

STATE OF NORTH CAROLINA
BOARD OF REVIEW



IN THE MATTER OF:

Higher Authority 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 to an adjudicator on the issue of separation from last employment. The adjudicator issued a Determination by Adjudicator under Docket No. finding the claimant (disqualified) (not disqualified) for benefits. The (claimant) (employer) filed an appeal from the Determination and the matter was heard by Appeals Referee 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 (disqualified) (not disqualified) from receiving unemployment insurance 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 of 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 or about . (He) (She) last worked for the employer on as a/an .



3. The claimant was separated from this job when

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.



N.C. Gen. Stat. § 96-14.6(c) enumerates eleven examples of conduct. If the evidence presented shows that a claimant engaged in any of them, the claimant could be found disqualified from receiving unemployment insurance benefits. These examples are “prima facie evidence of misconduct that may be rebutted” by the claimant. 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).

An individual does not have a right to benefits and is disqualified from receiving benefits if the Division determines that the individual left work for a reason other than good cause attributable to the employer. When an individual leaves work, the burden of showing good cause attributable to the employer rests on the individual and the burden may not be shifted to the employer. N.C. Gen. Stat. 96-14.5(a). While the language of N.C. Gen. Stat. 96-14.5(a) states that it is applicable when “an individual leaves work[,]” its relevance is not solely limited to when an individual quits his or her employment. The use of the verb “leaves” does not indicate that the legislature intended to apply the statute in only the narrow situation of a quit. It is also meant to apply in cases when an employee is discharged due solely to his disability or health condition and in which the other requirements of the statute are met. As such, the Board concludes that it is suitable to apply the provisions of N.C. Gen. Stat. § 96-14.5(a) to the instant case.

The Iowa Supreme Court dealt with the same issue of statutory construction in McCarthy v. Iowa Emp’t Sec. Comm’n, 247 Iowa 760, 764, 76 N.W.2d 201, 204 (1956). The Court held that “The words ‘If he has left work ...’ must be construed to mean ‘If he has become unemployed’ Only that interpretation accords with [the Iowa Employment Security Law] which states the very purpose of the legislation is to require the compulsory setting aside of reserves ‘for the benefit of persons *unemployed* through no fault of their own.’ ” (Emphasis in original). Accord, Cotright v. Doyal, La. Ct. App., 195 So.2d 176 (2nd Cir. 1967), Des Moines Indep. Cmty Sch. Dist. v. Dep’t of Job Serv., 376 N.W.2d 605 (Iowa 1985), and Welch v. Iowa Dep’t of Emp’t Servs., 421 N.W.2d 150 (Iowa 1988).

The General Assembly of North Carolina has declared that it is for “the public good and the general welfare of the citizens” of the State of North Carolina that the Employment Security Law was enacted and that funds collected pursuant to the Employment Security Law are “to be used for the benefit of persons *unemployed* through no fault of their own.” N.C. Gen. Stat. § 96-2. The Board concludes that in order to give full effect to the intent of the legislature, the words “Where an individual leaves work ...” in N.C. Gen. Stat. § 96-14.5(a) are construed to mean “Where an individual is separated from work ...”

In Applewhite v. Alliance One Int’l, Inc., 188 N.C. App. 271, 654 S.E.2d 764 (2008), and James v. Lemmons, 177 N.C. App. 509, 629 S.E.2d 324 (2006), the North Carolina Court of Appeals specifically held (cases in which the employer had discharged the claimant when a medical condition caused absences from work) that if the last incident leading to the claimant’s violation of the employer’s attendance policy was due to illness, “the [claimant] did not have reasonable control over this failure to conform to [the employer’s] policy,” and “the [claimant’s] behavior cannot rise to the level of substantial fault.” The Court also held, “that [the claimant’s] partial disqualification for unemployment compensation was not appropriate.” Furthermore, the Court found that those holdings were consistent with its holding in Lindsey v. Qualex, Inc., 103 N.C. App. 585, 406 S.E.2d 609, disc. rev. denied, N.C. 196, 412 S.E.2d 57 (1991).



CONCLUSIONS OF LAW:

In the present case, the Board of Review concludes from the competent and credible evidence and the facts found that the claimant was discharged from employment. The Board of Review further concludes that after applying the controlling case law to the facts in this case, the claimant (successfully rebutted) (failed to successfully rebut) the prima facie evidence of misconduct presented by the employer and that misconduct in this case was (not) shown. In this case, the claimant's absence from work was due to a medical condition over which the claimant had (no) (some) control.

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).

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).

IMPORTANT – SEE FOLLOWING PAGE



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: