COMMONWEALTH OF VIRGINIA
VIRGINIA EMPLOYMENT COMMISSION

MISCONDUCT: 190.1
Evidence-
Burden of proof and
presumptions.

DECISION OF COMMISSION

In the Matter of

Melvin A. Cottee, Claimant
[redacted]

Stonewall Jackson Hospital
Lexington, Virginia

Employer

Date of Appeal
To Commission: January 12, 1975

Date of Hearing: March 18, 1975

Decision No.: 6630-C

Date of Decision: March 19, 1975

Place: Richmond, Virginia

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This is a matter before the Commission on appeal by the claimant from the decision of the Examiner (No. UI-74-2979), dated January 3, 1975.

ISSUE

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

FINDINGS OF FACT AND OPINION

The findings of fact of the Appeals Examiner are adopted by the Commission. Additionally, subsequent to the Examiner's decision the claimant introduced medical records from Dr. Eckels that show that he did see a doctor on numerous occasions and surgery was required.

Section 60.1-58 (b) of the Virginia Unemployment Compensation Act provides a disqualification if it is found that a claimant was discharged for misconduct in connection with his work. The employer has stated that the claimant was discharged for excessive absenteeism. The evidence indicates that the claimant has missed work on many occasions to see a doctor; however, the claimant has testified that he had advised the employer of the necessity to see a doctor on each instance. At most, all that is shown by the evidence is excessive absenteeism. However, this has been due to illness and has not been shown to be unexcused absenteeism. The Commission in Elizabeth J. Hancock v. Mr. Casuals, Inc., # 1, Commission Decision No. 6355-C

(July 3, 1974) stated that mere absenteeism attributable to illness or injury when the employer was notified will not amount to misconduct. The sine qua non of wanton disregard of the employer's interest or malevolent intent is absent in such cases. Additionally, in myriad cases such as Nina V. Jarrell v. Ramada Inn, Commission Decision No. 6507-C (November 20, 1974), the Commission has held that although unexcused excessive absenteeism from work constitutes misconduct, the employer may not simply assert that a claimant was excessively absent and rest his case successfully. The burden of proof was on the employer to show the dates of such absences and the fact that they were unexcused.

Since the employer has offered no proof as to the dates of the absences or that they were unexcused, and the claimant has illustrated that he had numerous absences due to illness, it is the opinion of the Commission that the employer has failed to carry his burden of proof, and accordingly, no disqualification should be imposed upon the claimant for misconduct.

DECISION

The decision of the Appeals Examiner disqualifying the claimant for having been discharged for misconduct in connection with his work effective October 13, 1974, is hereby reversed. The deputy is instructed to determine the claimant's eligibility for the weeks in question.

B. Redwood Councill
Assistant Commissioner