COMMONWEALTH OF VIRGINIA
VIRGINIA EMPLOYMENT COMMISSION

DECISION OF COMMISSION

In the Matter of:

Penni L. Sydenstricker
[redacted]

Boddie-Noell Enterprises
Gloucester, Virginia

Date of Appeal to Commission: June 17, 1994

Date of Review: July 26, 1994

Place: RICHMOND, VIRGINIA

Decision No.: 45991-C

Date of Mailing: July 28, 1994

Final Date to File Appeal with Circuit Court: August 17, 1994

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This case came before the Commission on appeal by the claimant from a Decision of Appeals Examiner (UI-9408790), mailed June 10, 1994.

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 due to misconduct connected with work as provided in Section 60.2-618(2) of the Code of Virginia (1950), as amended?

FINDINGS OF FACT

On June 17, 1994, the claimant filed a timely appeal from the Appeals Examiner's decision which disqualified her for benefits, effective April 17, 1994. The basis for that disqualification was the Appeals Examiner's conclusion that the claimant left her job voluntarily without good cause.

Prior to filing her claim for benefits, the claimant last worked for Boddie-Noell Enterprises. She was employed as a dining room hostess, from April 23, 1993, until April 21, 1994. She was paid $4.60 an hour.

The employer has adopted a progressive disciplinary policy. Under that policy, specific offenses are identified together with the penalty that would be imposed. Some of the offenses would involve an employee receiving a verbal warning and two counselling forms prior to being discharged. Other offenses of a more serious nature are identified as "Discharge Offenses." Rule 20, leaving the restaurant without permission while on the clock, is identified as an immediate discharge offense.

The claimant was aware of the company rules and the progressive disciplinary system. The rules were reviewed with her at the time she was hired. In addition, the rules are posted on the employee bulletin board in each restaurant.

On April 18, 1994, the claimant was scheduled to work from 4:00 p.m. until 11:00 p.m. The claimant reported as scheduled; however, she clocked out at 7:35 p.m. without permission from her supervisor. Prior to leaving, the claimant told the manager in charge, "I cannot take this job anymore. Tell Roland that I left." The claimant walked off the job because she believed that the manager in charge was frustrated because of the heavy dinner rush that was complicated by the fact that the restaurant was very understaffed that evening. The claimant believed that the manager in charge had spoken to her inappropriately. In particular, the claimant felt that the tone of voice used by the manager in charge was rude and discourteous.

After walking off the job, the claimant contacted the regional manager. The regional manager told her that she should contact the general manager who had responsibility for her store.

The claimant spoke with her general manager on April 19, 1994. The general manager wanted to resolve the situation and be fair to everyone involved. Accordingly, he asked the claimant to confer with him that day. The claimant had been originally scheduled to work both April 19, and April 20, 1994. She asked the general manager if she should report prepared to work, and he responded in the affirmative.

The claimant was permitted to work April 19, and April 20, 1994, while the general manager investigated the situation. On April 21, 1994, the general manager met with the claimant and the manager who was in charge of the restaurant on the evening of April 18, 1994. At that meeting, the general manager asked both individuals to share with him their respective versions of what occurred three days earlier. The only area of substantial dispute was the manager's denial that she had yelled at the staff or used a rude, discourteous tone of voice. At the conclusion of that meeting, the general manager informed the claimant that she was being discharged for walking off the job without permission.

OPINION

Section 60.2-618 of the Code of Virginia delineates five circumstances when a claimant may be disqualified from receiving unemployment compensation benefits. Subsection 1 of the statute provides a disqualification if the Commission finds that a claimant left work voluntarily without good cause. Subsection 2 provides a disqualification if the Commission finds that a claimant was discharged for misconduct in connection with work.

The employer bears the burden of proving that the claimant left work voluntarily. Shuler v. V.E.C., 9 Va. App. 147, 384 S.E.2d 122 (1989). Once that has been established, the burden of proof is on the claimant to demonstrate good cause for leaving work. Kerns v. Atlantic American, Inc., Commission Decision 5450-C (September 20, 1971). In construing the meaning of the phrase "good cause," the Commission has limited it to those circumstances which are so substantial, compelling and necessitous as would leave a claimant no reasonable alternative other than quitting work. Accord, Phillips v. Dan River Mills, Inc., Commission Decision 2002-C (June 15, 1955); Lee v. V.E.C., 1 Va. App. 82, 335 S.E.2d 104 (1985).

