GENERAL ASSEMBLY OF NORTH CAROLINA
1989 SESSION

CHAPTER 583
HOUSE BILL 426

AN ACT TO MAKE TECHNICAL AMENDMENTS TO THE EMPLOYMENT SECURITY LAW.

The General Assembly of North Carolina enacts:

Section 1. G.S. 96-4(t) is amended by adding a new subdivision to read:

"(8) Any finding of fact or law, judgment, determination, conclusion or final order made by an adjudicator, appeals referee, commissioner, the Commission or any other person acting under authority of the Commission pursuant to the Employment Security Law is not admissible or binding in any separate or subsequent action or proceeding, between a person and his present or previous employer brought before an arbitrator, court or judge of this State or the United States, regardless of whether the prior action was between the same or related parties or involved the same facts.

Provided, however, any finding of fact or law, judgment, determination, conclusion, or final order made by an adjudicator, appeals referee, commissioner, the Commission or any other person acting under the authority of the Commission pursuant to the Employment Security Law shall be admissible in proceedings before the North Carolina Industrial Commission."

Sec. 2. G.S. 96-4 is amended by adding a subsection to read:

"(v) Advisory rulings may be made by the Commission with respect to the applicability of any statute or rule administered by the Commission, as follows:

(1) All requests for advisory rulings shall be made in writing and submitted to the Chief Counsel. Such requests shall state the facts and statutes or rules on which the ruling is requested.

(2) The Chief Counsel may request from any person securing an advisory ruling any additional information that is necessary. Failure to supply such additional information shall be cause for the Commission to decline to issue an advisory ruling.

(3) The Commission may decline to issue an advisory ruling if any administrative or judicial proceeding is pending with the person requesting the ruling on the same factual grounds. The Commission may decline to issue an advisory ruling if such a ruling may harm the Commission's interest in any litigation in which it is or may be a party.

(4) All advisory rulings shall be issued no later than 30 days from the date all information necessary to make a ruling has been received by the Chief Counsel.

(5) No advisory ruling shall be binding upon the Commission provided that in any subsequent enforcement action initiated by the Commission, any person's reliance on such ruling shall be considered in mitigation of any penalty sought to be assessed."

Sec. 3. G.S. 96-8(5) is amended by adding a subdivision to read:

"r. An employee service company which is an employing unit is the employer of an individual who is engaged in employment performing services for a client or customer of the employee service company if the employee service company is taxed under the Federal Unemployment Tax Act (26 U.S.C. §3301 to §3311) on the basis of that employment. For purpose of this Chapter, 'employee service company' means a leasing company or temporary help service which contracts with clients or customers to supply individuals to perform services for the client or customer and which, both under contract and in fact:

1. Negotiates with clients or customers for such matters as time, place, type of work, working conditions, quality, and price of the services;
2. Determines assignments or reassignments of individuals to its clients or customers, even if the individuals retain the right to refuse specific assignments;
3. Sets the rate of pay of the individuals, whether or not through negotiation;
4. Pays the individuals from its account or accounts; and
5. Hires and terminates individuals who perform services for the clients or customers."

Sec. 4. G.S. 96-9(c)(2)b. reads as rewritten:

"b. Any benefits paid to any claimant under a claim filed for a period occurring after the date of such separations as are set forth in this paragraph and based on wages paid prior to the date of (i) the ~~voluntary~~ leaving of work by the claimant without good cause attributable to the employer; (ii) the discharge of claimant for misconduct in connection with his work; (iii) the discharge of the claimant for substantial fault as that term may be defined in G.S. 96-14; (iv) the discharge of the claimant solely for a bona fide inability to do the work for which he was hired but only where the claimant was hired pursuant to a job order placed with a local office of the Commission for referrals to probationary employment (with a probationary period no longer than 100 days), which job order was placed in such circumstances and which satisfies such conditions as the

Commission may by regulation prescribe and only to the extent of the wages paid during such probationary employment; (v) separations made disqualifying under G.S. 96-14(2B) and (6A); or (vi) separation due to ~~involuntary~~ leaving for disability or health condition shall not be charged to the account of the employer by whom the claimant was employed at the time of such separation; provided, however, said employer promptly furnishes the Commission with such notices regarding any separation of the individual from work as are or may be required by the regulations of the Commission.

No benefit charges shall be made to the account of any employer who has furnished work to an individual who, because of the loss of employment with one or more other employers, becomes eligible for partial benefits while still being furnished work by such employer on substantially the same basis and substantially the same amount as had been made available to such individual during his base period whether the employments were simultaneous or successive; provided, that such employer makes a written request for noncharging of benefits in accordance with Commission regulations and procedures.

No benefit charges shall be made to the account of any employer where benefits are paid as a result of a decision by an Adjudicator, Appeals Referee or the Commission if such decision to pay benefits is ultimately reversed; nor shall any such benefits paid be deemed to constitute an overpayment under G.S. 96-18(g)(2), the provisions thereof notwithstanding."

