

COMMONWEALTH OF VIRGINIA
VIRGINIA EMPLOYMENT COMMISSION

MISCELLANEOUS: 340.1
Overpayments — Fraud or
Misrepresentation.



DECISION OF COMMISSION

In the Matter of

Mary Mortensen, Claimant

Date of Appeal

To Commission: February 28, 1985

Date of Hearing: April 22, 1985

Place: RICHMOND, VIRGINIA

Decision No.: UCFE-1025

Date of Decision: April 25, 1985

Date of Mailing: May 3, 1985

Final Date to File Appeal

with Circuit Court: May 23, 1985

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This matter comes before the Commission on appeal by the claimant from the Decision of Appeals Examiner (No. UCFE-85-7), mailed February 7, 1985.

APPEARANCES

None

ISSUE

Did the claimant make a false statement or representation knowing it to be false or knowingly fail to disclose a material fact to obtain or increase payment of benefits as provided in Section 60.1-58 (d) of the Code of Virginia (1950), as amended?

FINDINGS OF FACT

The claimant appealed a disqualification imposed from November 27, 1984 through November 30, 1985 because she knowingly made misrepresentations in connection with her claim for unemployment compensation benefits.

The claimant filed a claim for unemployment compensation effective July 1, 1984. In making her claim for benefits for the week ending September 29, 1984, she reported that she had filed an application at the Fort Myers Post Exchange on September 24, 1984, had talked to a Mr. Christ of Best Industries, Incorporated on September 25, 1984, and contacted Multiple Schools on September 26, 1985. Subsequent attempts to verify these contacts by a representative of the Commission's Random Audit Program were unsuccessful.

In reviewing the information she has supplied in connection with this claim, the claimant found that she had mistakenly identified the Accotink Schools, which she visited on September 25, 1985, as the Multiple School, and that she had actually submitted a resume rather than an application at Fort Myers Post Exchange. She did interview at Best Industries as reported.

OPINION

Section 60.1-58 (d) of the Code of Virginia (1950), as amended, provides a disqualification for fifty-two weeks, beginning with the date of the determination or decision, if the Commission finds that such individual, within thirty-six calendar months immediately preceding such determination or decision, has made a false statement or representation knowing it to be false or has knowingly failed to disclose a material fact, in order to obtain or increase any benefit or payment of unemployment compensation.

In her decision, the Appeals Examiner found that the preponderance of the evidence "tend[ed] to show that" the claimant did not contact the employers she listed on her claim form. However, the standard of proof required to impose a disqualification under this section of the Code is clear and convincing evidence, and the burden is on the Commission to establish fraud, rather than on the claimant to show the lack of it. This is in contrast with the standard of proof as well as the burden of proof required in order to show that a claimant filed her claim in accordance with the Commission's regulations as provided under Section 60.1-52 (f) of the Code. Under that provision, the burden is on the claimant to show by a preponderance of the evidence that she satisfied the eligibility requirements of the Act by filing her claim in accordance with the Commission's prescribed procedure. (Underscoring supplied)

In a case in which fraud is alleged, the burden is not carried by merely presenting hearsay testimony concerning what an employer or its representative told a Commission employee. Such evidence may be admissible to establish the course which an investigation took or the reason that a fraud determination was issued, but cannot

suffice to prove the assertion that the claimant did or did not make the contact as reported. The best evidence concerning the question of whether an employer was actually contacted would come directly from the employer, preferably testimony which is subject to both direct and cross-examination, or, alternatively, through an affidavit in which the affiant specifically affirms or denies that the contact occurred.

In this case, there is considerable conflict in the evidence which is complicated by the errors that the claimant made in reporting her work search activities for the week in question. While it is true that her certification was not accurate, her explanation concerning those errors is certainly plausible, and there is simply not enough evidence to show that she knowingly made a false statement or deliberately omitted to disclose any material information in order to receive unemployment compensation benefits. In the absence of such a showing, there can be no finding of fraud.

DECISION

The Decision of Appeals Examiner is hereby reversed. It is held that no disqualification should be imposed effective November 27, 1984 through November 30, 1985, inasmuch as the claimant did not knowingly make a false statement or fail to disclose a material fact in order to obtain or increase her benefits in connection with her claim for the week ending September 29, 1984.


Patrice T. Johnson
Special Examiner