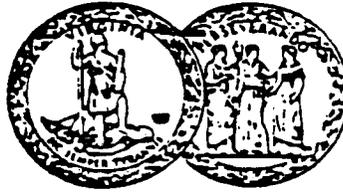


COMMONWEALTH OF VIRGINIA
VIRGINIA EMPLOYMENT COMMISSION



DECISION OF COMMISSION

In the Matter of:

Barbara A. Neil
[REDACTED]

Newport News Shipbuilding, Inc.
Newport News, Virginia

Date of Appeal

to Commission: November 15, 1991

Date of Review: December 24, 1991

Place: RICHMOND, VIRGINIA

Decision No.: 37114-C

Date of Mailing: December 24, 1991

Final Date to File Appeal

with Circuit Court: January 13, 1992

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This case is before the Commission on appeal by the claimant from Appeals Examiner's Decision UI-9114174, mailed November 4, 1991.

ISSUE

Was the claimant discharged from employment due to misconduct in connection with work as provided in Section 60.2-618.2 of the Code of Virginia (1950), as amended?

FINDINGS OF FACT

The claimant filed a timely appeal from the Appeals Examiner's decision which reversed an earlier Deputy's determination and disqualified her for unemployment compensation, effective September 1, 1991, for having been discharged from employment due to misconduct in connection with work.

Prior to filing her claim, the claimant last worked for the Newport News Shipbuilding and Dry Dock Company of Newport News, Virginia, between May 1, 1990, and August 30, 1991. Her position was that of a computer operator.

The employer has promulgated a series of yard regulations which are distributed to all employees. The violation of any of these rules

may subject the offending employee to discharge or other discipline. Rule # 32 specifically prohibits:

Sleeping or relaxing in an inattentive posture (even though not actually asleep) when supposed to be working or attentive.

On August 29, 1991, the claimant was working on the third shift. At approximately 3:45 a.m., the task she had been doing was completed and the next task was not scheduled to begin until 4:30. In the meantime, she chose to sit down in a chair in the work area.

A number of co-workers, including the lead operator, warned the claimant not to go to sleep. Because the claimant did not get along with the lead operator and felt that he was trying to harass her, she deliberately decided to make him angry by going into the break room and coming back with a pair of sunglasses which she proceeded to put on while informing him "Now you can't see my eyes." Despite this, the claimant did fall asleep and was so observed by the computer control coordinator who was in charge of the shift. It actually took several attempts to wake her up.

The claimant was subsequently called into the office of a higher level supervisor to discuss the incident which had been reported to him. Despite her denial that she was asleep, the decision was made to terminate her services for violating Yard Regulation # 32.

OPINION

Section 60.2-618.2 of the Code of Virginia provides a disqualification if it is found that a claimant was discharged from employment due to misconduct in connection with work.

In the case of Branch v. Virginia Employment Commission, 219 Va. 609, 249 S.E.2d 180 (1978), the Supreme Court of Virginia defined misconduct as follows:

In our view, an employee is guilty of "misconduct connected with his work" when he deliberately violates a company rule reasonably designed to protect the legitimate business interests of his employer, or when his acts or omissions are of such a nature or so recurrent as to manifest a willful disregard of those interests and the duties and obligations he owes his employer. . . . Absent circumstances in mitigation of such conduct, the employee is "disqualified for benefits", and the burden of proving mitigating circumstances rests upon the employee.

Any employer has the right to expect that employees will perform the duties for which they are being paid and not sleep on the job.

Additionally, in order to avoid disputes over whether a person was actually sleeping or not, the Commission concludes that a rule such as the one at hand in which a person has violated it by being in an inattentive posture even though not asleep, is reasonably designed to protect a legitimate business interest.

The Appeals Examiner made a credibility determination in favor of the employer by rejecting the claimant's contention that she was not asleep and that she was aware of her surroundings. Under the doctrine established in the case of Foster v. A & B Contract Service Company, Commission Decision 26249-C (February 14, 1986), such a credibility determination made by an Appeals Examiner who is in the unique position to observe the demeanor of the parties testifying, is entitled to respect so as not to be normally disturbed unless there is some clear reason for doing so. Not only can the Commission find no such reason in this case, but there are two separate reasons from the record to support the credibility determination which the Appeals Examiner made.

When the claimant told the lead operator that she was putting on her sunglasses so that he could not see her eyes, she admittedly was deliberately trying to make him mad. Nevertheless, she was also doing something which could be reasonably interpreted as an attempt to prevent others from seeing whether she was really asleep or not. Such action on her part is consistent with a deliberate attempt to violate the employer's rules.

The claimant also testified that the computer control coordinator was not even there during the course of the incident. This is in contrast to his testimony in which he stated that he actually observed her sleeping. It is not necessary to make a choice between one of these stories, inasmuch as there is a third possibility which allows for both of them to be true. That is that the claimant was, in fact, asleep; therefore, she never realized that she was being observed.

The Commission concludes that the employer has made out a prima facie case that the claimant's discharge was due to misconduct. By attempting to deny rather than explain her conduct, the claimant has failed to establish mitigating circumstances for it. Accordingly, she should remain disqualified for benefits under this section of the Code.

DECISION

The decision of the Appeals Examiner is hereby affirmed.

The claimant is disqualified for unemployment compensation effective September 1, 1991, for any week or weeks benefits are claimed until she has performed services for an employer during 30 days whether or not such days are consecutive and she subsequently

becomes totally or partially separated from such employment, because she was discharged due to misconduct in connection with work.

When this decision becomes final, the Deputy is instructed to calculate what benefits may have been paid to the claimant after the effective date of the disqualification, which she will be liable to repay the Commission as a result of this decision.


Charles A. Young, III
Special Examiner

NOTICE TO CLAIMANT

IF THE DECISION STATES THAT YOU ARE DISQUALIFIED, YOU WILL BE REQUIRED TO REPAY ALL BENEFITS YOU MAY HAVE RECEIVED AFTER THE EFFECTIVE DATE OF THE DISQUALIFICATION. IF THE DECISION STATES THAT YOU ARE INELIGIBLE FOR A CERTAIN PERIOD, YOU WILL BE REQUIRED TO REPAY THOSE BENEFITS YOU HAVE RECEIVED WHICH WERE PAID FOR THE WEEK OR WEEKS YOU HAVE BEEN HELD INELIGIBLE. IF YOU THINK THE DISQUALIFICATION OR PERIOD OF INELIGIBILITY IS CONTRARY TO LAW, YOU SHOULD APPEAL THIS DECISION TO THE CIRCUIT COURT. (SEE NOTICE ATTACHED)