



DEPARTMENT OF EMPLOYMENT AND TRAINING

BOARD OF APPEALS
1100 NORTH EUTAW STREET
BALTIMORE, MARYLAND 21201

(301) 383-5032

STATE OF MARYLAND

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— DECISION —

Decision No.: 204-BH-85

Date: March 26, 1985

Appeal No.: 02996

S. S. No.:

Claimant: Rubin L. Johnson

Employer: Union Trust Co. of Maryland

L.O. No.: 1

Appellant: CLAIMANT

Issue: Whether the claimant was discharged for gross misconduct, connected with the work, within the meaning of §6(b) 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 MAY BE TAKEN IN PERSON OR THROUGH AN ATTORNEY IN THE CIRCUIT COURT OF 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 April 25, 1985

— APPEARANCES —

FOR THE CLAIMANT:

Rubin Johnson;
Garth Corbett, Atty.

FOR THE EMPLOYER:

Patrick Pilachowski,
Attorney;
Mary O'Brien,
Vice Pres. of
Personnel

EVALUATION OF 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 in this case, as well as the Department of Employment and Training's documents in the appeal file.

It is undisputed by both parties that the claimant is an alcoholic. The employer alleges that the claimant was discharged due to his absenteeism and not his alcoholism. However, given the number of the claimant's absences due to being in an alcoholic treatment program (see Employer's Exhibit No. B-4) the fact that the claimant's last incidence of absenteeism, which immediately precipitated his dismissal, was due to his enrollment in an alcohol treatment program (see employer's warning notice to claimant dated February 22, 1984) and the employer's failure to state unequivocally that it would still have discharged the claimant based solely on his non-alcohol related absences, the Board cannot accept this allegation as a fact.

FINDINGS OF FACT

The claimant was employed by Union Trust Company of Maryland as a custodian from November 16, 1981 until February 28, 1984.

The claimant has been a chronic alcoholic for approximately 15 years. The employer was fully aware of this fact when the claimant was hired.

The claimant was first treated for alcoholism in 1979. He was not drinking at the time he was hired by Union Trust Company, but in August, 1983, he went to his supervisor and asked for help because he had started drinking again. With the employer's approval, the claimant enrolled in a treatment program at Mercy Hospital through the employee assistance program; the employer paid one-half of the cost. The claimant was absent 11 days while under treatment. These were treated by the employer as unpaid sick days. Although the employer agreed to this program, it issued the claimant a written warning notice at that time stating that if his condition (being under the influence of alcohol) continued after his return he would be dismissed.

In the same year, the claimant was absent 35 days as a result of an on-the-job injury to his back. The claimant received workman's compensation for this time. The claimant was also having some attendance problems prior to August, 1983 and this was reflected in a general way, on November, 1982, October, 1983 and November, 1983 performance evaluations. How much of this was caused by his alcoholism is not clear from the record, but the Board finds as a fact that at least some, though not all of his attendance problems were caused by his alcohol problem.

It is clear that the claimant was absent a total of 8 days in 1982 for which he was paid and for 14 paid days and 13½ unpaid days (11 for alcohol treatment) in 1983, in addition to the 35 workman's compensation days cited earlier.

In 1984, the claimant was absent for 3 days for which he was paid and 8 unpaid days, 4 of which were for alcohol treatment. In February, 1984 he started drinking again. On or about February 21, 1984 he was riding a bus to work when he began to feel sick with symptoms of alcohol withdrawal. He went immediately to Johns Hopkins Hospital to seek medical help and enrolled in a 7-day inpatient program there. The claimant did have someone from the Hospital notify his employer, who was aware of his absence and the reason therefor, but when the claimant returned to work approximately one week later, he was discharged. The employer's notice of dismissal specifically referred to the fact that this was the second time that the claimant had been enrolled in an alcohol treatment program before concluding that he should be dismissed due to his attendance.

