

VIRGINIA EMPLOYMENT COMMISSION

DECISION OF COMMISSION

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Decision No. 8252-C

MISCONDUCT: 15.2

Date: August 9, 1976

Absences -

Reasons

This is a matter before the Commission on appeal by the employer from the decision of the Examiner (No. UI-76-3189), dated June 11, 1976.

ISSUES

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

Has the claimant been available for work within the meaning of §60.1-52 (g) of the Code of Virginia (1950), as amended?

FINDINGS OF FACT AND OPINION

The claimant appealed from a determination of the Deputy which disqualified her for benefits effective March 28, 1976, for having been discharged for misconduct in connection with her work.

The Newport News Shipbuilding and Dry Dock Company was the claimant's last employer for whom she worked as a clerk from August 15, 1973, through March 26, 1976.

During the calendar year 1975, the claimant had been out of work for extended periods due to illness. She had been warned about her excessive absenteeism. Medical information furnished by the claimant shows that she was incapacitated from January 27, 1976, through March 15, 1976. During this period she was hospitalized several days. Her doctor released her as physically able to return to work on March 16, 1976. On March 16, 1976, the claimant called her employer to advise that her three-year-old child was sick and she could not be there. Her supervisor came to her home and checked on her and told her she would return to work the following day. The claimant was then transferred to the night shift and returned to work on March 17, 1976, and worked through March 26, 1976. Over the week-end she contracted the flu. She called her employer on March 29 and advised that she was sick and could not report to work. Her supervisor again came to her home on March 31, 1976, and told her that she was being terminated because someone was needed who could work full-time. According to the claimant, she had not missed any time from work except when she or her child was sick.

The claimant filed for unemployment compensation effective March 28, 1976, and continued her claim series through April 17, 1976. During this period she reported no efforts to find employment during the week ending April 3, 1976. During the week ending April 10, 1976, and the week ending April 17, 1976, she reported that she had contacted department stores for work as a sales clerk.

The claimant is an experienced clerk-typist and is able to type 60 or 65 words a minute, but she has shown little or no effort to find employment in this field.

Additionally, at the hearing before the Commission two employer representatives appeared and gave testimony. It was stated that the employer knew that the claimant was under the doctor's care since approximately January and, therefore, did not take any action to terminate her during her absences, which extended until March 17, 1976. The employer representatives also testified that the claimant had called in and spoken to other co-workers and her supervisor concerning receipt of her paycheck during her absence and it was generally understood that the claimant was ill and could not attend work. It was the position of the employer that the claimant did have a record of excessive absenteeism and accordingly, it was necessary to terminate the employment relationship with the claimant in order that another person could be hired and the job adequately manned.

In the record before the Commission is a physician's statement dated April 20, 1976, over the signature of John S. Gremer, M. D., which states that the claimant was incapacitated and unable to work from January 27, 1976, to March 15, 1976.

§60.1-58 (b) provides a disqualification if it is found that a claimant was discharged for misconduct in connection with her work. The Commission has consistently defined unexcused, chronic absenteeism to be tantamount to misconduct. However, the Commission has also consistently held that mere absenteeism which is attributable to sickness or injury as opposed to mere absenteeism, is not tantamount to misconduct. See Elizabeth J. Hancock v. Mr. Casuals, Inc. #1, Commission Decision No. 6355-C (July 3, 1974); Betty J. Weiford v. University of Virginia, Commission Decision No. 6513-C (November 25, 1974).

In the present case adequate medical evidence has been presented which unequivocally shows that the claimant was incapacitated from January 27, 1976, through March 15, 1976, due to illness. Accordingly, the absences which occurred during this period cannot be held to be tantamount to misconduct. Furthermore, in view of the fact that the employer was aware that the claimant was absent due to illness, it cannot be held that such absences were unexcused. No allegation has been made by the employer that the claimant's absences on March 29, 1976, through March 31, 1976, were due to any other reason besides illness, or that these absences were unexcused.

Accordingly, the Commission must find that such absences, in and of themselves, do not constitute misconduct within the meaning of the Act.

The Commission is of the opinion that the claimant was not guilty of unexcused absences such as would amount to misconduct, but rather that the claimant was absent due to illness. It cannot be said that where a claimant is absent due to illness and such illness has been substantiated by competent medical evidence, that such absences, in and of themselves, reflect any willful or wanton disregard of the employer's interest. Absent the requisite malevolent intent, the claimant's absences do not amount to misconduct within the eyes of the unemployment insurance law. Although the employer's decision to discharge the claimant may have been a sound one based on prudent business interests, this is not to say that such justification on business principles for such termination would preclude a discharged employee from drawing unemployment compensation. Accordingly, no disqualification should be imposed.

§60.1-52 (g) provides in part that in order to be eligible for unemployment compensation a claimant must be able and available for work. To be considered available for work, a claimant must show that she is earnestly and actively seeking suitable employment and placing no undue restrictions upon her employability.

The Commission has consistently held in previous decisions that it is not the number of employers to whom an individual applies for work which establishes an attachment to the labor market, but whether he is actively and realistically seeking employment. In this case it is to be noted that the claimant has made little or not effort to find employment in the clerical field for which she is well qualified.

For this reason it is the opinion of the Appeals Examiner [and adopted by the Commission] that she has not made a realistic search for work, nor has she shown a genuine attachment to the labor market, and thus has failed to meet the availability for work requirements of the Act during the period under consideration.

DECISION

The decision of the Appeals Examiner is hereby affirmed. It is held that no disqualification should be imposed in connection with the claimant's separation from work.

It also is held that the claimant has not met the eligibility requirements of the Act from March 28, 1976, through April 17, 1976.