COMMONWEALTH OF VIRGINIA
VIRGINIA EMPLOYMENT COMMISSION

DECISION OF COMMISSION

In the Matter of:
Vickie L. Spencer
[redacted]

Regis Hair Stylist
Charlottesville, Virginia

Date of Appeal to Commission: July 10, 1990

Date of Hearing: November 2, 1990

Place: RICHMOND, VIRGINIA

Decision No.: 34061-C

Date of Mailing: February 6, 1991

Final Date to File Appeal with Circuit Court: February 26, 1991

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This case came before the Commission on appeal by the claimant from a Decision of Appeals Examiner (UI-9003663), mailed June 19, 1990.

APPEARANCES

None

ISSUE

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

FINDINGS OF FACT

On July 10, 1990, the claimant filed a timely appeal from the Appeals Examiner's decision which disqualified her from receiving benefits, effective February 4, 1990. The basis for that disqualification was the Appeals Examiner's conclusion that the claimant had been discharged for misconduct in connection with her work.

Prior to filing her claim for benefits, the claimant last worked for Regis Hair Stylist of Charlottesville, Virginia. She worked for this employer from March 26, 1989, until January 16, 1990. She was employed as the manager of the company's Charlottesville location.

As the manager, the claimant was completely responsible for the day-to-day operations of the salon. One of her important duties was to ensure that all of the cosmetologists on staff had a current, valid cosmetology license from the State of Virginia. This responsibility was underscored in a memorandum dated April 4, 1989, which was sent to all salon managers and supervisors. That memorandum provided, in pertinent part, as follows:

> Obviously as manager, it is your responsibility to make sure that everything in your salon is in proper condition so that the salon can pass an inspection at any time. One of your first priorities is to be certain that everyone working on your staff has a proper individual cosmetology license. Please make sure that everyone you hire has a current and valid license, please make sure that the individual licenses are properly displayed (according to your individual state requirements), and please make sure that every one of your operators renew their individual license on a timely basis.

In November of 1989, the claimant's supervisor discussed with her deficiencies that existed in the salon's operation. The supervisor also reminded the claimant of the necessity to ensure that all of the cosmetologists were properly licensed. Under Virginia law, a cosmetologist must be licensed by the state. Cosmetologists are not permitted to work in that field without having a current, valid license. The state could take action against the employer for permitting a cosmetologist to work without having a valid license. The claimant was aware of the licensure requirement.

On January 16, 1990, the claimant's supervisor discovered that four cosmetologists, including the claimant, were working without a valid license. The claimant's license had expired on December 31, 1989. The licenses of two other individuals had expired on August 31, 1989, and October 31, 1989, respectively. The fourth individual had been hired by the claimant without having a valid license at all. The claimant was discharged on January 16, 1990, because of her failure to ensure that all of the cosmetologists had current, valid licenses.

The Commission scheduled a hearing in this case for 1:00 p.m. on November 2, 1990. The sole purpose of that hearing was to receive

oral argument in the case. Written notice of that hearing was mailed to both parties and their attorneys on September 13, 1990. The employer's attorney submitted a written argument in lieu of personally appearing for the hearing.

By letter postmarked October 29, 1990, and received by the Commission on October 30, 1990, the claimant requested that the hearing be postponed. According to her letter, the claimant was evidently in the process of changing attorneys. She had spoken with another attorney regarding her case; however, he had not agreed to represent her. The claimant's request for a postponement was denied. The Clerk of the Commission attempted to contact the claimant by telephone on three occasions from October 30 through November 1, 1990; however, there was never any answer at the claimant's residence. The claimant's attorney of record was contacted on November 1, 1990, and advised that a postponement had not been granted. On November 2, 1990, the claimant's attorney of record called the Commission and stated that he would rely upon the arguments set out in his appeal letter dated July 10, 1990.

