

DIVISION OF EMPLOYMENT SECURITY
NC DEPARTMENT OF COMMERCE

PRECEDENT DECISION NO. 32

IN RE BROWN
(Adopted April 30, 1997)

STATEMENT OF THE CASE:

The claimant filed a New Initial Claim (NIC) for unemployment insurance benefits effective November 10, 1996. Thereafter, the Commission determined that the weekly benefit amount payable to the claimant was \$87.00 and, during the benefit year established by the claimant, the maximum amount of unemployment insurance benefits payable to the claimant was \$2,262.00.

The claim was referred to an adjudicator on the issue of separation from last employment. The Adjudicator, Cindy Walters, issued a determination under DOCKET NO. 7947 finding the claimant disqualified for benefits beginning on November 10, 1996. The Adjudicator in her determination ruled that the claimant left her job pursuant to N.C. Gen. Stat. § 96-14(1) by failing to comply with the employer's policy to contact the company each day she is not working on assignment.

The claimant filed an appeal from the adjudicator's determination and the matter came on to be heard by an appeals referee under Appeals Docket No. VI-A-16676. The following individuals appeared at the hearing before Appeals Referee John F. Pendergrass on January 22, 1996: the claimant; and, Wendy Pace, Operations Manager, for the employer. On January 29, 1997, Appeals Referee Pendergrass issued a decision upholding the determination and finding the claimant disqualified to receive benefits. The claimant appealed the decision issued by the Appeals Referee.

FINDINGS OF FACT:

1. The claimant had filed continued claims for unemployment insurance benefits for the period November 10, 1996 through December 14, 1996. The claimant

has registered for work with the Commission, has 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).

2. The claimant had worked for the employer at sites operated by the employer's customers. The employer is a temporary personnel service company.
3. The claimant last completed a work assignment for the employer on Saturday, November 9, 1996.
4. On Monday, November 11, 1996, through Wednesday, November 13, 1996, the claimant contacted the employer as required by its initial employment agreement. However, the employer had no work available for the claimant.
5. On November 13, 1996, the claimant went to the Employment Security Commission local office where she applied for unemployment insurance benefits. At the time that the claimant applied for benefits, there were no available assignments from the employer.
6. After November 13, 1996, the claimant continued asking for assignments from the employer, and the employer continued asking the claimant to take assignments.

MEMORANDUM OF LAW:

The Employment Security Law of North Carolina provides that where there is a separation, the issue of qualification for benefits upon that separation is decided under G.S. §96-14. Temporary personnel service employers (equivalent to private personnel service employers as defined in G.S. §95-47.1 are treated as any other employer under the Employment Security Law.

The Employment Security Law also provides:

For the purpose of establishing a benefit year, an individual shall be deemed to be unemployed...if he has payroll attachment but, because of lack of work during the payroll week for which he is requesting the establishment of a benefit year, he worked less than the equivalent of three customary scheduled full-time days in the establishment, plant, or industry in which he has payroll attachment as a regular employee. If a

benefit year is established, it shall begin on the Sunday preceding the payroll week ending date.

G.S. §96-8(10)a.

An employee of a temporary personnel service employer whose assignment has ended and who is offered another assignment prior to filing an NIC or AIC for unemployment insurance benefits who does not accept the assignment and files a claim shall be treated as having left work under G.S. §96-14(1). Whether or not claimant left work with good cause attributable to the employer shall depend on whether or not the new assignment is suitable work. In determining whether or not the new assignment is suitable work, Precedent Decision No. 19, In re Tyndall, shall be applied.

An individual employed by a temporary personnel service employer who files a NIC or AIC for unemployment insurance benefits after an assignment has ended or after he/she is not permitted to return to an assignment and prior to an offer of another assignment shall not be considered separated from employment under G.S. §96-14(1), (2), (2A) or (2B), but shall be deemed unemployed in accordance with G.S. §96-8(10)a. and b., unless the claimant has been discharged. If claimant has been discharged, then claimant's qualifications to receive benefits shall be determined in accordance with G.S. §96-14(2), (2A) or (2B).

For any week when a claimant is receiving benefits under G.S. §96-8(10)a. or b. and fails to work all the work her/his temporary personnel service employer has made available to the claimant, the claimant's eligibility to receive benefits shall be decided under G.S. §96-13(a).

When a separated individual in claims status refuses an offer of work or an assignment by the temporary personnel service employer or any employer, the refusal shall be decided under G.S. §96-14(3). In a case decided under G.S. §96-14(3), once an employer or the Commission, whichever is appropriate, shows that offered work is suitable work, then the claimant has the burden of showing that he failed to accept the work with good cause.

In a case involving a temporary personnel service employer, as in a case involving any other employer, if a claimant quits work, the claimant has the burden of showing that he/she quit with good cause attributable to the employer. In a case where a claimant is discharged, the employer has the burden of showing that the claimant was discharged for a disqualifying reason. In deciding a case under G.S.

§96-14(1), (2), (2A), (2B) or (3), such items as a written agreement between the employer and the employee, written instructions to the employee, the application for employment, and/or oral agreements or oral instructions are relevant and pertinent evidence.

On the other hand, as a general rule, an employer, when faced with a failure of the employee to abide by the terms of an agreement, is free to ignore the breach of the terms of employment or to hold the employee accountable for violating the terms and conditions of an employment contract. If the employer then discharges the claimant, the issue of whether any single violation of the terms and conditions of an employment contract amounts to substantial fault connected with work under G.S. §96-14(2A) or misconduct connected with work under G.S. §96-14(2) is a matter to be decided on a case by case basis.

DISCUSSION:

This Commission has no position on the appropriateness of any specific employment arrangements between a temporary assignment employee and the temporary personnel service employer. The parties are free to engage in any lawful employment arrangements, terms, conditions or contracts as they may so choose.

There is no evidence in the record that either party was required or obligated to maintain the employment relationship for any certain period. In other words, the parties were free to break off their employment relationship at any time.

However, in this case, the Commission never reaches the issues of discharge from work or leaving work because there was no separation from employment. Neither the claimant nor the employer broke the employment relationship. Based on the facts of this case, there is no basis to conclude there was any separation. It appears that the Commission should not have raised a separation issue in the first place. As stated in her testimony, the claimant filed her claim, "...because the work had been real slow, and I just could not do anything else financially except to try to do this [file a claim]." Appeals hearing transcript p 5. This testimony does not support a conclusion that there had been a separation. Wright v. Bus Terminal Restaurant, 71 N.C. App. 395, 322 S.E.2d 201 (1984).

The Commission will take this opportunity to address a related situation. When a claimant stops performing an assignment before that assignment ends, there is no separation unless the employer or the claimant treat the event as a separation. Unless the parties present facts to the Commission showing the employment

relationship has ended, there is no basis for the Commission to assume and presume that the employment relationship has ended.

Based on the competent evidence in the record and the Commission's Findings of Facts based upon that record, it is concluded that the claimant was not separated as contemplated under G.S. §96-14(1),(2), or (2A). It is further concluded that the claimant was unemployed under G.S. §96-8(10)a.

DECISION:

IT IS NOW THEREFORE, ORDERED, ADJUDGED, AND DECREED that the decision of the Appeals Referee is **REVERSED**, and the CLAIMANT is **NOT DISQUALIFIED** for unemployment insurance benefits.