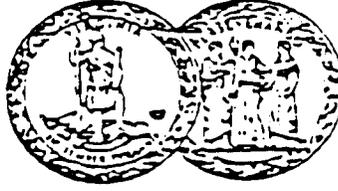


COMMONWEALTH OF VIRGINIA  
VIRGINIA EMPLOYMENT COMMISSION



DECISION OF COMMISSION

In the Matter of:

Lonnie J. Hurley  
[REDACTED]

William C. Wallace  
Grundy, Virginia

Date of Appeal  
to Commission: April 27, 1993  
Date of Hearing: July 7, 1993  
Place: RICHMOND, VIRGINIA  
Decision No.: 42091-C  
Date of Mailing: July 10, 1993  
Final Date to File Appeal  
with Circuit Court: July 30, 1993

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This case came before the Commission on appeal by the claimant from a Decision of Appeals Examiner (UI-9305977), mailed April 22, 1993.

APPEARANCES

None

ISSUE

Was the claimant discharged for misconduct connected with work as provided in Section 60.2-618(2) of the Code of Virginia (1950), as amended?

FINDINGS OF FACT

On April 27, 1993, the claimant filed a timely appeal from the Appeals Examiner's decision which disqualified him from receiving benefits, effective February 14, 1993. The basis for that disqualification was the Appeals Examiner's conclusion that the claimant had been discharged for misconduct connected with his work.

Prior to filing his claim for benefits, the claimant last worked for William C. Wallace, t/a Blue Goose Trucking, of Grundy, Virginia. He worked for this employer from March 3, 1992 through February 16, 1993, as a coal truck driver. Initially, the claimant worked from 7:00 a.m. until work was completed for the day, which could be as late as 9:00 or 10:00 p.m. At the end of his employment, the claimant usually worked from 7:00 a.m. until 3:00 p.m.

On February 17, 1993, the claimant was scheduled to report for work as 7:00 a.m.; however, he did not appear until 9:30 a.m. Employees had been requested by the employer to call in if they would be absent or late for work. The claimant did not call in on this occasion.

When the claimant reported for work, he spoke with the owner of the company. He explained to the owner that he had worked late the previous evening and that he had an ear ache. The owner asked the claimant if he had a doctor's excuse, and the claimant said no. At that point, the owner informed the claimant that he was being discharged.

The employer discharged the claimant because he was "not working." In particular, the employer asserted that the claimant had a problem reporting to work on time. The employer did not provide any specific dates when the claimant had been late on prior occasions. He was also unable to provide any dates when he had warned the claimant concerning his tardiness. At page 7 of the transcript, the Appeals Examiner ask the employer, "Had you had problems with him being late before?" The employer responded, "On occasions he has, but you know the hours we worked it's hard to say anything to anyone that way." At page 12 of the transcript, the following exchange occurred between the Appeals Examiner and the employer:

- Q. All right. All right, anything else you'd like to add to your testimony?
- A. The only other thing that I could add is, you know, he always worked both shifts and he asked if he could just work one shift, and I said, no problem and got another driver. And you know to help him out.
- Q. Okay, so the drivers work the whole shift, the whole twelve?
- A. Most of them work, just whatever, you know, from start time to cut-off time.

That's the reason bein' around an hour late I don't have to say nothin' to him because, you know, we're all human it's hard to, it's hard to do. (emphasis supplied)

#### OPINION

As a preliminary matter, the Commission must observe that, although neither party appeared for the Commission hearing, the claimant submitted a letter to be considered as his "argument." As a practical matter, the claimant's letter was not argument, but additional evidence that the Commission could not consider. Furthermore, contrary to the instruction that appeared on the reverse side of the hearing notice for the Commission hearing, the claimant did not certify on his argument that he had mailed a copy of it to the employer. For these reasons, the Commission cannot give any consideration to the claimant's written submission. Accordingly, the Commission's findings of fact and opinion are based solely upon the evidence submitted at the Appeals Examiner's hearing.

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).

In past cases, the Commission has held that chronic, unexcused tardiness constitutes misconduct in connection with work. For example, in the case of Newkirk v. Virginia National Bank, Commission Decision 5585-C (February 18, 1972), the Commission stated:

This Commission has consistently held that the conduct of an employee, which will be construed as misconduct within the meaning of the above section, is an act of willful disregard of the employer's interest, a deliberate violation of the employer's rules, a disregard of the standards of behavior which the employer has the right to expect of his employees, or substantial disregard of the employee's duties or obligations to the employer.

In accordance with this definition, persistent tardiness is generally considered misconduct. Only an isolated case of tardiness, which does not materially interfere with the employer's business does not fall within the above definition.

In this case, the evidence presented by the employer establishes only a single incident of tardiness. The employer did not identify any other occasions when the claimant had been tardy, and was unable to recall when or on how many occasions he warned the claimant about being late. As a practical matter, the passages of the transcript that are quoted in the findings of fact clearly suggest that, because of the lengthy hours his employees usually worked, the employer was lenient with the claimant and others who may have been late on occasion. Consequently, it does not appear that the claimant was on notice that his job might be in jeopardy.

In addition, the record does not show how the one isolated incident of tardiness that was proven materially interfered with the employer's business. Any time an employee is late reporting for work, the employer will undergo some degree of inconvenience in adjusting work schedules and assignments. Nevertheless, such an inconvenience does not equate to a material interference with the employer's business.

For these reasons, the Commission must conclude that the single incident of unexcused tardiness that was proven by the employer is insufficient to establish a prima facie case of misconduct in connection with work. Therefore, the claimant is qualified to receive benefits.

DECISION

The decision of the Appeals Examiner is hereby reversed. The claimant is qualified to receive benefits, effective February 14, 1993, based upon his separation from work with William C. Wallace, t/a Blue Goose Trucking.

*M. Coleman Walsh, Jr.*

M. Coleman Walsh, Jr.  
Special Examiner