DIVISION OF EMPLOYMENT SECURITY
NC DEPARTMENT OF COMMERCE

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.