Maryland

DEPARTMENT OF ECONOMIC AND EMPLOYMENT DEVELOPMENT

1100 North Eutaw Street
Baltimore, Maryland 21201
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BOARD OF APPEALS
Thomas W. Keech, Chairman
Hazel A. Warnick, Associate Member
Donna P. Watts, Associate Member

William Donald Schaefer, Governor
J. Randall Evans, Secretary

—DECISION—

Decision No.: 1111-BH-88

Date: Nov. 28, 1988

Claimant: Leslie A. Stauffer

Appeal No.: 8802218

S. S. No.:

Employer: Noxell Corporation
c/o Automatic Data Processing
ATTN: Gabrielle Allen

L. O. No.: 9

Appellant: CLAIMANT

Issue: Whether the claimant was discharged for gross misconduct or misconduct connected with the work, within the meaning of Section 6(b) or 6(c) of the law.

—NOTICE OF RIGHT OF APPEAL TO COURT —

YOU MAY FILE AN APPEAL FROM THIS DECISION IN ACCORDANCE WITH THE LAWS OF MARYLAND. THE APPEAL MAYBE TAKEN IN PERSON OR THROUGH AN ATTORNEY IN THE CIRCUIT COURT OF BALTIMORE CITY, IF YOU RESIDE IN BALTIMORE CITY, OR THE CIRCUIT COURT OF THE COUNTY IN MARYLAND IN WHICH YOU RESIDE.

THE PERIOD FOR FILING AN APPEAL EXPIRES AT MIDNIGHT ON December 28 , 1988

—APPEARANCES—

FOR THE CLAIMANT:

Leslie A. Stauffer - Claimant
W. Stanwood Whiting - Attorney

FOR THE EMPLOYER:

Frank Tyminski - Laboratory Mgr.
Peter Saucier - Attorney

Appearances continued:

For the employer -

Mike Tilrico -
Dir. Employee Rel.
Ann Valloton -
Mgr. Health Services
Marilyn Bushnell
Emp. Rel. Mgr.
Gypsy Jo Unkle -
Occupational Nurse

EVALUATION OF THE EVIDENCE

The Board of Appeals has considered all of the evidence presented, including the testimony offered at the hearings. The Board has also considered all of the documentary evidence introduced into this case, as well as the Department of Economic and Employment Development's documents in the appeal file.

FINDINGS OF FACT

The claimant was employed beginning March 10, 1986 as a technician in the cosmetics department of the employer. Her evaluations were consistently satisfactory, though there were areas noted in which she could have improved. In June of 1987, she was promoted to the position of Specialist Team Leader. This job required her to be in charge of two technicians who were performing quality control on the employer's cosmetics line on the third shift. This promotion required a change to the third shift.

The claimant was rated as satisfactory and no written warnings were given her with regard to any type of work deficiency. She was given a verbal warning concerning her attendance. The employer noticed, however, that the claimant had begun to take long lunches (over two hours) and had frequently been absent from her assigned work posts for periods of time long enough to interfere with production. The production manager complained that the claimant was not available to make decisions when they needed to be made. The two technicians who worked with the claimant also verified the problem of her being sometimes away from the work station. These complaints were justified.

On November 10, 1987 management confronted claimant with these problems. The claimant did not deny that these problems existed at that time. The employer declined to give claimant an official written warning or other type of reprimand for this conduct. Instead, the employer required that the claimant

undergo a complete medical screening, a screening which always included both a blood and a urine screening for drugs. The claimant was required, as a de _facto_ condition of her continued employment, to sign a form allowing the company to test her urine randomly for drugs. The test performed on the sample taken on November 10, 1987 was entirely negative, and the claimant was permitted to return to work.

The claimant, however, admitted recent personal use of cocaine on her personal time.

The claimant attributed her performance problems to her dislike of the third shift. A transfer was arranged whereby the claimant transferred back to the second shift. .Upon returning to the second shift, the claimant's work was rated as satisfactory again, and this rating was without as many qualifications as the previous satisfactory ratings.

On December 22, 1987, the employer notified the claimant that she had to submit immediately to a random urine analysis test. This was as a result of the claimant having admitted during the medical exam that she had used cocaine, and her signing of the form giving permission for the employer to conduct thes e tests. The claimant refused to take this test, although conferences were held with her during which it was made clear that the likely result would be termination.

The claimant has used cocaine on at least one occasion subsequent to the November 10, 1987 medical exam and drug screening. The available drug tests for cocaine are reliable only if taken relatively recently after use, as the cocaine indicia disappear from bodily fluids within 24 to 48 hours after use.

The claimant contacted the employer on December 23 and offered to take the test at that time, but her request was refused. The claimant was suspended and was later terminated effective December 22, based upon her refusal to take the random drug test when required.

