

COMMONWEALTH OF VIRGINIA
VIRGINIA EMPLOYMENT COMMISSION

PROCEDURE: 30.05
Requests that Commission Take
Additional Evidence and
Testimony -- General.



DECISION OF COMMISSION

In the Matter of:

Maryann LaPlace Kelly
[REDACTED]

Hofsam, Inc.
Fairfax, Virginia

Date of Appeal
to Commission: June 16, 1988
Date of Hearing: August 23, 1988
Place: RICHMOND, VIRGINIA
Decision No.: 30548-C
Date of Mailing: August 29, 1988
Final Date to File Appeal
with Circuit Court: September 18, 1988

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This is a matter before the Commission on appeal by the claimant from a Decision of Appeals Examiner (UI-8804571), mailed May 26, 1988.

APPEARANCES

Employer Representative, Attorney for Employer

ISSUES

Should the Commission direct the taking of additional evidence and testimony as provided in Regulation VR 300-01-4.3B of the Rules and Regulations Affecting Unemployment Compensation?

Did the claimant leave work voluntarily without good cause as provided in Section 60.1-618.1 of the Code of Virginia (1950), as amended?

FINDINGS OF FACT

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

The claimant filed a timely appeal from a Deputy's determination which disqualified her for benefits effective March 13, 1988, for having left work voluntarily without good cause.

The claimant was last employed as a waitress by Hofsam, Inc., in the company's Alibi restaurant in Fairfax, Virginia, from May 1987, to March 12, 1988.

On the evening of March 8, 1988, the claimant was the only waitress working in the dining room. During the course of the evening, the restaurant's owner asked her to serve a bottle of wine. The claimant got the correct bottle of wine, and eventually served it to the correct table. However, the amount of wine was not added to the customer's bill. The restaurant's general practice is that when the owner requests a waitress to serve a particular item, the amount is added to the bill by the waitress unless she is specifically told that the item is complimentary from the owner.

Subsequently, the owner discovered that the bottle of wine had not been paid for. The amount in question is \$16. On March 11, 1988, the owner advised the claimant that she had not charged for the wine she served to the customer in question. On March 12, 1988, when the owner was distributing tips among the staff, he deducted the price of the wine, \$16, from the claimant's share of tips. The claimant advised the owner that she did not think this was fair. He asked her whether she wanted the job or not. At that time, she said no, that she did not feel the situation was correct. She advised him she was quitting her job, and he told her to leave.

The claimant quit her job at that time, only because she had been forced into this confrontation by the owner. Although she had obtained the promise of a better position with a new restaurant, which was to open sometime in the future, she had no specific start to work date, as of the time she quit her job on March 12, 1988.

In general, it was the owner's policy to deduct amounts from employee's (sic) pay if they had made mistakes on customer's (sic) bills. On a previous occasion, an amount had been deducted from the claimant's pay, but as she had failed to total a check properly, she had not made an issue of the matter. Although she did not contact any other State or Federal agency about the problem until after she had quit her job and left the restaurant, she subsequently attempted to contact them

to determine whether the owner's actions were legal or not.

On August 22, 1988, the Commission received the claimant's written request that additional evidence and testimony be taken. Specifically, the claimant requested that the affidavit of Nicole Braken be considered as additional evidence in the case. Prior to the issuance of the Deputy's determination, the Deputy held a predetermination fact finding proceeding on March 29, 1988. The claimant, company president, and company attorney all attended that hearing. There is no indication in the record why the claimant could not have obtained the names of the customers at that proceeding or have requested the Commission to issue a subpoena duces tecum requiring the production of the employer's reservation book prior to the Appeals Examiner's hearing.

After the claimant filed her appeal from the Appeals Examiner's decision, a Notice of Appeal was mailed to the parties on June 22, 1988. That Notice of Appeal contained instructions concerning the appeals process. Part of those instructions were as follows:

If either party wishes a hearing to present additional testimony, evidence, or oral argument, a written request setting forth the grounds must be submitted to the Clerk of the Commission within fourteen (14) days from the mailing of this notice.

