



DECISION OF COMMISSION

In the Matter of

Abraham L. Day, Jr., Claimant  
████████████████████

WENZ Drum Communications  
Richmond, VA 23235

Date of Appeal

To Commission: October 2, 1979

Date of Hearing: April 24, 1980

Decision No.: 12892-C

Date of Decision: May 9, 1980

Place: Richmond, Virginia

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This matter comes before the Commission on appeal by the claimant from the decision of the Appeals Examiner (UI-79-6174), dated September 24, 1979.

ISSUE

Did the claimant leave work voluntarily without good cause as provided in Section 60.1-58 (a) of the Code of Virginia (1950), as amended?

FINDINGS OF FACT

Drum Communications was the last employer, for which he had worked as a radio announcer at station WENZ from 1977 through April 13, 1979. The claimant worked evening shifts 6:00 to 10:00 p.m. six nights a week and each day he worked from 4:00 to 6:00 p.m. on production work. He was paid a weekly salary of \$175.00 at the time of his separation. Since the claimant played in a band, he had requested that the employer transfer him to daytime work so that he could work and play in the band at night. The employer had no need for a radio announcer during the daytime shifts so the claimant's request was denied.

On April 9, 1979 the claimant was offered employment as a radio announcer at radio station WKIE on the day shift. He was to work from 6:00 a.m. to 10:00 a.m. six days a week and receive a salary of \$175.00 per week. The claimant quit his job without notice so that he could accept employment at WKIE.

The claimant worked at WKIE for approximately ten days. When WENZ heard the claimant broadcasting over the air they filed suit against WKIE based upon a contract containing a covenant not to compete which the claimant had signed on December 14, 1978. WKIE elected to suspend and later terminate the claimant rather than face litigation. The operative portion of the contract between the claimant and WENZ states in part:

- "b) for a period of six months following the cancellation or termination of this Agreement, however caused, Employee shall not accept employment with any standard or FM broadcasting station situated within the Richmond, Virginia Standard Metroplotian Statistical Area whose programming format is comparable to that offered by station WENZ or any subsequently acquired station in the Greater Richmond Area, including, without limitation, Stations WANT, WKIE, WLEE, WRNL, and WRVQ . . .
- c) Employee acknowledges that his services under this Agreement are special, unique and extraordinary and agrees that Drum shall be entitled, if Employee breaches his obligations under subparagraphs 5(a) or 5(b) hereof, to injunctive relief, in addition to such other remedies and relief which would, in the event of such breach, be available to Drum."

The claimant maintains that he reasonably believed the work at WKIE to be in his own best interest because it would allow him to work fewer hours and play in a band at night. At one point in his testimony the claimant stated that he had not really read the contract when he signed it and was not aware that it prohibited him from working with a competing radio station; later in his testimony the claimant stated he felt the employer would not mind if he worked for a competing station after leaving WENZ. The claimant, by counsel, argues that the covenant not to compete is unenforceable as it was not supported by new consideration at the time it was executed by the parties. Counsel points out that the claimant had already been employed by WENZ at the time he executed the contract, therefore, his continued employment would not be consideration for the contract.

OPINION

Section 60.1-58 (a) of the Code of Virginia provides a disqualification if it is found that an individual has left work voluntarily without good cause. The Commission has held in previous decisions that where an individual leaves one job in anticipation of improving himself by accepting new work, he must show that his expectation of improving himself was a reasonable one. Indications of the reasonableness would be whether or not the claimant had actually obtained the new employment, whether he reasonably believed the new work to be of a permanent duration, and whether

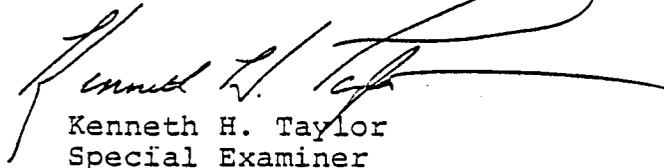
the new employment was a tangible benefit to him such as an improvement of his economic position or better utilization of his job skills.

Although it appears that the claimant in this case did reasonably believe that he had obtained the new employment and that it would improve his economic position, as it would allow him to perform with his band in the evenings, his expectation that the new work was to be permanent was not a reasonable one based upon his covenant not to compete. While the claimant would have the Commission decide the enforceability of the contract, the determinative factor in this case is the claimant's belief at the time of his leaving that he was capable and qualified to accept employment from WKIE. It is apparent that the claimant was aware that he had agreed not to go to work for a competitive station, expressly including WKIE, regardless of whether that agreement was enforceable in a court of law. The very existence of the covenant not to compete put the claimant on notice that the employer would object to its radio announcers leaving to accept employment immediately with a competing station. Had the claimant acted as a reasonable person in like circumstances he would have notified the employer as to the reason for his resignation and attempted to clarify with the employer their understanding of his liability and duties to the employer under the contract. Had he done so, the claimant would have obviously avoided the dilemma which led to his becoming unemployed. (underscoring supplied)

In view of the foregoing, it is the opinion of the Commission that the claimant's leaving of his last employment without any notice to his employer under the circumstances in this case was without good cause as that term is used in the Act.

DECISION

The decision of the Appeals Examiner is hereby affirmed.

  
Kenneth H. Taylor  
Special Examiner