

 **Maryland**
Department of Economic &
Employment Development

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Governor
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Secretary

Board of Appeals
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Baltimore, Maryland 21201

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Thomas W. Keech, Chairman
Hazel A. Warnick, Associate Member
Donna P. Watts, Associate Member

- D E C I S I O N -

Decision No.: 1329-BR-93

Date: July 23, 1993

Claimant: Lorenzor Toles

Appeal No.: 9309655

S.S. No.:

Employer: Caterair International Corp. Lo.No.: 1
ATTN : Edwin J. Treadway

Appellant: EMPLOYER

Issue: Whether the claimant was discharged for gross misconduct or misconduct, connected with the work, within the meaning of §8-1002 of the Labor and Employment Article.

- NOTICE OF RIGHT OF APPEAL TO COURT -

You may file an appeal from this decision in the Circuit Court for Baltimore City or one of the Circuit Courts in a county in Maryland. The court rules about how to appeal can be found in many public libraries, in the Annotated *Code of Maryland, Maryland Rules*, Volume 2, B rules.

The period for filing an appeal expires

August 22, 1993

- A P P E A R A N C E S -

FOR THE CLAIMANT:

FOR THE EMPLOYER:

REVIEW ON THE RECORD

Upon review of the record in this case, the Board of Appeals makes the following findings of fact and conclusions of law.

The claimant was employed as a dishroom supervisor, from December 15, 1989 until he was discharged on March 24, 1993.

On the claimant's last day of work, he left the work site, without permission, for lunch. The employer provided lunch facilities on the premises. If an employee wished to leave the premises during their lunch break they had to obtain permission first. The claimant did not do this. In addition to leaving the premises without authorization, the claimant returned a half hour late.

When the employer questioned the claimant about this incident the claimant became highly agitated. The employer thought the claimant's reaction indicated that the claimant was either under the influence of alcohol or drugs. The claimant had a prior drinking problem. As a result of all these factors, the employer ordered the claimant to submit to a urine analysis test.

The claimant's urine sample was tested by the employer's contracted lab in New Jersey. The test results indicated a positive reading for the presence of cocaine.

The claimant was advised of his rights pursuant to §17-214.1(d) of the Health-General Article of the Annotated Code of Maryland. Section 17.214.1(d) provides that:

(1) A person who is required to submit to a job-related testing, under subsection (b) of this section, may request independent testing of the same sample for verification of the test results by a laboratory that:

- (i) Holds a permit under this subtitle; or
- (ii) If located outside of the State, is certified or otherwise approved under subsection (d) of this section.

(2) The person shall pay the cost of an independent test conducted under this subsection.

The employer is a national company. The employer is not required to use a Maryland lab for its employee urine or blood testing.

Section 17.214.1(d) affords employees the right to have their urine or blood samples retested at their expense. The law sets no limitation on this expense and does not require the employer to use any particular lab in order to minimize cost to employees who desire a retest on their samples.

The Board of Appeals does not adopt the conclusion of the Hearing Examiner that use of an out-of-state lab imposes an unreasonable cost on employees to have samples retested. The claimant in this case could have had his sample retested by a

lab in New Jersey and thereby avoid the additional cost of having the sample sent back to Maryland. Alternatively, if the claimant truly believed that his sample did not contain any illegal drugs it would have been well worth the cost to have the drug returned to Maryland for retesting or retested in New Jersey.

The employer has met all requirements of the laws of the State of Maryland with regard to the manner of testing and informing the claimant of his rights to retesting. The test results relied upon by the employer are valid and will be considered by the Board in making its decision in this case.

CONCLUSIONS OF LAW


Section 8-1002 of the Labor and Employment Article defines gross misconduct as conduct of an employee that is a deliberate and willful disregard of standards of behavior that an employing unit rightfully expects and that shows gross indifference to the interests of the employing unit, or repeated violations of employment rules that prove a regular and wanton disregard of the employee's obligations.

The claimant's actions on his last day of work, along with his positive urine analysis for cocaine amount to gross misconduct within the meaning of 58-1002 of the Labor and Employment Article.

