COMMONWEALTH OF VIRGINIA
VIRGINIA EMPLOYMENT COMMISSION

MISCONDUCT - 485.05
Violation of Company Rule
General

DECISION OF COMMISSION

In the Matter of:

Victoria B. Tyson
[redacted]

Miller Oil Company, Inc.
Norfolk, Virginia

Date of Appeal
to Commission: October 25, 1995

Date of Hearing: December 18, 1995

Place: RICHMOND, VIRGINIA

Decision No.: 49924-C

Date of Mailing: December 22, 1995

Final Date to File Appeal
with Circuit Court: January 11, 1996

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This case came before the Commission on appeal by the employer from a Decision of Appeals Examiner (UI-9512874), mailed October 4, 1995.

APPEARANCES

Claimant, Witness for Claimant
Employer Representative, Attorney for Employer

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 25, 1995, the employer filed a timely appeal from the Appeals Examiner's decision which held that the claimant was qualified for benefits, effective July 23, 1995. The basis for that decision was the Appeals Examiner's conclusion that the claimant had been discharged for reasons that did not constitute misconduct in connection with her work.

Prior to filing her claim for benefits, the claimant was employed by Miller Oil Company of Norfolk, Virginia. The employer owns and operates a chain of gas stations/convenience stores. The claimant worked as an assistant manager/cashier in two of those stores from July 1, 1994, through July 21, 1995.

At the time she was hired the claimant received a copy of the company's employee handbook and certified that she would familiarize herself with and comply with the information contained in it, including the rules and regulations for managers and cashiers. Since the employer sells alcoholic beverages from its various locations pursuant to licenses issued by the Virginia Department of Alcoholic Beverage Control, strict compliance with all ABC laws and regulations is emphasized. Since it is illegal in Virginia to sell alcoholic beverages to individuals under 21 years of age, the employer expects its cashiers to properly identify customers to ensure that alcoholic beverages are not sold to underage individuals. Consequently, one of the rules adopted by the employer, of which the claimant had knowledge, provided for the immediate dismissal of any employee who failed to properly identify customers under 21 years of age.

When the claimant first began her employment with Miller Oil Company, she was persistent in requesting identification from customers purchasing alcoholic beverages until she became acquainted with the regular customers. She would not request customers to continually provide identification when they purchased alcoholic beverages once she recognized them as having presented valid identification in the past.

In February of 1995, the claimant began working at Miller Mart #27, which was located in Hampton, Virginia, approximately one and a half miles from Hampton University. Because of its close proximity, approximately 30 to 40 percent of the store's customers were students from Hampton University. While working at this location, the claimant followed the same practice that she had established at the previous store with respect to requesting identification. By the time her employment ended, the claimant could recognize between 80 and 85 percent of the regular customers as individuals who had previously provided valid identification when purchasing alcoholic beverages.

On July 21, 1995, the claimant was working the 3:00 p.m. to 11:00 p.m. shift. During the latter portion of that shift, the claimant sold beer to a customer that she did not know and whom she did not recognize as one who had previously patronized the store. The claimant did not request any identification because the customer appeared to her to be approximately 23 or 24 years of age.

An off-duty ABC agent was in the store. He observed the transaction and believed that the customer was underage. The agent

stopped the customer in the parking lot, requested identification, and discovered that the customer was only 19 years old. The agent issued a summons to the customer and to the claimant. The claimant was charged with violating the state law that prohibited the sale of alcoholic beverages to individuals under the age of 21 years.

The claimant reported the incident to the retail marketer, who served in a capacity similar to a regional supervisor. The retail marketer investigated the situation. Part of that investigation involved viewing the security video tape of that store for the night in question. That video tape was on a loop and, as a result, recorded only the period from 7:30 p.m. until 11:00 p.m. When he viewed the video tape, the retail marketer observed that from 7:38 p.m. until 10:04 p.m., the claimant had 23 consecutive transactions involving the sale of alcohol for which she requested no identification from the customers. He felt that this presented a reckless disregard of the company rule and its obligation under state law to ensure that alcoholic beverages are not sold to underage individuals. Therefore, he decided to discharge the claimant based upon her sale of alcohol to the 19-year old customer and her repeated failure to request identification from customers purchasing alcohol during her shift on July 21, 1995.

The retail marketer instructed the claimant's store manager to discharge her. When the store manager did so, she told the claimant the termination was based on her sale of alcohol to a minor. No mention was made of her failure to request identification from other customers. As a result of the claimant's conduct, the employer was fined $500 for the violation of ABC laws. In addition, the store where the claimant worked had its license to sell alcoholic beverages suspended for a period of ten days.

OPINION

Section 60.2-618(2) of the Code of Virginia provides for 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).

Here, the claimant was discharged for violating the company rule that requires employees to properly ID purchasers of alcoholic beverages who are under 21 years of age. The claimant was aware of this rule and the consequences for violating it.

On July 21, 1995, the claimant sold alcoholic beverages to a customer who was 19 years of age. The claimant did not know that customer or recognize him as an individual who had previously patronized the store. She sold him beer without requesting any identification. This resulted in the claimant receiving a summons for violating state ABC laws. In addition, the employer was fined $500 and the store where the claimant had worked had its license to sell alcoholic beverages suspended for ten days.

The claimant knew or should have known that under the employer's rule she had a duty to ensure that alcoholic beverages were not sold to underage customers. Notwithstanding that knowledge, she sold beer to the individual in question without requesting identification. Despite her belief that the customer was 23 or 24 years of age, she should have requested identification since she did not know him, she had not seen him patronize the store before, and she knew from her experience that some individuals appeared to be older than their actual age. Because of this last factor, the claimant should have known that she was placing herself and the employer at risk by requesting identification only from customers who appeared to be under 21 years of age.

Under these circumstances, the claimant's sale of alcoholic beverages to the 19-year old customer constitutes misconduct in connection with work within the contemplation of the Branch decision. The claimant's apparent belief that the customer in question was 23 or 24 years of age does not mitigate her conduct. Consequently, she must be disqualified for benefits.

The Commission, like the employer, is troubled by the fact that the claimant failed to request identification from 23 consecutive purchasers of alcoholic beverages on the evening in question. Given the location of the store, the nature of its clientele, and the time these purchases were made, it appears that a reasonably prudent cashier would have requested identification from some of those purchasers. Nevertheless, in light of the conclusion that the Commission has already reached regarding the sale of alcoholic beverages to an underage customer, it is unnecessary to determine whether the claimant's failure to request identification from 23 consecutive customers would independently constitute misconduct in connection with work.

DECISION

The Appeals Examiner's decision is reversed. The claimant is disqualified for benefits, effective July 23, 1995, because she was discharged for misconduct connected with her work.

This disqualification shall remain in effect for any week benefits are claimed until the claimant performs services for an employer during thirty days, whether or not such days are consecutive, and she subsequently becomes totally or partially separated from such employment.

M. Coleman Walsh, Jr.
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)