

VIRGINIA EMPLOYMENT COMMISSION

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Decision of Commission

MISCONDUCT: 135.35
Leaving in Anticipation of
discharge

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In the Matter of	§	Appeal from Examiner
	§	
Toni J. Howard,	§	Date of Appeal: April 27, 1972
Claimant	§	
S. S. No. [REDACTED]	§	Date of Hearing: May 18, 1972
	§	
Woodward & Lothrop	§	Decision No.: 5669-C
Washington, D. C.	§	
	§	Date of Decision: May 26, 1972
	§	
	§	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-72-723) dated April 14, 1972.

ISSUES

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

Was the claimant available for work for the week or weeks for which she claims benefits within the meaning of § 60.1-52 (g), Code of Virginia (1950), as amended?

FINDINGS OF FACT

The claimant was last employed by Woodward & Lothrop, Washington, D. C., for whom she worked as a Department Manager of the Girl's Department from August 1971 through January 28, 1972.

Several weeks prior to her separation, the claimant had a personnel review with the manager, who indicated that in some areas her work was not satisfactory and would have to improve. Around January 28, 1972, the claimant was told that since her work had not improved sufficiently, she would be terminated. He also stated that there were no openings in any other stores operated by the employer in the area.

The claimant was given the option of either resigning or being fired. The claimant, in order to protect her employment record, resigned.

The claimant filed her claim for benefits on January 30, 1972, and continued her claim series through the week ending March 11, 1972. Throughout this period several prospective employers were contacted in an effort to find work. As a result of these efforts, claimant secured employment on March 13, 1972.

OPINION

Section 60.1-58 (b) of the Virginia Unemployment Compensation Act provides a disqualification if it is found that an individual was discharged for misconduct in connection with his work.

This Commission is of the opinion that the factual situation is such as to create the issue of whether or not the claimant was "discharged" within the meaning of the term as interpreted by this Commission on previous occasions.

This Commission stated in Sid F. Kerns v. Atlantic American, Inc., Decision No. 5450-C (September 20, 1971): "It is established that the burden is upon the employer to produce evidence which establishes a prima facie case that the claimant left his employment voluntarily. The employer assumes the risk of non-persuasion in showing a voluntary leaving."

The evidence clearly shows that this separation of the claimant was initiated by the employer.

This Commission stated in Joyce H. Smith v. Meloy Laboratories, Inc., Decision No. 5512-C (November 22, 1971), as follows: "... the Commission holds that the legal inference of voluntary quit or discharge must be drawn from the facts of each case, and the words 'discharged' or 'fired' need not be expressly used by the employer, but may be inferred from such language as . . . 'it will be best if you resign.'

This Commission is of the opinion that based upon the aforesaid, the claimant's leaving was a result of a discharge and not a voluntary leaving.

This Commission is also of the opinion that because mere inefficiency, unsatisfactory conduct, or failure in good performance, as a result of inability or incapacity, does not constitute misconduct; that no disqualification should be imposed upon the claimant for having been discharged. The evidence falls far short of indicating any misconduct on the part of this claimant.

Section 60.1-52 (g) of the Virginia Unemployment Compensation Act provides in part that a claimant, in order to be eligible for benefits, must be

available for work. This Commission is of the opinion that the claimant has been doing those things required of an unemployed person to secure employment, which is supported by her securing employment on March 13, 1972.

DECISION

The decision of the Appeals Examiner is hereby reversed. It is held that no disqualification should be imposed upon the claimant for having been discharged for misconduct in connection with her work. It is also held that the claimant was meeting the eligibility requirements of the Act from January 30, 1972, through March 11, 1972, the claim weeks before the Commission.

A handwritten signature in dark ink, appearing to read "B. Redwood Councill", is written over the typed name.

B. Redwood Councill
Assistant Commissioner