Appellant's petition for appeal, Appellees suggest that this case is about deference to an administrative agency's interpretation of its own regulations. This suggestion is incorrect. First, as noted, both the agency's ALJ and Board of Review ruled *against* Appellees; it was the circuit court that reversed this ruling. And second, the scope of judicial deference to an agency's interpretation of its own regulations is not so broad as to permit an application of those regulations (if Local Office Rule 2200 can properly be so deemed) in such a manner as to yield an *ultra vires* result, as would necessarily be the case here: application of Local Office Letter 2200 to the facts of this case

On May 10, 2007, this Court granted Appellant's petition. Pending before the Court is Clearon's timely *Appeal* from Judge Zakaib's order.<sup>19</sup>

### III. ASSIGNMENT OF ERROR

**THE CIRCUIT COURT ERRED BY HOLDING THAT W. VA. CODE § 21A-6-3(1) DID NOT APPLY TO DISQUALIFY BOGGS AND CHILDRESS AND THAT LOCAL OFFICE LETTER 2200 INSTEAD APPLIED, AND IN CONCLUDING THAT EITHER BOGGS OR CHILDRESS IS QUALIFIED TO RECEIVE UNEMPLOYMENT COMPENSATION BENEFITS.**

### IV. DISCUSSION OF LAW

#### A. The Standard of Review.

The single issue in this case is a legal question, not a factual one. The circuit court's decision is, therefore, entitled to "no deference," and the Court's review thereof will be *de novo*.<sup>20</sup> In this case, while "[d]isqualifying provisions of the Unemployment Compensation Law are to be narrowly construed", syl. pt. 1, *Peery v.*

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would directly contradict both the applicable statutory mandate and the jurisprudence squarely on point.

<sup>19</sup> See W. VA. CODE § 21A-7-27 ("The judgment of the circuit court shall be final unless reversed, vacated or modified on appeal to the supreme court of appeals in accordance with the provisions of section one, article six, chapter twenty-nine-a of this code."). Although Judge Zakaib's order purports on its face to only apply to Appellee Boggs's case, the cases were consolidated, and it is unclear whether the Circuit Court intended its order to also apply to Appellee Childress. Except for the very slight difference noted, Boggs's and Childress's cases are materially identical (*see* Boggs's & Childress's Motion to Consolidate at 1 ("these two cases . . . both involve the same set of facts and same legal issues") & 2 ("Each case involves virtually identical facts and the legal issues are the same in both cases")). Accordingly, to the extent that the Circuit Court intended its order to apply to both, Clearon appeals both here.

<sup>20</sup> See *Keesee v. Gen. Refuse Serv., Inc.*, 216 W. Va. 199, 204, 604 S.E.2d 449, 454 (2004) ("Where the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a *de novo* standard of review.") (internal quotations and citation omitted); *cf.* syl. pt. 1, *Herbert J. Thomas Mem'l Hosp. v. Bd. Of Review Of W. Va. Bur. Of Employment Programs*, 218 W. Va. 29, 620 S.E.2d 169 (2005) ("The findings of fact of the Board of Review of the West Virginia [Bureau of Employment Programs] are entitled to substantial deference unless a reviewing court believes the findings are clearly wrong. If the question on review is one purely of law, no deference is given and the standard of judicial review by the court is *de novo*." ) (citation omitted) (quoting syl. pt. 3, *Adkins v. Gatson*, 192 W. Va. 561, 453 S.E.2d 395 (1994)).

*Rutledge*, 177 W. Va. 548, 355 S.E.2d 41 (1987), no construction, no matter how narrow or liberal, can possibly support the circuit court's decision.<sup>21</sup>

**B. The Trial Court erred by holding that Local Office Letter 2200 applied to this case and in concluding that Appellees are qualified to receive benefits.**

The only issue decided by the circuit court, and thus the only issue on appeal, was and is whether Boggs and Childress were disqualified from receiving unemployment compensation benefits as a result of their voluntarily retiring from employment with Clearon.<sup>22</sup> The agency and circuit court both looked to two sources

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<sup>21</sup> Although not before the Court in this appeal, if the specific question were relevant, "[t]he determination of whether there is 'good cause' for ceasing employment within the meaning of [W. VA. 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). Likewise, because this case is not about the persuasive force of the evidence, but instead the meaning of the law, the rule that "the burden of persuasion is upon the former employer to demonstrate by the preponderance of the evidence that the claimant's conduct falls within a disqualifying provision of the unemployment compensation statute," *Peery*, 177 W. Va. at 552, 355 S.E.2d at 45 (internal citations omitted), has no application here.

