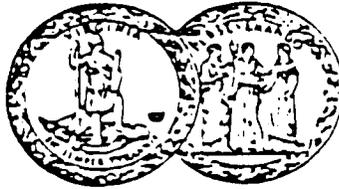


COMMONWEALTH OF VIRGINIA
VIRGINIA EMPLOYMENT COMMISSION



DECISION OF COMMISSION

In the Matter of:

Asrate Girma
████████████████████

News Emporium Inc., of Virginia
Ashburn, Virginia

Date of Appeal
to Commission: April 23, 1993
Date of Review: June 7, 1993
Place: RICHMOND, VIRGINIA
Decision No.: 42083-C
Date of Mailing: June 7, 1993
Final Date to File Appeal
with Circuit Court: June 27, 1993

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This case is before the Commission on appeal by the employer from Appeals Examiner's decision UI-9304684, mailed April 2, 1993.

ISSUE

Was the claimant discharged for 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 qualified the claimant for unemployment compensation, effective January 17, 1993, with respect to her separation from the employer's services.

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

The phrase "\$1" in the first sentence of the fourth paragraph is amended to read "one dollar bills." The word "place" in the next sentence is amended to read "placed."

The employer operates ten separate kiosks or newsstands at Washington National Airport. No documentation was introduced by the employer to indicate that the claimant was the person on duty at the particular kiosk where the video camera was placed on November 24, 1992. The claimant was found not guilty of criminal charges stemming from alleged similar videotaped incidents occurring on November 12, 1992. The videotape which was viewed by all parties and the Appeals Examiner at the hearing was not introduced into the record as an exhibit.

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 this employer conceded that the claimant had not been discharged for any violation of the specific rules regarding cash handling procedures, if it could be shown that she took money from the cash register, this would constitute a deliberate and willful violation of the standards of behavior expected of her as an employee whether or not there were any specific rules prohibiting theft. This is because such activity would amount to a deliberate and willful violation of the duty of loyalty which every employee owes to his or her employer. Hudnall v. Jet Services, Inc., Decision UI-73-43 (February 28, 1973), aff'd, Commission Decision 5920-C (March 27, 1973).

Although the videotape which was viewed by the Appeals Examiner and the participants in the hearing should have been introduced into the record as an exhibit, the failure to do so represented only harmless error. This is because the actions which occurred on that tape were described in detail. Furthermore, it was conceded that, due to the position of the camera being directly overhead, a full facial view of

the cashier could not be obtained. If there were a particular point anywhere on that tape where the cashier looked up, the burden would have been upon the employer representative to have marked its position so as to be able to insist that that portion of the tape be played. Inasmuch as the Commission is only reviewing the case and has not had an opportunity to see the claimant, deference must be given to the Appeals Examiner's assertion that the person she saw operating the cash register on the videotape could not be positively identified as the claimant.

Had the employer brought the videotape of the same November 12 transactions which had been played in court and resulted in the claimant being found not guilty, then any attempt to claim her fifth amendment privilege with respect to identifying herself before the Appeals Examiner would have been properly rejected. Although the Appeals Examiner could not have forced the claimant to identify herself, her failure to do so under such circumstances could have resulted in negative inferences being drawn from her refusal. Nevertheless, by bringing in a videotape of an entirely different incident occurring some 12 days later than those which formed the basis of the criminal prosecution, the claimant was being exposed to potential prosecution for an entirely separate offense. The Appeals Examiner made the proper ruling with respect to her assertion of privilege with respect to that incident, and no negative inferences may be drawn from her decision to decline to identify whether she was the cashier shown on the videotape.

Inasmuch as the employer representative admitted that there were ten separate kiosks or newsstands in operation at Washington National Airport, the mere fact that the claimant was shown as working during the shift on which the videotape was made merely means that there is a one in ten chance that the person shown on the tape as making a suspicious transaction was her. The Commission must conclude that a preponderance of the evidence has not established that she deliberately or willfully took money from her employer so as to bring about her subsequent discharge and impose a disqualification under this section of the Code.

DECISION

The decision of the Appeals Examiner is hereby affirmed.

The claimant is qualified for unemployment compensation, effective January 17, 1993, with respect to her separation from the services of News Emporium Inc., of Virginia.


Charles A. Young, III
Special Examiner