ESC PRECEDENT DECISIONS

GOVERNING THE CONTESTED UNEMPLOYMENT INSURANCE MATTERS ARISING UNDER THE EMPLOYMENT SECURITY LAW OF NORTH CAROLINA

[*These Precedent Decisions are constantly reviewed for the purpose of revisions to reflect changes in Law, Precedents and Published Policies.]*

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An adequate supply of the ESC Precedent Decisions shall be maintained by all offices of the Employment Security Commission (ESC). Upon request, a copy of these decisions must be provided to the public at no charge.

N.C.G.S. §96-4(c) Publication. – The Commission shall cause to be printed for distribution to the public the text of this Chapter, the Commission's Precedents and general rules, and any other material the Commission deems relevant and suitable, and shall furnish the same to any person upon application therefor. All publications printed shall comply with the requirements of G.S. §143-170.1.

ESC Precedent No. 21.17(B) provides that ESC may designate certain of its Commission decisions as precedents. ESC is controlled by such precedents except as modified by judicial review. All precedents are published and distributed to the adjudicators, appeals referees and other ESC employees as is deemed necessary to ensure consistency in ESC proceedings and decisions.

Employment Security Commission of North Carolina
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EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA

PRECEDENT DECISION NO. 1

IN RE TALBERT
(Adopted December 17, 1982)

FINDINGS OF FACT:

1. The claimant last worked for Charlotte Machine Company on July 30, 1982. From August 1, 1982 until August 28, 1982, the claimant has registered for work and continued to report to an employment office of the Commission and has made a claim for benefits in accordance with G.S. 96-15(a) as of the time the Adjudicator issued a determination. The employer appealed the Adjudicator's determination, and an evidentiary hearing was held by Charles E. Monteith, Jr., Appeals Referee, under Docket No. XI-UI-74483, who held that the claimant was disqualified for unemployment benefits. The claimant filed a timely appeal to the Commission.

2. The claimant left this job under the following circumstances: He reported to work on August 1, 1982. He informed his supervisor that he needed to check on some matters at the employment office. Claimant then left and did not return until the following week and then only to pick up his tool box.

3. Claimant was hired as a machinist/welder. He began work for Charlotte Machine Company on July 29, 1982 and last worked on July 30, 1982. In the course of his work claimant was required to lift items which he considered heavy and which he believed caused him to have pain in his back. Claimant stated that he had a pre-existing back problem at the time he began his employment on July 29, 1982, but he failed to indicate such on his employment application. The employer would not have hired the claimant for the job had he known about the claimant's pre-existing back problem because the job as a machinist/welder required lifting of various items of various weights.

4. At no time did the claimant indicate to the employer that he was having back pains until he returned the following week to pick up his tool box. Nor did the claimant request a transfer to other work. Other than presenting receipts from doctors indicating that he had been treated for back problems, the claimant presented no medical evidence as to restrictions on the type of job claimant could perform.

5. When claimant left the job, continuing work was available for claimant there.

MEMORANDUM OF LAW:

The Employment Security Law of North Carolina was enacted by the General Assembly for the purpose of paying benefits to individuals who are unemployed due to no fault of their own and in order that such individuals might have some protection against the hazard of unemployment and to insure that such individuals might have the burden of unemployment lightened by the payment to them of benefits during periods of unemployment. The primary purpose of the Act is to provide some source of income during temporary periods of unemployment to individuals until such individuals are able to find work and again become employed. The Act never was intended to encourage idleness and the benefit payments never were intended to replace the income or take the place of wages provided by steady work. Nor were unemployment insurance benefits intended by the General Assembly to be sickness insurance. Because a person is unemployed does not within itself entitle such individual to become the recipient of unemployment insurance payments.

There are certain conditions set forth in the Act which every claimant must meet before he is entitled to receive benefits. These conditions are set forth in G.S. 96-13 and G.S. 96-14 and relate to the claimant's eligibility for benefits and to possible disqualification from receiving benefits for a period of time under certain circumstances.

G.S. 96-14(1) provides that an individual shall be disqualified for benefits for the duration of his unemployment if it is determined by the Commission that such individual is unemployed because he left work voluntarily without good cause attributable to the employer. In order to disqualify an individual or claimant under this provision, it must be found that he (1) voluntarily left work and (2) such leaving was without good cause attributable to that individual's employer.

In ascertaining whether or not an employee voluntarily left his employment, the mental processes, constraining or compulsive forces or objective influences, or the freedom or lack of freedom from external compulsion or necessity which led up to the claimant's leaving work must be considered. As to the existence of "good cause attributable to the employer," the Commission should in every case be -fully satisfied that, where an employee has left the employment, the reasons for so doing were of an impelling character which, in the opinion of the Commission, afforded ample and complete justification for the severance of his employment. This would exclude all fictitious or feigned reasons or excuses for failure to continue in the work and would comprehend only such causes as operated directly on the employee which made, in the opinion of the Commission, his continuance in the employment impossible, or attendant with such circumstances as to make it unreasonably burdensome for him to continue therein. ESC Interpretation No. 48, dated January 5, 1944.

The Commission has long recognized that illnesses of such character and nature as to disable an employee from continuing in the employment could be such a cause as to make it necessary for the employee to discontinue his work as long as this condition existed; i.e., compelling health reasons. Because such illnesses deprive the employee of freedom from external compulsion or necessary in deciding whether to continue in employment, the

Commission has consistently held that a leaving of employment for compelling health reasons is an involuntary leaving and not a voluntary one covered under G.S. 96-14(1).

In order to sustain a determination that a leaving of employment was involuntary due to compelling health reasons, a claimant must (1) introduce competent testimony that at the time of leaving adequate health reasons existed to justify the leaving, (2) inform the employer of the health problem, (3) specifically request the employer to transfer him to a more suitable position, and (4) take the necessary minimal steps to preserve his employment such as requesting a leave of absence if appropriate and available. See Deiss v Unemployment Compensation Board of Review, 475 Pa. 547, 381 A.2d.132 (1977), Carroll v Board of Review, 9 Unemployment Insurance Reporter (CCH), 11,089 (1982).

The medical evidence introduced must support the claimant's contention that at the time of leaving his health precluded him from performing his assigned duties. See Coyle v Unemployment Compensation Board of Review, 56 Pa.Cmwlth. 170, 424 A.2d 588 (1981); Counts v Commissioner, 10 Unemployment Insurance Reporter (CCH) 8288 (1982).

In the case at hand, claimant has failed to meet his burden of proving either the 2nd, 3rd, or 4th requirements in order to establish an involuntary leaving for compelling health reasons. Although the medical evidence showed that adequate health reasons may have existed at the time of claimant's leaving, claimant failed to inform his employer, request other suitable work or to even attempt to preserve his employment by taking the necessary minimal steps. It must, therefore, be concluded that claimant has failed to establish or prove an involuntary leaving of employment for compelling health reasons.

Furthermore, it is concluded that the record evidence and the facts found therefrom do not support a conclusion that the claimant has met the burden of showing good cause attributable to the employer for a voluntary leaving. In re Hodges, 49 N.C.App. 189, 270 S.E.2d 599 (1980); In re Vinson, 42 N.C. App. 28, 255 S.E.2d 644 (1979).

The claimant must, therefore, be disqualified for benefits.

DECISION:

The claimant is disqualified for unemployment benefits beginning August 1, 1982, and continuing until the claimant qualifies for benefits in accordance with the Employment Security Law.

EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA

PRECEDENT DECISION NO. 2

IN RE SPRINGER
(Adopted January 13, 1983)

FINDINGS OF FACT:

1. The claimant last worked for N. C. Lutheran Homes, Incorporated on March 17, 1982. From June 6, 1982 until June 12, 1982, the claimant has registered for work and continued to report to an employment office of the Commission and has made a claim for benefits In accordance with G.S. 96-15(a) as of the time the Adjudicator issued a determination. The employer appealed the Adjudicator's determination, and an evidentiary hearing was held by Charles Monteith, Jr., Appeals Referee, under Docket No. XI-Ul-70079, who held that the claimant was not disqualified for unemployment benefits. The employer filed a timely appeal to the Commission. Pursuant to the employer's request, a Commission hearing to consider arguments on points of law was held on September 2, 1982. Appearing for the hearing were D. Russell Myers, Jr. and John B. Whidden, V, for the employer.

2. The claimant left this job of her own choice. She had been employed since July, 1980, as a restorative assistant. On March 17, 1982, she was injured on the job and became unable to work. She subsequently was placed on a medical leave of absence until released by her doctor to return to work. She was released by her doctor to return on June 2, 1982.

3. Between the claimant's last day of work on March 17, 1982 and June 2, 1982, another person had been hired as restorative assistant, and the work she had done through March 17, 1982 was not available for her. Pursuant to the employer's reasonable leave of absence policy, on June 2, 1982, she was offered the work it had available, on-call nurse assistant. This work would have paid $3.74 per hour, it would have required her to work when needed, and it was not a permanent position. Pursuant' to the employer's unwritten policy, she would have had priority for any permanent work which would become available.

4. The claimant did not accept the employer's offer of continuing, available work because it was on-call, non-permanent, and paid $.81 less per hour (18%) than her former permanent, full-time work as restorative assistant had paid, $4.55 per hour. She, instead, filed a claim for unemployment insurance benefits.

5. When the claimant left the job, continuing work was available for the claimant there.

MEMORANDUM OF LAW:

The Employment Security Law of North Carolina provides that an individual shall be disqualified for benefits for the duration of his unemployment if it is determined by the Commission that such individual is unemployed because he left work voluntarily without good cause attributable to the employer. G.S. 96-14(l).

An individual who voluntarily leaves work has the burden of showing good cause attributable to the employer for the voluntary leaving. Unless that burden is met, the individual is disqualified. In re Hodges, 49 N.C.App. 189, 270 S.E.2d 599 (1980); In re Vinson, 42 N.C.App. 28, 255 S.E.2d 644 (1979).

In this case, the claimant has shown she voluntarily left due to a[n] 18% reduction in pay and because of the change in work from permanent, full-time to non-permanent, on-call. Considering the provisions in G.S. 96-12(c) for partial weekly unemployment insurance benefits, the change in hours and duration is not good cause because a remedy exists in Chapter 96 of the General Statutes, the Employment Security Law.

As to the reduction in pay, the undersigned concludes that 18% is a substantial decrease and is good cause attributable to the employer for her voluntary leaving. Our Supreme Court has held that a job which was offered to continue the employment relationship was unsuitable when it paid 28% less than the previous job and that good cause attributable to the employer exists for the voluntary leaving. In re Troutman, 264 N.C. 289, 141 S.E.2d 613 (1965). In accord, see Bunny's Waffle Shop v. Cal. Emp. Comm., 24 Cal.2d 735, 151 P.2d 224 (1944), where a 25% reduction was good cause; Maitland v. California, California Court of Appeals, First Dist., Div. Two No. 52896, March 3, 1982, wherein an 8% reduction was not good cause.

The Commission considers that a substantial reduction in pay can be good cause attributable to the employer under North Carolina law and that 15% or more generally is substantial, provided the reduction was for reasons other than the claimant's causation. A demotion due to malfeasance, misfeasance, or nonfeasance which results in a substantial reduction in pay only would be good cause attributable to the employer if the employer had acted arbitrarily or capriciously.

It is concluded the claimant did voluntary leave but with good cause attributable to the employer and is not disqualified.

It is noted that had the claimant refused the same offer after a reasonable period, she might have been subject to disqualification under G.S. 96-14(3) since after a reasonable period, the same work offered could become suitable.

DECISION:

The claimant is not disqualified for unemployment benefits.

Commentary:

The Employment Security Law was subsequently amended to provide that good cause attributable to the employer exists for leaving work if the employer unilaterally and permanently reduced a claimant's rate of pay more than 15% of the customary scheduled full-time work hours. Good cause does not exist if the reduction resulted from malfeasance, misfeasance or nonfeasance on the part of the claimant. G.S. §96-14(1c).

EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA

PRECEDENT DECISION NO. 3

IN RE CLARK
(Adopted March 11, 1983)

FINDINGS OF FACT:

1. The claimant last worked for this employer on June 11, 1982. From October 17, 1982 until October 23, 1982, the claimant has registered for work and continued to report to an employment office of the Commission and has made a claim for benefits in accordance with G.S. 96-15(a) as of the time the Adjudicator issued a determination. The claimant appealed the Adjudicator's determination, and an evidentiary hearing was held by Charles M. Brown, Jr., Appeals Referee, under Docket No. XIII-UI-78814, who held that the claimant was not disqualified for unemployment benefits. The employer filed a timely appeal to the Commission.

2. The claimant was discharged from this job because he was unable to report to work due to being incarcerated.

3. The claimant was convicted in Robeson County, North Carolina, of driving under the influence and driving while license permanently revoked. The claimant was sentenced to twelve (12) months in prison and served his sentence at the unit in Troy, North Carolina, which is approximately two hundred (200) miles from the claimant's former place of employment. The claimant was released after having served four (4) months of his sentence. The claimant was eligible for work release during his incarceration.

4. The employer held the claimant's job open for a period of time in hopes that the claimant would be transferred to a unit near the employer's place of business and could return to work on work release. The claimant was never transferred to a unit nearby his former place of work. The employer discharged the claimant and found a replacement for him, because the employer could not hold the claimant's job open indefinitely.

MEMORANDUM OF LAW:

N.C.G.S. 96-14(2) provides that an individual shall be disqualified for benefits for the duration of the unemployment beginning with the first day of the first week after the disqualifying act occurs with respect to which week an individual files a claim for benefits if it is determined by the Commission that such individual is, at the time such claim is filed, unemployed because the individual was discharged for misconduct connected with the work. The term "misconduct connected with work" is not a defined term in the Employment Security Law of North Carolina; however, in the case of In re Collingsworth, 17 N.C.App. 340, 194 S.E.2d 210 (1973), the North Carolina Court of Appeals quoted with approval the following definition:

> ***[T]he term 'misconduct' (in connection with one's work) is limited to conduct evincing such wilful or wanton disregard of an employer's interest as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee, or in carelessness or negligence of such degree or recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to his employer.***

Yelverton v. Kemp Industries, 51 N.C.App. 215, 275 S.E.2d 553 (1981); Intercraft Industries Corporation v. Morrison, 305 N.C. 373, 289 S.E.2d 357 (1982).

It is concluded from the facts at hand that the claimant did evince an intentional and substantial disregard of his employer's interests by his conduct which caused him to be incarcerated and, therefore, unable to report for work. The North Carolina Court of Appeals in Yelverton v. Kemp Furniture Industries 51 N.C.App. 215, 275 S.E.2d 553 (1981) stated that the definition approved in Collingsworth permits the Commission to find misconduct and to deny benefits for conduct showing an intentional and substantial disregard of the employer's interests. The employer in the case at hand had a substantial interest in making sure that its operation ran smoothly and was fully manned. The employer had no obligation to the claimant to keep the claimant's job open indefinitely, particularly when the reason for the claimant's absence from work was due to his own legally inexcusable conduct. The claimant's conduct is clearly not within the conduct contemplated for the payment of benefits as described in G.S. 96-2, which sets out the public policy underlying the Employment Security Law. That section provides in part, that the funds collected under the Act are "to be used for the benefit of persons unemployed through no fault of their own." Since the claimant was discharged due to being absent from work while incarcerated following a conviction under the Motor Vehicle Laws of North Carolina, it cannot be said that the claimant became unemployed through no fault of his own. See Collins v. B & G Pie Company, Incorporated, ___ N.C. App. _____, 269 S.E.2d 809 (1982), disc. rev. denied, 299 S.E.2d 221 (1983), which upheld a disqualification of a claimant who was discharged for being absent from work while incarcerated due to a violation of conditions of probation.

The claimant must, therefore, be disqualified for benefits for having been discharged from the job for misconduct connected with the work.

DECISION:

The claimant is disqualified for unemployment benefits beginning October 17, 1982, and continuing until the claimant qualifies for benefits in accordance with the Employment Security Law.

EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA

PRECEDENT DECISION NO. 4

IN RE BOONE
(Adopted August 31, 1983)

FINDINGS OF FACT:

1. The claimant last worked for this employer on March 14, 1983. From March 20, 1983 until March 26, 1983, the claimant has registered for work and continued to report to an employment office of the Commission and has made a claim for benefits in accordance with G. S. 96-15(a) as of the time the Adjudicator issued a determination. The claimant appealed the Adjudicator's determination, and an evidentiary hearing was held by Jamie Creech, Appeals Referee, under Docket No. IX-UI-88153, who held that the claimant was not disqualified for unemployment benefits. The employer filed a timely appeal to the Commission.

2. The employer witness, a part owner, admitted to the Appeals Referee that the reason precipitating claimant's discharge or "the straw that broke the camel's back" was his discovery that the claimant was looking for another job. Prior to this time, the employer had been dissatisfied with claimant's work performance during the last few weeks of his employment because of claimant's mistakes in inventory, errors in daily bookkeeping, and his general attitude which reflected that he had lost interest in his job. During weekly staff meetings, these problems were discussed with claimant and other managerial staff members. The employer had to constantly go behind claimant to correct his errors and mistakes.

3. Claimant admitted that he had somewhat lost interest in his job because of the changes which had occurred, "both physical and staff wise." Claimant further admitted that he was making mistakes and errors in the performance of his job duties.

MEMORANDUM OF LAW:

N.C.G.S. 96-14(2) provides that an individual shall be disqualified for benefits for the duration of the unemployment beginning with the first day of the first week after the disqualifying act occurs with respect to which week an individual files a claim for benefits if it is determined by the Commission that such individual is, at the time such claim [is] filed, unemployed because the individual was discharged for misconduct connected with the work. The term "misconduct connected with work" is not a defined term in the Employment Security Law of North Carolina; however, in the case of In re Collingsworth, 17 N.C.App. 340, 194 S.E.2d 210 (1973), the North Carolina Court of Appeals quoted with approval the following definition:

> ***[T]he term 'misconduct' (in connection with one's work) is limited to conduct evincing such wilful or wanton disregard of an employer's interest as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee, or in

> carelessness or negligence of such degree or recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to his employer.***

The employer has the responsibility to show that the claimant for benefits was discharged for misconduct within the meaning of the law. Intercraft Industries Corporation v. Morrison, 305 N.C. 373, 289 S.E.2d 357 (1982).

The Commission has consistently held that if it is alleged that a claimant was discharged from his job for a series of incidents, the "totality of the circumstances" test as opposed to the "last incident" test will be utilized in determining whether he was discharged for misconduct connected with work. The "totality of the circumstances" test does not require that the last incident occurring prior to the discharge be sufficient, in and of itself, to bring about the discharge. Instead, the Commission will look at all the incidents as a whole in determining whether the claimant was guilty of misconduct. The employer, however, still must show that the last incident precipitating the decision to discharge the claimant contained some element of misconduct. Conversely, the "last incident" test requires a showing that the final act or failure to act on the part of the claimant prior to the discharge was sufficient, in and of itself, to cause claimant's discharge. This test is normally used when it is alleged that the claimant was discharged for only one reason. In the case under consideration, the employer has alleged that claimant was discharged due to unsatisfactory work performance, poor attitude toward his work, and seeking other employment while still employed. It appears that the appropriate test to apply to the facts of this case to determine whether misconduct connected with work existed is the "totality of the circumstances" test.

The employer has shown that the claimant had, in the last few weeks of his employment, failed to perform his job satisfactorily and had exhibited a poor attitude toward his work to such an extent that his work performance suffered. The employer admitted, however, that the last incident occurring and precipitating the discharge was claimant's search for other employment. But, there was no evidence presented by the employer that tended to prove that by seeking other work while employed, claimant violated or breached a term of his contract of employment or that the work search affected claimant's work performance. It must, therefore, be concluded that the evidence failed to establish that claimant's work search contained any element of misconduct. Applying the "totality of the circumstances" test to the facts and evidence of this case, it must also be concluded that the employer has not carried its burden of proving that claimant was discharged for misconduct connected with work since the last incident contained no element of misconduct.

The claimant is, therefore, not disqualified for benefits because the evidence fails to show that the claimant was discharged from the job for misconduct connected with the work.

The undersigned must note that since the last incident contained no element of misconduct, the employer could not have shown misconduct connected with work under the "last incident" test. It is further noted that had the employer merely discharged the claimant due to his work performance and attitude toward his job, misconduct connected with work may have been proven; however, the Commission must premise its decision upon all the reasons alleged for the discharge from employment and not merely upon those reasons which would establish misconduct.

DECISION:

The claimant is not disqualified for unemployment benefits.

EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA

PRECEDENT DECISION NO. 5

IN RE DALEY
(Adopted September 14, 1983)

FINDINGS OF FACT:

1. The claimant last worked for the employer on December 13, 1982. From January 9, 1983 until January 15, 1983, the claimant has registered for work and continued to report to an employment office of the Commission and has made a claim for benefits in accordance with G.S. 96-15(a) as of the time the Adjudicator issued a determination. The claimant appealed the Adjudicator's determination, and an evidentiary hearing was held by an Appeals Referee, under Docket No. IX-UI-84236, who held that the claimant was disqualified for unemployment benefits. The claimant filed a timely appeal to the Commission.

2. The claimant was discharged from his job as a registered nurse for two (2) separate reasons. The first reason was for alleged attendance at work on December 13, 1982 while under the influence of an intoxicating substance. The second reason was claimant's failure to truthfully respond to the employer's inquiry concerning his hospitalization which caused him to be absent from work and unavailable to perform those duties for which he had been employed.

3. The employer witnesses had no firsthand, direct knowledge concerning claimant's being at work on December 13, 1982 while under the influence of an intoxicating substance. Nor has claimant ever admitted to the employer that he was in such condition while at work on December 13, 1982, or any other day. Claimant denied this allegation of wrongdoing leveled by the employer witnesses.

4. On December 13, 1982, claimant left his job prior to the end of his shift without first requesting permission from his immediate supervisor. The supervisor was able to contact the claimant on the night of December 13, 1982 to set up an appointment for the morning of December 14, 1982, to discuss the reason why the claimant had left the job without first obtaining the supervisor's permission. Claimant,, however, was hospitalized on December 14, 1982, due to an adverse reaction to his use of cocaine on December 8, 9 and 10, 1982. The supervisor was merely informed on the 14th by claimant's wife that claimant had been hospitalized.

5. After his release from the hospital, claimant was scheduled for a conference with his supervisor on December 23, 1982. At the December 23, 1982 conference, claimant told his supervisor that he had been hospitalized due to anxiety and having pushed himself too hard. When requested by the supervisor to sign a release authorizing Forsyth Hospital to forward his medical records to the employer for verification that the reason for his hospitalization was as stated by him, claimant admitted that his hospitalization had resulted from his adverse reaction to 'some bad cocaine.' In response to questioning by the Appeals Referee, claimant admitted that he

had initially lied to the supervisor as to the cause of his hospitalization, and he had done so because "I was afraid that if anything came up about the cocaine that I'll get fired, and I was just trying to keep my job."

6. In his appeal to the Commission, claimant petitioned the Commission to admit, as additional evidence to the record, excerpts from what was purportedly the High Point Memorial Hospital, Incorporated Employee Handbook. These excerpts were in response to the employer's allegation that claimant's lack of truthfulness was a violation of the employer's Code of Ethics requiring truthfulness in all aspects of employment. The written employer's Code of Ethics was not offered into evidence at the hearing before the Appeals Referee.

MEMORANDUM OF LAW:

N.C.G.S. 96-14(2) provides that an individual shall be disqualified for benefits for the duration of the unemployment beginning with the first day of the first week after the disqualifying act occurs with respect to which week an individual files a claim for benefits if it is determined by the Commission that such individual is, at the time such claim is filed, unemployed because the individual was discharged for misconduct connected with the work. The term "misconduct connected with work" is not a defined term in the Employment Security Law of North Carolina; however, in the case of' In re Collingsworth, 17 N.C.App. 340, 194 S.E.2d 210 (1973), the North Carolina Court of appeals quoted with approval the following definition:

> ***[T]he term 'misconduct' (in connection with one's work) is limited to conduct evincing such wilful or wanton disregard of an employer's interest as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee, or in carelessness or negligence of such degree or recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employers interests or of the employee's duties and obligations to his employer.***

Yelverton v. Kemp Industries, 51 N.C.App. 215, 275 S.E.2d 553 (1981); Intercraft Industries Corporation v. Morrison, 305 N.C. 373, 289 S.E.2d 357 (1982).

It is concluded from the facts at hand that the employer has failed to present sufficient evidence to carry its burden of proof of showing that the claimant while in attendance at work on December 13, 1982, was under the influence of an intoxicating substance. The employer, therefore, has not shown misconduct connected with work on the part of the claimant in regards to this allegation.

As to claimant's untruthfulness in response to his supervisor's initial inquiry as to the reason for his hospitalization, the employer has shown misconduct connected with work. Fabrication by an employee of an excuse for absence constitutes wilful misconduct. Dunlap v. Unemployment Compensation Board of Review, 366 A.2d 618 (1976). Indisputably, an employee's deliberate lie or attempt to mislead his employer constitutes wilful misconduct. Walkowsky v. Board of Review, 432 A.2d 365 (1981); Smith v. Board of Review, 411 A.2d 712 (1980); Glaser v. Board of Review, 404 A.2d 768 (1979). The employer has a right to expect an employee to adhere to a standard of behavior which encompasses truthfulness in the employee's responses to inquiries made by the employer. Furthermore, an employee has a duty and/or obligation to the employer to deal with the employer in a truthful and trustworthy manner. This standard of behavior or duty arises by virtue of the existence of the employer/employee relationship. It is not necessary for the employer to have a written code of ethics wherein this standard of behavior or duty is specifically set out. A breach of the duty or standard of behavior requiring truthfulness in dealings with the employer constitutes misconduct connected with work when good cause for such breach does not exist.

The claimant in the present case breached the standard of behavior or duty of truthfulness in his dealings with his employer. The only reason advanced by the claimant to justify his lack of truthfulness was to avoid losing his job. It must be concluded that although such reason may have been a compelling one for the claimant, it does not amount to good cause or justification for his act of untruthfulness.

The claimant was discharged from his job for misconduct connected with his work and, therefore, must be disqualified for unemployment insurance benefits pursuant to G.S. 96-14(2).

It is further concluded that since this decision does not rest upon the employer's Code of Ethics, the admission into evidence of the purported excerpts from the Employer's Employee Handbook as it relates to the Code of Ethics would serve no useful purpose. Claimant's petition to the Commission to admit additional evidence, therefore, is denied.

DECISION:

The claimant is disqualified for unemployment benefits beginning January 9, 1983, and continuing until the claimant qualifies for benefits in accordance with the Employment Security Law.

PRECEDENT DECISION NO. 6

IN RE HENDRICK & HUMPHRIES
(Adopted September 19, 1983)

This cause came on for consideration by the undersigned upon an appeal from decisions rendered by the Appeals Referee. The undersigned, having reviewed the evidence in the record, does hereby vacate the decisions of the Appeals Referee and remand the cause for a new hearing and decision.

At the hearing before the Appeals Referee, the employer had 19 pieces of material that, if spread out, would have covered an area at least the size of 12 bed sheets. These pieces of real evidence are important in this case. The issue before the Appeals Referee is whether or not the claimants properly cut this material. It would appear from a review of the transcribed testimony that a viewing of these 19 pieces of material laid out in order is necessary for a just determination in this matter.

This order is in no way meant to imply criticism of the parties. The undersigned notes that this would appear to be the first instance where he has seen or heard of evidence that was not possible to display in the limited areas of the local office. The Appeals Referee should, however, have explored the possibility of laying out this material in the parking lot of the local office. If such was not feasible, other areas should have been explored such as the employer's place of business, an armory, an auditorium, etc.

The undersigned realizes that the Appeals Referee is not given an adequate amount of time to handle this type of evidence during a normal scheduled hearing. On those rare occasions, when such problems as this occur, the Appeals Referee should continue the matter for a time and place certain, if possible. If not possible to set a time and place certain, the Appeals Referee should continue the matter until he can make further arrangements and then notify the parties.

In this case, the Appeals Referee should arrange to have the real evidence displayed in the parking lot of the local office or some other available area. The Appeals Referee should view the 19 pieces of cloth and describe into the record as best he can what he observes. The employer witnesses and the claimant[s] should be given an opportunity to review his description and add any comments that they desire concerning his description and his observations.

"When real evidence (i.e., the object itself) is offered into evidence, it must be properly identified and offered." 6 N.C. Index 3d, Evidence section 26. A review of the record seemed to indicate that the 19 pieces of cloth were offered, but the offered evidence was never ruled upon perhaps because of their nature. The Appeals Referee who acts as both judge and jury and is the trier of fact must make findings of fact based upon competent evidence. Anderson vs. Northwestern Motor Company, 233 N.C. 372, 64 S.E.2d 265 (1951); Moses vs. Bartholomew, 238 N.C. 714, 78 S.9.2d 923 (1953).

In many cases, he is called upon to do this by determining the credibility of the witnesses without the benefit of any real evidence. Here, where there is real evidence available, it is most important that it be accepted and used. An extraordinary amount of time should be scheduled for this hearing so that all parties will have an ample opportunity to conduct and complete this matter.

PRECEDENT DECISION NO. 8

IN RE BUCHANAN
(Adopted December 8, 1983)

FINDINGS OF FACT:

1. The claimant last worked for the employer on May 31, 1983. From June 5, 1983 until June 11, 1983, the claimant has registered for work and continued to report to an employment office of the Commission and has made a claim for benefits in accordance with G.S. 96-15(a) as of the time the Adjudicator issued a determination. The employer appealed the Adjudicator's determination, and an evidentiary hearing was held by Louis J. Ferris, Jr., Appeals Referee, under Docket No. XIV-UI-92954, who held that the claimant was not disqualified for unemployment benefits. The employer filed a timely appeal to the Commission.

