COMMONWEALTH OF VIRGINIA
VIRGINIA EMPLOYMENT COMMISSION

DECISION OF COMMISSION

In the Matter of:

Stockton F. Garrett
[redacted]

Chester Drugs, Inc.
Chester, Virginia

Date of Appeal to Commission: April 1, 1992

Date of Hearing: July 8, 1992

Place: RICHMOND, VIRGINIA

Decision No.: 38209-C

Date of Mailing: March 1, 1993

Final Date to File Appeal with Circuit Court: March 21, 1993

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This case came before the Commission on appeal by the employer from a Decision of Appeals Examiner (UI-9111436), mailed March 27, 1992.

APPEARANCES

Claimant, Attorney for Employer

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 April 1, 1992, the employer filed a timely appeal from the Appeals Examiner's decision which held that the claimant was qualified to receive benefits, effective June 30, 1991. 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 his work.

Prior to filing his claim for benefits, the claimant was employed by Chester Drugs, Inc., of Chester, Virginia. He worked for this employer as a full-time pharmacist from July 3, 1989, until July 1, 1991. The claimant was paid $18.00 an hour.

The employer operates a full-service drug store. This store is not affiliated with any large national chain. In order to be competitive in the market, the employer emphasizes the necessity for all employees to be courteous, polite, cheerful, and friendly in providing service to customers. By providing excellent service, the employer hoped to ensure that customers would return and continue to patronize the store when they had health or pharmaceutical needs. This policy was emphasized to the claimant at the time he was hired. The policy was again reviewed with the claimant and the other pharmacists in subsequent staff meetings.

In November of 1989, the employer received complaints about the claimant's lack of courtesy from two customers, a Mrs. Young and a Mrs. Dillard. The employer could not recall any of the details surrounding those complaints, and the complaint lodged by Mrs. Dillard was never discussed with the claimant. The claimant called Mrs. Young and apologized for the situation. The employer warned the claimant about the necessity of being courteous to customers and avoiding any rudeness.

Sometime during 1990, the employer received another complaint regarding the claimant's conduct. This customer, a Mrs. Winebarger, was visited by the owner of the business and his wife, and an apology was offered. The employer discussed this situation with the claimant; however, neither the claimant nor the employer could recall many relevant details about the nature of the complaint.

On January 31, 1991, the president/co-owner of the business, who was also the chief pharmacist, had a meeting with the other three pharmacists who were on staff. During that meeting, the president emphasized the necessity of being polite, courteous, and helpful to all customers. He also emphasized the importance of trying to find any drug that was needed to fill a customer's prescription, even if that particular drug was not in stock.

In late April or early May of 1991, a Mrs. Todd spoke with one of the clerks about an apparent billing error. Since the claimant had filled the prescription in question, the clerk stated that she would ask him if he recalled the particular transaction. The customer told the clerk that she couldn't talk to the claimant because he was a "know it all." No other evidence was presented by the employer regarding this characterization of the claimant by this customer. Nothing was said to the claimant by the owners of the business regarding this incident.

On or about Saturday, June 22, 1991, a Mrs. Bryant visited the drug store and requested that two prescriptions be filled for her sick brother. This customer had been bringing her brother's prescriptions to be filled since he had complained about the claimant being rude to him. On one prior occasion Mrs. Bryant had experienced an incident when the claimant had rudely shoved a prescription back to her and manifested an attitude that he did not care whether he filled the prescription. As a result of that incident, Mrs. Bryant had begun visiting the employer's store only when the claimant was not on duty.

On June 22, 1991, the claimant informed Mrs. Bryant that the store did not have one of the drugs in stock. The medicine in question was a brand name drug which the employer did not have on hand; however, the generic drug was available. The claimant refused to order the drug when requested to do so by the customer.

The prescription in question required the pharmacist to dispense the drug as written. That meant that the claimant would have been required to dispense the brand name drug rather than the generic drug unless the physician gave approval over the telephone for filling the prescription generically. The physician who wrote this particular prescription routinely gave his permission to use generic rather than brand name drugs. He had given that permission two days earlier on another prescription for the same drug.

When the customer visited the employer on Monday, June 24, 1991, the pharmacist on duty was able to fill the prescription generically after contacting the physician's office. The customer's brother, however, had been without the medication during the weekend. As a result, this customer complained to the company president about the claimant's conduct.

On July 1, 1991, an elderly lady who was a medicaid patient brought a prescription to the store to be filled. The physician who prescribed the drug indicated a specific brand name drug and included the language "dispense as written." Under medicaid rules, the government will not pay for a brand name drug unless the doctor has written on the prescription "brand name required," or similar language. Because of the way the prescription was written, the claimant could not legally dispense the drug.

The claimant attempted, without success, to contact the physician's office by telephone. He explained the situation to the customer, a Mrs. Thomas, who became upset when the claimant spoke to her in a harsh tone of voice. She began to cry and requested that the prescription be returned to her. The claimant slapped the prescription down on the counter and shoved it across the counter to the customer.

One of the clerks, who had observed this incident, attempted to help this customer. When the customer approached her she said, "I don't know why he hates me, I've never done anything to him." At the time she made this statement, the customer was still crying and there were other customers in the store at that time. Eventually, the claimant gave this customer a small maintenance dosage of the brand name drug until such time as the physician could be contacted and another prescription could be prepared which met medicaid guidelines. This incident was reported to the company president. At the end of the day, on July 1, 1991, the claimant was discharged because of the complaints of his rudeness towards customers.

