BEFORE THE
CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

In the Matter of:

MICHAEL REIGH
(Claimant)

PRECEDENT
BENEFIT DECISION
No. P-B-467
Case No. 89-04448

S.S.A. No.

KAISER PERMANENTE
(Employer)
c/o Gates McDonald
Post Office Box 6001
Culver City, CA 90233-6001

Employer Account No.

Office of Appeals No. IN-06640

The employer appealed from the decision of the administrative law judge which held the claimant was not disqualified for benefits under section 1256 of the Unemployment Insurance Code.

STATEMENT OF FACTS

The claimant was most recently employed as a janitor for approximately 16 years. The following led to his discharge on January 24, 1989.

In August, 1988 the claimant was discharged by the employer. He was reinstated in November, 1988 upon the condition that he agree to undergo counseling and be willing to submit to random drug testing. On November 3, 1988 the claimant signed a "mental health rehabilitation" agreement within which these conditions are contained. The agreement also stated in pertinent part, "If a urine and/or blood test shows a detectable level of alcohol and/or a controlled substance, the grievant will be discharged." The claimant was given a drug test on January 16, 1989. The test indicated that there was a detectable amount of methamphetamine in the claimant's urine. The claimant was discharged.

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The urine sample was taken at the employer's facility. The sample was then picked up by employees of an independent laboratory used by the employer for drug testing purposes and transported to the independent laboratory. There is no evidence that there was a breach in the chain of custody or that the sample was tampered with. The sample was received by the independent laboratory in a sealed package with the employer's standard chain of custody form attached. The packet was not broken open until the sample was tested.

The toxicology manager of the independent laboratory reviewed the data on the sample analyzed at his facility and offered his testimony as an expert in the field of drug testing. He has a doctoral degree in analytical chemistry. He is one of fewer than 20 people in the State of California who is licensed as a director of clinical toxicology laboratories. He has directed the toxicology lab for the independent laboratory for approximately 10 years. He testified as follows.

A "detectable" level of drugs in the blood and/or urine follows the level indicated by federal guidelines which utilize the thresholds set by the National Institute on Drug Abuse. The "cutoff" point for methamphetamines is 500 nanograms per milliliter.

The initial drug screen indicated that the claimant's urine contained a detectable amount of methamphetamines. A confirming test was completed using a test more specifically designed to detect methamphetamines. Again, the test was positive. The employer's witness testified that when the laboratory finds two positive drug screens, as they did in this case, it will conduct a third confirmatory test; a gas chromotography-mass spectrometry test, which, according to the witness, is the most definitive test available for detecting the presence of drugs such as methamphetamines in the human body. The gas chromotography-mass spectrometry confirmed the presence of methamphetamines in the urine. Methamphetamine was detected at a level of 1494 nanograms per milliliter. The gas chromotography-mass spectrometry was then repeated along with the specific immunoassay screening, again giving a positive result for the presence of methamphetamines.

The witness further testified that it is possible on the initial screening that certain drugs such as Contac or Diatec, containing phenylpropanolamine, may produce a false positive; that is, a drug masquerading as methamphetamine causing a positive reading for that drug. He stated, however, that in this case the repeat screen was very specific in ascertaining the presence of methamphetamines in the claimant's urine. The

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witness did not believe it possible, given the multiple tests administered in this case, that any over-the-counter medication, or any drug manufactured naturally in the body, could masquerade as methemphetamine and cause a false positive reading.

The claimant testified that he had not taken amphetamines but that he had taken various over-the-counter medications to help clear his lungs following a fire in his home. The claimant previously had undergone lung surgery.

The administrative law judge concluded that since the sample was originally in the hands of the employer, the chain of custody was tainted and the sample potentially defective. He found that the sample could not be used as reliable evidence and that therefore the employer had not met its burden of proof to establish misconduct.

REASONS FOR DECISION

Section 1256 of the Unemployment Insurance Code provides that an individual is disqualified for benefits if he or she has been discharged for misconduct connected with his or her most recent work.

Citing Maywood Glass Co. v. Stewart (1959), 170 Cal.App.2d 719, the California Unemployment Insurance Appeals Board in Precedent Decision P-B-3 defined "misconduct connected with the work" as a substantial breach by the claimant of an important duty or obligation owed the employer, wilful or wanton in character, and tending to injure the employer.

On the other hand, mere inefficiency, unsatisfactory conduct, poor performance as a result of inability or incapacity, isolated instances of ordinary negligence or inadvertence, or good faith errors in judgment or discretion, are not misconduct.

Section 1952 of the Unemployment Insurance Code provides in pertinent part that administrative law judges are not bound by common law or statutory rules of evidence or by technical or formal rules of procedure, but may conduct the hearings and appeals in such a manner as to ascertain the substantial rights of the parties.

