

COMMONWEALTH OF VIRGINIA
VIRGINIA EMPLOYMENT COMMISSION

PROCEDURE: 70.15
Fraud — Procedure Before
Commission When Fraud Asserted.



DECISION OF COMMISSION

In the Matter of:

Richard M. Hull
[REDACTED]

A T & T Technologies, Inc.
Radford, Virginia

Date of Appeal to Commission: February 23, 1987

Date of Review: August 19, 1987
August 20, 1987

Place: RICHMOND, VIRGINIA

Decision No.: 28302-C

Date of Mailing: August 28, 1987

Final Date to File Appeal with Circuit Court: September 17, 1987

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This is a matter before the Commission on appeal by the claimant from a Decision of Appeals Examiner (UI-87-314), mailed February 2, 1987.

ISSUE

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

FINDINGS OF FACT

On February 23, 1987, the claimant filed a timely appeal from a Decision of Appeals Examiner. That decision held the claimant was disqualified from receiving benefits effective August 31, 1986. The basis for the disqualification was the Appeals Examiner's finding that the claimant had been discharged for misconduct connected with his work.

Prior to filing his claim for benefits, the claimant last worked with A T & T Technologies, Incorporated. He worked for this

company from December 8, 1980 through August 29, 1986. He performed services as a full-time utility operator.

The company has adopted a number of rules and policies which govern employee's conduct. Two of those rules are specifically applicable to this case. One of the rules forbids, insubordination in any form, including refusing direct orders for work assignments from supervisors. Also, the company prohibits the distribution of any kind of literature not sponsored by the company, regardless of its source, in working areas of company premises or during an employee's assigned work time. Assigned working time does not include break periods or mealtimes.

The claimant was one of several candidates for election to the union's Executive Board. On August 28, 1986, the claimant and other candidates met with the Section Chief of Labor Relations. The purpose of this meeting was to review and answer any questions regarding the ground rules which governed the campaigns. All of the candidates were reminded that their campaigns must be conducted on their own time and not on company time.

On August 29, 1986, the claimant had reported for work. During that morning, one of the Department Chiefs observed the claimant handing out his campaign literature. He followed the claimant into one of the worker areas where he confronted him and inquired what he was doing. The claimant responded "nothing." The Department Chief asked several other questions which the claimant did not answer. The Department Chief then demanded that the claimant surrender his pass to him. Under the company's policy, surrendering a pass is tantamount to being suspended. The claimant refused on at least three separate occasions to turn in his pass. Finally, the claimant's Department Chief was summoned to the scene. After arriving there, the claimant's Department Chief instructed the claimant to surrender his pass. The claimant stated that he wouldn't surrender it to the other Department Chief, but did surrender it to his Department Chief. He was then escorted from the company's property.

Later that afternoon, the claimant contacted his Department Chief to determine the outcome of these events. During that telephone conversation, he was informed that he had been discharged for insubordination.

During the confrontation with the Department Chief, the claimant requested union representation. Following this request, the company did not make any further attempt to investigate the claimant's conduct. Company supervisors merely reiterated the request that the claimant surrender his badge. One of the other supervisors attempted to locate a union representative to assist the claimant. However, the claimant surrendered his badge and was

escorted from the company's property prior to speaking with the union representative.

At the time he filed his appeal, the claimant alleged that fraud and obstruction of justice had been committed by the presiding Appeals Examiner, the employer's attorney, and one of the employer's representatives. By letter dated July 14, 1987, the Commission instructed the claimant concerning the procedures he must follow in order for the Commission to hear those issues. In that letter, the claimant was specifically instructed as follows:

First, you should submit a written petition which outlines the specific proof you could present to prove the allegation of fraud. Second, this proffer must be verified by affidavits from the witnesses who would testify concerning these matters. This could include affidavits not only from yourself, but from any witnesses who did have knowledge about these allegations. If the Commission is satisfied from the petition and affidavits that a prima facie case of fraud has been established, then the Commission will hold an evidentiary hearing on that issue. However, if a prima facie case of fraud is not established, the Commission will not hold an evidentiary hearing on that issue. Thereafter, the Commission will review the evidence taken by the Appeals Examiner and his decision and will render a decision on the merits of the case.

The claimant was given thirty days within which to submit the petition and affidavits. On August 14, 1987, the Commission did receive a letter from the claimant together with an affidavit of a Rita Kanode. In the claimant's letter, he stated that he would like to certify his case to the courts. He then reiterated that he felt he had been illegally and unlawfully terminated; that his compensation insurance rights and benefits refusal had been denied due to conspiracy and an obstruction of justice; that his civil rights had been violated; and that his constitutional rights had been violated. The affidavit of Rita Kanode simply certified that Jane O'Keefe had been employed by the Virginia Employment Commission before being employed by A T & T Technologies.

