DIVISION OF EMPLOYMENT SECURITY
NC DEPARTMENT OF COMMERCE

PRECEDENT DECISION NO. 8

IN RE BUCHANAN
(Adopted December 8, 1983)

FINDINGS OF FACT:

1. The claimant last worked for the employer on May 31, 1983. From June 5, 1983 until June 11, 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 employer appealed the Adjudicator's determination, and an evidentiary hearing was held by Louis J. Ferris, Jr., Appeals Referee, under Docket No. XIV-UI-92954, who held that the claimant was not disqualified for unemployment benefits. The employer filed a timely appeal to the Commission.

2. Claimant was discharged from this job for excessive absenteeism and tardiness pursuant to the employer's progressive disciplinary warnings procedure. The progressive disciplinary warning procedure included: a verbal warning, a first written warning, a second written warning, and a final warning which resulted in termination of employment. Claimant was well aware of the employer's policy as to absenteeism and tardiness to work. The disciplinary warning procedure was also known to the claimant. Both items were discussed with the claimant when she was re-hired by the employer on August 2, 1982.

3. The verbal warning was issued to the claimant on November 10, 1982, for accruing three (3) instances of absence in a one (1) month period. After accruing five (5) additional instances of absence for a total of nine (9) instances in a six (6) months period, claimant was issued her first written warning on March 16, 1983. The second written warning was issued on May 10 for eight (8) instances of tardiness in a six (6) months period. At the time the second written warning was issued, claimant was also suspended from work for a three (3) day period which ended on May 16. As it had in the March 16th warning, the employer requested that claimant improve her attendance

record in order to avoid further disciplinary action. The final warning was issued on May 31, 1983 for claimant's absence from work on that date. Consistent with the employer's progressive disciplinary warning procedure, claimant was discharged from her job upon the receipt of the fourth warning.

4. From August 2, 1982 through May 31, 1983, claimant gave the following reasons for her absences and/or tardiness: personal illness, personal business, husband's aunt died, appearing in court with husband, dental appointment, extraction of tooth, weather, illness of grandmother, stepfather died, desire to be with parents, unspecified personal reasons, and lack of child care.

5. Claimant's absence from work on May 31, 1983 was occasioned by lack of child care. Her regular babysitter had informed claimant on the afternoon of May 30th that she could no longer take care of the claimant's child. Claimant made efforts to locate appropriate child care but was unable to do so in time to permit her to report to work on May 31st. Claimant's child was nineteen (19) months of age and could not be left alone. The employer was duly informed of the reason for claimant's absence on May 31st. Claimant located a babysitter on May 31st and was able to return to work on June 1st; however, she had been discharged. The employer presented no evidence tending to show that the claimant could have located child care on May 30th which would have permitted her to report to work on May 31st.

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. App. 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 question presented by this appeal is whether claimant's absence from work on May 31, 1983, which violated her employer's rule on absenteeism and placed her in non-compliance with the employer's May 10, 1983 request and which was due to her inability to secure child care, constituted "misconduct" connected with her work so as to disqualify her for unemployment compensation benefits pursuant to G.S. 96-14(2).

The North Carolina Court of Appeals in In re Cantrell, 44 N.C. App. 718, 720, 263 S.E.2d 1, 3 (1980), quoted with approval the following language from McLean v. Board of Review, 476 PA. 617, 620, 383 A.2d 533, 535 (1978):

> We must evaluate both the reasonableness of the employer's request in the light of all the circumstances, and the employee's reason for noncompliance. The employee's behavior cannot fall within "willful misconduct" if it was justifiable or reasonable under the circumstances, since it cannot then be considered to be in willful disregard of conduct the employer "has a right to expect." In other words, if there was "good cause" for the employee's action, it cannot be charged as willful misconduct. (Citations omitted).

In Cantrell, the employer had instructed the employee to make a long trip with another driver who was black. This employee refused to do so due to personal reasons and his unsubstantiated belief that the employer's rotation system established for determining a team of drivers was no longer in effect. Claimant continued to refuse to comply with his employer's request even after again being directed to comply with the request. The court held that a claimant['s] deliberate and unjustifiable refusal to report to work, when the employer has the right to insist on the employee's presen[ce] and when the employee knows that his refusal would cause logistic[al] problems for the employer, constitute misconduct sufficient to disqualify the claimant from receiving benefits. It is clear that the Court found the

employer's request to be reasonable and the employee's noncompliance with this request to be without good cause.