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

In Precedent Decision P-B-221, the Appeals Board held that whether or not the claimant was specifically made aware of the existence of a rule against drinking on duty, such conduct evinced a disregard of the standard of behavior which the employer had the right to expect, and was not simply a good faith error in judgment or discretion. The claimant's discharge was for misconduct.

In Precedent Decision P-B-454 the Appeals Board found that for unemployment insurance law purposes, a drug test, using urine or blood samples, is a search and is subject to the constraints imposed by the United States and California Constitutions. The Appeals Board found drug testing a permissible encroachment on a worker's privacy when there was reasonable suspicion that a person working in an inherently dangerous occupation was in some way impaired.

We believe the case before us presents a different issue than that which faced the Appeals Board in P-B-454. In this case, the drug test had been administered. The claimant consented to the test. There was no evidence that the claimant was coerced into taking the test. The claimant entered into an agreement as a condition of his rehire that he would be subject to random drug testing. The employer has a rule that the presence of any detectable amount of a controlled substance found in an employee's body is cause for discharge. When the result of the test was made known to the claimant, he denied taking the drugs detected by the test. Had the claimant refused to take the test, we would be constrained to analyze this case pursuant to the principles the Appeals Board enumerated in Precedent Decision P-B-454. As the claimant consented to be tested, he waived any claim to the right of privacy occasioned by the intrusion of taking the drug test. The question before us is whether the claimant, because he tested positive for drugs, may be considered to have committed an act of misconduct under unemployment insurance law without a particularized suspicion prior to the test that he was under the influence of drugs at the workplace. We believe the answer to that question is yes.

We are aware that, with the possible exception of tests for "blood alcohol" levels, the result of a drug test may not with scientific precision establish whether or not an employee is impaired on the job. Although the precise level of impairment may be undetermined, impairment is the effect of the

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illegal substances identified in drug tests. Every employer and every employee has a vital interest in its workplace being drug free. The results of a properly administered drug test offer evidence of impairment. When an employee has engaged in illegal activity either on or off the job which caused him or her to test positive for illegal drugs, the impairment issue must not dominate (or control) the right of the employer or other employees to have and maintain a workplace free of illegal drugs in the bodies of any worker.

Additionally, we note that the courts have held that a valid consent eliminates the need for a warrant for probable cause. "Probable cause" to search an individual in the criminal law context is comparable to the "reasonable suspicion" required to compel an employee to take a blood test under Precedent Decision No. P-B-454. The courts have based their determinations as to what constitutes a valid consent on the totality of circumstances in an individual case, evaluating such factors as whether there were threats, or a show of force, leading to the consent (see United States v. Mendenhall, 446 U.S. 544). We state again that in the case before us the claimant consented to the test, thus eliminating the need for a "reasonable suspicion" by his employer that the claimant was impaired.

To find misconduct in a given case, the Board is not limited to the evidentiary standards that may be required to obtain a criminal conviction. There is no evidence that the chain of custody was broken in this case. There is no evidence the sample was tampered with. We therefore must reject the administrative law judge's conclusion that the fact that the chain of custody began with the sample being in the employer's custody taints that chain of custody. The weight of the evidence establishes that the sample that was examined was intact and had not been tampered with.

The detectable level utilized by the independent laboratory in this case was based upon the "cutoff" level recommended by the National Institute on Drug Abuse (NIDA). We take judicial notice that NIDA is a federal agency mandated to provide a national focus for the federal effort to increase knowledge and promote strategies to deal with the health problems and issues associated with drug abuse. A reading below the "cutoff" level means that the test will be characterized as negative. The term "detectable level" as used by professionals in the drug testing field is a term of art. Manufacturers of drug tests recommend cutoff levels between a positive and negative reading based upon the potential for inconsistencies of measuring drug concentrations below the

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indicated cutoff level. This is so even though the test may generally detect lower concentrations of the drug tested for (Miike and Hewitt, Accuracy and Reliability of Urine Drug Tests, U. of Kan. L. Rev. 366 (1988)). We accept as reasonable, the employer's reliance on NIDA's cutoff figure of 500 nanograms per milliliter as being the minimum detectable amount for testing positive for methamphetamines.

The claimant asserted at the hearing that certain drugs he was taking could have affected the test results. We find convincing the testimony of the employer's witness, eminently qualified in the area of drug testing, that given the testing done in the instant case, it was not possible for these drugs to have affected the sample.

The claimant signed an agreement which stated that if a detectable level of illegal drugs was found in his body, he could be discharged. We believe this agreement does not impose an unreasonable burden upon the claimant. The employer is quite reasonably requesting that this employee not engage in illegal activity which could affect his behavior and performance on the job. Furthermore, even in the absence of this specific agreement, we believe the employer's rule that its employees report to work without a detectable level of a controlled substance in their systems is a reasonable one provided the evidence would establish for each case that: the employee consented to be tested; the employer utilized a scientifically sound testing procedure; the chain of custody was secure; and "cutoff levels" for determining a detectable amount of an illegal drug are within standards generally recognized by the scientific community.

