COMMONWEALTH OF VIRGINIA
VIRGINIA EMPLOYMENT COMMISSION

DECISION OF COMMISSION

In the Matter of:

Nathaniel Robinson [redacted]

Smithfield Packing Co., Inc.
Smithfield, Virginia

Date of Appeal to Commission: January 21, 1992

Date of Hearing: March 4, 1992

Place: RICHMOND, VIRGINIA

Decision No.: 37615-C

Date of Mailing: March 6, 1992

Final Date to File Appeal with Circuit Court: March 26, 1992

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This case came before the Commission on appeal by the claimant from a Decision of Appeals Examiner (UI-9117912), mailed January 10, 1992.

APPEARANCES

Claimant

ISSUE

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

FINDINGS OF FACT

On January 21, 1992, the claimant filed a timely appeal from the Appeals Examiner's decision which disqualified him from receiving benefits, effective October 27, 1991. The basis for that disqualification was the Appeals Examiner's finding that the claimant had been discharged for misconduct in connection with his work.

Prior to filing his claim for benefits, the claimant last worked for Smithfield Packing Company of Smithfield, Virginia. He worked for this company from July 25, 1978, until October 19, 1991. The claimant was a full-time employee in the maintenance department and was paid $9.45 an hour. He usually worked the third shift, which began at 11:00 p.m. and extended until 7:30 a.m. He worked this schedule from Sunday night through Friday morning. On occasion, he would work overtime on Saturdays.

The employer has negotiated a collective bargaining agreement with the union that represents the employees. Part of that agreement includes certain rules and regulations which the employees have agreed to obey. One of those rules prohibits sleeping on the job. The penalty for violating this rule is immediate dismissal. The claimant was aware of this particular policy.

At approximately 2:00 a.m. on October 18, 1991, the claimant sat down in the shop and fell asleep. He was awakened by a supervisor and a union steward. The claimant did not know how long he had been sleeping. As a result of this incident, the claimant was discharged by the employer.

The claimant was working his sixth day that week and had already worked in excess of forty hours. On that particular shift, he was very tired, and this contributed to him falling asleep on the job.

At the Appeals Examiner's hearing, and in his argument before the Commission, the claimant maintained that his dismissal by the company had been racially motivated. In support of that argument, the claimant relied on his appeal letter (Exhibit 7), wherein he alleged that a year ago, his department included four white employees and three black employees. During that year, two black employees had been discharged and both of them had been replaced by white employees.

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).

In this case, the claimant was discharged because he was sleeping on the job. This violated a known company rule. The company rule in question provided that the offending employee would be automatically discharged. Under these circumstances, the Commission must conclude that a prima facie case of misconduct has been established. Accordingly, the burden is on the claimant to show mitigating circumstances for his actions.

The claimant has raised essentially two arguments to support his position that he had mitigating circumstances. First, he contended that his dismissal was racially motivated. Second, he argued that he fell asleep because he was tired, but did not deliberately intend to do so. The Commission does not agree with these contentions.

First, the claimant's testimony rebuts any inference that he was discharged because of his race. The claimant admitted that he fell asleep on the job in violation of a known company rule. The claimant also admitted that the company rule in question provided immediate dismissal as the penalty for a violation. The rule in question is facially neutral and applies to all employees. The claimant admitted that he violated the rule, and there is no evidence in the record to establish that the rule was enforced in an arbitrary, capricious, or discriminatory fashion.

Second, the fact that the claimant was tired does not excuse or justify falling asleep on the job. There are obvious safety factors which would justify any employer's decision to prohibit sleeping on the job. Consequently, it is the duty of each employee

to remain alert at all times while on duty. If an employee experiences some difficulty in that regard, the duty is on the employee to inform supervision of the problem. The Commission can certainly envision circumstances when a claimant's falling asleep on the job would not constitute a deliberate rule violation. For example, it is not likely that a claimant would be disqualified from receiving benefits if he had fallen asleep on the job because of a medical condition or drowsiness induced by a prescribed medication, where management had been informed of the situation in advance. Those types of circumstances have not been shown to exist in this case. Being tired does not amount to a mitigating circumstance for sleeping on the job.

For these reasons, the Commission must conclude that the claimant was discharged for misconduct connected with his work for which no mitigating circumstances have been shown. Therefore, he must be disqualified from receiving benefits in accordance with the provisions of Section 60.2-618(2) of the Code of Virginia.

DECISION

The Decision of Appeals Examiner is hereby affirmed. The claimant is disqualified from receiving benefits, effective October 27, 1991, 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.

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)