Sec. 5. G.S. 96-8(13)b. reads as rewritten:

"b. 'Wages' shall not include ~~any~~ :

1. Any payment made to, or on behalf of, an employee or his beneficiary from or to a trust which qualifies under the conditions set forth in Sections 401(a)(1) and (2) of the Internal Revenue Code of 1954~~, or under~~;
2. Any payment made to, or under, ~~or to~~ an annuity plan which at the time of the payment meets the requirements of Sections 401(a)(3), (4), (5) and (6) of the Code and exempt from tax under Section 501(a) of the Code at the time of the payment, unless the payment is made to an employee of the trust as remuneration for services rendered as an employee and not as beneficiary of the trust; or

3. Any payment made to, or on behalf of, an employee or his beneficiary under a Cafeteria Plan within the meaning of Section 125 of the Internal Revenue Code."

Sec. 6. G.S. 96-9(a) is amended by adding a subdivision to read:

"(6) If the amount of the contributions shown to be due after all credits is less than one dollar ($1.00), no payment need be made. If an employer has paid contributions, penalties, and/or interest in excess of the amount due, this shall be considered an overpayment and refunded provided no other debts are owed to the Commission by the employer. Overpayments of less than one dollar ($1.00) shall be refunded only upon receipt by the Chairman of a written demand for such refund from the employer. Nothing herein shall be construed to change or extend the limitation set forth in G.S. 96-10(e), (f), and (i)."

Sec. 7. G.S. 96-14(1) reads as rewritten:

"(1) 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 he left work ~~voluntarily~~ without good cause attributable to the employer.

Where an individual leaves work due solely to a disability incurred or other health condition, whether or not related to the work, ~~his leaving shall be considered an involuntary leaving for health reasons~~ he shall not be disqualified for benefits if the individual shows:

a. That, at the time of leaving, an adequate disability or health condition, either medically diagnosed or otherwise shown by competent evidence, existed to justify the leaving and prevented the employee from doing other alternative work offered by the employer which pays the minimum wage or eighty-five percent (85%) of the individual's regular wage, whichever is greater; and

b. That, at a reasonable time prior to leaving, the individual gave the employer notice of ~~the~~ his disability or health condition.

Where an employee is notified by the employer that such employee will be separated from employment on some future date and the employee leaves work prior to this date because of the impending separation, the employee shall be deemed to have left work voluntarily and the leaving shall be without good cause attributable to the employer. However, if the employee shows to the satisfaction of the Commission that it was impracticable or unduly burdensome for the employee to work until the announced separation date, the permanent disqualification imposed for leaving work without good cause attributable to the employer may be reduced to the greater of

four weeks or the period running from the beginning of the week during which the claim for benefits was made until the end of the week of the announced separation date.

An employer's placing an individual on a bona fide disciplinary suspension of 10 or fewer consecutive calendar days shall not constitute good cause for leaving work."

Sec. 8. G.S. 96-14(1A) reads as rewritten:

"(1A) ~~Except as specifically provided in G.S. 96-14(1), leaving of work shall constitute a voluntary leaving, not an involuntary leaving.~~ Where an individual leaves work, the burden of showing good cause attributable to the employer rests on said individual, and the burden shall not be shifted to the employer."

Sec. 9. G.S. 96-14 is amended by adding two new subsections to read:

"(1B) Where an individual leaves work due solely to a unilateral and permanent reduction in work hours of more than twenty percent (20%) of the customary scheduled full-time work hours in the establishment, plant, or industry in which he was employed, said leaving shall constitute good cause attributable to the employer for leaving work. Provided however that if said reduction is temporary or was occasioned by malfeasance, misfeasance or nonfeasance on the part of the individual, such reduction in work hours shall not constitute good cause attributable to the employer for leaving work.

(1C) Where an individual leaves work due solely to a unilateral and permanent reduction in his rate of pay of more than fifteen percent (15%), said leaving shall constitute good cause attributable to the employer for leaving work. Provided however that if said reduction is temporary or was occasioned by malfeasance, misfeasance or nonfeasance on the part of the individual, such reduction in pay shall not constitute good cause attributable to the employer for leaving work."

Sec. 10. G.S. 96-14(8) is amended by adding a paragraph at the end to read:

"Further provided, any benefits previously paid for weeks of unemployment with respect to which back pay awards, or other such compensation, are made shall constitute an overpayment of benefits and such amounts shall be deducted from the award by the employer prior to payment to the employee, and shall be transmitted promptly (or within 5 days) to the Commission by the employer for application against the overpayment. Provided, however, the removal of any charges made against the employer as a result of such previously paid benefits shall be applied to the calendar year in which the overpayment is transmitted to the Commission, and no attempt shall be made to relate such a credit to the period to which the award applies. Any amount of overpayment so deducted by the employer and not transmitted to the Commission or the failure of an employer to deduct

an overpayment shall be subject to the same procedures for collection as is provided for contributions by G.S. 96-10. It is the purpose of this paragraph to assure the prompt collection of overpayments of U. I. benefits, and it shall be construed accordingly."

