BEFORE THE
CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

In the Matter of:

VERNON E. ABLES
(Claimant)

SHULTZ STEEL COMPANY
(Employer)

PRECEDENT
BENEFIT DECISION
No. P-B-454
Case No. 86-05446

Office of Appeals No. LA-05266

The employer appealed from the decision of the administrative law judge which held that the claimant was not disqualified for unemployment insurance benefits pursuant to section 1256 of the Unemployment Insurance Code and that the employer's reserve account was not relieved from benefit charges.

STATEMENT OF FACTS

The claimant was employed as a drop hammer operator for over two and one-half years. His last day of work was December 17, 1985 and he was discharged by the employer for refusing to submit to a urinalysis which the employer was requiring to discover whether or not the claimant's ability to operate dangerous equipment was impaired by alcohol or drugs.

The employer had a formal written policy with regard to the circumstances under which an employee was required to submit to a chemical test. That policy is quoted immediately below:

> "If a manager or supervisor has a reason to suspect an employee of being under the influence of alcohol or drugs he or she may ask that employee to submit to a urinalysis or a blood test . . . which will be conducted at a company designated medical help center. Should the employee refuse to submit to the urinalysis or blood test . . . that employee will be terminated for insubordination.

> "If results of the urinalysis or blood test . . . show a positive presence of alcohol or controlled substance, the employee will be suspended for one week without pay on the first offense. In addition three unannounced drug or alcohol screen tests of the same nature will be required within a six-month period following the first incident." (Emphasis added.)

* * *

The claimant was aware of the employer's policy with regard to drug testing.

On the claimant's final day at work he arrived shortly before he was due at his work station. He had forgotten the key to his locker, and, rather than secure entrance to his locker from a security person, the claimant chose to forcibly break into his locker. Shortly thereafter, the security manager, having noticed the claimant's locker had been broken into, approached the claimant at the work station and inquired about the damaged locker. The claimant explained the circumstances leading to his breaking into the locker. Describing this conversation in a document written later that day, the Security Manager asserted, "The claimant's head moved from side to side and while doing so, I couldn't seem to get straight eye-to-eye contact with Vern [the claimant] most of the time. When I was able to look him in the eyes, I noticed that the pupils of his eyes were dilated, and that the whites of his eyes were slightly red. His eyes also appeared to be glazed. Vern's speech seemed to be slightly slurred. . . ."

Following these observations the security manager relayed his concerns about the claimant's physical condition to the Human Resources Manager. The Human Resources Manager, the Security Manager, and the claimant's immediate supervisor approached the claimant. When it became apparent that the three managers were concerned about the claimant's ability to work safely the claimant became verbally abusive and made obscene and profane comments to the Security Manager.

The Security Manager spoke to the claimant about his concern that the claimant may be under the influence of a substance which might impair the claimant's ability to work safely. The claimant's immediate supervisor stated that he had observed the claimant working earlier during the morning and felt the claimant to be in good working condition. The supervisor said the claimant was his "best hammer operator" and that he (the supervisor) would take responsibility for anything that would happen that day.

The claimant refused to take any chemical test. On a prior occasion the claimant had been required by the employer to take a chemical test and the test had come back negative. The claimant believed the employer was unreasonably requiring him to take the test because on a prior occasion his brother, while previously employed by the employer, had a test which showed positive for marijuana and cocaine.

Subsequently the claimant went to his locker and changed out of his uniform. At that point the Human Resources Manager again approached the claimant and assured the claimant that even if he showed positive on the test he would not be terminated but that the employer would work with the claimant with regard to any substance abuse problem the claimant might have. At the same time the claimant was specifically informed that he was required to take a test prior to performing any more work for the employer. The claimant refused to take the test and left the premises.

On December 19, 1985, the claimant appeared at the employer's premises and was again informed that he would be required to take a chemical test before resuming work. The claimant refused and left the employer's premises. On December 20, the claimant after reporting to work was informed that he must take the test. Once again the claimant refused. At this point the employer discharged the claimant.

