

DIVISION OF EMPLOYMENT SECURITY
NC DEPARTMENT OF COMMERCE

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 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.
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.
4. 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.
5. 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.
6. 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.

7. 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 a 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.

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(1). 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 Precedent Decision No. 30, In re Garrett (1995) was inconsistent with other 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 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 Precedent Decision No. 30, In re Garrett (1995) is **REVOKED, in part**.