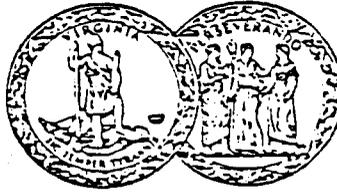


COMMONWEALTH OF VIRGINIA  
VIRGINIA EMPLOYMENT COMMISSION

MISCONDUCT: 485.45  
Violation of Company Rule  
-- Intoxicants, Use of.



DECISION OF COMMISSION

In the Matter of:

Henry J. Fogle  
████████████████████

Philip Morris, Inc.  
Richmond, Virginia

Date of Appeal  
to Commission: May 31, 1988  
Date of Hearing: July 13, 1988  
Place: RICHMOND, VIRGINIA  
Decision No.: 30439-C  
Date of Mailing: July 14, 1988  
Final Date to File Appeal  
with Circuit Court: August 3, 1988

---o0o---

This is a matter before the Commission on appeal by the claimant from the Decision of Appeals Examiner (UI-8803411), mailed May 19, 1988.

APPEARANCES

Attorney for Claimant, Two Employer Representatives

ISSUE

Was the claimant discharged for misconduct connected with his work as provided in Section 60.2-618.2 of the Code of Virginia (1950), as amended?

FINDINGS OF FACT AND OPINION

On May 31, 1988, the claimant filed a timely appeal from the Decision of Appeals Examiner which disqualified him from receiving benefits effective February 14, 1988. The disqualification was imposed based upon the Appeals Examiner's finding that the claimant had been discharged for misconduct connected with his work.

This case presents two specific questions that the Commission must resolve. First, does the claimant's drug addiction preclude a finding that he deliberately violated the employer's policies by possessing illegal drugs on company premises? Second, does the claimant's drug addiction constitute a mitigating circumstance for his possession of illegal drugs while on company property? The answer to both of these questions is no.

The material facts are, for the most part, undisputed. The claimant last worked for Philip Morris, Inc., from November 5, 1979, through December 23, 1987. He was a full-time employee and was paid \$15.04 an hour.

The company has adopted specific rules and policies which govern the conduct of employees. These rules are contained in a handbook entitled Standards of Work and Conduct for Hourly Employees. The company's rules with respect to the use and possession of drugs and alcohol are found on page 11 of this handbook. Under the company's policies, employees who report for work under the influence of alcohol or drugs will be subject to disciplinary action. Employees are forbidden from possessing, using, or being under the influence of, or engaging in the sale or purchase of unauthorized or illegal drugs on company property. Violators of that rule are subject to discharge. The rule applies to personal conduct on all company property, including the parking lots. The claimant had received a copy of this handbook and was aware of the company's policies.

On December 23, 1987, the claimant left work at lunch time and made a purchase of illegal drugs off company property. This was observed by detectives of the Richmond Police Department. These detectives followed the claimant as he returned to his job. The claimant was stopped by the detectives in the company's parking lot and searched. A syringe with a liquid substance inside, a spoon, and a glassine bag were discovered in the claimant's possession. These items were analyzed by the Division of Consolidated Laboratory Services for the presence of controlled substances. The syringe contained heroin, a Schedule I drug, and the spoon contained a residue of cocaine, a Schedule II drug.

On December 23, 1987, the claimant was arrested by the police and suspended by the employer. When the company received a copy of the Certificate of Analysis, the claimant was discharged for violating the company's rule which prohibited the possession of illegal drugs on company property. The claimant subsequently pled guilty to the possession of heroin and the possession of drug paraphernalia. He received a suspended jail sentence and was placed on supervised probation. One of the conditions of his

probation required that he participate in the Rubicon Rehabilitation Program.

The claimant is a drug addict. He had used heroin for twenty-three years and cocaine for four years. On two occasions he had taken advantage of the employer's Employee Assistance Program because of his problem with drug abuse. On each of those occasions, the claimant participated in residential treatment programs which lasted approximately one month.

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 his work.

This particular language was first interpreted by the Virginia Supreme Court in the case of Branch v. Virginia Employment Commission, et al, 219 Va. 609, 249 S.E.2d 180 (1978). In that case, the Court held:

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 warrants careful consideration. The burden of proof is on the employer to prove by a preponderance of the evidence that the claimant was discharged for reason which would constitute misconduct connected with his work. See, Dimes v. Merchants Delivery Moving and Storage, Inc., Commission Decision 24524-C (May 10, 1985); Brady v. Human Resource Institute of Norfolk, Inc., 231 Va. 28, 340 S.E.2d 797 (1986).

