

COMMONWEALTH OF VIRGINIA
VIRGINIA EMPLOYMENT COMMISSION



DECISION OF COMMISSION

In the Matter of:

Danny Busler
████████████████████

Rapoca Energy Company
Bristol, Virginia

Date of Appeal

to Commission: June 25, 1990

Date of Hearing: August 9, 1990

Place: RICHMOND, VIRGINIA

Decision No.: 34000-C

Date of Mailing: December 14, 1990

Final Date to File Appeal

with Circuit Court: January 3, 1991

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This case comes before the Commission on appeal by the claimant from a Decision of Appeals Examiner (UI-9003197), mailed June 21, 1990.

APPEARANCES

Attorney for 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 June 25, 1990, the claimant filed a timely appeal from the Appeals Examiner's decision which disqualified him from receiving benefits, effective January 28, 1990. That disqualification was based upon the Appeals Examiner's conclusion that the claimant had been discharged for misconduct in connection with his work.

Prior to filing his claim for benefits, the claimant was last employed by Rapoca Energy Company of Bristol, Virginia. He worked

for this company from October 1, 1977 through November 29, 1989. He performed services as a control room operator at the company's Blackwatch Preparation Plant. He was a full-time employee and was scheduled for the second shift which ran from 3:00 p.m. to 11:00 p.m.

The company does not have a handbook or set of rules that are provided to the employees. During 1985, the company's controller had a memorandum distributed to company employees regarding telephone usage. This memorandum was not dated; however, it was posted on a bulletin board and distributed to all employees with their paychecks. This memorandum states as follows:

After a recent review of the phone billing for our locations, it appears that usage is excessive in some areas.

I am soliciting your help in decreasing our phone costs, and increasing the efficiency of placing calls to our locations.

1. Business calls should be handled in a businesslike manner. Be to the point, and avoid elaboration! Also, please avoid putting calls on hold while you talk to someone else. This time costs money while it accomplishes nothing. PLEASE use WATTS (sic) lines whenever possible.
2. Personal calls, incoming and outgoing, should be limited to emergencies ONLY!!
3. When placing calls to another Rapoca division, check around to see if anyone else needs to talk to someone at that location. This will free up lines and speed up the placement of calls from division to division.

Please make a consious (sic) effort to practice these simple phone usage rules. They will make a difference in cost and efficiency.

Thank you for your cooperation.

The claimant was unsure if he had received this memorandum or if it was the actual memorandum that was posted. He did remember that a memorandum had been issued requesting that personal or long distance telephone calls be kept as brief as possible in order to reduce costs (Tr. 56-57). The claimant had interpreted the

company's admonition to keep personal phone calls brief to mean that such calls should be limited to five or ten minutes (Tr. 88).

The company discovered that a number of lengthy telephone calls were coming from one of its phones at the Blackwatch Preparation Plant. Therefore, the company initiated an investigation of its telephone bills for the period of December 2, 1988 through November 1, 1989. As a result of that investigation, the employer discovered that 25 long distance telephone calls had been placed from the plant control room to the home of Mr. Fred Busler, the claimant's father, in Kingsport, Tennessee. Another 19 long distance telephone calls were placed from the control room to the residence of Mr. Bob Salyer, the claimant's father-in-law, who also resided in Kingsport, Tennessee. The claimant admitted that he had made these long distance telephone calls from the control room to his parents and in-laws while he was on duty. Thirteen of these telephone calls lasted 10 minutes or less. Eleven of the telephone calls ranged from 20 to 29 minutes, and six telephone calls lasted from 32 to 60 minutes. These 44 telephone calls lasted a total of 783 minutes and the phone company billed the employer \$124.48 for them.

On or about November 29, 1989, the claimant was confronted with the results of the company's investigation. He offered to reimburse the company for the costs of the telephone calls; however, the company rejected his offer and elected to terminate him at that time.

The claimant made these telephone calls because he and his wife were having some financial difficulty. Their telephone had been disconnected and they were unable to call their parents from their home. Also, during the past year work had been slow and the claimant would sometimes miss two or three days of work each week. Consequently, it was difficult for him to meet the family's expenses, so he would call his parents or his wife's parents to request financial assistance (Tr. 59). On one occasion, the electricity at the claimant's home was cut off because he did not have enough money to pay the utility bill. He called his father to get the money to have the electricity restored. On other occasions, he would contact his parents or his in-laws if he needed money to buy prescription drugs for his children when they were sick. The majority of the 44 long distance phone calls were for situations such as this (Tr. 60).

