COMMONWEALTH OF VIRGINIA
VIRGINIA EMPLOYMENT COMMISSION

MISCONDUCT: 390.02
Relations with Fellow Employees -- Altercation or Assault.

DECISION OF COMMISSION

In the Matter of:

Troy E. Travers
[redacted]

Eastern Sleep Products Co.
Richmond, Virginia

Date of Appeal to Commission: October 19, 1993

Date of Hearing: January 11, 1994

Place: RICHMOND, VIRGINIA

Decision No.: 43893-C

Date of Mailing: January 28, 1994

Final Date to File Appeal with Circuit Court: February 17, 1994

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This case came before the Commission on appeal by the employer from a Decision of Appeals Examiner (UI-9315004), mailed October 5, 1993.

APPEARANCES

Claimant
Representative for Claimant
Employer Representative

ISSUE

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

FINDINGS OF FACT

On October 19, 1993, the employer filed a timely appeal from the Appeals Examiner's decision which held that the claimant was qualified to receive benefits, effective August 1, 1993. The basis for that disqualification was the Appeals Examiner's conclusion that the claimant had been discharged for reasons that would not constitute misconduct connected with his work.

Prior to filing his claim for benefits, the claimant last worked for Eastern Sleep Products Co. of Richmond, Virginia. He worked for the employer from October 13, 1989 through June 14, 1993. At the time of his separation he was a flanger helper.

On June 12, 1993 the plant manager received a telephone call at home from one of the company employees. This employee informed the manager that he had given the claimant a ride home that evening. He accused the claimant of stealing some money from him while he was buying a drink at a convenience store. The plant manager offered to meet with the employee and the claimant to try to resolve the situation.

The claimant was absent from work on June 13, 1993. When he reported for work the following day he heard that the other employee had accused him of theft. The claimant walked to this employee's work station and a confrontation ensued between them. During this confrontation, the other employee pushed the claimant away from him. The claimant retaliated by striking the co-worker with his fist, knocking him to the floor.

The plant manager was in the vicinity when the altercation began. He was on the scene within a matter of ten seconds and broke up the fight. The plant manger observed the claimant throwing multiple punches at the other employee while he was on top of him.

After breaking up the fight the plant manager investigated the situation. He spoke with both of the combatants as well as other employees who were nearby when the fight occurred. At the conclusion of that investigation, both the claimant and the other employee were discharged for violating the company rule which prohibited fighting on the job.

Immediately following the fight, the claimant admitted to the plant manager that he had struck the other employee. At the Appeals Examiner's hearing, the claimant denied striking the other employee. Instead, he asserted that he simply grabbed the other individual. The claimant's witness testified that he saw the claimant retaliate to the push by striking the other employee with his fist.

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 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).

Generally, fighting on the job or otherwise engaging in an altercation on the employer's premises or while on duty constitutes misconduct connected with work. Hawkins v. P. W. Plumly Lumber Corporation, Commission Decision 3707-C (May 25, 1961). The Commission has held, however, that no disqualification should be imposed for violating a company rule that prohibited fighting if the claimant proved that he acted only in justifiable self defense. Bryant v. United Parcel Service, Commission Decision 18879-C (October 13, 1982). In the Bryant case, the Commission cited with approval the analysis from Jackson v. Commonwealth, 96 Va. 107, 30 S.E 452 (1898), when the Virginia Supreme Court stated:

> A person assaulted while in the discharge of a lawful act, and reasonably apprehending that his assailant will do him bodily harm, has the right to repel the assault by all the force he deems necessary and is not compelled to retreat from his assailant, but may, in turn, become the assailant, inflicting bodily wounds until his person is out of danger. (emphasis supplied)

In this case, the claimant was discharged for violating the company rule that prohibited fighting on the job. Therefore, in order to avoid the statutory disqualification, the claimant must prove mitigating circumstances for his conduct.

The Appeals Examiner accepted the claimant's argument that he was acting only in self defense. Unfortunately, that is not supported by the evidence in the record. There was no

justification for the other employee's conduct in pushing the claimant away. As a practical matter, that constituted a technical battery under Virginia law. Nevertheless, the evidence in the record fails to show that the claimant had a reasonable apprehension that the co-worker would harm him after the push occurred. The claimant's own witness, who observed the entire event, characterized the claimant's conduct as being retaliatory in nature. In addition, the claimant's assertion that he merely grabbed the other employee was also refuted by his witness and the plant manager. (emphasis added)

If the record established that the other employee, after pushing the claimant, had engaged in some conduct, such as drawing his fist back, that could have made the claimant reasonably fear for his physical safety, and self defense could have been proven. In the absence of such proof, the claimant's participation in the fight in retaliation for being pushed did not amount to justifiable self defense. Consequently, the claimant has shown no mitigation for his actions, and he must be disqualified from receiving benefits. (emphasis added)

DECISION

The Appeals Examiner's decision is reversed. The claimant is disqualified from receiving benefits, effective August 1, 1993, 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.

M. Coleman Walsh, Jr.
Special Examiner