

COMMONWEALTH OF VIRGINIA  
VIRGINIA EMPLOYMENT COMMISSION



DECISION OF COMMISSION

In the Matter of:

Samuel Foster  
[REDACTED]

A & B Contract Service Company  
Norfolk, VA 23509

Date of Appeal  
to Commission: December 4, 1985  
Date of Hearing: January 29, 1986  
Place: RICHMOND, VIRGINIA  
Decision No.: 26249-C  
Date of Mailing: February 14, 1986  
Final Date to File Appeal  
with Circuit Court: March 6, 1986

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This is a matter before the Commission on appeal by the employer from a Decision of Appeals Examiner (UI-85-8327), mailed November 19, 1985.

APPEARANCES

Attorney for Employer

ISSUE

Was the claimant discharged for misconduct connected with his work, as provided in Section 60.1-58(b) of the Code of Virginia (1950), as amended?

FINDINGS OF FACT

On December 4, 1985, the employer filed a timely appeal from a Decision of Appeals Examiner which held that the claimant was qualified to receive unemployment insurance benefits and not disqualified based upon the circumstances surrounding his separation from work.

Prior to filing his claim for benefits, the claimant last worked for A & B Contract Service Company of Norfolk, Virginia. The claimant worked for this company as an accountant from February 11, 1985, through August 30, 1985. The claimant was a full-time employee and was paid \$35,000 per year.

During the course of the claimant's employment, the president of the company became increasingly dissatisfied with several aspects of the claimant's job performance. First, there were occasions when the president could not get in touch with the claimant to obtain information. Also, the president felt that the claimant was not properly organizing the office and books and that she was having too much difficulty getting essential information that she needed with respect to the company's contracts.

The problem that the employer perceived with the claimant's availability stemmed from two factors. First, the claimant would not always arrive at work at 9:00 a.m.. Second, he would frequently take a lunch break of longer than 30 minutes, although the claimant had understood that he was entitled to a one-hour lunch break. Although the employer was concerned about these items and documented her concerns, she did not speak directly with the claimant concerning his tardiness or the length of his lunch break. The claimant was never told that his job was in jeopardy due to these items.

At the time the claimant was hired as an accountant, he was informed by the company president that the company's books were "a mess" and that much work needed to be done to straighten things out. The claimant discovered that the president's characterization of the status of the books was extremely accurate and he had to go back and reconstruct transactions and make corrections for several years in the past. In addition, the employer's bookkeeping system was a manual system and some information that would be requested had to be reconstructed from records and financial statements.

In late August, 1985, the company president discovered that two duplicate payments had been made. One of the payments was for uniform rentals and the other payment was a tax deposit. The claimant and the president met on August 30, 1985, and discussed these two situations at length. In addition, the company president articulated, in a general way, her concern about the way the claimant was performing his job and that she could not go on under the conditions that existed at that time. As a result of the employer's dissatisfaction with the claimant's job performance, he was discharged effective August 30, 1985.

#### OPINION

Section 60.1-58(b) of the Code of Virginia provides a disqualification if the Commission finds that a claimant was discharged for misconduct connected with his work.

In the case of Vernon Branch, Jr. v. Virginia Employment Commission and Virginia Chemical Company, 219 Va. 609, 249 S.E. 2d 180 (1978), the Virginia Supreme Court had its first opportunity to interpret this particular provision of the law. In that case, the court stated:

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 very serious and requires careful consideration. The burden of proof in such cases is upon the employer to produce such evidence as would establish that the claimant's discharge was for reasons which constitute work-related misconduct.

In the present case, the claimant was discharged by the employer because of the company president's dissatisfaction with his job performance. While the Commission does not take issue with the employer's decision to discharge the claimant, the evidence in the record is insufficient to support a finding that the claimant was guilty of work-related misconduct.

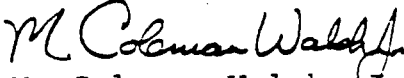
First, although the evidence is in dispute, the Appeals Examiner found that the claimant had not been warned about any tardiness or the length of his lunch breaks. The issue here is essentially one of credibility. The Appeals Examiner, after reviewing the evidence and observing the demeanor of the parties who testified, resolved that credibility question in favor of the claimant. The Appeals Examiner's credibility determination is entitled to respect and should not be reversed unless there is some clear basis for doing so. In this case, there is no basis which would warrant setting aside the Appeals Examiner's credibility determination. Accordingly, the Commission concurs with his finding that the claimant was not specifically warned about his tardiness or that his job was in jeopardy as a result of his failure to report for work on time or to come back earlier from his lunch breaks. In the absence of any warnings of that type, whether written or oral, the claimant's actions in that regard cannot be deemed to be misconduct. (Underscoring supplied)

The second basis for the claimant's discharge was the employer's general dissatisfaction with his job performance. The Commission has consistently held that inefficiency, poor job performance as a result of inability or incapacity, or errors in judgement or discretion do not constitute work-related misconduct. This is not to say that a claimant's job performance could never be the basis for imposing the disqualification for work-related misconduct. Certainly, an employee's continued, repeated neglect of his duties after warnings by his superiors would constitute misconduct in the absence of mitigating circumstances. However, in this case the record establishes only that the claimant did not satisfy the employer by providing information as quickly as she wanted it and by making a mistake in issuing two duplicate payments to creditors. In the absence of any other evidence, the Commission cannot conclude that the claimant's job performance rose to such a level of neglect as to constitute misconduct.

Therefore, after reviewing the evidence in the record and the arguments presented by the employer's attorney, the Commission is of the opinion that the claimant was discharged for reasons which do not constitute work-related misconduct. Accordingly, no disqualification may be imposed based upon his separation from work with this employer.

#### DECISION

The decision of the Appeals Examiner which held that the claimant is qualified to receive unemployment insurance benefits, effective September 1, 1985, is hereby affirmed.

  
M. Coleman Walsh, Jr.  
Special Examiner