<sup>22</sup> As noted, for purposes of this appeal, Clearon assumes Boggs's and Childress's initial eligibility *arguendo*. Cf. *Ohio Valley Med. Ctr., Inc. v. Gatson*, 202 W. Va. 507, 510, 505 S.E.2d 426, 429 (1998) ("This Court has . . . recognized that West Virginia's statutory eligibility and disqualification provisions concerning the receipt of unemployment compensation benefits establish a two-step process. . . . The first step involves determining whether an individual is eligible to receive such benefits, and the second step is to consider whether the individual is disqualified. . . .").

And while Appellees briefed the issue of whether Clearon sought a substantial change in the conditions of their employment, *see, e.g.*, syl. pt. 1, *Murray v. Rutledge*, 174 W. Va. 423, 327 S.E.2d 403 (1985) ("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 voluntarily. . . . Syl., *Amherst Coal Co. v. Hix*, 128 W. Va. 119, 35 S.E.2d 733 (1945)."), the circuit court (like both the ALJ and Board of Review) did not decide the issue in its conclusions of law, instead basing its decision to reverse the agency solely on its finding that Boggs and Childress did not "voluntarily" leave under Local Office Letter 2200. Accordingly, that issue is not before this Court on appeal. Compare *Trumka v. Clerk of Circuit Court of Mingo County*, 175 W. Va. 371, 374-75, 332 S.E.2d 826, 830 (1985) ("This Court will not pass on a nonjurisdictional question which has not been decided by the trial court in the first instance.") (citations, quotations, and internal quotations omitted), *with* syl. pt. 2, *Mowery v. Hitt*, 155 W. Va. 103, 181 S.E.2d 334 (1971) ("Upon an appeal to this Court from a judgment of a circuit court entered in a civil action, if it appears that certain questions were properly presented for decision but not considered or decided by the trial court, this Court may reverse the judgment of the trial court and remand the case to that court for decision of the questions thus properly presented for decision but not decided.").

In any event, as noted, Appellees testified that they took the early retirement package because it was lucrative. (*See, e.g.*, A. Boggs Tr. at 48 ("[A]lthough they did change some of the rules in the

to answer that question: W. VA. CODE § 21A-6-3(1), and BEP Local Office Letter 2200.

As the ALJ correctly determined, § 21A-6-3(1) and the Local Office Letter require the same thing: *i.e.*, that Boggs and Childress are disqualified.

Pursuant to the applicable statute, Appellees are disqualified from receiving unemployment benefits:

Upon the determination of the facts by the commissioner, an individual shall be disqualified for benefits . . . [f]or the week in which he or she ***left his or her most recent work voluntarily without good cause involving fault on the part of the employer*** and until the individual returns to covered employment and has been employed in covered employment at least thirty working days.

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W. VA. CODE § 21A-6-3(1).<sup>23</sup> The provision works to "disqualify those employees who are voluntarily unemployed and who therefore should not be entitled to the same benefits and treatment as involuntarily unemployed individuals." *Gibson v. Rutledge*, 171 W. Va. 164,166, 298 S.E.2d 137, 140 (1982).

Although "[u]nemployment compensation statutes, being remedial in nature, should be liberally construed to achieve the benign purposes intended to the full extent thereof," syl. pt. 6, *Davis v. Hix*, 140 W. Va. 398, 84 S.E.2d 404 (1954), "[t]he statute is not intended, however, to apply to those who 'willfully contributed to the

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bidding procedure, and it eliminated my chance of bidding to other departments that were probably better jobs . . . [.] *But that's not . . . I didn't really use that as a reasoning, but it's basically just a good package.*" (emphasis added).)

<sup>23</sup> Cf. W. VA. CODE § 21A-6A-1(12)(G) ("An individual shall not be eligible to receive extended benefits with respect to any week of unemployment in his eligibility period if such individual has been disqualified for regular benefits under this chapter because he or she voluntarily left work, was discharged for misconduct or refused an offer of suitable work unless the disqualification imposed for such reasons has been terminated in accordance with specific conditions established under this subdivision requiring the individual to perform service for remuneration subsequent to the date of such disqualification.").

cause of their own unemployment.' " *Hill v. Bd. of Review*, 166 W. Va. 648, 651, 276 S.E.2d 805, 807 (1981) (quoting *Bd. of Review v. Hix*, 126 W. Va. 538, 541, 29 S.E.2d 618, 619 (1944)).

Appellees argued before the agency and the circuit court that BEP's "Local Office Letter 2200" applied to the circumstances of this case and excused their decision to voluntarily retire. This argument is misplaced.

Local Office Letter 2200, written in 2002, interpreted the "left voluntarily" provision of § 21A-6-3(1) and said that where an employee is faced with the decision to either "quit or 'get quit' " and *that employee* decides to quit, such a departure is not "voluntary" within the meaning of the statute.<sup>24</sup>

Under BEP's sensible interpretation, "[a]n employee shall not be disqualified in situations where an employer notifies employees that some employees will be laid off, and allows *the* employees to take a mutually agreed upon election *rather than involuntary selection*."<sup>25</sup> In such a case, the employee-turned-claimant "*who volunteers for a layoff* shall not be disqualified from receiving benefits if the employer has an established workforce reduction plan that allows *the employee* to volunteer to be laid off *due to a lack of work situation, and the claimant's separation actually resulted from a lack of work*."<sup>26</sup> Under Local Office Letter 2200, "individuals who are determined to have elected to leave employment *under these*

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<sup>24</sup> As it is irrelevant to the instant appeal, Petitioner takes no position here as to whether Local Office Letter 2200, where purportedly applicable by its terms, would comply with BEP's statutory authority. Here, it is beyond doubt that the Letter simply does not apply. (To the extent that it was meant to apply to this case, it would be plainly wrong and in excess of the agency's statutory authority to allow benefits to an employee who has voluntarily quit.)

<sup>25</sup> (Local Office Letter 2200 at 1, attached as Ex. I (emphasis added).)

<sup>26</sup> (*Id.* (bold and italics added).)

*conditions* will be considered to have left work voluntarily with good cause involving fault on the part of the employer."<sup>27</sup>

Appellees' theory, however, stands this all on its head. According to the theory that they offered to the circuit court, if an employer decides to layoff *any* employees but decides nevertheless to offer the same attractive voluntary separation incentive to *all* employees (even the ones not facing so much as the possibility of involuntary termination), and *any other* employee (*i.e.*, any employee *not* facing termination) elects to take such wholly voluntary separation incentive, that employee did not "voluntarily" leave his job.

For example, in their brief to Judge Zakaib, Appellees argued that "it is apparent that the administrative law judge disagrees with the policy stated in" Local Office Letter 2200.<sup>28</sup> They said:

For example, the administrative law judge notes that the claimant could have continued to work. *Local Office Letter 2200 specifically provides that **whether the claimant could have continued to work is not relevant.*** What is important is that [*sic* the] employer have in place a workforce separation plan.<sup>29</sup>

Appellees have entirely missed the point, for what ALJ Smith disagreed with was not the Letter rule, but *Appellees' erroneous contention* that the Letter rule should apply to a case like theirs. If it did, then as noted *supra*, the ALJ would have been correct in disagreeing with it and in refusing to apply it as violative of the BEP's plain statutory authority.

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<sup>27</sup> (*Id.* at 2 (emphasis added).)

<sup>28</sup> (Boggs Br. at 3, attached as Ex. G.) Childress's brief was identical. (See Childress Br., attached as Ex. H.)

<sup>29</sup> (Boggs Br. at 3 (emphasis added).)

Of course, Local Office Letter 2200 does *not* mean this. Indeed, it is uncharacteristically clear on this point. Because it is undisputed that neither Boggs nor Childress is an employee who "take[s] a mutually agreed upon election ***rather than involuntary selection***" and that neither was a "volunteer[]" for a layoff," neither was "***the employee***" facing involuntary termination, and neither Boggs's nor Childress's separation "actually result[] from a lack of work."

In other words, Appellees' contention that "[t]he essence of Local Office Letter 2200 is that once an employer decides to reduce its work force, employees who are offered incentive to leave voluntarily are not disqualified from receiving benefits"<sup>30</sup> regardless of whether or not *they* were facing termination is just wrong. Instead, what the Letter rule actually *says* is that employees who are *required* to choose between an offer of incentive to leave voluntarily *or the threat of leaving involuntarily* are not disqualified from receiving benefits, because under such conditions, it cannot be said that they left voluntarily. But here, it is undisputed that neither Boggs nor Childress was ever subject to the latter: *i.e.*, to the threat either to retire or else be laid off.

Appellees argument before the circuit court that the agency should be entitled to deference in its interpretations of its organic statutes, while facially appealing, is for the same reason, not only misplaced, but actually undercuts their position. As both the agency's ALJ and Board of Review recognized, Local Office Letter 2200 *requires*, rather than prevents, Boggs's and Childress's disqualification.

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<sup>30</sup> (Boggs Br. at 5; *see also id.* (arguing, erroneously, that "[t]he elements that are necessary to invoke Local Office Letter 2200 are: (1) an employer-initiated plan to downsize; (2) the establishment of the voluntary election package; and (3) the election by an employee to accept that package."))

