

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD  
P O Box 944275  
SACRAMENTO CA 94244-2750

LAURIE M FREEMAN  
Claimant-Appellant

Precedent Benefit  
Decision No. P-B-503

KOHL'S DEPT STORES  
c/o UC EXPRESS  
Employer

DECISION

Attached is the Appeals Board decision in the above-captioned case issued by Board Panel members:

ROBERT DRESSER

MICHAEL ALLEN

KATHLEEN HOWARD

ROY ASHBURN, Written Dissent

Pursuant to section 409 of the California Unemployment Insurance Code, AO-304880 is hereby designated as Precedent Decision No. P-B-503.

Adopted as Precedent: April 9, 2013

**REV**

The claimant appealed from the decision of the administrative law judge that held the claimant disqualified for unemployment insurance benefits under section 1256 of the Unemployment Insurance Code, held the claimant not disqualified for unemployment insurance benefits under code section 1256.4<sup>1</sup>, and held the employer's reserve account not subject to charges related to the claimant's benefit claim.

**ISSUE STATEMENT**

The issues presented in this case are:

1. Whether the claimant was discharged from her most recent employment due to behavior that constituted misconduct connected with the work;
2. whether the claimant was discharged from her most recent employment due to behavior that was attributable to an irresistible compulsion to consume intoxicants, and
3. whether the employer's reserve account is subject to charges for benefits paid or payable to the claimant.

**FINDINGS OF FACT**

Prior to filing her benefit claim, the claimant was most recently employed by the employer as a material handler earning \$12.28 per hour. The claimant had been so employed for slightly more than two years when she was discharged on June 14, 2012. She was discharged because she refused to complete a urinalysis drug screen required by the employer.

Toward the end of the claimant's work shift on June 13, 2012, a small piece of cardboard or some other substance flew into the claimant's eye as the claimant was cutting a cardboard box. The claimant did not immediately seek medical attention because she considered the matter to be a minor annoyance that would resolve without need for medical treatment. By the time that the claimant reported for her next work shift on June 14, 2012, the affected eye had become more irritated and the claimant's supervisor at the beginning of the shift directed

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<sup>1</sup> Unless otherwise noted, all code references are to the Unemployment Insurance Code.

the claimant to see the company nurse on the employer's premises for the purpose of having the eye rinsed. The claimant complied with that directive and the nurse examined the claimant's eye.

Under the employer's "Safety and Accident Policy," any employee "reporting a work related injury is subject to drug/alcohol screening/testing." An employee's "failure or refusal to submit to such screening/testing may result in disciplinary action up to and including termination." The employer's stated intent of that policy is "to develop and maintain for all associates a work environment that is safe, and free of drugs and alcohol."<sup>2</sup> Pursuant to that policy, the company nurse required that the claimant submit to an initial drug screen test consisting of an oral swab. The claimant complied with that requirement. Since the result of that oral swab test was inconclusive, the claimant was required to undergo a second oral swab test and the claimant again complied. Inasmuch as the result of that second oral swab test was also inconclusive, the employer required the claimant to participate in a urinalysis drug screen test at a medical facility. The employer made arrangements to transport the claimant to that clinic and the claimant complied with that requirement.

Upon arriving at the clinic, the claimant's eye was examined and the claimant was given antibiotics, Tylenol and eye drops. The claimant was required to produce a urine specimen for urinalysis. The claimant advised clinic personnel that the claimant might have difficulty in quickly producing a urine specimen because the claimant had recently urinated before reporting to work, but the claimant complied with the request. She provided a urine specimen in the cup that had been supplied for that purpose. The claimant had participated in previous urinalysis drug screen tests and on the basis of that prior experience she believed that the amount of the urine specimen she provided on June 14, 2012 would be satisfactory. A doctor at the clinic decided, however, that the amount of the specimen was insufficient. That doctor poured the specimen in a

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<sup>2</sup> A separate and more general employer policy concerning workplace alcohol and drug prohibitions includes a section entitled "Injury on The Job – Distribution Centers" that provides as follows: "1. If an Associate is involved in an accident, which involved damage to company property that is outside of normal daily wear and tear on the building or equipment, a post accident drug test will be performed. Montana: Post-accident testing will be performed only for accidents resulting in damages in excess of \$1,500 or bodily injury. 2. If an Associate has an accident on power or non-power related equipment, which requires any Associate to seek medical treatment, a post-accident drug test will be performed."

