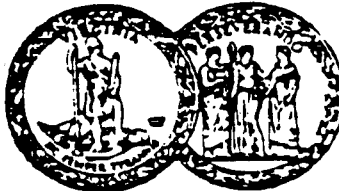


COMMONWEALTH OF VIRGINIA
VIRGINIA EMPLOYMENT COMMISSION



MISCONDUCT: 5
General (Effect of reinsta-
ment after discharge)

DECISION OF COMMISSION

In, the Matter of

Ralph H. Munsey, Claimant
Interstate - West Virginia
████████████████████

Kersey Manufacturing Company
Bluefield, Virginia

Employer

Date of Appeal

To Commission: November 23, 1976

Date of Hearing: March 8, 1977

Decision No.. 9022-C

Date of Decision: March 15, 1977

Place: Richmond, Virginia

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This is a matter before the Commission on appeal by the claimant from the decision of the Appeals Examiner (No. UI-76-5980), dated November 12, 1976.

ISSUE

Was the claimant discharged due to misconduct in connection with his work as provided in § 60.1-58 (b) of the Code of Virginia (1950), as amended?

FINDINGS OF FACT AND OPINION

The claimant appealed from a decision of the Appeals Examiner which disqualified him for benefits effective August 8, 1976, for having been discharged for misconduct in connection with his work.

The Findings of Fact of the Appeals Examiner are adopted by the Commission. Additionally, the Commission finds that the claimant ordered the men back to work only after he learned that OSHA would be unable to investigate the conditions at the mine that week.

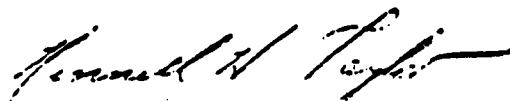
The claimant was reinstated without back pay on December 6, 1976, as the result of grievance proceedings which were taken against the company. He contends that by virtue of the fact that he was reinstated his discharge could not have been for reasons tantamount to misconduct in connection with employment.

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 repeatedly held in previous decisions that when an individual participates in a wildcat strike which is in violation of a "no strike" provision of the collective bargaining agreement which his Union has with the employer, such action is tantamount to misconduct. The claimant in this case argues that he was not a participant in the strike and that he left the employer's premises so that he could order the men back to work. The Commission finds the claimant's position untenable, especially in the light of his admission that he ordered the men back to work only when he determined that OSHA would be unable to investigate the working conditions that week. It is concluded, therefore, that the claimant's absence from work during the two days of the strike and his failure to unconditionally order the men back to work at the outset of the strike was tantamount to participation in the strike.

The claimant's argument regarding the effect of his reinstatement is without merit as the company may have granted the reinstatement notwithstanding the claimant's participation in the wildcat strike which led to his discharge. This Commission is charged with determining entitlement to unemployment compensation based on the relevant provisions of the statute as they have been interpreted by the Commission and the courts in previous decisions. Therefore, to hold that an individual's separation was not disqualifying under the statute merely by virtue of the fact that he was subsequently reinstated would be to delegate the statutory duty of the Commission to the parties and their representatives. The Commission is of the opinion, therefore, that the claimant's reinstatement would have no bearing on the issue of whether or not his separation was disqualifying under the statute. Since he did participate in a wildcat strike knowing such action to be in violation of the company policy, it is the opinion of the Commission that his discharge was for reasons tantamount to misconduct in connection with employment within the meaning of that term as used in the Act.

DECISION

The decision of the Appeals Examiner is hereby affirmed.



Kenneth H. Taylor
Assistant Director of Appeals