

COMMONWEALTH OF VIRGINIA
VIRGINIA EMPLOYMENT COMMISSION

MISCONDUCT: 255.1
Insubordination:
Disobedience



DECISION OF COMMISSION

In the Matter of:

Peter B. Bianco
[REDACTED]

The Stambaugh-Thompson Company
Hermitage, Pennsylvania

Date of Appeal
to Commission: July 18, 1994

Date of Review: August 23, 1994

Place: RICHMOND, VIRGINIA

Decision No.: 46269-C

Date of Mailing: August 30, 1994

Final Date to File Appeal
with Circuit Court: September 19, 1994

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This case is before the Commission on appeal by the claimant from Appeals Examiner's decision UI-9410420, mailed July 12, 1994.

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 reversed an earlier Deputy's determination and disqualified him for unemployment compensation, effective May 8, 1994, for having been discharged due to misconduct in connection with work.

Prior to filing his claim, the claimant last worked for the Stambaugh-Thompson Company of Hermitage, Pennsylvania, between November 23, 1993, and April 15, 1994. His position was that of a stock person.

When the claimant was first hired by the employer, he was wearing a small gold hoop earring in his left ear. The person who hired him did not notice it, and the store manager did not notice it

until over a week or two later. Although there is no specific company-wide policy prohibiting male employees from wearing earrings, the store manager felt it was unprofessional and told the claimant that he would have to either remove it or lose his job. At that point, the claimant suggested that he wear a bandage over the earring to cover it up and this compromise proved acceptable to the manager.

Sometime after Christmas, some other male employees decided to get their ears pierced. Although the claimant continued to cover his earring with the bandage, the other employees did not, and some of the earrings they wore were more elaborate than the claimant's. On April 1, 1994, the store manager posted a bulletin stating that effective April 15, no earrings were to be worn by any male employees.

All of the other male employees who had their ears pierced decided to remove their earrings while at work. The claimant refused to do so on the grounds of principle, inasmuch as he had been hired with the earring in his ear and he thought that the bandage cover had been an acceptable compromise. He was then terminated for failing to adhere to the new policy.

The manager appeared at the Appeals Examiner's hearing. He did not indicate that he felt that the claimant's earring posed any safety or health hazards; rather he had gotten some comments concerning it from customers who noticed it when the claimant was helping them with their purchases. He did not indicate that these comments were particularly negative or that any customers stated that they would no longer patronize the store due to the claimant's earring. The reason he decided to ban all earrings on male employees in April was due to the fact that the other employees who got their ears pierced were wearing more elaborate earrings than the claimant was, and he thought the matter was "getting out of hand."

OPINION

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 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.

Insubordination, the failure to follow the reasonable instructions of or to show reasonable respect for one in a position of authority, has been consistently held to constitute misconduct in connection with work. Seay v. One-Hour Valet, Commission Decision 3270-C (August 13, 1958); Vines v. Committee of Judges Systems, Commission Decision 9661-C (September 7, 1977); Anderson v. Glass Marine, Incorporated, Commission Decision 13211-C (April 8, 1980).

The Commission has decided a number of cases involving grooming and dress codes. In Zimmerman v. Orkin Exterminating Company, Commission Decision 7784-C (May 18, 1976), the claimant was discharged after it was found that his long hair and beard violated the employer's dress code. The Commission cited cases from other jurisdictions to indicate that where such a code is adopted as a safety or sanitary measure, or where the claimant's personal appearance caused a detriment to the employer's business, the refusal of an employee to comply with a dress or grooming code could amount to misconduct. Nevertheless, where there is no safety or health hazard and where the claimant's dress or grooming does not result in any detriment to the employer's business, then the claimant would not be disqualified. The claimant in Zimmerman had been a sales representative who last had an extremely good month and exceeded his quota. There was no showing of any detrimental impact from his hair or beard on the employer's business; therefore, he was found to be qualified for benefits.

In the case of Blount v. U Totem of Virginia, Inc., Commission Decision 36896-C (December 20, 1991), the employer implemented a policy requiring all employees to wear smocks while on duty. The claimant decided he did not like the idea and quit instead. The Commission found that he had left work voluntarily without good cause. In the case of Locker v. Southern Retailers, Inc., Commission Decision 37015-C (December 13, 1991), a claimant was discharged from his job after refusing to wear the smock which a new company rule had mandated for all employees. This was found to have been an act of insubordination and misconduct in connection with his work.

Had this claimant been told he could either remove his earring or leave the premises, and had he chosen the latter course, the Commission would have been inclined to disqualify him under the provisions of Section 60.2-618(1) of the Code for having left work voluntarily without good cause under the doctrine enunciated in Ettinger v. Jackson-Meadows Contracting Co., Decision UI-81-11960 (December 3, 1981); aff'd, Commission Decision 17834-C (April 5,

1992); aff'd, Waynesboro City Circuit Court, Order Book 9 (November 15, 1982). This is because, unlike a rule which might have required him to shave his beard or cut his hair, the employer was not seeking to regulate his appearance while off the job. It would have been a simple matter for the claimant to remove his earring while at work and replace it afterwards, so the Commission would not have found such a requirement to represent a change in the terms or conditions of his employment so oppressive as to render it unsuitable and give rise to good cause for leaving. Nevertheless, the evidence in this case establishes that the claimant was not given a choice to remove his earring or leave; rather he was discharged.

Unlike a case involving a voluntary leaving of work, in which the burden for showing good cause rests upon the claimant, the employer must carry the burden of showing that a claimant was discharged due to misconduct. In order to do so, it must be shown that the claimant deliberately and willfully violated a rule reasonably designed to protect the employer's legitimate business interests or that his actions were of such a nature or so repetitive as to manifest a willful disregard of the standards of behavior expected of him as an employee.

The Commission must find that this employer has failed to carry this burden for a number of reasons. The first involves the fact that the claimant was hired while wearing his earring and nothing was said about it at the time. Inasmuch as no one noticed it for a couple of weeks, it is apparent that it did not have a particularly significant impact upon his overall appearance.

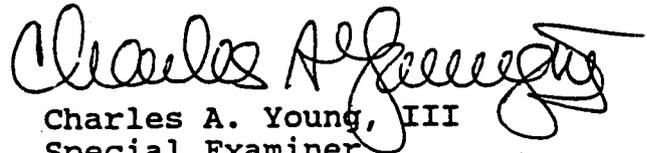
Even if it had not gone unnoticed, the wearing of the earring did not violate a company-wide dress code which was either in place or imposed after the claimant's date of hire. Instead, it was merely the store manager's personal reaction to the idea of male employees wearing earrings which led him to ban them. Additionally, he and the claimant had reached a compromise by which the earring could stay on if it was covered by a bandage, and the record fails to show that the claimant deliberately and willfully violated this agreement.

Finally, the employer has not shown that the prohibition against male employees wearing earrings was instituted as either a safety or sanitary measure or in response to negative complaints or comments from customers which were causing a loss of business. If the manager felt that the situation was getting out of hand with respect to the larger earrings being worn by other male employees, it would have been a simple matter to address those problems separately. Therefore, although it is apparent that the claimant did deliberately and willfully violate the manager's directive, it has not been shown to have been reasonably designed to protect a legitimate business interest. Accordingly, no disqualification under this section of the Code may be imposed.

DECISION

The decision of the Appeals Examiner is hereby reversed.

The claimant is qualified for unemployment compensation, effective May 8, 1994, with respect to his separation from the services of the Stambaugh-Thompson Company.


Charles A. Young, III
Special Examiner