

COMMONWEALTH OF VIRGINIA  
VIRGINIA EMPLOYMENT COMMISSION



PROCEDURE: 20.25

Requests to Reopen a Hearing  
— Prudent Conduct to Preserve  
Right to Participate in Future  
Proceedings.

DECISION OF COMMISSION

In the Matter of:

Celeste J. Pileggi

Wigman & Cohen, P. C.  
Arlington, Virginia

Date of Appeal  
to Commission: November 28, 1989

Date of Hearing: February 6, 1990

Place: RICHMOND, VIRGINIA

Decision No.: 32904-C

Date of Mailing: February 9, 1990

Final Date to File Appeal  
with Circuit Court: March 1, 1990

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This case comes before the Commission on appeal by the claimant from a Decision of Appeals Examiner (UI-8908757), mailed November 7, 1989.

APPEARANCES

Attorney for the Employer

ISSUES

Does the claimant have good cause to reopen the Appeals Examiner's hearing as provided in Regulation VR 300-01-4.2I of the Rules and Regulations Affecting Unemployment Compensation?

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?

FINDINGS OF FACT

On November 28, 1989, the claimant filed a timely appeal from the Decision of Appeals Examiner which disqualified her from receiving benefits, effective July 16, 1989. The basis for that

disqualification was the Appeals Examiner's finding that the claimant had left her job voluntarily for reasons that would not constitute good cause. In an addendum to her appeal, the claimant stated that she had minor surgery the day before the hearing and was not well enough to attend. As a result of this statement, the Commission also accepted the claimant's appeal as a request for a reopening of the hearing.

On October 10, 1989, the claimant contacted the Washington Hospital Center and was scheduled for surgery on October 12, 1989. This surgery was of such a nature that immediate attention, although not compelling, was the most reasonable and prudent action for the claimant to take. The surgery was successful, but the claimant's participation in the Appeals Examiner's hearing would have been difficult, if not impossible, because of the recuperation period required. The claimant did not contact the Commission in an attempt to have the Appeals Examiner's hearing rescheduled. In the affidavit that she submitted in lieu of a personal appearance at the Commission hearing (Commission Exhibit C), the claimant gave the following four reasons why she did not request the hearing be postponed or rescheduled:

- (i) I felt that I had adequately and fully explained my position at the two conferences which I had with an officer of the Virginia Employment Commission and in the documents which I provided to such Commission;
- (ii) I felt that this information would be considered at the hearing because the instructions on the back of the Notice of Hearing form stated: "APPEARANCE: If you do not appear for the hearing, the appeal will be decided on the basis of evidence taken at the hearing, if any, or it may be decided on other available evidence and information as may have a bearing on the case contained in the Commission records."
- (iii) I believed that a representative from Wigman & Cohen, P.C. would either not appear at the hearing or, if a representative did appear, he or she would not make patently untrue, inaccurate, and misleading statements of opinion and fact; and,
- (iv) I could not financially afford to delay the hearing and my chance of obtaining benefits.

The Findings of Fact of the Appeals Examiner are fully supported by the evidence in the record. Accordingly, they are

hereby adopted by the Commission with the following additions. The Appeals Examiner's Findings of Fact are as follows:

The claimant filed a timely appeal from a Deputy's determination which disqualified her from receipt of unemployment benefits, effective July 16, 1989. That determination held the claimant left her employment voluntarily without good cause.

Between February 21, 1979, and May 18, 1989, the claimant was employed as an Administrative Assistant by the law firm of Wigman & Cohen P.C. She was a full-time employee although she performed her duties during a combination of day and mostly evening hours. The claimant has been going to school since 1979.

During the spring of 1989, the claimant informed her supervisor that she has (sic) enrolled for courses during the day starting approximately in June, 1989. She indicated that she could not be available for work during the day hours although the employer needed her services during the day than evening hours. She was not willing to go to school at night and work during the day.

On May 12, 1989, the claimant signed an agreement with the employer relative to a new work schedule that was intended to balance the claimant's scheduling needs with that of the employer. The new schedule permitted the claimant to continue to work for the employer on a flexible schedule depending on the claimant's availability for work during the day. The claimant came in and worked for a few hours thereafter. However, she stop (sic) showing up for work. The employer considers the claimant's separation as a voluntary quit on account of job abandonment.

Although the claimant was duly notified of the time, date and place for her appeal hearing, she neither responded to the Notice of Appeal Hearing nor participated at the hearing.

On July 7, 1989, the employer's office administrator forwarded to the claimant her paycheck to cover the part-time work she had done since her last day of full-time work. The employer had work available for the claimant and the office manager put assignments on her desk for her to work on when she came in. The claimant never again reported for work, and filed her claim for benefits on July 21, 1989, asserting that she had been discharged.

