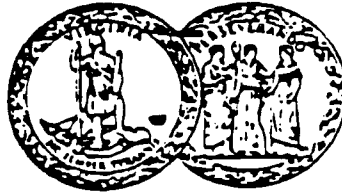


COMMONWEALTH OF VIRGINIA
VIRGINIA EMPLOYMENT COMMISSION



DECISION OF COMMISSION

In the Matter of:

Thomas J. Breagy
████████████████████

Automation Research Systems
Limited
Alexandria, Virginia

Date of Appeal
to Commission: January 17, 1991

Date of Review: February 1, 1991

Place: RICHMOND, VIRGINIA

Decision No.: 35210-C

Date of Mailing: March 1, 1991

Final Date to File Appeal
with Circuit Court: March 21, 1991

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This case is before the Commission on appeal by the employer from Appeals Examiner's decision UI-9008128, mailed December 27, 1990.

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 May 20, 1990, with respect to her separation from the employer's services.

Prior to filing his claim, the claimant last worked for Automation Research Systems, Limited of Alexandria, Virginia, between December 21, 1987 and May 18, 1990. His position was that of a security specialist.

The employer works in close cooperation with the U. S. Department of State with respect to providing security for the personnel of that agency, particularly when traveling to and from overseas assignments. In his job, the claimant had been overseas on business for the employer

and he maintained frequent telephone contact with Department of State employees in the Middle East.

At the time he was hired, the claimant went through the employer's orientation which included covering the sexual harassment policy. It provides in pertinent part:

Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when the following occurs:

- C. Such conduct has the purpose or effect of unreasonably interfering with an individual's performance; or creating an intimidating, hostile, or offensive working environment. While such conduct is sometimes difficult to assess, ARS will look at the record and circumstances as a whole to determine whether alleged conduct amounts to sexual harassment. Sexual harassment as defined in the preceding passage will not be tolerated on ARS premises or away from ARS premises during the conduct of official ARS business. . . .

Any employee of ARS who feels that he/she is being subjected to sexual harassment should submit a complaint to the director of human resources, who will be responsible for investigating sexual harassment complaints. The director of human resources will conduct an investigation of the complaint and submit a report to the president of ARS through the corporate counsel. The president of ARS will then decide whether the sexual harassment complaint is valid. Any ARS employee found guilty of sexual harassment will be subject to disciplinary action in accordance with ARS progressive disciplinary procedures. . . .

The employer's progressive disciplinary procedures provide that normally, sexual harassment is grounds for a three to five-day suspension for the first offense. It then goes on to provide in pertinent part:

Although ARS believes in helping its employees improve themselves, there are several offenses that the company finds inexcusable. These are grounds for immediate termination. The offenses are as follows:

- f. Committing sexual harassment when considered to be grossly intimidating and/or hostile conduct;

During the course of his employment, the claimant had occasion to work with and observe the work product of a particular female coworker. It was his opinion that she did not produce or care to produce work up to the standards he set for himself. When he brought what he considered to be errors in her work to her attention, she seemed to be quick to take offense and, as a result, their working relationship was strained. In fact, he made it a point of making sure that he was assigned to work in an entirely different part of the building because he foresaw problems which might result in them being "at each other's throats".

Due to some shifts in personnel assignments, the claimant found himself moved to the same office in the building where this female coworker was stationed. At the end of the first day, he made the remark to her that "this is the first day that we haven't had a tiff." The next day was May 15, 1990. The claimant came to work early because he had to make telephone calls to individuals stationed in the Middle East and, due to the time difference, he had to do it early to catch them before they left work for the day. He was on the telephone to a Department of State employee in Jordan when the female coworker walked into the office to begin her work. He had just been telling the individual on the other end of the line that the work had been reorganized and the coworker would be taking over project management responsibilities. At this point, he told the individual on the telephone:

Jeannette will be taking over responsibility for your area. She's in the office right now. In fact, we're having intercourse even as we speak.

The coworker called out to him in protest and he went on to state:

She'll be stroking you from now on.

Once the claimant realized how upset the coworker was at his comments, he attempted to apologize, to no avail. She pursued a formal complaint under the sexual harassment policy. Two days later, the claimant was sent a letter from the company president in which it was noted that his conduct was considered to be grossly intimidating; therefore, his services were terminated.

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.

Due to the liability which would attach in the event that an employee could establish injury through being sexually harassed on the job, employer rules prohibiting such conduct are reasonably designed to protect a legitimate business interest. Even one act of sexual harassment may constitute misconduct in connection with work. Baker v. Babcock & Wilcox Company, ___ Va. App. ___, ___ S.E.2d ___, Record No. 0099-90-3 (December 18, 1990).

Here, what the claimant said to his female coworker so as to bring about his termination did meet the employer's definition of constituting sexual harassment. This amounts to a prima facie showing that a reasonable company rule was violated. The only issue left to consider is whether the claimant has shown mitigating circumstances for his conduct so as to avoid the imposition of a disqualification under this section of the Code. Under the employer's rules, this means that the claimant only has to show that what he said did not constitute such aggravated sexual harassment as would justify his discharge.

The claimant in the Baker case cited previously committed blatant sexual harassment by exposing himself to a female coworker. The claimant in the case at hand simply made comments which he attempted to pass off as a joke. For a number of reasons, the Commission does not find the "joke" defense to be convincing.

The claimant admitted that he had previous problems with this particular coworker which revolved around his feeling that she could not produce work up to his standards. Because of their inability to get along, he had attempted to be physically separated from her at work. It then seems incredible that he would make such a comment as he did without expecting her to be quite offended. To make matters worse, he made his comment while he was on the telephone to a State Department employee overseas who was going to have to work with this individual in the future. Any reasonable person should have been able

to see that this would only enhance the degree of embarrassment and humiliation she must have felt. Through his remarks, the claimant was doing a pretty good job of publicly destroying his coworker's credibility which he already held in low esteem. Rather than mitigating circumstances, the Commission actually finds that his comments were particularly aggravated so as to make his discharge due to misconduct and impose a disqualification under this section of the Code.

DECISION

The Decision of Appeals Examiner is hereby reversed.

It is held that the claimant is disqualified for unemployment compensation effective May 20, 1990, for any week or weeks benefits are claimed until he has performed services for an employer during thirty days, whether or not such days are consecutive, and he has subsequently become 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)