NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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Re: *Darlene Harvey vs. Virginia Employment Commission, et al.*
Case No. CL-2016-4653

Dear Counsel:

This matter comes before the Court on a petition for judicial review of Virginia Employment Commission's Decision No. UI-119742-C, mailed on February 26, 2016, finding that Petitioner Darlene Harvey (hereinafter "Ms. Harvey") is ineligible to receive benefits as of April 12, 2015, based on the circumstances surrounding her separation from the services of Bruce L. Napoli, C.P.A., P.C. Ms. Harvey asks the Court to find she is entitled to benefits that she has received because she claims she did not give her resignation of employment to Employer Bruce L. Napoli (hereinafter "Employer").

OPINION LETTER

Standard of Review

The Court initially cited the Administrative Process Act, specifically Va. Code Ann. §§ 2.2-4025 and 2.2-4027, in error and now sets forth the proper standard of review under Va. Code Ann § 60.2-625. The Virginia Code provides that "[w]ithin thirty days after the decision of the Commission . . . has been mailed, any party aggrieved who seeks judicial review shall commence an action in the circuit court . . . in which the individual who filed the claim was last employed." Va. Code Ann. § 60.2-625(A) (2016). As prescribed by Va. Code Ann. § 60.2-625(A), "the findings of the Commission as to the facts, if supported by evidence and in the absence of fraud, shall be conclusive, and the jurisdiction of the court shall be confined to questions of law." Va. Code Ann. § 60.2-625(A) (2016). In this case, no allegation of fraud has been made by Ms. Harvey.

When undertaking judicial review of the Commission's decision pursuant to Va. Code Ann. § 60.2-625(A), the court "must consider the evidence in the light most favorable to the finding by the Commission." *Va. Emp't Comm'n, et al. v. Fitzgerald*, 19 Va. App. 491, 493 (1995). The Commission's findings "may be rejected only if, in considering the record as a whole, a reasonable mind would *necessarily* come to a different conclusion." *Craft v. Va. Emp't Comm'n*, 8 Va. App. 607, 609 (1989) (citing *Johnston-Willis, Ltd. v. Kenley,* 6 Va. App. 231, 242 (1988)). Although the Commission's decision is entitled to great weight, when considering the record as a whole, this Court necessarily comes to a different conclusion.

Background

Petitioner Darlene Harvey performed services as a bookkeeper for Bruce L. Napoli, C.P.A., P.C., of Herndon, Virginia, from October 1, 2009, until March 18, 2015. R. at 67. Prior to March 17, 2015, Ms. Harvey worked as many as 30 days for Employer. R. at 1-2. The Record reflects she worked an average of 33.7 hours per week during the last three calendar quarters of 2014. R. at 67. During the months of February and March, however, Ms. Harvey worked an average of 17 hours per week, but she continued to be covered under the Employer's group healthcare plan. *Id.* There is discussion by the parties that the work level and amount for Ms. Harvey at the office had diminished and that Employer was aware Ms. Harvey was going out on interviews for other jobs. R. at 177-78.

On March 16, 2015, Ms. Harvey wrote a letter of resignation. R. at 13. The letter stated, "I am resigning from my position with Bruce L. Napoli, CPA. My last day will be March 30, 2015." *Id.* This letter was signed by Ms. Harvey and addressed to Mr. Bruce L. Napoli, CPA. *Id.* Ms. Harvey put this letter in an envelope, wrote Employer's name on the outside, and left the envelope on her desk at the office. R. at

67. She returned to work for approximately five hours on March 17, 2015, and did not deliver the letter to her Employer that day. R. at 190. Employer found the letter the evening of March 17, 2015, on top of Ms. Harvey's desk. R. at 176.

The next day, March 18, 2015, Ms. Harvey returned to the office to find her desk cleaned off and her computer password changed. R. at 187. The letter she had left on her desk was gone. *Id.* Ms. Harvey was then advised that her resignation was accepted, effective immediately, and she was not permitted to work out her notice or be paid as though she had. R. at 67.