Later that day the claimant returned to the employer's premises in what the employer regarded as an intoxicated condition and volunteered to take the test. At this point the employer informed the claimant that his job was terminated and the opportunity to take the test was past.

REASONS FOR DECISION

Section 1256, California Unemployment Insurance Code, provides that a claimant discharged for misconduct connected with his or her most recent work is disqualified for benefits. Sections 1030 and 1032 of the code provide that the employer's reserve account may be relieved of charged if the claimant was discharged for misconduct.

In Appeals Board Decision No. P-B-3, citing Maywood Glass Company v. Stewart, 170 Cal.App. 2d 719, the California Unemployment Insurance Appeals Board defined misconduct as a wilful, substantial breach of a material duty owed the employer which tends to damage the employer's interests.

The issue in this case is whether the refusal to allow a drug test will be considered a breach of material duty owed the employer. In considering this we recognize that the claimant and the employer have obligations under the Labor Code. Section 2856 of that code provides that employees shall substantially comply with the directions of the employer unless obedience is impossible, unlawful, or imposes a new and unreasonable burden. Section 6400 of that code provides every employer shall provide a place of employment which is safe and healthful to its employees, while section 6401 mandates that every employer adopt practices, means, methods, operations and processes which are reasonably adequate to render a place of employment safe and healthful.

The claimant was employed to perform an activity which was very dangerous and provided a high risk of injury to the claimant himself or others if his abilities should in any way be impaired. Thus, it was crucially important to the claimant's safety and the safety of other employees working for the employer that the employer assure that the claimant and any other persons working at a task as dangerous as the claimant's were at all times in complete control of their physical faculties and free from any influence of drugs or alcohol which might impair their ability to safely perform their tasks.

It was a result of this responsibility that the employer adopted the formal written policy which required drug tests under certain circumstances.

We wish to observe that this is not a case where the employer "randomly" required its employees to submit to a drug test. Rather, in this case the crucial question which we are called upon to resolve is whether or not the employer's requirement that the claimant take a drug test, under all the circumstances that existed at that time, was reasonable. In short, did the employer have reasonable cause or reasonable suspicion to require the claimant to take a drug test?

While no court, federal or state, has yet given a definitive answer to the issues surrounding "drug usage in the workplace," especially in the private sector, a number of courts have examined various aspects of the issues involved in drug testing by public sector employers. These considerations are relevant since we are dealing with a public-provided benefit which cannot be withheld as a result of the demand that the employee waive a constitutional right (e.g., Hobbie v. Unemployment Appeals Commission of Florida (1987), U.S. , King v. California Unemployment Insurance Appeals Board (1972), 25 Cal.App.3d 199).

In Allen v. City of Marietta, 601 F.Supp. 482 Ga. (1985), a U.S. District Court in Georgia held, first, that a urinalysis test administered to employees was a search within the meaning of the fourth amendment. The court went on to find that where the tests were not for any criminal investigatory purpose but were administered in a purely employment context as part of the government's legitimate inquiry into the use of drugs by employees engaged in extremely hazardous work, the city (employer) has a right to make warrantless searches of its employees for the purpose of determining whether they are abusing drugs which would affect their work with hazardous materials.

In Jones v. McKenzie, 628 F.Supp. 1509 (1986), a U.S. District Court for the District of Columbia held a school bus attendant who had been tested and subsequently discharged for alleged marijuana use had a reasonable expectation of privacy from a mandatory, random urine test which had been administered without any reasonable cause to believe she might be a drug user. The court there contrasted the employee's position with that of other bus drivers, implying that where a substantial risk of harm might flow from impaired ability such a search, as was not permitted in the case of the bus attendant, might otherwise be condoned. In other words, while someone in a nonsensitive position may not be required to submit to a test, the court might condone a test of someone in a sensitive position if there was reasonable suspicion of use. The ultimate result in the case, however, was that the claimant's Fourth Amendment rights, i.e., the right to be free from unreasonable searches, had been violated.

