UNEMPLOYMENT COMPENSATION COMMISSION OF VIRGINIA

DECISION OF APPEALS EXAMINER

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Decision No: S-7912-7754

Date: July 9, 1959

MISCONDUCT - 300.3
Manner of performing work: Quantity of work.

POINTS AT ISSUE

(1) Has the claimant been available for work during the week or weeks for which he claims benefits?
(2) Was the claimant discharged for misconduct in connection with his work?

FINDINGS OF FACT

The claimant appealed from a decision of the Deputy which disqualified him from March 17, 1959, through May 4, 1959, and reduced his potential benefits by seven times the weekly benefit amount for having been discharged for misconduct in connection with his work.

The claimant was last employed by the Rebecca Coal Company, Richlands, Virginia, where he worked from October 18, 1958, through February 14, 1959. He was employed as a coal loader at the rate of $2.12\frac{1}{2}$ per hour and worked from 4 to 12 P. M., Monday through Friday. The claimant had worked for this employer on a previous occasion but had been dismissed for inefficiency. He was rehired to replace another individual who was off temporarily but who later decided not to return to his employment; therefore, the claimant was retained. On several occasions the assistant foreman complained to the general foreman that the claimant was not doing his share of the work. Finally, on the Friday night before his separation, the general foreman observed the claimant's work and found that he was not doing as much as the other workers. Nothing was said to him and he was allowed to return and work Monday night at which time he injured a finger, which resulted in his being absent on Tuesday night. On Wednesday night the general foreman went to the claimant's home and advised him that he had been discharged and another individual hired in his place.

A report was subsequently received from the doctor that the claimant's injury was not serious, although it resulted in his missing work for two days. This did not have any influence on their decision to discharge the claimant. It had been decided to do so prior to the injury.

The claimant was duly notified of the hearing at his last known address according to the Commission records but failed to appear at the scheduled time. The envelope in which the notice was mailed had not been returned by the U. S. Post Office Department and nothing further has been heard from the claimant.

OPINION

The burden is on every claimant to show that he is available for work while claiming unemployment benefits. Inasmuch as this claimant failed to appear at the hearing scheduled on the appeal, he has not carried the burden of showing that he has met the requirement of being available for work within the meaning of that term as used in Section 60-46(c) of the Code of Virginia.

Section 60-47(b) of the Virginia Unemployment Compensation Act provides a disqualification ranging from a minimum period of seven weeks to a maximum period of eleven weeks and the total amount of potential benefits reduced accordingly, if it is found that an individual was discharged for misconduct in connection with his work.

The Commissioner for the Unemployment Compensation Commission of Virginia in Decision No. 577-C, dated May 18, 1950, in defining the term "misconduct in connection with work" has said:

> "Misconduct within the meaning of an unemployment compensation act excluding from its benefits an employee discharged for misconduct must be an act of wanton or wilful disregard of the employer's interest, a deliberate violation of the employer's rules, a disregard of standards of behavior which the employer has the right to expect of his employee, or negligence in such a degree or recurrence as to manifest culpability, wrongful intent, or evil design, or show an intentional substantial disregard of the employer's interest or of the employee's duties and obligation to the employer. * * * Neither is mere inefficiency, unsatisfactory conduct, errors in judgment, or the like to be deemed misconduct. (Reference 48 American Jurisprudence, page 541)
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> "To the same effect is a decision of the Supreme Court of the State of Wisconsin - Boynton Cab Co. v. Neubeck, 296 N. W., 636."

As can be seen from the above, inefficiency cannot be construed as being misconduct in connection with employment. The claimant in the instant case had worked for this same employer on a previous occasion and had been discharged for inefficiency. In spite of this he was re-employed and, during this employment, was never reprimanded or warned that the amount or degree of his work was substandard or would result in his discharge. Even after the general foreman observed the claimant's work and found that he was not producing as much as other workers, nothing was said to him, and it was not until the date of his discharge that he was told the reasons therefor. It is therefore held that, although the claimant was discharged from his employment, it was not for causes which would constitute misconduct in connection with his work. He therefore would not be subject to the disqualifying provisions of the law. (Underscoring supplied)

DECISION

That portion of the Deputy's decision, holding the claimant eligible for benefits, is hereby reversed. It is held that the claimant has not met the eligibility requirements of the Act from March 10, 1959, through May 8, 1959, the date of the hearing before the Examiner.

It is further held that no disqualification should be imposed in connection with the claimant's separation from his last employment.

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NOTE: The Commission in Decision 3379-C, dated July 9, 1959, has said:

"This case comes on as a review of the entire record, including the transcript of evidence before the Appeals Examiner, and the Commission.

"The Examiner held the claimant unavailable for work because of his failure to carry the burden of proof that he was available. Necessitous circumstances prevented the claimant from appearing at the hearing before the Examiner. However, he did appear at the Commission's hearing and gave testimony that he had been seeking work four or five times a week. This search ultimately resulted in securing employment on June 17, 1959. On the basis of this evidence, coupled with the fact that through his own efforts the claimant secured employment, this Commission is of the opinion that the claimant has met the eligibility requirements of the Act from March 10, 1959 to June 17, 1959, the date of his present employment. The decision of the Examiner insofar as it relates to eligibility is hereby reversed.

"That portion of the Examiner's decision which refuses to impose a disqualification on the claimant is hereby affirmed.

"For the foregoing reasons, the claimant is held to be eligible for benefits without disqualification from March 10, 1959 to June 17, 1959."