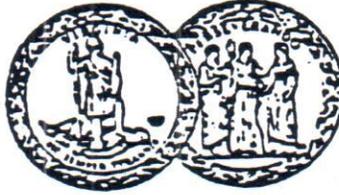


COMMONWEALTH OF VIRGINIA  
VIRGINIA EMPLOYMENT COMMISSION



DECISION OF COMMISSION

In the Matter of:

Charles H. Bower  
S. S. No. 285-70-1054

Thomas D. Thompson  
t/a McDonald's  
Norton, VA 24273

Date of Appeal  
to Commission: July 9, 1990

Date of Hearing: August 9, 1990

Place: RICHMOND, VIRGINIA

Decision No.: 34068-C

Date of Mailing: August 22, 1990

Final Date to File Appeal  
with Circuit Court: September 11, 1990

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This case comes before the Commission on appeal by the claimant from a Decision of Appeals Examiner (UI-9006966), mailed June 29, 1990.

APPEARANCES

Attorney for Claimant

ISSUES

Did the claimant leave work voluntarily without good cause as provided in Section 60.2-618(1) of the Code of Virginia (1950), as amended?

Was the claimant discharged for misconduct connected with his work as provided in Section 60.2-618(2) of the Code of Virginia (1950), as amended?

FINDINGS OF FACT

On July 9, 1990, the claimant filed a timely appeal from the decision of the Appeals Examiner which held that he was

disqualified from receiving benefits, effective April 29, 1990. The basis for that disqualification was the Appeals Examiner's finding that the claimant had left his job voluntarily without good cause.

Prior to filing his claim for benefits, the claimant last worked for the employer as a maintenance person. He was employed from February 28, 1984, through May 3, 1990.

On May 3, 1990, the claimant had a discussion with the employer regarding his continued employment. At that time, the employer informed the claimant that he had received complaints from two female employees. These employees alleged that the claimant had sexually harassed them. The claimant denied these allegations. The employer told him that he could either resign or an investigation would be instituted. The claimant was told that this investigation would probably be conducted by the sheriff's department or by individuals from McDonald's personnel department.

The claimant chose to submit his resignation rather than undergo the stress and possible humiliation of an investigation. When the claimant submitted his resignation, he provided two weeks notice as required by the employer's policy. The employer told the claimant that he did not need to work out the notice. Instead, the employer paid the claimant an amount equivalent to two weeks pay. The claimant was entitled to receive two weeks vacation every year. This vacation was accrued on a monthly basis. At the time of his resignation, the claimant had accrued approximately four days of vacation. The claimant was not paid for the notice period and the vacation days he had earned. Rather, the employer treated the four days of vacation as part of the notice period.

#### OPINION

Section 60.2-618 of the Code of Virginia delineates five circumstances when a claimant may be disqualified from receiving unemployment insurance benefits. Subsection 1 provides a disqualification if the Commission finds that a claimant left work voluntarily without good cause. Subsection 2 provides a similar disqualification if the claimant was discharged for misconduct in connection with his work.

The Commission has consistently held that the employer bears the burden of proving that a claimant's separation was voluntary. Once the voluntariness of a separation has been established, the claimant must then prove that the decision to leave work voluntarily was with good cause. Kerns v. Atlantic American, Inc., Commission Decision 5450-C (September 20, 1971). In the event that the employer does not prove that the separation was voluntary, then the separation must be treated as a discharge. Under those circumstances, the claimant would be disqualified only if it were shown

that he had engaged in work-connected misconduct as defined by the Virginia Supreme Court in the case of Branch v. Virginia Employment Commission, 219 Va. 609, 249 S.E.2d 180 (1978).

The ultimate resolution of this issue will be governed by the principles set out by the Commission in two decisions. In the case of Boyd v. Mouldings, Inc., Commission Decision 23871-C (September 13, 1984), the claimant provided her employer with a ten day notice of her intention to resign. The day after submitting that notice, the claimant was told to leave the job and she was paid only for that portion of her notice period that she actually worked. In that instance, the Commission ruled that the employer's intervening act of dismissing the claimant transformed an otherwise voluntary separation into an involuntary one. The Commission analyzed that situation as follows:

In the present case, it is apparent that had the claimant been allowed to work out her notice, or had she been paid wages in lieu of notice, then the employer would have discharged all obligations to her and her separation would have been a voluntary one. By accepting her resignation immediately, the employer was, in effect, severing the employer-employee relationship, and the claimant's separation must be considered as a discharge.