"[A] voluntary quit is defined as encompassing 'the free exercise of the will.'<sup>31</sup> Only "[w]here . . . the job is unavailable to the claimant whether she stays or leaves [is there] no free exercise of the will and therefore no voluntary quit."<sup>32</sup>

The instant case, however, is very different. It is undisputed that Mr. Boggs and Mr. Childress faced no such Hobson's choice: they were free to stay and continue working, protected by their seniority. Like the claimant in *Philyaw v. Gatson*,<sup>33</sup> Boggs's and Childress's "position was always available to [them]. [They] held [their] destiny in [their] own hands. [They] triggered the disqualifying event by freely choosing to" take Clearon's early retirement package.<sup>34</sup>

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<sup>31</sup> *Rhodes v. Rutledge*, 174 W. Va. 486, 488, 327 S.E.2d 466, 468 (1985) (citing *State v. Hix*, 132 W. Va. 516, 522, 54 S.E.2d 198, 201 (1949)); see also *id.* (recognizing that where "the employee had no choice but to leave her employment," she could not be said to have voluntarily quit).

<sup>32</sup> *Id.* This somewhat unremarkable proposition is consistent with other states' positions applying the same rule. See, e.g., *Ky. Unemployment Ins. Comm'n v. Murphy*, 539 S.W.2d 293, 294 (Ky. 1976) (defining "good cause" for leaving as existing "only when the worker is faced with circumstances so compelling as to leave no reasonable alternative but loss of employment"); *Lake v. State, Unemployment Appeals Comm'n*, 931 So.2d 1065, 1066 (Fla. Ct. App. 2006) (discussing *In re Astrom*, 362 So.2d 312 (Fla. Ct. App. 1978): "[There], employees of a company were advised that the company was moving to New York. The employees were given the choice of early retirement and increased retirement benefits, or continuing to work until an undetermined date in the future. Several claimants who elected early retirement filed for unemployment benefits, and the third district held that by leaving their employment for early retirement, the employees had voluntarily left their employment without good cause attributable to the employer."); *In re Scism*, 27 A.D.3d 938, 938-39, 811 N.Y.S.2d 479, 480 (N.Y. App. Div. 2006) ("It has been held that the decision to accept an early retirement package when continuing work is available does not constitute good cause for leaving employment . . . . Claimant, in effect, did just that by leaving her job to accept the bridge package when she knew her job was not in jeopardy. Accordingly, we find no reason to disturb the Board's decision [that claimant was disqualified from receiving unemployment insurance benefits because she voluntarily left her employment without good cause]."); *Billings v. Director Employment Sec. Dept.*, 133 S.W.3d 399 (Ark. Ct. App. 2003) (affirming denial of benefits where senior employees who were not in danger of losing their jobs nonetheless took voluntary separation package offered to everyone).

<sup>33</sup> 195 W. Va. 474, 466 S.E.2d 133 (1995).

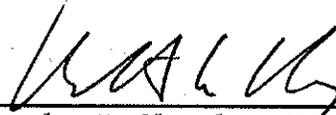
<sup>34</sup> 195 W. Va. at 479-80, 466 S.E.2d at 138-39.

## V. CONCLUSION

"The purposes of the [Unemployment Compensation] Act are only served when an available and willing worker who, *against his will and contrary to his choice*, is compelled to leave his employment, receives compensation."<sup>35</sup> Unlike such workers, Mr. Boggs and Mr. Childress "exercised [their] free will and voluntarily decided to" leave, "thereby terminating [their] employment,"<sup>36</sup> for which they were handsomely compensated.<sup>37</sup> They should not be permitted to double-dip.

WHEREFORE, Appellant prays that the Court **REVERSE** the decision of the Circuit Court of Kanawha County.

Dated this 11<sup>th</sup> day of June 2007.



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<sup>35</sup> *Lee-Norse Co. v. Rutledge*, 170 W. Va. 162, 167, 291 S.E.2d 477, 482 (1982) (emphasis added).

<sup>36</sup> 195 W. Va. at 479-80, 466 S.E.2d at 138-39.

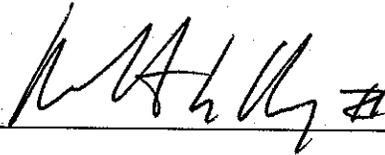
<sup>37</sup> Similarly, syl. pt. 2, *Lough v. Cole*, 172 W. Va. 730, 310 S.E.2d 491 (1983), and all of the cases on which it was predicated are likewise distinguished. Unlike plaintiff there, Appellees here were not faced with their employer's eminent "going out of business."

**CERTIFICATE OF SERVICE**

I hereby certify that on June 11, 2007, I served the foregoing *Brief of Appellant* on all counsel of record, by depositing a true copy thereof in the United States mail, postage prepaid, in an envelope addressed as follows:

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