12.00

MISCONDUCT

Sections 29(1)(b), 29(9)

MISCONDUCT cont.

Section 29(1)(b)

MISCONDUCT DISCHARGE, Definition of misconduct, Insubordination, Threatening a foreman

CITE AS: Carter v ESC, 364 Mich 538 (1961).

Appeal Pending: No

Claimant: Arthur Carter
Employer: Detroit Lead Corporation
Docket No: B59 2711 23422

SUPREME COURT HOLDING: "[T]he employee's refusal to carry out a foreman's order, and his subsequent threat to punch the foreman in the nose" is misconduct.

FACTS: Claimant was employed by the Detroit Lead Corporation. He was assigned to operate a furnace. The claimant refused to obey an order of his foreman to shovel a pile of lead dust (dross) into the furnace and further, threatened to punch the foreman in the nose if the foreman shoveled the dross into the furnace.

DECISION: The claimant is disqualified for misconduct.

RATIONALE: The Court adopted the definition of misconduct set forth in Boynton Cab Company v Neubeck, 237 Wis 249 (296 NW 636): "[T]he term 'misconduct' ... is limited to conduct evincing such wilful 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, or in carelessness or negligence of such degree or recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to his employer. On the other hand mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good-faith errors in judgment or discretion are not to be deemed 'misconduct' within the meaning of the statute."

"[A] refusal of an employee to carry out a reasonable order of his foreman, coupled with a threat to punch him in the nose when the foreman offered to do the work himself, is misconduct within the meaning of the statute. Such a response is both a wilful disregard of the employer's interests and a deliberate violation of standards of behavior which an employer has a right to expect of his employee."

Section 29(1)(b)

MISCONDUCT DISCHARGE, Sleeping on the job

CITE AS: Bell v ESC, 359 Mich 649 (1960).

Appeal pending: No

Claimant: Ora H. Bell
Employer: McInerney Spring & Wire Company
Docket No: B85 1012 20924

SUPREME COURT HOLDING: Misconduct connected with the work requires "a breach of those standards of conduct reasonably applicable to the industrial task assigned, rather than of those standards of ethics and morals applicable to the industrial task in general."

FACTS: The claimant was employed as a fireman to work in the employer's boiler room. "When the claimant was hired, it was stressed that he must be alert and must not drink on the job." He was discharged after he was found sleeping on the job.

DECISION: The claimant is disqualified for misconduct connected with the work.

RATIONALE: "We may concede that no man in his right mind would 'intend' to fall asleep while on duty in a boiler room. But also we must hold that a man intends the normal consequences of his acts . . . Moreover, tested by the 'standards of conduct reasonably applicable to the industrial task assigned' claimant's position is no better. The job for which he was hired was one of great responsibility. The results of a boiler explosion, either to him, as he dozed nearby, or to his fellow workmen, or to the plant itself, we need not describe. Judged by any criterion his act was 'misconduct connected with his work.'"

"We find the employer has fully met the burden of proof of establishing by a preponderance of the evidence that the claimant was discharged for misconduct connected with his work."

The Court relied upon Cassar v Employment Security Commission, 343 Mich 380 in reaching the decision.

12.03

Section 29(1)(b)

MISCONDUCT DISCHARGE, Burden of proof, Appraisal of evidence, Commission as interested party, Non-adversarial proceeding, Opposition at hearing

CITE AS: Miller v F. W. Woolworth Co, 359 Mich 342 (1960).

Appeal pending: No

Claimant: Mary V. Miller
Employer: F. W. Woolworth Co.
Docket No: B59 616 22717

SUPREME COURT HOLDING: A claimant's entitlement to benefits must be decided " ... without regard for the fact or nature of opposition, if any, by the employer or, for that matter, by the commission itself."

