

STATE OF NORTH CAROLINA
BOARD OF REVIEW



IN THE MATTER OF:

Higher Authority Appeals Decision No.

ATTN:

Claimant

Employer

STATEMENT OF CASE:

The claimant filed a NEW INITIAL CLAIM (NIC) for unemployment insurance benefits effective . Thereafter, the Division of Employment Security (“Division”) determined that the weekly benefit amount payable to the claimant was \$ and, during the benefit year established by the claimant, the maximum amount of unemployment insurance benefits payable to the claimant was \$.

The claim was referred for adjudication on the issue of separation from last employment. The adjudicator issued a Determination by Adjudicator under Docket No. on finding the claimant (disqualified) (not disqualified) for benefits pursuant to N.C. Gen. Stat. § 96-14(). The (claimant) (employer) filed an appeal from the Determination and the matter was heard by Appeals Referee (name) under Appeals Docket No. The following individuals appeared at the hearing before the Appeals Referee: . On , the Appeals Referee issued a decision finding the claimant (not) disqualified to receive benefits pursuant to N.C. Gen. Stat. § 96-14(). **The (claimant) (employer) has appealed.**

FINDINGS OF FACT:

1. The claimant has filed continued claims for unemployment insurance benefits for the period through . The claimant has registered for work with the Division, has continued to report to an employment office as requested by the Division, and has made a claim for benefits in accordance with N.C. Gen. Stat. § 96-15(a).
2. The claimant began working for the employer on as (a/an) . (He) (She) last worked for the employer on .



MEMORANDUM OF LAW:

The Employment Security Law provides:

- (a) An individual who the Division determines is unemployed for misconduct connected with the work is disqualified for benefits. The period of disqualification begins with the first day of the first week the individual files a claim for benefits after the misconduct occurs.
- (b) Misconduct connected with the work is either of the following:
 - (1) Conduct evincing a willful or wanton disregard of the employer's interest as is found in deliberate violation or disregard of standards of behavior that the employer has the right to expect of an employee or has explained orally or in writing to an employee.
 - (2) Conduct evincing carelessness or negligence of such degree or recurrence as to manifest an intentional and substantial disregard of the employer's interests or of the employee's duties or obligations to the employer.
- (c) The following examples are prima facie evidence of misconduct that may be rebutted by the individual making a claim for benefits:
 - (1) Violation of the employer's written alcohol or illegal drug policy.
 - (2) Reporting to work significantly impaired by alcohol or illegal drugs.
 - (3) Consumption of alcohol or illegal drugs on the employer's premises.
 - (4) Conviction by a court of competent jurisdiction for manufacturing, selling, or distributing a controlled substance punishable under G.S. 90-95(a)(1) or G.S. 90-95(a)(2) if the offense is related to or connected with an employee's work for the employer or is in violation of a reasonable work rule or policy.
 - (5) Termination or suspension from employment after arrest or conviction for an offense involving violence, sex crimes, or illegal drugs if the offense is related to or connected with the employee's work for an employer or is in violation of a reasonable work rule or policy.
 - (6) Any physical violence whatsoever related to the employee's work for an employer, including physical violence directed at supervisors, subordinates, coworkers, vendors, customers, or the general public.
 - (7) Inappropriate comments or behavior toward supervisors, subordinates, coworkers, vendors, customers, or to the general public relating to any federally protected characteristic that creates a hostile work environment.
 - (8) Theft in connection with the employment.
 - (9) Forging or falsifying any document or data related to employment, including a previously submitted application for employment.
 - (10) Violation of an employer's written absenteeism policy.
 - (11) Refusal to perform reasonably assigned work tasks or failure to adequately perform employment duties as evidenced by no fewer than three written reprimands in the 12 months immediately preceding the employee's termination.

N.C. Gen. Stat. § 96-14.6.