CONCLUSIONS OF LAW

The issue of mandatory drug testing is a controversial one, balancing as it does the nation's crucial need for a workplace free from drug impairment against an employee's crucial right to bodily and medical privacy.

Numerous cases have arisen with respect to the testing of public employees, and that issue is presently before the United States Supreme Court. National Treasury Employees' Union v. Von Raab, 816 F.2d 170 (5th Circuit. 1987), cert. granted, 56 U.S.L.W.______ (February 29, 1988). See generally, Miller, Mandatory Urinalysis Testing and the Privacy Rights of Subject Employees: Toward a General Rule of Legality under the Fourth Amendment, 48 U. Pitt, L. Rev. 201 (1986).

As the Board pointed out in its more extensive reasoning in Fitzgerald v. Oldham Associates (234-BH-88), a case involving a private employer does not contain the constitutional dimension which arises when the government requires drug screening of its employees. These cases involving private employers boil down to a question of whether the employer's action was reasonable, given all of the circumstances of the case. The constitutional cases dealing with public employees, however, are somewhat helpful, since the bottom line seems to be whether the search required was reasonable within the meaning of the Fourth Amendment to the United States Constitution, a question which has some similarity to the question which arises under the unemployment insurance law.

In the Fitzgerald case, the Board listed eight factors from which it concluded that the employer's drug testing program was not reasonable. Those factors were:

1. The claimant was not informed of any urinalysis program at the time he was hired;
2. the claimant had a good work record;
3. the claimant had had no accidents on the job;
4. the claimant was rot engaged in an extremely hazardous operation;
5. there was no indication that the claimant was impaired by the use of drugs on the job;
6. the urinalysis program could not detect drug-related job impairment;
7. the program could be used to detect numerous other personal aspects of the claimant's personal life which he could ordinarily expect to remain private;
8. the testing program required an invasion of the claimant's personal bodily-privacy.

The Board concludes that this case is different. The claimant in this case was required to undergo screening at two separate times. The Board will deal with each required screening separately. The first decision to require the claimant to undergo drug screening was made on November 10, 1987. The

Board concludes that this requirement was reasonable because the claimant had, in fact, displayed absences from her work station for long periods of time and for which she gave no particular explanation. The claimant's strongest point is that her work evaluations were consistently satisfactory and that the employer admitted that her absences from her duty posts did not warrant a written reprimand as of November 10. The question which thus arises is whether the work related problems were being used as an excuse to require the claimant to undergo a comprehensive drug screening or whether the drug screening was being required in search of an explanation for serious work deficiencies. Although there is little written documentation of any serious previous work problem on the part of the claimant, the Board has found the employer's witnesses credible with respect to the existence of that problem, and that credibility finding has been reflected in the Board's Findings of Fact. Since the work problems did exist, the fact that they were not documented in writing is not that important. It is obvious that a policy such as this employer's policy could be abused and could result in widespread (or random) invasions of privacy on the part of the employer, but the fact remains that there was no such abuse in this particular case. The Board, therefore, finds that the requirement that the claimant take a health and drug screening on November 10 was reasonable.

On December 22, 1987, the claimant was required to take a drug screening of her urine. It is true that the claimant's performance had actually improved since the time her urine was first screened (negatively) for drugs on November 10, 1987. By this time, however, another factor intervened, in that the claimant had admitted to the employer's doctor that she had actually used cocaine " the relatively recent past. Considering this fact, thin employer's requirement that she once again be screened for drugs was not unreasonable. In making this conclusion, the Board places no weight on the claimant's signing of an authorization statement allowing the employer to test her randomly for drugs at will, since this statement was mandatory and had to be signed by the claimant on penalty of losing her job. Since the claimant had admitted recent use, however, the employer's requirement that she be tested was reasonable.

The claimant's refusal to be tested was also a deliberate violation of standards her employer had a right to expect, showing a gross indifference to her employer's interest. This is gross misconduct within the meaning of Section 6(b) of the law. The claimant's decision to undergo the tests on the following day does not change its result, as the test would not be valid, if given on the next day.

DECISION

The claimant was discharged for gross misconduct, connected with the work, within the meaning of Section 6(b) of the Maryland Unemployment Insurance Law. She is disqualified from the receipt of unemployment insurance benefits for the week beginning December 20, 1987 and until she becomes reemployed and earns at least ten times her weekly benefit amount.

The decision of the Hearing Examiner is affirmed.

