COMMONWEALTH OF VIRGINIA
VIRGINIA EMPLOYMENT COMMISSION

DECISION OF COMMISSION

In the Matter of:

Barbara Y. Hodge

[redacted]

Sentara Nursing Center
Norfolk, Virginia

Date of Appeal
to Commission: February 18, 1992

Date of Hearing: April 28, 1992

Place: RICHMOND, VIRGINIA

Decision No.: 30317-C

Date of Mailing: May 2, 1992

Final Date to File Appeal
with Circuit Court: May 22, 1992

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This case came before the Commission on appeal by the employer from a decision of Appeals Examiner (UI-92-08), mailed February 13, 1992 (erroneously stated on the decision as mailed February 26, 1992).

APPEARANCES

None

ISSUE

Was the claimant discharged for misconduct connected with her work as provided in Section 60.2-618(2) of the Code of Virginia (1950), as amended?

FINDINGS OF FACT

On February 18, 1992, the employer filed a timely appeal from the Appeals Examiner's decision which held that the claimant was qualified to receive benefits, effective April 21, 1991. The Appeals Examiner concluded that the claimant had been discharged by the employer for reasons that would not constitute misconduct in connection with her work.

Prior to filing her claim for benefits, the claimant last worked as many as thirty days for Sentara Nursing Center in Hampton, Virginia. She worked for this employer as a certified nursing assistant from October 9, 1989, through March 11, 1991. She was a full-time employee and usually worked from 11:00 p.m. until 7:00 a.m. She was paid $4.75 an hour.

The employer has adopted rules and regulations that govern employee conduct. These rules are contained in a policy book that is given to all employees at the time they are hired. In addition, these policies are reviewed with all employees during their orientation. Sleeping on the job or the appearance of sleeping on the job is categorized as a Type "C" offense. A violation of this rule could result in a disciplinary suspension and/or dismissal.

In September of 1990, a resident complained to the facility administrator that personnel who worked on the night shift frequently slept on the job. This allegation could not be substantiated or corroborated. Additionally, the claimant had not worked the night shift immediately prior to this complaint being made. All of the staff members, including the claimant, were reminded of the employer's rule and admonished that corrective action, including dismissal, could result from any employee sleeping on the job.

On March 7, 1991, the LPN who was in charge on the night shift contacted the Assistant Director of Nursing (ADON). At that time, the LPN complained that she was losing control over the staff and that they were frequently sleeping on the shift. The ADON arrived at approximately 1:30 a.m. and interviewed three of the certified nursing assistants who were on duty, including the claimant. In private discussions with each of the nursing assistants, the ADON asked them if they had ever slept on the job. Two of them admitted to doing so on occasion. The claimant denied sleeping on the job. She did state, however, that on occasions she sat at the nurse's station and placed her hands under her face.

On the basis of these statements, all three of the nursing assistants were discharged. The claimant's dismissal was effective on March 11, 1991. The claimant's statement to the ADON was interpreted by the employer as an admission that she had violated the rule which prohibited sleeping on the job or appearing to sleep on the job.

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 in connection with work.

This particular language was first interpreted by the Virginia Supreme Court in the case of Branch v. Virginia Employment Commission, 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 reasons which would constitute misconduct connected with his work. 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).

Cases involving employees who have been discharged for sleeping on the job are not new to the Commission. Sleeping on the job has been held to constitute misconduct in connection with work because of the serious health and safety considerations that are involved, as well as the fact that every employee has an obligation to remain alert at all times while on duty. Robinson v. Smithfield Packing Co., Commission Decision 37615-C (March 6, 1992).

In this case, the employer's rule is certainly reasonable, however, the evidence is not sufficient to establish that the claimant deliberately violated that rule. The claimant's dismissal was predicated upon her alleged "confession" where she stated that on occasions she placed her hands under her face while sitting at the nurse's station. That statement, without more, does not show that the claimant reasonably appeared to be sleeping on the job. The employer did not present any witnesses who observed the claimant either sleeping on the job or in a posture that would prompt a reasonable person to believe that the claimant was sleeping. Therefore, no disqualification may be imposed upon the claimant's receipt of unemployment insurance benefits.

In the employer's appeal letter to the Commission, the Assistant Director of Human Resources stated that the facilities supervisor attended the Appeals Examiner's hearing ". . . to witness the fact this employee was terminated for misconduct of sleeping on the job." While it is true that the facilities supervisor attended the hearing and testified, she did not have any direct, firsthand knowledge of the events in question. The witness who allegedly had that type of knowledge was not produced by the employer to testify. Whenever an employer elects not to bring to a hearing those witnesses who actually

observed the incidents in question, the employer assumes the risk that it may not carry its burden of proof.

The employer also observed that the other nursing assistants who were discharged had been disqualified from receiving benefits by the Commission. The employer questioned why the claimant in this case was being treated differently. Although the information regarding the other two claims for benefits are not in the record of this case, the most obvious reason is the fact that those individuals apparently admitted that they had been sleeping on the job. That was not the situation in this case, and the evidence presented by the employer was not sufficient to prove that the claimant did violate the rule in question. Accordingly, for the reasons previously stated, the claimant is qualified to receive benefits.

DECISION

The Appeals Examiner's decision is hereby affirmed. The claimant is qualified to receive benefits, effective April 21, 1991, based upon her separation from work with Sentara Nursing Center.

M. Coleman Walsh, Jr.

M. Coleman Walsh, Jr.
Special Examiner