In this case, the claimant had prior knowledge that he could be tested for drugs at any time. He in fact consented to be tested. The test was scientifically sound and established that illegal drugs were present in the claimant's body at nearly three times the minimum detectable amount. We believe that by reporting to work with a detectable level of illegal drugs in his body, the claimant evinced a disregard of a standard of behavior which the employer had the right to expect. We conclude, therefore, that the claimant was discharged for misconduct.

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DECISION

The decision of the administrative law judge is reversed. The claimant is disqualified for benefits under section 1256 of the code.

Sacramento, California, November 2, 1989.

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

ROBERT L. HARVEY, Chairman

GEORGE E. MEESE

J. RICHARD GLADE

JAMES S. STOCKDALE

CHARLES W. WARD

DISSENTING - Written Opinion Attached:

LORETTA A. WALKER

DEBRA A. BERG

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DISSENTING OPINION

We dissent.

We share the majority's concern for the evil of drugs in our society. We believe that drug testing, if carefully and appropriately utilized, is a useful tool in protecting employers and employees from the perils of having drug-impaired individuals in the workplace. However, our colleagues, in a well-intentioned attempt to combat drug abuse, have adopted an overreaching rule which intrudes upon the right of privacy and departs from principles to which we have previously adhered.

Every drug case of which we are aware has found a particularized suspicion of impairment, or a violation of safety rules, or a particular occurrence such as an accident, or public safety or other special circumstances inherent in the work, in order to create a basis for requiring an individual to submit to a drug test. We know of no jurisdiction that has passed on the issue of drug testing which has required less in concluding that an individual's conduct is sanctionable. These cases, several of which we cite in this dissent, have held that such circumstances justify this invasion of privacy occasioned by drug testing and provide the connection with work which gives the test results relevance. The majority, however, requires none of this. It holds simply that the mere presence in one's system of the metabolytes of a controlled substance, without more, is sufficient to establish misconduct.

In Precedent Decision P-B-454 the Appeals Board states that an employee may be tested if there is a reasonable suspicion that the employee is functioning with impaired ability and the employee is engaged in an inherently dangerous occupation. We believe the prudent and logical course in the case before us is to apply these criteria, as well as the test results, before we determine that there has been misconduct.

Without consideration of these additional factors we will unwisely depart from our long-held principle that there must be a nexus between the act of misconduct and the work performed (P-B-192). An individual may not be disqualified for unemployment benefits unless he or she has been discharged for misconduct connected with his or her most recent work (section 1256 of the Unemployment Insurance Code).

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The Board has previously followed this principal in cases involving off-duty illegal activity. In P-B-189 the claimant was discharged for repeated violations over a period of years of an employer's rule against gambling during working hours on the employer's premises following a warning that one more violation would result in discharge. The occasion for the discharge was gambling which occurred away from the employer's premises while the claimant was on a leave of absence. The Appeals Board held that the discharge was not for misconduct connected with the claimant's work.

In Precedent Decision P-B-191 the claimant, a federal employee, was discharged following conviction on a charge of drunk driving pursuant to a regulation prescribing dismissal for "serious misconduct while off duty." The Appeals Board held that the claimant was discharged for reasons other than misconduct connected with the most recent work, and was not disqualified under section 1256 of the code.

Therefore, we find insufficient justification for the majority's departure from the requirement that there be a direct and proximate causal relationship between specific acts of misconduct and the discharge.

In the case before us the only evidence of misconduct is the result of the drug test. There is no evidence that the claimant was "under the influence" of a controlled substance. Furthermore, the evidence of record is clearly insufficient to establish impairment on the job.

The majority acknowledges that a drug test cannot establish impairment. It cannot establish when a person may have ingested a drug. It may take days or weeks from the time of ingestion for certain drugs to be eliminated from the body. Assuming that a test is scrupulously administered and the results unflawed, the test will only show that at sometime in the past the individual ingested a drug. Consequently, it is as likely as not that a tested individual would have taken a controlled substance on his own time and off the employer's premises.

Assuming the claimant took a controlled drug on his own time, we have no evidence that it affected his job. If we applied the "reasonable suspicion" test of P-B-454 there would be no misconduct for there would be no reasonable suspicion that the claimant was impaired before he was tested. In addition, the claimant was employed as a janitor, not an inherently dangerous job. Absent evidence of impairment we see no

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legitimate employer interest in testing the claimant for drugs and do not believe the subsequent positive test result can justify the intrusion upon the claimant's right to privacy.

