11.00

LEAVING TO ACCEPT

Section 29(5)

Section 29(5)

LEAVING TO ACCEPT, Permanent work, Length of successive employment

CITE AS: Bradford (Shreve Steel Erection), 1978 BR 53944 (B76 10199 RO).

Appeal pending: No

Claimant: Bruce Bradford
Employer: Shreve Steel Erection
Docket No: B76 10199 RO 53944

BOARD OF REVIEW HOLDING: "The mere fact that the claimant worked only two days does not make inapplicable Subsection 29(5) of the Act."

FACTS: The claimant voluntarily resigned to accept work with another employer. His successive employment lasted only two days, because he was laid off by his new employer.

DECISION: The claimant is not disqualified for voluntarily leaving.

RATIONALE: "When the claimant left Shreve Steel Erection, Inc., he did so for the purpose of accepting what he thought would be permanent full-time work with Michigan Boiler but for reasons unknown to the claimant, he was terminated from this employment after working only two days. The mere fact that the claimant worked ony two days does not make inapplicable Subsection 29(5) of the Act.

"The Board finds that the claimant left his employment with Shreve Steel Erection, Inc. to accept permanent full-time work with Michigan Boiler and the disqualification provision under Subsection 29(1)(a) of the Act is not applicable by virture of the provisions of Subsection 29(5) of the Act."

Section 29(5)

LEAVING TO ACCEPT, Performs Services

CITE AS: MESC v Clark, No. 82-23903 AE, Washtenaw Circuit Court (April 20, 1983).

Appeal pending: No

Claimant: George Clark
Employer: Ypsilanti Regional Psychiatric Hospital
Docket No: B81 04322 78627

CIRCUIT COURT HOLDING: "The broad interpretation of the phrase 'performs services' is both appropriate and just. To determine that the services performed were not adequate simply because the claimant was not directly compensated for them would basically conflict with the purpose of the Act."

FACTS: Claimant had informed his employer's personnel office that he had accepted full time employment with the Federal Government at the beginning of February, 1981. He asked that his resignation request be delayed because he knew that there was a federal hiring freeze in effect. However, since he had been told to report to work on February 9, he submitted his resignation and worked his last shift for the employer on February 8, 1981. When he reported to the VA he was told that there would be a delay in the start of his employment. He returned to the employer and asked to continue his part-time employment. He was told that the state had also imposed a hiring freeze and that since he had submitted his resignation he would not be rehired.

DECISION: The leaving to accept provisions of the Act, Section 29(5) apply to the claimant's separation.

RATIONALE: Section 29(5) provides an exemption from the disqualification provisions found in Section 29(1) of the Employment Security Act. Two criteria must be satisfied for this exemption to apply: There must be permanent full-time work, and the individual must perform services for that employer. The Court adopted the language contained in the Board of Review decision:

> "While the VA Hospital employer was prevented from assigning the claimant to the new position, there is no question that the claimant fully complied with the employer's recruitment procedures. His performance was clearly a service in behalf of the staffing needs of that employer. The claimant did, indeed, carry out acts under the direction of his new employer, although the specific tasks to which he was appointed could not be performed at that time because of the recruitment freeze."

Actions taken by the claimant must be reviewed in the context of the real world. This type of analysis mode allows factual situations like this to be covered by an exception clearly intended by the legislature to do this.

11.03

Sections 29(5), 40, 41

LEAVING TO ACCEPT, Excluded employment, Out of state employment, Restrictions on travel

CITE AS: Robinson v Young Men's Christian Association, 123 Mich App 442 (1983).

Appeal pending: No

Claimant: George Robinson
Employer: Young Men's Christian Association
Docket No: B76 18107 57053

COURT OF APPEALS HOLDING: Section 29(5) does not apply if a claimant leaves to accept employment with an out of state employer not subject to the jurisdiction of the MESC.

FACTS: Claimant was employed at the YMCA, but resigned to accept permanent full time employment at the YMCA in Muncie, Indiana. He was discharged by the Indiana employer. Claimant returned to Michigan and applied for unemployment compensation.

DECISION: Claimant is disqualified from benefits.

