



VOLUNTARY LEAVING: 135.25
Discharge or leaving --
Leaving Prior to Effective
Date of Discharge.

DECISION OF COMMISSION

In the Matter of:

Judy A. Watts
[REDACTED]

U. S. Postal Service
Merrifield, Virginia

Date of Appeal
to Commission:

November 30, 1993

Date of Review:

January 4, 1994

Place: RICHMOND, VIRGINIA

Decision No.:

44258-C

Date of Mailing:

January 7, 1994

Final Date to File Appeal

with Circuit Court: January 27, 1994

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This case is before the Commission on appeal by the employer from Appeals Examiner's decision UCFE-9318047, mailed November 12, 1993.

ISSUES

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?

Was the claimant discharged from employment due to misconduct in connection with work as provided in Section 60.2-618(2) of the Code of Virginia (1950), as amended?

FINDINGS OF FACT

The employer filed a timely appeal from the Appeals Examiner's decision which reversed an earlier Deputy's determination and qualified the claimant for unemployment compensation, effective September 12, 1993 with respect to her separation from the employer's services. Specifically, the Appeals Examiner found that the claimant had been discharged from her job; however this was not for misconduct in connection with work so as to impose a disqualification under the provisions of Section 60.2-618(2) of the Code.

Prior to filing her claim, the claimant last worked for the U. S. Postal Service between May, 1990 and August, 1993. Her position was that of a postal clerk, working the night shift at the employer's facility in Merrifield, Virginia.

The claimant had worked for the employer previously; however ever since coming back in 1990, she had been scheduled for large amounts of overtime which generally required her to work six days per week. She found that this was causing her stress and an inability to sleep to the point where she began missing time from work. On February 20, 1992 a letter of warning was issued to her concerning her attendance, primarily because she had taken many hours of unscheduled sick leave.

On June 15, 1992, the claimant was given another warning and suspended for seven days again for what the employer considered an excessive amount of unscheduled sick leave. On November 24, 1992, the claimant was again warned and suspended for 14 days for virtually the same reason. Although the claimant filed grievances to protest both suspensions, their ultimate resolution is not reflected in the record of this case.

On June 18, 1993, the employer issued a notice of removal to the claimant, indicating that she would be removed from her position 30 days from the date she received the letter because she continued to have incidents of unscheduled sick leave with some tardiness since the prior suspension. She promptly filed a grievance and obtained an extension of time which allowed her to continue to work through the end of July, 1993. At that point, based upon what she had been told by her union representative, the claimant was under the impression that she was being placed on a 21 day suspension, at the end of which she was presented with a "last chance settlement" letter and told that she would have to sign it if she wished to return to work. The claimant refused to sign it because she objected to many of its terms. She would have to agree to be on a one year probation during which time she could be terminated for any further unscheduled absences without recourse to the grievance procedure. Additionally, she had to agree that the time she had been off since her last day of work would be considered a suspension without back pay. The agreement went on to state:

I agree to refund all funds received in any claims or appeal process to include unemployment compensation as a result of the Notice of Removal dated June 18, 1993.

After the claimant refused to sign this agreement, her separation was processed in accordance with the removal letter which had been given to her previously. Despite this, her grievance to protest that action remained pending at the time of the Appeals Examiner's hearing. The claimant did note that she could not control all of her unscheduled absences since they were primarily due to illness which she never knew about in advance. The employer presented no evidence to indicate that

the claimant's absences in this regard were either unreported or that the claimant ever failed to present medical documentation to justify them when it may have been requested of her.

OPINION

Section 60.2-618(1) of the Code of Virginia provides a disqualification if it is found that a claimant left work voluntarily without good cause.

Section 60.2-618(2) of the Code of Virginia provides a disqualification if it is found that a claimant was discharged from employment due to misconduct in connection with work.

In the case of Kerns v. Atlantic American, Incorporated, Commission Decision 5450-C (September 20, 1971), the Commission held:

It is established that the burden is upon the employer to produce evidence which establishes a prima facie case that the claimant left his employment voluntarily. The employer assumes the risk of non-persuasion in showing a voluntary leaving. Once a voluntary leaving is shown, the burden of coming forward with evidence sufficient to show that there are circumstances which compel the claimant to leave his employment and that such circumstances amount to good cause as set out in the Unemployment Compensation Act, devolves upon the claimant.