In 1982, the North Carolina Supreme Court in Intercraft Industries Corporation v. Morrison, supra, stated:

> Our research discloses that it is generally recognized that chronic or persistent absenteeism, in the face of warnings, and without good cause may constitute willful misconduct. (Citations omitted.) However, a violation of a work rule is not willful misconduct if the evidence shows that the employee's actions were reasonable and were taken with good cause. (Citations omitted.) This court has defined "good cause" to be a reason which would be deemed by reasonable men and women valid and not indicative of an unwillingness to work. In re Watson, 273 N.C. 629, 161 S.E.2d 1 (1968); see also, In re Clark, 47 N.C. App. 163, 266, S.E.2d 854 (1980).

In Intercraft, the Court held that it was proper for the Commission as the trier of fact to find that the employee had, when she presented uncontroverted evidence tending to show that she could not locate appropriate child care, established good cause for failure to report to work although pursuant to the employer's rule concerning absenteeism she accrued her tenth unexcused absence and was subject to discharge. The Court went on to state that had the employer, to whom the Commission had allotted the burden of showing misconduct connected with work, offered any evidence to negate claimant's evidence of "good cause", the Commission would have been required to consider that evidence and make a specific finding as to whether "good cause" existed for the employee's violation of the employer's rule on absenteeism.

Citing Intercraft, supra, as support, the Court in Butler v. J.P. Stevens Company, Incorporated and Employment Security Commission, 60 N.C. App. 563, 566, 299 S.E.2d 672, 675 (1983) held:

> This definition of "misconduct" (as cited in Collingsworth, supra) suffices to encompass an employee's violation of the employer's reasonable attendance rules of which he has notice and his failure to give the employer proper notice of absences for which good cause may exist. (Emphasis added.)

The employee in Butler was discharged from his job for violating a company rule prohibiting the accruing of four (4) unexcused absences within a six months period. The fourth unexcused absence occurred when the claimant failed to properly

notify of his absence which was occasioned by illness. The court was of the opinion that the reason for claimant's absence constituted good cause for said absence; however, both the Court and the Commission found that the employee had not established good cause or justification for his failure to notify the employer concerning his absence.

The common thread running through the above-cited cases is that the Commission should consider in its determination of whether the employee was discharged for misconduct, any evidence presented by the parties which tends to show the presence or absence of good cause or justification for the employee's violation of a reasonable employer's rule or failure to comply with a reasonable employer's request (instructions). It is also clear from the language of these cases that it is incumbent upon the employee to present some evidence which would amount to "good cause" for violating or failing to comply with a known employer's reasonable rule or request. Once the employee has presented such evidence, the employer must, in order to carry its burden of establishing "misconduct," offer some evidence to negate the employee's showing of "good cause." If either of the parties fail in its responsibility, the conclusion as to the existence of "misconduct" should be made accordingly.

In the case at hand, the employer's progressive disciplinary warning procedure was sufficient to place claimant on notice that her attendance was poor and was unacceptable by the employer. Furthermore, the employer's May 10, 1983 request and final warning that claimant must improve her attendance to avoid further disciplinary action was definitely reasonable in light of the prior warning, both oral and written, and the suspension from work resulting from claimant's pattern of tardiness and absences. In addition, it is clear from the record evidence and the facts found therefrom that none of claimant's reasons for tardiness and some of her reasons for absences occurring prior to May 31 did not justify said tardies and absences.

Within fifteen (15) calendar days after returning from her three (3) day suspension from work, claimant was again absent from work. As did the employee in Intercraft, supra, claimant presented uncontroverted evidence in an effort to establish "good cause" for her May 31 absence of which the employer was properly notified. It is a valid assumption that problems in arranging alternative child care could arise as a result of a regular babysitter's short notice to the claimant that she would no longer be available to provide care to claimant's nineteen (19) months old child while claimant was at work. It was not indicative of an "unwillingness to work" when claimant, unable to arrange alternative child care, chose not to leave her young child unattended while she reported to work on May 31st. Claimant's immediate

return to work on June 1, 1983 after being successful on May 31 in arranging appropriate child care, did not reflect an unwillingness to work. Claimant's actions, under the existing circumstance, were those of a reasonable and prudent person and therefore, established good cause for her absence on May 31, 1983.

The employer presented no evidence tending to show that the reason advanced by claimant for her absence was untrue or that there was alternative child care available which would have permitted claimant to report to work on May 31 or that claimant did not conduct her child care search as a reasonable and prudent person would have and as a result child care was not obtained in sufficient time for claimant to report to work as scheduled. In essence, the employer failed to rebut or negate claimant's showing of good cause.

Pursuant to the principles established in Cantrell, Intercraft and Butler, as discussed supra, it must be concluded that the employer did not carry its burden of showing that claimant was discharged from work due to 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.

DECISION:

The claimant is not disqualified for unemployment benefits.