

COURT OF APPEALS OF VIRGINIA

Present: Judges Baker, Elder and Fitzpatrick

STEPHEN J. HASSETT

v. Record No. 2549-92-4

MEMORANDUM OPINION*

PER CURIAM

August 24, 1993

VIRGINIA EMPLOYMENT COMMISSION
AND
THE NOLAND COMPANY

FROM THE CIRCUIT COURT OF FAIRFAX COUNTY
F. Bruce Bach, Judge

(Richard Peyton Whiteley; Susan Stoney, on brief), for
appellant.

(Stephen D. Rosenthal, Attorney General; Gaye Lynn
Taxey, Assistant Attorney General; Lisa J. Rowley,
Assistant Attorney General, on brief), for appellee
Virginia Employment Commission.

No brief for appellee The Noland Company.

Upon reviewing the record and the briefs of the parties, we
conclude that this appeal is without merit. Accordingly, we
affirm the decision of the circuit court. Rule 5A:27.

Stephen J. Hassett contends that the circuit court erred in
affirming the decision of the Virginia Employment Commission
("VEC") which denied Hassett unemployment benefits on the basis
of work-related misconduct.

The Claims Deputy found that Hassett was disqualified from
receiving benefits on the basis of work-related misconduct
because he was discharged for failure to report to work without
the proper notification to his employer. The Claims Deputy noted
that Hassett stated that he was absent from work for five days

*Pursuant to Code § 17-116.010 this opinion is not
designated for publication.

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and that he called his employer the first two days of his absence, but did not make contact thereafter.

Hassett appealed the decision of the Claims Deputy. The Appeals Examiner affirmed the Claims Deputy's determination. In his opinion, the Appeals Examiner stated that Hassett acknowledged that he was aware of the company policy that he must call to notify his employer every day he was absent from work and that he was to speak with his immediate supervisor, yet he did not follow this policy on one or more days. The Appeals Examiner concluded that Hassett's alcoholism did not justify his failure to properly notify the employer and speak with his supervisor every day he was absent from work when scheduled. The Appeals Examiner found that Hassett's actions manifested a willful disregard of his employer's interests and of the duties and obligations he owed his employer, sufficient to constitute misconduct.

Hassett appealed the Appeals Examiner's decision. The Special Examiner affirmed the Appeals Examiner's decision, finding that the employer established a prima facie case of misconduct once it showed that Hassett understood he was supposed to call his supervisor any day he was absent, yet failed to do so. The Special Examiner correctly recognized that the burden then shifted to Hassett to show mitigating circumstances to avoid the disqualification.

In reviewing the evidence regarding mitigation, the Special Examiner noted that the commission was not prepared to accept

Hassett's testimony that he had blacked out after consuming alcohol so as not to have been capable of notifying his supervisor. The commission discounted medical evidence submitted by Hassett on this issue. Dr. Baer's letter stated that it was "possible" that Hassett was in a blackout during the time he failed to contact his employer; however, it did not establish that a blackout actually occurred.

Moreover, the commission had grave doubts about Hassett's credibility in light of his lack of candor on his VEC Claim For Benefits Form ("Benefits Form"), and in the statement he gave to the local office deputy regarding why he was terminated from employment. The record reveals that on the Benefits Form, Hassett stated that he was "Laid Off," and in the interview with the local deputy, Hassett stated that he had been sick with a sore throat, and that he had not called in for the last three days because he assumed the company knew he was sick. Hassett testified that he did not discuss his "drinking in a blackout period" when interviewed by the VEC office because he was not asked any of those questions. Accordingly, the commission found that Hassett failed to prove mitigating circumstances. The circuit court affirmed the commission's determination.

"Whether an employee's behavior constitutes misconduct . . . is a mixed question of law and fact reviewable by this court on appeal." Israel v. Virginia Employment Comm'n, 7 Va. App. 169, 172, 372 S.E.2d 207, 209 (1988) (citation omitted). "The findings of the VEC as to the facts, 'if supported by the evidence and in

the absence of fraud, shall be conclusive, and the jurisdiction of the court shall be confined to questions of law.'" Virginia Employment Comm'n v. Thomas Regional Directory, Inc., 13 Va. App. 610, 613, 414 S.E.2d 412, 415 (1992) (quoting Code § 60.2-500(B)(1)).

We conclude that the Special Examiner's findings of fact as to Hassett's credibility, as well as his failure to present sufficient evidence of mitigating circumstances to avoid disqualification for work-related misconduct, are supported by credible evidence.

It is clear that Hassett was aware of the company policy requiring him to notify his immediate supervisor on a daily basis if he was not going to report to work as scheduled. Yet, he violated this policy on at least one or more days. Thus, the employer met its burden of establishing a prima facie case that Hassett deliberately violated a company rule designed to protect its legitimate business interests. See Branch v. Virginia Employment Comm'n, 219 Va. 609, 249 S.E.2d 180 (1978).

With regard to the mitigation issue, the commission was entitled to reject Hassett's testimony that he blacked out after consuming alcohol so as not to have been capable of notifying his supervisor. The determination of a witness' credibility is within the fact-finder's exclusive purview. See Goodyear Tire & Rubber Co. v. Pierce, 5 Va. App. 374, 381, 363 S.E.2d 433, 437 (1987) (quoting Zirkle v. Commonwealth, 189 Va. 862, 870, 55 S.E.2d 24, 29 (1949)). The commission's credibility finding is

supported by evidence in the record that the Benefits Form completed by Hassett, and the information given by him to the local deputy with regard to the circumstances of his termination from employment, were later shown to be inaccurate. Therefore, we cannot say as a matter of law that Hassett met his burden of proving mitigating circumstances.

For the reasons stated, we affirm the order of the circuit court.

Affirmed.