In McDonnell v. Hunter, 612 F.Supp. 1122 (1985), a U.S. District court in Iowa held that a search can be no more intrusive than reasonably necessary and that a strip search which was administered randomly on the basis of a mere generalized suspicion was not justified absent probable cause to suspect the particular employee of illegal drug use. The employees here were guards in a correctional institution. The court in this case went so far as to say that advance consent to future unreasonable searches was not a reasonable condition of employment and public employees cannot be bound by such consent. It was concluded that the government employer may have preemployment or periodically scheduled drug tests but not random tests without probable cause, and that such random tests violate the employee's constitutional guarantees of privacy.

In a recent Florida case, City of Palm Bay v. Bauman, 475 So.2d 1322, the court held that a random search was unreasonable, even of persons in "sensitive" positions. The court observed that firefighters' and policemen's duties involved so much potential danger to themselves and the public that the employer has a legitimate concern that they not be users of a controlled substance. Notwithstanding that, the search was found unreasonable unless the urine test was grounded upon reasonable suspicion. Reasonable suspicion was opined to be less than probable cause but something more than "mere suspicion." This court observed that public employees may be legitimately subject to more regulation of their activities than private employees.

What becomes clear from the above is that there is no settled law on the issue, especially with regard to an unemployment insurance context. However, these cases are indicative of how courts have balanced the competing interests involved between legitimate employer concerns and employee rights. Notwithstanding the lack of clear judicial guidance, there does appear to be emerging from the courts that have examined the issue agreement on some things. A urinalysis or blood test is a search and therefore subject to the constraints imposed on the states by the Fourth and Fourteenth Amendments to the Federal Constitution. Both the State Constitution (Article I, Section 1) and the Federal Constitution (through court interpretations) recognize a person's right to privacy.

The cases we have examined, however, would permit some encroachment upon that right to privacy for drug tests providing certain safeguards are met. Preemployment tests would in certain cases be permitted. If the occupation is inherently dangerous, then employee testing will be permitted providing there exists a reasonable suspicion that the particular employee is functioning with impaired ability.

Turning now to the case before us, we are presented with a private employer who has a well-established written policy. The work the claimant was performing involved a high degree of risk to others, should it be performed by a person whose abilities were impaired by drugs or alcohol. The actions of the claimant led to the conclusion on the part of two of the employer's managers that there existed a reasonable suspicion that the claimant may be under the influence of some ability-impairing drug. We think it is important to observe that the standard which governs our examination of whether or not the test required of the claimant was reasonable, is not whether or not the claimant was actually intoxicated or under the influence of an ability-impairing drug but rather, did the employer have reasonable grounds to suspect that the claimant may have been so impaired.

Here, the fact that two of the employer's managers entertained such a suspicion leads us to the conclusion that their decision to compel the claimant to take the drug test was reasonable. We thus specifically find that the employer had a reasonable suspicion.

While each individual possesses a right to personal privacy, when an employee is employed in an inherently dangerous occupation where there exists a substantial risk of harm to himself or others, as was the case with the claimant here, such right must yield to the employer's overriding concern for the safety of all employees when there is a reasonable suspicion on the employer's part that an employee may be under the influence of some intoxicant.

Reviewing the facts of this case, it appears that the claimant unnecessarily resorted to violence when he physically broke into a locker. When questioned by the security manager about the incident, the security manager observed a number of different things which reasonably led him to the conclusion that the claimant might be under the influence of some intoxicating drug.

The security manager then went and got the personnel manager and together the two of them with a third person, the claimant's immediate supervisor, approached the claimant. When asked to submit to a drug test the claimant became angry, abusive and insulting and refused to take the test. At this point both the security manager and the personnel manager had a suspicion that the claimant was intoxicated and they consulted with higher management, and then formally instructed the claimant's supervisor to have the claimant take the test. The claimant refused and went to his locker to go home. The personnel manager met the claimant at his locker and explained the company policy, reiterating that even if the claimant were to come out positive on the drug test there would be no termination of employment. The claimant still refused to take the test and left the premises.

