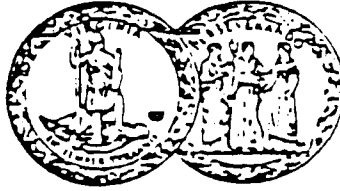


COMMONWEALTH OF VIRGINIA  
VIRGINIA EMPLOYMENT COMMISSION



DECISION OF COMMISSION

In the Matter of:

Edith V. Layne  
[REDACTED]

Leslie G. Rowland  
Warrenton, Virginia

Date of Appeal

to Commission: June 2, 1993

Date of Review: July 15, 1993

Place: RICHMOND, VIRGINIA

Decision No.: 42493-C

Date of Mailing: July 16, 1993

Final Date to File Appeal

with Circuit Court: August 5, 1993

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This case came before the Commission on appeal by the claimant from a Decision of Appeals Examiner (UI-9307340), mailed May 14, 1993.

ISSUE

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 January 28, 1993, the Appeals Examiner issued a decision (UI-9221301), which held that the claimant was qualified to receive benefits, effective November 8, 1992, based upon her separation from work with Leslie G. Rowland. The basis for that decision was the Appeals Examiner's conclusion that the claimant had been discharged for reasons that did not constitute misconduct in connection with work.

The employer filed a timely appeal to the Commission from that decision. On April 15, 1993, the Commission held a hearing to receive oral argument. During that hearing, the employer renewed her previous request that the Commission direct the taking of additional evidence and testimony. The basis for the request was the employer's proffer that the claimant had committed perjury during the Appeals Examiner's

hearing and, as a result, had procured a favorable decision. Based largely on the documentation submitted in support of the proffer, the Commission concluded that the regulatory criteria for directing that additional evidence be taken in the case had been satisfied. Consequently, on April 16, 1993, the Commission issued Commission Order 41390-C, which vacated the Appeals Examiner's decision of January 28, 1993, and remanded to the case for further proceedings.

The Commission's order directed the presiding Appeals Examiner to place certain documents in the record as exhibits. In addition, the Appeals Examiner was directed to receive any other evidence from the parties that was relevant and material to the issues that were in dispute. Furthermore, the Appeals Examiner was requested to ask the claimant to explain her answers to questions that appeared on certain pages of the transcript, since those answers were directly contradictory to the court records that the employer submitted in support of its proffer.

A hearing was scheduled before the Appeals Examiner for 1:00 p.m. on May 14, 1993. Due notice of that hearing was provided to all parties as required by law. The employer and one witness appeared to testify. The claimant neither appeared for the hearing nor responded to the hearing notice.

The first three paragraphs of the findings of fact of the Appeals Examiner are supported by the evidence in the record. Accordingly, those findings of fact are hereby adopted by the Commission with the following modification and additions.

The first sentence of the third paragraph of the findings of fact is modified to read, "On November 3, 1992, the claimant was arrested and charged with uttering a forged instrument to the prejudice of another's rights, pursuant to Section 18.2-172 of the Code of Virginia." Additional charges involving allegations of forgery, uttering, and credit card theft were subsequently placed against the claimant with respect to her dealing with one or more residents of the retirement community.

The claimant worked at the retirement community where the employer's beauty shop was located. The contractual agreement between the employer and the retirement community required the employer and her employees to abide by the same rules and regulations as the retirement community's employees. These policies prohibited, among other things, accepting tips or gratuities from the residents, or entering the apartment of a resident. Also, borrowing or attempting to borrow money from a resident, or lending or attempting to lend money to a resident was prohibited. Similarly, the theft of property belonging to an employee or a resident of the retirement community was prohibited. A violation of this latter rule would result in immediate termination. These rules had been made known to the claimant.

As a result of being arrested and charged with uttering a forged instrument, the administrator of the retirement community informed the employer that the claimant was barred from their property. Accordingly, the claimant was discharged by the employer.

#### 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).

At the first hearing that was conducted by the Appeals Examiner, the claimant denied that she was aware of the rules or policies of the retirement community. This conflicted with the employer's testimony that these various policies had been discussed with the claimant and other beauticians who worked for the employer. Usually, that type of conflict in the evidence would have been resolved in favor of the claimant since there was no independent corroborating evidence to make the employer's testimony of greater weight. That changed, however, once the record was reopened and evidence of the claimant's prior inconsistent statements were introduced.

At the first hearing, the claimant testified under oath that all charges against her had been dropped; that she had not entered any type of guilty plea to petit larceny; that she was not placed on any type of

probation; and that no charges placed against her had been reduced to lesser included offenses. The falsity of each of those statements has been clearly established by the record. Accordingly, the Commission is unwilling to afford the claimant's testimony much weight, if any at all.

The evidence in the record establishes that employees of the employer were bound to follow the same rules and regulations as employees of the retirement community. The claimant violated one of those rules by engaging in a form of theft involving the property of a resident. The claimant entered an "Alford" plea to the reduced charge of petit larceny. An "Alford" plea is a guilty plea which does not include an admission of guilt; however, by entering such a plea the defendant is stipulating to the court that the evidence, if heard, would be sufficient as a matter of law to support a finding of guilty.

Moreover, even in the absence of the claimant's "Alford" plea, the additional evidence secured on May 14, 1993, included the testimony of the investigating detective. That testimony was, standing alone, sufficient to establish a prima facie case of misconduct.

Although the Commission is persuaded that the claimant's conduct violated a rule that she knew she had to obey, the same result would have come about even in the absence of the rule. The claimant's conduct essentially constituted the perpetration of a fraud upon one or more customers of the employer's business. The claimant met the resident or residents in question by virtue of her employment with the employer. She owed her employer an absolute duty of honesty in all dealings that were related to her employment. See generally, Butts v. Jones, Blechman, Woltz & Kelly, P.C., Commission Decision 39702-C (October 15, 1992).

Since every employee has a duty to deal honestly with the employer's customers, the claimant's conduct not only violated that duty, but could have had a substantive detrimental impact on the employer. It is conceivable that the employer's agreement with the retirement community could have been terminated as a result of what occurred. Similarly, the claimant's conduct could have adversely affected the employer's business by discouraging residents of the retirement community from patronizing the employer's business. Thus, even in the absence of a rule, the claimant's conduct would have amounted to a willful disregard of the employer's interests and the duties and obligations owed to the employer by the employee. See generally, Coan v. Consolidated Cigar Corporation, Commission Decision 29542-C (February 5, 1988).

For the reasons expressed herein, the Commission concludes that the claimant was discharged for misconduct connected with her work for which no mitigating circumstances have been proven. Consequently, the disqualification provided by the statute must be imposed.

DECISION

The Appeals Examiner's decision is hereby affirmed. The claimant is disqualified from receiving benefits, effective November 8, 1992, because she was discharged for misconduct connected with her 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 she subsequently becomes totally or partially separated from such employment.

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

In addition, the Deputy is requested to investigate this case and to issue a written determination with respect to whether the claimant's testimony at the January 19, 1993 appeals hearing constituted administrative fraud pursuant to the provisions of Section 60.2-618(4) of the Code of Virginia.

The Clerk of the Commission is requested to provide the Deputy with a copy of (1) the transcript of the January 19, 1993 appeals hearing; (2) Commission Order 41390-C, mailed April 16, 1993; and (3) Commission Exhibit #1-A, which was introduced as evidence at the May 14, 1993 appeals hearing.



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)