



DECISION OF COMMISSION

In the Matter of:

James T. Wade
████████████████████

JPS Elastomerics Corporation
Stuart, Virginia 24171

Date of Appeal
to Commission: December 29, 1988

Date of Hearing: January 18, 1989

Place: RICHMOND, VIRGINIA

Decision No.: 31385-C

Date of Mailing: January 31, 1989

Final Date to File Appeal
with Circuit Court: February 20, 1989

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This matter comes before the Commission as the result of an appeal filed by the employer from the Decision of Appeals Examiner (UI-8810084), mailed December 22, 1988.

APPEARANCES

Employer Representative

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

On December 29, 1988, the employer filed a timely appeal from the Decision of Appeals Examiner which held that the claimant was qualified to receive benefits, effective October 23, 1988. The basis for that decision was the Appeals Examiner's finding that the claimant had been discharged for reasons that did not constitute misconduct connected with his work.

Prior to filing his claim for benefits, the claimant last worked for JPS Elastomerics Corporation from June 3, 1983 through October 20, 1988. At the time of his dismissal, he was a banbury operator and was normally scheduled to work on the third shift. He was a full-time employee and was paid \$7.10 an hour.

The employer is involved in manufacturing rubber that is used in diapers and the elastic found in swimwear. The claimant's particular job required him to feed raw rubber and chemicals into the banbury machine. After the rubber and chemicals were processed in his machine, he would discharge the product into a machine known as a mill. The mill was located below the banbury and was operated by another employee.

Prior to a merger, the employer was formerly known as J. P. Stevens & Co., Inc. Notwithstanding the merger, the rules and regulations previously promulgated by J. P. Stevens remained in full force and effect. These rules and regulations are contained in an employee handbook which is provided to all employees at the time of hire. The claimant had received a copy of the handbook.

The employer has adopted three different categories of rules. There are 16 Group One Rules, the violation of which would subject the offending employee to immediate discharge. The company has adopted 18 Group Two Rules and 10 General Safety Rules. With respect to violations of Group Two Rules, the company's policy provides as follows:

While a flagrant violation of any rule in this group may result in discharge, normally violations of any group two rule will result in progressive discipline.

Four warnings for group two rule violations that accumulate within a 12 month period will result in an employee's discharge.

A Final Notice will accompany the third warning to remind the employee that one more rule violation during the 12 month period will result in discharge.

Rule three under the Group Two category provides for discipline if an employee fails to do acceptable quality of work. Rule 18 under the Group Two category prohibits employees from using profane, abusive, threatening or indecent language.

The claimant had received three written warnings because of the quality of his work. These warnings were issued on April 20, 1988, September 26, 1988, and September 29, 1988. The employer also issued the Final Notice simultaneously with the written warning on September 29, 1988. That final notice informed the

claimant that another violation of a Group Two Rule under the Rules of Conduct before April 20, 1989 would result in his discharge.

On the night of October 19 - 20, 1988, one of the claimant's co-workers, Galen Gilbert, brought to the supervisor's attention a poster that was on the inside of an elevator door. The poster was a mock advertisement for a heavyweight wrestling match between "Galen the Gap Gilbert and Mark the Millman Pack \$10.00 a ticket." The poster indicated the "wrestling match" would take place at the factory. Four employees, including the claimant, were questioned about this and denied knowing anything about it. Later that same shift, the other employee named on the mock advertisement brought two chemical identification boards to the supervisor. Written on these boards, in a different handwriting from the poster, was basically the same language that had appeared on the poster. The employer investigated the situation and the claimant admitted he had prepared the boards. The supervisor was concerned about the situation because there had been some problems between Galen Gilbert and Mark Pack, which had required his intervention.

This situation was brought to the attention of the department manager, the personnel manager, and the plant manager. The claimant was issued a fourth written warning for the events that occurred on the night of October 19 - 20, 1988. The fourth written notice that was given to the claimant set out the company's position that his conduct in writing on the chemical identification boards constituted a violation of rule 18 of the Group Two Rules.

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 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 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 wilful 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 reasons 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).