FACTS: The claimant was discharged from her job at a soda fountain. Her supervisor testified that repeated incidents involving insolence and foul language caused her to bring the claimant's conduct to the attention of the store manager. The manager testified that he was told of the problem by the supervisor, but he took no action on the day of the discussion because he needed the claimant. He added that the claimant treated a customer improperly on the following day, and was discharged after a co-worker told the manager what had happened. The employer's only evidence of the final occurrence was hearsay.

DECISION: The claimant was discharged for misconduct.

RATIONALE: "There is no solution difficulty in this case once we perceive that Miss Miller has neither sued nor drawn upon her employer as at law; that she has applied to the employment security commission for benefits according to procedures authorized by the statute under which she claims; that the commission itself is designated by the statute as 'an interested party' (see sections 36 and 38 of the act, CLS 1956 Sections 421.36, 421.38); that the participant function of the commission is that of statutory administrator of a public trust fund the claimant may or may not have a right to tap depending on administrative appraisal of the whole of the evidence brought before its administrative arms, and that the appeal board (when called upon) is vested with independent duty as well as plenary authority to decide each claimant's qualification for benefits without regard for the fact or nature of opposition, if any, by the employer or, for that matter, by the commission itself."

Section 29(1)(b)

MISCONDUCT DISCHARGE, Definition of misconduct, Employer's interest, Inefficiency, Labor dispute, Unauthorized work stoppage, Wildcat strike

CITE AS: Cassar v ESC, 343 Mich 380 (1955)

Appeal pending: No

Claimant: Francis J. Cassar, et al
Employer: Precision Manufacturing Co.
Docket No: B2 5713 14896

SUPREME COURT HOLDING: (1) Participation in an unauthorized work stoppage, in violation of a union contract, is misconduct. (2) Inefficiency is not misconduct, but wilful disregard of an employer's interest is.

FACTS: All eight claimants took part in an unauthorized work stoppage precipitated by the discharge of their local union president. They were discharged for refusal to return to work.
DECISION: The claimants were discharged for misconduct.

RATIONALE: The Court adopted the following definition of misconduct from Boynton Cab Co v Neubeck, et al., 237 Wis 249 (296 NW 6326): "[T]he term 'misconduct' ... is limited to conduct evincing such wilful 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, or in carelessness or negligence of such degree or recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligation to his employer. On the other hand mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good-faith errors in judgment or discretion are not to be deemed 'misconduct' within the meaning of the statute."

The Court stated: "Plaintiffs have barred themselves from receiving what they might have obtained had they refrained from indulging in conduct designed to be prejudicial to the rights of their employer."

Section 29(1)(b)

MISCONDUCT DISCHARGE: Misrepresentation of qualifications

CITE AS: Syntax Corp. v Armbruster, No. 66425 (Mich App November 1, 1983).

Appeal pending: No

Claimant: Lynn Armbruster
Employer: Syntax Corporation
Docket No: B79 20775 71380

COURT OF APPEALS HOLDING: The evidence does not reach the level required to meet the "misconduct" standard.

FACTS: A Referee found that claimant was discharged for misconduct, apparently believing she could not perform at the level she said she could in the job interview. On appeal, the Board of Review reversed, holding that employer had not met its burden of establishing that claimant so overstated her secretarial abilities during the job interview as to be disqualified for misconduct under the statute. The Circuit Court affirmed the decision of the Board of Review.

DECISION: The claimant is not disqualified under Section 29(1)(b) of the Act.

RATIONALE: The Court adopted the language of Dunlap v MESC, 99 Mich App 400, 403; 297 NW2d 682 (1980), Lv den 411 Mich 904 (1981) which says:

"In this case, the act upon which the conclusion of misconduct was based occurred prior to employment. Every minor misstatement on an employment application does not constitute statutory misconduct of a level to justify denial of payment of unemployment compensation benefits."

In the within case, as in the cited cases, the evidence does not reach the level required to meet the "misconduct" standard. On the contrary, during a five hour interview, plaintiff-employer did little or nothing to test whether defendant Armbruster met the standard that plaintiff now asserts must be met. Whether or not her skills were adequate for the job, there is no evidence that defendant misrepresented them to the degree equivalent to misconduct under the statute.

Section 29(1)(b)

MISCONDUCT DISCHARGE, Assault and battery, Connected with work, Parking lot

CITE AS: Banks v Ford Motor Company, 123 Mich App 250 (1983).

Appeal pending: No

Claimant: John L. Banks
Employer: Ford Motor Company
Docket No: B79 06738 67680

COURT OF APPEALS HOLDING: "Disqualification may be based on an assault connected with the claimant's work, even though the reasons for the assault are not related to the work."

FACTS: "At approximately 10:45 p.m. on January 22, 1979, the claimant had entered the plant parking lot prior to beginning work on his shift. Another employee was moving his car from one space in the lot to another prior to finishing work on his shift. The claimant's vehicle was struck by the vehicle driven by the other employee. The claimant and the other employee each got out of his car. While the other employee apologized, claimant opened a penknife and struck him with it in the neck and chest."

DECISION: The claimant is disqualified for assault and battery.

RATIONALE: "(T)he assault occurred on company property. The assailant and his victim were both employees of Ford and were both at the plant to work. Under the Worker's Disability Compensation Act of 1969, the injuries to the victim of the claimant's assault arose out of and in the course of employment. MCL 481.301 (1)(3); MSA 17.237 (301)(1)(3). See Queen v General Motors Corp, 38 Mich App 630; 196 NW2d 875 (1972); Brady v Clark Equipment Co, 72 Mich App 274; 249 NW2d 388 (1976). The injury to, and potential for injury to, the employer's interests is evident in the present case."

Section 29(1)(b)

MISCONDUCT, Series of incidents, Single incident, Last straw doctrine

CITE AS: Christophersen v City of Menominee, 137 Mich App 776 (1984).

Appeal pending: No

Claimant: Warren Christophersen
Employer: City of Menominee
Docket No: B82 0013 82601

COURT OF APPEALS HOLDING: Misconduct under the statute can be based on a series of incidents which collectively indicate an employee's wilful disregard of the employer's interests even though no single incident constitutes misconduct under the statute.

FACTS: Claimant was employed for 16 years by the City of Menominee Police Department as a patrolman, sergeant, and captain. He was discharged as a result of four incidents occurring in 1981, although no single incident rose to the level of misconduct under the statute.

DECISION: The claimant is disqualified for misconduct discharge.

RATIONALE: The Court commented on the definition of misconduct set forth in Giddens v Employment Security Commission, 4 Mich App 526 and applied the definition therein to the factual situation in the present case.

"This Court interprets the ... language of Giddens, ... to mean that 'misconduct' is established in the series of acts under scrutiny, considered together, evince a wilful disregard of the employer's interests ... To hold otherwise would allow for unemployment compensation under circumstances where an individual engages in an infinite number of work place infractions, thereby causing strife in the work place and justifying discharge. Allowing for compensation under the circumstances is at odds with the declared policy of the MESC to benefit persons unemployed through no fault of their own."

"[T]here is sufficient, competent, and substantial evidence on the whole record to support the Referee's decision in determining that the four incidents considered collectively constituted 'misconduct' under the statute."

Section 29(1)(b)

MISCONDUCT DISCHARGE, Back injury, False statement on employment application, Medical history, Poor judgment

CITE AS: Dunlap v ESC, 99 Mich App 400 (1980); lv den 411 Mich 904 (1981).

Appeal pending: No

Claimant: James W. Dunlap
Employer: Tenneco, Inc.
Docket No: B76 12291 RO 55244

COURT OF APPEALS HOLDING: "Every minor misstatement on an employment application does not constitute statutory misconduct of a level to justify denial of payment of unemployment compensation benefits."

FACTS: The claimant stated on his application and medical history questionnaire that he had not had back trouble. He was discharged when treatment for an alleged work-related back injury disclosed that the claimant had hurt his back in a swimming accident six years prior to his date of hire.