CONCLUSIONS OF LAW

There is no dispute that the claimant is a chronic alcoholic. Alcoholism is recognized by the State of Maryland as an illness (H.G. §8-102 of the Annotated Code) and the chronic alcoholic is defined in H.G. §8-101 as follows:

Chronic alcoholic - "Chronic alcoholic" means an individual who chronically and habitually drinks alcoholic beverages so much that:

- (1) It injures the health of the individual;
- (2) It substantially interferes with the social or economic functioning of the individual; or
- (3) The individual cannot control the drinking.

The evidence here demonstrates that the claimant meets at least the second and third definitions and possibly all three.

In the frequently cited case, Jacobs v. California Unemployment Insurance App. Bd., 25 Cal. App. 3d 1035 (1972), the court concluded that whether the claimant's chronic absenteeism, caused by chronic intoxication, was misconduct under the unemployment insurance statute turned on whether he had the capacity to abstain from drinking (in which case it would be misconduct) or whether "his intoxication-induced behavior was the product of an irresistible compulsion to drink" and therefore not disqualifying under the unemployment law. See also, Leonard Timpson v. Bethlehem Steel Corp. and the Board of Appeals, 1978/1239/16211 (Superior Court of Baltimore City) (1980).

The Board concludes that this claimant was unable to control his drinking and that much of his absenteeism, but particularly the last incidence that led to his termination, was due to an irresistible compulsion to drink.

It has been argued that where an alcoholic has demonstrated an ability to refrain from drinking for a period of time (this period of time has never been defined) his or her return to drinking after that time should be viewed as a volitional act and therefore misconduct, see Timpson, supra. However, the Board does not have in this case any medical evidence to support that theory. Obviously, there is a great deal about alcoholism that this Board, and even the medical community, still does not know. But we note that there is little argument that the episodic return to drinking over a period of time is a common symptom of this disease. Given the fact that it is recognized as an illness by the State of Maryland, that the inability to refrain from drinking is a common symptom and even recognized as one of the definitions of this illness, given the lack of medical evidence to support a finding to the contrary, and given the testimony of the claimant in this case, we conclude that the claimant's actions here were as a result of his alcoholism and his irresistible compulsion to drink and therefore not misconduct.

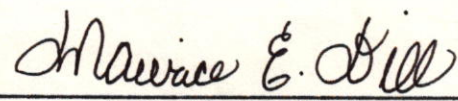
As noted in the Evaluation of Evidence above, there is little support in the record for the employer's argument that the claimant was discharged for absenteeism and not alcoholism. The claimant's record of absenteeism, of which a large portion was directly or indirectly a result of his alcoholism and the employer's dismissal notice itself clearly show that the claimant was discharged as a result of his alcoholism.

DECISION

The claimant was discharged, but not for misconduct connected with the work, within the meaning of §6(c) of the Maryland Unemployment Insurance Law. No disqualification is imposed based on his separation from his employment with Union Trust Company of Maryland. The claimant may contact the local office concerning the other eligibility requirements of the law.

The decision of the Appeals Referee is reversed.


 Associate Member


 Associate Member

DISSENTING OPINION

I would not find that the claimant suffered an irresistible compulsion to drink when, in February of 1984, he began drinking again. The Board reasons that the claimant is an alcoholic, that episodic returns to drinking are a common symptom of alcoholism and that this claimant's resumption of his drinking was a symptom of his disease and therefore an irresistible compulsion.

I would not find that an alcoholic's return to drinking after two periods of inpatient treatment and two long periods of abstinence was the product of an irresistible compulsion unless there were specific evidence of this compulsion. The fact that alcoholism is a disease does not mean that every lapse into drinking is the result of an irresistible compulsion. The majority opinion reads too much into Article 2C, the Maryland Intoxication and Alcoholism Act, an act which, in my opinion, was primarily concerned with alleviating the constitutional problems raised by treating alcoholism as a criminal offense, see, Powell v. Texas, 392 U.S. 514 (1968) and the moral problems raised by the lack of treatment available for those ravaged by this disease. My reasoning is more fully set out in the dissenting opinion in White v. Mayor and City Council (439-BH-84). The extent of the success of the Maryland Intoxication and Alcoholism Act, and its proper application, can be seen in the facts of this case: the claimant has been accepted for treatment now on four occasions at three separate institutions, he was hired despite the fact of his alcoholism and his employer allowed him one lengthy absence for inpatient treatment and paid 50% of the cost. The Act, however, was not meant to be a virtual assurance that alcoholics who relapse into drinking and are fired for the resulting absenteeism should be shielded from the natural consequences of their acts.

