COMMONWEALTH OF VIRGINIA
VIRGINIA EMPLOYMENT COMMISSION

DECISION OF COMMISSION

In the Matter of:

Vary Kao
[redacted]

Gordon Boulevard Services, Inc.
Woodbridge, Virginia

Date of Appeal to Commission: August 17, 1992

Date of Hearing: October 20, 1992

Place: RICHMOND, VIRGINIA

Decision No.: 39703-C

Date of Mailing: November 3, 1992

Final Date to File Appeal with Circuit Court: November 23, 1992

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This case came before the Commission on appeal by the employer from a Decision of Appeals Examiner (UI-9210120), mailed August 17, 1992.

APPEARANCES

None

ISSUE

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

FINDINGS OF FACT

On August 21, 1992, the employer filed a timely appeal from the Appeals Examiner's decision which held that the claimant was qualified to receive benefits, effective May 3, 1992. The basis for that decision was the Appeals Examiner's finding that the claimant had been discharged for reasons that did not constitute misconduct in connection with his work.

Prior to filing his claim for benefits, the claimant last worked for Gordon Boulevard Services, Inc., as a mechanic. He was employed by this company from July of 1991 until April 22, 1992. The claimant was a full-time employee and was paid $650 per week.

The employer operates a small business and the claimant was one of four employees who worked there. During the course of his employment, the claimant did or failed to do a number of things which the employer found to be aggravating. When the claimant was hired, he represented to the employer that he was a skilled, experienced mechanic and that he had his own tools. After he was hired, the employer discovered that the claimant did not have the degree of skills that he had represented. Also, the claimant had very few tools, and those that he possessed were, for the most part, inadequate to perform the work that was expected of him. As a result, he consistently borrowed tools from the employer. He also took those tools home and did not promptly return them when requested to do so. The employer was also aggravated by the fact that the claimant did not keep his work area clean and orderly. The claimant was also consistently late reporting for work. Generally, he was late by 10 or 15 minutes, and the employer spoke to him a number of times about his tardiness. The claimant also operated a business from his home, and he solicited customers for that business while he was working for the employer.

During the first two weeks of April, 1992, the claimant was verbally warned on five occasions about his failure to bring his own tools to work, his failure to put away the employer's tools after using them, and his inability to complete his work. He was admonished that he would be replaced if he did not improve in these areas.

The claimant last worked for the employer on or about April 22, 1992. He was absent from work on April 23 and April 24, 1992. The claimant subsequently informed the employer that he was taking the next week off as vacation. The employer told the claimant that the vacation was not approved because of the amount of work the shop had to complete. The claimant took the week off anyway, and when he returned to work on May 4, 1992, he was informed that he had been discharged.

The claimant's unexcused absence during the period of April 27, 1992 through May 1, 1992, was the final incident that precipitated his dismissal. In reaching the decision to discharge the claimant, the employer considered all of the other events that had transpired during the claimant's employment. The employer had tolerated a number of these incidents because the claimant had a very pleasant personality and everyone liked him.

The Appeals Examiner conducted two hearings in this case. The first hearing was scheduled to begin at 10:15 a.m. on July 14, 1992. The claimant arrived approximately 10 minutes after the Appeals Examiner had begun the hearing. Prior to starting the hearing, the Appeals Examiner had checked the waiting room in the local office several times and called the claimant's name; however, no one responded.

After the claimant entered the hearing room, an issue developed concerning the dates that the claimant was absent from work. The employer did not have its payroll records at the hearing, and the Appeals Examiner concluded that he would not have sufficient time to complete the hearing since it would be necessary to replay the tape recording of the hearing so that the claimant would be aware of the testimony received prior to his arrival. Accordingly, the Appeals Examiner continued the hearing to another date.

The second hearing was conducted at 9:00 a.m. on August 4, 1992, at the Commission's local office in Woodbridge, Virginia. Both parties were duly notified of that hearing; however, only the employer and a witness for the employer appeared to participate in that hearing.

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 connected 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).

In one key aspect, this case is very similar to Carr v. Conagra, Inc., Commission Decision 34343-C (November 9, 1990), aff'd, Circuit Court of Albemarle County, Law No. 4465-L (June 10, 1991). In the Carr case, the claimant requested a 30-day leave of absence to begin on May 21, 1990. Because of the amount of work that the employer had, the company approved only a two week leave of absence to begin on May 28, 1990. The claimant then requested emergency vacation for the period of May 20 through May 25, 1990. That request was never approved; however, the claimant took the time off on the assumption that approval would be granted. The employer discharged him for unexcused absenteeism. Under those circumstances, the Commission held that the claimant's absence from work was unauthorized and amounted to misconduct in connection with his work.

In the present case, the employer presented a lengthy list of grievances regarding the claimant's conduct and job performance. Although the evidentiary record was not as well developed as the Commission would usually prefer with respect to a number of the employer's complaints, it is clear from the record that the claimant's unauthorized absence during the period of April 27, 1992 through May 1, 1992, was the event that precipitated the employer's decision to discharge him. That final incident, standing alone, is sufficient to establish a prima facie case of misconduct in connection with work. Accordingly, in order to avoid the statutory disqualification, the claimant would need to prove mitigating circumstances.

The claimant failed to appear for the hearing that was conducted on August 4, 1992. Consequently, there is no sworn testimony from him regarding the circumstances surrounding his five days of unexcused absences. Although the claimant, in unsworn statements presented to the local office Deputy, maintained that his vacation had been approved, those assertions are outweighed by the sworn testimony presented at the hearing which establishes that approval had been denied.

Therefore, the Commission must conclude that the claimant was discharged for misconduct in connection with his work for which no mitigating circumstances have been proven. As a result, he must be disqualified from receiving benefits as provided in Section 60.2-618(2) of the Code of Virginia.

DECISION

The Appeals Examiner's decision is hereby reversed. The claimant is disqualified from receiving benefits, effective May 3, 1992, because he was discharged for misconduct connected with his work.

This disqualification shall remain in effect for any week benefits are claimed until the claimant performs services for an employer during 30 days, whether or not such days are consecutive, and he subsequently becomes totally or partially separated from such employment.

This case is referred to the Deputy who is requested to investigate the claimant's claim for benefits and to determine if he has been overpaid any sum of benefits to which he was not entitled and which he must 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)