

COMMONWEALTH OF VIRGINIA
VIRGINIA EMPLOYMENT COMMISSION



DECISION OF COMMISSION

In the Matter of:

Lanny B. Fuller
[REDACTED]

Banner Masonry
Baltimore, Maryland

Date of Appeal
to Commission: April 19, 1994

Date of Review: June 2, 1994

Place: RICHMOND, VIRGINIA

Decision No.: 45555-C

Date of Mailing: June 3, 1994

Final Date to File Appeal
with Circuit Court: June 23, 1994

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This case came before the Commission on appeal by the claimant from a Decision of Appeals Examiner (UI-9402842), mailed March 31, 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 for misconduct connected with work as provided in Section 60.2-618(2) of the Code of Virginia (1950), as amended?

Was the claimant separated as a result of an unlawful act which resulted in his conviction as provided in Section 60.2-618(5) of the Code of Virginia (1950), as amended?

FINDINGS OF FACT

On April 19, 1994, the claimant filed a timely appeal from the Appeals Examiner's decision which disqualified him from receiving benefits, effective December 19, 1993. The basis for that disqualification was the Appeals Examiner's conclusion that the claimant's separation arose as a result of an unlawful act for which he had been convicted.

Prior to filing his claim for benefits, the claimant last worked as many as 30 days for Banner Masonry of Baltimore, Maryland. The claimant was employed from September 13, 1993 through November 5, 1993. He was a full-time employee and was paid \$8.50 an hour.

On November 8, 1993, the claimant was convicted of a misdemeanor and sentenced to serve 60 days in jail. The claimant was eligible to participate in a work-release program.

On November 9, 1993, a classification counselor contacted the claimant's immediate supervisor. The classification counsellor needed to determine if the claimant had a job and, if so, how long it would last in order to determine his eligibility for the work release program. During this telephone conversation, the claimant's supervisor stated that he could not guarantee the claimant's job beyond three days. Because of that representation, the claimant was not eligible to participate in the work release program. The classification counsellor reported that information to the claimant. She also encouraged him to contact the employer. The claimant called the employer's office on November 9 and 10, 1993; however, he received no response concerning his inquiries about his job.

The claimant was released from jail after serving a total of 44 days. He did not return to the employer at that time based upon the information that the classification counselor had shared with him. The claimant assumed that he had been laid off since his supervisor would not guarantee his job beyond three days.

Two separate hearings were held by the Appeals Examiner. The employer was properly notified of both hearings; however, no company representative participated in either hearing.

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).

Section 60.2-618(5) of the Code of Virginia provides that an individual shall be disqualified upon his separation from an employing unit:

If such separation arose as a result of an unlawful act which resulted in a conviction and after his release from prison or jail until he has performed services for an employer for 30 days, whether or not such days are consecutive, and subsequently becomes totally or partially separated from such employment.

The Appeals Examiner concluded that the claimant should be disqualified under the provisions of Section 60.2-618(5) of the Code of Virginia. The evidence in the record is insufficient to support such a conclusion. It is not enough to show that the claimant was convicted of an unlawful act and subsequently separated from his employment. The employer, who bears the burden of proving that the claimant should be disqualified under the statute, must establish a causal link between the unlawful act for which the claimant was convicted and the separation from employment. Here, there is no evidence to establish that causal link.

The best evidence in the record would tend to show that the claimant was laid off because of a lack of work. The testimony of the classification counsellor established that the employer was not willing to guarantee that the claimant would have a job beyond three days. At no time was the classification counsellor informed that the claimant had been discharged, or did not have a job because of the conviction for an unlawful act. The employer's failure to respond to the claimant's subsequent telephone calls is a further indication that he had been separated because of a lack of work. If work was available and the employer needed the claimant's services, it is more likely than not that a company official would have responded in some fashion to the claimant's inquiries.

Under these circumstances, the Commission must conclude that the employer has failed to prove that the claimant voluntarily left his job, that he was discharged for misconduct connected with his work, or that he was separated as a result of an unlawful act for which he was subsequently convicted. Accordingly, no disqualification may be imposed upon the claimant's receipt of unemployment insurance benefits based upon his separation from work with Banner Masonry.

DECISION

The Appeals Examiner's decision is reversed. The claimant is qualified to receive benefits, effective December 19, 1993, based upon his separation from work with Banner Masonry.

M. Coleman Walsh, Jr.
M. Coleman Walsh, Jr.
Special Examiner