COMMONWEALTH OF VIRGINIA
VIRGINIA EMPLOYMENT COMMISSION

DECISION OF COMMISSION

In the Matter of:

Patricia J. Lauzonis
[redacted]

Holiday Inn-South
Richmond, Virginia

Date of Appeal to Commission: September 24, 1992

Date of Hearing: December 3, 1992

Place: RICHMOND, VIRGINIA

Decision No.: 39862-C

Date of Mailing: December 7, 1992

Final Date to File Appeal with Circuit Court: December 27, 1992

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This case came before the Commission on appeal by the employer from a Decision of Appeals Examiner (UI-9205059), mailed September 17, 1992.

APPEARANCES

Claimant, Employer Representative

ISSUE

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

FINDINGS OF FACT

On September 24, 1992, the employer filed a timely appeal from the Appeals Examiner's decision which found that the claimant was qualified to receive benefits, effective October 27, 1992. The basis for that decision was the Appeals Examiner's finding that the claimant had been discharged for reasons that would not constitute misconduct in connection with work.

Prior to filing her claim for benefits, the claimant last worked for the Holiday Inn-South in Richmond, Virginia. She was employed as a banquet server from September of 1987 until October 19, 1991.

On October 18, 1991, the claimant reported for work as scheduled. After she had been working for a period of time, a coworker approached her and stated, "PJ, I want you to keep your f------ mouth shut. I mean, keep your f------ mouth shut or else." The claimant was frightened by this threat because she had seen this same coworker "flare up" and get angry with other employees. She had also seen her throw things in the kitchen.

The claimant attempted without success to locate her supervisor or the general manager. She looked for them in the banquet and kitchen areas. She also asked at the front desk if anyone knew the whereabouts of her supervisor and the general manager. Since she was unable to locate her superiors, the claimant decided that it would be in her best interest to remove herself from a potentially volatile situation. Accordingly, she punched out and went home.

On October 19, 1991, she called the restaurant and spoke with her immediate supervisor. At that time, she was fired by her supervisor for leaving work the previous day without permission. The supervisor did not afford the claimant an opportunity to explain the circumstances that prompted her to leave the premises.

The Appeals Examiner conducted two separate evidentiary hearings in this case. Those hearings took place on January 9, 1992, and September 15, 1992. The employer was duly notified of both hearings; however, no representative from the employer appeared at either hearing to offer any evidence or testimony regarding the claimant's separation from work.

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 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 evidence in the record establishes that the claimant was discharged because she walked off her job without permission. The evidentiary record does not contain any statement of an employer rule that would prohibit such conduct. Nevertheless, even in the absence of such a rule, walking off the job without permission is the type of conduct which is contrary to the duties and obligations owed by an employee to his or her employer. Simonson v. Sligh Plumbing & Heating Company, Commission Decision 36655-C (November 27, 1991). Therefore, the claimant's decision to walk off the job without receiving permission amounts to a prima facie showing of misconduct under the second part of the test set out in the Branch case. Consequently, in order to avoid the statutory disqualification, the claimant must prove mitigating circumstances.

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.

It is undisputed that the claimant walked off her job without permission. Unlike the claimant in the Simonson case, the claimant here left the employer's premises after being subjected to conduct which, at a minimum, was intimidating and, given the totality of the circumstances, was reasonably believed by the claimant to constitute a threat to her physical well-being. The claimant looked in the banquet and kitchen areas of the restaurant, and also inquired at the front desk, trying to locate her immediate supervisor or the general manager. She chose to leave the premises only after her effort to locate her superiors was unsuccessful. The Commission is of the opinion that these factors are sufficient to mitigate the claimant's failure to obtain permission to leave the premises. Had she remained on the premises, it is possible that a physical altercation may have ensued which could have resulted in far more serious consequences to the employer. Therefore, the Commission concludes that the claimant should not be disqualified from receiving benefits since she has proven mitigating circumstances for her actions.

At the Commission hearing, the employer argued that the Commission should consider various documents that had been previously submitted, but which had not been made a part of the evidentiary record. Those documents included two pages from the company's Employee Handbook, an acknowledgment of receipt of that handbook signed by the claimant, a Record of Written Warning, dated October 19, 1991, which memorialized the employer's decision to discharge the claimant, and an unsworn statement, dated October 21, 1991, which was purportedly signed by a Denise Jones. From the Commission's review of the record, it appears that these documents were in the agency's file at the time of both of the appeals hearings. The failure to place such documents in the record could, under some circumstances, render the record insufficient as a matter of law and require that the case be remanded for further evidentiary proceedings. In this instance, however, the failure to place these documents in the record was merely harmless error.

The failure to put the pages from the Employee Handbook in the record, which contained the company rules, does not materially affect the outcome of the case. Even in the absence of a specific company rule, an employee's actions in leaving work during his or her shift without first receiving permission constitutes an act of misconduct under the second part of the Branch test. Also, neither the warning notice, nor the handwritten memorandum dated October 21, 1991, were sworn statements. Consequently, they cannot be afforded the same weight that must be given to the claimant's sworn testimony which was subject to the questioning of the Appeals

Examiner. Therefore, even if those documents had been placed in the record, they would not have altered the outcome of the case because of their limited probative value.

DECISION

The Appeals Examiner's decision is hereby affirmed. The claimant is qualified to receive benefits, effective October 27, 1991, based upon her separation from work with Holiday Inn-South.

M. Coleman Walsh Jr.

M. Coleman Walsh, Jr.
Special Examiner