OPINION

Regulation VR 300-01-4.3C of the Rules and Regulations Affecting Unemployment Compensation provides, in pertinent part, that postponements of a Commission hearing shall be handled in the same manner as Lower Authority appeal hearings, except that the request for a postponement shall be made through the Office of Commission Appeals or through the Special Examiner assigned to hear the case. Regulation VR 300-01-4.2C of the Rules and Regulations Affecting Unemployment Compensation provides, in part, that a request to postpone a scheduled hearing will not be granted unless it is shown that material and substantial harm may result from requiring the scheduled appearance. Furthermore, the regulation requires that all parties and their authorized representatives should appear for the scheduled hearing unless they are specifically informed that a postponement has been granted.

In this instance, there has been no showing that the claimant may suffer substantial and material harm from being required to go forward with the scheduled hearing. The claimant was capably represented at the Appeals Examiner's hearing by the same attorney who filed the appeal on her behalf. That attorney was, and still is, the claimant's counsel of record. The claimant was not exposed to any substantial or material harm by requiring her to proceed with her attorney of record rather than postponing the case for her to see if she could arrange for another attorney to represent her. Accordingly, the request for a postponement was properly denied.

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 claimant 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).

In this case, the claimant was discharged by the employer because she failed to carry out one of her more important responsibilities. The claimant failed to ensure that all of the cosmetologists had valid licenses from the State of Virginia despite admonitions from the employer. The claimant allowed two cosmetologists to work several months after their licenses had expired. The claimant allowed her own license to expire and she hired a cosmetologist who was not licensed at all. These acts and omissions transcend mere oversights or errors in judgment. Instead, they demonstrate a gross, willful neglect of the employer's legitimate business interests and the duties and obligations owed the employer by the claimant. The claimant knew of the importance of complying with the state's licensure requirements. Furthermore, she knew or should have known that the failure to do so could result in punitive action being taken against the company.

As manager of the salon, the claimant had the responsibility to ensure that all of the cosmetologists, including herself, had valid licenses. In that regard, she is in a comparable position to the claimant in the case of Virginia Employment Commission v. Gantt, 7 Va. App. 631, 376 S.E.2d 808 (1989). In that case, an assistant manager was discharged for a single violation of a company rule that prohibited eating breakfast in the store. In finding that the claimant was guilty of misconduct, the Court of Appeals observed that her violation was more serious because, as an assistant manager, she was expected to observe the rule and require compliance by those whom she supervised. That analysis is certainly applicable to the present case.

Therefore, the Commission must conclude that the employer has proven a prima facie case of misconduct in connection with work. Accordingly, in order for the claimant to avoid the statutory disqualification, she must prove mitigating circumstances.

The Commission has carefully reviewed the record together with the written arguments submitted to the Appeals Examiner and the grounds for appeal detailed by the claimant's attorney. The Commission can find no mitigating circumstances. The claimant alleged that she was not responsible for the complete, day-to-day operations of the salon; however, the preponderance of the evidence establishes exactly the opposite conclusion. The claimant also alleged that her dismissal was for reasons other than the failure to ensure that the cosmetologists were validly licensed. Nevertheless, the preponderance of the evidence establishes that the sole reason for her discharge was the licensure situation. Similarly, the claimant's allegations that she was discharged because (1) she objected to racial remarks allegedly made by her supervisor; and (2) that she was unable to properly perform her duties because of managerial difficulties from the home office are not supported by the credible evidence in the record.

For these reasons, the Commission must conclude that the claimant was discharged for misconduct in connection with her work for which no mitigating circumstances have been proven. Consequently, the disqualification provided in Section 60.2-618(2) of the Code of Virginia must be imposed.

DECISION

The claimant's request for a postponement is hereby denied because there has been no showing of substantial and material harm from requiring that she go forward with the scheduled hearing.

The decision of the Appeals Examiner is hereby affirmed. The claimant is disqualified from receiving benefits, effective February 4, 1990, because she was discharged for misconduct connected with her work. This disqualification shall remain in effect for any week benefits are claimed until she performs services for an employer during thirty days, whether or not such days are consecutive, and she subsequently becomes totally or partially separated from such employment.

The case is referred to the Deputy with instructions to investigate the claimant's claim for benefits and to determine if she has been paid any sum as benefits to which she was not entitled and which she is liable to repay the Commission as a result of the disqualification imposed by this decision.

M. Coleman Walsh, Jr.
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)