The Appeals Examiner found that the claimant had been discharged but went on to state that she could not be disqualified because the employer had not carried the burden of showing that the discharge was due to misconduct in connection with her work. The Commission would agree with the analysis concerning misconduct since the record fails to disclose evidence which would indicate that the claimant deliberately or willfully violated the rules or standards of behavior expected of her as an employee with respect to her unscheduled sick leave. Nevertheless, there is other evidence in the record which leads the Commission to conclude that the claimant was never discharged at all.

Had the claimant filed her claim for benefits immediately after she stopped working on July 31, 1993, but before she turned down the last chance settlement agreement, the Commission would agree that her separation was a discharge. Nevertheless, the fact remains that the claimant reasonably believed that she was still on a suspension so as to be attached to the employer's payroll up until the point in August where she turned down the last chance settlement agreement, and she did not file her claim until after this. At this point her unemployment was not due to the fact that she had been prevented from working since July 31, 1993; rather it was due to her own voluntarily decision to

turn down the chance to return to work which the employer extended to her. As noted in the case of Harvey v. Eastern Microfilming Sales and Services, Inc., Commission Decision 6085-C (September 13, 1973) a refusal of an offer of work made by an employee while still employed with knowledge that the refusal will result in her unemployment creates a voluntarily leaving issue under the predecessor to Section 60.2-618(1) of the Code. (emphasis added)

It is at this point that the case of Johnson v. VEC, 8 Va. App. 441, 382 S.E.2d 476 (1989) becomes important. In Johnson, the claimant had been discharged from her employment and she subsequently filed her claim for unemployment compensation to which she became qualified by prevailing in the appeals process. Her former employer then offered her the chance to return to work in a slightly lesser job and at a minor reduction in pay. Nevertheless, in order to do so, she had to agree that she would be unable to bid on any other jobs for a period of one year and she had to give up any claim to back pay for the period of time she had been out of work. The claimant turned down the offer and the issue then arose under the provisions of Section 60.2-618(3) of the Code, since the separation issue had already been decided at this point.

The Virginia Court of Appeals affirmed the Commission's position that the job offered to the claimant represented suitable work so as to shift the burden to her to show good cause for refusing it. It was noted that such a determination of good cause would involve a much broader inquiry than merely considering whether the intrinsic aspects of the job are acceptable, and that good cause to refuse a job offer could arise from factors totally independent of those criteria used to determine whether a job is suitable to a particular employee. Nevertheless, due to the punitive nature of the conditions under which the claimant had to accept the offer of reemployment, she was found to have good cause to refuse that offer.

But for the fact that this claimant's separation had not been adjudicated at the time she refused her employer's last chance settlement agreement to be able to return to her prior job, the analysis of the case would be virtually identical to that in Johnson with the exception of one issue which will be discussed later. In order to return to work for the employer, the claimant was going to have to agree that her time off would be considered a disciplinary suspension without pay, and she would be subject to discharge at any time she might become sick with no advance notice in the next year with no recourse to the grievance procedure. These punitive provisions were sufficient to give her good cause to refuse the employer's offer so as to become unemployed and avoid the imposition of a disqualification under the provisions of Section 60.2-618(1) of the Code.

There is one final issue of paramount importance to be considered in connection with this case. Section 60.2-107 of the Code of Virginia provides:

Any agreement other than an agreement made pursuant to Section 60.2-608 (which deals with child support obligations) by an individual to waive, release or commute his rights to benefits or any other rights under this title shall be void. Any agreement by an individual in the employ of any person or concern to pay all or any portion of an employer's taxes, required under this title from such employer, shall be void. No employer shall directly or indirectly make, require or accept any deductions from wages to finance the employer's taxes required from him, or require or accept any waiver of any right under this title by any individual in his employ. Any employee or officer or agent of any employer who violates any provision of this section shall, for each offense, be guilty of a class 1 misdemeanor.

The last chance settlement agreement under which the claimant turned down contained a provision by which she was expected to waive her rights to receive unemployment compensation. Such an agreement is void under Virginia law. The claimant had every right to refuse to sign it; accordingly, she could not be found to be disqualified as a result of her action even if the other punitive provisions had not been in the agreement. (emphasis added)

DECISION

The decision of the Appeals Examiner is hereby amended.

The claimant is qualified for unemployment compensation, effective September 12, 1993, because she had good cause to voluntarily refuse the employer's last chance settlement agreement, thereby precipitating her unemployment.


Charles A. Young, III
Special Examiner