After these events, this case began an arduous trek through the Virginia Employment Commission (hereinafter the "Commission"). On April 17, 2015, the Commission mailed Ms. Harvey a Deputy's Determination finding Ms. Harvey disqualified from benefits pursuant to Va. Code Ann. § 60.2-612. R. at 14-15. On April 22, 2015, Ms. Harvey filed an appeal. R. at 18. A hearing was conducted on May 12, 2015, and the Commission determined that Va. Code Ann. § 60.2-612(8) did not apply to Ms. Harvey and awarded her benefits. In the Matter of: Darlene Harvey, Commission Decision No. UI-1506440 (May 12, 2015).

Subsequently, on August 3, 2015, the Employer appealed the May 12, 2015, decision. R. at 27. The Commission then determined that the Appeal Examiner failed to join the Employer and reopened the case at the deputy level. In the Matter of: Darlene Harvey, Commission Order No. 118441-C (Aug. 12, 2015). The Commission mailed a Deputy Determination on October 9, 2015, which stated that Ms. Harvey's benefits were restricted pursuant to Va. Code Ann. § 60.2-612(8) and required her to repay benefits that were overpaid to her. R. at 36.

Ms. Harvey then appealed the October 9, 2015, Deputy Determination, and a hearing was held on November 3, 2015. R. at 43. The Appeal Examiner determined that Ms. Harvey voluntarily quit her job and did not show good cause for leaving. Darlene Harvey v. Bruce L. Napoli, CPA, PC, Commission Decision No. UI-1514176 (Nov. 3, 2015). Furthermore, the Appeal Examiner determined Ms. Harvey gave a resignation according to Va. Code Ann. § 60.2-612(8) and denied her benefits after the two-week period. *Id.*

On November 24, 2015, Ms. Harvey appealed the previous decision on the basis that she was not a participant in the hearing due to factors beyond her control involving incorrect addresses and notice of hearings. R. at 48. The Commission thus reopened the case at the First Level Appeals. Darlene Harvey v. Bruce L. Napoli, CPA, PC, Commission Order No. 119228-C (Dec. 7, 2015).

In the reopened appeal hearing, the Appeal Examiner determined that no good cause for leaving was shown, and Ms. Harvey's benefits would be restricted pursuant to Va. Code Ann. § 60.2-612(8). Darlene Harvey v. Bruce L. Napoli, CPA, PC, Commission Decision No. UI-1516423 (Jan. 8, 2016). On February 6, 2016, Ms. Harvey appealed this decision. R. at 63.

On February 26, 2016, the Commission mailed its decision concerning Ms. Harvey's appeal, which is the underlying decision of Ms. Harvey's petition for judicial review. Darlene S. Harvey v. Bruce L. Napoli, CPA, P.C., Commission Decision No. 119742-C (Feb. 22, 2016). The Commission noted that "although [Ms. Harvey] did not hand deliver or otherwise transmit her resignation letter to the practice owner, she left it in an envelope on top of her desk and addressed [it] to him. In so doing, she meant for him to find it and in that manner tendered her resignation." *Id.* at 4. However, the Commission determined the Employer did not establish that Ms. Harvey left work voluntarily and that Ms. Harvey's "separation . . . was a result of the [E]mployer's decision not to allow her to work out her two-week notice period." *Id.*

Furthermore, the Commission also decided Ms. Harvey did not demonstrate she had good cause to leave her employment. *Id.* at 5. As such, the remaining issue for the Commission to decide was whether Ms. Harvey "exhausted her benefit entitlement based on the circumstances surrounding her separation." *Id.* Applying Va. Code Ann. § 60.2-612(8), the Commission concluded Ms. Harvey did not demonstrate that she was discharged for misconduct or show that she had good cause for voluntarily leaving. *Id.* at 5-6. As such, Ms. Harvey was limited to two weeks of benefits under Va. Code Ann. § 60.2-612(8). *Id.* Because she was paid benefits for the weeks ending April 4, and 11, 2015, the Commission directed the Deputy to calculate what benefits were paid to the claimant during a period of ineligibility. *Id.* at 6.

