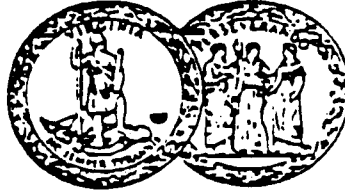


COMMONWEALTH OF VIRGINIA  
VIRGINIA EMPLOYMENT COMMISSION



DECISION OF COMMISSION

In the Matter of:

Patricia A. Bishop  
████████████████████

Crown Central Petroleum Corp.  
Chadd's Ford, Pennsylvania

Date of Appeal  
to Commission: May 10, 1991

Date of Review: June 13, 1991

Place: RICHMOND, VIRGINIA

Decision No.: 35866-C

Date of Mailing: June 24, 1991

Final Date to File Appeal  
with Circuit Court: July 14, 1991

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This case is before the Commission on appeal by the claimant from Appeals Examiner's decision UI-9103530, mailed May 3, 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 claimant filed a timely appeal from the Appeals Examiner's decision which affirmed an earlier Deputy's determination and disqualified her for unemployment compensation, effective January 20, 1991, for having been discharged from employment due to misconduct in connection with work.

Prior to filing her claim, the claimant last worked for the Crown Central Petroleum Corporation of Chadd's Ford, Pennsylvania, between September 14, 1989 and January 20, 1991. Her position was that of a clerk in one of the employer's self-service gas stations and convenience stores located in Portsmouth, Virginia.

The store where the claimant worked sells beer and wine under a license issued by the Virginia Department of Alcoholic Beverage Control (ABC). All clerks, including the claimant, were instructed as to what ABC regulations apply to the sale of beer and wine from the premises. In addition to the minimum age requirement for purchasing alcoholic beverages, the claimant was made aware that Virginia ABC regulations prohibit the sale of wine or beer between the hours of midnight and 6:00 a.m.

The operating rules in the store where the claimant worked provided for the doors to be closed to the public at 11:00 p.m. for security purposes. Customers could buy gas and purchase convenience store items all night by making payment at the walk-up window through a sliding drawer. Only store items small enough to fit in the drawer could be purchased after the door was locked, and the rules specifically prohibit the sale of alcoholic beverages in this manner.

The company rules also prohibit employees from buying alcoholic beverages while on duty. They are allowed to buy them while off duty so long as they comply with all applicable rules and regulations for the purchase. Thus, when the claimant worked a shift from 3:00 p.m. to 11:00 p.m., she could buy beer or wine immediately after work before midnight. Nevertheless, shortly before her separation, her hours of work were changed so that she would come in an hour later and get off after midnight.

The claimant worked this shift on Friday, January 18, 1991. She got off at approximately 12:30 a.m. on Saturday, January 19, and left the store after being relieved by the night shift cashier. Approximately 15 minutes later, she returned, still in her company uniform, and was admitted to the premises. She told the cashier that she wished to purchase some beer and asked if it would be alright to give her the money then, but have it put into the cash register after 6:00 a.m. The clerk agreed and placed a sixpack of beer in a bag for her to walk out with. She did not ring up the transaction at the time and the record is silent as to whether she ever did so the next morning after six o'clock.

The next morning, the store manager, as is her custom, played back the videotape recorded by the store's security camera at a high rate of speed while she was going over the paperwork from the previous shifts. When she observed the claimant coming back on the premises after the end of her shift, she slowed down the tape and saw that it recorded her receiving the beer from the night shift clerk after it was bagged and then leaving the premises with it after midnight. After the claimant was called in and admitted her part in the transaction, she was terminated. The night shift clerk received no discipline and was still working for the employer at the time of the Appeals Examiner's hearing.

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.

