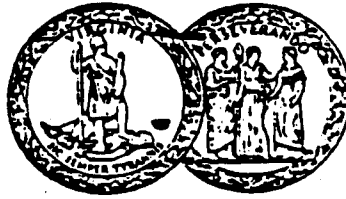


COMMONWEALTH OF VIRGINIA
VIRGINIA EMPLOYMENT COMMISSION



DECISION OF COMMISSION

In the Matter of:

Barbara L. Pugh
[REDACTED]

Christian Children's Fund
Richmond, Virginia

Date of Appeal
to Commission: February 14, 1990

Date of Hearing: June 14, 1990

Place: RICHMOND, VIRGINIA

Decision No.: 33298-C

Date of Mailing: June 29, 1990

Final Date to File Appeal
with Circuit Court: July 19, 1990

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This case comes before the Commission on appeal by the employer from a Decision of Appeals Examiner (UI-8909153), mailed January 25, 1990.

APPEARANCES

Attorney for the Claimant, Attorney for the Employer

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 her work as provided in Section 60.2-618(2) of the Code of Virginia (1950), as amended?

Did the claimant fail, without good cause, to apply for available, suitable work when so directed by the Commission or to accept suitable work when offered as provided in Section 60.2-618(3) of the Code of Virginia (1950), as amended?

FINDINGS OF FACT

On February 14, 1990, the employer filed a timely appeal from the Decision of Appeals Examiner which held that the claimant was qualified to receive benefits, effective August 6, 1989. The basis for that decision was the Appeals Examiner's finding that the claimant had been discharged by the employer, but not for misconduct in connection with her work. Additionally, the Appeals Examiner found that the claimant had good cause for refusing an offer of suitable work.

Prior to filing her claim for benefits, the claimant was employed by the Christian Children's Fund in Richmond, Virginia. She worked for this employer from April 1, 1957 through August 2, 1989. At the time of her separation from work, the claimant was the Manager of Systems & Programming in the Information Systems Division. She was a full-time employee and was paid a salary of \$50,516 annually.

Over the years, the Christian Children's Fund had become a global organization. It was automating all of its field offices in the third world and worked closely with international partner organizations in such countries as Canada and Australia. Due to the changes that were taking place in the Information Systems Division, the claimant's supervisor concluded that she did not have the technical abilities or managerial skills that were now required. Consequently, he initiated a reorganization which would eventually result in the claimant's position being abolished and her duties being distributed to other personnel.

The claimant was offered two options to remain with the employer. She was given the opportunity initially to accept a demotion to the Procedures Division. In the alternative, she could have transferred laterally to the job of Manager of Treasury Services. This was a new position that the employer was in the process of establishing. The claimant's hours of work, salary and benefits would not have been changed. The employer's Director of Human Resources felt that the claimant had a number of skills that could be utilized in that position, particularly her extensive knowledge gained during her long tenure and her good interpersonal communication skills. The claimant did not wish to accept either option; rather, she believed that she should remain in her position as the Manager of Systems & Programming. Sometime during the month of June, 1989, the claimant discussed briefly the Manager of Treasury Services position with the director of that division. She also discussed the situation with the head of the Christian Children's Fund who indicated that he would investigate the matter and get back with her.

The claimant was absent from work on sick leave for the five-week period ending July 31, 1989. On that day, she reported back for work, but was requested to return on August 2, 1989, to discuss the changes that the employer had proposed. On that day, the claimant returned and met with the Director of Human Resources and her supervisor. At that time, she was willing to accept the demotion to the Procedures Division; however, she was informed that option was no longer available. A copy of the job description for the Manager of Treasury Services position was shared with her. The claimant refused to accept the transfer to that position. She did so for two interrelated reasons. First, she felt that it would be only a matter of time before the employer decided to terminate her anyway. Second, if she accepted the transfer, she would be required to serve a six-month probationary period in accordance with the employer's policy. She believed that the probationary period would give the employer the right to terminate her at any time without her having any recourse whatsoever. As a result of her refusal to accept the transfer, the claimant became unemployed as of August 2, 1989. Thereafter, she filed her claim for benefits effective August 6, 1989.

OPINION

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

In cases where the character of a claimant's separation is in dispute, the burden of proof is on the employer to establish that a voluntary leaving did occur. Once that has been established, then the claimant must bear the burden of proving that she had good cause for leaving her job voluntarily. Kerns v. Atlantic American, Inc., Commission Decision 5450-C (September 20, 1971). If the employer fails to prove a voluntary leaving of work, then the claimant's separation will be deemed to have been a discharge. Then she can be disqualified from receiving benefits if the employer proves that the discharge was for misconduct connected with her work in accordance with Section 60.2-618(2) of the Code of Virginia, as that statute has been interpreted by the Virginia Supreme Court in Branch v. Virginia Employment Commission, 219 Va. 609, 249 S.E.2d 180 (1978).

In his decision, the Appeals Examiner concluded that, under the facts of this case, the claimant had been discharged. That conclusion was erroneous. That conclusion was erroneous because of the Commission's long established adherence to the principle that an employee who is separated because of the refusal to accept

a transfer or demotion has voluntarily left work. Accord, Harvey v. Eastern Microfilming Sales & Service, Inc., Commission Decision 6085-C (September 13, 1973); see generally, Young v. Mick or Mack, Commission Decision 24302-C (December 13, 1984); Hendrickson v. Commonwealth of Virginia, Commission Decision 31692-C (May 26, 1989). The rationale for this principle is simple. In these cases, the employee has the option of continuing in gainful employment or becoming unemployed. The employee's election to refuse a transfer or demotion constitutes a free, voluntary choice to become unemployed when continuing employment was readily available. Therefore, the Commission must conclude that the claimant voluntarily left her job with the Christian Children's Fund. Consequently, the Commission must now determine whether or not her leaving was for reasons that would constitute good cause.

