

## Summary of Virginia Court of Appeals Unpublished Opinions in UI Cases

### *Background*

The Virginia Court of Appeals first began hearing and deciding cases in 1985. Its jurisdiction extends to appeals in criminal and domestic cases as well as administrative agency cases. Over the years the Virginia Court of Appeals has issued a number of opinions in cases involving unemployment insurance. Those cases have been either published or unpublished opinions. By agency practice, all published opinions of the court that involve benefit cases are included in the Precedent Decision Manual. The unpublished opinions have generally not been included, principally because the Court of Appeals did not allow its unpublished opinions to be cited as precedent in other cases pending before it. However, several years ago the Court issued an opinion in a worker's compensation case that an administrative agency could use any of its unpublished opinions as precedent in its own decisions should it desire to do so.

The Virginia Employment Commission's Administrative Law Division – Office of Commission Appeals has prepared brief summaries of the unpublished Court of Appeals opinions issue since 1995 in UI benefit cases. The summaries are intended only to assist individuals in locating a particular case that may be of interest. They are not a substitute for reading the actual court opinion. Those summaries, together with a link to the court's opinion are set out below. We hope that this will be beneficial to those parties and representatives who appear before the Commission as well as the agency adjudicators at every level who hear and decide disputed benefit cases.

### *Voluntary Quit Cases*

[American Automobile Association v. George & VEC](#), Record No. 2344-94-4 (July 5, 1995). Employee who did not return as scheduled from her approved leave due to the severe illness of her mother did not leave work voluntarily without good cause and was not guilty of misconduct connected with work.

*Boyd v. VEC*, Record No. 1355-06-2 (November 21, 2006). The Court of Appeals summarily dismissed the appeal as being without merit. The Commission had disqualified the claimant for voluntarily leaving work without good cause and that decision had been affirmed by the circuit court.

*Gardner v. VEC*, Record No. 2240-94-3 (January 16, 1996). Employee who left work voluntarily due to the presence of cigarette smoke in the workplace did so without good cause as she did not exhaust the reasonable remedies available to her before quitting.

*Lindeman v. VEC*, Record No. 1842-03-3 (February 24, 2004). Employee who quit because the employer did not carry workers compensation insurance did so without good cause where employer had paid all of his medical expenses, had assured the employee such expenses related to his injury would be paid in the future, and employee had access to the Uninsured Employer's Fund if the company failed to pay him any sum he was entitled to under the Worker's Compensation Act.

*Nemetz v. V.E.C.*, Record No. 0482-08-01 (December 23, 2008). Claimant led one of partners to believe that she was quitting work. He later told her that her resignation was being accepted effective March 10, 2006. The next day the claimant overheard one partner make a comment that was offensive to her so she gathered her belongings and left. Her leaving was found to be without good cause. The Court of Appeals declined to limit the applicability of the "intervening cause" doctrine articulated in *Shifflett v. V.E. C.*, 14 Va. App. 96 (1992).

*Peck v. VEC*, Record No. 2469-01-4 (August 20, 2002). The claimant's agreement to the employer's proposed separation date did not constitute a voluntary leaving of work. The employer had already decided to replace the claimant because of their dissatisfaction with her performance, and her agreement to the date when her job would end did not alter the character of her separation from a discharge to a quit.

*Physical Therapy Works, Inc. v. VEC*, Record No. 2777-00-01 (upon a rehearing *en banc*, May 28, 2002). Claimant requested that her schedule be changed from 12 months to 10, and the employer agreed. When the claimant subsequently filed a claim for benefits, the Commission, Circuit Court and a panel of the Court of Appeals found her qualified for benefits. Upon a rehearing *en banc*, the full court, on a vote of 6-5, adopted the position of the panel dissent and concluded

that the claimant's unemployment was due to a voluntary leaving without good cause.

*Pizzino v. Hutchens Corporation & VEC*, Record No. 2958-95-3 (September 17, 1996). Following her return to work after surgery, the claimant declined to perform a specific task for fear that it would tear her stitches. When the employer stated that she "may as well go home," she left and did not return to work again and refused to speak with the employer when he attempted to contact her. The Court held that the claimant left work voluntarily and was not discharged. The Court also rejected the claimant's argument that she was the victim of sexual harassment.

*Smith v. S. W. Rodgers Company, Inc.*, Record No. 0003-99-4 (July 20, 1999). The claimant was the victim of extremely harassing conduct by two supervisors, and she complained to the company owner. She then met with the personnel director who responded promptly to her complaint, but the claimant quit because the employer would not assure her that she would never have contact with the two supervisors in the future. The Court held that, while she had a legitimate dispute, she failed to exhaust the remedies that were available to her. Consequently, she was denied benefits for leaving work without good cause.

*Stasko v. VEC*, Record No. 2835-00-2 (April 24, 2001). Claimant left his job when the employer converted his pay from an annual salary to an hourly rate, guaranteed him 40 hours of work per week during the winter, plus overtime as may be required during the summer. None of the other terms or conditions of his employment were altered. The claimant quit, without obtaining other employment, because he viewed the change as a demotion. The Court held that since the change in how his pay was computed made no material difference in his income, the claimant failed to establish that he had a legitimate employment dispute with his employer. The Court also opined that he did not fully explore the alternatives available to him before quitting. Consequently, good cause for doing so was not proven.

