

COMMONWEALTH OF VIRGINIA
VIRGINIA EMPLOYMENT COMMISSION



DECISION OF COMMISSION

In the Matter of:

Beverly J. Cornett
[REDACTED]

Harry C. Sutherland, CPA
Wytheville, VA

Date of Appeal
to Commission: January 14, 1987

Date of Hearing: April 13, 1987

Place: RICHMOND, VIRGINIA

Decision No.: 28159-C

Date of Mailing: April 23, 1987

Final Date to File Appeal
with Circuit Court: May 13, 1987

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This is a matter before the Commission as the result of an appeal filed by the claimant from the Decision of Appeals Examiner, (UI-86-9224), mailed December 24, 1986.

APPEARANCES

Claimant, Attorney for Claimant

ISSUE

Was the claimant discharged from employment due to misconduct in connection with work as provided in Section 60.1-58 (b) [recodified effective 1-1-87 as Section 60.2-618.2] of the Code of Virginia (1950), as amended?

FINDINGS OF FACT

The claimant filed a timely appeal from the Appeals Examiner's Decision which affirmed an earlier Deputy's determination disqualifying the claimant for benefits effective October 5, 1986, for having been discharged from employment due to misconduct in connection with work.

The claimant was last employed as a part-time secretary for Harry C. Sutherland, CPA of Wytheville, Virginia between July 1, 1985 and September 26, 1986.

On September 26, 1986, the claimant was arrested along with her husband, her son, and a brother-in-law and charged with manufacturing marijuana and with the possession of marijuana with the intent to distribute it. These charges grew out of the discovery of a large number of marijuana plants on property owned by the claimant and her husband.

The employer found out about the claimant's arrest on Saturday, September 27, 1986, when he watched a television report. He felt that, because of the publicity involved surrounding the arrest, some of his clients might react negatively if he kept the claimant on the payroll. Accordingly, on Tuesday, September 30, 1986, he "asked" her to resign. By his own admission, this was actually a discharge (transcript page 4).

At the hearing before the Appeals Examiner, the claimant asserted her constitutional privilege against self-incrimination and declined to comment upon the substance of the charges against her. She did indicate that a preliminary hearing on those charges was due to come up in January of 1987. At the hearing before the Commission, she presented evidence that all charges against her were dismissed after that preliminary hearing was held.

OPINION

Section 60.1-58 (b) of the Virginia Unemployment Compensation Act provides a disqualification if it is found that a claimant was discharged from employment due to misconduct in connection with work.

Branch v. Virginia Employment Commission and Virginia Chemical Company, 219 Va. 609, 249 S.E. 2d 180 (1978) gave this definition of misconduct:

"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."

As a preliminary matter, the Commission finds it necessary to comment upon the claimant's argument that the Appeals Examiner improperly used the claimant's assertion of her constitutional right against self-incrimination to impose a disqualification upon her. The Commission does not find this to be the case. The Appeals Examiner found that the employer had presented a prima facie case of misconduct and merely noted that the claimant had failed to present evidence to rebut that case or to show circumstances in mitigation as required by Branch, supra. This situation would have occurred if the claimant had chosen not to appear at the hearing at all; therefore, her assertion of her constitutional rights was not improperly used against her as evidence that misconduct had occurred.

The problem in this case from the Commission's point of view is the Appeals Examiner's finding that the employer had made a prima facie case that her separation was due to misconduct in connection with work. The facts in this case are distinguished from those in Priscilla E. Brady v. U. S. Military District of Washington, Decision No. UCFE-479, cited in his decision. In Brady, the claimant was convicted of a felony which caused her to lose the security clearance necessary for her to work at her job. The claimant here was not in an analogous situation. Although she was arrested and charged with two felonies, she was still entitled to the presumption of innocence until proven guilty of those charges. The only evidence presented by the employer in this case was confirmed by the claimant, namely that she was, indeed, arrested and charged with two felonies. The employer presented absolutely no evidence to indicate that the claimant actually committed the acts she was accused of doing. While it is true that in administrative hearings such as those before the Commission, misconduct need only be shown by a preponderance of the evidence, a preponderance of nothing is still nothing.

Had the employer brought a witness to the hearing to state that he had observed the claimant cultivating marijuana plants on her farm, then this would have represented evidence of the nature necessary to make a prima facie case against her with respect to showing that a discharge was due to misconduct in connection with work. Without such evidence and especially in light of the fact that all charges against the claimant were dismissed, the Commission can only conclude that her separation was for reasons insufficient to impose a disqualification under this Section of the Act.

DECISION

The Decision of the Appeals Examiner is hereby reversed.

It is held that the claimant is qualified for unemployment compensation effective October 5, 1986, with respect to her separation from the services of Harry C. Sutherland, CPA.

Beverly J. Cornett

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The Deputy is instructed to carefully determine the claimant's eligibility for benefits during any weeks for which they may have been claimed.


Charles A. Young, III
Special Examiner