COMMONWEALTH OF VIRGINIA
VIRGINIA EMPLOYMENT COMMISSION

DECISION OF COMMISSION

In the Matter of:

Pamela Turner
[redacted]

Christianburg Garment Co., Inc.
t/a Donn Kenny Apparel
Haysi, Virginia

Date of Appeal
to Commission: December 10, 1993

Date of Hearing: March 10, 1994

Place: RICHMOND, VIRGINIA

Decision No.: 44375-C

Date of Mailing: March 29, 1994

Final Date to File Appeal
with Circuit Court: April 18, 1994

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This case came before the Commission on appeal by the claimant from a Decision of Appeals Examiner (EUC-9318793), mailed December 3, 1993.

APPEARANCES

Attorney for Claimant

ISSUE

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

FINDINGS OF FACT

On December 10, 1993, the claimant filed a timely appeal from the Appeals Examiner's decision which disqualified her from receiving benefits, effective October 17, 1993. The basis for that disqualification was the Appeals Examiner's conclusion that the claimant had been discharged for misconduct connected with work.

Prior to filing her claim for benefits, the claimant was last employed by Christianburg Garment Company, Inc., t/a Donn Kenny Apparel. She worked as a janitor from August 12, 1993, until October 23, 1993. She was a full-time employee and was paid $4.25 an hour.

During the course of her employment, the employer was not satisfied with the quality of the claimant's work. On September 14, 1993, her immediate supervisor told her that she was not keeping the bathrooms, windows, and other areas of the plant clean. He instructed her to take more time and try to do a better job.

On October 15, 1993, the plant manager discussed the claimant's job performance with her. At that time, he informed her that she was not cleaning the offices and bathrooms "well enough."

The claimant's job performance did not improve in the estimation of the plant manager. Therefore, he personally cleaned a bathroom for the purpose of showing the claimant what level of performance he expected from her.

The plant manager requested the claimant to meet with him on October 21, 1993. The purpose of the meeting was to discuss the claimant's job performance. In addition, the plant manager intended to show the claimant the bathroom he had cleaned in order to explain his expectations.

The claimant met with the plant manager in his office. No other individuals were present. When the plant manager began criticizing the claimant's job performance, she became upset. She perceived the plant manager as being an individual that she could not satisfy regardless of what she did on the job. The claimant stood up and stated that she was tired of hearing his lip. It appeared to the plant manager that the claimant was preparing to leave the office. Accordingly, he asked her if she was quitting. The claimant responded in the negative, but also stated that the plant manager could fire her if he did not like what she was doing. (See, Employer Exhibit 3). The plant manager responded, "Okay, you are fired."

The claimant had not received any warnings for failing to abide by any company rules or regulations. The claimant had not engaged in any similar outbursts such as the one that occurred when she met with the plant manager on her last day of work.

After the claimant was dismissed, the plant manager prepared a memorandum recounting what had transpired during their meeting on October 21, 1993. This memorandum appears in the record as Employer Exhibit 3.

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 her 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).

After carefully reviewing the evidentiary record and the applicable law, the Commission must disagree with the Appeals Examiner's conclusion that the claimant had been discharged for work-connected misconduct. There are two fundamental reasons for the Commission's conclusion.

First, it appears that the claimant was actually discharged because of her job performance. The claimant's statement, as recorded by the plant manager on Employer Exhibit 3, reveals that she stated that he could fire her if he did not "like what she was doing." The plant manager responded by telling the claimant she was discharged. Therefore, it appears from the employer's version of the event that the motivating factor for the claimant's dismissal was her performance.

As a general proposition, the Commission has held that inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertency, or ordinary negligence in isolated instances do not constitute misconduct under the statute. Accord, Miller v. J. Henry Holland Corporation, Commission Decision 7470-C (February 9, 1976). That is not to say, however, that poor job performance will never amount to misconduct. In the case of Blubaugh v. R. R. Donnelley & Sons Co., Commission

Decision 19940-C (November 23, 1983), aff'd, Circuit Court of Rockingham County, Law No. 6882 (February 25, 1985), the claimant was discharged when the quality of his work significantly deteriorated after he had performed satisfactorily for the first three months of his employment. The deterioration continued despite warnings, a disciplinary suspension, and the specific directive by his supervisor to concentrate on quality rather than quantity. When the claimant made five serious mistakes on his last day of work, he was discharged. Both the Commission and the Circuit Court found that his dismissal was for work-connected misconduct.

