COMMONWEALTH OF VIRGINIA
VIRGINIA EMPLOYMENT COMMISSION

DECISION OF COMMISSION

In the Matter of:

Basil A. Stover
[redacted]

Pulaski Furniture Corporation
Pulaski, Virginia

Date of Appeal
to Commission: August 19, 1993

Date of Review: October 1, 1993

Place: RICHMOND, VIRGINIA

Decision No.: 43306-C

Date of Mailing: October 2, 1993

Final Date to File Appeal
with Circuit Court: October 22, 1993

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This case came before the Commission on appeal by the claimant from a Decision of Appeals Examiner (EUC-9311205), mailed August 2, 1993.

ISSUES

Did the claimant have good cause to reopen the Appeals Examiner's hearing as provided in Regulation VR-300-01-4.2I of the Regulations and General Rules Affecting Unemployment Compensation?

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 August 19, 1993, the claimant filed a timely appeal from the Appeals Examiner's decision which was issued on August 2, 1993. In that decision, the Appeals Examiner found that the claimant had good cause for reopening a prior hearing that was scheduled for July 9, 1993. The Appeals Examiner also concluded that the claimant had been discharged for misconduct connected with his work, and should be disqualified from receiving benefits, effective May 23, 1993.

The findings of fact of the Appeals Examiner are supported by the evidence in the record. Accordingly, they are adopted by the Commission with the following additions.

During the last six months of his employment, the claimant was absent from work six times and tardy six times. The instances of tardiness were attributable to problems with his car. On September 11, 1992, the claimant received a written warning because of his excessive tardiness. At that point, the claimant had been late for work on three occasions during the preceding 30 days. The claimant was told that another incident of tardiness prior to October 11, 1992, would result in either a three-day suspension or his termination.

OPINION

Based upon the facts proven by the record, the Appeals Examiner correctly determined that the claimant established good cause to reopen the prior hearing. Accordingly, that portion of the Appeals Examiner's opinion is hereby adopted by the Commission.

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 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).

Every employer has the right to expect employees to report for work as scheduled. Furthermore, an employee has a fundamental obligation to inform the employer of any absence. This is particularly true when the employer has adopted a policy which

requires notification. Thus, the Commission has held, that chronic, unexcused absenteeism without adequate justification and proper notification to the employer would constitute misconduct in connection with work. Epps v. Burlington Worsteds, Commission Decision 6523-C (December 10, 1974); Hancock v. Mr. Casual's, Inc., Commission Decision 6355-C (July 3, 1974); Casey v. Cives Steel Company, Commission Decision 27111-C (June 30, 1986), aff'd, Circuit Court of Frederick County, Chancery No. C-86-168 (April 27, 1987). Since chronic, excessive tardiness is a form of absenteeism, these same principles would apply in either situation. See generally, Newkirk v. Virginia National Bank, Commission Decision 5585-C (February 18, 1972).

In this case, the evidence before the Commission establishes that the claimant was discharged because he was excessively absent and late for work. On May 3, 1993, he received a final warning which was prompted primarily because of his recent pattern of tardiness. Three weeks later, the claimant was nearly four hours late reporting for work. This is sufficient to establish a prima facie case of misconduct. Accordingly, the claimant must show mitigating circumstances in order to avoid the statutory disqualification.

In his defense, the claimant argued that his tardiness was caused by problems with his car. Those problems were magnified because he lived 70 miles from the employer's place of business. Nevertheless, the Commission is not satisfied that the claimant has proven mitigation.

If the claimant's tardiness on May 24, 1993, had been the first time he had been late due to transportation problems, the Commission would be inclined to find mitigation. In this particular case, nearly every incident of tardiness was because of his car problems. The Appeals Examiner correctly pointed out that transportation to and from work is, as a general rule, the responsibility of each individual employee. Furthermore, when a particular means of transportation has proven itself to be unreliable, the employee must take affirmative steps to remedy the situation. Once he has been warned that his attendance record is unacceptable, the employee's continued use of an unreliable vehicle will not generally excuse, justify or mitigate further incidents of absenteeism or tardiness.

For these reasons, the Commission must conclude that the claimant has not proven mitigating circumstances for his chronic, persistent tardiness and absenteeism. Therefore, he must be disqualified as provided by the statute.

DECISION

The Appeals Examiner's decision is hereby affirmed. It is held that the claimant established good cause to reopen the appeals hearing that was scheduled for July 9, 1993.

It is further held that the claimant should be disqualified from receiving benefits, effective May 23, 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 30 days, whether or not such days are consecutive, and he subsequently becomes totally or partially separated from such employment.

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)