

COMMONWEALTH OF VIRGINIA
VIRGINIA EMPLOYMENT COMMISSION

MISCONDUCT - 485.3
Violation of Company Rule -
Dishonesty



DECISION OF COMMISSION

In the Matter of:

David W. Johnson
[REDACTED]

Service Gas Company
Wytheville, Virginia

Date of Appeal

to Commission: November 4, 1985

Date of Hearing: December 17, 1985

Place: RICHMOND, VIRGINIA

Decision No.: 25997-C

Date of Mailing: December 19, 1985

Final Date to File Appeal

with Circuit Court: January 8, 1986

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This is a matter before the Commission on appeal by the employer from the Decision of Appeals Examiner (UI-85-7695), mailed October 31, 1985.

APPEARANCES

Attorney for Employer

ISSUE

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

FINDINGS OF FACT

The employer appealed from a decision which held that the claimant was qualified to receive benefits effective September 8, 1985, inasmuch as he was discharged for reasons other than misconduct in connection with his employment.

The claimant was last employed by Service Gas Company, Incorporated of Wytheville, Virginia, from May 10, 1980, through September 9, 1985. At the time of his separation, he was working as an assistant manager of one of the employer's convenience stores.

The employer's operations policy provides in pertinent part that no checks may be cashed unless the maker has a check cashing application on file with the company. Store managers have discretion to cash checks for individuals who have not made such application.

On March 1, 1985, the claimant, who was employed as a manager of one of the convenience stores, used the employer's funds to cash his own personal check for \$500.00. At the time, he had not filed a check cashing application, and he did not have sufficient money in his bank account to cover the check. The employer learned of the claimant's actions when the check was returned by the bank for non-sufficient funds. As a result, the claimant was demoted to assistant manager and assigned to work at another location. In addition, the employer demanded reimbursement. The claimant indicated he was not able to pay in full and would need time.

The claimant made no payment on the debt for approximately two months. After discussing the matter with the retail supervisor, he agreed to a deduction of \$100.00 from his May 7, 1985, paycheck and \$50.00 per paycheck thereafter until the debt was paid. However, the employer did not take a deduction from every subsequent paycheck, and as of the first of August, 1985, the claimant still owed \$200.00.

On or about August 7, 1985, the employer was served with a notice of garnishment against the claimant's wages. After withholding money for the garnishment, the employer refrained from taking further deductions from the claimant's check in order to avoid placing his net pay below the federal minimum wage. Instead, a representative for the retail supervisor suggested to the claimant that he should continue to make the payments voluntarily. The claimant responded that he could not voluntarily pay the \$50.00 per pay period because he would be left with insufficient funds on which to live. The employer took no action until September 10, 1985, after he became aware that the claimant had initiated bankruptcy proceedings. At that time, the claimant was discharged from his employment.

OPINION

Section 60.1-58 (b) of the Code of Virginia (1950), as amended, provides a disqualification if it is found that an individual was discharged for misconduct in connection with his employment.

In interpreting the aforementioned statute, the Supreme Court of Virginia has stated the following:

"In our view, an employee is guilty of 'misconduct connected with work' when he deliberately violates a company rule reasonably designed to protect the legitimate business interests of his employer, or when his acts or actions are of such a nature or so recurrent as to manifest a willful disregard of those interests or 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." [Branch v. Virginia Employment Commission and Virginia Chemical Company, 219 Va. 609, 249 S.E.2d 180 (1978)]

The employer, by counsel, has argued that the claimant should be disqualified for benefits because the evidence establishes that he committed larceny in deliberately cashing a check for which he did not have adequate funds, and that he disregarded his obligation to reimburse the employer for the debt. Although the employer may not have forgiven the claimant for cashing the bad check, it acquiesced in the matter and elected to retain him in its employ for an indefinite period rather than discharge him. Thus, notwithstanding the criminal nature of the act, it was not the event which precipitated the claimant's separation from employment, nor was it his omission to make prompt restitution or regular payments. Even when the claimant declined a post-garnishment request to continue payments voluntarily, his superiors did not discharge him for breaching his agreement to repay. The matter was tolerated until the claimant's superiors became aware of his petition to file bankruptcy. Only then was his employment terminated. It is the employer's delay in the decision to terminate the claimant's employment which distinguishes this case from those cited by the employer. While it is clear that the claimant committed an act of misconduct, he was not discharged for that reason. He was discharged because it was thought that he had made it impossible for the employer to collect the rest of the debt. In view of these facts, the act of declaring bankruptcy simply does not constitute misconduct in connection with employment. For this reason, there can be no disqualification imposed under the aforementioned section of the Code. (Underscoring supplied)

DECISION

The Decision of Appeals Examiner is hereby affirmed. It is held the claimant is qualified to receive benefits effective September 8, 1985, inasmuch as he was discharged for reasons other than misconduct in connection with his employment.


Patrice T. Johnson
Special Examiner

NOTE: Affirmed by the Circuit Court, County of Pulaski, No. C-86-10, May 22, 1986.