In Ross v. Miller & Rhoads, Commission Decision 27799-C (February 6, 1987), the Commission was confronted with a factual scenario that is virtually indistinguishable from the present case. There, the claimant submitted a resignation with a two week notice. The employer relieved her of the obligation of reporting for work during a portion of that notice period and paid her two weeks of accrued vacation which was assigned to the notice period. The claimant was not paid the two week notice period plus her two weeks of accrued vacation. In concluding that the employer's actions did not render the claimant's separation involuntary, the Commission stated:

In Boyd, the claimant was told to leave the day after she gave a ten days' notice of resignation, and was only paid for the time she actually worked. The Commission held, in part, that because the claimant had not been allowed to work her notice and had not been paid for it, she had, in fact, been terminated from her employment. However, in the present case, regardless of whether the money was designated as vacation pay or payment in lieu of notice, the claimant did not become unemployed before the effective date of her resignation because she did receive compensation which was equal to two weeks' salary. Moreover, in the absence of evidence

of a specific contractual agreement to the contrary, it is reasonable to assume that the employer retained the right to schedule the claimant's vacation at its convenience, and that the employer could substitute the claimant's vacation for the notice period. Insofar as her notice was concerned, the claimant was made whole by the equivalence of two weeks' pay. Thus, the character of the claimant's resignation was not altered by the employer's action, and her separation from employment remained voluntary on her part.

It is a well-established principle that employers have the right to approve and schedule the vacations of their employees for the convenience of the company. In the absence of a specific agreement to the contrary, this means that an employer could legitimately assign an employee's accrued vacation to substitute, in whole or in part, for that employee's notice of resignation. In light of this and the principles articulated in both the Boyd and Ross cases, the Commission must conclude that the employer's decision here to assign the claimant's four days of accrued vacation to the notice period did not transform the claimant's resignation into a discharge. Therefore, in order to avoid being disqualified from receiving benefits, the claimant must show that he had good cause for leaving his job. (UNDERSCORING PROVIDED)

In construing the meaning of the phrase "good cause," the Commission has consistently limited it to those factors or circumstances which are so compelling and necessitous as would leave a claimant no other reasonable alternative other than quitting his job. Accord, Phillips v. Dan River Mills, Inc., Commission Decision 2002-C (June 15, 1955); Lee v. V.E.C., 1 Va. App. 82, 335 S.E.2d 104 (1985).

In this instance, the claimant chose to resign rather than submit to an investigation of various charges that had been leveled against him by two other employees. He took this action even though he adamantly maintained his innocence. Additionally, the claimant presented persuasive evidence at the Appeals Examiner's hearing that brought into question the motivation of the employees who made these allegations. Although the employees did not testify, their handwritten statements, which were admitted into the record as exhibits, are not very persuasive, and in some respects, are patently incredible.

Under these circumstances, it appears to the Commission that the more reasonable course of action would have been to cooperate in the investigation and present to the investigators the type of information he presented at the Appeals Examiner's hearing. After a thorough investigation, the employer may well have concluded that the allegations were without foundation. Unfortunately, the

claimant foreclosed this alternative by submitting his resignation. His desire to avoid the stress and possible humiliation of an investigation does not constitute a compelling or necessitous circumstance that left him no reasonable alternative other than quitting. Accordingly, the Commission must conclude that he has not proven good cause for his decision to quit his job voluntarily.  
(UNDERSCORING PROVIDED)

DECISION

The decision of the Appeals Examiner is hereby affirmed. The claimant is disqualified from receiving benefits, effective April 29, 1990, because he left his job voluntarily without good cause. This disqualification shall remain in effect for any week benefits are claimed until he performs services for an employer during thirty days, whether or not such days are consecutive, and he subsequently becomes totally or partially separated from such employment.

*M. Coleman Walsh, Jr.*

M. Coleman Walsh, Jr.  
Special Examiner

NOTICE TO CLAIMANT

IF THE DECISION STATES THAT YOU ARE DISQUALIFIED, YOU WILL BE REQUIRED TO REPAY ALL BENEFITS YOU MAY HAVE RECEIVED AFTER THE EFFECTIVE DATE OF THE DISQUALIFICATION. IF THE DECISION STATES THAT YOU ARE INELIGIBLE FOR A CERTAIN PERIOD, YOU WILL BE REQUIRED TO REPAY THOSE BENEFITS YOU HAVE RECEIVED WHICH WERE PAID FOR THE WEEK OR WEEKS YOU HAVE BEEN HELD INELIGIBLE. IF YOU THINK THE DISQUALIFICATION OR PERIOD OF INELIGIBILITY IS CONTRARY TO LAW, YOU SHOULD APPEAL THIS DECISION TO THE CIRCUIT COURT. (SEE NOTICE ATTACHED)

Affirmed by the Circuit Court of Wise County, July 15, 1991.