Although she did not appear at the Commission hearing, the claimant submitted a written argument. A copy was provided to the employer, and the argument was duly considered.

OPINION

Regulation VR 300-01-4.3B of the Rules and Regulations Affecting Unemployment Compensation provides:

Except as otherwise provided by this rule, all appeals to the Commission shall be decided on the basis of a review of the evidence in the record. The Commission, in its discretion, may direct the taking of additional evidence after giving written notice of such hearing to the parties, provided:

1. It is affirmatively shown that the additional evidence is material and not merely cumulative, corroborative or collateral; could not have been presented at the prior hearing through the exercise of due diligence; and it is likely to

produce a different result at a new hearing;
or

2. The record of proceedings before the appeals examiner is insufficient to enable the Commission to make proper, accurate, or complete findings of fact and conclusion of law.

The regulation also requires that any request for the taking of additional evidence and testimony must be made within fourteen days of the mailing of the Notice of Appeal.

In this case, the claimant's request that additional evidence be taken was made well after the fourteen-day period had expired. However, even if the claimant had made a timely request that additional evidence be taken, her request does not meet the criteria set out by the regulation.

First, it appears that this evidence could have been presented at the Appeals Examiner's hearing through the exercise of due diligence. The claimant could have obtained the name of the customer in question at the predetermination proceeding conducted by the Deputy. Also, the claimant could have requested a subpoena duces tecum for the production of documents prior to the date of the Appeals Examiner's hearing. In the event such documents were not produced prior to the hearing, then the claimant could have requested a postponement in order to locate the witnesses and have them called to testify. Further, when the affidavit is compared with the evidence in the record, the Commission is not convinced that it would be so material as to produce a different result at a new hearing. Both the claimant and the employer representative testified that the customers in question who were not charged for a bottle of wine were two ladies. The affidavit submitted by the claimant clearly reflects that Mrs. Braken and her husband were dining together at the restaurant. This glaring inconsistency between the affidavit and the testimony in the record creates a considerable doubt in the Commission's mind. Furthermore, when the guest check is carefully reviewed, it is obvious that no bottle of wine was charged on it. Therefore, for the reasons set out above, the Commission must conclude that the regulatory criteria for directing that additional evidence be taken have not been satisfied. Therefore, the claimant's request in this regard must be denied. (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 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 prompt a reasonably prudent person desirous of retaining employment to quit work. See Phillips v. Dan River Mills, Inc., Commission Decision 2002-C (June 15, 1955). Furthermore, a finding of good cause presupposes that the claimant has fully explored and exhausted all of the reasonable alternatives available prior to quitting work. See Lee v. Virginia Employment Commission, et al., 1 Va. App. 82, 335 S.E.2d 104 (1985).

In this case, the evidence is clear that the claimant left her job voluntarily over a dispute concerning her employer's decision to deduct from her tips the cost of a bottle of wine. The employer's decision to do so was prompted by the fact that customers that the claimant served had consumed a bottle of wine and they had not been charged for it on the guest check. The employer's policy to charge the waitresses for such errors is not inherently unreasonable, although there are those circumstances which strict adherence to it could be. However, this is not such a case.

While the claimant may have been upset that she was being charged for the bottle of wine, that is not such a substantial, compelling, or necessitous reason as would prompt a reasonable person to also quit work. Further, the claimant could have explored other alternatives such as filing a protest with the Wage and Hour Board or approaching the employer at some later time when, after further reflection, both parties may have been more amenable to working out a satisfactory resolution of the problem.

Therefore, after carefully reviewing the evidence in the record and considering the arguments presented by the employer at the Commission hearing and the claimant in her written submission, the Commission concludes that the claimant has failed to prove good cause for leaving her job. Accordingly, the disqualification provided in Section 60.2-618.1 of the Code of Virginia should be imposed.

DECISION

The claimant's request that the Commission take additional evidence and testimony is hereby denied.

The Decision of Appeals Examiner is hereby affirmed. It is held that the claimant is disqualified from receiving benefits, effective March 13, 1988, 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

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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.

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Special Examiner