

VIRGINIA EMPLOYMENT COMMISSION

DECISION OF COMMISSION

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Decision No.: 6523-C

MISCONDUCT: 15.2

Absence-

Reasons.

Date: December 10, 1974

This is a matter before the Commission on appeal by the claimant from the decision of the Examiner (No. UI-74-2092), dated August 28, 1974.

ISSUE

Was the claimant discharged for misconduct in connection with his work within the meaning of Section 60.1-58 (b) of the Code of Virginia (1950), as amended?

FINDINGS OF FACT AND OPINION

The claimant worked for his employer as a slicer tender from March 31, 1948, through July 4, 1974. According to the employer beginning in December 1972 the claimant began to develop a series of absences from work. When his absences reached the point that they were at the maximum allowed under the company policy, the claimant was given both verbal and written warnings concerning his absenteeism. Following his last day of work on July 4, 1974, the claimant was absent on July 8, through July 14, 1974. On Monday and Tuesday, July 8, and July 9, 1974, the claimant's supervisor attempted to contact the claimant by telephone, but was unsuccessful in doing so. The supervisor went to the claimant's home in an attempt to contact him, but was informed by a neighbor that the claimant was asleep and could not be wakened. When nothing further was heard from the claimant it was decided that his employment would be terminated. He did return to his employment on July 15, 1974, and presented a doctor's statement showing that he had been under the care of a doctor from July 11, 1974, and that he was unable to work from July 8, 1974.

According to the claimant, he had called in sick, but did not consult a doctor until July 11, 1974, since he was taking medicine which had previously been prescribed to him for the same ailment.

On Tuesday, July 9, 1974, he had been advised by his mother that his supervisor had been to visit him, and he then called his supervisor although he could not remember which day he had contacted him. When he returned to work on July 15, 1974, with a doctor's statement he was discharged.

Section 60.1-58 (b) of the Virginia Unemployment Compensation Act provides a disqualification if it is found that an individual was discharged for misconduct in connection with his work. The Commission has consistently held that unexcused, chronic absenteeism constitutes misconduct.

The record indicates that the claimant had a history of absenteeism. While it is understandable that an employee with as many absences as the claimant would in all probability be discharged, it does not mean that such a discharge would be attributable to misconduct. For misconduct to exist there must be unexcused absences. See Elizabeth J. Hancock v. Mr. Casuals, Inc., #1, Decision No. 6355-C (July 3, 1974). The claimant often would notify the employer that he could not come to work or bring in doctor's statements upon his return.

At most, all that is shown by the evidence is chronic absenteeism. However, evidence has been submitted that most of this absenteeism has been due to medical reasons. In the last instance of absences, there was medical evidence that was presented which showed that although the claimant was under the care of a physician from only July 11, through July 15, 1974, he was incapacitated due to his illness and unable to work from July 8, 1974. Because illness was the proximate cause of this absence, it cannot be said that there is any showing of a wanton disregard of the employer's interest on the part of the claimant. Therefore, there has been no showing of misconduct.

DECISION

The decision of the Appeals Examiner disqualifying the claimant for being discharged for misconduct in connection with his work is hereby reversed. Since the physician's statement advised the claimant to consult an internist in order to determine the cause of his disability, and it was unknown how long his disability would exist, a question is raised whether the claimant would be able to work as required under Section 60.1-52 (g) of the Virginia Unemployment Compensation Act. This case is remanded to the Deputy for a determination of that issue and a careful determination of whether the claimant has been available for work.