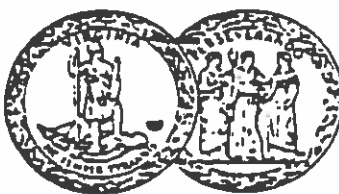


COMMONWEALTH OF VIRGINIA  
VIRGINIA EMPLOYMENT COMMISSION



DECISION OF COMMISSION

In the Matter of:

Cedric L. Thomas

S. S. No. [REDACTED]

Steven J. Chavis  
Newport News, Virginia

Date of Appeal  
to Commission: January 16, 1991

Date of Review: January 24, 1991

Place: RICHMOND, VIRGINIA

Decision No.: 35174-C

Date of Mailing: February 11, 1991

Final Date to File Appeal  
with Circuit Court: March 3, 1991

---oOo---

This case is before the Commission on appeal by the employer from Appeals Examiner's Decision UI-9014472, mailed January 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 employer filed a timely appeal from the Appeals Examiner's decision which reversed an earlier Deputy's determination and found the claimant to be qualified for unemployment compensation, effective November 11, 1990, with respect to his separation from the employer's services.

Prior to filing his claim, the claimant last worked for the S. J. Chavis and Daughters Trucking Company of Newport News, Virginia between April 26, 1990 and November 8, 1990. His position was that of a dump truck driver.

On the claimant's last day of work, he had just dumped a load at a construction site where the employer was doing work. After "slapping the bed" a couple of times to loosen any dirt which might remain in the truck, the claimant proceeded to leave the site without activating the switch to lower the dump body. Apparently his attention was caught by a school bus loading up ahead, and he then proceeded to follow it for approximately a quarter of a mile along the roadway. A flagman standing at the entrance of the construction site ran after him in an attempt to catch his attention; however, he was unsuccessful. The raised dump body of the claimant's truck hit an overhead power line, snapping a power pole and turning the truck over. This caused the loss of electricity to an entire neighborhood with total damages between \$30,000 and \$60,000. The claimant was then suspended until the results of a drug screen test came back. Even though they were negative, he was terminated due to the accident which the employer felt should never have occurred.

At the Appeals Examiner's hearing, the claimant admitted that the employer representative was correct in stating that the dump truck rides differently when the bed is up than when it is down. He also recalled that it was necessary to hit the switch to lower the bed before the overturned truck could be lifted back into an upright position. Although he was charged with reckless driving as a result of the accident, he was convicted of the lesser charge of improper driving once he got to court.

#### 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.

In the case of Poland v. T.D.L.C., Inc., Commission Decision 30841-C (November 8, 1988), the claimant was discharged from her job as a student truck driver. After she came upon a construction site and was confronted with one lane of traffic being closed up ahead, a car in the lane to be closed suddenly swerved in front of her. She slammed on the brakes and skidded into the median strip causing \$21,000 in damage to the truck she was driving. She paid a fine for driving too fast for conditions as a result of the accident. Despite this, the Commission found that she had committed only one act of simple negligence which was insufficient to constitute misconduct in connection with her work. In that case, it was noted that a single act of gross negligence might be found to constitute such misconduct.

In the case of Courtney v. Pollard Delivery Service, Inc., Commission 4728-C (May 9, 1968), the claimant was a truck driver who was discharged after he allowed the front end of the trailer he was uncoupling to hit the ground due to his failure to lower its front wheels. In that case, it was specifically held:

The Commission has also previously held that one act of negligence may, in specific cases, constitute misconduct. We are of the opinion that the act of the claimant, an experienced truck driver, is such a specific case. Uncoupling a trailer prior to putting the front wheels down was contrary to standard procedure. The failure of the claimant to follow such procedure constitutes a willful disregard of the employer's interests.

The case at hand involves facts more similar to those in Courtney than those in Poland. The accident which occurred was not the lapse of judgment which could be attributed to a student driver with little experience; rather it involved a failure to follow a known standard procedure. This claimant testified that the procedure was to push the button and allow the dump body to come down as he was leaving the construction site so that it would be lowered by the time he got on the roadway. Not only did he fail to do this, but he failed to notice that his truck was not riding normally or that the flagman was running along behind him trying to get him to stop. While it is certainly understandable that he would be concerned about the school bus up ahead, this did not excuse his gross negligence in not insuring that his vehicle was ready to travel on the public roadway. Inasmuch as the accident which followed was reasonably foreseeable in light of the circumstances and resulted in a conviction for improper driving, the Commission concludes that the claimant's negligence was of such a high degree as to manifest a willful disregard of the employer's interests. He has failed to establish mitigating circumstances for it, and he should be disqualified for benefits under this section of the Code.

DECISION

The decision of the Appeals Examiner is hereby reversed.

It is held that the claimant is disqualified for unemployment compensation, effective November 11, 1990, 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 he subsequently becomes totally or partially separated from such employment, because he 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 he 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)