

UNEMPLOYMENT COMPENSATION COMMISSION OF VIRGINIA

DECISION OF COMMISSIONER

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Decision No.: 386-C
Date: September 28, 1948

MISCONDUCT - 435
Tardiness

This is an appeal filed by the claimant from the decision of the Examiner (No. D-2556; M.S.-877), entered on September 1, 1948.

THE ISSUE

Was the claimant discharged for misconduct in connection with his work?

FINDINGS OF FACT

Claimant filed for benefits through the interstate procedure at Washington, D. C., on April 22, 1948. On May 17th, the Deputy disqualified the claimant from April 29th through June 30th on the ground that he was guilty of misconduct in connection with his work and was discharged for that reason. On appeal the Examiner sustained the decision of the Deputy.

The claimant had been employed by Bendall Motor Sales, Incorporated, at Alexandria, Virginia, for about three years. At the time of his separation he was manager of the parts division, a position he had held since August or September 1947. Prior to that time, he was assistant to the manager. The claimant states that during his period of employment his salary was increased to the point where his last salary was 75% more than his entrance pay.

Claimant was discharged on April 3, 1948, at which time his salary, plus two weeks extra, was paid to him. Testimony on behalf of the employer was given by the Office Manager. He states that the "basic reason" for the claimant's discharge was that the claimant had been late in reporting to work on several occasions; that he had been warned by Mr. Bendall, the General Manager, and Mr. Bridges, the Service Manager, with regard to the tardiness. Neither Mr. Bendall nor Mr. Bridges testified. The witness states that on April 3rd, a Saturday, Mr. Bendall came to the establishment and found no one in the parts department, and, thereupon, decided to discharge the claimant and directed him (the office manager) to prepare the claimant's pay for that week, plus two additional weeks. The witness says that the claimant was supposed to report for work at 8:00 A. M. and continue on duty until 6:00 P. M., except on Saturday the hours were from 8:00 A. M. to 1:30 P. M. The witness states that the claimant would sometimes get to work at 9:00 A. M., 10:00 A. M., or 11:00 A. M. However, he qualifies this statement by saying that he had no actual knowledge of the times the claimant would come to work but he was relying on information furnished to him by Mr. Bendall, the General Manager, who did not testify. It was Mr. Bendall who actually discharged the claimant. After the claimant was discharged, his position was filled by the promotion of his assistant. The witness is not sure whether this assistant's job was filled by a new employee or not.

In the month of March the company released five employees because of business conditions, one of whom was a service salesman earning \$70.00 per

week. The claimant contends that he was actually discharged for economic reasons, rather than on account of being late.

The witness for the employer does not know for sure whether or not the claimant ever assigned any reason for being late, but he says, "I believe sickness. I didn't have any personal contact with him on the reasons at all, I understood that. I actually don't know."

The employer's witness says that during the operation of the department by the claimant "it didn't measure up to expectations."

This witness further in his testimony, with respect to the reasons for the claimant's absence one or more times, states that "One time I remember it was sickness. He had some kind of heart condition. * *. I understand that his health has been a little bad."

The claimant testified that when he was first employed he was told that he was expected to report for work at 9:00 A. M.; that for three years this remained the reporting time. He states that on the day he was discharged he reported for work at 9:00. He says he never reported later than 9:00. He says that one man was taken out of his department shortly before his discharge and he intended to arrive at work at 8:00 on that account and during that time (10 days) he may have arrived at work three times between 8:00 and 9:00. Claimant states in justification for being late during the last two weeks of his employment that it took him one hour and twenty minutes to commute from his home to the employer's establishment; that his wife was sick, and that he had to tend to her, get breakfast, and get his seven year old daughter ready for school; that, as a result of these conditions, he had to be absent two days.

OPINION

In 48 American Jurisprudence, p. 541, the following digest of the law relating to misconduct appears:

"Misconduct within the meaning of an unemployment compensation act excluding from its benefits an employee discharged for misconduct must be an act of wanton or wilful disregard of the employer's interest, a deliberate violation of the employer's rules, a disregard of standards of behavior which the employer has the right to expect of his employee, or negligence in such degree or recurrence as to manifest culpability, wrongful intent, or evil design, or show an intentional substantial disregard of the employer's interest or of the employee's duties and obligations to the employer. * * * Neither is mere inefficiency, unsatisfactory conduct, errors in judgment, or the like to be deemed misconduct."

Unquestionably where an employee is wilfully and deliberately late in reporting to work, especially after being warned with regard to the matter, the act will be misconduct in connection with the work. But it is also unquestionably true that the burden rests upon one who alleges misconduct to produce sufficient proof to leave no doubt of the truth of the charge. The only proof we have in this case is the hearsay evidence of the office manager. His evidence is too uncertain and equivocal. There is no convincing proof of wanton and wilful disregard of the employer's interest by the claimant.

Tardiness does not constitute misconduct where the worker has a valid excuse, such as illness or other emergencies at the home. A search of the digest of the leading decisions of the various Commissions reveals no case holding to the contrary. (Underscoring supplied)

The claimant states that his wife was sick and that he was unable to get to the place of business by 8:00 A.M., after the hours had been changed. This statement is not denied. There is no evidence to indicate that the claimant ever intended to deliberately disregard the employer's interest. The employer has failed to show any such intention.

DECISION

The decision of the Examiner is hereby reversed; the disqualification from April 29th through June 30th, is removed; the Deputy is directed to process the claim accordingly.