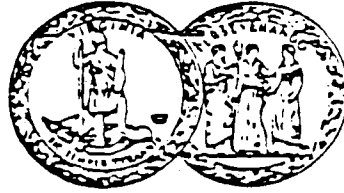


COMMONWEALTH OF VIRGINIA
VIRGINIA EMPLOYMENT COMMISSION



DECISION OF COMMISSION

In the Matter of:

Roy M. Cobble
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United Consumers, Inc.
Alexandria, Virginia

Date of Appeal
to Commission: April 15, 1993

Date of Hearing: May 20, 1993

Place: RICHMOND, VIRGINIA

Decision No.: 41966-C

Date of Mailing: June 28, 1993

Final Date to File Appeal
with Circuit Court: July 18, 1993

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This case came before the Commission on appeal by the claimant from a Decision of Appeals Examiner (UI-9304131), mailed March 24, 1993.

APPEARANCES

Employer Representative

ISSUES

Did the claimant file a timely appeal from the Decision of Appeals Examiner, and if not, was good cause shown to extend the 21-day appeal period as provided in Section 60.2-620B of the Code of Virginia (1950), as amended?

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

FINDINGS OF FACT

On April 15, 1993, the Commission received a letter from the claimant in which he appealed the Appeals Examiner's decision which disqualified him from receiving benefits, effective January 17,

1993. The disqualification was based upon the Appeals Examiner's conclusion that the claimant had been discharged for misconduct connected with his work.

The Appeals Examiner's decision was mailed to the claimant at his correct, last known address, on March 24, 1993. A notice appeared on the first page of that decision which informed the claimant of his right to appeal, the procedure for filing an appeal, and the final date for doing so. In this case, the final date for filing an appeal was April 14, 1993.

The claimant filed his appeal with the Commission via Airborne Express. The claimant's letter of appeal was received by the Office of Commission Appeals on April 15, 1993. The claimant's appeal letter had been delivered by Airborne Express to the agency's administrative office in Richmond, Virginia on April 14, 1993. A security guard assigned to the agency acknowledged receipt of the letter at 10:34 a.m., on April 14, 1993.

Prior to filing his claim for benefits, the claimant was employed by United Consumers, Inc. as an account representative and bill collector. He was employed by the company from June 15, 1992 through November 17, 1992. He was a full time employee and was paid \$8.16 an hour plus a commission.

The claimant had previously worked for the employer prior to June 15, 1992. The claimant was a recovering alcoholic who had received in-patient treatment for his alcoholism. He continued that treatment through an aftercare program.

On November 9, 1992, the claimant left work at noon complaining of his high blood pressure. On November 10, 1992, the claimant contacted the employer and advised that his blood pressure was still high and that he anticipated that he would return to work on November 11, 1992.

On November 11, 1992, the claimant called the employer and advised that his blood pressure was still high and that he was going to see his doctor. On the following day, the claimant again called the employer and stated that he would not be at work since his blood pressure remained high.

On November 13, 1992, the claimant contacted the employer and stated that his blood pressure was still high. He also advised the employer that his doctor had prescribed medication for him, but the medication had made him sick. He stated that he intended to go back to the doctor because of his reaction to the medication. Later that same day, the employer contacted the claimant and requested that he provide a note from his physician.

On November 16, 1992, the claimant contacted the employer's office and advised that he had not been honest with the company during the preceding week. The claimant stated that he had not gone to see a doctor, but had been on a drinking binge all week. Although he had stopped drinking on Friday, he was still physically unable to come to work.

On November 17, 1992, the claimant reported to work and met with his superiors regarding the events of the preceding week. He again admitted that he misrepresented the actual reason for his absences, and had not been honest with respect to visiting the doctor. At that time, the claimant was discharged because of his dishonesty and misrepresentations with respect to the circumstances surrounding his absences during the preceding week.

OPINION

Section 60.2-620B of the Code of Virginia provides that an Appeals Examiner's decision shall become the final decision of the Commission unless an appeal is filed within 21 days of the date which it was mailed to the last known address of the party requesting the appeal. For good cause shown, the appeal period may be extended.