Beyond the requirements that there be "reasonable suspicion of impairment" prior to requiring an employee to undergo a drug test, the claimant has a constitutionally protected right to privacy. In P-B-454 the Appeals Board acknowledged and affirmed the existence of a constitutionally protected right of privacy in the context of unemployment insurance law.

The majority decision in the instant matter finds that the claimant "consented" to be tested, obviating the necessity of analyzing the issue of the encroachment upon the claimant's right to privacy. We must disagree with our colleagues in the majority that the claimant consented to be tested.

The court upheld in Nat'l Federation of Fed. Employees v. Weinberger, 818 F. 2d 935 (D.C. Cir. 1987) that a search which is otherwise unreasonable cannot be redeemed by the "exaction of a consent to the search as a condition of employment."

The court in McDonnell v. Hunter, 809 F. 2d 1302 (8th Cir. 1987) stated, "advance consent to future unreasonable searches is not a reasonable condition of employment." In Railway Labor Executives Assn v. Burnley, 839 F. 2d 575 (9th Cir. 1988) the court states, "When a search has been determined to be constitutionally unreasonable the consent feature cannot save it."

We find that the claimant had no choice but to agree to the random testing condition or not be rehired. This was forced consent. We do not believe the claimant could freely consent to a test under these conditions.

P-B-454 states that the employer's interest in providing a safe workplace supersedes the claimant's right to privacy, and he may be tested for drugs only if he works in an inherently dangerous occupation. As was stated previously, the claimant was employed as a janitor, which is neither an inherently dangerous occupation, nor one that would be at risk to the public if a controlled substance were found in the claimant's system. In cases where the courts have approved random drug testing in the workplace the nature of the occupation has always been a factor taken into consideration. In Skinner v. Railway Labor Exec's, 109 S. Ct. 1402 (1989), the U.S. Supreme Court found that the safety of the

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railroad traveling public and fellow railroad employees superseded any right to privacy which would be encroached upon by a drug test. The court used similar analyses in Natl Treasury Employees Union v. Von Rabb, 109 S. Ct. 1384, dealing with law enforcement workers in the Customs Service; in McDonnell (Supra), with prison guards; and in Division 241, Amalgamated Transit Union v. Suscy, 588 F .2d, 1264 (7th Cir.), with bus drivers.

We note that the majority in this case has accepted NIDA's standard as to what constitutes a detectable level of controlled substance present in an individual's body. The record does not disclose the basis for the NIDA standard. Moreover, the general rule to be promulgated by the majority that the "cut-off levels be within standards generally recognized by the scientific community", we believe to be unworkably broad. There is a lack of consensus regarding "cut-off" levels in the scientific community. While NIDA's standard may be reasonable, other laboratories may be using a cut-off level higher or lower than NIDA's. Forgetting that this lack of consistency is illustrative of the unreliability of many drug testing programs, we cannot accept that a person may be considered to have tested positive under one standard and therefore disqualified, and negative under another standard and not disqualified, when he or she has the same level of drugs in his or her system.

The majority's findings which are based on NIDA's standard are suspect for another reason. The NIDA's standard was taken into the record by the majority under the guise of judicial notice, with no opportunity for the parties to object or even to argue its relevancy. Under our view, this is not the proper subject for judicial notice. This has the effect of denying the claimant due process of law.

We doubt that the majority's reasoning is founded upon the NIDA standard, in any case. The apparent standard of testing for amphetamines and methamphetamines, which in some circumstances are legal drugs, is 500 nanograms per mililiter. Thus, according to the majority's logic, would someone who tested positive at the level of 499 nanograms not be disqualified?

While the majority states that it was reasonable for the claimant not to engage in illegal behavior which would affect his performance on the job, there was no evidence that the claimant was unable to do his job as a janitor. There is nothing in the record to indicate the claimant was acting erratically or any other indication that the claimant was

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under the influence of drugs. We do not know if the claimant used drugs off duty. However, the evidence of record militates against such a conclusion.

The claimant had worked for the employer for sixteen years. The record is devoid of any evidence of previous misconduct by the claimant. He had been an elder in his church. He had been a child abuse and drug abuse counselor. There is no evidence that the employer suspected that the claimant had a drug problem. Moreover, the claimant denied using controlled substances.

Furthermore, we know that the claimant was required to sign a consent for random testing in order to be reinstated, but we do not know why. The record does not state why the claimant was terminated in the first place, or for what reason the claimant's consent was required.

The only evidence in support of a finding of misconduct is the result of an intrusive drug test, which in our opinion under the most ideal circumstances can only show that at some time the claimant ingested a controlled substance. That is insufficient, in our view, to establish misconduct. The claimant should not be disqualified from receiving unemployment benefits.

LORETTA A. WALKER

DEBRA A. BERG

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