OPINION

Regulation VR 300-01-4.2I of the Rules and Regulations Affecting Unemployment Compensation provides that any party who was unable to appear at a scheduled hearing before an Appeals Examiner, or who appeared but wishes to present additional evidence, may request that the hearing be reopened. When such a request is received after the Appeals Examiner's decision has been rendered, it shall be referred to the Commission for a determination. If the determination is to reopen the hearing, then the matter shall be remanded for that purpose. If the Commission decides not to reopen the hearing, the letter requesting the reopening shall be treated as an appeal to the Commission based upon the record as previously established.

In the case of Engh v. United States Instrument Rentals, et al, Commission Decision 25239-C (July 12, 1985), the Commission held:

In order to show good cause to reopen a hearing, the party making such a request must show that he was prevented or prohibited from participating in the hearing by some cause which was beyond his control and that, in the face of such a problem, he acted in a reasonably prudent manner to preserve his right to participate in future proceedings.

In this case, the Commission is satisfied that the claimant's medical condition warranted her decision to stay at home rather than attend the Appeals Examiner's hearing. Nevertheless, the claimant did not act in a reasonably prudent fashion to preserve her right to participate in future proceedings. The claimant could have requested that the Appeals Examiner's hearing be rescheduled. She made the conscious decision not to do so for the reasons she gave in her affidavit, which were recited verbatim in the Commission's Findings of Fact. Under these circumstances, the Commission has no alternative but to conclude that the claimant has not proven good cause to reopen the Appeals Examiner's hearing. Therefore, the Commission's decision will be based solely upon the evidentiary record developed by the Appeals Examiner. (Underscoring supplied)

Section 60.2-618.1 of the Code of Virginia provides a disqualification if the Commission finds that a claimant left work voluntarily without good cause. In cases where there is a dispute regarding the nature of the claimant's separation from work, the burden of proof is on the employer to establish that a claimant left work voluntarily. Once that has been proven, then the burden is on the claimant to prove that the decision to leave work voluntarily was prompted by reasons that would constitute good cause. Kerns v. Atlantic American, Inc., Commission Decision 5450-C (September 20, 1971). In interpreting the meaning of the phrase

"good cause," the Commission has consistently limited it to those factors or circumstances which are so substantial, compelling, and necessitous as would leave an individual no other reasonable alternative other than leaving work. Phillips v. Dan River Mills, Inc., Commission Decision 2002-C (June 15, 1955); Lee v. Virginia Employment Commission, 1 Va. App. 82, 335 S.E.2d 104 (1985).

The claimant disputed the Appeals Examiner's finding that she left her job voluntarily and, in a lengthy letter of appeal with attached exhibits and an addendum, she attempted to provide the Commission with additional information not submitted at the Appeals Examiner's hearing. Since all of this evidence that the claimant now wishes the Commission to consider could have been submitted at the Appeals Examiner's hearing had the claimant acted diligently to preserve her right to participate in it, the Commission cannot consider it at this juncture. Rules and Regulations Affecting Unemployment Compensation, Regulation VR 300-01-4.3B. Based upon the evidence that was introduced at the Appeals Examiner's hearing, it is readily apparent that the terms and conditions of the claimant's employment were modified; however, by signing the agreement on May 12, 1989, the claimant consented to the modification. Consequently, when she simply failed to report for work, her conduct amounted to an abandonment of her job. Snider v. Pounding Mill Quarry Corporation, Commission Decision 23975-C (March 8, 1985); See also, Lightfoot v. County of Henrico, Dept. of Public Utilities, Commission Decision 8327-C (August 24, 1976).

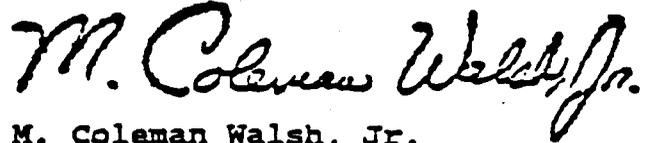
In light of the evidence that is in the record, the Commission concurs with the Appeals Examiner's finding that the claimant left her job voluntarily. Furthermore, since the claimant did not appear at the hearing and offer evidence to establish a compelling and necessitous reason for her leaving work, the disqualification provided by the statute must be imposed.

#### DECISION

The claimant's request that the Appeals Examiner's hearing be reopened is hereby denied since good cause for a reopening has not been proven.

The Decision of Appeals Examiner is hereby affirmed. The claimant is disqualified from receiving benefits, effective July 16, 1989, because she left work voluntarily without good cause.

This disqualification shall remain in effect for any week benefits are claimed until she performs services for an employer during thirty days, whether or not such days are consecutive, and she subsequently becomes totally or partially separated from such employment.



M. Coleman Walsh, Jr.  
Special Examiner