The stated intent of this policy is summarized as follows: "[The employer] is committed to providing a pleasant and safe working environment for all of our Associates. The use of illegal drugs or abuse of controlled substances or alcohol can pose a significant challenge to this commitment and negatively affect many Associates. Substance abuse may result in loss of work quality, damage to facilities, disruption of the work environment and potential Associate dishonesty; areas that affect all of us, not just the user. . . . [¶] With these basic thoughts in mind, the following detailed policies and procedures have been established to ensure that we continue to maintain a work place free of drug and substance abuse."

nearby toilet and indicated that the claimant would need to produce a new urine specimen before the claimant left the clinic.

The claimant believed that she had been treated unfairly because she had not been advised as to the required amount of the specimen before she was ordered to produce it. She also felt humiliated and frustrated by the proceedings in which she had been forced to participate after reporting to the company nurse. She concluded that she had in good faith complied with all of the requests with which she had to that point been presented and that it was unreasonable to require more from her. The claimant therefore declined to provide another urine specimen and requested that she be transported back to the employer's workplace. The individual who drove the claimant back to the employer's workplace operated the vehicle in a manner that the claimant considered to be unsafe.

Upon the claimant's return to the workplace, representatives of the employer's human resources department informed the claimant that she would be discharged due to her refusal to complete the urinalysis unless she immediately returned to the clinic and finished that drug screen procedure. Despite repeated entreaties from those representatives to preserve her job and avoid a discharge by completing the urinalysis process, the claimant persisted in her refusal to do so.

The claimant contends that her refusal to complete the urinalysis drug screen was due to both her belief that she had already sufficiently complied with the employer's drug screen requirements and her safety concern relating to the fact that the driver who would transport the claimant back to the clinic was the same driver who had already transported the claimant from that clinic to the workplace in a manner that the claimant had found to be unreasonably hazardous.

The employer discharged the claimant due to the claimant's refusal to complete the urinalysis process at the clinic.

It was not established that the claimant suffers from an irresistible compulsion to consume intoxicants. It was not established that the employer at any time had a reasonable suspicion that the claimant was working while impaired by the use of any intoxicant. It was not established that the claimant's job was safety-sensitive or otherwise involved extraordinary risks to the interests of the employer or the public from employee drug use.

## REASONS FOR DECISION

A claimant is disqualified for benefits under code section 1256 if he or she was discharged for misconduct connected with his or her most recent work.

Misconduct was defined in Precedent Benefit Decision P-B-3, citing *Maywood Glass Co. v. Stewart* (1959) 170 Cal. App. 2d 719, as being “conduct evincing such willful or wanton disregard of an employer’s interests as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee.”

Pursuant to code sections 1030 and 1032, an employer’s reserve account will be relieved of benefit charges if the claimant was discharged for misconduct connected with the work.

The employer has the burden of proving misconduct. (*Prescod v. California Unemployment Insurance Appeals Board* (1976) 57 Cal. App. 3d 29.)

An employee shall substantially comply with all the directions of his or her employer concerning the service on which he or she is engaged, except where such obedience is impossible or unlawful, or would impose new and unreasonable burdens upon the employee. (Labor Code, section 2856.)

An employee’s deliberate disobedience of a lawful and reasonable instruction of the employer, related to the employer’s business, is misconduct. (Precedent Benefit Decision P-B-190.)

In Precedent Benefit Decision P-B-194 the appeals board held that an employer rule requiring employees to submit to polygraph tests was unreasonable with the consequence that the claimant’s refusal to comply with that unreasonable rule did not amount to misconduct.

In *Amador v. California Unemployment Insurance Appeal Board* (1984) 35 Cal. 3d 671, the California Supreme Court held that an employee’s refusal to comply with a reasonable rule or direction is not misconduct if the employee has good cause for his or her refusal. The claimant has the burden of proving good cause exists for the refusal to comply.