The Commission agrees with the Appeals Examiner that the claimant's argument that any misconduct she may have committed was not connected with her work because she was a customer and not an employee at the time of the transaction, must fail. Employees do not cease being employees when they are off duty, and they are still obligated to conduct themselves in accordance with applicable rules while on the employer's premises. In the case of Self v. ABEX Corporation, Commission Decision 8283-C (August 11, 1976), the claimant, while on temporary layoff, came to the plant where he had worked and got into an argument with another employee. He refused a supervisor's instruction to leave and then became physically disruptive as he was being escorted from the premises. The Commission held that his subsequent discharge was due to misconduct in connection with his work.

A similar situation occurred here. While on the premises of her employer, wearing her employee uniform, the claimant deliberately and willfully violated Virginia ABC regulations, thereby endangering the employer's license to sell alcoholic beverages. It is concluded that the employer has carried the initial burden of showing that her subsequent discharge was due to a prima facie case of misconduct so as to place upon her the burden of showing mitigating circumstances if she is to avoid a disqualification under this section of the Code.

In the case of VEC v. Gantt, 7 Va. App. 631, 376 S.E.2d 808 (1989); aff'd en banc 9 Va. App. 225, 383 S.E.2d 271 (1989), the Virginia Court of Appeals discussed those factors which might constitute mitigating circumstances. This was important to that case because, at the same

time she committed the rule violation which led to her termination, that claimant's subordinate employees also violated the rule but were not terminated. The court rejected the contention that her discharge was due to selective enforcement. The Commission and the Court of Appeals both found that the claimant's management position carried with it greater responsibilities than those pertaining to her subordinates. Whereas all were expected to abide by the rule in question, the claimant was called upon to enforce it as well. Thus, her choice to violate the rule along with her subordinates, was rendered more egregious and deserving of stricter punishment.

Since deciding Gantt, the Virginia Court of Appeals has had another occasion to address the question of mitigating circumstances. In the recent case of Robinson v. Hurst Harvey Oil, Inc., \_\_\_ Va. App. \_\_\_, \_\_\_ S.E.2d \_\_\_, Record No. 1942-89-2 (1991), the claimant was a store clerk who admitted that she had violated her employer's rules by consuming food from the store without paying for it. Instead of discharging her immediately, the employer waited several months until a replacement could be found for her before doing so. The Court affirmed the Commission's holding that the delay acted as a mitigating circumstance so as to avoid the imposition of a disqualification under this section of the Code stating:

Various factors may be considered in determining mitigation, including the degree of enforcement of the employer's rule and the delay in enforcing the rules. (emphasis added)

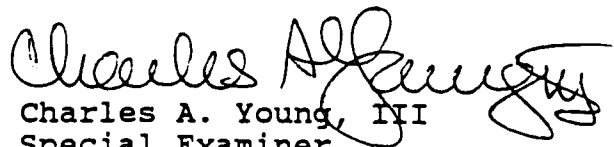
The Commission in this case must deal with the claimant's argument that she was the victim of selective enforcement or disparate treatment. After carefully reviewing the evidence in this case, the Commission must agree that she was. Although she initiated the transaction and bought the beer in violation of the ABC regulations, it was the night shift clerk who more directly violated those regulations by selling it to her. Nothing in the record indicates that this individual was powerless to prevent what occurred. Her willingness to participate in the transaction is demonstrated by the fact that she bagged the beer for the claimant and agreed to accept payment to be deposited later in the cash register. This active participation in violating the employer's rules and Virginia ABC regulations on her part made her at least as culpable as the claimant, if not more so. The employer's choice to discharge the claimant while retaining the services of the clerk has not been justified in the same manner as the retention of the subordinates was in the Gantt case. What the Commission is left with is a situation in which the claimant was discharged selectively and arbitrarily while her equally or more guilty coworker was retained. It is concluded that these represent mitigating circumstances sufficient to avoid the imposition of a disqualification under this section of the Code.

DECISION

The Decision of Appeals Examiner is hereby reversed.

The claimant is qualified for unemployment compensation effective January 20, 1991, with respect to her separation from the services of Crown Central Petroleum Corporation.

The Deputy is instructed to carefully determine the claimant's eligibility for benefits during any weeks for which they may have been claimed.

  
Charles A. Young, III  
Special Examiner