

COMMONWEALTH OF VIRGINIA  
VIRGINIA EMPLOYMENT COMMISSION



DECISION OF COMMISSION

In the Matter of:

Linda Thomas  
[REDACTED]

Family Fashions by Avon, Inc.  
Hampton, Virginia

Date of Appeal  
to Commission:

June 13, 1988

Date of Hearing: August 23, 1988

Place: RICHMOND, VIRGINIA

Decision No.: UI-030524C

Date of Mailing: August 26, 1988

Final Date to File Appeal  
with Circuit Court: September 15, 1988

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This is a matter before the Commission as a result of an appeal filed by the claimant from the Decision of Appeals Examiner (UI-8711652), mailed June 3, 1988.

APPEARANCES

Attorney for Claimant, Employer Representative

ISSUE

Was the claimant discharged for misconduct connected with her 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 benefits effective November 8, 1988, for having been discharged from employment due to misconduct in connection with work.

The findings of fact made by the Appeals Examiner have been reviewed and are hereby adopted by the Commission with the exception of the final sentence in the next to the last paragraph and with certain additions and corrections to be discussed in the following paragraph.

The statement made by the claimant to the undercover agent concerning the other employee was that she was "stealing her ass off." This particular employee had bragged to the claimant on occasion about stealing items from the employer (transcript page 80). Despite this, the claimant did not tell the security investigator about the two individuals who had specifically told her that they had stolen items because she had not actually seen them take anything. She denied knowledge of any employee who might have taken anything from the employer even after being informed that her job was in jeopardy.

#### 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, et al, 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.

As appropriately cited by the Appeals Examiner, the case of Hudnall v. Jets Services, Inc., Decision UI-73-43 (February 28, 1973); affirmed by Commission Decision 5920-C (March 27, 1973) held:

Generally, there are certain duties or implied obligations which arise out of the relationship between the employer and worker. An employee, by virtue of his relationship to his employer, is obligated to deal with him in good faith. A material breach of this obligation constitutes misconduct if it is prejudicial to the employer's interest.

The Commission agrees with the argument made on behalf of the claimant that she was under no obligation to disclose rumors to the security investigator. The Commission also agrees that the failure of the security investigator to appear at the hearing even after attempts were made to subpoena her, means that the evidence in the form of her report cannot be given as great a weight as contradictory testimony given by the claimant at the hearing. Despite this, this case does not turn on a credibility determination between the investigator's report and the claimant's testimony. The statement that the claimant made concerning the other employee "stealing her ass off" was confirmed by a witness and the claimant herself admitted that this employee had bragged about stealing items. Similarly, the security investigator who the claimant thought to be an employee directly told her that she had taken watches. Both of these items of information were not rumors; rather they represented admissions made in her presence. When the claimant was specifically asked at the security interview if she had any knowledge of employees possibly involved in theft she was then obligated to deal in good faith with her employer by reporting these admissions. Her failure to do so represented a deliberate and willful violation of the duties and obligations she owed her employer so as to constitute a prima facie case of misconduct in connection with her work. The burden then shifts to her to show mitigating circumstances for her conduct if she is to avoid a disqualification under this section of the Code.

The employer cited the investigator's possible fear of violence or retribution as contributing to her failure to appear at the hearing in response to a subpoena. Had the claimant advanced a convincing similar argument that she had been threatened if she disclosed the information, she might well have shown mitigating circumstances for the conduct which brought about her discharge. Instead, she simply made the erroneous contention that since she did not actually see the two employees who had admitted to her that they had stolen items take anything, this amounted to mere "rumors" which she was under no obligation to report. As noted previously, she did have firsthand information

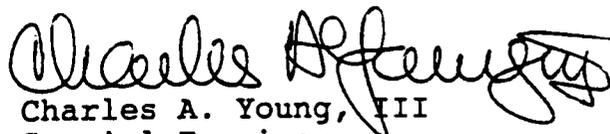
which she willfully chose to keep hidden even when asked specific questions designed to elicit it. It is concluded that the claimant has failed to show mitigating circumstances and her separation was properly found to be due to reasons constituting misconduct in connection with her work. Therefore, she should remain disqualified for benefits under this section of the Code.

### DECISION

The Decision of Appeals Examiner is hereby affirmed.

It is held that the claimant is disqualified for unemployment compensation effective November 8, 1987, for any week or weeks benefits are claimed until she has performed services for an employer during thirty 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)