In Precedent Benefit Decision P-B-454, the claimant, a drop hammer operator, was discharged because he refused to take a drug test. Since the drug test was required because the employer reasonably suspected that the claimant was working while impaired by drug use, the appeals board found the requirement of

the drug test to be reasonable. The claimant's refusal to take the test was therefore held to represent misconduct.

In *American Federation of Labor v. Unemployment Insurance Appeals Board* (1994) 23 Cal. App. 4th 51, the claimant was discharged because he refused to take an annual drug test as required by the employer's rules. The claimant worked on an offshore oil drilling platform. Due to the hazardous nature of that work environment, the claimant's job was considered safety-sensitive. Given the employer's strong interest in maintaining a drug-free work force in that hazardous environment and the claimant's minimal expectations of privacy under the circumstances of such employment, the requirement of the drug test was found to be reasonable. The claimant's refusal to take the test was therefore held to constitute misconduct.

Code Section 1256.4 disqualifies for benefits any claimant who was discharged from his or her most recent work for chronic absenteeism due to intoxication, reporting for work while intoxicated, using intoxicants on the job, or gross neglect of duty while intoxicated, when any of these incidents is caused by an irresistible compulsion to use or consume intoxicants, including alcoholic beverages. A claimant disqualified under code section 1256.4 remains disqualified until he or she either returns to work and earns five times his or her weekly benefit amount in bona fide employment, or a physician or authorized treatment program administrator certifies that the claimant has entered into and is continuing in, or has completed, a treatment program for his or her condition and is able to return to employment.

The reserve account of the claimant's most recent employer may be relieved of benefit charges if the claimant was discharged as a result of an irresistible compulsion to use intoxicants. (Unemployment Insurance Code, sections 1030 and 1032.)

The claimant was discharged because she refused to comply with the employer's directive to complete a urinalysis drug screen test. That directive was based upon the employer's post-accident/injury drug testing policy that requires an employee to undergo drug testing whenever the employee reports a work-related injury and regardless of however minor or inconsequential that injury might be. Thus, the questions presented under code section 1256 are whether that directive was reasonable and, if so, whether the claimant had good cause for refusing to obey it. If the directive was unreasonable, the claimant's failure to follow it would not constitute misconduct and it would not be necessary to consider the question of whether good cause otherwise existed to justify her refusal. For the reasons that we will now explain, we have concluded that such

directive was unreasonable because it impermissibly intruded upon the claimant's constitutional right to privacy.

In California, every individual enjoys a constitutional right to privacy that is not relinquished upon entering a workplace. (Cal. Const., art. I, §1; *Wilkinson v. Times Mirror Corporation* (1989) 215 Cal. App. 3d 1034.) An employer's requirement that an employee participate in a drug screen test intrudes upon that right to privacy. (*Loder v. City of Glendale* (1997) 14 Cal. 4th 846; *Edgerton v. State Personnel Board* (2000) 83 Cal. App. 4th 1350.) An intrusion upon that right will be permitted if it is justified by a sufficient competing interest. (*Hill v. National Collegiate Athletic Association* (1994) 7 Cal. 4th 1; *Loder v. City of Glendale, supra*.)

In *Hill*, the California Supreme Court upheld the drug testing of college athletes. In doing so, the Court provided a comprehensive explanation of the "balancing test" that should apply to such questions. The competing interests of safeguarding the integrity of intercollegiate sports and protecting the health and safety of students were held to justify the testing, particularly since college athletes already had a reduced expectation of privacy with regard to such matters. The Court held that such an invasion of an acknowledged privacy interest would be permissible if it was justified by a "legitimate and important" competing interest.<sup>3</sup> The Court rejected the proposition that the competing interest need be characterized as "compelling"<sup>4</sup> and observed that such conflicts are "best viewed flexibly."<sup>5</sup> It was observed that an individual alleging an invasion of the constitutional right to privacy must establish a legally protected privacy interest, a reasonable expectation of privacy in the circumstances involved, and conduct that constitutes a serious invasion of that privacy.<sup>6</sup>

