



DECISION OF COMMISSION

In the Matter of:

Marvin A. Coan, Jr.
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Consolidated Cigar Corporation
Secaucus, New Jersey

Date of Appeal
to Commission: December 22, 1987
Date of Hearing: January 21, 1988
Place: RICHMOND, VIRGINIA
Decision No.: 29542-C
Date of Mailing: February 5, 1988
Final Date to File Appeal
with Circuit Court: February 25, 1988

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This is a matter before the Commission on appeal by the claimant from the Decision of Appeals Examiner (UI-8710683), mailed December 10, 1987.

APPEARANCES

Attorney for the claimant

ISSUE

Was the claimant discharged for misconduct connected with his work as provided in Section 60.2-618.2 of the Code of Virginia (1950), as amended?

FINDINGS OF FACT

On December 22, 1987 the claimant filed a timely appeal from the Appeals Examiner's decision that was issued on December 10, 1987. That decision held that the claimant was disqualified from receiving benefits, effective October 18, 1987. The basis for the disqualification was the Appeals Examiner's finding that the claimant had been discharged for misconduct connected with his work.

Prior to filing his claim for benefits the claimant last worked for Consolidated Cigar Corporation, of Secaucus, New Jersey. The claimant worked as a regional sales manager from June of 1986, through September 25, 1987. The claimant was assigned to a region which included half of the state of Virginia. The claimant's duties and responsibilities required extensive driving. He was paid a salary of \$20,300 annually.

In addition to his salary, the employer furnished the claimant a car. The employer arranged for automobiles through a company known as Automotive Rentals, Incorporated. The employer was the actual lessee of the car. The user of the vehicle, in this case the claimant, was named as the attorney in fact for Automotive Rentals, Incorporated. The scope of the power of attorney was limited to authorizing the claimant to obtain license plates or tags in its name, and to sign any necessary papers in connection with that activity. The car was provided to the claimant for business use. The claimant was permitted to use the car for personal business. He paid to the employer the sum of \$20 per month as reimbursement for the personal use of the car.

While working for the company, the claimant had not received any warnings, counsellings, or disciplinary suspensions for violating any company rules or policies. In fact, he had received an award for outstanding performance.

On Saturday, September 19, 1987 the claimant had been out drinking with a friend. Shortly after leaving the establishment where they had been drinking, the claimant noticed a police vehicle following him. The police car had its blue lights on. The claimant pulled off into a vacant store lot and the police followed him. Thereafter, the claimant pulled back on the road, but lost control of the vehicle. As a result of losing control of the car, it spun completely around. The claimant saw two cars approaching him and attempted to drive between them. Unfortunately, his attempt was not successful and he struck both cars. The claimant did not stop until he was approximately a half mile further down the road. It was then he discovered that he had hit two police vehicles. In addition to damaging those vehicles, damage was also done to the company car. The claimant was charged with three misdemeanor offenses as well as attempted murder of a police officer. He appeared in court on these charges on December 15, 1987. At that time, the Commonwealth's Attorney requested that the court grant a motion nolle prosequi. The Commonwealth's Attorney's motion was granted and the prosecution against the claimant was discontinued.

The claimant reported the accident to the employer. As a result of the accident the claimant was discharged. After the accident the claimant came to the realization that he did have a serious drinking problem. He began receiving psychiatric help and counselling and began regularly attending Alcoholics Anonymous meetings. The claimant's driving record reflects only one prior traffic conviction. That conviction was in 1983 for reckless driving.

Written notice of the Appeals Examiner's hearing was mailed to the claimant and the employer on December 2, 1987. The notice set up the date, time and place of the hearing together with the issues that the Appeals Examiner would consider. At the time and place designated for the hearing the claimant and his attorney appeared. However, the employer neither appeared for the hearing nor responded to the hearing notice.

OPINION

Section 60.2-618.2 of the Code of Virginia provides a disqualification if the Commission finds that a claimant was discharged for misconduct connected with his work.

This language was interpreted by the Virginia Supreme Court in the case of Branch v. Virginia Employment Commission, et al, 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 or 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 establish by a preponderance of the evidence that the claimant was discharged for reasons which would constitute misconduct connected with his work. See, Dimes v. Merchants Delivery Moving & Storage, Inc., Commission Decision 24524-C (May 10, 1985); Brady v. Human Resources Institute of Norfolk, Inc., 231 Va. 28, 340 S.E.2d 797 (1986).

In the present case, the claimant was fired for the destruction and misuse of company property, to-wit, the car leased from Automotive Rentals, Incorporated. There is no evidence in the record to establish that the claimant's actions violated any company rule or regulation. Accordingly, the disqualification for misconduct would apply only if his actions that night were "...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." Branch, at 612. Of particular concern to the Commission is the issue of whether the claimant's conduct was connected with his work. If it is not, then no disqualification may be imposed.

The Commission has had a number of opportunities to interpret the meaning of the phrase "misconduct connected with his work." For example, in Brady v. U.S. Military District of Washington, Commission Decision UCFE-479 (August 1, 1979), the claimant lost her security clearance as a result of a felony conviction. The loss of her security clearance prevented her from performing the duties for which she had been hired and she was discharged by the employer. Misconduct was held to be sufficiently connected with her work for the actions to fall within the purview of the misconduct statute. In Brady, the Commission held:

We also feel that it is not necessary for the act to have occurred within the scope of employment. This is just too stringent a standard. A worker has a duty to conduct himself and his affairs in a manner not detrimental to his employment....When an individual knowingly commits an act of misconduct that has a substantive detrimental effect on his employer and as a result loses his job, such an individual will not be able to rely on the benefits of unemployment insurance.

In the case of Ashe v. Veeco, Commission Decision 16700-C (July 1, 1982), the claimant was fired after being convicted of a felony. There, the Commission held that there was reasonable nexus between the claimant's job duties and the act of misconduct, which warranted a finding that the misconduct was connected with his work. Furthermore, in the case of Goad v. Rental Uniform Service of Bedford, Inc., Commission Decision 19292-C (September 7, 1982), the Commission held that a claimant who was discharged following his conviction for driving under the influence which resulted in the revocation of his drivers license constituted

misconduct connected with his work. The Commission stated:

In the present case, the claimant was discharged by the employer after his license to operate a motor vehicle in the Commonwealth of Virginia was revoked due to the claimant's conviction for driving under the influence of intoxicants. Even though the act of misconduct did not occur within the scope of the claimant's employment, it was inextricably interwoven with his job since his job duties involved traveling a route and operating a motor vehicle.

The holdings in Brady, Ashe and Goad provide meaningful guidance in determining when an act of misconduct is connected with work. An act of misconduct which occurred outside the scope of employment or while the claimant was off duty will be connected with his work if (a) there is a reasonable nexus between the claimant's job duties and the misconduct; or (b) if the misconduct had a substantive detrimental impact on the employer; or (c) if the misconduct constituted a violation of any duty or obligation owed to the employer, whether expressed or implied. (Underscoring supplied)

When the claimant's conduct is tested by these criteria, it is readily apparent that it was connected with the work. The claimant's job involved extensive driving throughout the state of Virginia, which may have been a factor in the employer's decision to provide him with a company car. Since the employer could potentially be subjected to civil liability for an employee's negligent or reckless use of a vehicle, the company has the right to expect employees at all times to operate company vehicles properly and with due respect for the safety and property of other drivers and pedestrians. Even in the absence of a written policy, this duty is implicit whenever an employee is permitted to use a company vehicle. Therefore, since the claimant's conduct bore a reasonable nexus to his job and since it violated a duty he owed to the employer, it was conduct that was connected with his work.

The claimant's actions clearly constitute misconduct connected with his work. Notwithstanding the decision of the Commonwealth's Attorney to discontinue criminal prosecutions against the claimant, his conduct on the night in question was reckless and manifested a disregard for the property and safety of others. Even when the claimant's testimony is viewed in a light most favorable to him, it

establishes that he attempted to elude police officers, that he left the scene of an accident, and that he operated a company vehicle in a manner which jeopardized the safety of other drivers. Accordingly, the Commission is satisfied that the claimant was guilty of misconduct connected with his work.

Next, the Commission must consider whether there are any mitigating factors which would preclude imposing the disqualification provided under the provisions of Section 60.2-618.2 of the Code of Virginia. At the hearing before the Appeals Examiner, certain evidence was presented and argued with respect to mitigation. First, the claimant does have a reasonably good driving record, with only one conviction on it. That was a reckless driving conviction in 1983. Second, the claimant had never been previously warned or counselled concerning the violation of any company rules, policies or procedures. Third, on the night in question the claimant was impaired from drinking alcoholic beverages and he has subsequently sought professional help for his alcohol dependency. However, the Commission is not persuaded that these factors mitigate the claimant's conduct. The claimant's good driving record and his satisfactory employment record might be persuasive if the claimant's conduct had not jeopardized the lives, safety and property of other people. Also, while the claimant may have been under the influence or impaired by alcohol on the night in question, self-imposed intoxication is no defense to the type of reckless conduct manifested here. While it is certainly commendable that the claimant has attempted to rehabilitate himself by obtaining professional help, that is not a sufficient reason for withholding the disqualification provided by law.

Therefore, for the reasons stated herein, the Commission finds that the claimant was guilty of misconduct connected with his work which was not mitigated by the factors and circumstances discussed above. Accordingly, the disqualification provided in Section 60.2-618.2 of the Code of Virginia should be imposed.

DECISION

The Decision of Appeals Examiner is hereby affirmed.

It is held that the claimant is disqualified from receiving benefits, effective October 18, 1987, for having been discharged for misconduct connected with his work. This disqualification shall remain in effect for any week benefits are claimed until he performs services for an employer during thirty days, whether or not such days are consecutive, and subsequently becomes totally or partially separated from such employment.



M. Coleman Walsh, Jr.
Special Examiner