2. Claimant was discharged from this job for excessive absenteeism and tardiness pursuant to the employer's progressive disciplinary warnings procedure. The progressive disciplinary warning procedure included: a verbal warning, a first written warning, a second written warning, and a final warning which resulted in termination of employment. Claimant was well aware of the employer's policy as to absenteeism and tardiness to work. The disciplinary warning procedure was also known to the claimant. Both items were discussed with the claimant when she was re-hired by the employer on August 2, 1982.

3. The verbal warning was issued to the claimant on November 10, 1982, for accruing three (3) instances of absence in a one (1) month period. After accruing five (5) additional instances of absence for a total of nine (9) instances in a six (6) months period, claimant was issued her first written warning on March 16, 1983. The second written warning was issued on May 10 for eight (8) instances of tardiness in a six (6) months period. At the time the second written warning was issued, claimant was also suspended from work for a three (3) day period which ended on May 16. As it had in the March 16th warning, the employer requested that claimant improve her attendance record in order to avoid further disciplinary action. The final warning was issued on May 31, 1983 for claimant's absence from work on that date. Consistent with the employer's progressive disciplinary warning procedure, claimant was discharged from her job upon the receipt of the fourth warning.

4. From August 2, 1982 through May 31, 1983, claimant gave the following reasons for her absences and/or tardiness: personal illness, personal business, husband's aunt died, appearing in court with husband, dental appointment, extraction of tooth, weather, illness of grandmother, stepfather died, desire to be with parents, unspecified personal reasons, and lack of child care.

5. Claimant's absence from work on May 31, 1983 was occasioned by lack of child care. Her regular babysitter had informed claimant on the afternoon of May 30th that she could no longer take care of the claimant's child. Claimant made efforts to locate appropriate child care but was unable to do so in time to permit her to report to work on May 31st. Claimant's child was

nineteen (19) months of age and could not be left alone. The employer was duly informed of the reason for claimant's absence on May 31st. Claimant located a babysitter on May 31st and was able to return to work on June 1st; however, she had been discharged. The employer presented no evidence tending to show that the claimant could have located child care on May 30th which would have permitted her to report to work on May 31st.

MEMORANDUM OF LAW:

N.C.G.S. 96-14(2) provides that an individual shall be disqualified for benefits for the duration of the unemployment beginning with the first day of the first week after the disqualifying act occurs with respect to which week an individual files a claim for benefits if it is determined by the Commission that such individual is, at the time such claim is filed, unemployed because the individual was discharged for misconduct connected with the work. The term "misconduct connected with work" is not a defined term in the Employment Security Law of North Carolina; however, in the case of In re Collingsworth, 17 N.C. App. 340, 194 S.E.2d 210 (1973), the North Carolina Court of Appeals quoted with approval the following definition:

> ***[T]he term 'misconduct' in connection with one's work) is limited to conduct evincing such wilful or wanton disregard of an employer's interest as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee, or in carelessness or negligence of such degree or recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to his employer.***

The employer has the responsibility to show that the claimant for benefits was discharged for misconduct within the meaning of the law. Intercraft Industries Corporation v. Morrison, 305 N.C. 373, 289 S.E.2d 357 (1982).

The question presented by this appeal is whether claimant's absence from work on May 31, 1983, which violated her employer's rule on absenteeism and placed her in non-compliance with the employer's May 10, 1983 request and which was due to her inability to secure child care, constituted "misconduct" connected with her work so as to disqualify her for unemployment compensation benefits pursuant to G.S. 96-14(2).

The North Carolina Court of Appeals in In re Cantrell, 44 N.C.App. 718, 720, 263 S.E.2d 1, 3 (1980), quoted with approval the following language from McLean v. Board of Review, 476 PA. 617, 620, 383 A.2d 533, 535 (1978):

> We must evaluate both the reasonableness of the employer's request in the light of all the circumstances, and the employee's reason for noncompliance. The employee's behavior cannot fall within "wilful misconduct" if it was justifiable or reasonable under the circumstances, since it cannot then be considered to be in wilful disregard of conduct the employer "has a right to expect." In other words, if there was "good cause" for the employee's action, it cannot be charged as wilful misconduct. (Citations omitted).

In Cantrell, the employer had instructed the employee to make a long trip with another driver who was black. This employee refused to do so due to personal reasons and his unsubstantiated belief that the employer's rotation system established for determining a team of drivers was no longer in effect. Claimant continued to refuse to comply with his employer's request even after again being directed to comply with the request. The court held that a claimant['s] deliberate and unjustifiable refusal to report to work, when the employer has the right to insist on the employee's presen[ce] and when the employee knows that his refusal would cause logistic[al] problems for the employer, constitute misconduct sufficient to disqualify the claimant from receiving benefits. It is clear that the Court found the employer's request to be reasonable and the employee's noncompliance with this request to be without good cause.

In 1982, the North Carolina Supreme Court in Intercraft Industries Corporation v. Morrison, supra, stated:

> Our research discloses that it is generally recognized that chronic or persistent absenteeism, in the face of warnings, and without good cause may constitute wilful misconduct. (Citations omitted.) However, a violation of a work rule is not wilful misconduct if the evidence shows that the employee's actions were reasonable and were taken with good cause. (Citations omitted.) This court has defined "good cause" to be a reason which would be deemed by reasonable men and women valid and not indicative of an unwillingness to work. In re Watson, 273 N.C. 629, 161 S.E.2d 1 (1968); see also, In re Clark, 47 N.C.App. 163, 266, S.E.2d 854 (1980).

In Intercraft, the Court held that it was proper for the Commission as the trier of fact to find that the employee had, when she presented uncontroverted evidence tending to show that she could not locate appropriate child care, established good cause for failure to report to work although pursuant to the employer's rule concerning absenteeism she accrued her tenth unexcused absence and was subject to discharge. The Court went on to state that had the employer, to whom the Commission had allotted the burden of showing misconduct connected with work, offered any evidence to negate claimant's evidence of "good cause", the Commission would have been required to consider that evidence and make a specific finding as to whether "good cause" existed for the employee's violation of the employer's rule on absenteeism.

Citing Intercraft, supra, as support, the Court in Butler v. J.P. Stevens Company, Incorporated and Employment Security Commission, 60 N.C.App. 563, 566, 299 S.E.2d 672, 675 (1983) held:

> This definition of "misconduct" (as cited in Collingsworth, supra) suffices to encompass an employee's violation of the employer's reasonable attendance rules of which he has notice and his failure to give the employer proper notice of absences for which good cause may exist. (Emphasis added.)

The employee in Butler was discharged from his job for violating a company rule prohibiting the accruing of four (4) unexcused absences within a six months period. The fourth unexcused absence occurred when the claimant failed to properly notify of his absence which was occasioned by illness. The court was of the opinion that the reason for claimant's absence constituted good cause for said absence; however, both the Court and the Commission found that the employee had not established good cause or justification for his failure to notify the employer concerning his absence.

The common thread running through the above-cited cases is that the Commission should consider in its determination of whether the employee was discharged for misconduct, any evidence presented by the parties which tends to show the presence or absence of good cause or justification for the employee's violation of a reasonable employer's rule or failure to comply with a reasonable employer's request (instructions). It is also clear from the language of these cases that it is incumbent upon the employee to present some evidence which would amount to "good cause" for violating or failing to comply with a known employer's reasonable rule or request. Once the employee has presented such evidence, the employer must, in order to carry its burden of establishing "misconduct," offer some evidence to negate the employee's showing of "good cause." If either of the parties fail in its responsibility, the conclusion as to the existence of "misconduct" should be made accordingly.

In the case at hand, the employer's progressive disciplinary warning procedure was sufficient to place claimant on notice that her attendance was poor and was unacceptable by the employer. Furthermore, the employer's May 10, 1983 request and final warning that claimant must improve her attendance to avoid further disciplinary action was definitely reasonable in light of the prior warning, both oral and written, and the suspension from work resulting from claimant's pattern of tardiness and absences. In addition, it is clear from the record evidence and the facts found therefrom that none of claimant's reasons for tardiness and some of her reasons for absences occurring prior to May 31 did not justify said tardies and absences.

Within fifteen (15) calendar days after returning from her three (3) day suspension from work, claimant was again absent from work. As did the employee in Intercraft, supra, claimant presented uncontroverted evidence in an effort to establish "good cause" for her May 31 absence of which the employer was properly notified. It is a valid assumption that problems in arranging alternative child care could arise as a result of a regular babysitter's short notice to the claimant that she would no longer be available to provide care to claimant's nineteen (19) months old child while claimant was at work. It was not indicative of an "unwillingness to work" when claimant, unable to arrange alternative child care, chose not to leave her young child unattended while she reported to work on May 31st. Claimant's immediate return to work on June 1, 1983 after being successful on May 31 in arranging appropriate child care, did not reflect an unwillingness to work. Claimant's actions, under the existing circumstance, were those of a reasonable and prudent person and therefore, established good cause for her absence on May 31, 1983.

The employer presented no evidence tending to show that the reason advanced by claimant for her absence was untrue or that there was alternative child care available which would have permitted claimant to report to work on May 31 or that claimant did not conduct her child care search as a reasonable and prudent person would have and as a result child care was not obtained in sufficient time for claimant to report to work as scheduled. In essence, the employer failed to rebut or negate claimant's showing of good cause.

Pursuant to the principles established in Cantrell, Intercraft and Butler, as discussed supra, it must be concluded that the employer did not carry its burden of showing that claimant was discharged from work due to misconduct. The claimant is, therefore, not disqualified for benefits because the evidence fails to show that the claimant was discharged from the job for misconduct connected with the work.

DECISION:

The claimant is not disqualified for unemployment benefits.

EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA

PRECEDENT DECISION NO. 9

IN RE DAVIS
(Adopted February 2, 1984)

FINDINGS OF FACT:

1. The claimant last worked on May 25, 1983 as a substitute teacher for the County Board of Education. There was no further work available for the claimant at that time. From May 22, 1983 until July 2, 1983, the claimant has registered for work and continued to report to an employment office of the Commission and has made a claim for benefits in accordance with G.S. 96-15(a) as of the time the Adjudicator issued a determination. The claimant appealed the Adjudicator's determination, and an evidentiary hearing was held by Pat Barnes, Appeals Referee, under Docket No. IV-UI-93821, who held that the claimant was ineligible to receive unemployment benefits. The claimant filed a timely appeal to the Commission.

2. The claimant worked as a teacher for this employing unit until 1977. From 1977 until June of 1982, the claimant performed services for a college.

3. From November of 1982 until May of 1983, the claimant worked as a substitute teacher for both the County Board of Education and a private school. The claimant performed duties as a substitute teacher for one to six days for the County Board of Education. The claimant performed duties as a substitute teacher for the private school for one to six days during the school year of 1982-83.

4. The claimant's status as a substitute teacher with the private school is unknown.

5. The claimant's status with the County Board of Education is active, The claimant's name currently appears on a list of approved teachers for the 1983-84 school year. It is unknown whether or not the claimant will be called upon to provide substitute teaching services at this time. The claimant's chances for obtaining such employment are the same as many other individuals whose names appeared on such approved list. Those individuals will be called upon if and when they are needed to provide services as substitute teachers.

6. The claimant filed a new initial claim in January of 1983. He filed his additional initial claim effective May 22, 1983.

MEMORANDUM OF LAW:

The Employment Security Law of North Carolina provides that an unemployed individual shall be eligible to receive benefits with respect to any week only if the Commission finds that he is available for work. G.S. 96-13(a)(3).

The law further provides that the payment of benefits to any individual based on services for secondary schools, or subdivisions of said secondary schools, subject to this chapter, or administered under the provisions of this chapter, shall be in the same manner and under the same conditions of the law of the chapter as applied to individuals whose benefit rights are based on other services subject to this chapter.

The law further provides that any employee of a secondary school system shall be considered available for work during any week such individual is on vacation between successive academic years only if the individual does not have a contract, written, oral, or implied, or a reasonable assurance to perform services in any capacity for the secondary school system for both such academic years. The provisions of this subsection relating to the denial of benefits apply to individuals who perform services on a part-time or substitute basis. G.S. 96-13(b)(2).

Based upon the foregoing facts, it is concluded that the claimant did provide substitute teaching services during the 1982-83 school year for the County Board of Education and a private college. Such services were limited to no more than twelve days during the 1982-83 school year.

The claimant is on an approved list of substitute teachers to perform duties as a substitute teacher for the 1983-84 school year. The claimant is subject to be called if and when work is available during the 1983-84 school year.

The claimant last worked for the County Board of Education. While the claimant may or may not be eligible for benefits during the academic year, the claimant is clearly not eligible for benefits during the summer vacation period. The law is specific and no exceptions are provided.

Consequently, the claimant is not available for work within the meaning of the law during the week beginning May 22, 1983. The claimant is, therefore, not eligible to receive benefits for those weeks.

DECISION:

The claimant is not eligible to receive unemployment benefits for the week beginning May 22, 1983.

EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA

PRECEDENT DECISION NO. 10

IN RE LEE
(Adopted April 17, 1984)

This cause came on for consideration on the 29th day of March, 1984, by the undersigned upon an appeal from the decision rendered by Appeals Referee, Albert Jerome Williams, Jr. When this matter came on for argument, the following person(s) appeared representing their respective interests: John Doe, representative for employer.

In this matter, the employer has alleged that a prospective witness was intimidated by the claimant and would not appear before the Appeals Referee because of threats made by him to her. The claimant admits saying to her "I'll make sure . . . I won't forget this, I'm going to keep my eye on you" and "I'll be watching you" when informed by her that she was going to report him for sleeping. The undersigned concludes that there is a reasonable basis to support the employer's allegation that its witness was intimidated.

It is the policy of this Commission that reasonable measures will be taken to protect and ensure that any witness can be able to testify before the Commission without fear or subject to intimidation. To that end, the Appeals Referee assigned to a case shall take whatever reasonable steps are necessary to ensure such testimony in the event there is a reasonable basis to believe intimidation or threats have occurred. In most cases, the simplest measure is to arrange for a telephone hearing. This decision is therefore vacated and the matter is remanded for a telephone hearing.

It is now, therefore, ordered that the undersigned, having reviewed the evidence in the record, does hereby vacate the decision of the Appeals Referee and remand the cause for a telephone hearing and decision.

EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA

PRECEDENT DECISION NO. 11

IN RE TAYLOR
(Adopted May 15, 1984)

FINDINGS OF FACT:

1. The claimant last worked for the employer on May 31, 1983. From November 13, 1983 until November 19, 1983, the claimant has registered for work and continued to report to an employment office of the Commission and has made a claim for benefits in accordance with G.S. 96-15(a) as of the time the Adjudicator issued a determination. The claimant appealed the Adjudicator's determination, and an evidentiary hearing was held by John F. Pendergrass, Appeals Referee, under Docket No. IX-Ul-734, who held that the claimant was disqualified for unemployment benefits. The claimant filed a timely appeal to the Commission.

2. The claimant was initially employed as a cloth layer and worked approximately 40 hours per week.

3. Due to economic reasons, the claimant's hours were gradually reduced to around 25 hours per week.

4. The claimant believed that his financial condition did not make it feasible for him to work that number of hours. The claimant resigned his position in order to go into business for himself. At the time of the hearing, the claimant had not performed any services in his private business as a carpenter for several months.

5. The claimant could have supplemented his hours by performing other duties with the employer on a band lathe but failed to do so because he felt that job was not possible for him to perform because of his "nerves."

6. When the claimant left the job, continuing work was available for the claimant there.

MEMORANDUM OF LAW:

The Employment Security Law of North Carolina provides that an individual shall be disqualified for benefits for the duration of his unemployment if it is determined by the Commission that such individual is unemployed because he left work voluntarily without good cause attributable to the employer. G.S. 96-14(l).

In this case, the record evidence and facts found therefrom do not support a conclusion that the claimant has met the burden of showing good cause attributable to the employer for the voluntary leaving. In re Hodges, 49 N.C.App. 189, 270 S.E.2d 599 (1980); In re Vinson, 42 N.C.App. 28, 255 S.E.2d 644 (1979).

A claimant's dissatisfaction with a reduction in working hours and the financial difficulty resulting from such a reduction does not constitute a reason, necessitous and compelling enough to justify his voluntary leaving. Owen v. Board of Review, 26 Pa. Cmwlth. 278, 363 A2d 852 (1976).

Where a claimant who traveled 60 miles round trip to and from work daily quit her job after the employer reduced her hours from 36 to 20 per week, she was subject to disqualification for terminating her employment without good cause notwithstanding her contention that she was no longer able to afford to travel the distance because of the reduction in hours and pay. The fact that she accepted a job a considerable distance from home did not constitute cause "attributable to the employer." Begay, N.M. Sup. Ct., CCH, N.M., par. 8211 (1984).

The Employment Security Law provides that an individual who is working less than three customary, scheduled, full-time days is eligible for partial unemployment benefits. N.C.G.S. 96-8(10); N.C.G.S. 96-12(c).

In enacting these statutes, the legislature has set forth the amount of reduced employment an individual would have to suffer prior to obtaining partial unemployment insurance benefits,

The claimant had ample opportunity to seek other employment or to attempt to perform his self-employment during his reduced hours. Resignation without prospects of other full-time employment or a strong prospect of sufficient income from self-employment is not the conduct of a reasonable and prudent person.

The claimant must, therefore, be disqualified for benefits.

DECISION:

The claimant is disqualified for unemployment benefits beginning November 13, 1983, and continuing until the claimant qualifies for benefits in accordance with the Employment Security Law.

Commentary:

The Employment Security Law was subsequently amended to provide that good cause attributable to the employer exists for leaving work if the employer unilaterally and permanently reduced a claimant's work hours more than 20% of the customary scheduled full-time work hours. Good cause does not exist if the reduction resulted from malfeasance, misfeasance or nonfeasance on the part of the claimant. G.S. §96-14(1b).

PRECEDENT DECISION NO. 12

IN RE SCHOFIELD
(Adopted May 15, 1984)

FINDINGS OF FACT:

1. The claimant last worked for the employer on December 23, 1983. From January 15, 1984 until January 21, 1984, the claimant has registered for work and continued to report to an employment office of the Commission and has made a claim for benefits in accordance with G.S. 96-15(a) as of the time the Adjudicator issued a determination. The claimant appealed the Adjudicator's determination, and an evidentiary hearing was held by Jo Ann Weaver, Appeals Referee, under Docket No. II-UI-3475, who held that the claimant was not disqualified for unemployment benefits. The employer filed a timely appeal to the Commission.

2. On or about December 20, 1983, the claimant mailed a letter of resignation to the president of the employer who was located in Port Orange, Florida. The letter was mailed from the claimant's place of work in Goldsboro, North Carolina.

3. On December 22, 1983, claimant had a conversation with the president during which the matter that caused claimant's resignation was settled. Specifically, claimant disagreed with the new policy on commissions (effective January 1, 1984) that would have replaced the old policy of paying branch managers 2% of sales. The new policy was modified to eliminate claimant's objections to it. The modified policy provided that effective January 1, 1984, claimant was to be paid a minimum of 2% of sales or 25% of the net profit, whichever was greater.

4. Claimant expressed satisfaction with the compromised arrangement. Under this modification of the new commission policy, claimant would not have received less money than what he had received during the period that only the 2% commission on sales policy was applicable. Claimant's weekly salary of $500 was not affected by either the new or compromised policy change.

5. During the December 22nd telephone conversation, claimant did not inform the president that he had written and/or mailed his letter of resignation on December 20th. Further, claimant at no time during the conversation informed the president that he no longer desired for his resignation to be accepted by the employer. Claimant was of the opinion that the president received his letter of resignation on December 23rd.

6. By Western Union telex (dated December 23rd), the president advised the individual who had been named acting branch manager that the claimant had tendered his resignation and that such resignation had been accepted by the employer. The acting manager was instructed to inform the claimant of the acceptance and the desire that he vacate the premises immediately. The acting manager complied with these instructions.

7. At the time claimant submitted his resignation, he was a branch manager receiving a weekly salary of $500.00. On a monthly basis, he was paid 2% commission on sales.

8. Claimant's resignation was to be effective January 13, 1984. The employer, however, accepted claimant's resignation effective December 23rd, approximately three weeks prior to the date set by claimant. Claimant's resignation was accepted prior to January 13th because certain statements contained in claimant's letter of resignation failed to assure the employer that claimant, as branch manager, would act in the best interest of the employer during the notice period.

9. As a result of his separation from employment, claimant was paid $1,975.00 for accrued vacation and sick leave. Such payment was equivalent to approximately four weeks of salary or wages at the rate of $500.00 per week.

MEMORANDUM OF LAW:

The Employment Security Law of North Carolina provides that an individual-shall be disqualified for benefits for the duration of his unemployment if it is determined by the Commission that such individual is unemployed because he left work voluntarily without good cause attributable to the employer. G.S. 96-14(l).

N.C.G.S. 96-14(2) provides that an individual shall be disqualified for benefits for the duration of the unemployment beginning with the first day of the first week after the disqualifying act occurs with respect to which week an individual files a claim for benefits if it is determined by the Commission that such individual is, at the time such claim is filed, unemployed because the individual was discharged for misconduct connected with the work. G.S. 96-14(2).

The Employment Security Law further provides that no individual shall be considered unemployed if, with respect to the entire calendar week, he is receiving, has received, or will receive as a result of his separation from employment, remuneration in the form of accrued vacation, terminal leave pay, or wages by whatever name. G.S. 96-8(10)c.

In the case at hand, claimant, on December 20, 1983,.mailed a letter of resignation to the company president who was located in Florida. During a telephone conversation with the company president on December 22nd, claimant reached a satisfactory resolution as to the matter which had caused him to formulate and mail the resignation. Claimant, however, neither informed the company president that he had written or forwarded a letter of resignation nor that he wished or desired to withdraw his resignation. A reasonable person, under similar circumstances and desirous of continuing in employment, would have, at the minimum, made the employer aware of the resignation and that he no longer desired for it to be accepted.

The record is absent any evidence to the effect that claimant did not have the opportunity to discuss his resignation with the company president on December 22nd. Under the circumstances, the employer acted properly in accepting claimant's resignation and, in the absence of any evidence that claimant conveyed to the employer that he did not intend for his resignation to be accepted, it is found that it was the intent of the claimant to quit his job at the time the resignation was received and accepted by the employer. The employer neither requested nor coerced claimant to submit his resignation; consequently, it was a voluntary resignation and not an involuntary one which would constitute a discharge.

The record evidence clearly reveals that the payment of accrued vacation and sick leave to claimant was made as a result of his separation from employment The accrued vacation and sick leave pay covered claimant's weekly salary for at least 3 weeks after he submitted his resignation, the same number of weeks which was contained in his notice. It is found that although claimant did not actually perform work, he was paid remuneration or wages for his entire notice period in the form of accrued vacation and sick leave pay and, therefore, was still employed within the meaning of the law. Since claimant did not become unemployed until after his notice period had expired, it cannot be said that claimant became unemployed because his employer refused to allow him to work his notice.

The remaining question is whether claimant had good cause attributable to the employer for voluntarily leaving his job. At the time claimant posted his letter of resignation, he may have had good cause for terminating his own employment. After reaching a satisfactory compromise as to the policy on commissions, claimant's reason for allowing his resignation to stand was not "a reason for rejecting work that would be deemed by reasonable men and women as valid and not indicative of an unwillingness to work." Sellers v. National Spinning Co., Inc. and ESC, 614 N.C.App. 567, 307 S.E.2d 774, dis. rev. denied, 309 N.C. 464 (1983). The record evidence and facts found therefrom do not support a conclusion that the claimant has met the burden of showing good cause attributable to the employer for the voluntary leaving. In re Hodges, 49 N.C.App. 189, 270 S.E.2d 599 (1980); In re Vinson, 42 N.C.App. 28, 255 S.E.2d 644 (1979).

The claimant must, therefore, be disqualified for benefits.

DECISION:

The claimant is disqualified for unemployment benefits beginning January 15, 1984, and continuing until the claimant qualifies for benefits in accordance with the Employment Security Law.

EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA

PRECEDENT DECISION NO. 14

IN RE GORDON
(Adopted July 17, 1984)

FINDINGS OF FACT:

1. The claimant last worked for the employer on January 26, 1984. From February 19, 1984 until February 25, 1984, the claimant has registered for work and continued to report to an employment office of the Commission and has made a claim for benefits in accordance with G.S. 96-15(a) as of the time the Adjudicator issued a determination. The claimant appealed the Adjudicator's determination, and an evidentiary hearing was held by Jo Ann Weaver, Appeals Referee, under Docket No. II-UI-5253 JTPA, who held that the claimant was disqualified for unemployment benefits. The claimant filed a timely appeal to the Commission.

2. The claimant met with an Employment Interviewer in the Greenville Local Job Service Office on or about February 23, 1984. Claimant was enrolled in a Job Training Partnership Act Dislocated Workers Program.

3. During the conference, claimant was informed of the program class sessions scheduled to begin the following week and asked whether she could attend them. The classes were to be conducted from 2:00 p.m. to 5:00 p.m. The interviewer was unable to answer claimant's questions as to whether the attendance at these classes was mandatory and whether non-attendance would have any affect on her receipt of unemployment insurance benefits.

4. The claimant made the interviewer aware that it would be difficult for her to attend a class session lasting from 2:00 to 5:00. She gave two (2) reasons for this position: (a) the length of the sessions, and (b) problems with child care for her grandchildren.

5. Claimant did not attend the JTPA class sessions and the matter was referred for adjudication.

MEMORANDUM OF'LAW:

The Job Training Partnership Act (hereinafter JTPA) was enacted in October 1982. The purpose of the Act is

> . . . to establish programs to prepare youth and unskilled adults for entry into the labor force and to afford job training to those economically disadvantaged individuals and other individuals facing serious barriers to employment, who are in special need of such training to obtain productive employment. 29 U.S.C.A., Sec. 1501.

Under Subchapter II of this Act - Employment and Training Assistance for Dislocated Workers - the U.S. Secretary of Labor is authorized and required to make available (to state agencies) certain designated funds "for the purpose of providing training, retraining, job search search assistance, placement . . . to individuals who are affected by mass layoffs . . . or who reside in areas of high unemployment . . . . " 29 U.S.C.A., Sec. 1651(c). (Emphasis added).

Federal law (26 U.S.C.A., Sec. 3304(a)(8)) provides that a claimant shall not be denied unemployment insurance compensation based upon availability for work, active search for work, or refusal to accept work, when he/she is participating in training which has been approved by a state employment service agency. Under JTPA (29 U.S.C.A., Sec. 1652(d)), a claimant's acceptance of training pursuant to a JTPA plan is deemed to be acceptance of training with the approval of the state agency within the meaning of any provision of federal law (or consistent state law) relating to unemployment benefits.

The Commission's approval of training for a specific claimant carries with it a determination that (1) reasonable employment opportunities for which the claimant is fitted by training and experience do not exist in the locality or are severely curtailed, (2) the training relates to an occupation or skill for which there are expected to be reasonable opportunities for employment, and (3) the claimant has the required qualification and the aptitude to successfully complete the training course.

Under N.C.G.S. 96-13(a)(3), a claimant attending a vocational school or training program that has been approved by the Commission is not required to actually meet the benefit eligibility conditions of being available for work, actively seeking work and accepting an offer of suitable work. Such individual is deemed to be available for work within the meaning of the law.

Statutorily, participation in Commission approved training is the only situation in which a claimant for unemployment insurance benefits is specifically exempted from the requirements of being available for work, actively seeking work and accepting an offer of suitable work. ESC Regulation No. 10.25 sets forth the only other situations where suspension of benefit eligibility conditions may apply - temporary layoffs and exhaustion of all potential opportunities for suitable work. However, the full exemption or suspension applicable to individuals in Commission approved training is not applicable to claimants-in 'these particular situations.

JTPA did not usurp state law governing a claimant's eligibility or qualification to receive unemployment compensation when he/she has failed to comply with the guidelines of the approved training program. A claimant's failure to adhere to the guidelines made known to him/her could result in the loss of his/her exemption and/or an imposition of an indefinite disqualification for unemployment insurance benefits. G.S. 96-14(4) provides that an individual shall be indefinitely disqualified from receiving unemployment insurance benefits if the Commission determines that

> a. Such individual has failed without good cause to attend a vocational school or training program <u>when so directed by the Commission</u> (Emphasis added);

b. Such individual has discontinued his training course without good cause; or

c. If the individual is separated from his training course or vocational school due to misconduct.

It is clear from the foregoing discussion that the treatment of claimants participating in Commission approved training programs is extraordinary. Consequently, Commission personnel must strictly comply with the procedure for awarding exemptions and specifically make the claimant aware of what is required when he/she enrolls in a training program.

Sections of the N.C. Employment Security Law imposing disqualification for benefits must be strictly construed in favor of the claimant and should not be enlarged by implication. In re Watson, 273 N.C. 629, 161 S.E.2d 1 (1968); In re Scaringelli, 39 N.C.App. 648, 251 S.E.2d 728 (1979). Ergo, if a claimant is to be disqualified for failure to attend a training program, it must be first shown that he/she was directed by the Commission to attend the program. "(D)irected" is not defined within Chapter 96 but the plain meaning derived from its usage within subsection 96-14(4) is "ordered; commanded; instructed".

In the present case, during a conference with claimant on or about February 23, 1984, a Commission interviewer enrolled claimant in a JTPA Dislocated Workers Program that pursuant to federal law constituted claimant's acceptance of a training program approved by the Commission. As a part of this program, class sessions for program participants were to be conducted the following week. The interviewer did not, at any time during this conference, "direct, order, command, or instruct" claimant to attend said sessions. Claimant was informed of these sessions in such language as to cause a reasonable person to believe that attendance was optional. Further, the interviewer expressed a lack of knowledge as to whether non-attendance would adversely affect claimant's receipt of unemployment insurance benefits; therefore, it cannot be said that claimant should have known that she was being directed to attend the class sessions or possibly be subject to a disqualification for benefits for failure, without good cause, to attend.