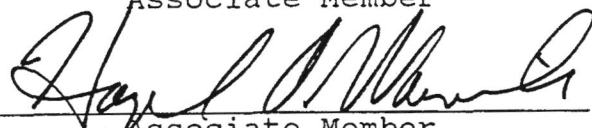
DECISION

The claimant was discharged for gross misconduct, connected with the work, as defined in §8-1002 of the Labor and Employment Article. He is disqualified from receiving benefits from the week beginning March 21, 1993 and until he becomes reemployed, earns 20 times his weekly benefits amount (\$4460.00) and thereafter become unemployed through no fault of his own.

The decision of the Hearing Examiner is reversed.



Associate Member



Associate Member

DW:W

kbm

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CLAIMANT
EMPLOYER
UNEMPLOYMENT INSURANCE - BALTIMORE

Automatic Data Processing
ATTN: Donna Klauza

The Legal Aid Bureau, Inc.
ATTN: Thomas Weisser, Esq.

is required to get permission. The claimant did not get the permission, but that was not the reason he was terminated. The claimant was out on his lunch hour and was one-half hour late in returning. The employer felt that he had been out sleeping in a truck and questioned him about it. The claimant came upset about it because of being questioned for returning to work one-half hour late from lunch and became in his own words "pissed off." The claimant became what he calls hyper and became aggitated. He appealed to his immediate supervisors to possibly be under the influence of alcohol or drugs. The claimant had a prior acohol problem. The claimant was set for a urine analysist test and gave a urine sample here in the Baltimore region. The urine sample was transported to New Jersey where it was tested and a report sent back. The report showed that the claimant's urine sample tested positive for cocaine.

The claimant had consistently denied the use of cocaine or any other drug. He was told of his right to have the sample retested and started to pursue it, but then he learned that he would need \$97 in order to have the sample tested. A portion of that money was being charged to him to transport the sample from New Jersey to a laboratory in Maryland. The claimant was unable to raise the money and a sample was never retested. The claimant did sign a document in which it stated to him that he might choose to have the sample tested at another facility certified by the State of Maryland, but that if he chose another facility he would be responsible for transportation as well as testing charges.

The claimant inquired about vacation money and was told that he could not get any. The employer asked the claimant when would he have the money he needed to have the testing done. The claimant indicated that he did not have the money to have the testing done and was told that the cost would be \$97. The employer's witness testified that approximately \$30 of that cost were transportation charges from New Jersey to the lab in Maryland. It is clear that the claimant wanted to have the sample retested at a lab of his choice that met the Maryland requirements, but that he could not do so because he did not have the money. It is also clear that a portion of that expense was unnecessarily imposed upon him by the employer's use of an out-of-state laboratory for the test.

CONCLUSIONS OF LAW

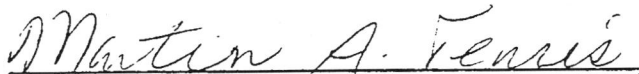
A claimant may not be denied unemployment insurance benefits in this case based upon the report of a positive test for cocaine at a laboratory located in New Jersey and used by the employer. It is not the selection of an out-of-state laboratory that causes the test not to be used, it is the fact that the employer imposed additional conditions upon having a retest other than those allotted for in the Maryland Law, relating to drug testing. The Maryland Law relating to drug testing requires that an employee be given an opportunity to have the drug retested at a facility of the

employee's choice and that the cost of the testing is to be borne by the employee. This does not give the employer the right to impose a difficult expense on the cost of the testing by shipping the test out of state and incurring additional charges for transportation of the sample back into the State of Maryland to have it tested where the claimant worked and where his original sample was given. Because of this, I am not taking into account the results of the test that caused the claimant to be discharged and in the absence of those results, it cannot be found that he was discharged for misconduct or gross misconduct connected with his work.

DECISION

It is held that the claimant was discharged from this employment, but not for gross misconduct or misconduct connected with the work, within the meaning of the MD Code, Title 8, Section 1002 or 1003. No disqualification is imposed based on his separation from this employment. The claimant should contact the local office concerning the other eligibility requirements of the Law.

The determination of the Claims Examiner is reversed.


Martin A. Ferris
Martin A. Ferris
Hearing Examiner

Date of Hearing: 6/3/93
rc/Specialist ID: 01078
Seq 02
Copies mailed on: 6/7/93 to:

Claimant
Employer
Unemployment Insurance - Baltimore - MABS

The Legal Aid Bureau, Inc.
Attn: Thomas S. Weisser
Administrative Law Unit

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