While the question of what requirements are imposed upon private employers by the California constitutional right to privacy was not presented in that case, the Court in *Hill* indicated that such question should be answered by application of the same "balancing test" described in the decision.<sup>7</sup> However, the Court confirmed that, at least in the context of government employment, a mere employer interest in a "drug-free" workplace would not, in itself, justify drug testing without reasonable suspicion of impairment in the workplace.<sup>8</sup> Indeed, the Court cited the following language from *American Federation of Government Employees, AFL-CIO v. Roberts* (9th Cir. 1993) 9 F. 3d 1464, 1468: "No one

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<sup>3</sup> *Hill, supra*, at p. 38

<sup>4</sup> *Id.* at pp. 34-35

<sup>5</sup> *Id.* at p. 31

<sup>6</sup> *Id.* at pp. 35-37

<sup>7</sup> *Id.* at p. 55

<sup>8</sup> *Id.* at p. 54

would want to live in an Orwellian world in which the government assured a drug-free America by randomly testing the urine of all its citizens.”<sup>9</sup> It was acknowledged that “particular kinds of employment settings” presenting “extraordinary risks to employer or public interests from employee drug use” had been necessary in order to justify the drug testing of public employees in the absence of a reasonable suspicion of impairment.<sup>10</sup>

There are as yet no California court decisions involving private employment that apply the principles announced in *Hill* to facts similar to those presented by this case. Moreover, most of the relevant case law that has developed on the subject of post-accident/injury drug testing concerns federal employment. We recognize that those cases discuss the application of the Fourth Amendment’s protection against unreasonable searches and seizures, a proscription that does not apply to private employers. However, inasmuch as those cases are otherwise governed by the same balancing of rights and interests described in *Hill*, we have looked to those cases for guidance in assessing the propriety of the post-accident/injury drug screen test requirement imposed upon the claimant in this case.

In *Skinner v. Railway Labor Executives’ Association* (1989) 489 U.S. 602, the United States Supreme Court upheld the post-accident drug testing of railway employees “directly involved” in “major train accidents” defined as any train accident that involved a fatality, the release of hazardous materials resulting in evacuation or reportable injury, or damages in excess of \$500,000. The Court also upheld drug testing after accidents or incidents of less severity if a supervisor had a reasonable suspicion that the employee’s acts or omissions contributed to the occurrence or the severity of the accident or incident. The Court recognized the strong government interest in regulating railroad employees’ conduct to ensure public safety. The tests were not considered unduly intrusive, in part, because of the employees’ diminished expectations of privacy due to the industry being highly regulated for safety.

In subsequent cases, the federal courts have interpreted *Skinner* as requiring a reasonable suspicion that the employee caused or bears substantial responsibility for the accident or injury and either a reasonable monetary threshold of property damage or substantial injury in order to justify the intrusion upon the employee’s privacy represented by drug testing. In *Plane v. United States*, (W.D. Mich. 1990) 750 F. Supp. 1358, the United States District Court enjoined enforcement of a policy that required the drug testing of all employees “involved” in workplace accidents or “mishaps” concerning specified damage

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<sup>9</sup> *Id.* at p. 55

<sup>10</sup> *Id.* at pp. 54-55

thresholds on the ground that the “involvement” standard was so overbroad that it would impose testing in situations where there was no employee fault, such as when an employee was merely sitting in a vehicle that was rear-ended.

In *Connelly v. Newman* (N.D. Cal. 1990) 753 F. Supp. 293, the United States District Court struck down a policy of the United States Office of Personnel Management that required urinalysis drug testing of its employees, who are primarily clerical workers, whenever an on-duty accident resulted in injury requiring hospitalization or caused property damage in excess of \$1,000. The court held that the Fourth Amendment requires such post-accident drug testing policies to establish “some threshold level of severity (measured in terms of actual personal injury or property damage suffered, or the level of harm at risk)” and cover only the employee or employees who “may have caused the accident.”<sup>11</sup> Since the policy did not contain a causation requirement and set a threshold for testing that was deemed to be “unreasonably low,”<sup>12</sup> the policy was invalidated. The court found that the government’s interests did not outweigh the employees’ reasonable expectations of privacy.