OPINION

Before addressing the issue concerning the claimant's discharge, the Commission will first turn its attention to the claimant's allegation of fraud. In cases where fraudulent conduct

by the Hearing Officer or a party is alleged, the Commission has generally followed the guidelines set out by the Virginia Supreme Court in the case of Jones v. Willard, et al., 224 Va. 602, 299 S.E.2d 504 (1983). In that case, the court stated:

We hold that when a party aggrieved by a decision of a Virginia Employment Commission alleges in his petition for review that the decision was procured by extrinsic fraud committed by the successful party and submits with the petition a proffer of proof, verified by affidavits of witnesses, the Circuit Court shall remand the case to the Commission for a hearing on the issue if, upon review of the proffer and argument by counsel, the court finds the proffer sufficient as a matter of law to establish a prima facie case of such fraud.

In this case, the claimant has failed to establish a prima facie case of fraud against anyone. Although he alleged that the employer's attorney and an employer representative, Jane O'Keefe, obstructed justice by using their influence to delay the timing of the hearing, there is nothing before the Commission to substantiate that allegation. With respect to the Appeals Examiner, the claimant alleged that he obstructed justice by refusing to instruct Ms. O'Keefe to answer a specific question, and by not allowing him to recall two of the employer witnesses. Further he alleged that the Appeals Examiner and the employer's attorney knew each other on a personal basis. The Appeals Examiner's rulings on the proposed question to Ms. O'Keefe and recalling the two employer witnesses were correct rulings and do not establish any type of improper conduct. Further, there is absolutely nothing in the record to substantiate the allegation of any type of personal relationship between the Appeals Examiner and the employer's attorney. Accordingly, the Commission finds that the claimant has failed to establish a prima facie case of fraud and his petition in that regard is dismissed.

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 language was 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 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.

In this case, the claimant was observed distributing some campaign literature on company time. This was a violation of the company rule which the claimant should have known in light of the meeting he attended the previous day. When the Department Chief requested that the claimant surrender his pass, that was a proper supervisory directive which the claimant had an obligation to obey. His adamant refusal to surrender the pass to the Department Chief constitutes insubordination. The Commission has held in cases too numerous to cite, that insubordination constitutes misconduct connected with work because of the adverse impact it has on the employer-employee relationship. See Vines v. Commonwealth of Virginia, Decision Number 9661-C (September 7, 1977); Carter v. Atlantic Tire Service, Inc., Decision Number 5466-C (September 20, 1971).

In his defense, the claimant has argued that his dismissal was unlawful. He states that the employer violated Federal law by discharging him in a telephone conversation. Second, the claimant argues that his dismissal was unlawful because he was denied his right to union representation. However, the Commission is not persuaded that these are the type of mitigating circumstances which the Commission should consider in determining if an individual should be disqualified for misconduct connected with his work.

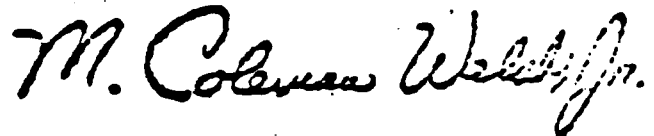
Other than the claimant's bald assertion that his dismissal was unlawful since it was communicated to him by telephone, there is nothing in the record to support such a contention. The claimant does cite the case of NLRB v. Weingarten, 420 U.S. 251 (1975) in support of his argument that he was improperly denied union representation. However, a review of the Weingarten case reveals that the claimant was entitled to union representation only during the course of interviews when the employer is attempting to secure information from the employer prior to making a decision on discipline. Where the purpose of the meeting is to inform the employee that he is being subjected to discipline, he is not entitled to union representation. Based upon a review of the record, it is apparent that the employer made no attempt to obtain information from the claimant after he indicated that he desired union representation. Since the only request made of the claimant

was that he surrender his badge, that was tantamount to simply imposing discipline.

Therefore, since the claimant was guilty of insubordination and refusing to surrender his pass to a supervisor and since he has failed to prove circumstances which would mitigate his conduct, the Commission is of the opinion that he was discharged by the employer for misconduct connected with his work. Accordingly, the disqualification provided in Section 60.2-618.2 of the Code of Virginia should be imposed.

DECISION

The Decision of Appeals Examiner is hereby affirmed. It is held the claimant is disqualified from receiving benefits, effective August 31, 1986, for having been 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 subsequently becomes totally or partially separated from such employment.



M. Coleman Walsh, Jr.
Special Examiner

NOTE: Aff'd by Circuit Court for the County of Pulaski, L-87-208 (January 19, 1988); Dismissed by Court of Appeals May 13, 1988.