The claimant conceded that some of these situations developed during the morning; however, he would wait until he reported to work to call his relatives rather than place a phone call from a telephone booth. The record is silent regarding why the claimant made these telephone calls from the employer's business rather than calling his relatives collect. The claimant was asked if there was

any reason that some of the phone calls were rather lengthy. The claimant provided the following explanation:

Uh, well, no. Not, I guess not really a reason. Uh, a lot of the calls when I would call, uh, I stated before when I called, you know, and stuff and used the phone, I'd be looking at the board, you know, that I was supposed to have watched and when something, you know, would happen or I had to, you know, uh, if an emergency would arrive or something, I would have to, you know, either hang up or, I'd say, well hold on just a minute, you know, and then I'd do that, basically, but, uh (Tr. 95)

The claimant had made personal phone calls from work throughout the 12 years of his employment. At least five or six other individuals who worked on his shift would come into the control room and use the phone to make personal calls. Prior to his layoff in 1984, the claimant's father-in-law had called his wife in Kingsport, Tennessee two or three times each week using a company telephone. The record is silent on whether he had permission to do so or if he reimbursed the company for these calls. Similarly, the employer's in-house counsel, who testified at the Appeals Examiner's hearing, admitted that he had made some personal, long distance phone calls. The record does not reveal how many phone calls there were, whether he had permission to make them, and whether he reimbursed the company for them.

Although the claimant had made personal phone calls throughout his tenure with the company, the record does not establish that he made personal long distance phone calls prior to his last year of employment when work got slow at the plant. The claimant had not received any warnings from the company regarding his use of the company telephones. When the company investigated this matter, the telephone bills for the period of December, 1988 until November 1, 1989, were analyzed. That investigation did not reveal the same pattern or extent of personal, long distance telephone calls by any other employee.

At the Appeals Examiner's hearing, the employer was represented by its in-house counsel. Over the objection of the claimant's original trial counsel, the employer's attorney was permitted by the Appeals Examiner to participate in the hearing as an advocate and as the sole witness for the employer. In permitting the employer's attorney to testify, the Appeals Examiner considered him to be an "authorized representative" pursuant to the provisions of Regulation VR 300-01-4.2F of the Rules and Regulations Affecting Unemployment Compensation. That regulation provides, in pertinent part, as follows:

At any hearing before an Appeals Examiner, an interested party may appear in person, by counsel, or by an authorized representative. Persons in these categories will be permitted to attend the entire hearing.

OPINION

The Commission must first address the claimant's argument that a reversal of the disqualification is required because of the Appeals Examiner's decision to permit the employer's attorney to serve in the dual roles of advocate and witness. The Appeals Examiner's reliance on the regulation cited in the findings of fact was misplaced and her decision to permit the employer's attorney to serve in dual roles was erroneous.

An attorney engaged in the active practice of law who has been employed by a client to represent him before the Virginia Employment Commission appears in that proceeding as counsel of record, and not as an authorized representative. The same is true for a company's in-house counsel. The phrase "authorized representative" found in Regulation VR 300-01-4.2F does not include attorneys who are actively engaged in the practice of law or attorneys who are employed by companies as their in-house counsel.

Canon 5 of the Code of Professional Responsibility requires an attorney to exercise independent professional judgement on behalf of a client. DR 5-101(B) specifically requires that:

A lawyer shall not accept employment in contemplated or pending litigation if he knows or it is obvious that he or a lawyer in his firm ought to be called as a witness, except that he may undertake the employment and he or a lawyer in his firm may testify:

- (1) If the testimony will relate solely to an uncontested matter or to a matter of formality and there is no reason to believe that substantial evidence will be offered in opposition to the testimony.
- (2) If the testimony will relate solely to the nature and value of legal services rendered in the case by the lawyer or his firm to the client.
- (3) As to any matter, if refusal would work a substantial hardship on the client because of the distinctive value of the

lawyer or his firm as counsel in the particular case.

DR 5-102(A) further provides that:

If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that he or a lawyer in his firm ought to be called as a witness on behalf of his client, he shall withdraw from the conduct of the trial and his firm, if any, shall not continue representation in the trial, except that he may continue the representation and he or a lawyer in his firm may testify in the circumstances enumerated in DR 5-101(B)(1) through (3).

In the case of Connell v. Clairol, Inc., 440 F. Supp. 17, 19 (N.D. Ga. 1977) the court addressed the question of the judiciary's role in supervising attorneys' conduct:

The policy behind DR 5-102(A) protects not only the interests of the parties, but also the integrity of the entire judicial system, and it, like any other ethical principle contained in the Code, deserves the utmost judicial deference and will be overridden only for the most compelling reasons.