Similarly, in *American Federation of Government Employees, AFL-CIO v. Sullivan* (D.D.C. 1990) 744 F. Supp. 294, the United States District Court abrogated a Department of Health and Human Services policy that required urinalysis drug testing of any employee involved in an on-the-job accident resulting in death or personal injury requiring immediate hospitalization or damage to government or private property in excess of \$1,000. In so doing, the court concluded as follows: “The government’s interest in securing a safe workplace is certainly important, but the testing of any employee for any accident resulting in as little as \$1,000 of damage, when the employee is not engaged in a safety-sensitive position, when there is no indication that the employee was at fault, and when the employee may not have engaged in any conduct which would diminish his or her expectations of privacy, is simply too invasive for the government’s stated purpose.”<sup>13</sup>

In *American Federation of Government Employees, Local 1533 v. Cheney* (N.D. Cal. 1990) 754 F. Supp. 1409, the United States District Court considered the constitutionality of a Navy policy that called for the urinalysis drug testing of “any employee involved in an on-the-job accident.”<sup>14</sup> While acknowledging that the Navy had a strong interest in determining the cause of an accident and otherwise ensuring the safety of its employees, the court also noted that that the Navy had the burden of showing that the events triggering the testing met “some threshold

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<sup>11</sup> *Id.* at p. 296

<sup>12</sup> *Id.* at p. 297

<sup>13</sup> *Id.* at p. 302

<sup>14</sup> *Id.* at p. 1425

level of severity in terms of potential harm and actual personal injury or property damage.”<sup>15</sup> It was observed that Navy employees engage in “a wide variety of duties, from traditional office work to operation of major equipment necessarily implicating major public safety issues.”<sup>16</sup> Concluding that the policy would allow testing for any incident necessitating medical treatment, no matter how trifling, and that it applied to all employees, regardless of their job duties and reasonable expectations of privacy in their job positions, the court found that the Navy policy did not satisfy the necessary “threshold level of severity” by setting a “reasonably high threshold” for “events” that would trigger testing.<sup>17</sup> The court therefore enjoined application of the policy to employees beyond those in safety-sensitive positions.

Having considered these authorities in conjunction with our review of the facts of this case, we have concluded that this employer’s post-accident/injury policy is unconstitutionally overbroad and unreasonable to the extent that it purportedly required the claimant to undergo drug screen testing merely because she saw the company nurse in order to remove a speck from her eye. Before explaining our reasons for this decision, however, we first confirm that the claimant had not only a constitutional right to privacy with regard to such drug testing, but also a reasonable expectation of privacy concerning such matters. Her job as a material handler was not shown to be safety-sensitive and she thus could not be reasonably expected to anticipate that she would be subjected to such an invasion of her privacy merely because she briefly had a small particle of cardboard or some other substance in her eye. Moreover, the urinalysis testing she was required to undergo represented an invasion of her privacy that was manifestly serious.

With regard to the requisite balancing of the claimant’s right to privacy against the employer’s interest for requiring drug testing, we find in the facts of this case no legitimate and important interest sufficient to justify the serious invasion of the claimant’s right to privacy represented by the required drug testing. As was recognized in *Hill* and *Skinner*, an employer’s mere desire for a drug-free workplace is not, in itself, a sufficient competing interest to justify drug testing in the absence of a reasonable suspicion that the employee involved was impaired while at work. The employer in this case had no suspicion that the claimant was working while impaired by drug use. It was also not established that the drug testing was otherwise justified on the ground that the claimant’s job was safety-sensitive or involved other “extraordinary risks” to the employer or the public from employee drug use.

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<sup>15</sup> *Id.* at p. 1418

<sup>16</sup> *Id.* at p. 1425

<sup>17</sup> *Id.* at p. 1426

Moreover, the employer's post-accident/injury drug testing policy is devoid of the necessary safeguard provisions concerning damage thresholds, severity of injury, and fault.<sup>18</sup> On its face, the employer's post-accident policy requires drug testing in the event of any reported work-related injury regardless of the extent of any damage, the extent of the injury, and whether the claimant bears any responsibility for incurring the injury. As such, the policy is overbroad and unreasonable.

