COMMONWEALTH OF VIRGINIA
VIRGINIA EMPLOYMENT COMMISSION

MISCONDUCT: 485.45
Violation of Company Rule -- Intoxicants, Use of.

DECISION OF COMMISSION

In the Matter of:
Deborah J. Parks
[redacted]

American Furniture Co., Inc.
Chilhowie, VA 24319

Date of Appeal to Commission: October 17, 1988

Date of Review: December 27, 1988

Place: RICHMOND, VIRGINIA

Decision No.: 31069-C

Date of Mailing: December 30, 1988

Final Date to File Appeal with Circuit Court: January 19, 1989

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This is a matter before the Commission on appeal by the employer from a Decision of Appeals Examiner (UI-8805463), mailed September 29, 1988.

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 October 17, 1988, the employer filed a timely appeal from the decision of the Appeals Examiner which held that the claimant was qualified to receive benefits effective May 8, 1988. The basis for that decision was the Appeals Examiner's finding that the claimant had been discharged for reasons that did not constitute misconduct connected with her work.

Prior to filing her claim for benefits, the claimant was last employed by American Furniture Company, Inc. at its plant in Chilhowie, Virginia. She worked for this employer from October 7, 1980, through May 9, 1988. She was an assembler in the cabinet room, and usually worked from 7:00 a.m. until 3:30 p.m. Monday through Friday.

On January 7, 1986, the company posted a notice to all its employees with respect to illegal and unauthorized drugs, narcotics and alcoholic beverages. This notice, in pertinent part, stated as follows:

> In accordance with our long-standing policy, this notice is to re-emphasize to our employees (and employees of other companies and contractors) that the possession, use, or distribution of illegal or unauthorized drugs (including marijuana), drug paraphernalia, narcotics, or alcoholic beverages upon Company premises poses a serious threat to the safety of our employees and the Company's operations. Accordingly, the use, possession, distribution or sale of such items on Company premises or being under the influence of such illegal and/or unauthorized drugs, (including marijuana), narcotics, or alcoholic beverages upon company premises, is absolutely prohibited. . . . Any Company employee who violates the above policy will be subject to discharge (and employees of other companies and contractors who do so will not be allowed to remain on Company premises).
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> . . . The Company further reserves the right to request employees to take blood, urine and other medical tests (when the Company has reason to believe that an employee has violated this rule). Your participation in such searches and tests is voluntary; however, refusal of an individual to permit same will result in appropriate disciplinary action up to and including discharge for company employees (and will be cause for not allowing contractor employees upon Company premises).

On March 26, 1986, employer modified its drug policy to require that all employees who are involved in work related accidents must submit a urine specimen for drug and alcohol

analysis. Refusal to comply with this policy could result in disciplinary action. This modification of the policy was adopted to deal solely with employees who were involved in work related accidents. If an employee who had been involved in a work related accident tested positive for drugs or alcohol, that employee would be retested after a short period of time. If the second test was positive, the employee would be discharged. If the second test was negative, the employee would not be discharged, but would be subject to random testing in the future. Under the general policy statement adopted on January 7, 1986, an employee who refused to take a test or tested positive would be automatically discharged. The employer elected to treat its employees differently under these policies because it did not want to be accused of firing an employee for filing a worker's compensation claim in those cases where such an employee had also tested positive for alcohol or controlled substances.

On May 9, 1988, the claimant was requested to give a urine specimen to be tested for drugs. The claimant's supervisor made this request because he and another employee observed the claimant conducting herself in a manner which they thought was different from her usual conduct. In fact, the claimant had not acted any differently on May 9, 1988, or the days immediately preceding it than she did on any other occasion. The claimant is very outgoing, and is known to joke, tease her co-workers and give them and her lead man a good natured hard time. This has been her consistent behavior throughout her entire period of employment with this company.

After the supervisor made his request that the claimant give a urine specimen, she accompanied him to the nurse's station. After completing some necessary paperwork, the nurse gave the claimant a specimen cup. The claimant returned from the restroom a few moments later, threw the cup in the trash can, and stated that she couldn't give a specimen. She left the nurse's office and had a conversation with her supervisor. During this discussion, the claimant was informed that if she refused to take the test, she would be terminated. The claimant then asked that she be permitted to give a specimen, and she was allowed to do so. The claimant gave a specimen, but diluted it with water, and presented it to the nurse. The nurse detected that the specimen had been contaminated, and the claimant was confronted with this. She admitted to diluting the sample, and was again told that if she did not give a valid sample that she would be discharged. The claimant asked her supervisor what would happen if the test came back positive. The supervisor told her that if that occurred she

would be fired. At that point, the claimant stated that he may as well go ahead and terminate her because she had smoked some marijuana on Saturday, May 7, 1988. The claimant was discharged for refusing to give a urine specimen, for tampering with the urine specimen, and for admitting to using marijuana.