Sec. 11. G.S. 96-15(f) reads as rewritten:

"(f) Procedure. – The manner in which disputed claims shall be presented, the reports thereon required from the claimant and from employers, and the conduct of hearings and appeals shall be in accordance with regulations prescribed by the Commission for determining the rights of the parties, whether or not such regulations conform to common-law or statutory rules of evidence and other technical rules of procedure. All testimony at any hearing before an appeals referee upon a disputed claim shall be recorded unless the recording is waived by all interested parties, but need not be transcribed unless the disputed claim is further appealed and, one or more of the parties objects, under such regulations as the Commission may prescribe, to being provided a copy of the tape recording of the hearing. Any other provisions of this Chapter notwithstanding, any ~~party~~ individual receiving the transcript shall pay to the Commission such reasonable fee for the transcript as the Commission may by regulation provide. The fee so prescribed by the Commission for a party shall not exceed ~~the lesser of twenty-five cents (25¢) per page or thirty-five dollars ($35.00) per transcript.~~ the lesser of sixty-five cents (65¢) per page or sixty-five dollars ($65.00) per transcript. The Commission may by regulation provide for the fee to be waived in such circumstances as it in its sole discretion deems appropriate but in the case of an appeal in **forma pauperis** supported by such proofs as are required in G.S. 1-110, the Commission shall waive the fee."

Sec. 12. G.S. 96-15(i) reads as rewritten:

"(i) Review Proceedings. – If a timely petition for review has been filed and served as provided in G.S. 96-15(h), the court may make party defendant any other party it deems necessary or proper to a just and fair determination of the case. The Commission may, in its discretion, certify to the reviewing court questions of law involved in any decision by it. In any judicial proceeding under this section, the findings of fact by the Commission, if there is any competent evidence to support them and in the absence of fraud, shall be conclusive, and the jurisdiction of the court shall be confined to questions of law. Such actions and the questions so certified shall be heard in a summary manner and shall be given precedence over all civil cases. An appeal may be taken from the judgment of the superior court, as provided in civil cases. The Commission shall have the right to appeal to the appellate division from a decision or judgment of the superior court and for such purpose shall be deemed to be an aggrieved party. No bond shall be required of the Commission upon appeal. Upon the final determination of the case or proceeding, the Commission shall enter an order in accordance with the determination. When an appeal has been entered to any judgment, order, or decision of the court below, no benefits shall be paid pending a final determination of the cause, except in those cases in which the final decision of the Commission allowed benefits."

Sec. 13. G.S. 96-18(e) reads as rewritten:

"(e) An individual shall not be entitled to receive benefits for ~~one year beginning with the first day following the last benefit week for which he received benefits, or one year from the date upon which the act was committed, whichever is the later, if~~ a period of 52 weeks beginning with the first day of the week following the date that notice of determination or decision is mailed finding that he, or another in his behalf with his knowledge, has been found to have knowingly made a false statement or misrepresentation, or who has knowingly failed to disclose a material fact to obtain or increase any benefit or other payment under this Chapter."

Sec. 14. G.S. 96-18(g)(1) reads as rewritten:

"(1) Any person who, under subsection (e) above, has been held ineligible for benefits and who, because of those same acts or omissions has received any sum as benefits under this Chapter to which he was not entitled, shall be liable~~, for 10 years after the decision under subsection (e) becomes final,~~ to repay any such sum to the Commission as provided in subparagraph (3) below, provided ~~such decision under subsection (e) has been made within two years of the last such act or omission~~ no such recovery or recoupment of such sum may be initiated after 10 years from the last day of the year in which the overpayment occurred."

Sec. 15. G.S. 96-14(10) reads as rewritten:

"(10) Any employee disqualified for the duration of his unemployment due to the provisions of (1), (2), (2B), (3), (4), or (6A) above may have that permanent disqualification removed if he meets the following three conditions:

a. Returns to work for at least five weeks and is paid cumulative wages of at least 10 times his weekly benefit amount;

b. Subsequently becomes unemployed through no fault of his own; and

c. Meets the availability requirements of the law.

Any disqualification imposed by the provisions of subsection (2A) may be removed as provided by this subsection.

Provided for good cause shown the Commission in its discretion may as to any permanent disqualification provided in this Chapter reduce the disqualification period to a time certain but not less than five weeks. The maximum amount of benefits due any individual whose permanent disqualification is changed to a time certain shall be reduced by an amount determined by multiplying the number of weeks of disqualification by the weekly benefit amount.

Provided further, any permanent disqualification pursuant to the provisions of (1), (2), (3), (4), or (6A) shall terminate two years after the effective date of the beginning of said disqualification."

Sec. 16. G.S. 96-29 reads as rewritten:

"**§ 96-29. Openings listed by State agencies.**

Every State agency shall list with the Employment Security Commission of North Carolina every job opening occurring within the agency which opening the agency wishes filled and which will not be filled solely by promotion or transfer from within the existing State government work force. The listing shall include a brief description of the duties and salary range and shall be filed with the Commission within 30 days after the occurrence of the opening. The State agency may not fill the job opening for at least 21 days after the listing has been filed with the Commission. The listing agency shall report to the Commission the filling of any listed opening within 15 days after the opening has been filled."

Sec. 17. This act is effective upon ratification.

In the General Assembly read three times and ratified this the 5th day of July, 1989.