We think it has been well established that drug testing of an employee may be reasonably required if it is reasonably suspected that the employee is working while impaired by drug use or the employee's position is safety-sensitive. We also acknowledge that employers may often have legitimate and important reasons for reasonably requiring the drug testing of employees who bear responsibility for workplace accidents that result in considerable damage or substantial injury. Indeed, the above-cited authorities support the inference that an employer's policy that calls for the drug testing of an employee in the event of a work-related accident or injury will likely be considered reasonable if the testing requirement is made conditional upon both (1) a reasonable suspicion that the employee caused the incident or substantially contributed to its occurrence or severity, and (2) the existence of either property damage in excess of a reasonable monetary threshold or some substantial injury as a result of the incident.

We do not believe, however, that an employee should have his or her constitutional right to privacy violated by an employer's requirement that he or she submit to a drug test merely because the employee sustained a paper cut, blister, speck in the eye or some other trivial work "injury" that may have resulted in the employee receiving a Band-Aid or some other brief assistance from a company nurse or similar authority. We therefore discern no legitimate and important employer interest that justified the employer's requirement that the claimant undergo urinalysis drug testing merely because she briefly had a small irritant in her eye.

Since the directive that the claimant complete the urinalysis was unreasonable, the claimant's refusal to comply with that directive did not constitute misconduct. It is therefore not necessary to address the question of whether the claimant otherwise had good cause for that refusal. The employer has not satisfied its burden of proving that the claimant was discharged for misconduct. The claimant

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<sup>18</sup> While the employer's separate policy concerning injuries "on the job" in "distribution centers" lists a monetary threshold for accidents resulting in damages in excess of \$1,500 in Montana, no such limitation exists with regard to workers in California.

is not subject to benefit disqualification under code section 1256 and the employer's reserve account is not entitled to relief from benefit charges.

Inasmuch as there is no basis for concluding that the claimant suffers from an irresistible compulsion to consume intoxicants, there is no basis for concluding that the claimant is subject to benefit disqualification under code section 1256.4.

### DECISION

The decision of the administrative law judge is, in part, affirmed and, in part, reversed. That portion of the decision that concerns the claimant's qualification for benefits under code section 1256.4 is affirmed; the claimant is not disqualified for benefits under code section 1256.4. That portion of the decision that concerns the claimant's disqualification for benefits under code section 1256 and the chargeability of the employer's reserve account is reversed; the claimant is not disqualified for benefits under code section 1256 and the employer's reserve account is not relieved of benefit charges related to the claimant's benefit claim. Benefits are payable to the claimant provided the claimant is otherwise eligible.

## DISSENTING OPINION

I respectfully dissent from the decision reached by my colleagues. I would affirm the decision of the administrative law judge holding the claimant disqualified for benefits under code section 1256 and the employer's reserve account not subject to benefit charges.

The employer instituted its safety and accident policy in an understandable effort to protect its workplace from the deleterious effects of drug and alcohol use. Under that policy, any employee who reports a work-related injury is subject to drug testing. I find that rule to be eminently reasonable. I see no reason why we should hamper the efficacy of such rules by burdening employers with the additional obligation of guessing at whether the injury is sufficiently "substantial" or "consequential" to warrant the requirement of a drug test. Indeed, often enough it is a relatively minor workplace injury that provides an employer with the first indication that the employee in question may be under the influence of some intoxicant. Permitting employers the flexibility to require a drug test at the first sign of such trouble allows employers the opportunity to promptly address the cause of the problem before more serious injuries and consequences develop. I therefore think that my colleagues have erred in declaring that the rule is unreasonable.

I also take issue with the depiction of this claimant's injury as "trivial" or "trifling." Given the value most of us place on our eyesight, I believe that any injury to an eye should be considered as being serious. Moreover, I note that by the time that the claimant was required to take the drug test the injury had worsened rather than improved. I therefore suggest that the injury suffered by the claimant was sufficiently "substantial" to justify the requirement that she complete the drug test.

In my opinion, the requirement that the claimant complete the drug screen test was reasonable and the claimant has revealed no good cause for her refusal to comply with that directive. That refusal constituted misconduct within the meaning of code section 1256. I thus believe that the Employment Development Department and the administrative law judge were correct in holding the claimant disqualified for benefits under that provision with the result that the employer's reserve account was relieved of benefit charges.

ROY ASHBURN