DECISION: The claimant is not disqualified for misconduct.

RATIONALE: "In this case, the act upon which the conclusion of misconduct was based occurred prior to employment. Every minor misstatement on an employment application does not constitute statutory misconduct of a level to justify denial of payment of unemployment compensation benefits.

"We would believe that plaintiff's failure to characterize his minor swimming accident of six years earlier as 'back trouble' or 'back injury' was more error of judgment than a deliberate and intentional falsification of his medical history. Under these circumstances, we decline to find that the trial judge was clearly erroneous in holding that, on the facts of this case, the so-called misrepresentation on the job application did not constitute such misconduct as to disqualify plaintiff from unemployment compensation benefits."

12.09

Section 29(1)(b)

MISCONDUCT, Religious beliefs, Refusal to work on Saturday

CITE AS: Key State Bank v Adams, 138 Mich App 607 (1984); lv den 422 Mich 871 (1985).

Appeal pending: No

Claimant: Georganne Adams
Employer: Key State Bank
Docket No: B82 08965 RO1 85084W

COURT OF APPEALS HOLDING: " ... the Free Exercise Clause of the First Amendment, US Const, Am I, prevents the state from withholding benefits when the reason for termination of employment is based upon conversion to a religious faith."

FACTS: The claimant was employed in a position requiring Saturday work. "Subsequent to commencing her employment, and, after working on Saturdays for a period of several months, [claimant] underwent conversion to the Seventh-Day Adventist Church and refused to work on Saturdays any longer." The employer discharged claimant after attempting in good faith, but without success, to accommodate her religious beliefs.

DECISION: The claimant is not disqualified for misconduct discharge.

RATIONALE: The Court cited Sherbert v Vernier, 374 US 398; 10 L Ed 2nd 963; 83 S Ct 1790 (1963) and Thomas v Review Board of the Indiana Employment Security Div, et al, 4509 US 707; 67 L Ed 2d 624; 10 S Ct 1425 (1981) as controlling precedents on the issue herein.

In both Sherbert and Thomas "the termination flowed from the fact that the employment once acceptable, became religiously objectionable because of changed conditions ... the focus of the Court in Thomas, supra, and Sherbert was not on the conduct of the employers, but on the State's conditioning receipt of an important benefit upon conduct prescribed by a religious faith or [denial of] such benefit because of conduct mandated by religious belief."

"The only factual difference between this case and the Supreme Court precedents is that the claimant herein adopted her religious beliefs after gaining employment. We do not accept the view that the First Amendment protects the right to adhere to religious beliefs, but not the right to adopt such beliefs in the first instance or convert from one faith to another."

"The State may not constitutionally apply the eligibility provision to deny" claimant benefits.

11/90
6, 14, d1:NA

Section 29(1)(b)

MISCONDUCT DISCHARGE, Absences, Burden of proof, Reasons beyond control, Tardiness

CITE AS: Washington v Amway Grand Plaza, 135 Mich App 652 (1984).

Appeal pending: No

Claimant: Charlene Washington
Employer: Amway Grand Plaza
Docket No: B82 16268 86387

COURT OF APPEALS HOLDING: "As a matter of law, absences or tardiness resulting from events beyond the employee's control or which are otherwise with good cause cannot be considered conduct in wilful or wanton disregard of the employer's interests."

FACTS: The claimant was fired from her job for being late or absent on several occasions ... In the nine months of claimant's employment, she received five warnings regarding lateness or absenteeism, including three "final" warnings on May 5, May 16, and June 7, 1982. Other warnings were issued on December 21, 1981, and May 15, 1982. Tardiness and absenteeism were also brought to claimant's attention in an employee evaluation in April, 1982. Dale Hamilton, assistant chief steward for Amway, testified that the reasons claimant offered for lateness were an inadequate alarm clock, marital problems and that she overslept. Claimant testified that many times the weather was the reason she could not get to work.

DECISION: "The case is remanded to the Board of Review to determine whether statutory misconduct was present after considering claimant's explanation and excuses."

RATIONALE: "The Referee and the Board did not consider claimant's explanations and excuses for her absences and tardiness. It appears that the Referee and Board took the position that since claimant was discharged for violation of Amway's rules and regulations concerning attendance, she was necessarily disqualified under the statute.

"The case is remanded to the Board of Review to determine whether statutory misconduct was present ... In making this determination, the Board should specifically consider claimant's explanations and excuses for her absences and tardiness which resulted in the discharge. Statutory misconduct cannot be made out ... if the Board factually determines that the absences and tardiness which resulted in the discharge were with good cause or for reasons otherwise beyond claimant's control. On remand, the burden of proving misconduct remains on the employer."

11/90
6, 14, d3:D

Section 29(1)(b)

MISCONDUCT DISCHARGE, Agency shop fees, Discharge, Good cause

CITE AS: Parks v ESC, 427 Mich 224 (1986).

Appeal pending: No

Claimant: Anne B. Parks
Employer: Detroit Public Schools
Docket No: B78 12258 66005

SUPREME COURT HOLDING: An individual whose employment is terminated for failing to pay agency shop fees as required by the applicable collective bargaining agreement is disqualified from receiving unemployment benefits.

FACTS: Claimant's employment with the Detroit Public Schools was terminated pursuant to the terms of a collective bargaining agreement because she failed to pay agency shop fees to the Detroit Federation of Teachers, the recognized bargaining agent for teachers and counselors. She objected to being "forced" to financially support an organization which conducted activities to which she was opposed.

DECISION: The claimant is disqualified from receiving unemployment benefits.

RATIONALE: A majority of the Court held the claimant is disqualified. A plurality, Justices Brickley and Archer and Chief Justice Williams, concluded the claimant should be disqualified for work-connected misconduct under Section 29(1)(b) as her failure to pay agency shop fees after receiving notice from the employer demonstrated an intentional disregard of the employer's interests. Two justices, Boyle and Cavanaugh, concluded that the claimant, by failing to pay the shop fees as required by the agreement, had voluntarily left her work without good cause attributable to the employer.

Section 29(1)(b)

MISCONDUCT DISCHARGE, Dereliction of duty, Gambling activity connected with work, Off-duty police officer, Standard of conduct

CITE AS: Bowns v City of Port Huron, 146 Mich App 69 (1985); lv den 424 Mich 899 (1986).

Appeal pending: No

Claimant: John Bowns
Employer: City of Port Huron
Docket No: B82 09389 RO1 84805W

COURT OF APPEALS HOLDING: A police officer's off-duty conduct is sufficiently connected with his employment to justify denial of unemployment benefits.

FACTS: Claimant, a police officer/supervisor, was observed in a bar playing poker and conversing with a known "number's man" and another person known to be a supplier of football game cards. The bar was being investigated by the Michigan State Police for sports betting, bookmaking and high stakes poker games. Claimant's attendance at the bar was during his off-duty hours when he was not in uniform, nor carrying his weapon. The employer charged claimant with dereliction of duty for not reporting the activities at the bar.

DECISION: Claimant is disqualified for misconduct.

RATIONALE: Relying on Core v Traverse City, 89 Mich App 492 (1979), the court stated that illegal or improper conduct by employees in positions of public trust may undermine their ability to function in an official capacity and damage the prestige of the public employer. The court also adopted Cerceo v Darby, 3 PA Comm 174, 183 281 A2d 251, 255 (1971): " ... We demand from our law enforcement officers, and properly so, adherence to demanding standards which are higher than those applied to many other professions ... in both an officer's private and official lives ... "

Section 29(1)(b)

MISCONDUCT, Illness, Leave without authorization

CITE AS: Brown v MESC, No. 85575 (Mich App December 17, 1986).

