

DIVISION OF EMPLOYMENT SECURITY
NC DEPARTMENT OF COMMERCE

PRECEDENT DECISION NO. 26

IN RE LYNCH

(Adopted January 20, 1993)

This is an appeal by the EMPLOYER from a decision by Appeals Referee Charles M. Monteith, Jr., mailed on March 13, 1990.

Mr. Larry Lynch, Claimant, who was discharged from his employment with PPG Industries, filed for unemployment insurance benefits beginning on October 1, 1989. The Claims Adjudicator ruled that the claimant was discharged for misconduct connected with his employment and disqualified him from receiving benefits. The claimant appealed and the first Appeals Referee determined that the Claimant was discharged for work related misconduct and therefore was disqualified from receiving unemployment insurance benefits. The Claimant appealed and the Chief Deputy Commissioner set aside the decision of the Appeals Referee because the tape recording of the Appeals Referee's hearing was substantially inaudible. Thereafter, a second Appeals Referee's hearing was conducted by Appeals Referee Monteith who determined that Claimant was not discharged for misconduct and therefore, was qualified for unemployment insurance benefits. PPG Industries, Incorporated (Employer) appealed to the Employment Security Commission.

This matter was heard by the Employment Security Commission on April 19, 1990. Members of the Commission present and voting were: Charles R. Cagle, John J. Cavanagh, Jr., Kevin L. Green, Allen H. Holt and James W. Smith. The Employer was represented by Jerry W. Strong, Personnel Manager. The Claimant did not appear. Thomas S. Whitaker, Chief Counsel, appeared on behalf of the Employment Security Commission.

The Employer lodged no exceptions to the second Appeals Referee's findings of fact, but disagreed with his conclusions of law. Since the findings are supported by evidence, those findings in the attached Appeals Referee's decision are adopted as the findings of fact by the Commission. Consequently, the only issue for review is whether these findings of fact support the Appeals Referee's conclusion of law

that claimant was not discharged for misconduct or substantial fault connected with his employment.

A claimant shall be disqualified from receiving unemployment insurance benefits if he is discharged from employment for "misconduct connected with work." N.C.G.S. §96-14(2). Misconduct under this standard is defined as:

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 interest or of the employer's duties and obligations to his employer.

A claimant may also be disqualified from receiving benefits if discharged from employment "for substantial fault on his part connected with his work not rising to the level of misconduct." N.C.G.S. §96-14(2A). Under this lower standard, substantial fault includes:

Those acts or omissions of employees over which they exercised reasonable control and which violate reasonable requirements of the job. . . .

Measuring the findings of fact against these standards, the Commission concludes that the Claimant's conduct at the very least rises to the level of substantial fault under N.C.G.S. §96-14(2A). The question then is whether this conduct falls within the stricter standard of misconduct under N.C.G.S. §96-14(2).

In 1989, the General Assembly responded to the growing problem of drug abuse in our State by amending N.C.G.S. §96-14(2) to clarify that misconduct included:

Discharge for misconduct with the work as used in this section is defined to include but not be limited to separations initiated by an employer for . . . conviction by a court of competent jurisdiction for manufacturing, selling, or distribution of a controlled substance punishable under G.S. 90-95(a)(1) or G.S. 90-95(a)(2) while in the employ of said employer.

The clear and unambiguous intent of this amendment was to include but not limit misconduct for unemployment insurance benefits to discharged for drug convictions punishable under N.C.G.S. §90-95(a)(1) and N.C.G.S. 90-95(a)(2). This clearly excludes crimes punishable under N.C.G.S. 90-95(a)(3) but clearly includes the crime for which the claimant was convicted. See Bradshaw v. Administrative Office of the Courts, 320 NC 134, 357 S.E.2d 370 (1987) where the Supreme Court held that disqualification sections must be strictly construed only if the language in the statute is ambiguous. Herein, the language is not ambiguous as N.C.G.S. §96-14(2) specifically refers to crimes punishable under N.C.G.S. § 9 0-9 5(a) (1) and (2).

Thus, on the sole remaining issue before the Commission on whether or not the discharge from employment for conviction for possession of cocaine with the intent to sell or deliver, punishable under N.C.G.S. §90-95(a)(1), is misconduct under N.C.G.S. §96-14(2), the Commission holds that it is misconduct.

DECISION:

IT IS NOW THEREFORE, ORDERED, ADJUDGED, AND DECREED that the decision of the Appeals Referee is **REVERSED**, and the CLAIMANT is **DISQUALIFIED** from receiving unemployment insurance benefits.

[This decision was upheld by the appellate court: Lynch v. PPG Industries, 105 N.C. App. 223, 412 S.E.2d 163 (1992)]