

DIVISION OF EMPLOYMENT SECURITY  
NC DEPARTMENT OF COMMERCE

**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.A pp. 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.