The Act does not establish or even support the notion that an alcoholic who returns to drinking generally does so as the result of an irresistible compulsion. Nor does the evidence in this case. The Board simply reads too much into the fact that the claimant is an alcoholic. The result of this kind of reasoning is that alcoholics who commit misconduct (at least as regards absenteeism) against their employer are shielded from the consequences of their actions, at their employer's expense.

In addition to the claimant's absences due to alcoholic relapses and treatment, he also missed numerous days for totally unexplained reasons.

For the above reasons, I would find that the claimant's actions were volitional and that his repeated absences were a series of violations of work rules, showing that he has regularly and wantonly disregarded his obligations. This is gross misconduct under §6(b) of the law.

Thomas W. Keech

Chairman

K
kbm

Date of Hearing: September 11, 1984

COPIES MAILED TO:

CLAIMANT

EMPLOYER

Garth Corbett, Esq.

Patrick Pilachowski, Esq.

UNEMPLOYMENT INSURANCE - BALTIMORE



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 Administrative
 Hearings Examiner

- DECISION -

CLAIMANT: Rubin L. Johnson

DATE: May 4, 1984

APPEAL NO.: 02996

S. S. NO.:

EMPLOYER: Union Trust Company of Maryland

L. O. NO.: 1

APPELLANT: Claimant

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

NOTICE OF RIGHT TO PETITION FOR REVIEW

ANY INTERESTED PARTY TO THIS DECISION MAY REQUEST A REVIEW AND SUCH PETITION FOR REVIEW 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 PETITION FOR REVIEW EXPIRES AT MIDNIGHT ON May 21, 1984

- APPEARANCES -

FOR THE CLAIMANT:

Rubin L. Johnson - Claimant
 Helen Johnson - Mother - Witness
 Garth Corbett, Esquire -
 Legal Aid Bureau, Incorporated

FOR THE EMPLOYER:

Mary A. O'Brien -
 Vice-President of
 Personnel

FINDINGS OF FACT

The claimant was employed by Union Trust Company of Maryland from November 16, 1981 as a custodian earning \$8,143 per year, until his last day of work on February 28, 1984.

On August 15, 1983, the claimant was given a warning for reporting to work under the influence of alcohol. Because of the claimant's alcoholism, he missed a considerable amount of time from work. On October 5, 1983, the claimant was given a warning that if his lateness and absenteeism did not improve he would be terminated. On January 2, 3, 6 and 14, 1984, the claimant missed time from work. The claimant was sent to an alcoholic clinic from February 21, 1984 to February 25, 1984. Thereafter, the claimant's employment was discontinued by the employer because of his attendance record.

CONCLUSIONS OF LAW

Although alcoholism is a disease, the claimant missing so much time from work was gross misconduct connected with his work within the meaning of the Maryland Unemployment Insurance Law. Therefore, the determination of the Claims Examiner will be affirmed.

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. He is disqualified from receiving benefits for the week beginning February 26, 1984 and until the claimant becomes reemployed and earns at least ten times his weekly benefit amount (\$950) and thereafter becomes unemployed through no fault of his own.

The determination of the Claims Examiner is affirmed.

John G. Hennegan

John G. Hennegan
APPEALS REFEREE

DATE OF HEARING: April 4, 1984
ras
(1414 & 2423 -- Lancaster)

copies mailed to:

Claimant
Employer
Unemployment Insurance - Baltimore

Legal Aid Bureau. Incorporated