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

In many cases involving an employee's refusal to accept a transfer or demotion, the basis for doing so is rooted in the contention that the new work is in some way unsuitable. The Commission has recognized in such cases that proof that the new work was unsuitable would establish good cause for quitting. Accord, Burke v. McDowell Industries, Inc., Commission Decision 12826-C (November 20, 1979); Weakley v. Sperry Marine Systems, Commission Decision 6680-C (April 7, 1975).

In addressing this issue, it is necessary to review the provisions of Section 60.2-618(3)(b), which sets out specific criteria the Commission must consider in determining whether or not any work is suitable for an individual. In particular, the statute requires that the Commission consider the degree of risk involved to the employee's health, safety, and morals, the employee's physical fitness, prior training and experience, length of unemployment, and the accessibility of the available work from the employee's residence.

As counsel pointed out at oral argument, the recent decision by the Virginia Court of Appeals in Johnson v. Virginia Employment Commission, 8 Va. App. 441, 382 S.E.2d 476 (1989), provides substantial guidance with respect to this issue. In the Johnson case, the Court of Appeals provided the following analysis regarding the concepts of suitability and good cause:

"Suitability" of employment and "good cause" for refusal involve separate determinations but they are not mutually exclusive. The same factors may, but will not necessarily, be considered in each determination. Generally "suitability" entails an evaluation limited to the nature and characteristics of the job in relation to the skills, training, and experience of the particular employee and the length of unemployment. The determination of "good cause" to refuse employment, however, will involve a much broader inquiry than merely considering whether the intrinsic aspects of the job are acceptable to the prospective employee. "Good cause" to refuse a job offer may arise from factors totally independent of those criteria used to determine whether a job is suitable to a particular employee; however, some or all of those factors intrinsic to the job may be considered in combination with extrinsic circumstances to determine whether good cause exists for the employee to refuse the employment. . . .

Thus, the determination of "suitability" entails both a subjective and objective examination whether an employee with certain qualifications would reasonably be expected to accept an offer of employment considering, among other factors, the wage, the benefits, the duties, and the conditions intrinsic to a particular job in light of the length of unemployment and reasons therefor--usually a reasonably comparable wage in a job which utilizes an employee's experience and skills will be the major factors to measure suitability of a job offer; 8 Va. App. at 447, 448, 382 S.E.2d at ____.

The Commission is of the opinion that the work offered to the claimant was suitable. The claimant would have received the same salary and benefits, and would have worked the same or similar hours. There is no evidence in the record to establish that the new job represented any degree of risk to her health, safety, and morals. Similarly, there is no evidence in the record to establish that the job would have been located anywhere other than the same facility where the claimant had been working as the Manager of Systems & Programming. Furthermore, her extensive experience with the employer, coupled with her outstanding interpersonal communication skills made her a viable candidate for the position of Manager of Treasury Services.

Since the Commission has concluded that the Manager of Treasury Services job was suitable employment, the burden rests upon the claimant to establish good cause for refusing the transfer to that position. In addressing the question of "good cause," the Johnson court stated:

The claimant has the burden to show that good cause exists for her refusal to accept suitable employment, and she must put forward real and substantial reasons for her refusal. To support a finding of good cause to refuse suitable employment, the reasons advanced must be such that a reasonable person desirous of employment would have refused the offered work. 8 Va. App. at 452, 382 S.E.2d at ____ [citations omitted].

When these principles are applied to the facts of the present case, the conclusion is inescapable that the claimant has not proven good cause. The claimant's refusal to accept the transfer was based upon her speculation that she would be discharged anyway within six months. Furthermore, she was concerned that accepting the position would result in her having to serve a six-month probationary period which she viewed as another opportunity for the employer to terminate her without leaving her any viable recourse. On the other hand, it is just as likely that the claimant may well have succeeded in the position of Manager of Treasury Services. It appears to the Commission that a reasonably prudent person desirous of employment would have accepted this position and attempted to do the very best job possible. If that was not satisfactory to the employer and a termination then resulted at some point in the future, the claimant at least had the benefit of that additional period of meaningful employment. Furthermore, she would not necessarily have been barred from pursuing any legal remedies if the employer's decision to terminate her at some point in the future had violated any state or federal law. Finally, if the new job did not develop to her satisfaction, she could have sought other employment that would have been more to her liking. Had she done so, she could have made a smooth transition from one job to the other without hazarding the economic risks associated with being unemployed.

In conclusion, the Commission finds that the claimant did leave her job voluntarily for reasons that do not constitute good cause under the provisions of Section 60.2-618(1) of the Code of Virginia. Accordingly, the claimant must be disqualified from receiving benefits, effective August 6, 1989, pursuant to that statute.

DECISION

The Decision of Appeals Examiner is hereby reversed. The claimant is disqualified from receiving benefits, effective August 6, 1989, because she left her job voluntarily without good cause. This disqualification shall remain in effect for any week benefits are claimed until she performs services for an employer during thirty days, whether or not such days are consecutive, and she subsequently becomes totally or partially separated from such employment.

The case is remanded to the Deputy with instructions to examine the claimant's claim for benefits and to determine if she has been overpaid any sum as benefits to which she was not entitled and which she is liable to repay the Commission as a result of the disqualification herein imposed.

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)