

COMMONWEALTH OF VIRGINIA
VIRGINIA EMPLOYMENT COMMISSION



DECISION OF COMMISSION

In the Matter of:

Karen L. Vanwinkle
[REDACTED]

Ammars, Incorporated
Bluefield, Virginia

Date of Appeal
to Commission: September 8, 1995
Date of Hearing: February 21, 1996
Place: RICHMOND, VIRGINIA
Decision No.: 49590-C
Date of Mailing: July 25, 1996
Final Date to File Appeal
with Circuit Court: August 24, 1996

---o0o---

This case comes before the Commission on appeal by the claimant from Appeals Examiner's decision UI-9511506, mailed September 6, 1995.

APPEARANCES

Attorney for Claimant

ISSUE

Was the claimant discharged due to misconduct connected 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 held her disqualified for benefits, effective July 9, 1995. The basis for the disqualification was the Appeals Examiner's conclusion that the claimant was discharged due to misconduct connected with work.

The claimant was employed by Ammars, Inc., t/a Magic Mart Stores, from April 15, 1993, to July 7, 1995, as a cashier.

On July 6, 1995, while the claimant was performing services as a cashier, a customer came to her register with several items of merchandise, including a package of cigarette lighters. After ringing up the other merchandise, the claimant stated to the customer that she didn't believe she had rung up the cigarette lighters. The customer responded, "Well that's not my problem honey, I can't help if you can't do your job." "You need to take credit for your own dumb a--mistakes." The customer also used other expressions of profanity toward the claimant, and the claimant advised her that if she continued to curse her she would call for management. The customer continued to berate the claimant and she subsequently called a "code orange," which alerts management that a cashier is having a problem with a customer.

The assistant manager responded and asked the customer what the problem was. The customer accused the claimant of being rude to her and abusing her, and stated that the claimant did not deserve to be working with the public. While the customer and the assistant manager were talking, the claimant took money from the customer's hand to pay for the merchandise she had purchased, and bagged the merchandise. The claimant interrupted the customer and the assistant manager several times in an attempt to tell her version of what had occurred since she felt the customer was lying. She also told the manager on several occasions that he needed to remove the customer from the store.

The assistant manager then told the claimant to count down her till and to check out. As the assistant manager and the customer were walking away, the claimant told the customer that she was getting off in a few minutes and they could discuss this outside.

After the claimant completed her count, she left the store and went over to where the assistant manager and the customer were talking. She said that if the conversation concerns her maybe she should stay. The customer challenged the claimant to hit her and blew cigarette smoke in her face. When the customer threw her cigarette on the ground, the claimant stated "that's littering." The assistant manager then told the claimant to go home and as she was walking to her car, the customer called her a "piece of white trash" and a "slut." The claimant asked the assistant manager if they could discuss the matter in the office and he said they would discuss it tomorrow. As the claimant was walking to her car, she pointed to her buttocks and said to the customer, twice, "kiss this." The customer responded "it looks too much like your face."

After the claimant got in her car, she drove to where the assistant manager and the customer were standing and again stated that if they were going to continue to discuss the matter she needed to be in on it, and she requested a meeting. The assistant manager again told her they would discuss it tomorrow.

On July 7, 1995, the store manager discharged the claimant for insubordination, and because of the problems she had with the customer.

The claimant had received a warning on September 14, 1993, for photocopying a \$100 bill, and on May 29, 1995, the claimant was issued a verbal warning and advised to give departments more time for paging, to calm down her attitude and to act more professionally towards customers and other employees, and for leaving her register to get a price check.

Employer policy prohibits harassment of employees by outside vendors and customers, and also provides that insubordination such as using vile and threatening language and gestures, or refusal to perform the assigned job, is grounds for disciplinary action up to and including dismissal.

OPINION

Section 60.2-618(2) of the Code of Virginia provides for a disqualification if the Commission finds that a claimant was discharged due to misconduct connected with 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).

The claimant was discharged for insubordination and for her conduct toward a customer. The Commission has consistently held that insubordination, either the deliberate refusal to follow reasonable, legitimate instructions of a supervisor, or participating in conduct which shows a flagrant disrespect for a supervisor's position and authority, is sufficient to constitute misconduct connected with work. Ware v. Adesso Precision Machine Company, Commission Decision 31397-C

(July 25, 1989); Kennedy's Piggly Wiggly Stores, Inc., v. Cooper, 14 Va. App. 701, 419 S.E.2d 278 (1992).

The Commission agrees with the Appeals Examiner that the claimant's interruptions of the assistant manager's conversation with the customer in the store is not sufficient in and of itself to constitute insubordination. The claimant was frustrated because she believed the customer was lying when describing the incident, and she wanted the opportunity to present her version of the events. Furthermore, the claimant's statement to the assistant manager that she felt the customer should be removed from the store is also not sufficient to constitute insubordination.

Nevertheless, other events occurred with respect to the claimant which the Commission finds more troubling, and which the Commission believes are sufficient to constitute a prima facie case of misconduct. First of all, the claimant invited the customer outside to "discuss" the situation. The claimant has contended that this did not constitute a challenge to engage in a fight, however, such language can certainly be reasonably interpreted as such. Furthermore, at the time she made the statement, the assistant manager was attempting to handle and resolve the situation.

Secondly, once the assistant manager and the customer had left the store, the claimant again attempted to approach them and intervene in the conversation. Then, after being instructed to leave by her supervisor she made an obscene gesture and statement to the customer. At that point, the claimant still did not leave, but after entering her car, she drove over to where the assistant manager and the customer were talking, and again attempted to intervene in the discussion. This conduct on the part of the claimant was of such a nature as to manifest a willful disregard of the interests, duties and obligations she owed the employer. Therefore, if she is to avoid the statutory disqualification she must establish circumstances in mitigation.

In mitigation, the claimant cited the fact that the customer cursed her and berated her while in the checkout line, the customer provoked her while outside the store, and management did not adequately respond to her concerns. The Commission agrees with the argument put forth by the attorney for the employer that these reasons do not constitute mitigating circumstances. The claimant at all times had the option of removing herself from the situation and taking the assistant manager's advice that they discuss the situation the following day. In spite of this, the claimant persisted in injecting herself into the discussion, and engaging in inappropriate conduct toward the customer. Despite what the customer had said to the claimant, her conduct exacerbated the situation as opposed to assisting in remedying it.

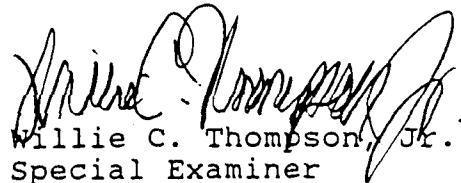
Based on the foregoing, the Commission concludes that the claimant was discharged for misconduct connected with work, and for which no mitigating circumstances have been proven. Accordingly, she was correctly held to be disqualified for benefits based upon her separation from the services of this employer.

DECISION

The Appeals Examiner's decision is hereby affirmed.

The claimant is disqualified for benefits, effective July 9, 1995, with respect to her separation from the services of Ammars, Inc., because she was discharged due to misconduct connected with work.

This disqualification shall remain in effect for any week benefits are claimed until the claimant has performed services for an employer during 30 days, whether or not such days are consecutive and she subsequently becomes totally or partially separated from such employment.


Willie C. Thompson, Jr.
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)