On the following day, the claimant went back to the place of employment and was instructed he must take the drug test. The claimant again refused to submit to a test. It was only then that his employment was terminated.

Given this set of circumstances, we think the employer's actions in insisting the claimant submit to the drug test were reasonable. It follows that the claimant's refusal to take the test was unreasonable and insubordinate. His resulting discharge was for misconduct as that term is used in section 1256 of the Unemployment Insurance Code.

DECISION

The decision of the administrative law judge is reversed. The claimant is disqualified pursuant to section 1256 of the code and the employer's reserve account is relieved from benefit charges.

Sacramento, California, May 7, 1987.

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

ROBERT L. HARVEY, Chairman

GEORGE E. MEESE

J. RICHARD GLADE

JAMES S. STOCKDALE

CONCURRING IN PART and DISSENTING IN PART (Separate Opinion Attached)

LORETTA A. WALKER

DEBRA A. BERG

SEPARATE OPINION

We concur in part and dissent in part from the decision of the majority.

Though we are in agreement with what we believe to be the fundamental principle established by this case, for the reasons given below we do not think the particular facts of the case warrant disqualification of this claimant.

We concur with the majority with regard to the following proposition:

Every person possesses a right to personal privacy. However, when an employee is employed in an inherently dangerous occupation where there exists a substantial risk of harm to the employee or others should the employee be working with impaired ability, such right to personal privacy must yield, on occasion, to the employer's overriding concern and responsibility with the safety of its employees and the public at large. One such occasion occurs when there is a reasonable suspicion on the employer's part that an employee may be under the influence of some ability-impairing chemical substance.

When the employer has a reasonable suspicion that the abilities are impaired, the employer may require that the employee submit to testing. In short, drug testing may be compelled only upon reasonable suspicion and only when the employee is involved in an inherently dangerous occupation.

Now, turning to the situation involved with this particular claimant, we do not think it has been established that the employer had a reasonable suspicion to require him to take a chemical test.

First, when the employer's personnel manager originally approached the claimant he did not detect any signs which led him to believe the claimant was under the influence of an intoxicating substance. Next, the security manager was not present at the hearing and thus the evidence with regard to his impressions was not subject to cross-examination. It was this hearsay evidence which was relied on by the majority in their decision. The most significant aspects of this hearsay evidence were directly contradicted by the claimant under oath at the hearing. The claimant's supervisor corroborated the claimant's evidence. The claimant's immediate supervisor, who it would appear was in the best position to evaluate the claimant's physical condition,

did not think the claimant exhibited signs of impaired abilities, was willing to vouch for the claimant, and argued against the claimant being required to take any drug test.

Of perhaps most significance, however, is the fact that the administrative law judge specifically found the claimant's testimony credible.

Generally, the findings of the trier of fact who heard the evidence and observed the witnesses will be disturbed only if arbitrary or against the weight of the evidence (Appeals Board Decision No. P-T-13). In the instant case, the findings of the administrative law judge, we think, are not against the weight of the evidence and we believe we are not permitted to substitute other findings for his (Appeals Board Decision No. P-B-10).

For all these reasons we are not convinced that this claimant exhibited a physical condition which reasonably led the employer to believe he was under the influence of alcohol or drugs and we think the employer's insistence upon the claimant's submitting to some kind of chemical test was unreasonable.

We also wish to point out that the claimant ultimately acquiesced to the employer's request that he submit to a chemical test, and at the time he agreed to take the test, the time limit for such compliance, as had been established by a telegram from the employer to the claimant, had not yet passed. However, the employer would not then permit the claimant to take the test. Had the claimant been permitted to take the test according to the employer's policy, whether positive or negative results were obtained, he would not have been discharged.

In view of the above, we believe the majority's conclusion that the claimant was discharged for misconduct is incorrect and we would not deny benefits in this case.

LORETTA A. WALKER

DEBRA A. BERG