The claimant was discharged pursuant to a company policy which provided for dismissal in the event an employee received four warnings within a 12-month period for Group Two Rule violations. In adjudicating cases of this type, the Commission will look first to the last incident that occurred resulting in the final warning notice. If that incident, standing alone, would constitute misconduct connected with work, then the claimant would be disqualified from receiving benefits unless he could prove mitigating circumstances. If the last incident did not amount to misconduct connected with work, then the Commission will look at the totality of the circumstances to see if all of the violations, when reviewed as a whole, would establish a prima facie case of misconduct. If the Commission concludes that misconduct has been shown, then the claimant would be obligated to prove mitigating circumstances in order to avoid the disqualification. This analysis would not require the employer to prove that each individual violation constituted misconduct connected with work. Rather, the employer must prove the existence of a reasonable rule, that the rule in question was violated, and that the company was justified, in light of that violation, in issuing a warning. (Underscoring supplied)

The Commission is satisfied from the evidence that the claimant committed three quality errors which constituted violations of rule three of the Group Two Rules, and which justified the company in issuing the warning notices in April and September of 1988. Accordingly, the case will turn on the final incident that occurred during the evening of October 19, and the early morning hours of October 20, 1988.

The evidence proves that the claimant did write on two chemical identification boards substantially the same mock advertisement that appeared on the poster in the elevator. Nevertheless, even if the Commission assumes that such conduct violated a company rule, it would not amount to misconduct connected with work in and of itself. When that conduct is carefully reviewed, it is obvious that it is not the type of employee conduct which is so egregious as would warrant imposing the misconduct disqualification. This is underscored by the company's own actions regarding this incident. The company viewed it as nothing more than a violation of one of its Group Two Rules. This incident precipitated the claimant's discharge only because he had three prior Group Two warnings. If this was the first violation or even the second

or third violation within the last 12 months, the company would not have discharged the claimant. Therefore, since this incident does not, in and of itself, constitute misconduct connected with work, the disqualification for benefits would be imposed only if the totality of the circumstances proved that the claimant was guilty of work connected misconduct.

The Commission is unable to conclude that the claimant's actions on his last day of work constituted a violation of rule 18. It is obvious that the words in the mock advertisement are neither profane nor indecent. The employer has conceded that point, but argued that the language was abusive to Galen Gilbert and threatening because it might have led to an altercation between Galen Gilbert and Mark Pack, who had exchanged words very recently before this incident. The Commission is not persuaded by these arguments. The words "threat" and "threaten" are defined in Webster's New World Dictionary (2nd College Ed.) as follows:

Threat: 1. An expression of intention to hurt, destroy, punish, etc., as in retaliation or intimidation; 2. An indication of imminent danger, harm, evil, etc.

Threaten: 1. To make threats against; express one's intention of hurting, punishing, etc.; to express intention to inflict punishment, reprisal, etc.; 2. To be a menacing indication of danger, harm, distress, etc.

The words used by the claimant in rewriting the mock advertisement simply does not communicate a threat from him to either of the two employees named. While the language could easily be characterized as teasing or poking fun, it lacks any true indicia of what one would normally consider threatening language.

Similarly, the Commission has great difficulty in construing the language used as being abusive. That word is defined Webster's New World Dictionary (2nd College Ed.) as, "coarse and insulting in language; scurrilous; harshly scolding."

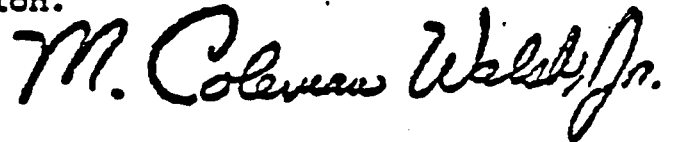
While the language contained in the mock advertisement was probably in poor taste and inappropriate, it was not abusive either in light of its definition, or society's common understanding of that term. Furthermore, if the employer interprets rule 18 to include such language under the heading of "abusive," the rule is ambiguous. The use of the word "abusive," in a rule which also prohibits profane, threatening or indecent language, connotes the use of scurrilous or harshly scolding remarks, and not remarks that could be interpreted as simply teasing or poking fun. Inasmuch as this type of interpretation creates an ambiguity in the rule, the courts and the Commission have been uniform in construing any such ambiguity against the employer who wrote the rule. Branch, 219 Va.

at 613; Wheeler v. Hershey Chocolate Company, Commission Decision 23983-C (February 15, 1985). (Underscoring supplied)

Given all these circumstances, the Commission must conclude that the claimant's conduct on his last day of work did not constitute a violation of rule 18 of the company's Group Two Rules. Since the employer has failed to carry its burden of proving the fourth rule violation, the claimant's dismissal was not for reasons that would constitute misconduct connected with his work.

DECISION

The decision of the Appeals Examiner is hereby affirmed. The claimant is qualified to receive benefits, effective October 23, 1988, based upon the circumstances surrounding his separation from work with JPS Elastomerics Corporation.



M. Coleman Walsh, Jr.
Special Examiner