

COMMONWEALTH OF VIRGINIA
VIRGINIA EMPLOYMENT COMMISSION



MISCONDUCT: 485.45
Violation of company
rule: Intoxicants,
use of

DECISION OF COMMISSION

In the Matter of:

Ned N. Cary
[REDACTED]

Anheuser-Busch, Inc.
Williamsburg, Virginia

Date of Appeal
to Commission: July 20, 1992

Date of Hearing: September 14, 1992

Place: RICHMOND, VIRGINIA

Decision No.: 39246-C

Date of Mailing: October 1, 1992

Final Date to File Appeal
with Circuit Court: October 21, 1992

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This case comes before the Commission pursuant to a timely appeal by the claimant from Appeals Examiner's decision UI-9210563, mailed July 8, 1992.

APPEARANCES

Claimant, Attorney for Employer

ISSUE

Was the claimant discharged for 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 an appeal from a decision of the Appeals Examiner which affirmed a Deputy's determination disqualifying him for benefits, effective May 3, 1992, because he was discharged for misconduct connected with work.

The claimant was employed by Anheuser-Busch, Incorporated from May 30, 1980 through March 5, 1992, and from March 13, 1992 through

May 4, 1992, as a full-time maintenance technician, earning \$19.64 per hour.

The employer's work rules for employees are governed by a union contract between Anheuser-Busch and the Brewery and Soft Drink Workers Conference and International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. The claimant does not belong to either of the unions involved. However, pursuant to federal law, the union contract negotiated with the employer governs all employees working for the employer. The employer has a policy to maintain a drug-free workplace. Rules regarding drug testing are regulated by Article 45 of the contract with the union. Section C of Article 45 provides, in pertinent part:

Any employee who refuses to provide a urine specimen for testing or refuses to authorize the testing by signing a consent form shall be subject to immediate discharge.

Prior to conducting drug tests, the employer requires all employees to sign a consent form. The consent form permits the testing, release of test data to a designated Medical Review Officer, reporting of results to the employee relations manager, and acknowledges that the employee has received an explanation of the test procedures and chain of custody procedures. In early March, 1992, the claimant refused to sign the consent form. He was discharged from employment on March 5, 1992. He grieved this action to the union and was subsequently reinstated to work on March 13, 1992. In the reinstatement letter addressed by the employer to the union representative, the claimant was advised that he would be required to sign a drug testing consent form on May 4, 1992, when he had been rescheduled for drug testing.

The claimant worked from March 13, 1992 through May 4, 1992. On May 4, the claimant was requested to submit to drug testing and to sign the consent form. The claimant refused, on principle, to sign the consent form. He was discharged for refusing to sign the consent form.

The claimant was aware of the requirement that he sign the consent form. The claimant was also aware that he could be discharged for his failure to do so. The claimant disagrees with the employer's drug testing policy, but agreed to give a urine specimen under duress. However, the claimant refused to sign a consent form because he felt that signing said form would signify his concurrence with the duress he was under. The claimant is a Baptist minister and contends also that his religious faith "prohibits me from exhibiting my own personal assent to duress." (Commission Exhibit 7).

OPINION

As a preliminary matter, the Commission must comment upon the information supplied by the appellant in his letter of appeal, in which he was apparently seeking to submit additional evidence. In such cases, the Commission is guided by the following rule.

Regulation VR 300-01-4.3B of the Regulations and General Rules Affecting Unemployment Compensation provides:

Except as otherwise provided by this rule, all appeals to the Commission shall be decided on the basis of a review of the evidence in the record. The Commission, in its discretion, may direct the taking of additional evidence after giving written notice of such hearing to the parties, provided:

1. It is affirmatively shown that the additional evidence is material, and not merely cumulative, corroborative, or collateral; could not have been presented at the prior hearing through the exercise of due diligence; and it is likely to produce a different result at a new hearing; or
2. The record of proceedings before the appeals examiner is insufficient to enable the Commission to make proper, accurate, or complete findings of fact and conclusions of law.

The claimant has failed to show that the additional evidence he wishes to present could not have been presented at the Appeals Examiner's hearing through the exercise of due diligence. Therefore, to the extent that information in the claimant's appeal letter and affidavit represents new evidence, that information is not considered in rendering this decision.

Section 60.2-618(2) of the Code of Virginia provides a disqualification if it is found that a claimant was discharged for misconduct in connection with work.

This particular language was first interpreted by the Virginia Supreme Court in the case of Branch v. Virginia Employment Commission, 219 Va. 609, 249 S.E.2d 180 (1978). In that case, the Court held:

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 disqualification for misconduct is a serious matter which warrants careful consideration. The burden of proof is on the employer to prove by a preponderance of the evidence that the claimant was discharged for reasons which would constitute misconduct connected with his work. Dimes v. Merchants Delivery Moving and Storage, Inc., Commission Decision 24524-C (May 10, 1985); Brady v. Human Resource Institute of Norfolk, Inc., 231 Va. 28, 340 S.E.2d 797 (1986).

In this case, the employer had established a reasonable rule with regard to both drug testing and the signing of a consent form prior to the testing procedure. The rule established by the employer was not unilateral, but had been agreed to in a contract negotiated by the union which represented the majority of the employees at the employer location. The specific rule which required the signing of a consent form is found by the Commission to have been reasonable. The purpose of the form was to assure that the employer had full consent of the claimant with regard to all of the administrative procedures associated with the drug testing process, and to assure that the claimant was fully informed as well.

Here, the claimant had already been discharged and reinstated two months prior to the discharge in the instant case. His discharge had been as a result of the very issue over which he was discharged here, namely, refusal to sign the consent form. The evidence is undisputed that the claimant was aware of the company requirement and that he was aware of the consequences of refusing to comply with the requirement.

The claimant's basis for refusing to sign the consent form related to his disagreement with the drug testing program. Although he was willing to give a urine specimen, the claimant said he would do so only under duress in order to maintain his employment. However, he felt that signing a consent form would amount to his agreement with being forced to give a urine specimen. The Commission disagrees with the claimant's reasoning. The consent form merely provides an administrative record to protect

the employer regarding the procedures to be followed subsequent to the giving of the urine specimen. It also includes an acknowledgment that the claimant has been fully informed regarding the procedure. However, the form does not indicate that an employee agrees with the testing or the purpose of the testing. Therefore, the claimant's grounds for refusing to sign the claim form are not based in fact and do not represent a mitigating circumstance that would justify his failure to sign the form.

Therefore, the Commission concludes that the employer has proven, by a preponderance of the evidence, that the claimant was discharged for misconduct in connection with his work. The claimant has not shown mitigating circumstances for his failure to sign.

DECISION

The decision of the Appeals Examiner is hereby affirmed.

The claimant is disqualified, effective May 3, 1992, for any week benefits are claimed until he has performed services for an employer during thirty days, whether or not such days are consecutive, and subsequently becomes totally or partially separated from such employment, because the claimant was discharged for misconduct connected with work.


David J. Latham
Special Examiner

**COMMISSION DECISION AFFIRMED BY THE VIRGINIA COURT OF APPEALS
IN AN UNPUBLISHED DECISION DATED SEPTEMBER 28, 1993.**

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)