Subsequently, Ms. Harvey filed her petition for judicial review.

Arguments

The issue before the Court is whether or not Ms. Harvey gave notice of her resignation, which pursuant to Va. Code Ann. § 60.2-612(8), effectively limits the benefits she is able to receive once she gives notice of resignation.

Ms. Harvey takes the position that the Commission erred by limiting her benefits pursuant to Va. Code Ann. § 60.2-612(8) because she asserts that she did not give notice of her resignation as required under the statute. Ms. Harvey also claims that the Commission's conclusion that she intended to resign is not supported by the

Commission's finding of fact or the record. In the underlying decision, the Commission applied Va. Code Ann. § 60.2-612(8) to limit Ms. Harvey's benefits to a two week period, concluding that Ms. Harvey "meant for [her Employer] to find" the letter and "in that manner tendered her resignation." Darlene S. Harvey v. Bruce L. Napoli, CPA, P.C., Commission Decision No. 119742-C (Feb. 22, 2016). Ms. Harvey argues the plain meaning interpretation of the word "give" in the relevant statute requires that an employee take action by delivering or conveying the resignation to her employer. Ms. Harvey asserts such "giving" did not occur in this case. An employee allowing an employer to "find" a resignation letter, which was the phrasing used in the Commission's decision, is not the same as giving notice of resignation under the plain meaning of Va. Code Ann. § 60-2.612(8). Pet'r's Br. at 6. An employee must take affirmative action to deliver or convey her resignation to the employer.

Ms. Harvey further contends that the Commission's conclusion that she intended to resign is not supported by the Commission's Finding of Fact or the record. She takes the position that her leaving a letter on her desk did not in itself indicate that she intended anything, let alone give her resignation to her employer. Pet'r's Br. at 7. Ms. Harvey also references her testimony and specifically points out statements about her "still contemplating resignation," "still thinking about quitting," and her not having "positively made up her mind." Pet'r's Br. at 7 (citing R. at 82-83). The Employer's testimony is also referenced by Ms. Harvey. Employer testified that Ms. Harvey's "resigning kind of took [him] by surprise." Pet's Br. at 7 (citing R. at 123-24). Overall, Ms. Harvey asserts that none of the testimony supports the conclusion that Ms. Harvey intended to give her Employer the resignation letter on March 17, 2015.

In contrast, the Commission opposes Ms. Harvey's interpretation and claims the evidence demonstrates that she left work voluntarily without good cause. Comm'n's Br. at 4. The Commission argues that although Ms. Harvey did not hand deliver or otherwise transmit her resignation letter to the practice owner, she left the addressed letter on top of her desk. In doing so, she clearly *meant* for her employer to *find* it because the letter was left in clear view of her supervisor in what he views as "his office" on a desk he owned. In this manner, her resignation was tendered. Her separation, however, was a result of the Employer's decision not to allow her to work her two-week notice period. As such, the Commission next addresses whether Ms. Harvey demonstrated good cause for leaving work.

The Commission notes that when interpreting the meaning of the phrase "good cause" it has limited the definition to those factors or circumstances that are so substantial, compelling, and necessitous as would leave a petitioner no reasonable alternative other than quitting work. Phillip v. Dan River Mills, Inc., Commission Decision 2002-C (June 15, 1955). Because Ms. Harvey did not pursue all reasonable

options before tendering her resignation, such as continuing to work in hopes of an increase in the volume of business or waiting until she had secured a definite offer of permanent, full-time employment, the Commission claims she did not demonstrate that she faced compelling or necessitous circumstances that left her without any reasonable options except to relinquish her job.