If the employer does not prove that the claimant left work voluntarily, then the separation would be treated as a discharge pursuant to the provisions of Section 60.2-618(2) of the Code of Virginia. In that event, a disqualification would be imposed only if the claimant had, without mitigation or justification, deliberately violated a company rule reasonably designed to protect the legitimate business interests of the employer, or engaged in acts or omissions which, by their nature or recurrence, manifested a willful disregard of the employer's interests and the duties and obligations owed to the employer. Branch v. V.E.C., 219 Va. 609, 249 S.E.2d 180 (1978); V.E.C. v. Gantt, 7 Va. App. 631, 376 S.E.2d 808 (1989), aff'd on rehearing en banc, 9 Va. App. 225, 385 S.E.2d 247 (1989).

In his decision, the Appeals Examiner concluded that the claimant voluntarily left her job. In reaching that conclusion, it appears that the Appeals Examiner may have mischaracterized a holding in the Shuler case and erroneously relied upon Hurd v. 3 M, Inc. Commission Decision 35329-C (april 26, 1991), aff'd, Circuit Court of Wise County, Chancery No. C-91-244 (March 31, 1992).

After quoting a brief passage from the Shuler case, the Appeals Examiner stated, "It further held the three days of unreported absence were not sufficient to find the claimant voluntarily quit her job, but her separation was a discharge under Section 60.2-618(2) of the Act." This statement appears to suggest that Shuler stands, in part, for the proposition that an unreported absence of three days would not be sufficient to constitute a voluntary leaving of work. If that implication was intended, it is incorrect. The Court of

Appeals in Shuler found that the employer failed to prove that the claimant voluntarily left her job, based largely on evidence in the record which showed that the three days of absence had been approved. Consequently, there was no intent on the claimant's part to abandoned or quit her job.

In the Hurd case, there is a significant factual difference that clearly distinguishes it from the case at hand. In the Hurd case, after quitting his job, the claimant asked if he could return to work. The employer denied that request and advised that the resignation had been accepted. In the present case, the claimant was permitted to return to work for two days while the employer was investigating the circumstances surrounding the April 18, 1994 incident. The employer's decision to allow the claimant to return to work was, for all intents and purposes, a rescission of the claimant's resignation.

Under these circumstances, the Commission must conclude that the claimant was discharged on April 21, 1994, at the conclusion of the employer's investigation. Therefore, her qualification for benefits must be resolved under the discharge statute.

Here, the employer had adopted a number of rules and regulations that clearly established the nature and scope of its business interests and the duties and obligations that were expected from its employees. As the Court of Appeals observed in the Gantt case:

> When an employer adopts a rule, that rule defines the specific behavior considered to harm or to further the employer's interests. By definition, a violation of that rule disregards those interests. The rule violation prong, then, allows an employer to establish a prima facie case of misconduct simply by showing a deliberate act which contravenes a rule reasonably designed to protect business interests. 7 Va. App. at 634-35.

The employer's rule was certainly reasonable. Given the nature of the fast food industry, the employer could not meet the expectations of its customers if employees could walk off the job with impunity.

The record shows without question that the claimant was aware of the rule involved in this case and that she deliberately walked off the job in violation of that rule. The claimant acknowledged that before she walked off the job, the restaurant was very busy and understaffed. Therefore, her conduct is even more egregious because she knew that her departure would make it even more difficult for the remaining staff to provide quality service to the customers. For these reasons, the Commission must conclude that the employer has

proven a prima facie case of misconduct. Accordingly, in order to avoid the disqualification provided by the statute, the claimant must prove mitigating circumstances.

In her defense, the claimant maintained that the manager in charge had spoken to her in a tone of voice that was rude and discourteous. She also maintained that the manager had yelled at her and at other employees. She attributed this behavior to the manager's frustrations that resulted from the under staffing and the volume of business that night.

The evidence in the record is in dispute regarding what the manager said and did on the evening of April 18, 1994. Nevertheless, if the Commission accepted the claimant's version of those events in its entirety, it would not prove mitigation for her deliberate violation of the company rule that prohibited walking off the job without permission. The manager's conduct may well have been an appropriate basis for the claimant to complain to the store manager or regional manager. It did not justify, excuse, or mitigate her decision to walk off the job. Therefore, since the claimant did not prove mitigating circumstances, she must be disqualified from receiving benefits.

DECISION

The Appeals Examiner's decision is amended. The claimant is disqualified for benefits, effective April 17, 1994, because she was discharged for misconduct connected with work.

This disqualification shall remain in effect for any week benefits are claimed until the claimant performs services for an employer during thirty days, whether or not such days are consecutive, and she subsequently becomes totally or partially separated from such employment.

This case is referred to the Benefit Payment Control Unit to determine if the claimant has been overpaid any sum of benefits that must be repaid to the Commission as a result of the disqualification imposed by this decision.

M. Coleman Walsh, Jr.

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Special Examiner