The Virginia courts have not been remiss in addressing this subject. The courts of the Commonwealth have consistently expressed their grave reservations and displeasure whenever counsel for a party has appeared as a material witness for his client. Inman v. Inman, 158 Va. 597, 164 S.E. 383 (1932); Macon v. Commonwealth, 187 Va. 363, 46 S.E.2d 396 (1948); Durette v. Commonwealth, 201 Va. 735, 113 S.E.2d 842 (1960). In a more recent case, the Virginia Supreme Court stated:

The circumstances are rare indeed where any lawyer may properly testify in a case in which he is participating as an advocate. Decisions of this kind must be left to the sound discretion of the trial court. Bennett v. Commonwealth, 236 Va. 448, 374 S.E.2d 303 (1988).

Even though administrative hearings before the Virginia Employment Commission are quasi-judicial proceedings, the Commission's statutory hearing officers have the inherent authority to supervise the conduct of attorneys who appear to represent their clients' interests. The principles enunciated in the Connell case, as well as the line of Virginia cases cited above, are certainly

applicable to the statutory hearings conducted by the Virginia Employment Commission. When the facts of the present case are viewed in light of these principles, it is apparent that the employer's attorney should not have been permitted to proceed in the dual roles of advocate and witness since none of the exceptions to the advocate-witness rule have been satisfied.

Nevertheless, the Commission is compelled to conclude that this was nothing more than harmless error. First, it must be remembered that the advocate-witness rule is a rule of ethics, and not a rule of the law of evidence. The fact that testimony is unethical should not make it incompetent unless some established rule of evidence is involved. Thus, even though counsel for the employer may have exposed himself to potential disciplinary action, that does not per se render his testimony inadmissible. Friend, Law of Evidence in Virginia, (3rd ed.), Section 62, pp. 171-72. This proposition is further underscored by the disciplinary rules set out in Canon 5 of the Code of Professional Responsibility. The disciplinary rules do not forbid an attorney from testifying. Instead, the attorney is obligated to withdraw from representation if he must testify in a case where he is appearing as counsel for one of the parties, unless one of the exceptions contained in DR 5-101(B) is met.

Second, there has been no showing that the claimant was denied some fundamental right of due process of law by virtue of the employer's attorney testifying. In fact, the testimony of the claimant and the employer's attorney is remarkably similar on virtually every material issue concerning the circumstances surrounding his dismissal. The only significant point where the testimony of the claimant and the employer's attorney was different concerned the two memoranda circulated by the employer regarding telephone usage. The attorney testified that the memorandum recited in the findings of fact was posted on a bulletin board and distributed to the employees with their paychecks. The claimant did not deny that testimony, but simply stated that he did not recall that particular memorandum. Instead, he testified about a memorandum that, based on his testimony, was consistent with the philosophy expressed in the other memorandum, i.e. encouraging employees to be more efficient and cost-conscious in their use of the telephones. Therefore, in the absence of any showing that the claimant was denied due process of law, neither a reversal of the disqualification nor a remand for further evidentiary proceedings is warranted by the fact that the employer's attorney was permitted to testify.

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 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).

The employer has conceded that no specific rules or regulations had been promulgated and distributed to its employees. Although the two memoranda regarding telephone usage could conceivably be viewed as a company rule, the absence of any specific provision for discipline in the event of a violation constrains the Commission from making such a finding. Nevertheless, the two written pronouncements regarding telephone usage do establish a legitimate business interest that the company's employees are obligated to respect. The employer has a legitimate business interest in ensuring that its telephones are used for business purposes and that any personal use of the telephones by company employees is strictly limited to bona fide emergencies. By insisting that any personal phone calls be kept brief and limited to emergency situations, the employer was putting all employees on notice of their duties and obligations with respect to using the company's telephones.

The evidence establishes that there were two memoranda that addressed this issue. The first memorandum is recited verbatim in the findings of fact. Although the claimant did not recall seeing that memorandum, the Commission is satisfied that it was posted in the plant and that he did receive it with his paycheck. Accordingly, the claimant had at least constructive knowledge of

the employer's expectations. Furthermore, by his own admission, the claimant did receive another memorandum which informed employees that personal phone calls and long distance phone calls should be kept brief in order to minimize the cost of such calls to the company. Thus, the claimant knew that any personal phone calls must be limited to emergency situations, and should be as brief as possible. The claimant's understanding of this latter requirement was that a personal phone call should not be more than 10 minutes in duration.

When the claimant's conduct is judged by the standards established by the two memoranda, it is apparent that the employer has established a prima facie case of work-connected misconduct. During the 11-month period that preceded his termination, the claimant made 44 personal long distance telephone calls to his relatives. The duration of those calls ranged from four minutes to one hour; however, 70 percent of those calls (31 out of 44) exceeded 10 minutes in duration. Additionally, a total of 17 personal long distance phone calls were more than 20 minutes in length. The company was billed \$124.48 for these phone calls and, during the 13 hours he was conducting personal business over the telephone, the employer was not receiving the benefit of an employee who was fully attentive and focused on his job duties.

