Maryland

DEPARTMENT OF ECONOMIC AND EMPLOYMENT DEVELOPMENT

1100 North Eutaw Street
Baltimore, Maryland 21201
(301) 333-5033

— DECISION —

Decision No.: 552-BH-88

Date: June 24, 1988

Claimant: Steven A. Conney

Appeal No.: 8712977

S. S. No.:

Employer: Fort Howard Cup Corp.
ATTN: Don Slipper, Pers. Mgr.

L. O. No.: 45

Appellant: EMPLOYER

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 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 July 24, 1988

— APPEARANCES —

FOR THE CLAIMANT:

Claimant not present

FOR THE EMPLOYER:

Anna Mary Culver - Attorney
Robert Strickland - Supervisor

For the employer continued:

Melvin Mowrey, Jr. -
Third Shift manager's operator
Brenda Gottleib -
Benefits Coordinator
Don Slipper -
Personnel Manager
George Purnell -
Set Up Person

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 in 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 by Fort Howard Cup Corporation as a print helper from approximately May 19, 1986 until he was discharged on or about October 30, 1987. The claimant was discharged for refusing to take a drug screening test in violation of company policy and the direct order of his supervisor.

The claimant worked the third shift, from 11:00 p.m. to 7:00 a.m. On the evening of October 29, 1987, one of the set up persons in the print shop, George Purnell, went into the men's room right outside the print shop where the claimant and others worked and immediately noticed a strong smell of marijuana in the men's room. He reported this to his supervisor, Robert Strickland.

The employer has a very strict policy against the use of any drugs on the premises and this policy is posted on all of the bulletin boards all around the plant. Upon hearing this report Mr. Strickland suspected the claimant and two other individuals working that night, based on his observations of their behavior. Earlier that evening Mr. Strickland had been looking for the claimant who was to meet with him for a performance evaluation. This was a weekly meeting in which Mr. Strickland, the claimant and two other persons were present. Although the claimant knew about this meeting in advance, he was late for the meeting because he had been in the men's room, the very

same men's room where the marijuana smoke was reported. When the claimant finally arrived for the meeting, the supervisor noticed that the claimant kept dozing off during the meeting and could not pay attention, even though there were only four people in the room and the whole focus of the meeting was the claimant's evaluation. The employer also noticed that the claimant appeared glassy eyed, was dragging his feet, and had a dazed look.

Mr. Strickland reported these observations and his suspicions to his supervisor, Melvin Mallory. Mr. Mallory was head supervisor of the third shift, had been trained in drug testing and had the authority to order employees, whose conduct was suspect, to submit to a urinalysis test. Although the claimant had never specifically signed a consent, the employer's posted and written policy, which had been in effect since 1985, was that "where circumstances, accidents, or other workplace conditions justify, the company will require such testing [drug testing program] of current employees." See employer's exhibit B-1. Therefore, in accord with that policy, on the evening of October 29, Mr. Mallory conducted a drug screening test on one of the other suspect employees, but by the time he could locate the claimant the shift was over and the claimant went home. The claimant was notified on the next day, October 30, 1987, to report for the urinalysis test but he flatly refused to do so. Again the claimant was reminded that he had to take the test and was given further time, until the following Monday, to report to take the urinalysis test. The claimant refused to take such a test and he was consequently discharged.

CONCLUSIONS OF LAW

The issue of whether and under what circumstances a company can require an employee to submit to a drug screening test, is a difficult one, but one that is occurring with more and more frequency, in unemployment insurance law as well as other areas of the law. In a recent Board decision. Fitzgerald v. Oldham Associates, 234-BH-88, (April 8, 1988), the Board dealt with this issue in some detail. In that case, the Board concluded that the claimant's refusal to submit to a urinalysis test was not misconduct or gross misconduct, within the meaning of Section 6(c) or 6(b) of the law because the urinalysis program in that case was unreasonable. However, based on the same reasoning used in the Oldham case, the Board here reaches a different conclusion, namely that under these circumstances, the order to take the test was a reasonable order and the claimant's refusal constitutes gross misconduct within the meaning of Section 6(b) of the law.

As in in the Fitzgerald case, this case deals with a private employer, not a government employer. Therefore constitutional issues are technically not relevant. However, the crucial issue that the Board examined in that case and which is equally applicable here is whether or not the employer's rule requiring a drug screening test was reasonable. The disposition of that issue is based largely on a balancing of the potential loss of privacy of the employee versus the employer's legitimate concern for safety in the workplace.- In Fitzgerald, the Board considered the following eight factors in reaching its conclusion that the requirement of the drug test was not reasonable, noting that if any of the factors had been different, the Board may have reached a different conclusion:

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 not engaged in an extremely hazardous occupation such as truck driving;
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.

Looking at these factors it becomes clear that there are important differences between the facts in Fitzgerald and the facts here. First, the drug test in Fitzgerald was totally arbitrary and random, requiring no suspicious acts or evidence of impairment of the employee whatsoever. This is very different from the situation here where the claimant was evidencing symptoms of drug impairment which were personally observed by his supervisor and had also earlier been in an area that smelled from marijuana. Second, although the claimant may not have been informed of the drug program at the time he was hired, the evidence is uncontroverted that he knew of the program or should have known of the program well in advance of the incident on October 29th. The policy had been in effect since 1985, was posted on 27 bulletin boards, and that policy made it clear that an employee could be required to take a drug screening test if circumstances justified it. The Board concludes that the facts in this case clearly justified such a request by the employer given the behavior of

the claimant. Third, although the claimant was not engaged in an extremely hazardous operation, he did work in a print shop around large pieces of equipment; therefore, the employer's concern about safety was legitimate and understandable. Fourth, the supervisor testified that the procedures for the urinalysis test were set up to insure bodily privacy as much as possible. The employees took their own samples and the tests were performed in the medical facilities of the employer. Employees were allowed to take the samples, seal Up the bottles and label them in total privacy.

Given the particular circumstances of this case, the Board concludes that the employer's request for the claimant to submit to a urinalysis test was a reasonable request and that the claimant's refusal to take the test, after being given tw chances to think about it and two warnings, was gross misconduct, connected with his work within the meaning of Section 6(b) of the law.

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 from the week beginning November 1, 1987 and until he becomes reemployed, earns at least ten times his weekly benefit amount and thereafter becomes unemployed through no fault of his own.

The decision of the Hearing Examiner is reversed.

Associate Member

Associate Member

Chairman

H:D:K
kmb

DATE OF HEARING: May 31, 1988

COPIES MAILED TO:

CLAIMANT

EMPLOYER

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UNEMPLOYMENT INSURANCE - NORTHWEST