The definition of misconduct connected with the work has been judicially interpreted on many occasions. See, e.g., Intercraft Indus. Corp. v. Morrison, 305 N.C. 373, 289 S.E.2d 357(1982); Lynch v. PPG Indus., 105 N.C. App. 223, 412 S.E.2d 163 (1992) [drug-related separation from employment]; Yelverton v. Kemp Furniture Indus., 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). When a claimant has been discharged from work, the employer has the burden of proving that the claimant's discharge was for a reason that would disqualify the claimant for unemployment insurance benefits. Guilford Cty. v. Holmes, 102 N.C. App. 103, 401 S.E.2d 135 (1991). A finding of "misconduct," for purposes of denial of unemployment compensation benefits, does not necessarily depend upon a violation of a specific work rule. Gregory v. Dep't of Revenue, 93 N.C. App. 785, 379 S.E.2d 51 (1989).

The Controlled Substance Examination Regulation Act ("CSERA") sets forth the procedural requirements for controlled substance examinations in North Carolina. Although an employer must prove its case by presenting competent evidence, it is not required to show actual harm to its interests to establish misconduct on the part of an employee. Eury v. N.C. Emp't Sec. Comm'n, 115 N.C. App. 590, 446 S.E.2d 383, cert. denied, 338 N.C. 309, 451 S.E.2d 383 (1994). Pursuant to CSERA, an employer must establish: (1) that an employee tested positive for a controlled substance; (2) the chain of custody of the drug-testing sample; (3) the reliability of the controlled substance examination; and (4) exactly how the employee violated the employer's drug-testing policy. See N.C. Gen. Stat. 95 §§ 230 through 235; 13 N.C. Admin. Code 20.0101 through 20.0602. A positive result from a controlled substance examination constitutes misconduct connected with work if an employer shows compliance with CSERA. Similarly, an employee's refusal to comply with a reasonable and properly implemented drug testing policy, without good cause, constitutes misconduct. See Boesche v. Raleigh-Durham Airport Auth., 111 N.C. App. 149, 432 S.E.2d 137 (1993) (holding that random drug testing policy implemented by employer, pursuant to which maintenance mechanic was discharged for refusing to submit to test, did not violate mechanic's constitutional rights to be free from illegal searches, and employee was not wrongfully discharged from employment); See also DES Precedent Decision No. 21, In re Roecker (1987).

An affidavit or testimony from the laboratory that conducted the examination may prove the controlled substance examination results presented in contested claim cases involving a drug or alcohol-related separation from employment. The affidavit or testimony must explain what the results mean. Evidence may also be submitted regarding tests conducted as required by the United States Department of Transportation Federal Motor Carrier Safety Administration pursuant to 49 C.F.R. Part 40, or the United States Nuclear Regulatory Commission pursuant to 10 C.F.R. Part 26. The results of a controlled substance examination and compliance with applicable statutory or regulatory procedural requirements may be deemed proven if the claimant admits or stipulates to them during the hearing before the Appeals Referee, or by affidavit. See 04 N.C. Admin. Code 24C .0211; DES Precedent Decision No. 34, In re Teachey (1999).

CONCLUSIONS OF LAW:

In the present case, the Board concludes from the competent and credible evidence and the facts found that the claimant was discharged from employment. The Board further concludes that

Based on the foregoing, the decision of the Appeals Referee must be (affirmed/reversed/modified). Further, the claimant must be held (disqualified) (not disqualified) from receiving unemployment insurance benefits.



DECISION:

The decision of the Appeals Referee is (**AFFIRMED**)(**REVERSED**)(**MODIFIED**).

The claimant is **DISQUALIFIED** for unemployment insurance benefits beginning .
(**NOT DISQUALIFIED** and will receive unemployment insurance benefits beginning .

Board of Review members Susan Doe and John Doe participated in this appeal and concur with this decision.

This the .