The undersigned has no alternative but to find that claimant has not failed "to attend . . . . a training program when so directed by the Commission." Since no showing has been made that claimant was even directed to attend a training program as required by G.S. 96-14(4)a, the undersigned does not find it necessary to reach the issue of whether claimant had good cause for non-attendance.

It is, therefore, concluded that claimant is not disqualified from receiving benefits because the evidence fails to prove that claimant failed to attend a training program when so directed by the Commission.

PRECEDENT DECISION NO. 15

IN RE VAUGHN
(Adopted August 18, 1984)

FINDINGS OF FACT:

1. The claimant last worked for the employer on April 3, 1984. From April 1, 1984 until April 7, 1984, the claimant has registered for work and continued to report to an employment office of the Commission and has made a claim for benefits in accordance with G.S. 96-15(a) as of the time the Adjudicator issued a determination. The claimant appealed the Adjudicator's determination, and an evidentiary hearing was held by Mitchell A. Wolf, Appeals Referee, under Docket No. V-UI-7331, who held that the claimant was not disqualified for unemployment benefits. The employer filed a timely appeal to the Commission.

2. Claimant quit her job. She was not discharged by the above-named employer.

3. On claimant's last day of work, she was given the option of either performing the work requested of her by the employer or leaving the job. The work requested of claimant was within her job description as a dental technician. Further, claimant could have performed the tasks. Claimant, however, wanted to perform housekeeping tasks which were not within her job description.

4. After being given the option as indicated above, claimant made out her paycheck for the days she had worked and handed it to the employer to sign. The employer signed the check. Claimant left and did not return to the employer's place of business for the purpose of performing work. At the time claimant left, her workday had not been completed. Had claimant not left her job, continuing work was available for her there.

5. During the discussion which led to the employer directing the claimant to either do the work or leave the job, both the claimant and the employer used obscene words and spoke in a loud tone of voice. The use of obscenity and loud tone of voice was not unusual in the working relationship between the employer and the claimant.

6. Claimant did not leave the job because of the employer's use of obscenity and loud tone of voice. She left the job because she interpreted the ultimatum given to her by the employer to mean that she had been 'fired'. At no time did the claimant convey to the employer that she thought such an ultimatum constituted a 'firing'. Since claimant did not initially perform the work which she was asked to do but instead left the employer's place of business, the employer thought claimant had quit the job.

MEMORANDUM OF LAW:

The Employment Security Law provides that an individual shall be disqualified from receiving unemployment insurance benefits if it is determined that she voluntarily quit her job

without good cause attributable to the employer or was discharged for misconduct or substantial fault connected with the work. G.S. 96-14(l), (2), and (2A). Whether an employee voluntarily terminates her employment or is discharged is a question of law.

Initially, we must decide whether claimant's leaving work on April 3, 1984 and not thereafter returning to her job was a voluntary termination of her employment or whether she was, in fact, discharged. The critical testimony relative to the matter is that of the claimant, as follows:

> A: Then he said, If you don't want to do the work, just get out. And that was it for me, I mean, I considered myself fired ....
>
> Q: Okay. Thank you.
>
> ATTORNEY FOR CLAIMANT: Now, what did you do after that encounter? Did you, did you walk out of your laboratory?
>
> A: Yes, I took my pocketbook, went out the door, but I didn't have a car, because I carpool with this other lady, so I was standing out on the sidewalk no place to go. So I had to go back in and make a phone call and talk to my husband and tell him to get me. And, but he was not at the place he was suppose to be by the time this all happened, so I had to wait a few minutes for him to arrive there, so I could call him. I kind of just sat around waiting for him to get there. I did the crown, as Dr. Walton told me, so he could not say that I didn't do what he told me. And a few minutes later, I called my husband and said, I consider myself fired ....

In order for an employer's language to be interpreted as a discharge, it must possess the immediacy and formality of a 'firing.' Lawlor v. Unemployment Compensation Board of Review, 37 Pa. Commonwealth Ct. 380, 391 A2d 8, (1978); Rizzitano v. Unemployment Compensation Board of Review, 32 Pa. Commonwealth Ct. 59, 377 A2d 1060 (1977). The degree of certainty in an employer's language resulting in a termination is often the difference between those cases in which the employee's termination was voluntary and those in which the employer's rather than the employee's act effected the termination.

In the present case, the Appeals Referee held that the claimant had been discharged from her job. The Adjudicator, with much less evidence before it than the Appeals Referee, found that the claimant had voluntarily left her employment. The undersigned is of the opinion that the Appeals Referee erred in finding that claimant was discharged from her job since the record evidence clearly shows that it was the claimant's act rather than the employer's which effected the termination of her employment. Claimant was given a reasonable alternative between performing a task which was within her job description or leaving the job. Claimant opted to do the latter rather than the former.

Claimant was neither coerced nor pressured by the employer to leave her job. The only pressure or coercion applied by the employer was to get claimant to perform the duties of her job and a reasonable man or woman under similar circumstances would have interpreted the employer's remarks in this manner. For the foregoing reasons, the undersigned concludes that, as a matter of law, claimant voluntarily left her job and was not discharged by the employer. The remaining question is whether such leaving was with good cause attributable to the employer.

The burden of showing good cause attributable to the employer for the voluntary leaving of a job is upon the claimant. In re Hodges, 49 N.C.App. 189, 270 S.E.2d 599 (1980); In re Vinson, 42 N.C.App. 28, 255 S.E.2d 644 (1979). "Good cause" as used in the statue, connotes a reason for rejecting work that would be deemed by reasonable men and women as valid and not indicative of an unwillingness to work. Sellers v. National Spinning Company and ESC, 614 N.C.App. 567, 307 S.E.2d 774, dis. rev. denied, 309 N.C. 464 (1983). "Attributable to the employer" as used in G.S. 96-14(l) means "produced, caused, created or as a result of actions by the employer." Sellers, supra; Vinson, supra.

The Appeals Referee found that if claimant's separation from employment constituted a voluntary leaving within the meaning of the law, "the employer's verbal abuse towards the claimant was sufficient and good cause for the claimant to voluntarily leave her position...." However, claimant's own testimony fails to establish that the decision to terminate her employment was, directly or indirectly, related to the use of obscenity and/or loud tone of voice by her employer. By her own admission, claimant left the job because she interpreted a particular remark made by her employer as a 'firing", not because of the employer's use of obscenity and/or a loud tone of voice.

Even if claimant left her job because of the obscenity and loud tone of voice utilized by the employer, the undersigned is not persuaded that working conditions had become so intolerable or unbearable that the claimant had no-alternative but to terminate her own employment. Obscenity and/or a loud tone of voice was not unusual in the working relationship between the claimant and her employer and appears to have been used by the claimant as often as it was used by the employer.

It is concluded that claimant has not carried her burden of proof and the findings of fact and record evidence clearly show that claimant's voluntary leaving was without good cause attributable to the employer.

The above conclusion does not constitute a condonation of an employee's or employer's use of obscenity and/or loud tone of voice within an employer-employee relationship. However, if such behavior is common practice within the relationship, it is not usually considered a basis for terminating employment by either the employer or employee. To justify a termination of employment when such practice exist, it must be shown that the obscenity and/or loud tone of voice went beyond that which was commonly engaged in by the parties and that a reasonable man or woman, under similar circumstances, would have deemed such behavior as being a valid reason for terminating employment.

The claimant must, therefore, be disqualified for benefits.

PRECEDENT DECISION NO. 16

IN RE GARDNER
(Adopted August 30, 1984)

FINDINGS OF FACT:

1. The claimant last worked for the County Health Department on or around January 30, 1984. From February 5, 1984 until February 11, 1984, the claimant has registered for work and continued to report to an employment office of the Commission and has made a claim for benefits in accordance with G.S. 96-15(a) as of the time the Adjudicator issued a determination. The claimant appealed the Adjudicator's determination, and an evidentiary hearing was held by Albert Jerome Williams, Jr., Appeals Referee, under Docket No. III-UI-4528, who held that the claimant was disqualified for unemployment benefits. The claimant filed a timely appeal to the Commission.

2. The claimant was discharged from this job because she omitted her employment with the County Tax Department on employment applications she submitted in order to obtain employment with the County Health Department.

3. The claimant filed two applications with the above-named employer. The first application was dated and signed May 21, 1982. It was admitted into evidence at the Appeals Referee's hearing without objection as the Employer's Exhibit No. 5. This application is handwritten. In the space for current or last employer, the claimant indicated a temporary services company located in Wilmington, North Carolina. The claimant entered her dates of employment with this company as 1980 to "present." This application lists two previous employers, a concrete company and UNC-W. This application for employment was submitted at the time the claimant applied for a temporary Clerk Typist III position with the Health Department. The claimant was hired for that job.

4. The claimant filed a second application with the County Health Department on October 8, 1982; the application was for a permanent position. This application was admitted into evidence at the Appeals Referee's hearing without objection as Employer's Exhibit No. 6. This application is typewritten. Under the work history entry for the temporary service company, the claimant shows employment from 1980 until June, 1982. In addition to the concrete company and UNC-W, the claimant listed an agricultural chemicals company as her employer from 1967 until 1971. The claimant was hired as a permanent Clerk Typist III.

5. The claimant did not indicate on either application that she was employed by the County Tax Department from October 20, 1981, until December 7, 1981.

6. The applications filed by the claimant with the County Health Department were made on a form which bears the heading Application for Employment - State of North Carolina. The form requests that applicants complete a 'Work History," including volunteer experience. The applicant is directed to use additional sheets if necessary. At the end of the form, there is a place

for the signature of the applicant and the date. The following statement appears above the signature line:

> I certify that all of the statements made in this application and any attached documents are true, complete, and correct to the best of my knowledge and belief and are made in good faith. I authorize investigation of all statements made in this application and release to State Government hiring officials. I understand that false information may be grounds for rejection of my application and (or) dismissal if I am employed.

The claimant's signature appears below this statement on both applications.

7. In her testimony, the claimant gave two reasons for her failure to list her employment with the County Tax Department on her applications with the County Health Department: the claimant did not think that a five-week term of employment was important when she completed the first application since that application was for a temporary position; the claimant alleged that when she completed the second application she typed from the first application and did not think about her employment with the Tax Department. The Claimant's Exhibit No. 1, pages 5 and 14, contain similar statements to the effect that the claimant believed that a short term of employment was not important; there are also statements that the claimant chose to block out or to forget her experience with the Tax Department, since she had found it unpleasant. Commission Exhibit No. 3, page 5, contains a statement that the claimant did omit her Tax Department employment on the application, and chose to "forget and forgive." It is found as a fact that the claimant's reason as to why she omitted the information from the second application is not persuasive, since that application includes information additional to that which was included in the first application, for example, the claimant's employment with the agricultural chemicals company.

8. During the claimant's tenure of employment with the County Tax Department, the claimant received oral warnings and a follow-up written warning. The claimant resigned from her job with the County Tax Department without notice because of what she deemed to be harassment by the Tax Administrator. The claimant did not file a grievance concerning the alleged harassment. Based on the above findings of fact and the competent and credible evidence of record, it is found as a fact that the claimant's omission of her employment with the County Tax Department from her applications for employment with the County Health Department was intentional, and that the claimant's actions were without good cause.

9. The employer's decision to discharge the claimant was made pursuant to personnel policies for Local Government Employment subject to the State Personnel Act, Section 4 - Disciplinary Action - Suspension and Dismissal.

10. The claimant has alleged that she was singled out for discharge for reasons other than the falsification of information on her employment applications. The claimant has failed to produce sufficient evidence tending to show that her discharge was for a reason other than the falsification of her job applications filed with the County Health Department.

MEMORANDUM OF LAW:

G.S. 96-14(2) provides that an individual shall be disqualified for benefits for the duration of the unemployment beginning with the first day of the first week after the disqualifying act occurs with respect to which week an individual files a claim for benefits if it is determined by the Commission that such individual is, at the time such claim is filed, unemployed because the individual was discharged for misconduct connected with the work.

Misconduct connected with the work is defined as conduct evincing such wilful or wanton disregard of an employer's interest as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee, or in carelessness or negligence of such degree or recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to his employer. G.S. 96-14(2). See also, In re Collingsworth, 17 N.C.App.340, 194 S.E.2d 210 (1973); Yelverton v. Kemp Furniture Industries, Inc., 51 N.C.App. 215, 275 S.E.2d 553 (1981); Intercraft Industries Corporation v. Morrison, 305 N.C. 373, 289 S.E.2d 357 (1982).

It is concluded from the facts at hand that the claimant did wilfully and without good cause omit information from her application for employment with the above-named employer, with the knowledge that false information could be grounds for the rejection of her application and/or her dismissal if she were to be employed. This conduct was clearly a deliberate disregard of standards of behavior which an employer has the right to expect of an employee, and shows an intentional and substantial disregard of the employer's interest as well as the employee's duties and obligations to the employer.

The claimant must, therefore, be disqualified for benefits for having been discharged from the job for misconduct connected with the work.

PRECEDENT DECISION NO. 17

IN RE DRAPER
(Adopted October 11, 1984)

This matter has come on for consideration by the undersigned upon the employer's appeal-from the decision rendered by the Appeals Referee. The entire record and file having been considered carefully, the undersigned is of the opinion that the decision of the Appeals Referee should be vacated and the matter remanded for further hearing.

At the appeals hearing, both witnesses for the appellant were not allowed in the room at the same time when the hearing was being conducted due to a lack of physical space. Its legally qualified representative, however, was in the hearing room at all times when the hearing was being conducted. Although sequestration of witnesses upon motion can be proper, there was no such motion herein, and the limitation on the number of witnesses present in the hearing room was due solely to a lack of space. One potential problem of such space limitation is illustrated by the claimant's ex parte reference to one of the appellant's witnesses as a 'big liar" while that witness was being called to the hearing room by the appellant's legally qualified representative. (Transcript, p. 3)

It is the policy of the Commission that suitable and adequate space will be provided to conduct all appeals hearings. If any Appeals Referee is unable at the time and place scheduled to provide such space, the matter shall be continued until suitable and adequate space can be provided.

It is now, therefore, ordered, adjudged and decreed that the decision of the Appeals Referee is vacated and remanded for a new hearing and decision. It is further ordered that suitable and adequate space be provided for the hearing.

PRECEDENT DECISION NO. 18

IN RE CUNNINGHAM
(Adopted November 15, 1984)

FINDINGS OF FACT:

1. The claimant last worked for this employer on May 22, 1984. The claimant appealed the Adjudicator's determination, and an evidentiary hearing was held by an Appeals Referee who held that the claimant was not disqualified for unemployment insurance benefits. The employer filed a timely appeal to the Commission.

2. Claimant was hired as a market manager in September 1983 by the employer. He later transferred to the Kinston store in January 1984. Approximately 6 weeks prior to his last day of work, claimant, at his own request, was demoted to assistant market manager. Another individual was transferred from the Jacksonville store to become the Kinston market manager. On or about May 22, 1984, claimant quit his job.

3. Before the Appeals Referee, claimant gave two (2) reasons for his decision to terminate his own employment. They were: (a) he felt pressured to work "off the clock"; that is, overtime without compensation, and (b) a subordinate had spoken to him, on several occasions, in a disrespectful manner. Claimant told the employer, at the time he quit, that it was impossible for him to work with his immediate supervisor, the market manager.

4. Claimant's immediate supervisor was the market manager whose superior was the area market supervisor. Any complaints that claimant may have had concerning his job were to be initially presented to the market manager for resolution. If a satisfactory response was not received, claimant could have presented the complaint directly (or indirectly through the store manager) to the area market supervisor for resolution. The market manager and the area market supervisor had the authority to direct, counsel, instruct and discipline claimant regarding his work performance. The store manager could only discipline market employees with the approval of the area market supervisor.

5. As assistant market manager, claimant had the authority to counsel, direct and instruct other market employees. Such authority included taking appropriate disciplinary action against the employees under his supervision.

6. Claimant was expected to perform all of his assistant manager's duties, including the primary one of daily cutting a sufficient supply of meat, within a 44 hour time period each week. Company policy, of which claimant was aware, required him to perform his work while "on the clock". If he worked 'off the clock', he was subject to disciplinary action.

7. On several occasions prior to his leaving the job, claimant had been counseled by his superiors concerning low productivity during his regularly scheduled work hours. It was claimant's opinion that such complaints about his work was solely for the purpose of pressuring

him to work "off the clock'. Claimant admitted, however, that neither the market manager, area market supervisor nor the store manager suggested or mentioned that he work "off the clock". Instead, they always talked in terms of claimant's productivity not being justified by the number of hours he put in each day or week while "on the clock". Claimant admitted that he never informed his superiors that he felt he was being pressured to work "off the clock".

8. It was claimant's opinion that in order to meet the productivity standards set by the employer, he would have been required to work overtime hours. Although claimant testified in terms of working overtime hours while "off the clock", he presented no evidence tending to show that he could not have worked overtime hours while "on the clock"; i.e., overtime hours for which compensation would have been paid.

9. Claimant alleged that he had requested the demotion to assistant market manager because, as the market manager, he worked "off the clock" to meet the performance standards established by his employer. When claimant became assistant market manager, it was his intention to work only during the 44 hours he was scheduled to perform his job duties during any given week. It is found as a fact that claimant did not work any overtime hours for which he did not receive compensation while he was assistant market manager despite his belief that pressure was being applied to get him to do so. No evidence was presented that claimant had made a demand of the employer to compensate him for any overtime hours he may have worked as the market manager.

10. As to his second reason for leaving his employment, claimant alleged that a subordinate gave him an "ugly answer" each time he directed or instructed her to perform a task. At no time did claimant inform his supervisor or other superiors that he considered this a problem. Nor did he discipline the subordinate regarding her actions or statements. Claimant advanced no reason for his failure to take the appropriate disciplinary action which his position as assistant market manager authorized him to take in such situations. Approximately one week prior to him leaving his job, the claimant told the store manager that the subordinate fraternized with the market manager and had made several "nasty remarks" to claimant. Company policy required employees to obtain the employer's permission to date each other.

11. Prior to leaving his job, claimant took no action or steps to seek relief from what he perceived as pressure for him to work overtime hours without compensation, despite having opportunities to do so. This also applied to his interaction with his subordinate.

12. At the time claimant left his job, continuing work was available for him.

MEMORANDUM OF LAW:

The Employment Security Law of North Carolina provides that an individual shall be disqualified for benefits for the duration of his unemployment if it is determined by the Commission that such individual is unemployed because he left work voluntarily without good cause attributable to the employer. G.S. 96-14(l).

It is clear from the facts and evidence in the record that claimant left his job. He was neither coerced nor pressured to do so. It is concluded that he voluntarily left his job. The remaining question is whether he had good cause attributable to. the employer for the voluntary leaving.

"Good cause," as used in the statue, connotes a reason for rejecting work that would be deemed by reasonable men and women as valid and not indicative of an unwillingness to work. Sellers v. National Spinning Company, Inc. and Employment Security Commission, 614 N.C.App. 567, 307 S.E.2d 774, dis. rev. denied, 309 N.C. 464 (1983). "Attributable to the employer" as used in G.S. 96-14(l) means "produced, caused, created, or as a result of actions by the employer." In re Vinson, 42 N.C.App. 28, 255 S.E.2d 644 (1979).

In deciding whether good cause existed for leaving a job, the Commission should in every case be fully satisfied that, where an employee has left his employment, the reasons for doing so were of an impelling character which, in the opinion of the Commission, afforded ample and complete justification for the severance of his employment. This would exclude all fictitious or feigned reasons or excuses for failure to continue in the work and would comprehend only such causes as operated directly on the employee which made, in the opinion of the Commission, his continuance in the employment impossible, or attended with such circumstances as to make it unreasonably burdensome for him to continue therein. ESC Interpretation No. 48 (1944).

The Commission has consistently held that an employer's failure to properly compensate an employee for overtime hours which amounted to a violation of the federal or state wage and hour laws may constitute good cause as that term is defined above. It must be shown, however, that (1) the employer's business is covered by the federal or state wage and hour law; (2) the complaining employee worked overtime hours which were required by the employer; (3) the employer failed to compensate or properly compensate the employee for these hours; (4) the employee made the employer aware of its omission and demanded compensation; and (5) the employer wrongfully refused or failed, within a reasonable time after notification of its omission, to remedy the situation. See, LaTruffe v. Unemployment Compensation Board of Review, 453 A2d 47 (1982); Soloman v. Board of Review, 461 A2d 1341 (1983); Sirman v. Board of Review, 35 Commw. 334, 385 A2d 1052 (1918); Zablow v. DES, 10 CCH Unemployment Insurance Reporter 48, Sec. 631 (Vermont Supreme Court, 1979).

In the case at hand, claimant has failed to meet any of the criteria set out above to show good cause for leaving work based on a violation of a wage and hour law by his former employer. Consequently, it is found that good cause for his voluntary leaving has not been established by the claimant as to this allegation.

The claimant appears to reason that when his supervisors expressed dissatisfaction with the amount of work done by him during the hours for which he was paid, the only logical implication was that he was to do unpaid work. The claimant's reasoning is erroneous since an equally logical and, in view of the employer's acknowledged policy forbidding working "off the clock", likely implication is that the claimant's supervisors were exhorting the claimant to work harder during the time he was at work, which exhortation an employer is privileged to make.

Further, the record evidence fails to establish that claimant worked overtime hours without proper compensation after he became assistant market manager.

Based on the foregoing, it must be concluded that the claimant has not shown good cause for voluntarily leaving his job based upon an unsubstantiated feeling or thought that his superiors were pressuring him to work 'off the clock'. This conclusion is amply supported by claimant's failure to take any action or steps to retain his employment such as seeking relief from or a remedy for a situation which he perceived to have existed in his place of employment. The N.C. Court of Appeals has stated that an employee must take some necessary minimal steps to preserve the employment relationship. Sellers, supra. The claimant in this case has advanced no reason which would have prevented him from taking minimal steps to retain his employment.

As to claimant's allegation that a subordinate's disrespect toward him led to his decision to leave his job, the undersigned is of the opinion that, under the circumstances of this case, this does not connote a reason for rejecting work that would be deemed by reasonable men and women as valid and not indicative of an unwillingness to work. Claimant had the authority to discipline this subordinate but chose not to do so. He presented no reasons which would have impeded him from taking the appropriate disciplinary action against the subordinate. Further, claimant did not inform his superiors that this subordinate's action could cause him to leave his job or, at the minimum, he considered the subordinate's action a problem.

Although the law does not require an individual to perform a vain act, the individual must first show that the act would have been in vain or futile. In the case at hand, the claimant has not shown that had he taken the appropriate disciplinary action against the subordinate or reported the matter to his superiors, matters would have remained the same and he would have received no support from his superiors in correcting the matter.

In order to avoid being disqualified for benefits for voluntarily leaving a job, the claimant must show more than just an existence of a problem at work As stated above, the employee must prove both that conditions of work were such that a reasonable person, willing to work, would not tolerate them and that these conditions persisted in. spite of the employee's reasonable efforts to have them corrected. The claimant here has proved neither with regard to his subordinate.

In summary, the record evidence and the facts found therefrom do not support a conclusion that the claimant has met the burden of showing good cause attributable to the employer for the voluntary leaving. In re Hodges, 49 N.C.App. 189, 270 S.E.2d 599 (1980); In re Vinson, 42 N.C.App. 28, 255 S.E.2d 644 (1979).

The claimant must, therefore, be disqualified for benefits.

PRECEDENT DECISION NO. 19

IN RE TYNDALL
(Adopted December 17, 1984)

FINDINGS OF FACT:

1. The claimant last worked for this employer on July 3, 1984. From July 1, 1984 until July 14, 1984, the claimant has registered for work and continued-to report to an employment office of the Commission and has made a claim for benefits in accordance with G.S. 96-15(a) as of the time the Adjudicator issued a determination. The employer appealed the Adjudicator's determination, and an evidentiary hearing was held by an Appeals Referee who held that the claimant was disqualified for unemployment benefits. The claimant filed a timely appeal to the Commission.

2. Approximately eight (8) days prior to his last day of work, claimant was promoted from his shop production position to a driver of semi-tractor trailers for the employer. The promotion caused claimant's hourly wage to be increased from $3.75 to $4.00 or a 6 1/4% increase. The permanency of the promotion depended upon claimant's performance during his probationary period (thirty (30) days). The employer had retained the option of returning claimant to his shop production position if his performance as a driver was not satisfactory.

3. On or about July 3, 1984 or the 8th day of his employment as a driver, claimant crashed into the rear end of a 1976 Buick that had come to a complete stop in preparation to turn into a driveway. The collision totaled the car. The employer's insurance carrier was required to pay to the driver of the car $1,077.59 for property damage and $150.00 for bodily injury. Claimant admitted that he was told by the police officer that the police report would reflect that he was following too close.

4. Pursuant to the option which it had retained, the employer, in the person of Mr. Arnold Gaspersohn, President of Woodcomp Corporation, directed claimant to check with the shift supervisor about returning to his former position as a shop production worker. Claimant would have retained all benefits which he had accrued during his period of employment with the Corporation. The claimant's former position was still vacant and it was the intent of the employer to return him to that position.

5. Claimant did not comply with Mr. Gaspersohn's instructions; instead, he left the employer's place of business. Claimant was of the opinion that the accident was unavoidable and that he should not have been removed from the driver position.

6. When claimant left the employer's place of business, continuing work was available for him there.

MEMORANDUM OF LAW:

The Employment Security Law of North Carolina provides that an individual shall be disqualified for benefits for the duration of his unemployment if it is determined by the Commission that such individual is unemployed because he left work voluntarily without good cause attributable to the employer. G.S. 96-14(l).

Prior to 1981, the Commission treated a termination of employment and an immediate offer of continuing work as involving two (2) issues: a discharge and suitable work, G.S. 96-14(2) and G.S. 96-14(3), respectively. In most of these cases, both claimant and the employer unequivocally stated that the claimant left work or quit because the claimant did not want to accept continuing work for the employer in a different job. It became very difficult for the Commission to explain how it could take an admitted quit and turn it into a discharge for no work available, and an offer of suitable work. The Commission, after much consideration, determined that such practice was legally unsound, both as to the provisions of the Employment Security Law and as to judicial interpretations. E.g., In re Troutman, 264 N.C. 289, 141 S.E.2d 613 (1965), which contains an analysis of this type of fact situation in the terms of G.S. 96-14(l) - voluntarily leaving.

In order to be in conformity with sound legal principles and common sense, the Commission determined that the type of case involving the termination of "old work" and the immediate offer of "new work" would be treated as an issue of voluntarily leaving with or without good cause attributable to the employer under G.S. 96-14(l). If the claimant had the choice of continuing to work for the employer, even though it was a different job, the leaving was voluntary. In determining whether the claimant had good cause attributable to the employer, the Commission would consider whether the different job was suitable at the time for the claimant. If the different job was suitable, the claimant did not have good cause attributable to the employer for voluntarily leaving the job. If the different job was not suitable, the claimant did have good cause attributable to the employer.

In determining suitability, the standards set forth in G.S. 96-14(3) were to be considered:

> . . . the degree of risk involved to his (employees) health, safety, and morals, his physical fitness and prior training, his experience and prior earnings, his length of unemployment and prospects for securing local work in his customary occupation and the distance of the available work from his residence.

In the present case, the job that the-claimant rejected was the same one which he had held just eight (8) days prior to his removal as a driver. Claimant does not in any way allege that the shop production position was not suitable work for him. The hourly wage in the old job was 6 1/4% less than the new job but the Commission has consistently held that unless an offer of continuing work results in a 15% or more decrease in wages, the individual would not have good cause attributable to the employer for voluntarily leaving his employment. See ESC Precedent Decision No. 2, In re Springer, (1982).

Based on the foregoing, it is concluded that claimant voluntarily left his job and was not discharged. It is further concluded that the shop production job was suitable for the claimant. Consequently, claimant did not have good cause attributable to the employer for voluntarily leaving based upon the suitability of the work offered so that claimant could remain employed.

As to whether the employer was justified in demoting claimant from the driver position to the shop production job, one must consider that the employer had retained the option to make that decision. Such a decision was to be based upon whether claimant performed his job satisfactorily. The undersigned is of the opinion that the employer had a reasonable basis for deciding that the claimant's performance as a truck driver was unsatisfactory and therefore justified his removal from that position.

In that the employer's actions were reasonable in light of the existing circumstances and not arbitrary or capricious, it is concluded that claimant did not have good cause to reject the offer of continuing suitable work; i.e., good cause for voluntarily leaving his employment.

It is, therefore, concluded that claimant must be disqualified for benefits for voluntarily leaving his job without good cause attributable to the employer.

PRECEDENT DECISION NO. 20

IN RE LANIER
(Adopted July 31, 1987)

This cause came on for consideration by the undersigned upon the CLAIMANT'S APPEAL from the decision rendered by the Appeals Referee. The undersigned, having reviewed the evidence in the record, does hereby VACATE the decision of the Appeals Referee and REMAND the cause for a new hearing and decision.

This matter is remanded so that a new Appeals Referee's hearing can be conducted in accordance with Chapter 8B of the North Carolina General Statutes, Interpreters for Deaf Persons. This Chapter provides that when a deaf person is a party to or a witness in an administrative proceeding before any department of the state, the appointing authority conducting the proceeding shall appoint a qualified interpreter to interpret proceedings to the deaf person and to interpret the deaf person's testimony. The law further provides that a deaf person who is entitled to the services of an interpreter under Chapter 8B may waive these services; however, a waiver must be approved in writing by the person's attorney or if the person is not represented by an attorney, the approval must be made in writing by the appointing authority. Before acting, an interpreter shall take an oath or affirmation that he will make a true interpretation in an understandable manner to the person for whom he is appointed and that he will convey the statements of the person in the English language to the best of his skill and judgment. In light of the above-requirements of 8B of the General Statutes of North Carolina, the hearing in this matter shall be conducted in the following manner:

1. The Appeals Referee shall arrange for the appointment of an interpreter pursuant to the provisions of Chapter 8B. If the claimant wishes to have his own interpreter and does not wish to use the services of an interpreter appointed under Chapter 8B, then the Appeals Referee shall approve in writing the claimant's waiver.

2. Before acting, the interpreter shall be administered an oath or affirmation in accordance with Chapter 8B. At the first hearing in this matter, the claimant's interpreter was identified and it was indicated on the record that the "parties had been sworn." The record was silent as to whether the claimant's interpreter had been sworn or taken an oath of any kind.

3. The Appeals Referee must very carefully control the hearing particularly if it appears that the interpreter chosen by the claimant will also act as a witness for the claimant. At the first hearing before the Appeals Referee, the claimant's interpreter's statements could not clearly be identified as

interpretation of the claimant's statements or her own testimony regarding the claimant's separation. It is not acceptable for the interpreter to speak on behalf of the claimant or as a representative of the claimant if her function is actually to interpret statements made by the claimant. If the interpreter wishes to act as a witness, it must be differentiated when she is so doing.

4. The statements of the employer witnesses must be interpreted to the claimant or it must be otherwise established that the claimant is cognizant of what the employer witnesses are saying. In this way, the claimant can then formulate questions for cross-examination of the employer witnesses. The Appeals Referee must allow the claimant and the employer the opportunity for cross-examination.

5. If the claimant does not waive the appointment of an interpreter under Chapter 8B, the interpreter shall be compensated according to the provisions of the law.

PRECEDENT DECISION NO. 21

IN RE ROECKER
(Adopted August 31, 1987)

STATEMENT OF CASE:

The claimant filed a NEW INITIAL CLAIM (NIC) for unemployment insurance benefits effective October 19, 1986. Thereafter, the Commission determined that the weekly benefit amount payable to the claimant was $184.00, and during the benefit year established by the claimant, the maximum amount of unemployment insurance benefits payable to the claimant was $4,784.00.

The claim was referred to an ADJUDICATOR on the issue of SEPARATION FROM LAST EMPLOYMENT. The Adjudicator, Miriam Byrd, issued a determination under DOCKET NO. 1123-IV on November 4, 1986, finding the claimant disqualified for benefits pursuant to N.C. Gen. Stat. §96-14(2). The claimant filed an APPEAL from the ADJUDICATOR'S determination and the matter came on to be heard by an APPEALS REFEREE under APPEALS DOCKET NO. V-UI-52401T. The following individuals appeared at the hearing before the Appeals Referee: Robin D. Roecker, claimant; M. Catherine Tamsberg, attorney for claimant; Mike Plueddemann, employer witness. On December 30, 1986, Mitchell A. Wolf, Appeals Referee, issued a decision finding the CIAIMANT NOT DISQUALIED to receive benefits pursuant to N.C. Gen. Stat. §96-14(2) or (2A). The EMPLOYER APPEALED. Pursuant to the claimant's request, a Commission hearing to consider arguments on points of law was held on February 5, 1987. Appearing for the hearing were: M. Catherine Tamsberg and Victor Boone, attorneys for the claimant; Margie T. Case, attorney for the employer; V. Henry Gransee, Jr., Deputy Chief Counsel, appeared representing the Commission.

FINDINGS OF FACT:

1. At the time the Claims Adjudicator issued a determination in this matter, the claimant had filed continued claims for unemployment insurance benefits for the period October 19, 1986 through October 25, 1986. The claimant has registered for work with the Commission, has continued to report to an employment office of the Commission and has made a claim for benefits in accordance with N.C. Gen. Stat. §96-15(a).

2. The claimant last worked for Daniel Construction on October 16, 1986. The claimant was last employed as an Electrical Engineer Aide III and had worked since August 1984 for this employer.

3. The claimant was discharged from this job for wilfully and without good cause refusing to take a urinalysis test.

4. On June 27, 1986, the claimant had acknowledged the employer's drug and alcohol abuse policy dated June 13, 1986, and had signed the form regarding it. (Employer's Exhibit #1)

In part, the form she signed stated, ". . . I understand the Company's policies and practices on drug and alcohol abuse and I agree to abide by them. I further understand that compliance with the provisions of the Company's drug and alcohol abuse policies and practices is required in order to remain on Company property or to work on any Company projects . . . ." (Employer's Exhibit #1) Pursuant to this policy, in the fall of 1986, the employer began testing all employees who had less than three years of security clearance at the direction of Carolina Power and Light, the owner of the Shearon Harris Nuclear Power Plant where the claimant was employed for the employer.

5. On October 16 1986, the claimant was directed to submit to a urinalysis test. She gave the employer no reason for her refusal because she " . . .didn't feel like that it would benefit [her] in any way to . . . [give my] . . . reasoning . . ." to the employer. (Transcript p. 33) While being examined on direct by her attorney, she testified:

> Q: Why did you refuse to submit to the test?
>
> A: I felt that it was a form of, of really of harassment. I was due to be released from the Shearon Harris project on November the 14th, which was less than a month from the day that they asked me to take the urinalysis. And I felt that it was probably the start of a form of harassment. And I decided that I did not want be ill-treated, so I chose not to take the urinalysis.
>
> Q: When you use the term harassment, what made, what makes you choose that word? Mr. Plueddemann has said everybody was being tested. Why do you feel like it was harassment?
>
> A: Because I was so close to my release date, being November the l4th, that I just felt like it was a start of more to come. Of, I don't know, maybe harassment isn't the right word. But it just seems like a wasted cause to start processing someone through that when they are so close to being released. (Transcript, p. 34)

It is found as fact that the claimant refused to take the urinalysis test only because of the closeness of her release date on November 14, 1986. She made no attempt to discuss the refusal with the employer even though she knew she further could have talked about any questions she had with the test with Mike Plueddemann, the Senior Industrial Relations Representative for the employer.

6. Although the Appeals Referee found in his finding No. 17 that the claimant had "several reasons" for her refusal, neither her testimony nor that of the employer's witness supports his finding. As found in finding No. 5, she did not give the employer any reason for her refusal, even though she knew she could have discussed it, and the only reason she gave for her refusal to the attorney in direct examination was "harassment" -- because of her impending

layoff. It specifically is found that the employer was not harassing the claimant by directing her to take the test since it was complying with its contractor's requirements for the policy to which the claimant had agreed in writing on June 27, 1986.

7. The employer's "Drug and Alcohol Abuse Policy" (Employer Exhibit 1) is found to be reasonable and work-related.

MEMORANDUM OF LAW:

The Employment Security Law of North Carolina provides:

> An individual shall be disqualified for benefits . . . [f]or the duration of his unemployment beginning with the first day of the first week after the disqualifying act occurs with respect to which week an individual files a claim for benefits if it is determined by the Commission that such individual is, at the time such claim is filed, unemployed because the individual was discharged for misconduct connected with his work.

N.C. Gen. Stat. §96-14(2)

Misconduct connected with the work is conduct evincing such willful or wanton disregard of an employer's interest as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee, or in carelessness or negligence of such degree or recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to his employer. N.C. Gen. Stat. §96-14(2). This definition has been judicially interpreted on many occasions. See, e.g., Williams v. Burlington Industries, 318 N.C. 441, 349 S.E.2d 842 (1986); Intercraft Industries Corporation v. Morrison, 305 N.C. 373, 289 S.E.2d 357 (1982); Yelverton v. Kemp Furniture Industries, 51 N.C.App. 215, 275 S.E.2d 553 (1981); In re Cantrell, 44 N.C.App. 718, 263 S.E.2d 1 (1980); In re Collingsworth, 17 N.C.App. 340, 194 S.E.2d 210 (1973).

The Employment Security Law further provides:

> An individual shall be disqualified for benefits . . . [f]or a period of not less than four nor more than 13 weeks beginning with the first day of the first week during which or after the disqualifying act occurs with respect to which week an individual files a claim for benefits if it is determined by the Commission that such individual is, at the time the claim is filed, unemployed because he was discharged for substantial fault on his part connected with his work not rising to the level of misconduct. Substantial fault is defined to include those acts or omissions of employees over which they exercised reasonable control and which violate reasonable requirements of the job but shall not include (1) minor infractions of rules unless such infractions are repeated after a warning was received by the

> employee, (2) inadvertent mistakes made by the employee, nor (3) failures to perform work because of insufficient skill, ability, or equipment. Upon a finding of discharge under this subsection, the individual shall be disqualified for a period of nine weeks unless, based on findings by the Commission of aggravating or mitigating circumstances, the period of disqualification is lengthened or shortened within the limits set out above. The length of the disqualification so set by the Commission shall not be disturbed by a reviewing court except upon a finding of plain error.

N.C. Gen. Stat. §96-14(2A).

In a case where the claimant was discharged from his work, the employer has the burden to show that the claimant's discharge was for a disqualifying reason. Intercraft, 305 N.C. at 376. It is concluded from the competent evidence in the record mid the facts found therefrom that the claimant's refusal to take the urinalysis test was wilful and without good cause. The claimant had agreed to the employer's policy and wilfully refused to abide by her agreement without discussing her change of position with the employer or even telling the employer her reason. The opinions she expressed at the hearing as to her feelings, the unauthenticated affidavit and the article offered are irrelevant.

The Commission has no position on the appropriateness of drug testing in the work place as a policy. If an employer has promulgated such a policy and the employee has agreed to such policy either explicitly as herein or implicitly by continuing to work after the policy has been communicated to her, such becomes a rule or policy of the work. An employee's subsequent change of position does not give her good cause to refuse to take the test. Whether employers, employees, or unions should adopt or should not adopt such policies is outside the jurisdiction of this Commission. Except for public employment, which does not apply herein, no "probable cause" or "reasonable basis" standard is constitutionally or statutorily required, although were it relevant herein, the Commission would find such had been shown.

Commission views this issue similarly to polygraph examinations. Once polygraph examinations are part of the work, the refusal without good cause to submit to one is disqualifying. The agreement to a polygraph or other similar examinations can be shown either in the original agreement of work or its being adopted thereafter either by specific or explicit agreement by the employee or implicit agreement or ratification by the employee's continuing in work.

The difference from polygraph to substance testing cases relates to results. Polygraph results cannot be admitted or used by courts or the Commission. State v. Grier, 307 N.C. 628, 300 S.E.2d 351 (1983). Drug or substance test results, however, can be used provided the employer shows by competent evidence a chain of custody for the tested sample, the reliability of the test, and exactly how the claimant violated the policy of the employer. It would seem an expert witness would be necessary to prove any case involving substance test results.

In this case, the claimant had agreed in writing to a rule, then wilfully violated it without good cause. Such is misconduct connected with work. Employment Security Com. v. Smith, 235 N.C. 104, 69 S.E.2d 32 (1952).

The claimant is, therefore, disqualified for unemployment insurance benefits. Pursuant to N.C. Gen. Stat. §96-9(c)(2)b., no overpayment of benefits already paid is established by this decision.

DECISION:

IT IS NOW, THEREFORE, ORDERED, ADJUDGED AND DECREED that the decision of the Appeals Referee is **REVERSED**, and the CLAIMANT is **DISQUALIFIED** for unemployment insurance benefits beginning October 19, 1986.

EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA

PRECEDENT DECISION NO. 22

IN RE PARIS
(Adopted October 31, 1991)

STATEMENT OF CASE:

This case came on for a hearing before the undersigned on Friday, February 10, 1989, at the local office of the Employment Security Commission in Chapel Hill, North Carolina. The matter came on for a hearing pursuant to an order referring the matter to the undersigned to determine whether Thelma Paris was an employee of or independent contractor with Mary D. Emmerson.

Appearing at the hearing before the undersigned and offering testimony were: Thelma Paris; Fred B. Emmerson, Jr.; and Michael Clayton, Field Tax Auditor with the Employment Security Commission. The Employment Security Commission was represented by C. Coleman Billingsley, Jr., Staff Attorney. Fred B. Emmerson, Jr. is an attorney representing his mother, Mary D. Emmerson, and also offered testimony. Thelma Paris appeared pro se. All parties were given ten (10) days from the date of the hearing to present a proposed opinion. No party submitted a proposed opinion.

FINDINGS OF FACT:

1. Thelma Paris began working for Mary D. Emmerson as a nurse's assistant. She began on November 19, 1986, and last worked on or about February 4, 1988. She has a certificate in home health care and is certified as a nurse's assistant by the State of New York. She answered an ad in the Village Advocate to obtain this position.

2. Mary D. Emmerson and her husband are both ill and have required care. Paris performed such duties as bathing, cooking, and taking care of Mary D. Emmerson. She did her personal grooming. She would also, from time to time, do grocery shopping. She prepared breakfast and lunch and normally worked 7:00 a.m. to 3:00 p.m. five to six days per week. She gave medication according to the instructions of the physician. The grocery shopping was done with the mother.

3. Paris also would perform services for Fred B. Emmerson such as bathing him, giving him medication and performing other related services.

4. During the time Paris worked for Emmerson, she last received $6.00 per hour. She was paid every two weeks and was paid by submitting a time sheet.

5. Her household duties involved cleaning, vacuuming, washing dishes and various other household chores.

6. As the Emmersons became more ill, her household duties decreased and she spent more time performing services for the Emmersons directly related to their health needs.

7. When Paris began this relationship with the Emmersons, she was interviewed by Fred B. Emmerson, Jr. She wanted to be paid without Social Security or taxes withheld. She understood that she would have to pay her own taxes and would have no benefits such as vacation, insurance, etc. She was responsible for arranging for other care givers to be there and was responsible for arranging for a replacement when she could not be there. She has, on occasion, submitted a time sheet and paid the replacement out of the money that she received.

8. This employment relationship began with the expressed understanding that Paris was an independent contractor and not an employee. She acted in a supervisory type capacity for the other individuals who worked for the Emmersons. Mary Emmerson is unable to talk and both Fred B. Emmerson and Mary Emmerson require a great deal of help. Thelma Paris was replaced by a licensed practical nurse because an individual with more extensive training in health care was needed.

9. Fred Emmerson, Jr., retained the right to discharge or separate Thelma Paris for gross negligence and to insure that she properly cared for his parents. He did not retain the right nor did he supervise and control the daily activities of the claimant.

OPINION:

G.S. 96-8(5) defines "employer" as an employing unit which has individuals in his employment for a certain number of weeks or a certain amount of wages for a calendar quarter. G.S. 96-8(6) defines "employment" as service performed for wage under any contract of hire in which the relationship of the individual performing such service and the employing unit for which such service is rendered is the legal relationship of employer and employee. If an employing unit is an employer with individuals in employment, he is liable for unemployment insurance contributions.

It becomes necessary, then, to consider the elements of employment under the common law. One of the landmark cases in determining the question of the indicia necessary to constitute employment under the common law is Hayes vs. Elon College, 22 4 N.C. 11 (1944). In that case, the court held that independent contractors must:

1. Be engaged in an independent business, calling or occupation.
2. Have the independent use of his special skill, knowledge or training in the execution of the work.
3. Be doing a specified piece of work at a fixed price or a lump sum upon quantitative basis.
4. Not be subject to discharge because he adopts one method of work rather than another.
5. Not be a regular employee of the contracting party.
6. Be free to use such assistants as he may think proper.
7. Be in full control of the assistants.
8. Be able to select his own time to perform.

The court went on to say that the presence of no particular one of these indicia is controlling nor is the presence of all required.

Taking each of the items cited in Hayes vs. Elon College, the following observations must be made:

1. Paris was a nurse's assistant.
2. She performed duties as a nurse's aide taking care of Fred B. and Mary D. Emmerson.
3. She was paid by the hour.
4. According to the testimony, she could be discharged or separated because of negligence.
5. Not applicable.
6. Paris was free to have other individuals work in her place and did arrange for the other individuals to work there.
7. The other individual reported to Paris but they were considered to be independent contractors, too.
8. The Emmersons required around the clock care and Paris and Fred Emmerson, Jr., saw to it that they received around the clock care.

In Scott v. Lumber Company, 232 N.C. 162 (1950), it was held that in the question of an employer and employee or independent contractor relationship, the test is whether the party for whom the work is being done has a right to control the work with respect to the manner or method of doing the work, as distinguished from the right merely to require certain definite results conforming to the contract. If the employer has the right to control, it is immaterial whether he actually exercises it.

And in 1958, the court expressed the test in everyday language when in Pressley v. Turner, 249 N.C. 102, it said: "Tersely stated, the test which will determine the relationship between parties while work is being done by one which will advantage another is "'who is boss of the job?'"

G.S. 96-8(5)o. provides that employer means "with respect to employment on or after January 1, 1978, any person who during any calendar in the current calendar year or the preceding calendar year paid wages in cash of one thousand dollars ($1,000) or more for domestic service in a private home..."

Revenue Ruling 61-196 states that registered nurses and licensed practical nurses who perform private duty nursing are generally not employees for federal employment tax purposes. However, the facts and the circumstances in every case must be considered. Nurses aides, domestics, and other unlicensed individuals, are, in general, insufficiently trained or equipped to render professional or semi-professional services, and their services are not those of an independent contractor. Where an individual performs such services as bathing the individual, arranging bedding and clothing, preparing and serving meals, and occasionally giving oral medication left in their custody, these individuals are not independent contractors and the employer is liable for federal employment taxes.

This case is one that does not easily lend itself to a decision. Certain criteria would indicate that this claimant was an employee and others would indicate that she was independent contractor. The undersigned reaches the result that is reached because he believes that the parties clearly intended for this to be a relationship of employer/independent contractor and not employer/employee.

ORDER:

It is now, THEREFORE, ORDERED, ADJUDGED AND DECREED that Mary D. Emmerson was not the employer of Thelma Paris and Thelma Paris was an independent contractor with Mary D. Emmerson.

[This tax opinion was upheld by the appellate courts: State ex rel. Emp. Sec. Comm'n v. Paris, 101 N.C.App. 469, 400 S.E.2d 76, aff'd, 330 N.C. 114, 408 S.E.2d 852 (1991)].

EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA

PRECEDENT DECISION NO. 23

IN RE LAMBERT
(Adopted November 15, 1991)

STATEMENT OF CASE:

The claimant filed a NEW INITIAL CLAIM (NIC) for unemployment insurance benefits effective July 29, 1990. Thereafter, the commission determined that the weekly benefit amount payable to the claimant was $133.00, and during the benefit year established by the claimant, the maximum amount of unemployment insurance benefits payable to the claimant was $3,458.00. An ADDITIONAL INITIAL CLAIM (AIC) was filed effective January 27, 1991.

The claim was referred to an ADJUDICATOR on the issue of claimant's eligibility for benefits under N.C. Gen. Stat. §96-13. The Adjudicator, Kenneth C. Ray, issued a determination under DOCKET NO. 1301-00 on May 7, 1991, finding the claimant not eligible for benefits because of inadequate work search. The claimant filed an APPEAL from the ADJUDICATOR'S determination and the matter came on to be heard by an APPEALS REFEREE under APPEALS DOCKET NO. XI-QC-040T. The following individuals appeared at the hearing before the Appeals Referee: Mark A. Lambert, claimant; and Richard Sharpe, Quality Control Investigator. On August 19, 1991, Lawrence Emma, Appeals Referee, issued a decision finding the CLAIMANT NOT ELIGIBLE to receive benefits pursuant to N.C. Gen. Stat. §96-13(a)(3). The CLAIMANT APPEALED.

FINDINGS OF FACT:

1. At the time the Claims Adjudicator issued a determination in this matter, the claimant had filed continued claims for unemployment insurance benefits for the period July 29, 1990 through March 9, 1991. The claimant has registered for work with the Commission, has continued to report to an employment office of the Commission and has made a claim for benefits in accordance with N.C. Gen. Stat. §96-15(a).

2. Prior to filing his AIC which was effective on January 27, 1991, claimant worked for Kelly Services, Inc. on an assignment at Fabco Fasteners, Inc. Claimant became unemployed when there was no longer any work available for him.

3. There is no evidence in the record that claimant looked for work at any place other than Fabco Fasteners, Inc., after he filed his AIC effective January 27.

4. Claimant had an employment interview with Fabco on February 8, 1991.

5. On February 14, 1991, claimant was offered a job with Fabco and was told that he would start work on March 18, 1991 subject to his passing a pre-employment physical.

6. Claimant took a pre-employment physical and learned that he had passed it on February 26, 1991.

7. Claimant actually began work with Fabco on March 11, 1991.

MEMORANDUM OF LAW:

The Employment Security Law provides that an employed individual shall be eligible to receive benefits with respect to any week only if the Commission finds that he is able to work, and is available for work: Provided that, unless temporarily excused by Commission regulations, no individual shall be deemed available for work unless he establishes to the satisfaction of the Commission that he is actively seeking work. N.C. Gen. Stat. §96-13(a)(3). This availability requirement has generally been viewed as an indication of a claimant's attachment to the labor force and is designed to test each claimant's attachment to the labor market. See, In re Beatty, 386 N.C. 226, 210 S.E.2d 193 (1974).

This case presents the question of whether one who is involuntarily unemployed and successfully pursues a job prospect to the point that an offer of employment has been made and accepted will be considered available for work during the period between his acceptance of the job and its commencement if he makes no other work search contacts for permanent employment.

The regulations of the Employment Security Commission of North Carolina provide in pertinent part:

> Actively seeking work is defined as doing those things which an unemployed person who wants to work would normally do. A prima facie showing of "actively seeking work" has been established when:
>
> > During the week for which a claim for regular unemployment insurance benefits has been filed, the claimant has sought work on at least two (2) different days and made a total of at least two (2) in-person job contacts.

ESC Regulation No. 10.25(a).

Clearly, the determining factor in this case is whether claimant was actively seeking work during each particular benefit week. ESC Regulation No. 10.25(a) sets forth the requirements for a prima facie case. A prima facie case, if not contradicted by other evidence, establishes that one is actively seeking work. Absent a prima facie case, a claimant has the burden to show by other evidence that he is actively seeking work. The facts and circumstances of each particular case must be considered to determine an individual's availability for work. In re White, 93 N.C.App. 762, 379 S.E.2d 91 (1989).

Justice Lake has eloquently expressed the policy behind the Employment Security Law as follows:

> . . . It does not provide for payment of benefits to one who, through fear that he may be overtaken by honest work, erects around himself all manner of conditions precedent to his acceptance of employment so as to preclude any possibility of his contact with a job. On the other hand, the statute must be construed so as to provide its benefits to one who becomes involuntarily unemployed, who is physically able to work, who is available for work at suitable employment and who, though actively seeking such employment, cannot find it through no fault of his own.

In re Watson, 273 N.C. 629, 633, 161 S.E.2d 1 (1968).

Certainly, the claimant's genuine acceptance of employment is a conclusive indication that he is doing those things which an unemployed person who wants to work would normally do and is attached to the labor force. Further, it is not unreasonable in today's complex business environment that some time might pass between the offer and acceptance of employment and its commencement. Background and security investigations and, as in this case, physical examinations are often required by employers before an otherwise desirable job applicant is finally allowed to start work. To hold claimant ineligible in such a case would be to punish the industrious claimant who has been successful in his efforts to remove himself from the roles of the unemployed. Such a result is not the intent of the Employment Security Law.

It is concluded from the competent evidence in the record and the facts found therefrom that the claimant has failed to show that he was able and available for work for the weeks ending February 2, and February 9, 1991. During these weeks, the claimant had no assurance of imminent commencement of permanent employment. The claimant's work search, limited to seeking work with only one employer, was not sufficient to show that he was actively seeking work as required by law. It is further concluded that the claimant has shown that he was able and available for work for the weeks ending February 16 through March 9, 1991. After having obtained permanent employment to begin in the very near future, claimant's failure to continue to look for permanent work did not render him ineligible for benefits. It is noted, parenthetically, that a claimant must continue to be available for referral to suitable temporary work under such circumstances.

The claimant is, therefore, not eligible for benefits for the claim weeks ending February 2 and February 9, 1991, but eligible for benefits for the claim weeks ending February 16 through March 9, 1991.

DECISION:

IT IS NOW, THEREFORE, ORDERED, ADJUDGED AND DECREED that the decision of the Appeals Referee is **REVERSED** to the extent that claimant is **NOT ELIGIBLE** for unemployment insurance benefits for the claim weeks ending February 2 and February 9,

1991 but is **ELIGIBLE** for unemployment insurance benefits for the claim weeks ending February 16 through March 9, 1991.

COMMENTARY:

ESC Regulation No. 10.25(A) establishes a standard that a claimant may use to show that he/she is actively seeking work. Once this standard is met, no further inquiry need be made by the local office. If the standard is not met, the local office must examine the claimant's work search activity further in order to determine whether he/she is doing those things that an unemployed person who wants to work would normally do.

In re Lambert illustrates that under some circumstances, an individual may show the Employment Security Commission that he/she is actively seeking work even though two different, in-person work search contacts on two different days have not been made each week. One who has successfully obtained permanent work to begin at some future date has made a showing of the desire to work and, under the circumstances, would not be expected to continue the same type work search as one who has no promise of employment. Along the same lines, a claimant normally employed in certain areas of skill may show an active search for work by submitting resumes rather than making in-person job contacts. That the Employment Security Commission has great latitude to make such determinations was recognized by the N.C. Court of Appeals in White v. Employment Security Commission of North Carolina, 93 N.C.App. 762, 379 S.E.2d 91 (1989).

PRECEDENT DECISION NO. 24

IN RE LINDSEY
(Adopted January 27, 1992)

BELINDA L. LINDSEY, Petitioner-Appellant
v.
QUALEX, INC. and EMPLOYMENT SECURITY COMMISSION
OF NORTH CAROLINA, Respondents-Appellees

COURT OF APPEALS OF NORTH CAROLINA
103 N.C.App. 585; 406 S.E.2d 609 (1991)

Opinion by: Arnold, Judge

The question presented by this appeal is whether failure to maintain minimum point standards required by the employer's no-fault attendance policy constitutes substantial fault on the employee's part connected with her work not rising to the level of misconduct. N.C. Gen. Stat. §96-14(2A) (1990). Claimant's conduct does rise to the level of substantial fault. The superior court's judgment upholding the decision of the Employment Security Commission of North Carolina to disqualify claimant from receiving unemployment benefits for a period of nine weeks, pursuant to G.S. §96-14(2A), is affirmed.

The record discloses the following: Employer Qualex, Inc. had a no-fault attendance policy. The employer did not keep records of an employee's reasons for being absent, tardy, or for leaving early. The attendance policy was based on a point system. Each employee received 100 points upon hire.

Employees lost points for being absent, tardy, or leaving early. The attendance policy provided the following point deductions:

1. Tardy -- more than 10 minutes after scheduled starting time -- 5 points.

2. Leaving early -- less than two hours before scheduled quitting time -- 5 points.

3. Appointments during shift -- less than two hours -- 5 points, more than 2 hours -- 15 points.

4. Excused absence -- 15 points.

5. Unexcused absence -- 50 points.

Absences covered by employee benefits or other company programs such as sick pay, vacation leave, floating holidays, leaves of absence, workers' compensation, funeral leave, and jury duty were not included in the policy and did not carry penalty points. Fifteen points were added to an

employee's point total each time she completed thirty consecutive calendar days with no points deducted. An employee could not exceed a total of 100 points at any given time.

The employee's supervisor would review with the employee her current point standing in accordance with the following schedule: (1) verbal counseling when employee's point total was reduced to 70 points and (2) written warning and counseling when employee's total was reduced to 35 points. An employee would be discharged when her point total fell to zero.

Qualex, Inc. employed claimant Belinda L. Lindsey from November 1986 to October 1989. The employer discharged claimant on 9 October 1989, when her point total fell to zero. Claimant filed a claim for benefits with the Commission. The adjudicator determined that claimant was disqualified for benefits because she was discharged for misconduct connected with her employment. Claimant appealed. The appeals referee concluded that claimant was disqualified from receiving nine weeks of unemployment benefits because she was substantially at fault in her job separation. She again appealed and the Commission affirmed. Claimant then appealed the Commission's decision to the superior court, which affirmed the decision in its entirety. From this judgment, claimant appeals.

The standard of review for an appellate court in reviewing the action of the Commission is set out in N.C. Gen. Stat. §96-15(i) (1990): "In any judicial proceeding under this section, the findings of fact by the Commission, if there is any competent evidence to support them and in the absence of fraud, shall be conclusive, and the jurisdiction of the court shall be confined to questions of law." In reviewing the Commission's decision, this Court must determine whether the findings of fact are supported by competent evidence and, if so, whether the findings support the conclusion of law. *Baptist Children's Homes v. Employment Sec. Comm'n*, 56 N.C. App. 781, 783, 290 S.E.2d 402, 403 (1982).

The Commission made the following pertinent findings of fact:

> 3. The claimant was discharged from this job for excessive absenteeism and tardiness in violation of employer's "point" system.
>
> * * * *
>
> 5. The claimant violated the reasonable requirements of the job in the following way(s): The claimant, as for all of the employees, was given 100 point[s], 50 to be deducted for any unreported or unexcused absen[ces], 15 deducted for excused absences, 5 deducted for tardiness or leaving early. In addition, an individual can gain 15 points by going 30 days without any tardies or absences.
>
> 6. The last time claimant had a full 100 points was in January of 1987. From there she constantly and routinely had either lates or tardies for work.

> September, 1987, February, 1988, March, 1988, April, 1988, November, 1988, January, 1989.
>
> 7. The claimant violated the above job requirements because of personal illness. Many of the cases are unknown (although car problems did enter into the tardies).

These findings are supported by the following competent evidence: Claimant knew the requirements of the attendance policy when she was hired in November 1986. The last time she accrued the maximum 100-point total was 11 April 1987. (It should be noted that the Commission committed a harmless error in finding that claimant last had a full 100 points in January 1987.) Claimant was tardy on two occasions due to car trouble, each resulting in a 5-point deduction. On another occasion she was tardy and subsequently left more than two hours before scheduled quitting time due to her mother's illness, for which 5 points and 15 points were deducted respectively. Also, she was tardy on 9 October 1989 due to personal illness, for which 5 points were deducted. Altogether, these incidents accounted for 35 points in deductions. No evidence was presented concerning other specific point deductions.

During her last five months, from 7 May 1989 to 9 October 1989, claimant was tardy ten times and had three excused absences. Also, during this time, she earned 15 points on three separate occasions for a total of 45 recovery points. As claimant's point total fell, she received counseling several times concerning how she lost points and how she could recover points, and she received warnings that she would be discharged if her point total dropped to zero. On 24 May 1989, she received counseling and a warning because her point total had dropped to 15. She also received counseling concerning her low point total in September 1989. As of 9 October 1989, the date of discharge, her point total was zero.

Thus, there was competent evidence to support the Commission's findings favorable to the employer and these findings are conclusive on appeal. G.S. §96-15(i); *In re Thomas*, 281 N.C. 598, 604, 189 S.E.2d 245, 248 (1972).

Whether the Commission's findings of fact support its conclusion of law and decision must next be considered. In denying her claim for benefits, the Commission concluded that claimant was discharged for substantial fault connected with her employment. Claimant contends her conduct did not rise to the level of substantial fault because her conduct was due to circumstances beyond her reasonable control. This argument is unpersuasive.

Claimant was disqualified for benefits under G.S. §96-14(2A), which provides that an individual shall be disqualified for benefits for a period of four to thirteen weeks if her discharge from employment is due to "substantial fault on [her] part connected with [her] work not rising to the level of misconduct." The statute further defines substantial fault

> to include those acts or omissions of employees over which they exercised *reasonable control* and which violate *reasonable requirements of the job* but shall not include (1) minor infractions of rules unless such infractions are repeated after a warning was

> received by the employee, (2) inadvertent mistakes made by the employee, nor (3) failures to perform work because of insufficient skill, ability, or equipment. *Id.* (emphasis added).

The essence of G.S. §96-14(2A) is that if an employer establishes a reasonable job policy to which an employee can conform, her failure to do so constitutes substantial fault.

What constitutes "reasonable requirements of the job" will vary depending on the nature of the employer's business and the employee's function within that business. In general, however, several factors appear to be relevant when determining the reasonableness of the job policy at issue. They include: (1) how early in the employee's tenure she receives notice of the policy; (2) the degree of departure from expected conduct which warrants either a demerit or other disciplinary action under the policy; (3) the degree to which the policy accommodates an employee's need to deal with the exigencies of everyday life; (4) the employee's ability to redeem herself or make amends for rule violations; (5) the amount of counseling the employer affords the employee concerning rule violations; and (6) the degree of notice or warning an employee has that rule violations may result in her discharge. The reasonableness of the employer's job requirements should be analyzed on a case-by-case basis in light of the totality of the circumstances surrounding the employee's function within the employer's business.

An employee has "reasonable control" when she has the physical and mental ability to conform her conduct to her employer's job requirements. For example, an employee does not have reasonable control over failing to attend work because of serious physical or mental illness. An employee does have reasonable control over failing to give her employer notice of such absences. Also, an employee does not have reasonable control over tardiness caused by an unexpected traffic accident. An employee does have reasonable control over tardiness caused by her failure to maintain her own vehicle. An employee also has reasonable control over her ability to comply with job rules when the employer's policy gives her the opportunity to make up for demerits resulting from circumstances in which she had marginal or little control. Reasonable control coupled with failure to live up to a reasonable employment policy equals substantial fault. *Id.*

Turning to the facts of this case, the employer's attendance policy was reasonable. The Commission found that the attendance policy (1) gave each employee 100 points upon hire, (2) deducted points for being tardy, leaving early, or taking an excused absence, and (3) awarded points for good attendance. Employees received notice of the policy at the beginning of their employment. The policy resulted in point deductions commensurate with the degree of departure from expected conduct. The policy was accommodating to employees' needs to deal with the exigencies of everyday life because (1) employees were given 100 points at the beginning of their employment and (2) the policy gave employees an opportunity to reclaim lost points. It provided for counseling both when the employee's point total fell to 70 points and again when it reached 35. Finally, all employees were told early and often that a zero-point total would result in discharge.

In addition, claimant had reasonable control over her ability to conform her conduct to the requirements of the employer's attendance policy. The Commission found that claimant was constantly and routinely late or tardy, and that she was discharged for excessive tardiness and absenteeism in violation of her employer's attendance policy. Also, the Commission found that personal illness and car trouble explained only some of her policy violations. Moreover, even though claimant could not control the fact that her mother was sick and required her assistance, she could ultimately control the nature of the penalty suffered from tardiness and absenteeism caused by this factor by reclaiming points through the employer's accommodating policy. Nevertheless, claimant allowed her point total to fall to zero. In light of the reasonableness of the employment policy and claimant's ability to control her own destiny with respect to that policy, her failure to do so constituted substantial fault.

The Commission's findings support its conclusion of law that claimant was discharged for substantial fault connected with her employment, and the conclusion of law sustains the Commission's decision. Her disqualification for unemployment benefits for a period of nine weeks was accordingly appropriate.

Judgment is Affirmed.

Judges Wells and Phillips concur.

[N.C. Supreme Court denied petition for certiorari: 330 N.C. 196, 412 S.E.2d 57 (1991)]

COMMENTARY:

In Lindsey the North Carolina Court of Appeals addressed the question of whether an employee who was discharged under a no-fault absenteeism policy could be disqualified from receiving unemployment benefits. Ultimately the Court affirmed the Superior Court's affirmation of Commission Decision No. 90(UI)0384, which disqualified the claimant for nine weeks pursuant to G.S. 96-14 2A. The North Carolina Supreme Court denied claimant's petition for discretionary review.

In reaching its decision, the Court of Appeals enumerated the following factors to be considered in determining whether to impose a disqualification in absenteeism cases;

1. How early in the employee's tenure he receives notice of the policy;
2. The degree of departure from expected conduct that warrants either a demerit or other disciplinary action under the policy;
3. The degree to which the policy accommodates an employee's need to deal with the exigencies of everyday life;
4. The employee's ability to redeem himself or make amends for rule violations;
5. The amount of counseling the employer affords the employee concerning rule violations;
6. The degree of notice or warning an employee has that rule violations may result in her discharge.

In applying Lindsey to later cases, it is critical for all levels of the Commission (local offices, adjudicators, appeals referees, etc.) to have records which-contain all relevant evidence on each of the six factors set out above. Thus, developing a complete record is essential compliance with regulations is critical. Staff at all levels of the adjudication process must make the best effort to assemble the most accurate and complete record possible in accordance with Employment Security Commission Regulations Nos. 13.11, 13.12, 13.14, 13.17, 14.16, 14.18, and 14.28.

PRECEDENT DECISION NO. 25

IN RE PELOQUIN
(Adopted February 19, 1992)

This cause has come on before the undersigned chairman of the Employment Security Commission, pursuant to N.C. Gen. Stat. §96-15(e), to consider the EMPLOYER'S APPEAL from the decision of Appeals Referee Sam Taylor, under APPEALS DOCKET No. VI-UI-03127T. Having reviewed the record in its entirety, the undersigned is of the opinion that the aforesaid decision must be vacated and the cause remanded for de novo hearing and a new decision.

Pursuant to the Employment Security Law, appeals referees have the responsibility to conduct hearings. It is the law and policy of the Commission that all interested parties are given a reasonable opportunity to have a fair hearing -in connection with the payment and denial of unemployment compensation benefits. ESC Regulation No. 14.10. Such requires appeals referees to conduct hearings complete enough to provide sufficient information upon which the Commission can act with reasonable assurance that its decision to pay or deny unemployment compensation benefits is consistent with the Employment Security Law of North Carolina and the Federal Unemployment Tax Act.

In this case, it appears that one of the parties requested a continuance in order to change the format from a telephone hearing to that of an in-person hearing. The motion to have the case heard as an in-person hearing rather than as a telephone hearing was denied. The requesting party was the employer. The employer represents, and the Commission accepts for the purpose of this order that the format change request was denied both for being untimely and for being without notice to the other party. The appeals referee apparently followed the appeals department's informal policy or rule of "five days," that is, that such requests for continuances must be made at least five days prior to the hearing.

However, it appears that the request was timely and sufficient. The Commission construes the reasonable opportunity to have a fair hearing requirement to mean that any party can have the hearing changed from a telephone format to an in-person format at any time prior to the actual commencement of the appeals hearing. This practice almost always requires that the hearing be rescheduled and delayed in order to reset the case on the docket and give the other parties proper notice of the changes in the hearing.

There are some practical limitations to the Commission's ability to change cases from telephone hearings to in-person hearings. This right is limited by the requirement that the party requesting the change to an in-person hearing must be willing to travel to the Employment Security Commission office most convenient to the other parties, ESC Regulation No. 15.11 (the objecting party is to travel). Further, the distances that witnesses must travel to the hearing must

be considered. The appeals referee must also consider allowing the taking of testimony by telephone from witnesses whose in-person appearance might be unduly burdensome, such as expert witnesses testimony on behalf of a party in support of or opposition to a drug test.

Except as limited above, an appeals referee may not deny a party's prehearing request to change a telephone hearing to an in-person hearing unless the referee makes findings showing that the change to an in-person hearing will deny the opportunity to have a fair hearing to either party.

In this case, it also appears that the employer sought a continuance in order to secure the testimony of a witness necessary to ascertain the employer's substantial rights. The witness in question was a supervisor of the employer. This witness was represented as being the supervisor with the most knowledge concerning the claimant's separation. At the time of the scheduled hearing, this supervisor was unavailable.

It is part of the responsibility of the appeals referee as the primary fact finder to regulate the course of appeals hearings. That responsibility includes enabling each party to exercise its right to call and examine all witnesses believed necessary to ascertain the substantial rights of the parties, ESC Regulation Nos. 14.10 (opportunity for fair hearing), 14.11 (A) (3) (referee to regulate course of hearing and set continued hearings), and 14.15 (A) (every party has right to call all witnesses).

Effective July 16th, 1991, Senate Bill 429 gives appeals referees the specific statutory authority to grant continuances for good cause. The law reads in pertinent part:

> G.S. 96-15 is amended by adding a new subsection to read: (dl) A continuance may be granted only for good cause shown and upon such terms and conditions as justice may require. Good cause for granting a continuance shall include but not be limited to those instances when a party to the proceeding, a witness, or counsel of record has an obligation of service to the State, such as service as a member of the North Carolina General Assembly, or an obligation to participate in a court of greater jurisdiction.

The passage of Senate Bill 429 demonstrates the General Assembly's intention that all parties to an appeals hearings be given a-fair opportunity to present their witnesses and evidence to the appeals referee. To accomplish that end, the appeals referee can use the existing specific regulatory authority to grant continuances for good cause when any party's necessary witness is not available due to a prior commitment which cannot be rescheduled, ESC Regulation No. 14.11(A)(5)(d) (referee can continue cases because of a party's prior commitment that can not be rescheduled). The recent passage of Senate Bill 429 reinforces the conclusion that under Regulation 14.11(A)(5)(d), the term "party" includes the party's necessary witnesses.

The referee further has an obligation of assisting the parties in the discovery of facts and, if necessary, to take the initiative in the discovery of information, ESC Regulation No. 14.28 (rules on how the referee is to conduct and control the hearing). See: Hoke v. Brinlaw Mfg. Co., 73 N.C.App 553 at 559, 327 S.E.2d 254 (1985). The fair hearing requirement makes it evident

that the parties must have the means requesting the production of evidence which effects eligibility and qualification for benefits. It is therefore also required that the appeals referee must have the means to compel the production of such evidence.

To secure the attendance of necessary witnesses and the production of related documentary evidence, the appeals referee has the power to issue subpoenas and to continue hearings in support of subpoenas whether issued by the appeals referee or one of the parties. See: G.S. 96-15 (dl) (referee can grant continuance for good cause); ESC Regulation Nos. 14.11(A)(2) (referee can issue subpoenas), 14.11(A)(3) (referee can regulate and continue hearings), 14.15(A) (party has right to call-and examine witnesses), and 14.15(D) (referee may issue subpoenas for witnesses and documents).

In this case, the request for a continuance was made only one working day before the hearing. However, the Commission has no specific time limitation on granting such continuances. While a general three or five day limitation on granting continuances before the hearing might be practical and give some threshold of greater notice to opposing parties about scheduling changes, such a fixed rule would also limit the opportunities for parties to effectively present witnesses necessary to ascertain their rights.

In balancing the needs of all parties, the Commission cannot restrict the efforts of parties to secure all necessary testimony. ESC Regulation No. 14.15(A) reads in pertinent part:

> ... [E]very party, representative or attorney of record shall, upon request, have the right to call and examine all witnesses believed necessary to establish the rights and to make an oral cross-examination of any person present and testifying.

In fact, an appeals referee on his or her own motion or by request of a party may conduct an in-person hearing at which the attendance and testimony of witnesses is taken by telephone.

Nor can the Commission permit three or five day guidelines to limit its decisions on whether or not to issue subpoenas to secure all necessary testimony. Appeals referees can even issue subpoenas during the course of hearings. Here, the Commission's practice requires an in-person hearing. Further, a subpoena, if necessary, to secure testimony of a necessary witness should be issued. In other words, the appeals referee may use format changes, split formats, continuances, subpoenas, and adjournments in order to secure necessary testimony.

Here, the record shows there is no evidence that the claimant would have been denied an opportunity to have a fair hearing if the employer's request for a continuance or an in-person hearing had been granted. Indeed, the record suggests that the claimant did not object to a continuance.

IT IS NOW, THEREFORE, ORDERED, ADJUDGED AND DECREED that the decision entered by the Appeals Referee is VACATED, and the cause is REMANDED for further proceedings consistent with this decision.

PRECEDENT DECISION NO. 26

IN RE LYNCH
(Adopted January 20, 1993)

This is an appeal by the EMPLOYER from a decision by Appeals Referee Charles M. Monteith, Jr., mailed on March 13, 1990.

Mr. Larry Lynch, Claimant, who was discharged from his employment with PPG Industries, filed for unemployment insurance benefits beginning on October 1, 1989. The Claims Adjudicator ruled that the claimant was discharged for misconduct connected with his employment and disqualified him from receiving benefits. The claimant appealed and the first Appeals Referee determined that the Claimant was discharged for work related misconduct and therefore was disqualified from receiving unemployment insurance benefits. The Claimant appealed and the Chief Deputy Commissioner set aside the decision of the Appeals Referee because the tape recording of the Appeals Referee's hearing was substantially inaudible. Thereafter, a second Appeals Referee's hearing was conducted by Appeals Referee Monteith who determined that Claimant was not discharged for misconduct and therefore, was qualified for unemployment insurance benefits. PPG Industries, Incorporated (Employer) appealed to the Employment Security Commission.

This matter was heard by the Employment Security Commission on April 19, 1990. Members of the Commission present and voting were: Charles R. Cagle, John J. Cavanagh, Jr., Kevin L. Green, Allen H. Holt and James W. Smith. The Employer was represented by Jerry W. Strong, Personnel Manager. The Claimant did not appear. Thomas S. Whitaker, Chief Counsel, appeared on behalf of the Employment Security Commission.

The Employer lodged no exceptions to the second Appeals Referee's findings of fact, but disagreed with his conclusions of law. Since the findings are supported by evidence, those findings in the attached Appeals Referee's decision are adopted as the findings of fact by the Commission. Consequently, the only issue for review is whether these findings of fact support the Appeals Referee's conclusion of law that claimant was not discharged for misconduct or substantial fault connected with his employment.

A claimant shall be disqualified from receiving unemployment insurance benefits if he is discharged from employment for "misconduct connected with work." N.C.G.S. §96-14(2). Misconduct under this standard is defined as:

> Conduct evincing such willful or wanton disregard of an employer's interest as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee, or in carelessness or negligence of such degree or recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interest or of the employer's duties and obligations to his employer.

A claimant may also be disqualified from receiving benefits if discharged from employment "for substantial fault on his part connected with his work not rising to the level of misconduct." N.C.G.S. §96-14(2A). Under this lower standard, substantial fault includes:

> Those acts or omissions of employees over which they exercised reasonable control and which violate reasonable requirements of the job . . . .

Measuring the findings of fact against these standards, the Commission concludes that the Claimant's conduct at the very least rises to the level of substantial fault under N.C.G.S. §96-14(2A). The question then is whether this conduct falls within the stricter standard of misconduct under N.C.G.S. §96-14(2).

In 1989, the General Assembly responded to the growing problem of drug abuse in our State by amending N.C.G.S. §96-14(2) to clarify that misconduct included:

> Discharge for misconduct with the work as used in this section is defined to include but not be limited to separations initiated by an employer for . . . conviction by a court of competent jurisdiction for manufacturing, selling, or distribution of a controlled substance punishable under G.S. 90-95(a)(1) or G.S. 90-95(a)(2) while in the employ of said employer.

The clear and unambiguous intent of this amendment was to include but not limit misconduct for unemployment insurance benefits to discharged for drug convictions punishable under N.C.G.S. §90-95(a)(1) and N.C.G.S. 90-95(a)(2). This clearly excludes crimes punishable under N.C.G.S. 90-95(a)(3) but clearly includes the crime for which the claimant was convicted. See Bradshaw v. Administrative Office of the Courts, 320 NC 134, 357 S.E.2d 370 (1987) where the Supreme Court held that disqualification sections must be strictly construed only if the language in the statute is ambiguous. Herein, the language is not ambiguous as N.C.G.S. §96-14(2) specifically refers to crimes punishable under N.C.G.S. § 9 0-9 5(a) (1) and (2).

Thus, on the sole remaining issue before the Commission on whether or not the discharge from employment for conviction for possession of cocaine with the intent to sell or deliver, punishable under N.C.G.S. §90-95(a)(1), is misconduct under N.C.G.S. §96-14(2), the Commission holds that it is misconduct.

DECISION:

IT IS NOW THEREFORE, ORDERED, ADJUDGED AND DECREED that the decision of the Appeals Referee is **REVERSED** and the **CLAIMANT** is **DISQUALIFIED** from receiving unemployment insurance benefits.

[This decision was upheld by the appellate court: Lynch v. PPG Industries, 105 N.C.App. 223, 412 S.E.2d 163 (1992)]

PRECEDENT DECISION NO. 27

IN RE MCHENRY
(Adopted April 8, 1993)

STATEMENT OF THE CASE:

The claimant filed a NEW INITIAL CLAIM (NIC) for unemployment insurance benefits effective May 31, 1992. Thereafter, the Commission determined that the weekly benefit amount payable to the claimant was $215.00, and during the benefit year established by the claimant, the maximum amount of unemployment insurance benefits payable to the claimant was $5,590.00. The claim was referred to an ADJUDICATOR on the issue of SEPARATION FROM LAST EMPLOYMENT. The Adjudicator, Denise Sampson, issued a determination under DOCKET NO. 19347 on June 24, 1992 finding the claimant NOT ELIGIBLE for benefits pursuant to N.C. Gen. Stat. §96-13(a). The CLAIMANT filed an APPEAL from the ADJUDICATOR'S determination and the matter came on to be heard by an APPEALS REFEREE under APPEALS DOCKET NO. V-A-14423R. The following individuals appeared in the hearing before the Appeals Referee: Lucile McHenry, claimant; Joe Mantione, representative for claimant; Larry Smith, witness for the claimant; and Susan Williams, witness for the employer. On October 22, 1992, Janice Paul, Appeals Referee, issued a decision finding the CLAIMANT DISQUALIFIED to receive benefits pursuant to N.C. Gen. Stat. §96-14. The CLAIMANT APPEALED.

FINDINGS OF FACT:

1. At the time the Claims Adjudicator issued a determination in this matter, the claimant had filed continued claims for unemployment insurance benefits for the period May 31, 1992 through June 6, 1992. The claimant has registered for work with the Commission, has continued to report to an employment office of the Commission and has made a claim for benefits in accordance with N.C. Gen. Stat. 96-15(a).

2. The claimant last worked for US Air, Incorporated on May 25, 1992. The claimant was last employed as a flight attendant.

3. The claimant left this job because she could not perform her work duties as she was placed on mandatory maternity leave as of June 25, 1992. The employer placed her on this maternity leave because of an agreement between her union, the Association of Flight Attendants, and it, providing for no active flight duty after the 27th week of pregnancy until 45 days after giving birth. The employer had no other work available for her and had been given reasonable notice by her of her status.

4. Beginning on May 25, 1992, the claimant was unemployed due to her pregnancy.

5. Beginning on May 25, 1992, claimant's pregnancy was an adequate disability or health condition that was the sole and exclusive reason for claimant's leaving work.

6. The record does not show there has been any issue raised concerning the claimant's ability to work in positions other than flight attendant.

MEMORANDUM OF LAW:

Pursuant to G.S. 96-14(l)(a. and b.), the claimant fully complied with any and all of the necessary conditions to make her both eligible and qualified for receiving unemployment benefit due to leaving work due to an adequate disability or health condition.

The Employment Security Law of North Carolina further provides:

> An individual shall be disqualified for benefits . . . (f)or the duration of his unemployment beginning with the first day of the first week after the disqualifying act occurs with respect to which week an individual files a claim for benefits if it is determined by the Commission that such individual is, at the time such claim is filed, unemployed because he left work without good cause attributable to the employer.

N.C. Gen. Stat. 96-14(l).

"Good cause" has been interpreted by the courts to mean a reason which would be deemed by reasonable men and women valid and not indicative of an unwillingness to work. Sellers v. National Spinning Company, 64 N.C.App. 567, 307 S.E.2d 774 (1983), disc. rev. denied, 310 N.C. 153, 311 S.E.2d 293 (1984); In re Clark, 47 N.C.App. 163, 266 S.E.2d 854 (1980). "Attributable to the employer" as used in N.C. Gen. Stat. 96-14(l) means produced, caused, created, or as a result of actions by the employer. Sellers, 64 N.C App. 567; In re Vinson, 42 N.C.App. 28, 255 S.E.2d 644 (1979); N.C.G.S. 96-14(l). Claimant has the burden of proving that he is not disqualified for benefits. G.S. 96-14(lA).

The Employment Security Law further provides at G.S. 96-14(l) that where an individual leaves work due solely to a disability incurred or other health condition, whether or not related to the work, his leaving shall be considered an involuntary leaving for health reasons if the individual shows:

> a. That, at the time of leaving, an adequate disability or health condition, whether medically diagnosed or otherwise shown by competent evidence, existed to justify the leaving and prevented the employee form doing other alternative work offered by the employer which pays the minimum wage or eighty-five percent (85%) of the individual's regular wage, whichever is greater; and
> b. That, at a reasonable time prior to leaving, the individual gave the employer notice of the disability or health condition.

Prior to its enactment into law, the concept of involuntary leaving due to health reasons had been recognized by our courts. Milliken and Company v. Griffin, 65 N.C.App. 492, 309

S.E.2d 733 (1983), rev. denied, 311 N.C. 402, 311 S.E.2d 373 (1983); and Hoke v. Brinlaw Manufacturing Company, 73 N.C.App. 553, 327 S.E.2d 254 (1985). Each case of this nature must be decided on its own peculiar facts, and the claimant's actions should be assessed in light of the reasonable person standard. Hoke, 73 N.C.App. at 559. The claimant's testimony concerning the advice of a medical authority need not be substantiated by a doctor's sworn testimony or affidavit. Hoke, 73 N.C. App. at 559; Milliken, 65 N.C.App. at 495. Johnson v. U.S. Textiles Corp., 105 N.C.App. 680, 414 S.E.2d 374 (1992).

The payment of benefits is fully according to law and is further in compliance with the currently applicable Employment Security Commission Official Interpretation No. 261 on the Subject of Leaves of Absence which states in specific pertinent part:

> Nothing contained herein shall be interpreted to conflict with federal and State statutes; specifically, with 26 U.S.C. Section 3304(a)(12) providing that unemployment benefits may not be denied solely on the basis of pregnancy or termination of pregnancy.

The Appeals Referee's conclusion of law in Appeals Decision No. V-A-14423R denying benefits to the claimant was contrary to law and to the reasoning of Interpretation No. 261. The Appeals Referee is charged with the responsibility to apply and implement the policy of law as set forth in Interpretation and 26 U.S.C. 3304(a)(12) as amended.

It is concluded from the competent evidence in the record and the facts found therefrom that the claimant has met her burden under the subsection to show she is not disqualified. The General Assembly recognized that leaving work due to disability or health condition was generally not due to fault on the part of the claimant or employer, providing therefore for payment of benefits to those still able and available for substantial, full-time work, and also providing protection for the employers who had not caused such disability or health condition.

The claimant is, therefore, not disqualified for unemployment insurance benefits due to her separation from work, and, pursuant to G.S. 96-9(c)(2)(b)(vi), this decision also allows non-charging of the employer's account.

The employer is entitled to have its account fully non-charged for any and all benefits payable to the claimant by virtue of her leaving due to health reasons pursuant to the employer account non-charging authority of G.S. 96-9(c)(2)(b)(vi).

DECISION:

IT IS NOW, THEREFORE, ORDERED, ADJUDGED AND DECREED that the decision entered by the Appeals Referee is **REVERSED** and the Claimant is **NOT DISQUALIFIED** from receiving unemployment insurance benefits beginning May 31, 1992 in accordance with her claims record, provided she has met all benefit eligibility conditions, and the employer's account is non-charged.

EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA

PRECEDENT DECISION NO. 29

IN RE WATSON
(Adopted March 8, 1994)

BERNICE WATSON, Petitioner-Appellant,
v.
EMPLOYMENT SECURITY COMMISSION, and THE
PLASTIC FORMER COMPANY, Respondents-Appellees.

COURT OF APPEALS OF NORTH CAROLINA
111 N.C.App. 410, 432 S.E.2d 399 (1993)

Opinion by: Martin, Judge

The sole question for determination is whether petitioner is disqualified from receiving unemployment benefits on the ground that she left work without good cause attributable to her employer. We conclude that she is not and reverse the denial of her claim for benefits.

In its Decision denying petitioner's claim, The Employment Security Commission found the following pertinent facts:

> 2. The claimant last worked for The Plastic Former Company on September 19, 1991. The claimant was employed as a packer and had been employed since March 21, 1989.
>
> 3. The claimant left this job. When the claimant left the job, continuing work was available for the claimant with the employer.
>
> 4. The claimant left this job because she did not have a reliable means of transportation to work.
>
> 5. The employer moved from it [sic] location on Wilkinson Boulevard in Charlotte to Mooresville around November or December, 1990.
>
> 6. Before the move, the claimant had expressed reservations about her ability to maintain reliable transportation to and from work. Due to Mr. Haywood's [petitioner's supervisor] encouragement, she decided that she would continue working.
>
> 7. Mr. Haywood was available to take the claimant to work on Monday and Tuesday. The claimant worked Monday through Thursday, and he had taken her to work on past occasions.

> 8. The claimant's car broke down after the employer moved its plant. She made a series of different arrangements to get to work. Immediately prior to leaving her job, she was riding to work in a truck owned by a co-worker. On September 19, 1991, the truck was in disrepair, causing the claimant and the co-worker to arrive at work at approximately 8:15 a.m., fifteen minutes after the scheduled beginning of the shift. Both the claimant and the co-worker were sent home as a penalty for arriving late. The claimant had been tardy several times before, and was aware of this penalty as it had been waived twice before.
>
> 9. Believing the co-worker's truck to be beyond immediate repair, and having no other foreseeable means of transportation to work every day of the week, the claimant announced she was quitting. The co-worker was out of work ten days, but returned to work when his vehicle was repaired.

Petitioner did not except to the Commission's findings; they are therefore presumed to be supported by the evidence and are binding on appeal. *Beaver v. Paint Co.*, 240 N.C. 328, 330, 82 S.E.2d 113, 114 (1954). Based on its findings, the Commission concluded "that the claimant's leaving was without good cause attributable to the employer." The Commission's conclusions of law are fully reviewable. *Eason v. Gould, Inc.*, 66 N.C. App. 260, 311 S.E.2d 372 (1984), *affirmed*, 312 N.C. 618, 324 S.E.2d 223 (1985).

In enacting Chapter 96 of the North Carolina General Statutes, the "Employment Security Law," our General Assembly declared as the public policy of this State:

> Economic insecurity due to unemployment is a serious menace to the health, morals, and welfare of the people of this State. Involuntary unemployment is therefore a subject of general interest and concern which requires appropriate action by the legislature to prevent its spread and to lighten its burden which now so often falls with crushing force upon the unemployed worker and his family . . . . The legislature, therefore, declares that in its considered judgment the public good and the general welfare of the citizens of this State require . . . the compulsory setting aside of unemployment reserves to be used for the benefit of persons unemployed through no fault of their own.

N.C. Gen. Stat. § 96-2. Because the Act was designed to provide protection against economic insecurity due to unemployment, it should be liberally construed in favor of applicants. *Eason, supra*.

G.S. § 96-14(1) (1991) provides in pertinent part that:

> An individual shall be disqualified for benefits . . . if it is determined by the Commission that such individual is, at the time such claim is filed, unemployed because he left work without good cause attributable to the employer.

