COMMONWEALTH OF VIRGINIA
VIRGINIA EMPLOYMENT COMMISSION

MISCONDUCT: 435
Tardiness.

DECISION OF COMMISSION

In the Matter of:

Latreas D. Watkins

Didlake, Inc.
Alexandria, Virginia

Date of Appeal to Commission: September 28, 1993

Date of Review: October 27, 1993

Place: RICHMOND, VIRGINIA

Decision No.: 43750-C

Date of Mailing: November 11, 1993

Final Date to File Appeal with Circuit Court: December 1, 1993

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This case comes before the Commission on appeal by the claimant from a Decision of Appeals Examiner (UI-9314964), mailed September 10, 1993.

ISSUE

Was the claimant discharged for 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 held her disqualified for benefits, effective July 11, 1993. The basis for that decision was the Appeals Examiner's conclusion that the claimant had been discharged for reasons that would constitute misconduct connected with work.

Didlake, Inc. was the claimant's last employer for whom she worked from November 5, 1991 through June 18, 1993. She was last employed as a team leader and supervisor of a cleaning crew. She was a full-time employee earning $6.18 per hour.

The employer's attendance policy, which was known to the claimant, stated that all employees were to be at work at their scheduled time. The claimant was scheduled for work beginning at 9:30 a.m.

On August 13, 1992 and November 12, 1992, the claimant received memos from the employer for violating the employer's attendance policy. On May 25, 1993, she received a memo from the employer informing her that her job was in jeopardy. She failed to adhere to a company policy concerning the supervision of her work crew.

On June 8, 1993, the claimant was giving a final written warning concerning her attendance. She was informed that she had used all of her leave and was told that if she went to any medical appointments, they should be rescheduled to non-working hours. She was put on notice that any further absences would result in her termination.

On June 11, 1993, the claimant was 31 minutes late for work. She gave no notice to the employer. On June 14, 1993, she was 17 minutes late for work and again there was no notice to the employer. At that time the claimant was again told that her job was in jeopardy. On June 15, 1993, she was 46 minutes late and on June 17, 1993, she was 26 minutes late. On both occasions, the claimant did not notify her employer about her lateness.

On June 18, 1993, the claimant was told that she was discharged as a result of her continued lateness in reporting for work, given her past warnings. The claimant did not give a reason why she failed to notify her employer when she would be late for work. The only excuse the claimant gave for being late for work occurred on June 15, 1993, when there was a traffic problem.

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).

Every employer has the right to expect employees to report for work as scheduled. Furthermore, an employee has a fundamental obligation to inform the employer of any absence. This is particularly true when the employer has adopted a policy which requires notification. Even in the absence of a specific policy, the Commission has held that an employee has a fundamental obligation to the employer to provide notification of an absence when the employee knows that he was scheduled for work. Alexander v. Crizmar, Inc., Commission Decision 37370-C (March 3, 1992). Thus, the Commission has held, that chronic, unexcused absenteeism without adequate justification and proper notification to the employer would constitute misconduct in connection with work. Epps v. Burlington Worsteds, Commission Decision 6523-C (December 10, 1974); Hancock v. Mr. Casual's, Inc., Commission Decision 6355-C (July 3, 1974); Casey v. Cives Steel Company, Commission Decision 27111-C (July 30, 1986), aff'd, Circuit Court of Frederick County, Chancery No. C-86-168 (April 27, 1987). Since chronic, excessive tardiness is a form of absenteeism, these same principles would apply in either situation. See generally, Newkirk v. Virginia National Bank, Commission Decision 5585-C (February 18, 1972). (Emphasis added)

In the instant case, the Commission must find that the employer has demonstrated that the claimant's chronic tardiness in reporting for work as well as her failure to notify the employer constituted misconduct. The claimant knew that her job was in jeopardy as a result of the warnings that had been given to her. In addition, the claimant knew that if she was going to be late for work, she was expected to notify the employer of that fact. After these warnings were given, she continued to be late reporting for work without notification and without justification. Accordingly, since the employer has demonstrated a prima facie case of misconduct connected with work, the burden of proof now shifts to the claimant to come forward and prove mitigating circumstances.

The Commission must find that the claimant has not presented sufficient mitigation for her tardiness or for her failure notify the employer. Except for one occasion, she has not shown any emergency which was beyond her control which prevented her from reporting for work on time. Furthermore she has not demonstrated why she was unable to contact her employer when she was going to be late. Accordingly, the claimant has not proven mitigating circumstances. Therefore she would be disqualified from receiving benefits.

DECISION

The Appeals Examiner's decision is hereby affirmed.

The claimant is disqualified for unemployment compensation, effective July 11, 1993, because she was discharged for misconduct in connection with 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 she subsequently become totally or partially separated from such employment.

Theodore G. Ourednik
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)