The evidence in the record establishes that the employer was not satisfied with the claimant's performance. The record also reveals that the claimant apparently never performed the job up to the employer's expectations. Accordingly, it appears that her lack of good performance was the result of inability or incapacity, and not any deliberate or willful act or omission. For these reasons, the claimant's job performance would not constitute misconduct in connection with work.

The Appeals Examiner analyzed this case as being a discharge for insubordination. Even if the Commission agreed that the claimant was discharged because of what she said during the October 21, 1993, meeting, those comments would not be sufficient to constitute misconduct in connection with work. In this regard, the holding of the Virginia Court of Appeals in the case of Kennedy's Piggly Wiggly Stores, Inc. v. Cooper, 14 Va. App. 701, 419 S.E.2d 278 (1992), is particularly instructive.

In the Cooper case, the claimant was discharged because he told the company CEO that he was "full of shit." He also stated that he did not believe anything told to him by company officials. The claimant's comments followed a lengthy private meeting with management officials during which the CEO had repeatedly asked the claimant for his resignation. In addition, the claimant had been a long-term employee with no prior record of misconduct. Under these facts, the court concluded that Cooper, although acting disrespectfully, was not guilty of work-connected misconduct which would invoke the statutory disqualification.

In considering whether the use of profanity would constitute misconduct, the court stated:

> Our sister states have considered several factors in determining whether the utterance of such language constitutes willful misconduct. Such factors include the severity of the language used; the quantity of the language used, i.e., whether it was a lengthy barrage or a brief incident; whether the language was spoken in the presence of customers, clients or

> other employees; whether the employee had a record of misconduct; whether prior warnings were given regarding employee's conduct; and whether the language was provoked by the employer. 14 Va. App. at 706 (citations omitted).

The Commission recognizes that the claimant did not use any profanity when she addressed the plant manager on her last day of work. Despite that distinction, the Commission is of the opinion that the factors outlined in the Cooper case should be considered in any instance where an employee was discharged for allegedly participating "in conduct which shows a flagrant disrespect for a supervisor's position and authority." Ware v. Adesso Precision Machine Co., Commission Decision 31397-C (July 25, 1989).

As previously noted, the claimant did not use any profanity during her meeting with the plant manager. The language that she utilized, although disrespectful, was neither lengthy nor spoken in the presence of customers, clients or other employees. Additionally, the claimant had never engaged in a similar outburst during her employment, and she had no record of prior misconduct. In this respect, the Commission does not consider the oral counsellings regarding her job performance as evidence that she was guilty of misconduct.

For more than 50 years, the courts of the Commonwealth have recognized that the Virginia Unemployment Compensation Act is remedial legislation that must be liberally construed in order to effect its beneficent aims. U. C. C. v. Collins, 182 Va. 426, 29 S.E.2d 388 (1944); Ford Motor Co. U. C. C., 191 Va. 812, 63 S.E.2d 28 (1951); Israel v. V. E. C., 7 Va. App. 169, 372 S.E.2d 207 (1988). These principles were underscored by the Cooper court when it stated:

> The statutory term 'misconduct' should not be so literally construed as to effect a forfeiture of benefits by an employee except in clear instances; rather, the term should be construed in a manner least favorable to working a forfeiture so as to minimize the penal character of the provision by excluding cases not clearly intended to be within the exception. 14 Va. App. at 707-8.

With these considerations in mind, the Commission is of the opinion that the claimant's remarks that she made to the plant manager on October 21, 1993, do not constitute misconduct in connection with work. Therefore, the claimant may not be disqualified from receiving unemployment benefits. In reaching this conclusion, the Commission does not hold that the employer is required to tolerate the claimant's behavior. Every employer is

entitled to receive reasonable respect from its employees. Nevertheless, "Even employees who are fired for what the employer considers good cause may be entitled to unemployment compensation." Cooper, 14 Va. App. at 708, citing Blake v. Hercules, Inc., 4 Va. App. 270, 273, 356 S.E.2d 453, 455 (1987).

DECISION

The decision of the Appeals Examiner is reversed. The claimant is qualified to receive benefits, effective October 17, 1993, based upon her separation from work with the employer.

M. Coleman Walsh, Jr.
Special Examiner