"Good cause" connotes a reason for rejecting work that would be deemed by reasonable men and women as valid and not indicative of an unwillingness to work. *Sellers v. National Spinning Co.*, 64 N.C. App. 567, 307 S.E.2d 774 (1983), *disc. review denied*, 310 N.C. 153, 311 S.E.2d 293 (1984); *In re Clark*, 47 N.C. App. 163, 266 S.E.2d 854 (1980). A cause "attributable to the employer" is one which is produced, caused, created or as a result of actions by the employer and also includes inaction by the employer. *Ray v. Broyhill Furniture Industries*, 81 N.C. App. 586, 344 S.E.2d 798 (1986).

In *Barnes v. The Singer Co.*, 324 N.C. 213, 376 S.E.2d 756 (1989), a case involving facts similar to those in the present case, our Supreme Court reversed the Commission's denial of benefits to the claimant. In that case, the claimant, an employee of Singer Company, commuted to the employer's plant, a forty-four mile round trip, with her brother-in-law, who worked for another company in the same town. The claimant was not licensed to operate a car, nor did she own one. When Singer moved its plant to another location eleven miles further from plaintiff's home, plaintiff no longer had transportation to work, because her brother-in-law was unable to drive her the additional distance. She was unable to secure other transportation to the new plant and quit her job with Singer.

At the time the plaintiff in *Barnes* applied for benefits, G.S. 96-14(1) disqualified claimants from receiving benefits for having left work "*voluntarily* without good cause attributable to the employer." The test for disqualification from unemployment benefits consisted of two prongs: was the termination by the employee voluntary, and if so, was it without good cause attributable to the employer. *Barnes, supra*. The Court found that an employee does not leave work voluntarily when termination is caused by events beyond the employee's control or when the acts of the employer caused the termination. *Id.* Specifically, the Court held that:

> Singer, by moving its plant, caused plaintiff's commuting distance to be increased fifty percent and in effect destroyed plaintiff's ability to go from her home to the job site. The moving of the plant was beyond the plaintiff's control. Her leaving work was in response to the removal of the plant by Singer and not an act of her own free will. Thus, the external motivating factor causing the termination of plaintiff's employment was not of her own doing but done by Singer for its own benefit. All the evidence was to the effect that plaintiff wanted to continue to work for Singer but, despite her best efforts, could not physically or economically do so.

Id., at 216, 376 S.E.2d at 758-59. Because the Court decided the case based upon the "voluntariness" prong of the two pronged test, it found it unnecessary to discuss the second prong, i.e., the "good cause attributable to employer" issue.

Effective 5 July 1989, G.S. § 96-14(1) was amended to delete the "voluntary" prong of the disqualification test (except in those instances where the employee quits after being notified by the employer of a termination at some future date). 1989 N.C. Sess. Laws, ch. 583, § 7. The test for disqualification is now simply whether the employee left work without good cause attributable to the employer. We believe, however, that the rationale of *Barnes* and the similarity

of its facts are sufficiently broad to support a conclusion that respondent employer's moving of its plant in this case is "good cause attributable to the employer" for petitioner's leaving. The Commission found that petitioner left her job after her employer moved its plant from Charlotte to Mooresville because she had no reliable means of transportation to work every day of the week even though she had attempted to make a series of arrangements to get to work. The Commission also found that when petitioner became aware that her employer was moving its plant, she expressed reservations about her ability to maintain reliable transportation to work, but that due to her supervisor's encouragement, she continued work for a period of time even after the plant moved.

All of the Commission's findings of fact make clear that petitioner desired, and attempted, to continue to work for respondent employer. The relocation of the plant was an act of the employer, done for its benefit, and was an event over which petitioner had no control. Her leaving work was solely the result thereof. Thus her separation from employment was unquestionably "attributable to the employer." Under the interpretation which our courts have given to "good cause," a reasonable person would clearly view petitioner's reason for quitting her job as a valid one which does not indicate an unwillingness to work on her part, nor did the Commission find that she was unwilling to work. Although an employee's transportation to and from work is not ordinarily the employer's responsibility, petitioner's inability to get to work is the direct result of her employer's actions in moving its plant, thereby significantly changing the circumstances of her employment. The result which we reach comports fully with the policy established by our General Assembly in G.S. § 96-2 that one who becomes unemployed through no fault of their own should receive unemployment benefits.

Respondents argue, however, that petitioner in this case, unlike the claimant in *Barnes*, "chose to accept the transfer and worked for many months . . ." after the plant relocation occurred. We find this distinction inconsequential. Petitioner should not be penalized merely because she attempted to continue working after defendant chose to move the plant to another city. To the contrary, petitioner's efforts should be commended and are in line with our state's policy that unemployment benefits should go only to those who are not at fault in their unemployment. We note that courts in other jurisdictions have similarly approved the award of unemployment benefits to persons who left employment due to workplace relocation even when the claimant had attempted to work at the new location. *See Guillory v. Office of Employment Sec.*, 525 So.2d 1197 (La.App. 1988) (employee who initially tried to make additional fifty mile round trip after employer relocated plant had "good and legal" cause for leaving work after she became nervous and emotionally upset by the drive); *Ross v. Rutledge*, 338 S.E.2d 178 (W.Va. 1985) (employer's removal of work site an additional 19.8 miles was a substantial unilateral change in the conditions of employment furnishing good cause for leaving work for ten employees who quit their jobs at the time of the move or shortly thereafter due to the added time and expense of travel).

For the foregoing reasons, we hold that the Commission erred in disqualifying petitioner from receiving benefits. The judgment of the Superior Court is reversed and this case is remanded to

that court for remand to the Employment Security Commission for entry of an award of benefits in accordance with this opinion.

Reversed and remanded.

Judges ARNOLD and COZORT concur.

EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA

PRECEDENT DECISION NO. 30

ORDER REVOKING, IN PART, PRECEDENT DECISION

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(Adopted February 1, 2010, *See ESC Precedent Decision No. 40*)

On December 10, 2009, the Full ESC Commission voted to revoke, in part, ESC Precedent Decision No. 30, In re Garrett (1995), adopted January 22, 1996, in accordance with the authority granted to it by ESC Regulation No. 21.17(B).

As explained in ESC Precedent Decision No. 40, In re Pehollow (adopted December 10, 2009), the language regarding an employer's policy on resignation notice period found in paragraphs 3 and 4 in ESC Precedent Decision No. 30 is defectively incomplete. That is, the language is not consistent with the holdings in other ESC Precedent Decisions and governing court cases requiring (1) a showing that the employee knew or should have known about such policy, and (2) that the burden of proving such knowledge is on the employer. Thus, Precedent Decision No. 30 is no longer legally sound on this point.

IT IS NOW, THEREFORE, ORDERED, ADJUDGED AND DECREED that ESC Precedent No. 30, In re Garrett (1995), be and the same is **REVOKED, in part,** and the inconsistent language in paragraphs 3 and 4 shall be removed from ESC Precedent Decision No. 30.

EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA

PRECEDENT DECISION NO. 30

IN RE GARRETT
(Adopted February 1, 2010)

This cause has come on before the undersigned Chairman of the Employment Security Commission pursuant to G.S. 96-15(e), to consider the EMPLOYER'S APPEAL from a decision by Appeals Referee J. Lynn Noland, under APPEALS DOCKET NO. XV-A-02156. Having reviewed the record in its entirety, the undersigned is of the opinion that the aforesaid decision must be vacated and remanded for a hearing de novo and to issue a new decision.

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Every decision of an Appeals Referee shall contain the entire procedural history of the matter, including orders of continuance and remand. When a hearing is remanded, the findings of fact made by the Referee shall state the procedural posture of the case including the reason for the remand, the requirements of the remand order, and the parties appearing at each of the hearings when an additional hearing is ordered. Further, it is inappropriate and usually reversible error for the Appeals Referee to merely recite the previous findings. Certainly, the Appeals Referee can incorporate previous findings into the new decision in the interest of judicial economy, but additional findings must be made when ordered in accordance with the order of remand. It should be evident from an Appeals Referee's decision following an order of remand to take additional evidence and render a new decision that the Referee heard and considered the additional evidence and complied with the remand order.

IT IS NOW, THEREFORE, ORDERED, ADJUDGED AND DECREED that the decision of the Appeals Referee is SET ASIDE and the cause is hereby REMANDED for further proceedings consistent with this decision. No overpayment is established of benefits paid pursuant to the decision of the Appeals Referee. G.S. 96-9(c)(2)b, last paragraph.

IT IS ALSO ORDERED that all interested parties shall be duly notified as to time and place for rehearing, and the Appeals Referee shall identify the new decision at the conclusion of the remanded hearing by using all previously assigned docket numbers.

IT IS ALSO ORDERED that all documents contained in the record transmitted to the Appeals Referee with this decision, including the appeal and all other correspondence or documents by whatever name or designation, shall be marked as exhibits and entered into the record by the Appeals Referee on remand in order that the record will be complete as required by law and ESC Regulation 14.18(C).

IT IS ALSO ORDERED that a decision in this matter shall be mailed within 30 days from the date of this decision, unless an extension is granted in writing by the Chief Appeals Referee and made part of the record.

PRECEDENT DECISION NO. 31

IN RE HUCKABEE T/A RED CARTAGE
(Adopted July 3, 1996)

STATEMENT OF CASE:

This case came on to be heard before Guy C. Evans, Deputy Commissioner, on Wednesday, July 25, 1990, at the local office of the Employment Security Commission (ESC) in Fayetteville, North Carolina. The matter came on for a hearing pursuant to an order referring the matter to a Deputy Commissioner to determine whether or not certain individuals were employees of or independent contractors with J. Walter Huckabee T/A Red Cartage.

This matter was originally scheduled to be heard on March 14, 1990 and was continued at the request of the employer's wife. The matter was subsequently scheduled to be heard on Wednesday, May 2, 1990 and was continued at the request of the employer's attorney.

Appearing at the hearing before the Deputy Commissioner and offering testimony were: Vickie V. Burton and Lorraine Huckabee, witnesses for the employer; Coy Thomas Stewart and Dennis K. Crumpler, subpoenaed witnesses for the ESC; and Tom Holmes, Field Tax Auditor, and Phil Smith, Field Tax Auditor Supervisor, both with the ESC. The employer was represented by Steven J. O'Connor, Attorney at Law. The ESC was represented by C. Coleman Billingsley, Jr., Staff Attorney. Present as an observer was Kaye Corbett, Field Tax Auditor with the ESC.

Guy C. Evans, Deputy Commissioner, issued an opinion on January 8, 1991, holding the loaders to be employees and not independent contractors.

The employer entered exceptions to the opinion of the Deputy Commissioner and a hearing before the undersigned Chairman of the ESC was held on April 18, 1991. An Order Overruling Exceptions and affirming the opinion of the Deputy Commissioner was issued on April 30, 1991. From that order, the employer entered Notice of Appeal to the Superior Court.

The matter came on for hearing before the Honorable George R. Greene, Judge of Superior Court, on September 9, 1991. He issued an order making findings of fact and reversed the opinion of the ESC. From the judgment or order of the Superior Court, the ESC entered an appeal to the Court of Appeals. The Court of Appeals vacated and remanded the matter to the Superior Court on January 5, 1993 [No. 9112SE1211, Reported per Rule 30(e)].

The matter was heard on October 11, 1993 before the Honorable Gary E. Trawick, Judge Presiding of the Cumberland County Superior Court. On October 31, 1993, Judge Trawick entered a judgment affirming the findings of fact of the ESC in their entirety and remanding the matter to the ESC for the ESC to make additional findings of fact based on questions in the judgment and for rendering of a new decision.

FINDINGS OF FACT:

The following seventeen (17) findings of fact are the original findings of fact of the Deputy Commissioner and affirmed by the Superior Court in the order of October 31, 1993.

1. This hearing was the result of a protest entered by the employer to an Unemployment Tax Assessment and Demand for Payment mailed September 21, 1989.

2. J. Walter Huckabee T/A Red Cartage is a sole proprietorship. It was formed in 1987.

3. Red Cartage has a contract with various trucking companies to load tires onto their trailers at the Kelly Springfield Tire Manufacturing Plant. The trucking companies bring empty trailers to the Red Cartage lot and pick up loaded trailers for delivery. Red Cartage takes the empty trailers to Kelly Springfield to be loaded with tires. Red Cartage brings the loaded trailers from Kelly Springfield to the business location of Red Cartage for the trailers to be picked up by the various trucking companies.

4. Red Cartage reports its office personnel and its truck drivers as employees. Red Cartage contends that the individuals who load the trailers at Kelly Springfield are independent contractors and not employees.

5. The Unemployment Insurance Tax Assessment and Demand for Payment mailed September 21, 1989, was the result of an audit investigation by Tom Holmes and Phil Smith. They determined that the loaders of the trailers were employees of Red Cartage. A Form NCUI 685 was completed for the 3rd and 4th Quarters of 1987; the lst, 2nd, 3rd, and 4th Quarters of 1988; and the lst and 2nd Quarters of 1989 showing the wages of the loaders and the taxes plus penalties and interest due on those wages. (Commission Exhibits 24-26)

6. Tires may be loaded five days a week at Kelly Springfield beginning at 7:30 a.m., 1:30 p.m., 7:30 p.m., or 1:30 a.m. Coy Thomas Stewart and Dennis K. Crumpler are both loaders. Crumpler has worked for Red Cartage since 1987 and Stewart since 1988. Crumpler works at 1:30 p.m. and is the number one loader on that shift. Stewart works at 7:30 a.m. and is the number five loader on that shift. Red Cartage (the employer) obtains the services of various individuals to load the trailers it takes to and removes from Kelly Springfield (Kelly). Crumpler was doing this work for another employer prior to going to Red Cartage.

7. The employer obtains the services of loaders and, in some cases, trains them. The employer apparently stopped training loaders in 1988. It takes approximately one or two days to

train a loader. They train with other loaders. Crumpler has trained loaders at the request of Vickie Burton, the employer's bookkeeper, or John Burton, the employer's office manager. The employer and Kelly will only allow an individual to be trained one or two days. If an individual is not able to learn the work in one or two days' training, he is not retained.

8. The employer maintains a list of loaders by shift. The employer telephones loaders to report to Kelly when needed. Stewart, who is number five on the 7:30 a.m. shift, will be the fifth loader called. If there are not five loads available on that shift, he may be called for another shift. Loaders are called at approximately 6:00 a.m. for the 7:30 a.m. shift.

9. Crumpler, number one loader on the 1:30 p.m. shift, will be called at approximately 11:00 a.m. He is the first loader called. He will be told what loads are available and given his choice of what trailer to load. A loader will normally load one trailer per shift. It takes two or more hours to load a trailer.

10. Loaders are paid by trailer size and weight. A loader may make more money if he is able to load more tires into a trailer. The type of tire also affects the weight. A trailer load of truck tires would weight more than a trailer load of car tires. Some jobs do not call for full loads.

11. Stewart and Crumpler normally work five days per week. Kelly at one time was working six days per week but has reduced its operations to five days per week. Stewart and Crumpler normally take the jobs assigned. If they do not take a job, the employer calls the next loader.

12. While there is a turn-over in loaders, some unspecified number of loaders work on a regular basis for the employer and have done so for a period of time.

13. The only equipment involved in loading a truck is a hand-truck and that belongs to Kelly. When the loader reports to Kelly, he had to go through the gate guard. He then reports to Kelly personnel at the loading dock. Only one individual is permitted to load a truck. If the Kelly personnel do not recognize or know the loader, they will verify the loader's identity with Red Cartage. The only time more than one loader is allowed is when a loader is training another individual.

14. The loader knows from the telephone call which truck he is to load and what he is to load. He will load the tires provided by Kelly personnel onto the trailer. He will keep a record of the tires loaded and verify the number loaded with Kelly personnel. When the Kelly tally and the loader tally match (either initially or after recount), the loader is given a pass to leave the Kelly property. The loader gives the pass to the gate guard on his departure.

15. The employer had the loader sign a contract that stated that they were contractors. The contract provided for the method of pay. The loaders did not negotiate the contract and had no input into the amount of money to be paid. Loaders had to sign the contract in order to work.

16. During a meeting with Smith and Holmes, J. Walter Huckabee told them that the loaders were employees.

17. The employer could terminate the services of the loaders at any time without incurring any penalty or financial obligation to the loaders other than for work already performed. The loaders could cease doing work for Red Cartage at any time without incurring any liability to Red Cartage.

The following findings of fact numbered 18 to 27 are the questions posed by the Superior Court with the corresponding answer.

18. Could the loaders work for other cartage companies and did they work for other cartage companies? Loaders were apparently not prohibited from working for other cartage companies though there is no evidence that any of them did so. The two employees who appeared at the hearing did not do so. Those two individuals generally performed all work that was available working five or six days per week for Red Cartage.

19. Were the loaders required to work every day or to inform Red Cartage of their whereabouts? Workers were not scheduled in advance but were telephoned prior to the beginning of the shift in an order set forth on a list maintained by the employer. There was no requirement that workers inform Red Cartage of their whereabouts, but those that worked on a regular basis for Red Cartage apparently contacted Red Cartage if they were not at home to be telephoned.

20. Did Red Cartage have control or supervision over how the trucks were loaded? Red Cartage did not control and-supervise how the trucks were loaded, Kelly Springfield did so.

21. Could the loaders refuse loads when called, did the loaders refuse loads, and did the loaders sometimes load for other haulers? Loaders could refuse loads and did refuse loads. Loaders working for Red Cartage did not normally work for other loaders. One of the two witnesses worked for another cartage company for one load with the approval of Red Cartage.

22. Under the written contracts, were the loaders liable for their own negligence? Yes.

23. Did Red Cartage furnish equipment or materials to the loaders to be used in performing their services? Red Cartage furnished no equipment. Kelly Springfield furnished any equipment required.

24. Could the loaders increase their earnings by loading more weight on specified trucks and by choosing a particular loading job that had a greater potential for profit? Loaders were paid by weight of tire loaded. A special order called for a specific load, and the loader got paid for the weight of that specific load. A full trailer called for the loader to fill the trailer and Kelly required that the loader completely fill the trailer. An experienced loader might be able to get more weight in a trailer than an inexperienced loader. Also, weight varied by the type of tire. A special load

might weigh more than the full load due to the type of tire. The loader does not have control over the length of the trailer (longer trailers would carry more tires and potentially more weight) and loads the trailer to which he has been assigned by Red Cartage when he arrives at Kelly Springfield. The first-called loader or loaders might get a choice of loads, but eventually there would be no choice.

25. Did the loaders carry liability insurance for any loss or damage to themselves or to Red Cartage or to Kelly Springfield? There is no indication that any of the loaders carried liability insurance.

26. Was the job site of the loaders an "at risk" situation because the loaders were classified as independent contractors with no employer provided benefits such as insurance, etc.? Loaders had no benefits, were potentially personally liable for any damage, and had no protection from Red Cartage or Kelly Springfield for any at-work injury or death.

OPINION:

G.S. 96-8(5) defines "employer" as an employing unit which has individuals in his employment for a certain number of weeks or a certain amount of wages for a calendar quarter. G.S. 96-8(6) defines "employment" as service performed for wage under any contract of hire in which the relationship of the individual performing such service and the employing unit for which such service is rendered is the legal relationship of employer and employee. If an employing unit is an employer with individuals in employment, he is liable for unemployment insurance contributions. G.S. 96-9(a), et seq.

It becomes necessary, then, to consider the elements of employment under the common law. One of the landmark cases in determining the question of the indicia necessary to constitute employment under the common law is Hayes vs. Elon College, 22 4 N.C. 11 (1944). In that case, the court held that independent contractors must:

(a) Be engaged in an independent business, calling or occupation.
(b) Is to have the independent use of his special skill, knowledge or training in the execution of the work.
(c) Is doing a specified piece of work at a fixed price or a lump sum upon quantitative basis.
(d) Is not be subject to discharge because he adopts one method of work rather than another.
(e) Is not in the regular employ of the other contracting party.
(f) Is free to use such assistants as he may think proper.
(g) Has full control over such assistants.
(h) Selects his own time to perform.

The court went on to say that the presence of no particular one of these indicia is controlling nor is the presence of all required. *Id.*

Taking each of the items cited in Hayes vs. Elon College, following observations must be made:

(a) The individuals involved loaded trucks. That loading required one or two days training and would not be classified as an independent business, calling, or occupation. The loaders had no business themselves and did not hold themselves out to be in business;

(b) The loaders loaded trucks, which requires one or two days training and does not involve special skill, knowledge, or training to execute the work;

(c) Workers are paid based on the weight of tires and the size of the trailer loaded based on a formula established by the employer;

(d) Workers can be separated for any reason;

(e) Many of the loaders work for Red Cartage five days per week on a regular and ongoing basis;

(f) Workers cannot use assistants;

(g) Not applicable;

(h) Workers worked specific shifts when work was available. A worker could request a shift but work had to be performed during the specified shift.

In Scott v. Lumber Company, 232 N.C. 162, 59 S.E.2d 592 (1950), it was held that in the question of whether the relationship is that of employer and employee or independent contractor, the test is whether the party for whom the work is being done has a right to control the work with respect to the manner or method of doing the work, as distinguished from the right merely to require certain definite results conforming to the contract. If the employer has the right to control, it is immaterial whether he actually exercises it.

The Supreme Court expressed the test in everyday language when in Pressley v. Turner, 249 N.C. 102, 105 S.E.2d 289 (1958), it said: "Tersely stated, the test which will determine the relationship between parties while work is being done by one which will advantage another is 'who is boss of the job?'"

An employer should not be able to avoid the impact of the Employment Security Law because the structure of the industry and its method of operation permits the employer to operate without giving orders in the conventional sense. In other words, control can be implicit if the nature of the business is such that all the control needed can be affected by establishing a certain pattern of operations and engaging persons, who if they respond normally, will conform

to the established pattern. Foster v. Michigan Employment Security Commission, 15 Mich.App. 96, 166 N.W.2d 316 (1968); Grant v. Director, 71 Cal.App.3rd 647, 139 Cal. Rptr. 533 (1977). There is no evidence that the employer retained the right to control.

The employer's reliance on Reco Transportation, Inc. vs. Employment Security Commission, 81 N.C.App. 415, 344 S.E.2d 294, pet. disc. rev. denied, 318 N.C. 509, 349 S.E.2d 865 (1986) is misplaced. The court specifically noted that the drivers had investments. The drivers could refuse to haul a load of freight assigned by Reco and using Reco trucks, could haul freight that the driver secured. Finally, the purchase price of the tractor-trailer rigs has risen to an extent to make it not financially feasible for would-be owner/operators to purchase they own tractor-trailer rigs.

More on point is State, ex rel ESC vs. Faulk, 88 N.C.App. 369, 363 S.E.2d 225, pet. disc. rev. denied, writ of supersedeas denied, 321 N.C. 480, 364 S.E.2d 917 (1988) wherein taxi drivers were held to be employees and Youngblood vs. North State Ford Truck Sales, 321 N.C. 380, 364 S.E.2d 433 (1988) wherein the Supreme Court held that the trainer obtained by North State Ford to train its employees was an employee of North State Ford because North State Ford designated the equipment to be used in training and designated the hours of training.

Also of note is Service Trucking, Inc. vs. United States, 347 F.2d 671 (4th Cir. 1965), wherein it was held that individuals obtained by truck drivers to unload the trucks in cities where the trucking company had no terminals were employees of the trucking company.

Here, the workers did not report to the place of duty or call if they were not able to report to work as is customary in most businesses. In this business, the employer telephoned the employee several hours prior to the beginning of the shift to notify the worker whether or not there was work.

The loaders did not have the ability to make a profit or suffer a loss. The workers were paid based on the size of the trailer loaded and the weight loaded into the trailer. This is nothing more than a worker being paid based on production.

Also important is the employer's admission that these loaders were employees. His wife's allegation that he was somehow not competent or capable of carrying on his affairs is not supported. J. Walter Huckabee is an individual and is the employer. There is absolutely no showing that any Court has removed him from the handling of his business or that he is not competent and capable of handling his affairs. Therefore, his admission carries great weight.

There was not a meeting of the minds and the employees and the employer did not, collectively, have a common intent for the loaders to be independent contractors. See, ESC vs. Paris vs. Emmerson, 101 N.C.App. 469, 400 S.E.2d 76, affirm 330 N.C. 114, 408 S.E.2d 852 (1991). The individuals performing services as loaders were providing manual labor requiring little training or skill to perform the work. These individuals were loading tires onto a truck.

This work is not the type of work where someone has a special business or occupation utilizing skill, knowledge, and training. It is a manual labor type situation where the employer is attempting to avoid its tax responsibilities by labeling employees independent contractors. Whether Red Cartage supervised and controlled the activities of the loaders or it was delegated to Kelly Springfield, who did have the right to supervise and control the loading of the trucks, is not material. Under the arrangement, Kelly Springfield had the right to supervise and control the activities and work of the employees of Red Cartage.

It is concluded that the loaders were employees of J. Walter Huckabee T/A Red Cartage. Taxes plus penalties and interest as noted on the Unemployment Tax Assessment and Demand for Payment mailed September 21, 1989 are due. Interest at the statutory rate of one-half of one percent (.5%) per month on the unpaid tax continues to accrue.

ORDER:

It is now, THEREFORE, ORDERED, ADJUDGED AND DECREED that J. Walter Huckabee T/A Red Cartage is the employer of the loaders it engages to load trailers at Kelly Springfield Tire Plant. Taxes plus penalties and interest as noted on the Unemployment Tax Assessment and Demand for Payment mailed September 21, 1989 are due. Interest accrues at the statutory rate of one-half of one percent (.5%) per month.

Commentary:

A Cumberland County Superior Court Judge reversed this tax opinion on June 30, 1994. ESC appealed to the N.C. Court of Appeals and a divided three-judge panel (Judge Cozort dissenting) entered a decision reversing the judgment of the Superior Court Judge: State ex rel. Emp. Security Commission v. Huckabee, 120 N.C.App. 217, 461 S.E.2d 787 (1995). Upon appeal by the employer, the decision of the Court of Appeals was affirmed, per curiam, by the N.C. Supreme: 343 N.C. 297, 469 S.E.2d 552 (1996).

PRECEDENT DECISION NO. 32

IN RE BROWN
(Adopted April 30, 1997)

STATEMENT OF THE CASE:

The claimant filed a New Initial Claim (NIC) for unemployment insurance benefits effective November 10, 1996. Thereafter, the Commission determined that the weekly benefit amount payable to the claimant was $87.00 and, during the benefit year established by the claimant, the maximum amount of unemployment insurance benefits payable to the claimant was $2,262.00.

The claim was referred to an adjudicator on the issue of separation from last employment. The Adjudicator, Cindy Walters, issued a determination under DOCKET NO. 7947 finding the claimant disqualified for benefits beginning on November 10, 1996. The Adjudicator in her determination ruled that the claimant left her job pursuant to N.C. Gen. Stat. §96-14(1) by failing to comply with the employer's policy to contact the company each day she is not working on assignment.

The claimant filed an appeal from the adjudicator's determination and the matter came on to be heard by an appeals referee under Appeals Docket No. VI-A-16676. The following individuals appeared at the hearing before Appeals Referee John F. Pendergrass on January 22, 1996: the claimant; and, Wendy Pace, Operations Manager, for the employer. On January 29, 1997, Appeals Referee Pendergrass issued a decision upholding the determination and finding the claimant disqualified to receive benefits. The claimant appealed the decision issued by the Appeals Referee.

FINDINGS OF FACT:

1. The claimant had filed continued claims for unemployment insurance benefits for the period November 10, 1996 through December 14, 1996. The claimant has registered for work with the Commission, has continued to report to an employment office of the Commission and has made a claim for benefits in accordance with G.S. §96-15(a).

2. The claimant had worked for the employer at sites operated by the employer's customers. The employer is a temporary personnel service company.

3. The claimant last completed a work assignment for the employer on Saturday, November 9, 1996.

4. On Monday, November 11, 1996, through Wednesday, November 13, 1996, the claimant contacted the employer as required by its initial employment agreement. However, the employer had no work available for the claimant.

5. On November 13, 1996, the claimant went to the Employment Security Commission local office where she applied for unemployment insurance benefits. At the time that the claimant applied for benefits, there were no available assignments from the employer.

6. After November 13, 1996, the claimant continued asking for assignments from the employer, and the employer continued asking the claimant to take assignments.

MEMORANDUM OF LAW:

The Employment Security Law of North Carolina provides that where there is a separation, the issue of qualification for benefits upon that separation is decided under G.S. §96-14. Temporary personnel service employers (equivalent to private personnel service employers as defined in G.S. §95-47.l) are treated as any other employer under the Employment Security Law.

The Employment Security Law also provides:

> For the purpose of establishing a benefit year, an individual shall be deemed to be unemployed...if he has payroll attachment but, because of lack of work during the payroll week for which he is requesting the establishment of a benefit year, he worked less than the equivalent of three customary scheduled full-time days in the establishment, plant, or industry in which he has payroll attachment as a regular employee. If a benefit year is established, it shall begin on the Sunday preceding the payroll week ending date.

G.S. §96-8(10)a.

An employee of a temporary personnel service employer whose assignment has ended and who is offered another assignment prior to filing an NIC or AIC for unemployment insurance benefits who does not accept the assignment and files a claim shall be treated as having left work under G.S. §96-l4(l). Whether or not claimant left work with good cause attributable to the employer shall depend on whether or not the new assignment is suitable work. In determining whether or not the new assignment is suitable work, Commission Precedent Decision No. 19, In re Tyndall, shall be applied.

An individual employed by a temporary personnel service employer who files a NIC or AIC for unemployment insurance benefits after an assignment has ended or after he/she is not permitted to return to an assignment and prior to an offer of another assignment shall not be considered separated from employment under G.S. §96-l4(l), (2), (2A) or (2B), but shall be deemed unemployed in accordance with G.S. §96-8(l0)a. and b., unless the claimant has been discharged. If claimant has been discharged, then claimant's qualifications to receive benefits shall be determined in accordance with G.S. §96-l4(2), (2A) or (2B).

For any week when a claimant is receiving benefits under G.S. §96-8(l0)a. or b. and fails to work all the work her/his temporary personnel service employer has made available to the claimant, the claimant's eligibility to receive benefits shall be decided under G.S. §96-l3(a).

When a separated individual in claims status refuses an offer of work or an assignment by the temporary personnel service employer or any employer, the refusal shall be decided under G.S. §96-l4(3). In a case decided under G.S. §96-l4(3), once an employer or the Commission, whichever is appropriate, shows that offered work is suitable work, then the claimant has the burden of showing that he failed to accept the work with good cause.

In a case involving a temporary personnel service employer, as in a case involving any other employer, if a claimant quits work, the claimant has the burden of showing that he/she quit with good cause attributable to the employer. In a case where a claimant is discharged, the employer has the burden of showing that the claimant was discharged for a disqualifying reason. In deciding a case under G.S. §96-l4(l), (2), (2A), (2B) or (3), such items as a written agreement between the employer and the employee, written instructions to the employee, the application for employment, and/or oral agreements or oral instructions are relevant and pertinent evidence.

On the other hand as a general rule, an employer, when faced with a failure of the employee to abide by the terms of an agreement, is free to ignore the breach of the terms of employment or to hold the employee accountable for violating the terms and conditions of an employment contract. If the employer then discharges the claimant, the issue of whether any single violation of the terms and conditions of an employment contract amounts to substantial fault connected with work under G.S. §96-14(2A) or misconduct connected with work under G.S. §96-14(2) is a matter to be decided on a case by case basis.

DISCUSSION

This Commission has no position on the appropriateness of any specific employment arrangements between a temporary assignment employee and the temporary personnel service employer. The parties are free to engage in any lawful employment arrangements, terms, conditions or contracts as they may so choose.

There is no evidence in the record that either party was required or obligated to maintain the employment relationship for any certain period. In other words, the parties were free to break off their employment relationship at any time.

However, in this case, the Commission never reaches the issues of discharge from work or leaving work because there was no separation from employment. Neither the claimant nor the employer broke the employment relationship. Based on the facts of this case, there is no basis to conclude there was any separation. It appears that the Commission should not have raised a separation issue in the first place. As stated in her testimony, the claimant filed her claim, "...because the work had been real slow, and I just could not do anything else financially except to try to do this [file a claim]." Appeals hearing transcript p 5. This testimony does not support a conclusion that there had been a separation. Wright v. Bus Terminal Restaurant, 71 N.C. App. 395, 322 S.E.2d 201 (1984).

The Commission will take this opportunity to address a related situation. When a claimant stops performing an assignment before that assignment ends, there is no separation unless the employer or the claimant treat the event as a separation. Unless the parties present facts to the Commission showing the employment relationship has ended, there is no basis for the Commission to assume and presume that the employment relationship has ended.

Based on the competent evidence in the record and the Commission's Findings of Facts based upon that record, it is concluded that the claimant was not separated as contemplated under G.S. §96-14(1),(2), or (2A). It is further concluded that the claimant was unemployed under G.S. §96-8(10)a.

DECISION:

IT IS NOW, THEREFORE, ORDERED, ADJUDGED AND DECREED that the decision of the Appeals Referee is **REVERSED**, and the **CLAIMANT IS NOT DISQUALIFIED** for unemployment insurance benefits.

PRECEDENT DECISION NO. 33

IN RE FALLIN
(Adopted April 30, 1997)

This cause has come on before the undersigned pursuant to N.C.G.S. §96-15(e), to consider the EMPLOYER'S APPEAL from a DECISION by Appeals Referee Betsy Loytty under APPEALS DOCKET NO. IV-A-16898. Having reviewed the record in its entirety, the undersigned is of the opinion that the aforesaid decision must be vacated and remanded to take additional evidence and to issue a new decision.

The claimant and the employer shall be provided with a copy of the transcript of the hearing not later than the date the Appeals Referee mails notice of the remanded hearing.

The record in this case is deficient. While not clear, it appears that the claimant secured employment at $8.00 per hour with a client of Mid-Carolina Temporary Services, Inc. and the client sent the claimant to Mid-Carolina and used Mid-Carolina as a payroll service. Claimant began work for the client of the employer on October 24, 1996 and claimant's last day of work was November 18, 1996. The client was apparently a company called Aquatics though that is not clear from the record. Apparently on November 22, 1996, claimant was offered an assignment by the employer starting at $5.96 per hour in the shipping department of a client. Claimant refused that assignment and filed an Additional Initial Claim (AIC) on November 26, 1996 effective November 17, 1996. The terms and conditions of claimant's employment with the employer are not known. Any requirements placed on claimant by the employer and made known to the claimant are not known. The specifics as to how claimant became an employee of this employer are not known.

The issues cited in the Notice of Hearing before the Appeals Referee were whether or not claimant failed without good cause to apply for available suitable work or failed without good cause to accept available suitable work under G.S. §96-14(3)(i) or (ii). The case is properly decided under G.S. §96-14(l). Temporary personnel service employers (equivalent to private personnel service employers as defined in G.S. §95-47.1) are treated as any other employer under the Employment Security Law. An employee of a temporary personnel service employer whose assignment has ended and who is offered another assignment prior to filing a New Initial Claim (NIC) or an Additional Initial Claim (AIC) for unemployment insurance benefits who does not accept the assignment and files a claim shall be treated as a quit under G.S. §96-14(l). Whether or not claimant quit with good cause attributable to the employer shall depend on whether or not the new assignment is suitable work. In determining whether or not the new assignment is suitable work, Commission Precedent Decision No. 19, In re Tyndall, shall be applied.

An individual employed by a temporary personnel service employer who files a NIC or AIC for unemployment insurance benefits after an assignment has ended or after he is not permitted to return to an assignment and prior to an offer of another assignment shall not be

considered separated from employment under G.S. §96-14(l), (2), (2A) or (2B), but shall be deemed unemployed in accordance with G.S. §96-8(10)a. and b., unless the claimant has been discharged. If claimant has been discharged, then claimant's qualifications to receive benefits shall be determined in accordance with G.S. §96-14(2), (2A) or (2B).

For any week when a claimant is receiving benefits under G.S. §96-8(10)a. or b. and fails to work all the work her/his temporary personnel service employer has made available to the claimant, the claimant's eligibility to receive benefits shall be decided under G.S. §96-13(a).

When a separated individual in claims status refuses an offer of work or an assignment by the temporary personnel service employer or any employer, the refusal shall be decided under G.S. §96-14(3). In a case decided under G.S. §96-14(3), once an employer or the Commission, whichever is appropriate, shows that offered work is suitable work, then the claimant has the burden of showing that he failed to accept the work with good cause.

In a case involving a temporary personnel service employer, as in a case involving any other employer, if a claimant quits work, the claimant has the burden of showing that he/she quit with good cause attributable to the employer. In a case where a claimant is discharged, the employer has the burden of showing that the claimant was discharged for a disqualifying reason. In deciding a case under G.S. §96-14(l), (2), (2A), (2B) or (3), such items as a written agreement between the employer and the employee, written instructions to the employee, the application for employment, and/or oral agreements or oral instructions are relevant and pertinent evidence.

Every decision of an Appeals Referee shall contain the entire procedural history of the matter, including orders of continuance and remand. When a hearing is remanded, the findings of fact made by the Referee shall state the procedural posture of the case including the reason for the remand, the requirements of the remand order, and the parties appearing at each of the hearings when an additional hearing is ordered. Further, it is inappropriate and usually reversible error for the Appeals Referee to merely recite the previous findings. Certainly, the Appeals Referee can incorporate previous findings into the new decision in the interest of judicial economy, but additional findings must be made when ordered in accordance with the order of remand. It should be evident from an Appeals Referee's decision following an order of remand to take additional evidence and render a new decision that the Referee heard and considered the additional evidence and complied with the remand order.

IT IS NOW, THEREFORE, ORDERED, ADJUDGED AND DECREED that the decision of the Appeals Referee is **SET ASIDE** and the cause is hereby **REMANDED** for further proceedings consistent with this decision. No overpayment is established of benefits paid pursuant to the decision of the Appeals Referee. G.S. §96-9(c)(2)b, last paragraph.

IT IS ALSO ORDERED that all interested parties shall be duly notified as to time and place for rehearing, and the Appeals Referee shall identify the new decision at the conclusion of the remanded hearing by using all previously assigned docket numbers.

IT IS ALSO ORDERED that all documents contained in the record transmitted to the Appeals Referee with this decision, including the appeal and all other correspondence or documents by whatever name or designation, shall be marked as exhibits and entered into the record by the Appeals Referee on remand in order that the record will be complete as required by law and ESC Regulation 14.19.

IT IS ALSO ORDERED that a decision in this matter shall be mailed within 30 days from the date the remanded record is received by the Appeals Department, unless an extension is granted in writing by the Chief Appeals Referee and made part of the record.

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PRECEDENT DECISION NO. 34

IN RE TEACHEY
(Adopted May 10, 1999)

Pursuant to N.C.G.S. §96-15(e), this cause has come on before the Commission to consider the **EMPLOYER'S APPEAL** from a decision by Appeals Referee Milford K. Kirby under Appeals Docket No. VIII-A-09591. The employer requested oral arguments to be held. A notice of oral arguments, scheduled to be held on February 25, 1999, was mailed to all interested parties on February 8, 1999. When the matter came on to be heard, appearing and presenting oral arguments were: Harley H. Jones, attorney for the employer.

The record evidence has been reviewed in its entirety. All written and oral arguments have been considered.

G.S. §96-15(i) requires that findings of fact found by the Commission to be supported by competent evidence. ESC Regulation No. 14.25(C) makes this same requirement applicable to findings of fact made by the Appeals Referee. Pursuant to G.S. §96-15(f), the Commission has promulgated procedures by which such competent evidence may be presented at hearings.

In cases involving "a drug related separation from work", the Commission permits controlled substance examination results to be deemed proved by affidavit or testimony from the testing laboratory. The affidavit or testimony must show that the controlled substance examination from which the results were derived met all statutory procedural requirements. The affidavit or testimony also must explain what the results mean.

What are the procedural requirements of a controlled substance examination (test)? Under G.S. §95-232, the required procedures are:

1. Collection of samples for examination or screening under reasonable and sanitary conditions and in a manner reasonably calculated to prevent substitution of samples and interference with the collection, examination, or screening of samples;

2. Use of approved laboratories for screening and/or confirmation of samples;

3. Confirmation of any sample that produces a positive result by a second examination of the sample utilizing gas chromatography with mass spectrometry or an equivalent scientifically accepted method;

4. Retention by the screening and/or confirmation laboratory of a portion of every sample that produces a confirmed positive examination for a period of 90 days from the time the results of the confirmed positive examination are mailed or otherwise delivered to the examiner;

> 5. Establishment by the examiner or its agent of a chain of custody for sample collection and examination to ensure proper record keeping, handling, labeling, and identification of examination samples; and
>
> 6. Making confirmed positive samples available to the affected examinee or his/her agent, within the retention period, if the examinee elects to have the samples retested at his/her own cost.

To make it convenient to present testimony as to the results of the controlled substance examination, the Commission allows the personnel of the testing laboratory to participate and testify in the hearing by way of teleconference means, although the original hearing may be scheduled to be conducted in-person. ESC Regulation No. 14.18, in pertinent part, provides:

> (O) When a party desires to introduce documents, affidavits or statements at a hearing, that party must provide an authenticated copy plus one copy of each exhibit for the use of the Appeals Referee and a copy for each party to the proceeding.

The notice of hearing in a case involving a "drug related separation from work' informs the parties of the type of proof that would be necessary and the availability of the teleconference means if a party desired to present this proof through testimony from witnesses. The notice further states:

> At the hearing you will need to bring documentary evidence and/or witnesses to prove or disprove any test and its results that had a part in the separation from work, along with any applicable work rules.
>
> . . .
>
> If you have documents which you wish to be considered, you must bring them to the hearing. Please bring the original document and two copies.

In the present case, the claimant was discharged from employment because the employer had reason to believe that the claimant tested positive for a controlled substance. The Appeals Referee found as a fact that the "claimant's drug test was positive for cannabinoids." At no time has the claimant denied that the controlled substance examination results were positive. His argument, as presented at the hearing before the Appeals Referee, centered around how the controlled substance came to be present in his body; i.e., "second-hand" inhalation of the drug rather than use of the drug.

The employer argues that the employer did not know of the proof requirement in cases involving drug related separation from work, and therefore is entitled to a remand to present such proof at another hearing. In the alternative, the employer argues that "too high a burden" is placed on the employer "by requiring an affidavit or testimony from the testing laboratory in order to prove misconduct connected with work relating to a positive drug test." The employer also argues that since the claimant did not deny that the results were positive, an affidavit or testimony from the testing laboratory was unnecessary and the positive results should have been deemed to have been proved.

Commission Exhibit 8, the Notice of Hearing mailed to all interested parties on December 18, 1998, clearly shows that the employer knew or should have known of the type of proof required in a case involving a drug related discharge from work and how such proof could be presented. Furthermore, the Appeals Referee, during the January 7, 1999 hearing, offered the employer an opportunity to have the hearing continued in order that the employer could arrange to obtain the necessary proof. The employer declined this opportunity. Accordingly, the Commission finds the employer's argument on this ground to be unpersuasive and without merit.

In view of the statutory and regulatory requirement that findings of fact be supported by competent evidence, the Commission is of the opinion that the methods by which drug test results are to be deemed proved at hearings before the Appeals Referee are not burdensome. They are the most convenient and least intrusive methods of proof.

The employer further argues that Employer Exhibit 2 at page 3 (drug test results report) shows that a confirmation of the positive sample was conducted by a second examination of the sample utilizing gas chromatography with mass spectometry. The Appeals Referee found as a fact that "there is no evidence that the positive test result was confirmed by a second test utilizing gas chromatography with mass spectrometry." This finding was apparently based on the testimony of the employer witness that she had evidence only as to one test in response to the Appeals Referee's question: "Was a positive result confirmed by a second test using gas chromatography with mass spectrometry?" The employer argues that its witness misunderstood the question and thought the Appeals Referee was referring to a test that the claimant could have had done at his own cost. This failure of the employer witness to understand the question and testify accordingly showed the necessity of having an affidavit or testimony from the testing laboratory. Because the record is absent any showing of him having expertise in this field, the Appeals Referee properly refrained from attempting to interpret the meaning of the terms and abbreviations appearing on the drug test results report. Accordingly, the Commission concludes that the Appeals Referee did not commit error in finding that no confirmation examination had been conducted.

The employer's Substance Abuse Policy, Employer Exhibit 1, is premised on the "use" of abused substances by employees and job applicants. The claimant, who did not deny that his drug test was positive for cannabinoids, did deny using drugs. He blamed the presence of the drug in his system on his "second-hand" inhalation of marijuana smoke that was present at a social gathering that he attended. This reason is uncontroverted since the employer presented, by testimony or affidavit, no expert evidence explaining what the positive results meant. That is, it is unknown from the drug test results report whether the levels found in the claimant's system established the "use" of the drug rather than "second-hand" inhalation as asserted by the claimant. This failure of the employer witness to make this distinction showed the necessity of having an affidavit or testimony from the testing laboratory explaining what the positive results meant.

Is the employer entitled to another hearing in order that it may present additional evidence? When a party has had a hearing with the opportunity to present and refute any

evidence and chooses not to call certain witnesses, the party is not entitled to a rehearing because the party has been accorded procedural due process. Douglas v. J. C. Penney Company, 67 N.C.App. 344, 313 S.E.2d 176 (1984). Where there is evidence in the record that supports a conclusion on a material issue, the Commission may not grant an employer more than one opportunity to produce other evidence to prove that a claimant is disqualified from receiving unemployment insurance benefits. To do otherwise, would allow employers repeated opportunities to meet their burden of proving that an employee should be disqualified. Dunlap v. Clarke Checks, Inc., 92 N.C.App. 581, 375 S.E.2d 171 (1989).

The Commission concludes that the employer was afforded procedural due process and had a reasonable opportunity to present all relevant and material evidence to prove its case. Also, the Commission concludes that the record contains sufficient evidence to support conclusions as to all material issues. Accordingly, the employer is not entitled to another hearing to present additional evidence in this matter.

Pursuant to the statutory authority of the Commission to "affirm, modify, or set aside any decision of an appeals referee on the basis of the evidence previously submitted, or direct the taking of additional evidence", IT IS NOW, THEREFORE, ORDERED, ADJUDGED AND DECREED that the employer's request for a rehearing be, and the same, is **DENIED**, and the attached decision by the Appeals Referee is **AFFIRMED** and **ADOPTED** as the decision of the Commission.

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PRECEDENT DECISION NO. 35

IN RE MARLOW
(Adopted May 17, 1999)

[*In re Marlow*, decided by the North Carolina Court of Appeals, holds that sexual harassment in the workplace by a supervisor constitutes "good cause attributable to the employer" for leaving work under N.C.G.S. §96-14(1). This case further holds that if sexual harassment by a supervisor is proven by the claimant/employee, mere failure of the claimant/employee to report the sexual harassment pursuant to the employer's grievance policy does not, in itself, disqualify the claimant/employee from receiving unemployment insurance benefits. Discretionary review denied by N.C. Supreme Court: 347 N.C. 577, 402 S.E.2d 595 (1998)]

REBECCA L. MARLOW, Petitioner-Appellant,
v.
NORTH CAROLINA EMPLOYMENT
SECURITY COMMISSION, Respondent-Appellee.

COURT OF APPEALS OF NORTH CAROLINA
127 N.C.App. 734; 493 S.E.2d 302 (1997)

Opinion by: John, Judge

Petitioner appeals the trial court's order affirming decisions of the Employment Security Commission of North Carolina (the Commission) and the Appeals Referee denying her claim for unemployment benefits. We reverse the trial court.

The underlying facts are essentially uncontroverted and pertinent portions are set out in the findings of fact of the Appeals Referee as follows:

> 1. [Petitioner] worked for Carpenter Decorating Company . . . as a machine operator. . . . . .
> 3. [She] left this job because her immediate supervisor made repeated sexual comments to her in the workplace over a period of several years up until [her termination]. [Petitioner] was offended and intimidated by the supervisor's behavior and told him to stop it, but he never did. . . .
> 4. The supervisor's behavior amounted to sexual harassment. . . .
> 5. [The] employer's policy, known to [petitioner] at the times in question, prohibited sexual harassment and required that it be reported to upper management if the harasser was the direct supervisor.

> 6. [Petitioner] never reported the sexual harassment to any management over the immediate supervisor because she thought that she would not be believed . . . .

The Appeals Referee further found that "by failing to report the sexual harassment to upper management before leaving the job, [petitioner] denied employer the opportunity to solve the problem." Based upon the foregoing findings, the Appeals Referee concluded petitioner's termination of employment was not for good cause attributable to her employer, and denied her claim for unemployment benefits. On 9 April 1996, the Commission affirmed and adopted as its own the decision of the Appeals Referee. Petitioner sought judicial review 24 April 1996 in Catawba County Superior Court, which affirmed the Commission 20 August 1996. Petitioner filed notice of appeal to this Court 16 September 1996.

Upon leaving her position at Carpenter Decorating Company (CDC), petitioner filed for unemployment benefits pursuant to the Employment Security Act (the Act), codified at N.C.G.S. § 96-1 *et seq.* (1995). The Act is to be liberally construed in favor of applicants. *Eason v. Gould, Inc.,* 66 N.C. App. 260, 263, 311 S.E.2d 372, 374 (1984), *aff'd*, 312 N.C. 618, 324 S.E.2d 223 (1985). Further, in keeping with the legislative policy to reduce the threat posed by unemployment to the "health, morals, and welfare of the people of this State," N.C.G.S. § 96-2 (1995), statutory provisions allowing disqualification from benefits must be strictly construed in favor of granting claims. *Barnes v. The Singer Co.*, 324 N.C. 213, 216, 376 S.E.2d 756, 758 (1989).

The statutory disqualification provision applicable to the case *sub judice* is N.C.G.S. § 96-14(1)(1995), which states, *inter alia:*

> An individual shall be disqualified for benefits . . . if it is determined by the Commission that such individual is, at the time [his] claim is filed, unemployed because he left work without good cause attributable to the employer.

Petitioner has consistently maintained she terminated employment with CDC because of sexual harassment by her immediate supervisor, and, indeed, the Appeals Referee found as a fact that her "supervisor's behavior amounted to sexual harassment of [petitioner]." Consequently, petitioner continues, she left for "good cause attributable to the employer" and was not, as a result, disqualified from receipt of unemployment benefits by G.S. §96-14(1).

An employee who terminates employment for "good cause" leaves for a reason "that would be deemed by reasonable men and women as valid and not indicative of an unwillingness to work." Watson v. Employment Sec. Comm'n., 111 N.C. App. 410, 413, 432 S.E.2d 399, 401 (1993). It cannot be contested that sexual harassment in the workplace constitutes good cause under G.S. §96-14(1) for leaving employment, and the Commission has advanced no argument to the contrary. *See Phelps v. Vassey*, 113 N.C. App. 132, 137, 437 S.E.2d 692, 695 (1993) ("the public

policy of North Carolina must be to stop sexual harassment in the work place"), and *In re Bolden*, 47 N.C. App. 468, 471, 267 S.E.2d 397, 399 (1980) (had claimant "left her job because of racial discrimination practiced against her by her employer, she would have had good cause attributable to her employer and so would not have been disqualified for benefits"); *see also Hoerner Boxes, Inc. v. Mississippi Employment Sec. Com'n*, 693 So. 2d 1343, 1348 (Miss. 1997)("sexual harassment in the work place constitutes good cause for voluntarily leaving employment in the context of unemployment compensation benefit claims").

Moreover, the Commission, in asserting that the trial court ruled properly and in responding to petitioner's argument to this Court, does not focus upon imputation to CDC of the supervisor's actions in sexually harassing petitioner. *See Martin v. Cavalier Hotel Corp.*, 48 F.3d 1343, 1350-52 (1995) (where supervisor's sexual misconduct occurred "in the workplace, during working hours, on an employee whom he had authority to hire, fire, promote, and discipline," supervisor acted within scope of his employment such that employer is vicariously liable in action grounded on supervisor's actions); *Hogan v. Forsyth Country Club Co.,* 79 N.C. App. 483, 492, 340 S.E.2d 116, 122, *disc. review denied,* 317 N.C. 334, 346 S.E.2d 140 (1986) ("'designation "manager" implies general power and permits a reasonable inference that he was vested with the general conduct and control of defendant's business . . ., and his acts are, when committed in the line of his duty and in the scope of his employment, those of the company'") (quoting *Gillis v. Great Atlantic & Pacific Tea Co.,* 223 N.C. 470, 474, 27 S.E.2d 283, 285 (1943)).

Rather, the Commission, in arguing petitioner's termination of employment was not for good cause attributable to CDC, points in the main to findings of the Appeals Referee that CDC was never advised by petitioner of the supervisor's actions notwithstanding CDC's policy against sexual harassment, and that petitioner's "failure to report the sexual harassment to upper management before leaving the job . . . denied [CDC] the opportunity to solve the problem." Accordingly, the Commission asserts, the trial court properly affirmed the determination of the Appeals Referee that plaintiff's leaving employment at CDC was not attributable to her employer:

> The facts in this unemployment case do not show this employer was at fault since it had a policy prohibiting sexual harassment and did not know that the claimant had been sexually harassed since she did not follow the employer's reasonable policy that required reporting it to the "upper management."

The Commission's argument is unfounded.

An earlier decision of this Court, *In re Werner*, 44 N.C. App. 723, 725, 263 S.E.2d 4, 6 (1980), squarely resolved the question of whether an employee's failure to seek redress under the

employer's grievance procedure rendered her departure without good cause attributable to the employer. In *Werner,* we affirmed the trial court's ruling that as a matter of law, claimant's failure to use the grievance machinery did not render the separation voluntary or without good cause attributable to the employer. *Werner,* 44 N.C. App. at 728, 263 S.E.2d at 7. In reaching this holding, we examined the legislative intent behind enactment of G.S. §96-1 *et seq.*:

> Although the General Assembly could have, by statute, disqualified all such employees who do not exhaust the employer's grievance machinery, it has not done so. The disqualifying provisions of G.S. 96-14 are to be construed strictly in favor of the claimant . . . . It therefore would not be consistent with the public policy of our State, as expressed in G.S. 96-2 or the opinions [*738] of our courts, to disqualify from benefit eligibility such employees for not availing themselves of the employer's grievance machinery.

Id. (citation omitted).

The holding of *Werner* is precisely on point with the facts herein: petitioner's mere failure to report sexual harassment pursuant to her employer's grievance policy did not, in itself, disqualify her from unemployment benefits eligibility. *See also In re Clark*, 47 N.C. App. 163, 167, 266 S.E.2d 854, 856 (1980) (citing *Werner* for holding that employee terminating employment for good cause attributable to employer is not, in order to preserve employee's claim for unemployment benefits, obligated to attempt resolution of the conflict prior to leaving). Petitioner's failure to report her supervisor's misconduct having been the basis for the Commission's denial of her unemployment benefits claim, the trial court erred in affirming the Commission. Construing the relevant disqualifying provisions strictly and in favor of granting petitioner's claim, *Barnes*, 324 N.C. at 216, 376 S.E.2d at 758, we hold that petitioner, under the circumstances *sub judice*, left employment with CDC for good cause attributable to her employer. *See Werner*, 44 N.C. App. at 728, 263 S.E.2d at 7, and *Clark*, 47 N.C. App. at 167, 266 S.E.2d at 856.

Based on the foregoing, the order of the trial court is reversed and this case remanded to that court for further remand to the Commission with instructions to ascertain the period of petitioner's entitlement to unemployment benefits and thereupon to award her the appropriate amount thereof.

Reversed and remanded.

Judges LEWIS and SMITH concur.
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EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA

PRECEDENT DECISION NO. 36
IN RE BRIGHT
(Adopted November 17, 2003)

STATEMENT OF CASE:

The claimant filed a NEW INITIAL CLAIM (NIC) for unemployment insurance benefits effective July 20, 2003. Thereafter, the Employment Security Commission determined that the weekly benefit amount payable to the claimant was $408.00 and, during the benefit year established by the claimant, the maximum amount of unemployment insurance benefits payable to the claimant was $10,608.00.

The claim was referred to an adjudicator on the issue of separation from last employment. Adjudicator Joe Manley issued a determination under Docket No. 4019-95 finding the claimant not eligible for benefits. The claimant filed an appeal from the determination and the matter came on to be heard by a Hearing Officer under Appeals Docket No. V-A-36848. The following individuals appeared at the hearing before the Hearing Officer: Yvonne L. Bright, the claimant. On September 10, 2003, Charlotte A. Dover, Hearing Officer, issued a decision finding the claimant not eligible to receive unemployment insurance benefits pursuant to G.S. §96-8(10)a. and b. The CLAIMANT has APPEALED.

FINDINGS OF FACT:

1. The claimant has filed continued claims for unemployment insurance benefits for the period July 20, 2003 through August 2, 2003. The claimant has registered for work with the Commission, has continued to report to an employment office of the Commission and has made a claim for benefits in accordance with G.S. §96-15(a).

2. The claimant began working for the employer on or about October 1, 1995, and was continuing to work for the employer at the time of the hearing before the Hearing Officer.

3. During the weeks ending July 26 and August 2, 2003, the claimant was attached to the employer's payroll.

4. The claimant began working for the employer while engaged in full-time employment with International Paper Company, Inc., where she had worked since 1968. The claimant's full-time job was her primary employment.

5. The claimant has worked for the employer on a part-time basis. She customarily averages 12 hours per week, but was not guaranteed any set number of hours during employment. Her work hours have fluctuated depending on the needs of the employer's ESC usiness and the economy, which means that she has worked more than 12 hours per week when called in to help with inventory or to cover for other employees on vacation. There have been weeks, particularly since September 11, 2001, when she has worked less than 12 hours per week. The claimant understood from the employer that her reduced hours during those weeks were because of the economy.

6. The claimant continued to work for both the employer and for International Paper Company, Inc., until she was separated from the latter employment on March 28, 2002

7. The claimant received a "pay-out" package as a result of her separation from employment with International Paper Company, Inc.

8. The claimant continued to work for the employer on a part-time basis following her separation from International Paper Company, Inc., and filed a claim for unemployment insurance benefits effective July 20, 2003, after the funds that she received from her "pay-out" package from International Paper Company, Inc. were exhausted.

MEMORANDUM OF LAW:

The Employment Security Law of North Carolina provides that for the purpose of establishing a benefit year, an individual shall be deemed to be unemployed:

1. If he has payroll attachment but, because of lack of work during the payroll week for which he is requesting the establishment of a benefit year, he worked less than the equivalent of three customary scheduled full-time days in the establishment, plant, or industry in which he has payroll attachment as a regular employee. If a benefit year is established, it shall begin on the Sunday preceding the payroll week ending date.
2. If he has no payroll attachment on the date he reports to apply for unemployment insurance. If a benefit year is established, it shall begin on the Sunday of the calendar week with respect to which the claimant met the reporting requirements provided by Commission regulation.

G.S. §96-8(10)a.

The Employment Security Law of North Carolina provides that, for benefit weeks within an established benefit year, a claimant shall be deemed to be:

1. Totally unemployed, irrespective of job attachment, if his earnings for such week, including payments defined in subparagraph c below, would not reduce his weekly benefit amount as prescribed by G.S. 96-12(c).
2. Partially unemployed, if he has payroll attachment but because of lack of work during the payroll week for which he is requesting benefits he worked less than three customary scheduled full-time days in the establishment, plant, or industry in which he is employed and whose earnings from such employment (including payments defined in subparagraphs c below) would qualify him for a reduced payment as prescribed by G.S. 96-12(c).

3. Part-totally unemployed, if the claimant had no job attachment during all or part of such week and whose earnings for odd jobs or subsidiary work (including payments defined in subparagraph c below) would qualify him for a reduced payment as prescribed by G.S. 96-12(c).

G.S. §96-8(10)b.

The Employment Security Law of North Carolina also provides that:

> No individual shall be considered unemployed if, with respect to the entire calendar week, he is receiving, has received, or will receive as a result of his separation from employment, remuneration in the form of (i) wages in lieu of notice, (ii) accrued vacation pay, (iii) terminal leave pay, (iv) severance pay, (v) separation pay, or (vi) dismissal payments or wages by whatever name.

G.S. §96-8(10)c.

CONCLUSIONS OF LAW:

In the present case, the Hearing Officer erred by concluding that the claimant was not unemployed within the meaning of the law. The work the claimant performed for the employer was in the nature of subsidiary work. It was secondary employment that the claimant continued to perform after the loss of her primary job. Employment Security Commission of North Carolina Interpretation No. 256, Supplement I, states that, " [a] person who continues to work part-time in secondary employment after losing a primary job is ordinarily part-totally unemployed because of the loss of the primary job."

Paragraph C.3. of the interpretation, which deems that a person is not unemployed when the person continues to work part-time and waits 2 months or more after losing a full-time job before filing a claim for benefits, does not apply when the reason the person waited to file the claim was because he was receiving as a result of his separation from employment, and as set forth in G.S. §96-8(10)c., remuneration in the form of (i) wages in lieu of notice, (ii) accrued vacation pay, (iii) terminal leave pay, (iv) severance pay, (v) separation pay, or (vi) dismissal payments or wages by whatever name. The claimant, in the present case, waited to file her claim for benefits because she was in receipt of separation pay.

The Commission concludes from the competent evidence and the facts found therefrom that the claimant was part-totally-unemployed under G.S. §96-8(10)b.3. during the weeks ending July 26 and August 2, 2003. The Commission further concludes that the claimant's separation from employment with International Paper Company, Inc., raises the issue of whether the claimant is disqualified from receiving unemployment insurance benefits under G.S. §96-14 et seq. based on her separation from last employment.

Based on the foregoing, the decision of the Hearing Officer must be reversed. Further, the claimant must be held eligible to receive unemployment insurance benefits for the weeks ending July 26 and August 2, 2003. The issue of whether the claimant is disqualified from receiving benefits based on her separation from last employment with International Paper Company, Inc. is remanded to the Wilmington office of the Commission for fact finding and, if necessary, adjudication.

DECISION:

The decision of the Hearing Officer is **REVERSED**.

The claimant is **ELIGIBLE** to receive unemployment insurance benefits for the weeks ending July 16 and August 2, 2003, provided all other requirements of the law have been met.

The issue of whether the claimant is disqualified from receiving unemployment insurance benefits based on her separation from employment with International Paper Company, Inc., is **REMANDED** to the Wilmington office of the Commission for further proceedings consistent with this decision.

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EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA

PRECEDENT DECISION NO. 37

IN RE HEENAN
(Adopted November 16, 2005)

STATEMENT OF CASE:

The claimant filed a NEW INITIAL CLAIM (NIC) for unemployment insurance benefits effective April 3, 2005. Thereafter, the Employment Security Commission determined that the weekly benefit amount payable to the claimant was $426.00 and, during the benefit year established by the claimant, the maximum amount of unemployment insurance benefits payable to the claimant was $11,076.00.

The claim was referred to an adjudicator on the issue of separation from employment. Adjudicator Kaye Powell issued a determination under Docket No. 42476-O finding the claimant disqualified from receiving unemployment insurance benefits under N.C.G.S. S§96-14(1). The claimant filed an appeal from the determination and the matter came on to be heard and was heard by an Appeals Referee under Appeals Docket No. O-L-10115. When the matter came on to be heard, the following individuals appeared and/or presented testimony: Jack T. Heenan, the claimant; Bill Wise, witness for the claimant; Michael G. Okun, attorney for the claimant; Mike Annan, Hub Manager for Aircraft Maintenance, and Tim Conlon, Manager of Maintenance Administration, witnesses for US Airways, Incorporated (hereinafter "employer"); and Gregg Hogan, legal representative for the employer. On June 27, 2005, Joseph D. Pearlman, Appeals Referee, issued Appeals Decision No. O-L-10115 holding the claimant disqualified from receiving benefits under G.S. §96-14(1). The CLAIMANT APPEALED and requested oral arguments before the Commission.

With prior written notice mailed to the parties on July 19, 2005, the Full Commission conducted a proceeding on August 29, 2005, at which oral arguments on points of law were presented. Appearing and presenting oral arguments were Michael G. Okun, attorney for the claimant, and Gregg Hogan, legal representative for the employer. The Full Commission reviewed and considered the record on appeal and any written and oral arguments presented; thereafter, the full Commission directed the issuance of the decision as set forth below.

FINDINGS OF FACT:

1. The claimant filed continued claims for unemployment insurance benefits for the period from April 3, 2005 through April 16, 2005. He registered for work with the Employment Security Commission (ESC), continued to report to an ESC office and made a claim for benefits in accordance with G.S. §96-15(a).

2. The claimant began working for the employer in September 1981. He last worked for the employer on or about March 27, 2005 as a line utility worker. The employer is involved in airline

transportation. The claimant worked from 6:30 a.m. to 3:00 p.m. On a weekly basis, he commuted from his residence in Roanoke, Virginia to his job site in Charlotte, North Carolina.

3. Due to severe financial and economic conditions, the employer took action that adversely affected the terms under which the claimant was employed. By notice dated February 18, 2005, the employer informed the claimant that his position as a line utility worker had been abolished. The employer outsourced the claimant's job, which meant the claimant's job was eliminated from the employer's job classification structure. [The claimant was afforded an opportunity to exercise his seniority to obtain a base utility position at an hourly wage of $14.75.] The employer contracted with another entity to perform the line utility work. Upon application of the employer, a federal bankruptcy court voided the claimant's union collective bargaining agreement. His pension plan was terminated on January 6, 2005. The holidays and vacation days in his benefit plan were reduced drastically. The reduction in the claimant's hourly wage from $17.47 to $14.75 became permanent after February 2005. [Under an order signed by a federal judge, the employer had been allowed to temporarily reduce the claimant's hourly wage in this manner from October 2004 until February 2005.]

4. As a direct result of the adverse actions as described in the foregoing paragraph, the claimant decided to terminate his continued employment with the employer. The claimant filing an application for inclusion in the employer's "Voluntary Separation Program" implemented this decision. The employer accepted the claimant's application because his separation would allow an individual with less seniority to continue his/her employment with the employer and reduce the number of individuals that the employer would have to involuntarily layoff to meet its financial solvency goal. The claimant signed the General Release under this Program on March 23, 2005.

MEMORANDUM OF LAW:

The Employment Security Law of North Carolina provides that an individual shall be disqualified for benefits for the duration of his unemployment beginning with the first day of the first week after the disqualifying act occurs with respect to which week an individual files a claim for benefits if it is determined by the Commission that such individual is, at the time such claim is filed, unemployed because (s)he left work without good cause attributes to the employer. G.S. §96-14(1).

G.S. §96-14(1c) states:

> Where an individual leaves work due solely to a unilateral and permanent reduction in his rate of pay of more than fifteen percent (15%), said leaving shall constitute good cause attributable to the employer for leaving work. Provided however that if said reduction is temporary or was occasioned by malfeasance, misfeasance or
> nonfeasance on the part of the individual, such reduction in pay shall not constitute good cause attributable to the employer for leaving work.

"Good cause' has been interpreted by the courts to mean a reason which would be deemed by reasonable men and women valid and not indicative of an unwillingness to work. Sellers v. National

Spinning Company, Incorporated, 64 N.C.App. 567, 307 S.E.2d 774 (1983), disc. rev. denied, 310 N.C. 153, 311 S.E.2d 293 (1984); In re Clark, 47 N.C.App. 163, 266 S.E.2d 854 (1980). "Attributable to the employer" as used in G.S. §96-14(1) means produced, caused, created, or because of actions by the employer. Sellers, 64 N.C.App. 567; In re Vinson, 42 N.C.App. 28, 255 S.E.2d 644 (1979). The claimant has the burden of proving that (s)he is not disqualified for benefits under G.S. §96-14(1); G.S.§96-14(1A) In re Whicker, 56 N.C.App. 253, 287 S.E.2d 439 (1982). When this burden is not carried, G.S. §96-14(1) mandates that the claimant is held disqualified from receiving benefits.

CONCLUSIONS OF LAW:

In the present case, the competent and credible evidence contained in the hearing record supports the facts as found by the Commission. The Commission concludes from the competent and credible evidence and the facts found therefrom that the claimant left work with good cause attributable to the employer. The Appeals Referee erred when he failed to distinguish between the decision to quit and how the decision was implemented. That is, the claimant's decision to quit his employment was made because of the adverse changes in his employment terms. The employer provided a method (the "Voluntary Separation Program") by which the claimant could communicate and implement his decision to quit. The permanent and unilateral reduction in the claimant's hourly wage, standing alone, met the definition of good cause attributable to the employer for leaving work as defined in G.S. §96-14(1c). In addition, all of the adverse actions, considered as a whole, met the general definition of good cause attributable to the employer for leaving work. The Appeals Referee again erred in only applying the statutory provision related to the permanent and unilateral reduction in the claimant's hourly wage.

Based on the foregoing, Appeals Decision No. O-L-10115 must be reversed. Furthermore, the claimant must be held not disqualified from receiving unemployment insurance benefits.

DECISION:

IT IS NOW, THEREFORE, ORDERED, ADJUDGED AND DECREED that Appeals Decision No. O-L-10115 be, and the same is, **SET ASIDE**, and the claimant is **NOT DISQUALIFIED** from receiving unemployment insurance benefits.

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PRECEDENT DECISION NO. 38

IN RE KOPP
(Adopted April 7, 2006)

ORDER

Pursuant to N.C.G.S. §96-15(e), this cause has come on before the Commission to consider the claimant's appeal from a decision by Appeals Referee Broxie J. Nelson under Appeals Docket No. VII-A-09218R. The record evidence and any briefs or written arguments timely submitted have been reviewed in their entirety. The undersigned finds that:

1. The claimant filed a claim for unemployment insurance benefits effective March 20, 2005;

2. On April 9, 2005, a Determination by Adjudicator, Docket No. 38462 was issued which held the claimant disqualified for unemployment insurance benefits beginning March 20, 2005 based on the claimant's separation from last employment with Craven County. The claimant appealed the Determination by Adjudicator on April 18, 2005;

3. The matter was scheduled for a hearing before an Appeals Referee. The hearing was conducted on June 6 and July 19, 2005. On August 3, 2005, Appeals Decision No. VII-A-09218 was issued by the Appeals Referee. Said decision held the claimant disqualified for unemployment insurance benefits beginning March 20, 2005. The claimant appealed the decision and the matter came on before the Commission for review. Commission Decision No. 05(UI)4180 was issued on September 20, 2005. Said decision vacated Appeals Decision No. VII-A-09218 and remanded the matter to the Appeals Referee to conduct an additional appeals hearing to recapture the lost testimony elicited at the July 19, 2005 appeals hearing;

4. The remand hearing was scheduled for October 28, 2005 before an Appeals Referee. On October 25, 2005, the Appeals Department of the Employment Security Commission received the claimant's written request which stated: "I am accepting the decision of the commission to vacate the Appeals Referee decision Mr. Broxie J. Nelson. I am also withdrawing my claim for unemployment benefits. I would also like to request withdraw from the appeals hearing."; and

5. The remand hearing was conducted on October 28, 2005 by the Appeals Referee. Neither the claimant nor the claimant's attorney appeared at the hearing. The Appeals Referee acknowledged receipt of the claimant's request to withdraw her appeal but did not rule on the claimant's request. The Appeals Referee reissued Appeals Decision No. VII-A-09218R which held the claimant disqualified from receiving unemployment insurance benefits beginning March 20, 2005. The claimant appealed and the matter came on before the Commission for review.

A review of the record indicates that the claimant requested withdrawal of her appeal and claim for unemployment insurance benefits prior to the scheduled appeals hearing on October 28, 2005. The claimant's request was voluntary made by the claimant and the record is absent any indication that the claimant's request was done under coercion or duress. The Appeals Referee erred when he reissued Appeals Decision No. VII-A-09218R and did not grant the claimant's request for withdrawal of her appeal.

It is hereby **ORDERED, ADJUDGED AND DECREED** that:

1. The claimant's request to withdraw her appeal of the Determination by Adjudicator, Docket No. 38462 is **ALLOWED**.

2. Appeals Decision No. VII-A-09218R is hereby **VACATED** and declared **NULL and VOID**

3. The Determination by Adjudicator rendered under Docket No. 38462 is declared the **FINAL** decision of the Commission.

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PRECEDENT DECISION NO. 39

IN RE THE STAFFING ALLIANCE
(Adopted February 27, 2007)

Pursuant to N.C.G.S. §96-4(m) and the notice mailed to all parties on June 30, 2005, this cause has come on to be heard and was heard before the Commission on August 10, 2005, and the **EMPLOYER'S** exceptions in regards to Tax Opinion No. 3188, mailed April 22, 2005, were considered. Appearing and presenting arguments were: Robert Winfree, the employer's President, and Fred R. Gamin, attorney for the Employment Security Commission. Lynn Salezar, the employer's Human Resource Manager, and Iris Carmon, ESC Legal Assistant, appeared as observers.

The undersigned Chairman of the Employment Security Commission (ESC) has considered all arguments, written and oral. After a careful and thorough reconsideration of the statutory and case law on involuntary successorship, the undersigned concludes that G.S. §96-9(c)4 was not properly applied in this case because said provision required The Staffing Alliance (successor) to have "[succeeded] to or [acquired] **all of the organization, trade or business**" of Action Labor of North Carolina (predecessor) before it could be involuntarily assigned the tax status and liabilities of Action Labor of North Carolina for use in the determination of its rate of unemployment insurance contributions, (emphasis added), and the facts and evidence clearly established this was not the case.

Only in the "involuntary assignment" of tax status and liabilities section (second paragraph of the cited statutory provision) has the North Carolina General Assembly (hereinafter Legislature") used the term "all of the organization, trade or business." The adjective "all" is defined as "being or representing the entire number, amount or quantity;" "constituting, being or representing the total extent or the whole;" being the utmost possible of;" and "every." *See, The American Heritage College Dictionary, Third Edition (1993).* The North Carolina Supreme Court held that "words in a statute are to be given their natural, ordinary meaning, unless the context requires a different construction. (Citation omitted)" In re Watson, 273 N.C. 629, 635 (1968). The undersigned is not persuaded that within the context of the taxing provisions of Chapter 96 the work "all" requires a different construction.

Should ESC interpret "all" to be the same as "substantially all?" Only in those parts of G.S. §96-9(c)4 permitting a voluntary assumption of tax status and liabilities, has the Legislature used "substantially all" term. It cannot be presumed that the omission of the qualifying word "substantially" from the involuntary assignment of tax status and liabilities was an oversight on the part of the Legislature. In re Watson, 273 N.C. 629, 635 (1968). If the Legislature meant to say "substantially all," it could have said so instead of "all" without any qualifying words attached thereto.

Should "**all of the organization, trade or business**" be interpreted as meaning only the acquiring of or succeeding to only those assets sufficient to carry on the organization, trade or business? Employment Security Commission v. Skyland Crafts, Inc., 240 NC 727 (1954), is cited as a support for such interpretation. For the reasons set forth below, the undersigned no longer finds this argument to be persuasive.

The Court in *Skyland Crafts* interpreted the following phrase appearing in G.S. §96-(8)(f)2: "Any employing unit which acquired the organization, trade or business or substantially all the assets thereof." G.S. §96-8(f)(2) was the statute that permitted ESC to assign to a new corporation the tax status and liabilities of the old corporation without the consent of the either party; i.e., determining that a corporation was a successor to an old corporation and that the tax status and liabilities of the old corporation was to be used in the determination of the new corporation's rate of unemployment insurance contributions. G.S. §96-9(c)4 serves that purpose today. Of great significance is the absence of (1) the descriptive term "all of" in G.S. §96-8(f)(2), a term that currently appears in the involuntary assignment section of G.S. §96-9(c)4, and (2) "substantially all of the assets thereof" term in G.S. §96-9(c)4, a term that appeared in G.S. §96-8(f)(2).

The *Skyland Crafts* Court was persuaded that findings in the ESC decision to hold the new corporation to be a successor because it purchased the physical assets that the old corporation had on hand three (3) months after it ceased operating,

> without evidence or findings to the extent of the assets of the old corporation on the date it ceased to do business or the date the new corporation purchased its specific
> personal property, and without findings that the new corporation purchased the accounts receivables, customers lists, good will, or trade name of the old corporation, would seem insufficient to support the conclusion that the new corporation acquired substantially all of the assets of the old within the meaning of G.S. 96-8(f)(2), since the term "assets" ordinarily embraces all property, real and personal, tangible and intangible.

Headnotes 2 and 3 at pp. 727-728.

It was in this context that the Court spoke of "continuity, the new employing unity succeeding to and continuing the business or some part thereof of the former employing unit." That is, the Court held that there must be more than the buying of physical assets, not that "**all of the organization, trade or business**" is required to be interpreted as meaning the acquiring of or succeeding to only those assets sufficient to carry on the organization, trade or business.

Based on the foregoing, the Commission concludes that The Staffing Alliance was not the successor to Action Labor of North Carolina. Accordingly, the tax status and liabilities of Action Labor of North Carolina shall not be used in the determination of The Staffing Alliance's rate of

Based on the foregoing, the Commission concludes that The Staffing Alliance was not the successor to Action Labor of North Carolina. Accordingly, the tax status and liabilities of Action Labor of North Carolina shall not be used in the determination of The Staffing Alliance's rate of unemployment insurance contributions. Thus, the undersigned's previous holding in Tax Opinion No. 3188 to the contrary must be set aside, as well as the Unemployment Tax Rate Assignment Effective January 1, 2003, mailed November 2, 2002. Finally, the cause must be referred to the ESC Tax Department for whatever action necessary to implement this Order.

IT IS NOW, THEREFORE, ORDERED, ADJUDGED AND DECREED that the employer's exceptions to Tax Opinion No. 3188 be, and the same are, **ALLOWED**, Tax Opinion No. 3188 is **SET ASIDE,** and the Unemployment Tax Rate Assignment Effective January 1, 2003, mailed November 2, 2002 is **SET ASIDE .**

IT IS ALSO ORDERED that this cause is **REFERRED** to the ESC Tax Department for further proceedings as set forth in this Order.

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IT IS ORDERED ADJUDGED AND DECREED that the above decision shall constitute a "precedent decision" of the Employment Security Commission and a copy should be provided to each local and branch office of the Commission and said decision shall be provided to any interested member of the public, upon request, for inspection pursuant to ESC Regulation No. 21.17.

PRECEDENT DECISION NO. 40

IN RE PENHOLLOW

(Adopted February 1, 2010)

STATEMENT OF CASE:

The claimant filed a NEW INITIAL CLAIM (NIC) for unemployment insurance benefits effective June 28, 2009. Thereafter, the Employment Security Commission (ESC) determined that the weekly benefit amount payable to the claimant was $494.00 and, during the benefit year established by the claimant, the maximum amount of unemployment insurance benefits payable to the claimant was $12,844.00.

The claim was referred to an adjudicator on the issue of separation from last employment. The Adjudicator issued a determination under Docket No. 00812 finding the claimant disqualified from receiving unemployment insurance benefits under N.C.G.S. §96-14(1). The claimant filed an appeal from the determination and the matter came on to be heard by a Hearing Officer under Appeals Docket No. III-A-41926 on September 2, 2009. The following individuals appeared at the hearing before the Hearing Officer: Elizabeth Penhollow, the claimant; Larry Parker, witness for the claimant, and Jodi Briseno, the employer's Chief Financial Officer and Human Resource Manager. On September 16, 2009, Charles Whitehead, Hearing Officer, issued a decision holding the claimant disqualified from receiving benefits under G.S. §96-14(1). The CLAIMANT APPEALED to the Commission.

The claimant requested the scheduling of oral arguments. With appropriate notice being mailed on November 17, 2009 to all parties, the matter came on to be heard and was heard before the Full Commission on December 10, 2009. Elizabeth Penhollow, the claimant, and Anthony Howell, the employer's President, appeared and presented oral arguments. Jodie Briseno, the employer's Chief Financial Officer, was present as an observer. The Commissioners reviewed and considered the record on appeal and all written and oral arguments presented by the parties. The Full Commission voted to reverse the Appeals Decision and to repeal ESC Precedent Decision No. 30, In re Garrett (1995).

FINDINGS OF FACT:

1. The claimant filed continued claims for unemployment insurance benefits for the period June 28, 2009 through July 25, 2009. The claimant registered for work with the Employment Security Commission (ESC), continued to report to an ESC office and made a claim for benefits in accordance with G.S. §96-15(a).

2. The claimant began working for the employer September 7, 2007. She last worked for the employer on or about June 26, 2009, as a Sales Associate. Her last supervisor was Cameron Thigpen, the employer's General Manager.

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3. During her employment, the claimant was the top sales associate. Almost every month, the employer awarded the claimant a plaque for her sales. The claimant was paid commission on her delivered sales.

3. On June 26, 2009, the claimant tendered a letter of resignation to the employer. The resignation would be effective August 1, 2009. The claimant chose to give the employer and work a 4-week notice of her resignation because she had $105,000 worth of sales for which she had yet received commission of $5,000. During the notice period, the claimant would have received her accrued commission. The terms of the claimant's employment provided that any commission due and owing to the claimant would not be paid to her after her last day of work. That is, the claimant would not receive any commission for delivered sales made before her last day of work and unpaid on her last day of work..

4. The employer refused to allow the claimant to work the notice period. On the same date, the claimant submitted notice of her intended resignation, Cameron Thigpen instructed the claimant "to leave immediately and not come back." (This statement was relayed to the claimant as coming from the employer's President, Anthony Howell.) The claimant complied with these instructions. Because she had not been paid the $5,000 commission on or before June 26, 2009, the employer was not required to pay the commission under the terms of the claimant's employment.

5. The claimant had no knowledge of an employer's policy regarding permitting or not permitting an employee to work a notice period after submitting her intent to resign on a designated date. The employer did not provide the claimant a copy of such written policy or tell her one existed. The claimant had no reason to know that she would not be permitted to work her notice period when she tendered her intent to resign with a notice period. Because of the employer's policy on unpaid accrued commission, the right to or the absence of the right to work a notice period was a crucial term of the claimant's employment. The employer did not offer into evidence a copy of a written policy on notice periods.

6. The decision to make June 26, 2009 the claimant's last day of work was made by the employer. Other than submitting notice of her intent to resign, the claimant had not engaged in any type of conduct that placed her at risk of losing her job. The claimant was not paid wages instead of working a notice period.

MEMORANDUM OF LAW:

G.S. §96-15(e) governs the Commission's review of decisions issued by Hearing Officers. The Commission may "affirm, modify, or set aside any decision of an Hearing Officer on the basis of the evidence previously submitted."

Among other things, the Employment Security Law provides:

> An individual shall be disqualified for benefits . . . for the duration of his unemployment beginning with the first day of the first week after the disqualifying act occurs with respect to which week an individual files a claim for benefits if it is determined by the Commission that such individual is, at the time such claim is filed, unemployed because the individual was discharged for misconduct connected with his work.

G.S. §96-14(2).

Misconduct connected with the work is conduct evincing such willful or wanton disregard of an employer's interest as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee, or in carelessness or negligence of such degree or recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to his employer. G.S. §96-14(2). This definition has been judicially interpreted on many occasions. See, e.g., Intercraft Industries Corporation v. Morrison, 305 N.C. 373, 289 S.E.2d 357 (1982); Yelverton v. Kemp Furniture Industries, 51 N.C.App. 215, 275 S.E.2d 553 (1981); In re Cantrell, 44 N.C.App. 718, 263 S.E.2d 1 (1980); In re Collingsworth, 17 N.C.App. 340, 194 S.E.2d 210 (1973).

The Employment Security Law further provides:

> An individual shall be disqualified for benefits . . . for a period of not less than four nor more than 13 weeks beginning with the first day of the first week during which or after the disqualifying act occurs with respect to which week an individual files a claim for benefits if it is determined by the Commission that such individual is, at the time the claim is filed, unemployed because he was discharged for substantial fault on his part connected with his work not rising to the level of misconduct. Substantial fault is defined to include those acts or omissions of employees over which they exercised reasonable control and which violate reasonable requirements of the job but shall not include (1) minor infractions of rules unless such infractions are repeated after a warning was received by the employee, (2) inadvertent mistakes made by the employee, nor (3) failures to perform work because of insufficient skill, ability, or equipment.
>
> G.S. §96-14(2a).

When a claimant has been discharged from work, the employer has the burden of proof to show that the claimant's discharge was for a reason that would disqualify the claimant for unemployment insurance benefits. Intercraft, 305 N.C. at 376.

ESC Precedent Decision No. 30, In re Garrett (1995), in pertinent part, provides:

> The Commission has held in some cases that an employee has been discharged where an employer refuses or fails to allow the employee to work a required or contractual notice period. However, if the employer is able to show (1) it has a policy of not allowing or requiring employees to work a notice, (2) it has a

> policy on the length of the notice period contrary to the notice period offered or given by the employee, (3) the employee was paid for the notice period, or (4) it establishes for some other reason a reasonable basis existed for not allowing the employee to work an offered notice period, the employee's separation from employment shall remain an issue to be decided under G.S. §96-14(l). The question is whether the employee left work with or without good cause attributable to the employer. The Appeals Referee shall not adjudicate the case as a discharge under G.S. §96-14(2) or G.S. §96-14(2A).

In passing upon issues of fact in cases involving contested claims for unemployment insurance benefits, the Commission is the ultimate judge of the credibility of the witnesses, and of the weight to be given to their testimony. The Commission may accept or reject the testimony of a witness, in whole or in part, depending solely upon whether it believes or disbelieves the same. See, Moses v. Bartholomew, 238 N.C.App. 714, 78 S.E.2d 923 (1953). When the evidence as to the circumstances surrounding a claimant's separation from employment is controverted, the Commission must resolve the controversy by making findings of fact based on competent and credible evidence. See, Phillips v. Kincaid Furniture Company, 67 N.C.App. 329, 313 S.E.2d 19 (1984). The Commission is not bound by the credibility determinations made by the Hearing Officer. Forbis v. Weselyan Nursing Home, Inc., 73 N.C.App. 166, 325 S.E.2d 651 (1985). If there is a reasonable basis for the credibility determinations and the evidence relied upon is not inherently incredible, the Commission usually defers to the Hearing Officer's judgement in such matters

CONCLUSIONS OF LAW:

In the present case, the Full Commission concluded that the employer did not establish that (1) it had a policy not allowing or requiring employees to work a notice, (2) it had a policy on the length of the notice period contrary to the notice period offered or given by the claimant, (3) the claimant was paid for the notice period, or (4) for some other reason a reasonable basis existed for not allowing the claimant to work the offered notice period. Applying In re Garrett, the Full Commission concluded that the claimant did not leave work as found and concluded in the Appeals Decision, but was discharged from employment by the employer. Thus, the employer had the burden of presenting competent evidence that showed the claimant was discharged for reasons that would disqualify her from receiving unemployment insurance benefits. For this reason, the employer's evidence and any evidence supportive of the employer's case presented by the claimant were closely scrutinized. As the ultimate fact finder and decision-maker, the Full Commission made all necessary and pertinent findings of fact based on the credible and competent record evidence presented regarding the circumstances leading to the claimant's separation from employment.

The Full Commission also concluded that the Appeals Decision erred in failing to address the claimant's knowledge of the employer's purported policy on working notice periods. The Commission has consistently held that when a claimant's separation from employment is dictated by an employer's policy, the employer must show that the claimant knew or should have known of the policy.

The Full Commission concluded from the competent and credible evidence and the facts found therefrom that the employer has failed to carry its burden of showing by competent evidence that the claimant was discharged for conduct rising to the level of substantial fault or misconduct connected with her work. Accordingly, the Appeals Decision must be reversed. Furthermore, the claimant must be held not disqualified from receiving unemployment insurance benefits.

The Full Commission concluded that the language in paragraphs 3 and 4 of ESC Precedent Decision No. 30, In re Garrett (1995) was inconsistent with other ESC Precedent Decisions, as well as relevant court cases, that addressed employer's policies. That is, the identified language failed to require that (1) the policy on notice periods be written and made known to all employees, or (2) the policy on notice periods be an established custom and practice and made known to all employees, and (3) the employer has the burden of proving the existence of the policy on notice periods and the employee knew or should have known about such policy. The Full Commission, therefore, voted to revoke In re Garrett (1995), in part, and that this decision be made an ESC Precedent Decision.

DECISION:

IT IS NOW, THEREFORE, ORDERED, ADJUDGED AND DECREED that Appeals Decision No. III-A-41926 be, and the same is, **REVERSED.**

IT IS FURTHER ORDERED that the claimant is **NOT DISQUALIFIED** from receiving unemployment insurance benefits.

IT IS ALSO ORDERED that ESC Precedent Decision No. 30, In re Garrett (1995) is **REVOKED, in part.**