K:H:D
kmb
DATE OF HEARING: October 25, 1988
COPIES MAILED TO:

CLAIMANT

EMPLOYER

W. Stanwood Whiting, Esquire

Peter S. Saucier, Esquire

UNEMPLOYMENT INSURANCE - TOWSON

STATE OF MARYLAND
APPEALS DIVISION
1100 NORTH EUTAW STREET
BALTIMORE, MARYLAND 21201
(301) 383-5040

STATE OF MARYLAND
William Donald Schaefer
Governor

--- DECISION ---

Date: Mailed: May 26, 1988

Claimant: Leslie A. Stauffer

Appeal No.: 8802218

S.S. No.:

Employer: Noxell, Corporation
c/o ADP

L.O.No: 09

Appellant: Employer

Issue: Whether the Claimant was discharged for gross misconduct connected with his work within the meaning of Section 6(b) of the Law.

—NOTICE OF RIGHT OF FURTHER APPEAL —

ANY INTERESTED PARTY TO THIS DECISION MAY REQUEST A FURTHER APPEAL AND SUCH APPEAL MAY BE FILED IN ANY EMPLOYMENT SECURITY OFFICE OR WITH THE APPEALS DIVISION, ROOM 515, 1100 NORTH EUTAW STREET, BALTIMORE, MARYLAND 21201, EITHER IN PERSON OR BY MAIL.

THE PERIOD FOR FILING A FURTHER APPEAL EXPIRES AT MIDNIGHT ON June 10, 1988

NOTICE: APPEALS FILED BY MAIL, INCLUDING SELF-METERED MAIL, ARE CONSIDERED FILED ON THE DATE OF THE U.S. POSTAL SERVICE POSTMARK.

— APPEARANCES --

FOR THE CLAIMANT:

Present
Theodore Cavacos, Atty.

FOR THE EMPLOYER:

Gabrielle Allen,
Fred Tynski,

Anna Ballotton and
M. Tilrico, Barbara
Yarbrough and Jo
Unkle

FINDINGS OF FACT

The Claimant was employed by the Noxell Corporation in its quality control laboratory. She worked for Noxell from March 10, 1986

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until January 4, 1988. The Claimant had been a good employee until toward the end of her employment when her performance began to decline. This decline in her performance was noted by management and she was referred to the medical department for an examination to rule out ill health as the cause of her failing to perform up to her previous standards. In the course of her conversations in the medical department she revealed to a nurse that she had used cocaine approximately once a month. The Claimant was then asked to sign a document authorizing the employee health department of the company to randomly test her blood and/or urine for drugs and/or alcohol. The Claimant signed that on November 10, 1987. An examination for drugs was conducted at that time and it was disclosed that she was negative for the use of drugs or alcohol at that time. At a later time, approximately two months later the Health Department wished to again make a random test and asked the Claimant for a urine specimen so that they could do so. The Claimant refused. It was made very clear to the Claimant that if she continued to refuse that she would be discharged. It was called to her attention that she had authorized a random testing for drugs and alcohol. The Claimant continued to refuse and was discharged.

CONCLUSIONS OF LAW

Drugs in the work in the work place is one of the most important problems facing management and the nation today. The Claimant in this case admitted to the use of cocaine and admitted to it under circumstances in which she had been observed by management to have fallen off in the performance of her job duties.

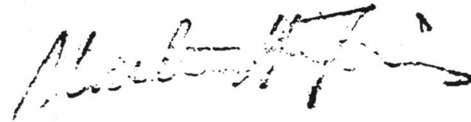
Management had a right at this point to assure that she would take those steps necessary so that she would be able to properly perform her job up to standards she had demonstrated herself capable of in the past. The Claimant, in fact, agreed to this and agreed to a random drug test. She then refused it when it was randomly scheduled, approximately two months after her agreement to the random testing. It was explained carefully to her that if she continued her refusal she would be terminated.

The Claimant's actions were a deliberate and willful disregard of standards of behavior which the employer had a right to expect showing a gross indifference to the employer's interest. The employer, in this case, takes a enlightened approach to drug abuse. It furnishes an employee assistance program, medical treatment, and testing. The Claimant, in this case, at first agreed to enter into such a program to assure that she would remain drug free so that her performance of her job duties would not deteriorate any further. She then reniged on her promise and in doing so engaged in conduct which an employer does not have to accept from an employee who has been abusing drugs in a fashion that has caused her work levels to deteriorate.

DECISION

The Claimant was discharged for gross misconduct connected with her work within the meaning of Section 6(b) of the Maryland Unemployment Insurance Law. She is disqualified from receiving unemployment insurance benefits for the 'week beginning December 20, 1987 and until she becomes re-employed and earns at least ten times her weekly benefit amount.

The determination of the Claims Examiner is reversed.



Martin A. Ferris
Hearing Examiner

Date of Hearing: May 6, 1988
Cassette: 2624 & 2623
Specialist ID: 09657
Copies Mailed on May 26, 1988 to:
Claimant
Employer
Unemployment Insurance - Towson (MABS)

Theodore Cavacos, Esq.