RATIONALE: "In Merren v Employment Security Commission, 3 Mich App 383 (1966) a panel of this court held that the word 'employer' in the phrase in question referred only to Michigan employers. This interpretation was affirmed by an equally divided Supreme Court, Merren v Employment Security Commission, 380 Mich 240 (1968)." "The term employer as used in the Act does not include out of state employers.

The Court of Appeals went on to say that Section 29(5) does not impinge upon Claimant's right to interstate travel . . . and finds without merit Claimant's argument that this construction of the statute renders it unconstitutional as a denial of equal protection of the laws.

Section 29(5)

LEAVING TO ACCEPT, Permanent work, Length of successive employment, Performs services

CITE AS: Ingham County v Joan M. Cole and Story Oldsmobile, No. 55295 (Mich App October 1, 1981).

Appeal pending: No

Claimant: Joan M. Cole
Employer: Ingham County & Story Oldsmobile
Docket No: B78 03330 60690

COURT OF APPEALS HOLDING: Claimant satisfied the leaving to accept provision of Section 29(5) even though she was on the payroll for 1/2 of a day and did not perform any work tasks. She did observe the work of others at the direction of the employer. Thus she "performed services" under the meaning of Section 29(5).

FACTS: Claimant left a bookkeeping position with Story Oldsmobile to accept a position with Ingham County. Although the position was considered to be temporary until a "posting" process was completed claimant was assured by the county clerk that the position was permanent. Claimant reported to work in the morning and remained until noon. At the direction of the person who hired her the claimant observed others work during that time but did not actually perform any tasks. She concluded the job involved secretarial duties rather than the bookkeeping responsibilities she had expected. She terminated her employment with the county and was paid for the partial day.

DECISION: Claimant is not subject to disqualification under Section 29(1)(a) for leaving Story Oldsmobile because she satisfied the leaving to accept provisions of Section 29(5).

RATIONALE: 1) Permanent nature of the work: Although the county personnel director considered the position to be a temporary one which had to be posted before it became permanent, claimant was led to believe by the person who hired her that she was hired for a permanent position and the posting requirement was only a formality. Under these facts the Board of Review's decision the position was permanent is supported by the record, 2) Performance of services: Claimant observed the work of others but did not actually perform any specific tasks herself. This was done at the direction of the person who hired her. "Since Cole performed tasks at her work place in accordance with the instructions of her employer, we find that she performed services within the meaning of Subsection MCL 421.29(5). This conclusion is bolstered by the fact that the county intended to pay Cole for the time she spent working ... ."

Section 29(5)

LEAVING TO ACCEPT, Performs services, Pre-employment physical, Stipulation of facts

CITE AS: Mosley v Advantage Health, Kent Circuit Court, No. 03-05557-AE (November 13, 2003)

Appeal pending: No

Claimant: Eva M. Mosley
Employers: Advantage Health, Spectrum Health
Docket No. B2002-10112-RO3-167380

CIRCUIT COURT HOLDING: In order for Section 29(5) to apply, the claimant must perform services for the new employer for which compensation is due.

FACTS: Claimant worked as a medical biller for Advantage Health until May 15, 2002 when she quit to work for Spectrum Health. Spectrum Health required her to undergo a physical exam and drug screen before beginning employment. On May 17, 2002 Spectrum Health withdrew its offer of employment. Claimant filed for unemployment benefits. At a July 31, 2002 Referee hearing, the parties entered into a stipulation that the physical exam and drug screen constituted performance of services. The Referee found the stipulation binding and held claimant not disqualified under Section 29(1)(a) by question of the leaving to accept provision of Section 29(5). The Board of Review reversed.

DECISION: Claimant is disqualified because she did not perform compensable services for Spectrum Health.

RATIONALE: For Section 29(5) to apply, the claimant must have left work to accept permanent full-time work with another employer and **perform[ed] services for that employer.** A stipulation that certain facts warranted the application of Section 29(5) to the claimant's separation from the involved employer, when such facts clearly did not support such application, is void. The phrase "performs services for the employer" plainly and obviously means services for which compensation is payable. Claimant never performed any compensable services for Spectrum Health before the offer of employment was withdrawn. Pre-employment physical examinations and drug screens may preclude employment, which is why they are done before employment begins.

(Note: Also see Board Rule 317 regarding stipulations.)

11/04