*VEC v. Hill*, Record No. 1436-03-3 (May 4, 2004). The claimant submitted her resignation because she believed the employer might discharge her at some future date due to her attendance. She gave a two-week notice, but offered to work until a replacement was found. When the employer hired a replacement the claimant was informed that she need not report for work. The Court of Appeals reversed the circuit court and reinstated the Commission's decision that disqualified

the claimant for leaving work without good cause. The decision by the Court of Appeals is noteworthy for its discussion and resolution of various issues related to procedural due process and the appropriate scope of judicial review under Section 60.2-625 of the *Code of Virginia*.

[Vick v. VEC](#), Record No. 0722-96-2 (March 18, 1997). In a 2-1 panel decision, the Court of Appeals found that the claimant left her job voluntarily without good cause since she did not explore the reasonable alternatives available to her prior to quitting. The majority opinion acknowledged that the claimant testified that she was the victim of sexual harassment, but noted that her allegations had been denied by the employer and that the VEC's factual finding of no sexual harassment was supported by evidence in the record.

[Waldemar v. VEC](#), Record No. 1393-05-2 (December 13, 2005). Claimant's decision to leave work due to the loss of her babysitter was not good cause since she took no meaningful steps to rectify the situation prior to quitting.

[Webster v. VEC](#), Record No. 1323-95-4 (April 2, 1996). Claimant left her job as a school custodian because she felt she was not medically able to perform her duties. Her physician diagnosed a bone spur in her foot, but authorized her to return to work and did not advise her to quit. The Court held that she left work without good cause.

#### *Misconduct Cases*

[Bistawros v. VEC](#), Record No. 2207-00-4 (February 20, 2001). Claimant fired for disobeying direct instructions to refrain from discussing witchcraft and to bring concerns directly to management was guilty of misconduct and disqualified for benefits.

[Bower v. Roanoke College & VEC](#), Record No. 2373-94-2 (June 29, 1995). Employee's action in listing a computer on an inventory to show that it was on campus when, in fact, the employee had removed it from campus amounted to falsification of records that supported a finding of misconduct connected with work.

[Calvary Memorial Park, Inc. v. VEC](#), Record No. 1730-98-4 (June 29, 1999). Employee who restructured a contract for the purchase of a cemetery lot to afford the customer a discount and the employee a commission was not guilty of misconduct since the company had no rule that prohibited this type of transaction. The Court also held the

employee did not willfully disregard any interest of the employer because incentives provided by the employer made such transactions reasonably foreseeable.

*Denisar v. Barrett Hauling & VEC*, Record No. 2861-03-4 (August 17, 2004). Claimant who refused to make an additional delivery at the end of his last day of work was discharged for misconduct. The claimant's plans to leave work by 5 pm that day to begin his vacation and celebrate his birthday with his father were not mitigate mitigating circumstances.

*Duncan v. Data Services America*, Record No. 0431-00-2 (September 5, 2000). Employee who wrote a defamatory and threatening letter to the company president violated an established company rule and was discharged for misconduct for which he proved no mitigating circumstances.

*Garland v. VEC*, Record No. 0433-00-3 (August 8, 2000). Employee with recurrent attendance problems who was intentionally absent without notice shortly after a three-day suspension for attendance problems was discharged for misconduct. The Court also ruled on a number of procedural issues related to the submission of additional evidence, allegations of fraud, and the authority of the circuit court to allow a party to amend a petition for judicial review.

*Gerni v. VEC and U. S. Postal Service*, Record No. 0146-95-2 (December 11, 1995). Claimant's failure to follow doctor's restrictions while claiming total disability from a job-related injury and his misdelivery of mail constituted misconduct.

*Grant-Boesen v. V.E.C.*, Record No. 0469-09-4 (January 12, 2010). Court of Appeals summarily affirmed the claimant's disqualification for misconduct. The claimant had been discharged for unreported and unexcused absences.

*Groves v. VEC*, Record No. 1908-01-2 (December 11, 2001). Employee who was discharged for violating the employer's sexual harassment policy was guilty of misconduct connected with work. The Court also rejected a number of procedural and evidentiary objections raised by the employee in his appeal.

*Hale v. Southwest Sanitation Co., Inc.*, Record No. 1071-98-3 (November 24, 1998). Employee who refused to empty customers'

loose trash into his truck or to bag it was guilty of insubordination and disqualified for benefits.

[Henderson v. VEC](#), Record No. 1056-99-2 (September 14, 1999). Employee who failed to provide notice of his absence to his supervisor as required by the employer's policy; who failed to bring in a doctor's note as requested until after his discharge; and who failed to schedule a meeting with his supervisor as directed was guilty of misconduct in connection with his work. The Court rejected the employee's claims that he had been denied a fair hearing and that his termination violated the *Americans with Disabilities Act*.

