COMMONWEALTH OF VIRGINIA
VIRGINIA EMPLOYMENT COMMISSION

DECISION OF COMMISSION

In the Matter of:

Paul R. Summers

Turn-Key Homes, Inc.
Stafford, Virginia

INTERSTATE

Date of Appeal
to Commission: May 31, 1988

Date of Review: June 23, 1988

Place: RICHMOND, VIRGINIA

Decision No.: 30470-C

Date of Mailing: July 8, 1988

Final Date to File Appeal
with Circuit Court: July 28, 1988

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This is a matter before the Commission as the result of an appeal filed by the employer from the Decision of Appeals Examiner (UI-8804298), mailed May 12, 1988.

ISSUE

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

FINDINGS OF FACT

The employer filed a timely appeal from the Appeals Examiner's decision which reversed an earlier Deputy's determination and qualified the claimant for benefits effective March 13, 1988, with respect to his separation from the employer's services.

Prior to filing his claim, the claimant last worked for Turn-Key Homes, Inc., of Stafford, Virginia, between December 20, 1987, and February 14, 1988. His position was that of a carpenter.

The employer was engaged in building homes in a particular subdivision. Although there was no formal arrangement made with the employer, a lunch wagon would appear on the street in front of the jobsite on a daily basis. This vehicle was operated and staffed by a particular lady that the claimant had met the previous summer on another jobsite. He recalled buying food or drink from the lunch wagon two or three times in a week.

On two occasions, the claimant had "joked around" with the operator of the lunch wagon by tugging at her pants as if he wished to remove them. She let him know in no uncertain terms that she did not appreciate this type of behavior on his part.

On the last day he worked, the claimant sneaked up behind the lady at the lunch wagon, grabbed the seam of her pants with both hands, and lightly tugged at them. Obviously startled, she turned around and kicked him, stating, "Don't you ever!" There were approximately ten other employees or subcontractors of the employer around, and the claimant assumed that the lady was joking and thought no more of the incident.

The following day, upon reporting to work, the claimant was informed that he was being discharged upon the orders of the vice president who had received a complaint from the lady at the lunch wagon concerning his conduct. The employer was most concerned about potential liability in the event that the lady chose to file suit alleging sexual harassment.

OPINION

Section 60.2-618.2 of the Code of Virginia provides a disqualification if it is found that a claimant was discharged from employment due to misconduct in connection with work.

In the case of Branch v. Virginia Employment Commission, et al, 219 Va. 609, 249 S.E.2d 180 (1978), the Supreme Court of Virginia defined misconduct as follows:

> 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 claimant is "disqualified for benefits", and the burden of proving mitigating circumstances rests upon the employee.

The Commission has long taken a position against sexual harassment in the workplace. In the case of Miller v. Michie Tavern, Decision UI-76-2083 (April 1, 1976); appeal withdrawn by employer and dismissed by Commission Order 8173-C (July 28, 1976), a claimant was found to have good cause for voluntarily leaving work which had become unsuitable for her due to sexual advances made toward her by her supervisor. Considering the risk of liability, as well as the detrimental effect upon production and morale, incidents of sexual harassment at the workplace would be considered a willful violation of the standards of behavior expected of virtually any employee by his employer.

In the case of Brady v. U. S. Military District of Washington, Commission Decision UCFE-479 (August 1, 1979), the Commission squarely addressed the issue of whether a particular act needed to occur within the scope of employment in order to constitute misconduct in connection with work. In that case, it was held:

> We also feel that it is not necessary for the act to have occurred within the scope of employment. This is just too stringent a standard. A worker has a duty to conduct himself and his affairs in a manner not detrimental to his employment. . . . When an individual knowingly commits an act of misconduct that has a substantive detrimental effect on his employer and as a result loses his job, such an individual will not be able to rely on the benefits of unemployment insurance.

In the case of Ashe v. Vepco, Commission Decision 16700-C (July 1, 1982); aff'd by the Circuit Court for the City of Virginia Beach (November 10, 1983), the claimant was convicted of the felony possession of an unregistered firearm and discharged from his job as a meter reader. The Commission found that this discharge was due to misconduct connected with his work even though the charge grew out of an incident which occurred off the job on his own time. This decision was reached upon consideration of the nature of the charge, the adverse publicity which identified the claimant as an employee of the employer, as well as the fact that he had a job which required that he have access to

businesses, homes, and backyards of the employer's customers. This case is important in that it cites a long series of prior cases in which work related misconduct was found even though the incidents themselves technically occurred "off the job."

In the case at hand, the fact that the lunch wagon lady had previously told the claimant that she did not appreciate his behavior toward her placed him in a position where he knew or should have known that he would repeat that behavior toward her at his own risk. The action which occurred on his last day of work was not only something which could constitute criminal sexual battery, but it also subjected the lunch wagon lady to public humiliation in front of a number of men who were associated with the employer. This placed her in an obviously difficult situation. If she were to take it as a joke and do nothing, the other men might get the idea that they could do the same thing with impunity. Since she had already told the claimant not to do it again, it was certainly reasonable of her to take the next obvious step of complaining to the employer.

That this act had a connection with the claimant's work is amply demonstrated by the fact that it occurred in front of the jobsite where he was working at a facility which, although not officially engaged in supplying a service to the jobsite, unofficially did so. Not only was the employer subjected to possible liability if nothing had been done concerning the incident once it was reported, but the jobsite stood the risk of losing the services of the lunch wagon, and this, in itself, would have had a negative impact upon the employer. After reviewing the evidence in this case, the Commission concludes that the employer has carried the burden of establishing that the claimant deliberately committed an act of sexual harassment in a situation which had a direct impact upon his employer. The burden now shifts to him to show mitigating circumstances for his conduct if he is to avoid a disqualification under this section of the Code.

The claimant's assertion that he was only joking around with the lunch wagon lady and that this was all in fun cannot mitigate his action. Even seemingly minor incidents of teasing or horseplay can have drastic or tragic consequences. Sexual harassment, no matter how trivial, is far more than innocent teasing or horseplay. The claimant's act has not been mitigated, and it is, therefore, concluded that his discharge was due to misconduct in connection with his work, and he should be disqualified for benefits under this section of the Code.

DECISION

The Decision of Appeals Examiner is hereby reversed.

It is held that the claimant is disqualified for unemployment compensation effective March 13, 1988, for any week or weeks benefits are claimed until he has performed services for an employer during thirty days, whether or not such days are consecutive, and he has subsequently become totally or partially separated from such employment, because he was discharged from employment due to misconduct in connection with work.

When this decision becomes final, the Deputy is instructed to calculate what benefits may have been paid to the claimant after the effective date of the disqualification which he will be liable to repay the Commission as a result of this decision.

Charles A. Young, III
Special Examiner

NOTICE TO CLAIMANT

IF THE DECISION STATES THAT YOU ARE DISQUALIFIED, YOU WILL BE REQUIRED TO REPAY ALL BENEFITS YOU MAY HAVE RECEIVED AFTER THE EFFECTIVE DATE OF THE DISQUALIFICATION. IF THE DECISION STATES THAT YOU ARE INELIGIBLE FOR A CERTAIN PERIOD, YOU WILL BE REQUIRED TO REPAY THOSE BENEFITS YOU HAVE RECEIVED WHICH WERE PAID FOR THE WEEK OR WEEKS YOU HAVE BEEN HELD INELIGIBLE. IF YOU THINK THE DISQUALIFICATION OR PERIOD OF INELIGIBILITY IS CONTRARY TO LAW, YOU SHOULD APPEAL THIS DECISION TO THE CIRCUIT COURT. (SEE NOTICE ATTACHED)