In the case of Barnes v. Economy Stores, Inc., Commission Decision 8624-C (November 22, 1976), it was held:

The aforementioned statute enunciates the statutory time limit in which an appeal from a decision of an Appeals Examiner must be filed. It allows an extension of that 14-day (subsequently extended to 21 days) time limit where good cause is shown. A reasonable construction of the good cause provision of that statute is that in order for good cause to be shown, the appellant must show some compelling and necessitous reason beyond his control which prevented him from filing an appeal within the enunciated statutory time limit.

In this case, the question regarding the timeliness of the claimant's appeal arose since the claimant's appeal letter was received by the Office of Commission of Appeals one day after the appeal period had expired. The claimant was subsequently able to provide documentation from Airborne Express to show that the Commission had received his letter of appeal on April 14, 1993, the final date for filing an appeal. The Commission has followed a long standing practice that an appeal is filed when it is delivered by the appellant, the appellant's agent, or a courier to any office, branch or division of the agency. Therefore, the fact that there was a one day delay in forwarding the claimant's appeal to

the Office of Commission Appeals cannot be used as a basis for concluding that the appeal was not timely. Since that appeal was received by the agency on the final date for appeal, it shall be accepted as timely filed.

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 the case of Butts v. Jones, Blechman, Woltz & Kelly, P. C., Commission Decision 39702-C (October 15, 1992), the claimant was a mail clerk for a law firm. She was discharged because she had misappropriated postage from the firm's postage meter machine to mail a personal package. The claimant did not pay for the postage, and during the firm's investigation of the incident, the claimant made false statements concerning her actions. In finding that the claimant was guilty of misconduct the Commission stated:

Regardless of any written rules or policies, every employee owes two fundamental duties to his or her employer. First, the employee owes the employer the duty of loyalty. This requires the employee to deal with the employer in good faith in all matters that

are related to the employment relationship. A material breach of this duty constitutes misconduct if it is prejudicial to the employer's interest. Hudnall v. Jet Services, Inc., Decision UI-73-43 (February 28, 1973), aff'd, Commission Decision 5920-C (March 27, 1973); Colton v. Greyhound Airport Service, Decision UI-74-603 (April 1, 1974), aff'd, Commission Decision 6282-C (May 14, 1974).

Second, every employee owes the duty of honesty to the employer. The act of providing false or misleading information to an employer has been held to constitute misconduct in connection with work. Powell v. Sims Wholesale Company, Commission Decision 13448-C (June 10, 1980); Madison v. Newport News Shipbuilding & Dry Dock Company, Decision UI-78-7966 (December 26, 1978), aff'd, Commission Decision 12128-C (May 24, 1979), aff'd, Circuit Court of the City of Newport News (June 9, 1980).

In this instance, the claimant was not discharged because of his relapse or the fact that he had been ill as a result of his consumption of the alcoholic beverages. Instead, he was discharged because he failed to be honest and candid with the employer concerning the reasons and circumstances surrounding his absences. In particular, the claimant misrepresented the nature of his illness, and lied to the employer about visiting a doctor for medical treatment. The claimant's conduct in this regard undermined his credibility and trustworthiness in the eyes of his employer. Those are essential elements of any successful employer-employee relationship. Although the claimant may have been understandably embarrassed about his relapse, that does not mitigate or justify his deliberate misrepresentation and false statements to the employer.

Under these circumstances, the Commission must conclude that the claimant was discharged for misconduct connected with his work for which no mitigating circumstances have been proven. Therefore, he must be disqualified from receiving benefits as provided by the statute.

DECISION

The claimant's appeal is accepted by the Commission as being timely filed.

The Appeals Examiner's decision is hereby affirmed. The claimant is disqualified from receiving benefits, effective January 17, 1993, 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 thirty 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 the claimant has been overpaid any sum of benefits to which he was not entitled and which he will be liable to repay the Commission as a result of the disqualification imposed by this decision.

M. Coleman Walsh, Jr.
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)