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 her work.

This particular language was first interpreted by the Virginia Supreme Court in the case of Branch v. Virginia Employment Commission, et al, 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. See, 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 threshold issue that the Commission must decide is whether the employer was justified in requiring the claimant to submit to a drug test. This is an issue because of the very language of the company's policy which conditions the employer's right to request an employee to take blood, urine or other medical tests upon a reasonable belief that the employee has

violated the company's drug policy. The employer presented hearsay testimony concerning the reasons the company believed that the claimant's behavior was erratic. Neither the supervisor nor the other employee who allegedly observed the behavior appeared to testify at the hearing. The hearsay testimony offered by the employer was to the effect that the claimant had been loud, boisterous, and very argumentative on May 6, 1988, and had been observed singing on the line. By contrast, the claimant testified that she had an outgoing personality and that she usually was loud and boisterous and frequently joked and teased with her lead man and other co-workers. The claimant's testimony in this regard was corroborated by one of her co-workers who testified that she had worked next to the claimant for over a year and that on May 9, 1988, she observed no unusual or uncharacteristic behavior at all.

The language contained in the company's policy basically means that the company has the right to require that an employee submit to a drug test if they have reasonable suspicion or belief that the employee has violated the policy. Such a policy is reasonable and clearly is designed to protect a legitimate business interest. Similar policies requiring a reasonable suspicion/belief that an employee has violated a drug policy as a precondition to requiring a search or drug test have met with approval from the Commission and the courts. See, McDonell v. Hunter, 612 F. Supp. 1122 (D.C. Iowa 1985); Division 241 Amalgamated Transit Union v. Suscy, 538 F.2d 1264 (7th Cir.), cert denied, 492 U.S. 1029 (1976); Johnson v. D. G. Shelter Products, Commission Decision 28756-C (July 31, 1987); Zimmerman v. Philip Morris, Commission Decision 30128-C (June 3, 1988). In this case, however, the employer has not proven the existence of a reasonable suspicion that the claimant was under the influence of alcohol or controlled substances. In the absence of that reasonable suspicion, the claimant was not obliged to submit to a drug test.

The Commission concedes that this case is complicated by the claimant's action in tampering with a specimen. That conduct was part and parcel of her continuing refusal to take the drug test itself. In light of the fact that the employer has failed to prove a reasonable suspicion for requiring the test, the claimant's decision to dilute the specimen does not in and of itself rise to a level of work connected misconduct. Similarly, the claimant's admission that she had smoked marijuana on Saturday, May 7, 1988, does not prove that she deliberately violated the company's rule. There is no evidence in the record to establish that she smoked marijuana on company premises. Furthermore, the evidence is insufficient to establish that she was under the influence of marijuana when she reported for work on May 9, 1988. Since the employer's rule is an "under the influence" rule, the fact that a blood or urine test which shows

some detectable level of alcohol or controlled substances in an employee's system would not, standing alone, prove a violation of the rule. In addition to consumption, there must be proof of impairment.

In the case of Wheeler v. Hershey Chocolate Company, Commission Decision 23983-C (January 30, 1985), the claimant was discharged under an employer rule that prohibited employees from reporting to work under the influence of alcohol or other controlled substances. In that case, the Commission stated:

> The language "under the influence" implies more than a mere consumption or use of alcohol or controlled substances. Rather, the phrase envisions that the offending employee must, in some way, be impaired by his use of the controlled substances or alcohol.

Based upon the evidence in the record, the Commission must conclude that the claimant was not guilty of misconduct connected with her work since the employer failed to prove a reasonable suspicion of a rule violation which would warrant requesting a drug test. Accordingly, no disqualification may be imposed based upon the claimant's separation from work with this employer. (Underscoring supplied)

DECISION

The decision of the Appeals Examiner is hereby affirmed. The claimant is qualified to receive benefits effective May 8, 1988, based upon her separation from work with American Furniture Company, Inc.

The case is remanded to the Deputy with instructions to carefully review the claimant's claim for benefits and to determine if she has complied with the eligibility requirements of the Code for each week benefits have been claimed.

M. Coleman Walsh, Jr.
Special Examiner