BOARD OF REVIEW

Chairman

NOTE: This Higher Authority Decision will become final thirty (30) days after mailing unless a petition for judicial review is filed with the superior court as indicated below. The date of mailing is found on the last page of this decision. Although the Board does not impart legal advice, please see the enclosed pamphlet for additional guidance on how to appeal a Higher Authority Decision. The pamphlet is available in the public employment offices throughout the State, and on the Division of Employment Security's website. You may also visit the *Frequently Asked Questions* section on the Division of Employment Security's website at www.des.nc.gov, and consult an attorney of your choosing.

APPEAL RIGHTS FOR JUDICIAL REVIEW

Appeals from this Higher Authority Decision must be filed with the Clerk of Superior Court by the petitioner in the county in which he or she resides, or in which the petitioner has its principal place of business. If a party does not reside in any county or have a principal place of business in any county in North Carolina, appeals must be filed with the Clerk of Superior Court of Wake County, North Carolina *or* with the Clerk of Superior Court of the North Carolina county in which the controversy arose.

This Higher Authority Decision will become final thirty (30) days after mailing unless a timely petition for judicial review is filed with the superior court pursuant to N.C. Gen. Stat. §§ 96-15(h) and (i).

IMPORTANT – SEE FOLLOWING PAGE



Copies of any Petition for Judicial Review filed with the Clerk of Superior Court must be served upon the Division of Employment Security (“Division”) and upon all parties of record to the proceedings within ten (10) days of the filing of the petition. Copies of the petition must be served by personal service or by certified mail, return receipt requested. Petitions for superior court review must be served on and addressed to the registered agent for service of process for the Division:

Frank Doe
Chief Counsel
North Carolina Department of Commerce
Division of Employment Security
Mailing Address: Post Office Box 25903, Raleigh, NC 27611-5903
Physical Address: 700 Wade Avenue, Raleigh, NC 27605-1154

NOTE: If you are served with a Petition for Judicial Review by another party, you will not be a party to the judicial review proceedings unless you: (1) notify the superior court within ten (10) days after you receive the petition that you want to become a party to the proceedings, or (2) file a motion to intervene as provided in N.C. Gen. Stat. § 1A-1, Rule 24.

NOTICE TO ALL INTERESTED PARTIES

A legal representative as defined in 04 N.C. Admin. Code 24A .0105(32) (including individuals from a third-party company serving as an employer’s unemployment insurance administrator) must be a licensed attorney, or a person supervised by a licensed attorney in accordance with N.C. Gen. Stat. Ch. 84 and § 96-17(b). Notices and/or certification of attorney supervision must be in writing pursuant to 04 N.C. Admin. Code 24C .0504. **Legal representation in judicial proceedings must comply with N.C. Gen. Stat. Ch. 84.**

Pursuant to 04 N.C. Admin. Code 24C .0504, when a party has a legal representative, all documents or information required to be provided to the party will only be sent to the legal representative. Any information provided to a party’s legal representative will have the same force and effect as if it had been sent directly to the party.

For claims filed on or after June 30, 2013, claimants are subject to repayment of benefits received from any administrative or judicial decision that is later reversed on appeal. N.C. Gen. Stat. § 96-18(g)(2).

SPECIAL NOTICE TO CLAIMANTS: If you were receiving or have previously received unemployment insurance benefits in connection with the underlying claim and this Higher Authority Decision rules you ineligible or disqualified for all or part of such benefits, you may now have an overpayment of benefits pursuant to N.C. Gen. Stat. § 96-18(g)(2). If an overpayment is created by this Higher Authority Decision, you will be mailed a separate Notice of Overpayment or Determination of Overpayment from the Division’s Benefits Integrity/Benefit Payment Control Section. The Notice of Overpayment or Determination of Overpayment will specify, among other things, the amount of your overpayment and any penalties that apply. Please note that the only way you may contest the overpayment is to file a petition for judicial review of this Higher Authority Decision with the superior court as provided above, and in accordance with North Carolina law. In your petition, you must specify whether you are appealing (1) the issue of disqualification or eligibility and/or (2) the resulting determination that you received an overpayment of benefits.

Appeal Filed:

Decision Mailed: