NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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July 1, 2019

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Re: *Sarah N. Laryea* v. *INOVA Health System & Virginia Employment Commission*, CL 2019-4116

Dear Mr. Sutter, Ms. Peay, and Ms. Randall:

This matter came before the court on June 10, 2019 for argument on Petitioner's petition to overrule the determination of the Virginia Employment Commission ("Commission") that Petitioner was ineligible for unemployment compensation, or, in the alternative, to remand the matter to the Commission for further proceedings. For the reasons that follow, the court remands the matter to the Commission for further proceedings.

Factual Background

The Commission found the following:

> [Petitioner] was employed [by INOVA Health System ("INOVA")] as a laboratory technical assistant I, from June 2, 2014 to January 29, 2018. She was assigned to the Central Processing Department of INOVA Laboratories in August of 2016 and attended training in September and

OPINION LETTER

October 2016 on departmental procedures and policies. . . .

While assigned to Central Processing, Petitioner registered patient blood and tissue specimens collected at network hospitals and clinics. Starting in May of 2017, she switched some patients' first and last names during the registration process and was given a documented verbal warning in July 2017. She repeated this offense several times over the next month or so and was issued a written warning on September 1, 2017.

[Petitioner] switched 3 patients' first and 1ast names during the next two weeks, prompting her receipt of a final warning on October 16, 2017. She transposed a patient's first and last names while registering a biopsy specimen on January 19, 2018. For her ongoing patient identification errors after several warnings, Petitioner was discharged on January 29, 2018.

Decision of Commission at 2.

The Commission also found that INOVA:

expects its employees to perform their duties in an accurate manner, especially with patient identification. Its Progressive Discipline Policy divides unacceptable conduct into groups based on severity. Misidentifying a patient is a Group I offense, which if repeated, subjects the offending employee to progressive discipline leading to discharge. The claimant was made aware of these expectations and rules at the time of hire.

Decision of Commission at 2.

The Commission heard no evidence, and thus made no findings of fact, about the number of blood and tissue specimens Petitioner registered from the time she began working at the Central Processing Department in 2016 until May of 2017, and from May of 2017 until she was terminated on January 29, 2018, nor did the Commission hear any evidence, and thus did not make findings of fact, about the complexity and time requirements of the registration process.

The Commission's Conclusions

In light of the facts recited above, the Commission concluded that Petitioner:

violated a policy regarding the accurate recording of patient information, which is reasonably designed to protect its legitimate interests in ensuring proper patient identification, patient confidentiality and safety. . . .

Despite being issued a number of warnings, she continued to switch patients' first and last names during the registration process.

Although the claimant was confused with names that could be given or family names (i.e. Bailey or Taylor), she had merely to enter these names in the same order in which they were presented to her, which negates the impact of her professed unfamiliarity with the English language. . . . Thus, the employer has established a prima facie

> case of misconduct, shifting the burden to the claimant to present mitigating circumstances for her conduct.

Decision of Commission at 4-5.

Finally, the Commission found that Petitioner "has not offered sufficient evidence of mitigating circumstances or adequate justification for her conduct." Decision of Commission at 6.

Scope of Review

In reviewing a decision of the Commission, the "sole determination as to factual issues" is:

> whether substantial evidence exists in the agency record to support the agency's decision. The reviewing court may reject the agency's findings of fact only if, considering the record as a whole, a reasonable mind would necessarily come to a different conclusion.

Johnston-Willis v. Kenley, 6 Va. App. 231, 242 (1988).

The court finds that the Commission's factual findings, as far as they go, are supported by "substantial evidence exist[ing] in the agency record . . . ."

Analysis

Code § 60.2-618(2) provides in pertinent part that an employee is "disqualified for benefits . . . if the Commission finds such individual is unemployed because he has been discharged for misconduct connected with his work." In *Branch v. Employment Comm.,* 219 Va. 609 (1978), the Supreme Court, for the first time, construed the phrase "misconduct connected with his work," holding that 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. (Citation omitted). Absent circumstances in mitigation such conduct, the employee is "disqualified for benefits" and the burden of proving mitigating circumstances rests upon the employee.

219 Va. at 611-612 (emphasis in original).

Although the Commission did not expressly state that Petitioner's acts or omissions were of "such a nature or so recurrent as to manifest a willful disregard" of the employer's interests and the duties and obligations, the Commission also does not appear to have concluded that Petitioner's acts or omissions were "deliberate." Accordingly, the court concludes that the Commission based its conclusions solely on a finding that Petitioner's acts or omissions were of such a nature or so recurrent as to manifest a willful disregard of the employer's interests and the duties and obligations; the court's analysis will thus focus only on the willful disregard prong of *Branch.*

Following *Branch,* the Court of Appeals, in *Va. Employment Commission v.*

Sutphin, 8 Va. App. 325 (1989), adopted the holding of *Schappe v. Unemployment Compensation Bd. of Review*, 38 Pa. Comwlth. 249, 392 A.2d 353 (1978), that "misconduct" involves "'manifest culpability, wrongful intent, evil design, or intentional and substantial disregard for the employee's interests. . . .'" 8 Va. App. at 329 (citing 38 Pa. Comwlth. at 253, 392 A.2d at 355-56).

Five years later, in *Borbas v. Virginia Employment Comm'n*, 17 Va. App. 720, 440 S.E.2d 630 (1994), the Court of Appeals recognized that an employee's "behavior which is involuntary, unintentional or the product of simple negligence does not rise to the level necessary to justify a denial of unemployment benefits." 17 Va. App. at 722.[1] Thus, the Court of Appeals concluded:

> [T]here was simply no evidence that appellant's acts were volitional, and none of the reprimands involved the same behavior. Although all three incidents involved breaches of prison security, appellant violated three otherwise unrelated procedures. Finally, the record contains no evidence that appellant ever demonstrated an ability to perform her job satisfactorily.

17 Va. App. at 723.

In *Whitt v. Ervin B. Davis & Co., Inc.*, 20 Va. App. 432 (1995), the Court of Appeals, applying *Branch*, and considering the claimant's prior satisfactory performance of identical duties and the provision of counseling and warnings received from employer, held:

> [T]he nature of claimant's lapses in satisfactory performance, combined with their frequency, supports the VEC's determination that the decline in her job performance was the result of a willful disregard of the interests of her employer and, thus, constituted misconduct connected with her employment.

20 Va. App. at 437-438.

Unfortunately, the Court of Appeals did not articulate the specific instances, or numerical frequency of, the claimant's lapses in satisfactory performance, stating only that the claimant:

> *repeatedly* made similar errors when performing routine duties, which she had previously accomplished without error. Claimant was repeatedly counseled about her job performance during this period.
>
> Three months prior to her termination, claimant was advised that her continued employment was contingent upon improvement in her job

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[1] *Virginia Employment Commission v. Gantt*, 7 Va. App. 631 (1989), is inapposite to the case at bar because the issue was whether the circuit court erred in finding that the rule that was violated by the employee "was reasonably designed to protect a legitimate business interest." 7 Va. App. at 636. There was no dispute that "the employer established a deliberate violation of a company rule . . . ." *Id.* By contrast, in the case at bar, there is no dispute that the rule which was violated was reasonably designed to protect a legitimate business interest.

> performance. Claimant's work product continued to be unsatisfactory. On August 20, 1992, claimant's supervisor gave her written instructions concerning a specific assignment to be performed. Claimant completed the assignment later that day and her work product was checked by the supervisor. The supervisor discovered that claimant had not followed the instructions she had been given.

20 Va. App. at 435 (emphasis added).

In a case outside of the employment context, the Virginia Supreme Court, in *Osman v. Osman,* 285 Va. 384 (2013), cited with approval the discussion in the United States Supreme Court case of *Safeco Ins. Co. v. Burr,* 551 U.S. 47 (2007) of the "differences between the term 'willful' in a criminal context versus a civil one" (285 Va. at 391):

> [W]here willfulness is a statutory condition of civil liability, we have generally taken it to cover not only knowing violations of a standard, but reckless ones as well. (Citations omitted). This construction reflects common law usage, which treated actions in "reckless disregard" of the law as "willful" violations.

551 U.S. at 57.

In another case outside the employment context, *Pilli v. Virginia State Bar,* 269 Va. 391 (2005), the Court equated "reckless disregard" with "utter indifference . . ." 269 Va. at 397. See also *Griffin v. Shively,* 227 Va. 317, 321 (1984) ("Willful and wanton negligence is . . . acting with reckless indifference to the consequences").[2]

Accordingly, while trial courts know that they must determine if there is substantial evidence in the agency record to support the agency's decision that the employee's acts or omissions were of such a nature or so recurrent as to manifest a willful disregard of the employer's interests and the duties and obligations, trial courts have been given no guidance, other than errors must be "repeated" (*Whitt,* 20 Va. App. at 435), on what specific set of facts rise to the level of "willful" or "reckless" disregard, or "utter indifference" or "reckless indifference" (although we know that "willful" disregard does not include simple negligence).

Given that the applicable standard for "willful" disregard requires a showing of utter or reckless indifference, it was impossible for the Commission, as a matter of law, to determine whether Petitioner acted with such indifference without knowing the context of her actions. That is, did her errors constitute a significant percentage of the registrations she processed so as to manifest an utter indifference to her task, or did they constitute such a minuscule percentage of such registrations that there was no such manifestation? And was the registration process so difficult, or the time pressure so severe, that errors had to be expected, or was the process so simple, and the time pressure so moderate, that errors were possible only a result of indifference? Without

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[2] While not an oft-quoted legal authority, reckless disregard is probably best described as the attitude expressed by Rhett Butler toward Scarlett O'Hara in the 1939 film classic *Gone With The Wind*: "Frankly, my dear, I don't give a damn."

this information, the Commission (and the court upon review) could not have reached any meaningful legal conclusions.

As a result of the absence of material information, the court, pursuant to *Jones v. Willard,* 224 Va. 602 (1983),[3] will remand the matter to the Commission to take further evidence and to make additional findings concerning the number of blood and tissue specimens Petitioner registered from the time she began working at the Central Processing Department in 2016 until May of 2017, and from May of 2017 until she was terminated on January 29, 2018, the complexity and time requirements of the registration process, and any other facts which would demonstrate Petitioner's indifference (or lack thereof) to her duties.

An appropriate order will enter.

Sincerely yours,

[redacted]

Richard E. Gardiner
Judge

[3] "Code § [60.2-625] does not expressly empower a reviewing court to remand a cause to the Commission. But, absent a specific mandate to the contrary, a statutory grant of appellate jurisdiction necessarily implies such a power." 224 Va. at 606-607.

V I R G I N I A :

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

SARAH N. LARYEA	)	
	)	
Petitioner	)	
	)	
v.	)	CL 2019-4116
	)	
INOVA HEALTH	)	
	)	
VIRGINIA EMPLOYMENT COMMISSION	)	
	)	
Respondents	)	

ORDER

THIS MATTER came before the court on Petitioner's petition to overrule the determination of the Virginia Employment Commission ("Commission") that Petitioner was ineligible for unemployment compensation, or, in the alternative, to remand the matter to the Commission for further proceedings.

THE COURT, for the reasons set forth in the court's letter opinion of today's date, hereby remands the matter to the Commission for further proceedings.

ENTERED this 1st day of July, 2019.

[redacted]

Richard E. Gardiner
Judge

ENDORSEMENT OF THIS ORDER BY COUNSEL OF RECORD FOR THE PARTIES IS WAIVED IN THE DISCRETION OF THE COURT PURSUANT TO RULE 1:13 OF THE SUPREME COURT OF VIRGINIA

Copies to:

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Counsel for Petitioner

Elizabeth B. Peay
Lauren Frederickson Randall
Counsel for Respondents