The claimant's testimony underscores the willfulness of his conduct. He conceded that, although a number of the personal situations that prompted these phone calls occurred while he was off-duty, he waited until he was on the job to place these calls. He did not choose to place the calls from a telephone booth and the record is silent regarding why they could not have been made collect to his relatives. Finally, the claimant admitted that a majority of the phone calls were for circumstances that he deemed to be personal emergencies. This testimony confirms the fact that not all of the calls were for emergency situations as the company required. For all of these reasons, the Commission must conclude that a prima facie case of work-connected misconduct has been proven. Therefore, in order to avoid the disqualification provided by the statute, the claimant must prove mitigating circumstances for his actions.

The case of Virginia Employment Commission v. Gantt, 7 Va. App. 631, 376 S.E.2d 808 (1989), involved a claimant who was discharged for violating a particular company rule. Although that case involved a deliberate rule violation, the following analysis by the Virginia Court of Appeals on the concept of mitigating circumstances is particularly instructive.

Mitigating circumstances are likely to be those considerations which establish that the employee's actions were not in disregard of

those interests. Evidence of mitigation may appear in many forms which, singly or in combination, to some degree explain or justify the employee's conduct. Various factors to be considered may include: the importance of the business interest at risk; the nature and purpose of the rule; prior enforcement of the rule; good cause to justify the violation; and consistency with other rules. Therefore, in order to constitute misconduct, the total circumstances must be sufficient to find a deliberate act of the employee which disregards the employer's business interest. 7 Va. App. at 635.

The claimant's primary argument with respect to mitigation is that his actions were condoned by the employer. The Commission has recognized that condonation can mitigate a prima facie case of misconduct, Tyree v. White Tower Management Corp., Commission Decision 6762-C (May 1, 1975); Fisher v. Siegel's Supermarket, Commission Decision 22643-C (February 18, 1984); however, no condonation has been proven here. The claimant did testify that throughout his employment he had made personal phone calls; however, the gravamen of the employer's case is that he made personal long distance phone calls. The claimant has not shown that he had engaged in a practice of making personal long distance telephone calls throughout a substantial period of his employment. At most, the record establishes that these personal long distance phone calls began during the year prior to his dismissal. The claimant testified that during that last year work had gotten slow and, as a result, he felt compelled to call his relatives and seek financial assistance for his family.

At page 60 of the transcript from the Appeals Examiner's hearing, the following exchange occurred between the claimant and his original trial counsel:

- Q. Sir, are you, is it our (sic) testimony that the majority of the phone calls were related to family emergencies?
- A. The majority of 'em. I'm not saying they all wasn't, but the majority of 'em is.
- Q. And was it also your understanding that based on prior practice that RAPOCA had no problems with that?
- A. As far as I know they didn't.

This passage, while arguably supporting the claimant's condonation argument, is not sufficient to do so. If read in the light most favorable to the claimant, this testimony would suggest that, based upon past company practice, the claimant did not believe his employer objected to his making long distance personal phone calls when they were related to family emergencies. Even if that were the case, it does not justify the personal long distance phone calls the claimant made that were not related to family emergencies. Furthermore, this passage must be considered in light of the claimant's admission that he had received a memorandum that put him on notice that personal phone calls and long distance phone calls were to be kept brief. No mitigation has been shown for the 31 personal long distance phone calls that exceeded 10 minutes in duration. Consequently, the Commission must find that the claimant has not carried his burden of proving that the employer had condoned his excessive use of company telephones to make personal long distance calls.

Counsel for the claimant also contended that there were other employees who made personal phone calls that were not disciplined. The claimant testified that five or six workers on his shift used the telephone in the control room to make personal calls; however, there is no evidence in the record to establish that, like the claimant's, these calls were long distance and excessive in length. Furthermore, the fact that the claimant's father-in-law and the company's in-house counsel made personal long distance phone calls is not sufficient to show mitigation. The record is silent regarding whether the claimant's father-in-law had permission to call home and if he reimbursed the company for the calls. Similarly, there is no evidence to establish if the company's in-house counsel made excessive long distance calls, did not have permission to make them or did not reimburse the company for them. Because of this, the claimant has not shown that their conduct was comparable to his own. Therefore, their actions cannot be relied upon as mitigation for his conduct.

Accordingly, the Commission concludes that the claimant was discharged for work-connected misconduct for which no mitigation has been proven. Consequently, the disqualification provided by the statute must be imposed.

DECISION

The decision of the Appeals Examiner is hereby affirmed. The claimant is disqualified from receiving benefits, effective January 28, 1990, because he was 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 he subsequently becomes totally or partially separated from such employment.

M. Coleman Walsh, Jr.
M. Coleman Walsh, Jr.
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)