The Commission then briefly touches on Va. Code Ann. § 60.2-612(8) noting that Ms. Harvey was released after she tendered her two weeks' notice. The Commission further states that the Employer did not demonstrate that Ms. Harvey was discharged for misconduct, and Ms. Harvey did not show that she had good cause for her voluntarily leaving. As such, the Commission confirms that Ms. Harvey was limited to the two weeks of benefits under Va. Code Ann. § 60.2-612(8).

Analysis

The narrow issue now before the Court is whether Ms. Harvey gave notice of her resignation as contemplated by Va. Code Ann. § 60.2-612(8). The statute provides that

> [a]n unemployed individual shall be eligible to receive benefits for any week only if the Commission finds that . . . [h]e has given notice of resignation to his employer and the employer subsequently made the termination of employment effective prior to the date of termination as given in the notice, but in no case shall unemployment compensation benefits awarded under this subdivision exceed two weeks; provided, that the claimant could not establish good cause for leaving work pursuant to § 60.2-618 and was not discharged for misconduct as provided in § 60.2-618.

Va. Code Ann. § 60.2-612(8) (2016). Ms. Harvey contends she did not give notice to her employer and Va. Code Ann. § 60.2-612(8) does not apply to limit her benefits. This Court agrees and holds the cap on benefits contained in Va. Code Ann. § 60.2-612(8) does not apply unless an employee gives notice of his or her resignation to the employer.

In order to receive unemployment benefits, "a claimant must be eligible under Code § 60.2-612 and not disqualified under Code § 60.2-618." *Actuarial Benefits & Design Corp. v. Va. Emp't Comm'n*, 23 Va. App. 640, 645 (1990). The claimant bears the burden of proving she has met the eligibility conditions of Va. Code Ann. § 60.2-612. *Id.* (citing *Unemployment Comp. Comm'n v. Tomko*, 192 Va. 463, 468 (1951)). In reviewing the eligibility conditions set forth by this provision, the Court must employ a simple statutory construction analysis.

When interpreting statutes, Virginia courts repeatedly uphold the well-established principle that the "plain, obvious, and rational meaning of a statute is always to be preferred to any curious, narrow, or strained construction." *Va. Emp't Comm'n v. Fitzgerald*, 19 Va. App. 491, 495 (1995) (quoting *Turner v. Commonwealth*, 226 Va. 456, 459 (1983)). There is no need to bend or mold the language within a statute when a plain language meaning will do. As such, "words and phrases used in a statute should be given their ordinary and usually accepted meaning unless a different intention is fairly manifest." *Id.* (quoting *Woolfolk v. Commonwealth*, 18 Va. App. 840, 847 (1994)).

The outcome of this case hinges on a two-word phrase – "given notice" – found in Va. Code Ann. § 60.2-612(8). The plain meaning, dictionary definition of the word "give" is "to grant or bestow by formal action," "to put into the possession of another for his use," "to transfer from one's authority or custody," "to convey to another," "to deliver by some bodily action," or "to offer for consideration, acceptance, or use." *Webster's Ninth New Collegiate Dictionary* 518-519 (1989). Thus, the plain meaning mandated by Va. Code Ann. § 60.2-612(8) requires that an employee take some step of affirmative action by granting, bestowing, putting into possession, transferring, conveying, delivering, or offering the notice of resignation to his or her employer.

Based on the record, the Court finds no such act occurred because Ms. Harvey took no affirmative action to effectively give her notice. On March 16, 2015, Ms. Harvey wrote a letter of resignation in which she stated her two weeks' notice. R. at 67. Ms. Harvey placed this letter in an envelope and wrote her employer's name on the outside of the envelope. *Id.* She then left the letter on her own desk. *Id.* At this point, the Court finds it relevant to note the actions not taken by Ms. Harvey. She did not post-mark the letter and put it in a mailbox. She did not leave the letter on her employer's personal desk. She did not hand deliver the letter to her employer or give it to someone else to give to him. She did not directly talk to the employer about her resignation or verbally reference a letter on her desk. None of these aforementioned actions were taken, and Ms. Harvey did not engage in any verbal or physical behavior that would amount to her "giving" notice to her employer.

As pointed out by Ms. Harvey, the guiding Va. Code Ann. § 60.2-612(8) cases involve fact patterns where it is self-evident that an employee "gave" notice within the plain meaning of the word because the employee directly told their employer that they were resigning through verbal communications. *See Actuarial Benefits & Design Corp.*, 23 Va. App. at 643 ("During a meeting on January 9 concerning the snowsuit incident . . . Ms. Lipcsey (the employee) gave the president two weeks' notice of her resignation"); *see also* Boyd v. Moudlings, Inc., Commission Decision No. 23871-C (September 6, 1984) (the employee told her supervisor that she was resigning in 10 days and the following day she told the personnel manager that she resigned). The

present facts before the Court do not involve any such verbal communications or an affirmative act of resignation by Ms. Harvey. Instead, it was the coincidental discovery of the letter by Employer on March 17, 2015, that resulted in Ms. Harvey's termination. R. at 67.

This Court cannot interpret Employer's "finding" of the resignation letter as "giving" notice because such an interpretation gives rise to allowing one's presumption of another's resignation to control whether an individual is entitled to benefits. Certainly, the undertones in the record suggest that Ms. Harvey was eventually intending to leave her place of employment; however, many employees consider leaving their employment or make undirected comments about finding a new place of work. Such comments could be based in truth or simply autoschediastic. Thus, courts should be hesitant to opening the door for employers to presume resignation and act without investigation. A fact intensive, case-by-case determination is necessary in determining whether an employee gives notice of her resignation by taking an action to deliver such notice.

This Court's interpretation of the giving notice requirement as provided by Va. Code Ann. § 60.2-612(8) upholds the legislature's purpose in passing the Virginia Unemployment Compensation Act. The General Assembly sought to provide unemployment benefits "to those who find themselves unemployed without fault on their part." *Francis v. Va. Emp't Comm'n*, 59 Va. App. 137, 143 (2011) (quoting *Va. Emp't Comm'n v. Cmty. Alternatives, Inc.*, 57 Va. App. 700, 704 (2011)). Although Ms. Harvey was likely soon to walk out the door, her exit was prematurely rushed by a presumption made by her Employer. Under the facts presented in the record, the Court does not find that Ms. Harvey tendered or "gave" notice as contemplated by Va. Code Ann. § 60.2-612(8). Therefore, she was unemployed without fault on her part and the cap of Va. Code Ann. § 60.2-612(8) should not apply.

The enclosed Final Order was prepared and entered by the Court under Rule 1:13 of the Rules of the Supreme Court of Virginia.

Sincerely,

[redacted]

Jan L. Brodie

Enclosure

OPINION LETTER

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

Darlene Harvey,	)	
Petitioner,	)	
	)	**CL-2016-4653**
v.	)	
	)	
Virginia Employment Commission,	)	
***et al.*,**	)	
Respondents.	)	

ORDER

THIS MATTER CAME BEFORE THE COURT on Petitioner Darlene Harvey's Petition for Judicial Review, which was heard by this Court on June 24, 2016; and

IT APPEARING THAT the Court considered arguments of counsel, submitted briefs, and case law; and

IT APPEARING THAT the Court issued a letter opinion and order on July 20, 2016; and

IT APPEARING THAT the Court erred in identifying the appropriate standard of review; and

IT APPEARING THAT the Court vacated the July 20, 2016, letter opinion and order; it is

ORDERED, ADJUDGED, and DECREED that Virginia Employment Commission's Decision No. 119742-C is reversed for the reasons stated in the revised letter opinion dated August 3, 2016, incorporated herein by reference.

Entered this 3rd day of August 2016.

[redacted]

Jan L. Brodie
Judge, Fairfax County Circuit Court

ENDORSEMENT OF THIS ORDER BY COUNSEL OF RECORD FOR THE PARTIES IS WAIVED IN THE DISCRETION OF THE COURT PURSUANT TO RULE 1:13 OF THE SUPREME COURT OF VIRIGINIA.