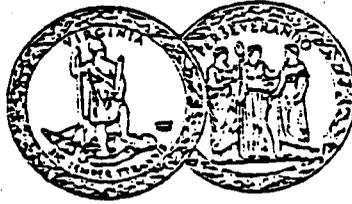


COMMONWEALTH OF VIRGINIA
VIRGINIA EMPLOYMENT COMMISSION



MISCONDUCT: 485.85.
Violation of Company Rule --
Store Purchases

DECISION OF COMMISSION

In the Matter of

April G. Fisher
[REDACTED]

Siegel's Supermarket
Richmond, Virginia

Date of Appeal
To Commission: December 15, 1983
Date of Hearing: February 9, 1984
Place: RICHMOND, VIRGINIA
Decision No.: 22643-C
Date of Decision: February 13, 1984
Date of Mailing: February 24, 1984
Final Date to File Appeal
with Circuit Court: March 15, 1984

This is a matter before the Commission on appeal by the employer from the decision of the Appeals Examiner (No. UI-83-10730), mailed November 25, 1983.

APPEARANCES

Employer Representative; Attorney for the Employer
Three Witnesses for the Employer; Claimant; Three
Witnesses for the Claimant

ISSUE

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

FINDINGS OF FACT

On December 15, 1983, the employer initiated a timely appeal from a decision of the Appeals Examiner which held that the claimant was not disqualified from receiving

unemployment insurance benefits based upon the circumstances surrounding her separation from work.

Immediately prior to filing her claim for benefits, the claimant was last employed by Siegel's Supermarket of Richmond, Virginia. The claimant worked for this employer from August 26, 1982, until September 16, 1983. As of her last day of work the claimant was performing services as a part-time cashier and was being paid \$4.25 an hour.

The company's rules and regulations are contained in an employee handbook which is made available to all employees. One part of the company's rules deals with employee purchases and check-out of merchandise. This policy was distributed separately to all employees on April 23, 1983, as a result of recent violations of the policy. The Notice reprinted the policy and advised all employees that it would be strictly enforced without exception. Any employee who intentionally violated the policy would be subject to immediate dismissal. In pertinent part, the policy provides as follows:

1. All employees who wish to purchase merchandise in any Siegel's market shall make their purchases before or after their own working hours. Employees shall not make purchases while they are on duty. Purchases shall be made only during the hours that the store is open to the public; never before or after store hours. After store closing time, nothing shall be taken out of the store by employees. Any purchase made during regular store hours shall be taken out of the store immediately.
2. No employee shall ever check-out his/her own purchases. No employee shall ever check out another employee unless the store manager or assistant manager or designated person is present to witness the check-out.

* * * * *

On Tuesday, September 13, 1983, the claimant made a purchase at the store. She complied with the company policy in that she made the purchase at a time when she was not on duty. After making her purchase and paying for the items, the claimant requested permission from the assistant manager to place these items, which included perishable goods, in the meat cooler. The claimant would be going on duty shortly and had no personal transportation of her own. Consequently, she was unable to take these purchases from the store immediately. The assistant manager on duty gave her permission to place her purchases in the meat cooler. Later that evening after the claimant had completed her shift, the company president observed her removing her grocery items from the meat cooler. The claimant left work that evening and, since she had the next two days off, did not report for work until September 16, 1983. At that time the claimant was discharged for her failure to comply with the company policy regarding employee purchases.

The claimant had been given permission on several other occasions by the assistant manager on duty to leave her purchases in the cooler. Additionally, the assistant manager had given permission to other employees to place their purchases in the cooler instead of immediately removing them from the store as required by company policy. The assistant manager, himself, had not complied with the company's policy in that he was observed making purchases after closing hours and not removing his purchases immediately from the store.

When the claimant was discharged on September 16, 1983, a written Confirmation of Performance Interview was prepared by the store manager and reviewed with the claimant. This document made reference to the claimant's violation of the employee purchase policy as well as an accusation of displaying a poor attitude in the presence of a customer. Notwithstanding the allegation concerning the claimant's attitude, the sole reason for her discharge on September 16, 1983, was her violation of the company's employee purchase policy.

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 her work.

This particular language was first interpreted by the Virginia Supreme Court in the case of Vernon Branch, Jr. v. Virginia Employment Commission and Virginia Chemical Company, 219 Va. 609, 249 S.E.2d 180 (1978). 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 a serious matter which requires careful consideration. Since it involves the indefinite forfeiture of unemployment insurance benefits by a claimant, the Commission has consistently held that the burden of proof is upon the employer to present sufficient evidence to establish that the acts or omissions of which they complained did occur and were of such a nature as would constitute misconduct connected with work.

In the present case, the claimant was discharged by the employer for failure to comply with the company's employee purchase policy. The Commission, like the Appeals Examiner, does not have any problem concerning the reasonableness of the company policy or the legitimacy of the employer interest it is designed to protect. Furthermore, it is clear from the employer's evidence and the claimant's admission that she did violate this policy. In the absence of any other evidence, the Commission would not hesitate to impose the disqualification for work-related misconduct. However, there is substantial evidence beyond those facts which must be considered.

At both the Commission hearing and the hearing held by the Appeals Examiner, the claimant and her witnesses offered testimony concerning the failure of the employer to enforce this policy. Each of the witnesses who testified on behalf of the claimant witnessed violations of the

policy that were condoned by management officials or had, themselves, stored items in the cooler with the permission of a manager or assistant manager. The employer's witnesses, all of whom were in management positions, strenuously denied ever giving any employee permission to violate the policy and maintained that they vigorously enforced the rules concerning employee purchases. In reviewing this conflicting evidence, the Commission is of the opinion that the testimony of the claimant and her witnesses are deserving of greater credibility. The Commission, at its hearing, had the opportunity to observe all of the witnesses as they testified and to make credibility determinations based upon their testimony as well as their demeanor. Certainly the most credible witness who appeared before the Commission was Mrs. Smith, who testified about instances when she herself had been given permission by the assistant manager to store items in the meat cooler in violation of the company's policy. The Commission can not believe that this witness, who formerly served as a Deputy Sheriff and is currently a magistrate for the City of Richmond would appear before the Commission and perjure herself concerning incidents which occurred when she was employed on a part-time basis by this company.

Under these circumstances, the Commission is of the opinion that management officials of the company condoned and permitted violations of this particular policy. These officials were clothed by the employer with the apparent authority to grant the type of permission that was requested by the claimant and other employees. Accordingly, when such permission is granted by a management official it also binds the employer, regardless of the fact that the permission may have been improperly granted. For these reasons, the Commission is of the opinion that the claimant's violation of the employee purchase policy does not constitute misconduct connected with her work and no disqualification may be imposed based upon the circumstances surrounding her discharge from employment. (Underscoring supplied)

DECISION

The decision of the Appeals Examiner which held that the claimant was not subject to a disqualification from

receiving unemployment insurance benefits, effective
September 18, 1983, is hereby affirmed.


M. Coleman Walsh, Jr.
Special Examiner