The claimant had been observed being friendly to customers from time to time. He had an abrupt way of dealing with and speaking to customers, particularly when he was very busy. One of his co-workers had overheard the claimant referring to the elderly medicaid patients as "deadbeats."

During the Appeals Examiner's hearing, the claimant acknowledged that he had read the affidavit of Mrs. Bryant (Exhibit # 1). When asked to respond to that affidavit, the claimant stated, "I can recall nothing about Mrs. Bryant, nor having any, uh, any discourse with her." He also stated that he questioned the competency of this customer based upon what was in the affidavit.

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 his 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).

Implicit in any employer-employee relationship is the understanding that employees will be respectful and courteous to the employer's customers and patrons. Repeated, recurrent acts of rudeness and discourtesy to the employer's customers, if proven, could constitute misconduct connected with work. Stevens v. Copy Systems, Commission Decision 25853-C (December 12, 1985), appeal dismissed, Circuit Court of Henrico County, Case # 85C1342 (February 4, 1991). This proposition is particularly true when, as here, the employer has adopted specific rules and policies which emphasize the importance of courtesy, politeness, and a high degree of customer service.

The evidence establishes that the claimant was aware of the employer's policies and had been reminded of them on several occasions when complaints had been made. Although neither party could recall the details surrounding the incidents in 1989 and 1990, it is clear that those incidents caused the employer to remind the claimant about the need for him to deal courteously and politely with the employer's customers.

The incident regarding the comment by Mrs. Todd is simply two vague and nebulous to be relied upon as evidence that the claimant was rude to her. Similarly, there was a passing reference made that another customer, a Mrs. Costa, complained about the claimant being rude. No specific details were offered about that incident and consequently, the Commission could not rely upon it either in deciding this case. The incidents concerning Mrs. Bryant and Mrs. Thomas are completely different matters.

Contrary to the finding by the Appeals Examiner, the claimant did not deny the allegations made by Mrs. Bryant. His testimony was simply that he did not recall having a discussion with her. Furthermore, the Commission does not have any reservations about Mrs. Bryant's competency after reviewing her sworn affidavit. Those portions of her affidavit that dealt with her particular experiences with the claimant were clear, cogent, and credible. The claimant's refusal to order the particular medication specified on the prescription was certainly in violation of the employer's policy. Furthermore, that conduct represented a willful disregard of the duties and obligation the claimant owed the employer.

The claimant's conduct in dealing with Ms. Thomas was also very inappropriate. The Commission does not take issue with the claimant's reluctance to fill a prescription which has not been properly drafted by the physician. That is not the issue. The claimant spoke to this customer in a harsh tone of voice, slapped the prescription down on the counter and shoved it back to her. The customer became upset and began to cry, and this incident occurred while other customers were in the store. The claimant had been previously heard characterizing medicaid patients as "deadbeats" and his attitude and demeanor to Mrs. Thomas was certainly consistent with that misguided perception.

For these reasons, the Commission must conclude that the employer established a prima facie case of misconduct in connection with work. Therefore, in order to avoid the statutory disqualification, the claimant must prove mitigating circumstances for his conduct.

In V.E.C. v. Gantt, 7 Va. App. 631, 376 S.E.2d 808 (1989), aff'd on rehearing en banc, 9 Va. App. 225, 385 S.E.2d 247 (1989), the Virginia Court of Appeals provided the following guidance with respect to the concept of mitigating circumstances:

> Mitigating circumstances are likely to be those considerations which establish that the employee's actions were not in disregard of those interests. Evidence of mitigation may appear in many forms which, singly or in combination, to some degree explain or justify the employee's conduct. Various factors to be considered may include: the importance of the business interest at risk; the nature and purpose of the rule; prior enforcement of the rule; good cause to justify the violation; and consistency with other rules. Therefore, in order to constitute misconduct, the total circumstances must be sufficient to find a deliberate act of the employee which disregards the employer's business interest.

The evidence in the record does not show any mitigation to claimant's refusal to order the medication requested by Mrs. Bryant. There has been no showing that the claimant was unusually busy and unable to comply with the request. Additionally, there has been no showing why the claimant could not have attempted to contact the physician who wrote the prescription to determine if the generic drug, which was available, could be dispensed in lieu of the brand name drug on the prescription.

Similarly, the claimant has not proven mitigation for his actions on July 1, 1991. At the hearings conducted by both the Appeals Examiner and the Commission, the claimant attempted to

justify his conduct by pointing to the fact that he could not fill the prescription as it was written and be in compliance with the requirements of the medicaid program. That argument misses the point. The claimant's failure to fill the prescription is not the issue. Rather, it was his rude, discourteous conduct which manifested itself in his angry tone of voice and the way he slapped the prescription down on the counter and shoved it back to the customer. There has been no showing of any circumstances which warranted, justified, or mitigated those actions.

For these reasons, the Commission must conclude that the claimant was discharged for misconduct in connection with his work for which no mitigating circumstances have been proven. Therefore, he must be disqualified from receiving benefits as provided by the statute.

DECISION

The Appeals Examiner's decision is hereby reversed. The claimant is disqualified from receiving benefits, effective June 30, 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 30 days, whether or not such days are consecutive, and he subsequently becomes totally or partially separated from such employment.

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

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)