COMMONWEALTH OF VIRGINIA
VIRGINIA EMPLOYMENT COMMISSION

DECISION OF COMMISSION

In the Matter of:

John E. Bland
[redacted]

Bristol Newspapers, Inc.
Bristol, Virginia

Date of Appeal
to Commission: July 16, 1993

Date of Review: August 19, 1993

Place: RICHMOND, VIRGINIA

Decision No.: 42977-C

Date of Mailing: August 28, 1993

Final Date to File Appeal
with Circuit Court: September 17, 1993

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This case is before the Commission on appeal by the claimant from Appeals Examiner's decision UI-9307824, mailed June 30, 1993.

ISSUE

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

FINDINGS OF FACT

The claimant filed a timely appeal from the Appeals Examiner's decision which reversed an earlier Deputy's determination and disqualified him for unemployment compensation effective April 4, 1993, for having been discharged due to misconduct in connection with work.

The findings of fact made by the Appeals Examiner have been reviewed and are hereby adopted by the Commission with certain corrections and additions to be discussed in the following paragraphs.

The claimant had not merely touched the belt loop of the female employee he wished to move out of his way; rather he had used her belt loops as handles to guide her in the direction he wished her to go. In the discussion with his supervisor over that incident, a female

subordinate came in with a problem and the claimant put his hand on her shoulder. The supervisor informed him that that is exactly what he was talking about as being something the claimant should not do. The article given to the claimant at that time was on the topic of sexual harassment with emphasis upon what employers should do to avoid being sued over such charges. This article specifically stated that employees should not be permitted to tell sexual jokes or make innuendos, refer to women as "girls" or to touch or flirt with willing or unwilling subordinates.

The claimant had transferred from a newspaper owned by the same company in Charleston, South Carolina. There, in a warmer climate close to the seashore, dress during the hot summer months was far more casual than in Bristol, Virginia. As part of his sales training for new employees, the claimant used his experience in Charleston for examples. He would say that some of his subordinates wore provocative clothing if they needed to make their sales quota while others learned the product line, dressed conservatively and professionally, and were equally successful at making sales. He even gave names to his characters used as examples, the provocative dresser being "Felicia" and the conservative but knowledgeable sales representative being "Bill." The employee who made the complaint against the claimant which directly led to his discharge specifically recalled during her training which occurred somewhere around February 1, 1993, that he referred to the provocative dressers in South Carolina as the "girls he worked with."

The telemarketing manager who overheard the conversation which so upset the sales representative had also heard the claimant make suggestive comments about one of the few high female executives in the company, heard him make remarks about the anatomy of some female employees, and heard him make "mooing" noises at a pregnant employee, the same individual who he had moved out of the way by her belt loops earlier. She also recalled that the claimant called her the "mother to the girls" in the office. She was the individual he delegated to inform the employee that she should be wearing a slip under her lightweight dresses.

OPINION

Section 60.2-618(2) of the Code of Virginia provides a disqualification if it is found that a claimant was discharged from employment due to misconduct in connection with work.

In the case of Branch v. Virginia Employment Commission, 219 Va. 609, 249 S.E.2d 180 (1978), the Supreme Court of Virginia defined misconduct as follows:

> 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.

Considering the disruption at work as well as the potential liability in the event that an employee makes a charge that an employer has tolerated sexual harassment in the workplace, the Commission has consistently held that rules prohibiting such conduct represent a legitimate business interest. Additionally, it is not even necessary to have rules prohibiting such conduct which would still represent the violation of the standards of behavior expected of virtually any employee by his or her employer. The Commission has held that one incident of sexual harassment may be sufficient to constitute misconduct even if the evidence indicates that there were no prior warnings. Thus, in the case of Breagy v. Automation Research Systems, Ltd., Commission Decision 35201-C (March 1, 1991), a claimant was found to be disqualified after he joked on the telephone to a State Department employee that his female co-worker who would be taking over the account was having sex with him as they were speaking.

In the case of Summers v. Turn-key Homes, Inc., Commission Decision 30470-C (July 8, 1988), the claimant was found to be disqualified for an act of sexual harassment which did not even occur on the job. During his lunch break, he had "joked around" with a female employee of the lunch wagon which came by the jobsite by tugging at her pants. This situation seems quite similar to the incident in which the claimant moved the female subordinate out of the way by her belt loops.

In the case of Simmons v. Numanco, Commission Decision 35999-C (July 11, 1991), a claimant who had been warned that his habit of touching female employees when he spoke to them and "preaching" during working hours was considered to be disrupting was found to have been discharged due to misconduct after a female employee complained that he had attempted to initiate a conversation with her concerning homosexuality. This case stands for the principle that once an individual has been warned that he has done things which may have violated the appropriate standards of conduct, he should be expected to avoid engaging in any type of conduct which could be conceivably misconstrued.

In this case, it is apparent that the claimant either consciously or unconsciously has held to negative stereotypical views of women in the workplace. This is evidenced by his reference to them as "girls" even after being warned by the reprint article that this should not occur, as well as his repeated references in his training to the

examples of "Felicia" and "Bill." As a supervisor, the claimant was expected not only to enforce the company policy against sexual harassment, but to serve as an example to his subordinates. In the case of VEC v. Gantt, 7 Va. App. 631, 376 S.E.2d 808 (1989); aff'd en banc, 9 Va. App. 225, 383 S.E.2d 271 (1989), the Virginia Court of Appeals specifically held that a supervisor could be accorded a harsher punishment for violating a company rule than that meted out to a subordinate. The Commission agrees with the Appeals Examiner that a preponderance of the evidence indicates that this claimant engaged in inappropriate sexually harassing conduct so as to bring about his termination for a prima facie act of misconduct in connection with his work. This shifts the burden to him to show mitigating circumstances if he is to avoid a disqualification under this section of the Code.

As noted previously, the contention that what was said was misconstrued or only said as a joke does not amount to mitigating circumstances. This is because in sexual harassment cases it is not the intentions of the speaker or actor which are determinative; rather it is the perceptions of the recipient of the words or deeds. The fact that the employer's policy did not specifically provide for discharge for the first offense of sexual harassment also does not amount to a mitigating circumstance, inasmuch as there is evidence of multiple offenses on the claimant's part as well as clear warning of the standard of behavior expected of him to follow in the form of the reprint article which was given to him in March, 1992. Accordingly, the claimant has failed to establish mitigating circumstances so as to avoid a disqualification under this Section of the Code.

DECISION

The decision of the Appeals Examiner is hereby affirmed.

The claimant is disqualified for unemployment compensation effective April 4, 1993, for any week or weeks benefits are claimed until he has performed services for an employer during 30 days, whether or not such days are consecutive, and he has subsequently become totally or partially separated from such employment because he was discharged due to misconduct in connection with work.

When this decision becomes final, the Deputy is instructed to calculate what benefits may have been paid to the claimant after the effective date of the disqualification, which he will be liable to repay the Commission as a result of this decision.

Charles A. Young, III
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)