MISCONDUCT: 485.1
Violation of Company Rule-
Absence, Tardiness

COMMONWEALTH OF VIRGINIA
VIRGINIA EMPLOYMENT COMMISSION

DECISION OF COMMISSION

In the Matter of:

Terri L. Jones

Perdue, Incorporated
Accomac, Virginia

Date of Appeal
to Commission: February 24, 1988

Date of Hearing: April 12, 1988

Place: RICHMOND, VIRGINIA

Decision No.: 029878-C

Date of Mailing: April 26, 1988

Final Date to File Appeal
with Circuit Court: May 16, 1988

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This is a matter before the Commission as the result of an appeal filed by the employer from the Decision of Appeals Examiner (UI-8801525), mailed February 16, 1988.

APPEARANCES

Attorney for Employer, Two Employer Representatives.

ISSUE

Was the claimant discharged from employment 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 employer filed a timely appeal from the Appeals Examiner's decision which affirmed an earlier Deputy's determination qualifying the claimant for benefits effective December 20, 1987, with respect to her separation from the employer's services.

Prior to filing her claim, the claimant's last thirty-day employer was Perdue, Incorporated, of Accomac, Virginia, where she worked between November, 1986, and December 21, 1987. Her position was that of a production line worker.

The employer has an attendance policy which is termed an "absentee control program" which provides for progressive discipline in the event that an employee is tardy or absent. The first four "occurrences" of absenteeism will result in oral conferences with the employee's immediate supervisor. The next three occurrences will result in written warnings and, ultimately, a three-day suspension. The eighth occurrence will result in termination. An "occurrence" of absenteeism is defined as any single absence or a consecutive period of absence for any one cause regardless of the reason or duration. Certain types of absenteeism, including death in the family, jury duty, military leave, maternity leave, and hospital admissions, do not count as occurrences at all. Two incidents of tardiness within an eight-week period will count as one occurrence. Every time an employee can go for eight consecutive weeks without being later absent, the last occurrence will be dropped from their record.

During the course of her employment, the claimant progressed along the disciplinary procedure through the first six steps by March, 1987. Her six occurrences of absenteeism were primarily due to problems associated with her pregnancy and, although she did not call in to report these absences from work, the attendance policy made no distinction between absences which were or were not reported. Starting in April, the claimant went on maternity leave and her status was considered "frozen" until she returned in November. On December 1, 1987, she was again absent and was assessed with her seventh occurrence and was also given a three-day suspension. She was then absent from work on December 21, 1987, and was terminated.

On December 21, 1987, the claimant appeared at the job site early to inform her supervisor that she could not work that day because her baby had a high temperature and needed to be taken to the doctor. The supervisor requested that she start to work her shift because that way she could use her discretion to send her home early and she would not be assessed with her eighth occurrence. The claimant responded that she could not stay because her baby needed immediate attention and she then left.

OPINION

Section 60.2-618.2 of the Code of Virginia provides a disqualification if it is found a claimant was discharged from employment due to misconduct in connection with work.

In the case of Branch v. Virginia Employment Commission, et al, 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.

The Branch case involved the interpretation of an employer rule concerning garnishments. In that case, it was specifically held that an employer rule must be construed most strictly against its maker and most liberally in favor of the employee.

In the present case, the employer has argued strenuously against the Appeals Examiner's opinion that focused upon the last incident which brought about the claimant's separation. Not only was this appropriate, it was virtually mandated by the employer's own rule.

The employer has, what its attorney argued, is a "no fault" attendance policy. This is a rule which must be construed most strictly against its maker in accordance with the principles enunciated in Branch, supra. Inasmuch as the employer's own rules make no distinction between absences which are reported and those which are not reported, the fact that the claimant failed to call in to justify her first seven "occurrences" is irrelevant to a decision as to whether her discharge was due to misconduct in connection with work. The Commission is satisfied that the first seven occurrences did take place so as to bring the claimant to the final step prior to discharge under the

employer's rule. Nevertheless, it is the final occurrence which stands as the act, but for which, the claimant would have remained employed. Therefore, under the employer's own rule, the Commission must, of necessity, focus upon that occurrence. If it could be attributed to any deliberate or willful violations of the rules or negligence of such a high degree or recurrence as to manifest such, and in the absence of mitigating circumstances, then a disqualification under this section of the Code would lie.

The incontroverted testimony of the claimant is that her child was sick and, in her opinion, needed immediate medical attention. The employer was placed on notice that this situation existed, and the Commission must conclude that this represented a circumstance beyond the claimant's control which prevented her from working on that particular day. The Commission is also not prepared to second guess her decision to leave immediately to see about her child's health; rather than to clock in, start work, and then hope that she would receive authorization to leave early.

After reviewing the evidence in this case, and considering the reasons for the claimant's absences which led to her discharge in conjunction with the employer's rule, the Commission is unable to conclude that the claimant's discharge was due to any deliberate and willful violations of that rule or negligence of such a high degree or recurrence as to manifest such a deliberate and willful violation of the standards of behavior expected of her as an employee. For this reason, the Appeals Examiner properly found the claimant to be qualified for benefits under this section of the Code.

DECISION

The Decision of Appeals Examiner is hereby affirmed.

It is held the claimant is qualified for unemployment compensation effective December 20, 1987, with respect to her separation from the services of Perdue, Incorporated.

Charles A. Young, III
Special Examiner

Affirmed by the County of Accomack Circuit Court, Case No. 88CL085 February 28, 1991