

COMMONWEALTH OF VIRGINIA
VIRGINIA EMPLOYMENT COMMISSION



DECISION OF COMMISSION

In the Matter of:

Daniel E. Simmons
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Numanco
Mineral, Virginia

Date of Appeal
to Commission: May 30, 1991
Date of Review: July 1, 1991
Place: RICHMOND, VIRGINIA
Decision No.: 35999-C
Date of Mailing: July 11, 1991
Final Date to File Appeal
with Circuit Court: July 31, 1991

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This case is before the Commission on appeal by the claimant from Appeals Examiner's Decision UI-9106793, mailed May 23, 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 him for unemployment compensation, effective March 17, 1991, 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 certain additions to be discussed in the following paragraph.

The claimant performed his duties in the laundry where clothes were washed and checked for radioactive contamination. While on their breaks or at lunchtime, employees read magazines or other non-job-related materials. No employee ever directly complained to the

claimant concerning "preaching" or "touching." In addition to quoting from the Bible on the last incident, the claimant had attempted to initiate a conversation concerning homosexuality, which the female co-worker rebuffed.

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.

Although the argument has been advanced on behalf of the claimant that the Appeals Examiner incorrectly went beyond the Deputy's findings in imposing a disqualification, the Commission must reject this assertion. While it is correct that the Deputy made no mention of the touching of female co-workers as being grounds for the claimant's termination, both the claimant and the employer had stated from the outset that this was a contributing factor (Commission Exhibit #3). Under Commission regulations, information given to a Deputy is not taken under oath, nor is any verbatim record of the proceedings retained. Such does not occur until the parties have a hearing before an Appeals Examiner, at which time the record is created for the Commission to review in the event that there is a further appeal. It would have represented error on the Appeals Examiner's part not to have inquired into the allegations that the claimant physically touched female co-workers.

If this employer had discharged the claimant simply for reading the Bible during his break or at lunchtime, while allowing other employees to read non-job-related materials without punishment, it would be a simple matter to find that his discharge was not due to misconduct. Nevertheless, based primarily on the claimant's own testimony, it is apparent that his separation did not occur but for

the facts that his reading and quotation from the Bible during working hours, as well as his habit of touching female employees when he spoke to them, were found to be disruptive influences. This is something which the employer had a right to regulate whether or not any employees may ever have complained to the claimant personally.

A male employee who attempts to engage a female co-worker in a discussion of homosexuality and who then places his hands upon her during their conversation could well be viewed as having committed sexual harassment. Considering the extreme risk of liability which could be imposed upon any employer who did not act swiftly and decisively to deal with such conduct, the Commission must conclude that, whether or not there are any specific rules prohibiting sexual harassment, it represents a violation of the standards of behavior expected of any employee by their employer.


This claimant was warned twice that his conduct was considered to be disruptive and that it should cease. Only ten days after the second warning he again engaged in the proscribed conduct. The Commission concludes that his subsequent discharge has been shown to have been due to a prima facie case of misconduct so as to shift the burden to him to show mitigating circumstances if he is to avoid a disqualification under this section of the Code.

That the claimant may not have meant anything by his conduct is not sufficient to mitigate it, due to its nature. A reasonable person knows or should know that what he did, even if done innocently, could very easily be misconstrued as an act of sexual harassment. Considering the warnings he had previously received, the Commission must conclude that the claimant deliberately and willfully violated the standards of behavior expected of him as an employee, for which he has failed to show mitigating circumstances. Thus, he should remain disqualified for benefits under this section of the Code.

DECISION

The decision of the Appeals Examiner is hereby affirmed.

The claimant is disqualified for unemployment compensation effective March 17, 1991, for any week or weeks benefits are claimed until he has performed services for an employer during 30 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.


Charles A. Young, III
Special Examiner