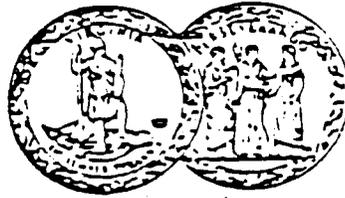


COMMONWEALTH OF VIRGINIA  
VIRGINIA EMPLOYMENT COMMISSION



DECISION OF COMMISSION

In the Matter of:

Dennis J. Warren  
████████████████████

Orion Associates, Inc.  
Virginia Beach, Virginia

INTERSTATE

Date of Appeal  
to Commission: September 8, 1992  
Date of Review: October 15, 1992  
Place: RICHMOND, VIRGINIA  
Decision No.: 39904-C  
Date of Mailing: November 19, 1992  
Final Date to File Appeal  
with Circuit Court: December 9, 1992

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This case is before the Commission on appeal by the claimant from Appeals Examiner's decision UI-9211358, mailed August 31, 1992.

ISSUES

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?

Was the claimant's separation the result of a law violation for which he was convicted and subsequently incarcerated as provided in Section 60.2-618(5) of the Code of Virginia (1950), as amended?

FINDINGS OF FACT

The claimant filed a timely appeal from the Appeals Examiner's decision which amended an earlier Deputy's determination and disqualified him for unemployment compensation, effective April 26, 1992. While the Deputy found that the disqualification should be imposed because he had been discharged due to misconduct in connection with work, the Appeals Examiner found that it should be imposed because he had been discharged as the result of a law violation for which he was subsequently convicted and incarcerated.

Prior to filing his claim, the claimant last worked for Orion Associates, Inc. of Virginia Beach, Virginia, on two separate occasions. The first apparently lasted from 1988 through 1991, and the second ran from March 1992 through May 5, 1992.

During the course of his second period of employment, the claimant was absent without calling in on March 8, March 29, April 5, April 16, and April 18, 1992. He was also absent for the two week period between April 20 and May 2, 1992. This final period of absenteeism is what ultimately caused him to be terminated.

The company president was contemplating discharging him for absenteeism before the last two weeks the claimant was out. With respect to that occasion, he had told his supervisor in advance that he had to go to court and he expected to pull some jail time. In fact, the claimant was convicted of the possession of controlled substances and was incarcerated for two weeks. As he had promised him, the foreman held his job; therefore the claimant returned to work on May 4 and May 5. Nevertheless, the corporate president found out about the situation, overruled the foreman, and terminated the claimant due to his conviction and incarceration which stemmed from an incident occurring before he had returned to work.

#### 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.

Section 60.2-618(5) of the Code of Virginia provides that a claimant shall be disqualified while imprisoned or confined in jail. Additionally, upon a conviction and after his release from prison or jail he shall be disqualified for benefits for any weeks he is separated from the work of his former employer if such separation arose as a result of the unlawful act.

Both of these sections of the Code apply only to separations caused when a claimant has been discharged by his employer. It is also apparent that there is some overlap in application. This is due to prior Commission decisions which have held that convictions for criminal acts occurring on the job or off the job under circumstances which could be found attributable to the work may constitute misconduct in connection with it under the provisions of Section 60.2-618(2) of the Code. Obviously, such a conviction may also result in incarceration with the result being that the claimant is absent from work for an extended period of time. Unexcused and unreported absences from work may also constitute misconduct in connection with it so as to result in a disqualification under the provision of Section 60.2-618(2) of the Code. Casey v. Cives Steel Company, Commission Decision 27111-C (June 30, 1986); Aff'd by the Frederick County Circuit Court, Chancery No. C-86-168 (April 27, 1987).

The Virginia General Assembly saw fit to add Section 60.2-618(5) to the Code to cover certain specific situations. Based upon the facts of the case at hand, it was proper for the Appeals Examiner to obtain a waiver of notice from the parties so as to consider whether that provision of the Code might be more appropriately applied.

Inasmuch as the president had not yet taken action to discharge the claimant prior to the time he was absent due to his conviction and incarceration, the fact that he was about to do so makes no difference. Additionally, it is apparent that any misconduct the claimant committed which resulted in his conviction was not connected with his work in any way. Finally, although he did miss two weeks from work, his foreman had been informed of the situation in advance. Because he was able to return to work for two more days after his incarceration, the fact that the company president did not choose to act to discharge him during his absence means that a disqualification under the provisions of Section 60.2-618(2) of the Code cannot be imposed.

The Commission must reach a different result with respect to the imposition of a disqualification under the provisions of Section 60.2-618(5) of the Code. The company president offered uncontradicted testimony that the culminating event which caused him to discharge the claimant was his absence which was the direct result of his conviction for an illegal act and his subsequent incarceration for two weeks. The fact that he was able to return to work for two days following that is not such a length of time as would amount to condonation and estop the employer from asserting this as being the reason for his separation. Therefore, he shall 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 April 26, 1992, 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 became separated from his employment due to his conviction for an illegal act and his subsequent incarceration.

  
Charles A. Young, III  
Special Examiner