In this case, there is no dispute that the company rule was reasonable and designed to protect a legitimate business interest. Also, there is no dispute that the claimant violated this rule by virtue of having illegal drugs in his possession while on company property. The issue raised by the claimant's

attorney is whether that violation was "deliberate," to bring his actions within the meaning of the misconduct statute as it was interpreted by the Virginia Supreme Court in the Branch case. The work "deliberate" is defined in Webster's New World Dictionary, Second College Edition (1980), as follows:

1. carefully thought out and formed, or done on purpose; premeditated
2. careful in considering, judging, or deciding; not rash or hasty.

Here, the Commission is satisfied that the evidence clearly establishes that the claimant deliberately violated the company's rule. The claimant left the job at lunch time and purchased illegal drugs. After consummating that purchase, he then returned to the employer's facility. These actions show a carefully thought out, purposeful act on his part. Furthermore, since he knew or should have known of the employer's rule prohibiting the possession of drugs on company property, his conduct was manifestly "deliberate," within the meaning of the definition of misconduct as articulated in the Branch case. Even though the claimant is a drug addict, that medical condition does not make his actions any less deliberate. (Underscoring supplied)

The claimant's drug addiction was also argued as a mitigating circumstance for his conduct. In support of this argument, as well as the argument that he did not deliberately violate the company rule, counsel for the claimant cited the cases of Cox v. Durham & Bush, Commission Decision 7248-C (December 5, 1975), and Goodman v. J. W. Ferguson & Son, Inc., Commission Decision 25210-C (July 5, 1985). However, those cases are distinguishable from the case at bar.

In the case of Rook v. Postal Data Center, Commission Decision UCFE-443 (October 19, 1978), the claimant was discharged after he reported for work in an intoxicated condition, and two days later was absent from work because he was intoxicated. The claimant was a confirmed alcoholic who had spent time in the hospital for treatment of his condition. The Commission held that the claimant was disqualified for misconduct connected with his work. In distinguishing the Cox case, the Commission stated:

The claimant in that case had been discharged by his employer while he was in the hospital with the employer's knowledge for treatment of alcoholism. Although the claimant in this case had been hospitalized for alcoholism with his supervisor's knowledge, he had not been

discharged for that reason. His employment resulted from intoxication while on duty and absence without notification to the employer because of intoxication.

This claimant's knowledge that he was suffering from the disease of alcoholism did not justify his intoxication while on duty, or absence from work without the employer's permission or due notification to the employer. Such actions by a worker not only show a deliberate disregard of the employer's interests, but also of the standards of behavior which the employer has a right to expect of an employee.

In the more recent case of English v. Washington Metropolitan Area Transit Authority, Commission Decision 28545-C (May 15, 1987), the claimant was placed on a six-month suspension while participating in the company's Employee Assistance Program. This resulted from the claimant reporting to work with detectable amounts of alcohol or drugs in his system. Such conduct violated a specific company rule. The claimant argued, but did not prove, that he was a drug addict. In speaking to the issue of whether drug addiction constitutes mitigation, the Commission stated:

Furthermore, even if the claimant had been diagnosed as a drug addict, that does not mean that he would be incapable of committing misconduct in connection with his work. Prior decisions have treated alcoholism and drug addiction as diseases. (Citations omitted) Such holdings have only gone to allow benefits in cases where an individual was absent from work due to circumstances surrounding medically diagnosed drug addiction or alcoholism. These decisions do not go so far as to state that a medically diagnosed alcoholic who appears to work under the influence of alcohol or a medically diagnosed drug addict who appears at work with traces of drugs in his system has not committed misconduct through those actions. Therefore, even if the claimant in this case could show that he was medically diagnosed as being a drug addict, this would only serve to excuse his failure to report for work due to his illness. It would not excuse him if he

reported to work with detectable amounts of drugs in his system in violation of the employer's rules.

In reviewing the claimant's actions in light of these principles, the Commission simply cannot conclude that his drug addiction constitutes mitigation or precludes a finding that he deliberately violated the company rule. In fact, his conduct on the day in question was of such a nature that it led to his being convicted of one felony and one misdemeanor. The cases cited by the claimant's attorney do not support the premise that a drug addict who possesses illegal drugs on company property, in violation of a company rule, would be qualified to receive benefits. Therefore, the Commission concludes that the claimant was discharged by the employer for reasons which amount to misconduct connected with his work. Furthermore, since the claimant has not proved mitigating circumstances for his conduct, the disqualification provided under Section 60.2-618.2 of the Code of Virginia should be imposed. (Underscoring supplied)

#### DECISION

The Decision of Appeals Examiner is hereby affirmed. The claimant is disqualified from receiving benefits, effective February 14, 1988, because he was discharged for misconduct connected with his work. This disqualification shall remain in effect for any week benefits are claimed until he performs services for an employer during thirty days, whether or not such days are consecutive, and he subsequently becomes totally or partially separated from such employment.

*M. Coleman Walsh, Jr.*  
M. Coleman Walsh, Jr.  
Special Examiner