

COMMONWEALTH OF VIRGINIA  
VIRGINIA EMPLOYMENT COMMISSION



DECISION OF COMMISSION

In the Matter of:

Delois C. Agnew  
[REDACTED]

Memorial Hospital of Martinsville  
Martinsville, Virginia

Date of Appeal

to Commission: November 8, 1994

Date of Hearing: January 24, 1995

Place: RICHMOND, VIRGINIA

Decision No.: 47019-C

Date of Mailing: February 28, 1995

Final Date to File Appeal  
with Circuit Court: March 20, 1995

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This case came before the Commission on appeal by the employer from a Decision of Appeals Examiner (UI-9414201), mailed October 18, 1994.

APPEARANCES

Representative for Claimant  
Employer Representative

ISSUE

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

FINDINGS OF FACT

On November 8, 1994, the employer filed a timely appeal from the Appeals Examiner's decision which held that the claimant was qualified for benefits, effective August 21, 1994. The basis for that decision was the Appeals Examiner's conclusion that the claimant had been discharged for reasons that would not constitute misconduct in connection with her work.

Prior to filing her claim for benefits, the claimant last worked for Memorial Hospital of Martinsville, Virginia. She worked for this employer on two separate occasions. Her most recent period of employment began on November 30, 1974 and ended on August 20, 1994. At the time of her separation from work, the claimant was a full-time food service supervisor and was paid \$9.85 an hour.

The employer has a progressive disciplinary policy that applies to excessive absenteeism and tardiness. Under that policy, three occurrences of absenteeism or tardiness within three months could result in a verbal warning. The policy also defines excessive absenteeism as seven or more occurrences of absence during a 12-month period. (Commission Exhibit #4, p. 9)

On August 20, 1993, the claimant received a letter from her supervisor, the food service director, concerning her attendance record. At that time, the employer noted that the claimant had accumulated five occurrences of absenteeism due to sickness that encompassed a total of 25 days. There were also four incidents of tardiness documented during the period of January 1 through August 20, 1993. The claimant was counselled about the importance of regular attendance, and the adverse impact her absences could have on patient care.

On November 23, 1993, the claimant received a written warning. This warning was issued because there had been three further occurrences of tardiness and three occurrences of absenteeism since the August 20, 1993 counselling letter. All of the absences were due to sickness.

On April 27, 1994, the claimant received two separate written warnings. The first written warning noted that she had four occurrences of sickness since the beginning of 1994. The written warning also observed that she had nine occurrences of absenteeism due to illness since May of 1993. She was required to attend the company's Employee Assistance Program and admonished that further occurrences or her failure to participate in the EAP program would result in termination.

The second written warning that she received on April 27, 1994, concerned the completion of her timecard the preceding day. The claimant was scheduled to report for work at 5:00 a.m. She was late and actually reported at 6:40 a.m. The claimant made a mistake in completing her timecard and noted that she had reported at 5:40 p.m. The food service director believed that the claimant had falsified her timecard. Accordingly, she was suspended for three work days, required to participate in the EAP Program, and advised that further occurrences or her failure to attend the Employee Assistance Program would result in her termination.

In addition to this disciplinary action, the claimant was placed on a 90-day probation. During that probationary period, the claimant was hospitalized. The employer granted her a medical leave and extended the probation period to cover the amount of time she was on leave. As a result, the claimant's probation was due to expire on August 24, 1994.

The claimant was scheduled to report for work at 5:00 a.m. on August 24, 1994. She did not report for work until approximately 8:00 a.m., because her alarm clock failed to ring due to an apparent power failure. The claimant woke up at 7:30 a.m. and noticed that her alarm clock was blinking on and off. She immediately contacted an employee in her department and left word that she would report for work as soon as possible. After arriving at work, the claimant met with her immediate supervisor who discharged her for excessive tardiness and her overall attendance record.

During her last year of employment, the claimant had experienced a significant amount of illness that was the primary cause for her poor attendance record. She provided medical documentation for her absences when requested 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).

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). Because chronic, excessive tardiness is a form of absenteeism, these same principles would apply in either situation. Stover v. Pulaski Furniture Corporation, Commission Decision 43306-C (October 2, 1993); see generally, Newkirk v. Virginia National Bank, Commission Decision 5585-C (February 18, 1972).

Here, the evidence establishes that virtually all of the claimant's absences were due to illness. The record does not reveal that the claimant failed to provide proper notification or any required medical documentation to justify her absences. Therefore, the claimant's absences due to illness could not support a finding of misconduct because the requisite elements of deliberateness or willfulness are lacking.

In addition to being absent because of illness, the claimant had been tardy on a number of occasions during her last year of employment. Because of her overall attendance record and the employer's belief that she had falsified her timecard, the claimant was warned on April 27, 1994, that further occurrences of absenteeism or tardiness would result in termination. On the last day of her employment, the claimant was late for work because her alarm clock did not ring due to an apparent power failure.

The claimant would not have been discharged but for the final incident of tardiness. Therefore, although the claimant's entire attendance record must be considered, the final incident has greater significance. On that occasion, the claimant was admittedly late; however, the best evidence in the record establishes that her tardiness was attributable to a circumstance beyond her control. This negates any inference of deliberateness or willfulness.

The employer contended that the claimant should have done additional things, such as purchasing a battery operated or wind-up clock, or made arrangements with a friend or relative to call her early in the morning to ensure that she arrived at work on time. The Commission must reject this argument because the record fails to reveal that the claimant had ever experienced problems with the reliability of her alarm clock. If she had experienced such problems, her continued use of an unreliable alarm clock would not generally excuse, justify or

mitigate further incidents of absenteeism or tardiness in light of the warnings she had received. In this regard, the present case is analogous to the Stover case previously cited. There, the Commission rejected the claimant's contention that transportation problems, which caused his excessive absenteeism and tardiness, should constitute a mitigating circumstance. In rejecting this argument, the Commission stated:

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.

If the record in this case showed that the claimant had been tardy on multiple occasions because of problems with her alarm clock, her continued reliance on that alarm clock would have been just as unreasonable as the claimant's continued use of an unreliable vehicle. In the absence of such evidence, the Commission is not prepared to require a claimant to take the steps advocated by the employer as a precondition to proving mitigation for an incident of tardiness.

For these reasons, the Commission must conclude that the claimant was not guilty of misconduct in connection with her work within the contemplation of the Branch case. Accordingly, she is qualified to receive benefits based upon her separation from work with the employer.

#### DECISION

The decision of the Appeals Examiner is affirmed. The claimant is qualified to receive benefits, effective August 21, 1994, because she was discharged by Memorial Hospital of Martinsville for reasons that do not constitute misconduct in connection with her work.

*M. Coleman Walsh, Jr.*

M. Coleman Walsh, Jr.  
Special Examiner