[Hunter v. VEC](#), Record No. 0947-07-3 (December 23, 1997). Employee who was discharged for failing to provide proper notice of his absence as required by company policy was guilty of misconduct in connection with work.

[JPS Converter v. VEC & LaPrade](#), Record No. 1584-95-2 (December 19, 1995). Employer's evidence was insufficient to show that the claimant had thrown away a gift intended for a supervisor. Award of benefits upheld.

[Lane v. V.E.C.](#), Record No. 1809-07-2 (January 15, 2008). Court of Appeals summarily affirmed claimant's disqualification for misconduct.

[Poole v. V.E.C.](#), Record No. 2196-09-3 (February 16, 2010). Court of Appeals summarily affirmed claimant's disqualification for misconduct that was largely based on her failure to report a workplace injury in violation of company policy.

[Rodriguez v. V.E.C.](#), Record No. 0291-09-4 (September 29, 2009). Court of Appeals upheld the disqualification of the claimant, an attorney, who lost his job when the Virginia State Bar revoked his law license. The Court of Appeals rejected various procedural and due process arguments advanced by the claimant.

[Scarborough v. V.E.C.](#), Record No. 2248-07-3 (October 14, 2008). Claimant was discharged and subsequently disqualified for benefits for using his company e-mail account and the employer's e-mail system to distribute to all company employees and some outside the company an e-mail that was politically partisan in nature. The e-mail violated known company policies regarding the use of e-mails and engaging in partisan political activity.

[The Haven Shelter & Services, Inc. v. Hay](#), Record No. 2755-07-2 (October 21, 2008). The Court of Appeals reversed the Circuit Court and reinstated the Commission decision that disqualified the claimant for misconduct. The claimant had been fired for a series of three incidents that violated rules, policies or directives of the employer. The Court of Appeals rejected the claimant's argument that her discharge was for poor job performance as well as the contention that she could not be disqualified for benefits in the absence of proof that she had performed her job satisfactorily.

#### *Refusal of Suitable Work*

[Sword v. Automotive Industries, Inc.](#), Record No. 1373-98-3 (April 6, 1999). The claimant was discharged by the employer because of her attendance. She filed a claim and was initially awarded benefits. The employer then offered the claimant her job back on the same shift and at the same rate of pay. She would, however, lose her seniority, have no accrued vacation, be required to work all mandatory overtime, and could miss no days from work for 60 days, except for jury duty, death of her spouse, or a job-related injury. After 60 days she would have 3 days of accrued vacation. When the offer was made, the claimant requested to be late on her first day to attend the reading of a will. The employer declined so the claimant refused the offer of work.

The Court held the offer of work was suitable, that the conditions imposed by the employer were not punitive, and that the claimant failed to prove good cause for refusing the offer. The claimant asserted that she refused the job offer because of the loss of seniority and her dissatisfaction with the way her last paycheck had been handled; however, she raised neither of these concerns at the time the offer was made or at any time prior to the hearings held by the Commission.

#### *Timeliness of Appeal, Judicial Review & Appellate Practice*

[Agnew v. Baker Roofing Co. & VEC](#), Record No. 1004-97-2 (February 10, 1998). Claimant's contention that VEC was obligated to either personally serve him with the notice of the appeals hearing or mail it by certified or registered mail, return receipt requested, was rejected. Statute requires the Commission to provide parties with a reasonable opportunity to participate in the hearing and mailing the notice 15 days in advance of the hearing satisfied that requirement. Claimant's failure to attend the hearing was due to his own negligence in not promptly reading his mail. The claimant's contentions regarding

the sufficiency of the evidence, the Commission's refusal to allow him to present additional evidence, and allegations of extrinsic and intrinsic fraud were also rejected.

[Groves, Paul v. VEC](#), Record No. 3141-05-2 (October 31, 2006). Circuit Court's order upholding the Commission's decision that the claimant had been overpaid benefits summarily affirmed.

[Jones, Darick v. VEC](#), Record No. 0362-04-4 (November 23, 2004). The Commission dismissed the claimant's appeal because it was not timely and good cause to extend the 30 day appeal period had not been proven. This decision was affirmed by the circuit court and subsequently appealed by the claimant. The Court of Appeals affirmed the circuit court primarily because the claimant failed to properly preserve his objections to the action taken by the circuit court and also failed to file a transcript or agreed statement of facts.

[Jones, Debra v. VEC](#), Record No. 0717-95-4 (August 29, 1995). Claimant's failure to name the employer as a party in her Petition for Judicial Review was a jurisdictional defect and the Circuit Court's order granting the Commission's motion to dismiss was proper.

[Offield v. V.E.C.](#), Record No. 2133-08-1 (July 14, 2009). The sole issue before the Court of Appeals was whether a subsequent employing unit that would not be liable for any benefits that might be paid the claimant had standing to appeal an adverse Deputy's determination. After examining the applicable statutes and regulations the Court of Appeals held that a subsequent employing unit did have standing to file such an appeal.

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