

COMMONWEALTH OF VIRGINIA
VIRGINIA EMPLOYMENT COMMISSION



DECISION OF COMMISSION

In the Matter of:

Daniel L. Holloway
[REDACTED]

Pearle Vision Center, Inc.
Chesapeake, Virginia
(Last 30-Day Employing Unit)

The Price Club
Hampton, Virginia
(Subsequent Employing Unit)

Date of Appeal
to Commission:

July 19, 1991

Date of Review:

August 27, 1991

Place: RICHMOND, VIRGINIA

Decision No.:

36310-C

Date of Mailing:

August 29, 1991

Final Date to File Appeal

with Circuit Court: September 18, 1991

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This case is before the Commission on appeal by the claimant from Appeals Examiner's decision UI-9109086, mailed July 15, 1991.

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 from employment due to misconduct in connection with work as provided in Section 60.2-618.2 of the Code of Virginia (1950), as amended?

FINDINGS OF FACT

The claimant filed a timely appeal from the Appeals Examiner's decision which affirmed an earlier Deputy's determination and disqualified him for unemployment compensation, effective May 12, 1991, for having been discharged from employment due to misconduct in connection with work.

Prior to filing his claim, the claimant's last 30-day employment was with Pearle Vision Center, Inc., of Chesapeake, Virginia. He had worked as an optician in various locations, ending up in Chesapeake, Virginia. He then had subsequent employment as an optician for The Price Club in Hampton, Virginia between April 15, and May 1, 1991.

Section 54.1-1704 of the Code of Virginia requires that no person shall practice or offer to practice as an optician in Virginia unless he holds a license issued by the Virginia Board for Opticians. The claimant had a license; however, he let it expire as of December 31, 1988, when he failed to pay the necessary fee for getting it renewed.

When the claimant's new employer asked him for his license, he was unable to produce it. He was given three days to do it or be terminated. After the three-day period was up, the claimant resigned, indicating that it was impossible for him to produce his license. This was because the Board for Opticians did not meet again until June, and it looked as though the claimant would be required to retake the board exam in order to get his license renewed.

OPINION

Section 60.2-618.1 of the Code of Virginia provides a disqualification if it is found that a claimant left work voluntarily without good cause.

In this case, it is apparent that the claimant resigned his job only to avoid an immediate and impending discharge, inasmuch as the three days he had been given to produce his license had come to an end, and he could not produce it. The only choice he had in the matter was how his separation would be reflected in the employer's records, since the decision that he would no longer be working there had been unilaterally made by the employer. Because of this, his separation was properly treated as a discharge rather than a voluntary leaving.

Section 60.2-618.2 of the Code of Virginia provides a disqualification if it is found that a claimant was discharged from employment due to misconduct in connection with work.

In the case of Branch v. Virginia Employment Commission, 219 Va. 609, 249 S.E.2d 180 (1978), the Supreme Court of Virginia defined misconduct as follows:

In our view, an employee is guilty of "misconduct connected with his work" when he deliberately violates a company rule reasonably designed to protect the legitimate business interests of his employer, or when his acts or omissions are of such a nature or so recurrent as to manifest a willful disregard of those interests and the duties and obligations he owes his employer. . . . Absent circumstances in mitigation of such conduct, the employee is "disqualified for benefits", and the burden of proving mitigating circumstances rests upon the employee.

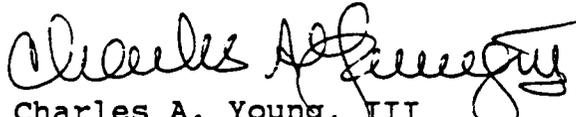
If an individual is hired to perform a job which requires that he possess a license, it is his responsibility to keep it in good standing; otherwise, the employer would be subject to extreme liability in the event of an accident or injury which could be attributed to an unlicensed employee. Inasmuch as this claimant illegally went to work as an optician for The Price Club without possessing a valid Virginia opticians license, a prima facie case has been made that his subsequent separation was due to misconduct. This shifts the burden to him to show mitigating circumstances if he is to avoid a disqualification under this section of the Code.

Even if the claimant's testimony to the effect that he simply forgot about renewing his license for over two years could be believed, this failure on his part would still represent negligence of such a high degree as to manifest a willful disregard of the standards of behavior expected of him as an employee. This is especially true in light of the fact that he had just changed jobs. An individual who is switching jobs which require a license would certainly be expected to make sure that his was in order at the time of transition. It is concluded that the claimant has failed to establish mitigating circumstances for the conduct which brought about his termination. Therefore, he should remain disqualified for benefits under this section of the Code.

DECISION

The decision of the Appeals Examiner is hereby affirmed.

The claimant is disqualified for unemployment compensation, effective May 12, 1991, for any week or weeks benefits are claimed until he has performed services for an employer during 30 days, whether or not such days are consecutive and he has subsequently become totally or partially separated from such employment, because he was discharged due to misconduct in connection with work.


Charles A. Young, III
Special Examiner