COMMONWEALTH OF VIRGINIA
VIRGINIA EMPLOYMENT COMMISSION

DECISION OF COMMISSION

In the Matter of:

Pamela G. Larrabee
S. S. No. 044-36-8114

The Sealaw Group
Alexandria, Virginia

Date of Appeal
to Commission: October 2, 1996

Date of Hearing: December 11, 1996

Place: RICHMOND, VIRGINIA

Decision No.: 52458-C

Date of Mailing: December 16, 1996

Final Date to File Appeal
with Circuit Court: January 15, 1997

---oOo---

This case comes before the Commission on appeal by the claimant from Appeals Examiner's decision UI-9609147, mailed September 18, 1996.

APPEARANCES

None

ISSUES

Did the claimant file a timely appeal from the Notice of Deputy's Determination, and if not, has good cause been proven to extend the 21-day appeal period as provided in Section 60.2-619D of the Code of Virginia (1950), as amended?

Was the claimant discharged due to misconduct connected 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 affirmed the Deputy's determination, and held her disqualified for benefits, effective April 14, 1996. In addition, the Appeals Examiner concluded that the claimant had filed a timely appeal from the Notice of Deputy's Determination.

The findings of fact made by the Appeals Examiner have been reviewed and are hereby adopted by the Commission with the following corrections and additions.

In line four of paragraph two of the findings of fact, the word "was" is inserted after the word "envelope." In the last line of paragraph three of the findings of fact, the word "was" is inserted after the word "and."

In line eleven of paragraph four of the findings of fact, the word "advised" is corrected to read "advise." In the next to the last line of paragraph six of the findings of fact, the word "type" is corrected to read "typed."

Neither the claimant nor the employer appeared for the Commission hearing scheduled for oral argument, however, both parties submitted written arguments in lieu of an appearance.

OPINION

The opinion of the Appeals Examiner with respect to the timeliness of the claimant's appeal from the Notice of Deputy's Determination is hereby adopted by the Commission.

Section 60.2-618(2) of the Code of Virginia provides for a disqualification if the Commission finds that a claimant was discharged due to misconduct connected 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.

The Commission has consistently held that an employee's deliberate failure to follow the reasonable instructions or directions of a supervisor, or to show reasonable respect for one in a position of authority constitutes misconduct connected with work. Seay v. One-Hour Valet, Commission Decision 3270-C (August 13, 1958);

Vines v. Committee of Judges System, Commission Decision 9661-C (September 7, 1977); Anderson v. Glass Marine, Inc., Commission Decision 13211-C (April 8, 1980). In the case of Guynn v. Kahn & Feldman, Inc., the Commission stated that insubordination, since it breeds discontent among employees and jeopardizes the harmony of labor-management relationships, thereby impeding industrial progress, it is sufficient to constitute misconduct connected with work.

The Commission agrees with the Appeals Examiner and concludes that the conduct exhibited by the claimant on March 21, 1996, toward the co-owner of the business, constituted insubordination, and was also misconduct connected with work. The claimant not only told the co-owner that when she and the other co-owner decided what they wanted in the report, perhaps they should come back and type it themselves, but she also argued over the content of the report for approximately ten minutes. This is sufficient to constitute a prima facie case of misconduct connected with work, and if the claimant is to avoid the statutory disqualification she must establish circumstances in mitigation.

The claimant has alleged that the Appeals Examiner ignored her evidence as to the events that occurred during the week beginning March 18, 1996, and that those events constituted provocation for her conduct. The Commission concludes that the circumstances of the prior week, are not sufficient provocation to constitute mitigating circumstances, and nothing in the employer's conduct either on March 21, 1996, or during the previous week would constitute provocation for her conduct. In addition, the Commission does not accept the claimant's contention that she meant the statement only as a joke. The evidence in the record is clear that the employer did not receive it as a joke, and there is no evidence in the record from which the Commission can conclude that based upon the manner in which the statement was made, the claimant was joking and was not serious. Furthermore, there is nothing to show that the claimant took any steps to ensure that the employer understood that she was joking, and that she was not serious about not completing the report as instructed. She merely hung up the phone when the owner did not respond immediately to the comment.

The claimant also contends that the Court of Appeals holding in the case of Kennedy's Piggly Wiggly Stores, Inc. v. Cooper, 14 Va. App. 701, 419 S.E.2d 278 (1992), is applicable here. In that case, the claimant directed profanity toward the chief executive officer of the company, and the court established certain criteria which must be considered in determining whether the claimant was guilty of misconduct. The holding in Kennedy does not stand for the proposition that the use of profanity, and the other cited criteria, must be involved before the Commission can find a claimant guilty of misconduct. Certainly, there are circumstances where an employee can direct comments toward a supervisor, even without the use of profanity, which would constitute a blatant disrespect for that

person's position and authority. In the opinion of the Commission, this is just such a case. Therefore, the Kennedy case is not controlling here.

The claimant also contended that the employer made false statements to the Commission about her employment status and therefore, its credibility should be adversely affected. First of all, that allegation is unfounded and not supported by the evidence. Secondly, the mere allegation cannot form the basis of a challenge to the employer's credibility. The Appeals Examiner considered the evidence in the case, as well as the demeanor of the witnesses who testified, and believed the employer's case in virtually every respect. The Commission and the courts have held that credibility determinations by an Appeals Examiner should be given deference and respect, and should not be set aside unless there is a clear basis in the record for doing so. Foster v. A & B Contract Service Company, Commission Decision 26249-C (February 14, 1986); accord, Goodyear Tire & Rubber Company v. Pierce, 5 Va. App. 374, 363 S.E.2d 433 (1987). After reviewing the record of this case, the Commission concludes that there is no clear basis for disregarding the Appeals Examiner's implicit credibility determination or her conclusion that the employer's evidence had greater probative value than the evidence offered by the claimant.

DECISION

The Appeals Examiner's decision is hereby affirmed.

The claimant's appeal from the Deputy's determination was correctly held to be timely filed.

The claimant is disqualified for benefits, effective April 14, 1996, with respect to her separation from the services of the Sealaw Group, because she was discharged due to misconduct connected with work.

This disqualification shall remain in effect for any week benefits are claimed until the claimant performs 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.

Willie C. Thompson, Jr.
Special Examiner