Appeal pending: No

Claimant: Robert Charles Brown
Employer: Ford Motor Company
Docket No: B84 06483 97069W

COURT OF APPEALS HOLDING: Leaving work early, like absence, cannot support a finding of misconduct unless the absence is without good cause. Failure to notify the employer of the need to leave early, even where the leaving is for good cause, may constitute misconduct, after similar prior infractions for which discipline has been issued. However, even where there have been similar previous incidents, the circumstances of the final incident must be examined.

FACTS: Claimant knew the employer's procedure required him to inform a foreman that he was leaving. If that was not possible he was to inform a co-worker. Claimant left his workplace because he was suffering from diarrhea which had caused him to soil himself. Claimant was unable to locate a foreman and failed to notify a co-worker.

After arriving home claimant made one unsuccessful attempt to call the employer. He made no further attempts since his illness largely confined him to the bathroom. Claimant went to his doctor that evening and provided the employer with an excuse from the doctor upon his return to work the following day. Claimant had been disciplined 5 times previously for being absent or leaving work without permission.

DECISION: Claimant's separation was not for misconduct. Claimant is not disqualified.

RATIONALE: "We note that absences, and by logical extension, leaving work early, cannot support a finding of misconduct unless the absence is without good cause. ... We believe that plaintiff's previous infractions militate in favor of a finding that this inaction bordered on a 'wilful or wanton disregard for [the] employer's interests.' However, we do not believe that the previous infractions are dispositive given the sensitive nature of plaintiff's circumstances on the particular day in question."

Section 29(1)(b)

MISCONDUCT DISCHARGE, Absence without notice, Incarceration

CITE AS: Jones v Hackley Hospital, No. 83-17596 AE, Muskegon Circuit Court (October 2, 1984).

Appeal pending: No

Claimant: Willie Jones, Jr.
Employer: Hackley Hospital
Docket No: B82 13563 RO1 86935W

CIRCUIT COURT HOLDING: Inability to get to work because of involuntary incarceration does not constitute wilful or wanton misconduct connected with the work.

FACTS: The claimant worked for the employer as a janitor. He was discharged after being absent for three consecutive days without notice to the employer. The claimant was under the constraints of a work release program from the County Jail. His work release privileges were revoked as a result of a complaint filed by his wife. The revocation of the work release privileges prevented the claimant from reporting to work.

DECISION: The claimant is not disqualified for misconduct discharge.

RATIONALE: "To hold that plaintiff's [claimant's] involuntary incarceration constituted misconduct connected with his employment would result in this court agreeing that wilfulness was present, where subject was held against his will, an interesting but illogical proposition. It is only reasonable to conclude that the word 'connected' as used in the legislative act, was intended to make a distinction between misconduct with reference to an individual's private life and misconduct arising during and related to his employment."

The claimant lost his work release privileges under circumstances which might have been completely beyond his control. "The reason behind the revocation of his work release did not have the slightest connection with his employment."

Section 29(1)(b)

MISCONDUCT, Collective bargaining agreement violation, Substantial disregard of employer's interests

CITE AS: Razmus v Kirkhof Transformer, 137 Mich App 311 (1984).

Appeal pending: No

Claimant: Stanley Razmus
Employer: Kirkhof Transformer
Docket No: B81 09842 79068

COURT OF APPEALS HOLDING: The violation of an employer's rules or a provision of the collective bargaining agreement is not, per se, misconduct within the meaning of the statute.

FACTS: The claimant was discharged in accordance with a collective bargaining agreement after claimant committed his third "Group II" violation of shop rules. The Group II violations which justified claimant's discharge included violations of wasting time, loitering on company property and a violation of the safety rules.

DECISION: The claimant is not disqualified for misconduct discharge.

RATIONALE: "The safety violation, if anything, evinces an intent to further the employer's interest. Plaintiff removed his safety glasses because they kept falling off and interfering with his helping a new employee. Plaintiff's first violation occurred when he left for only a few minutes to get a pack of cigarettes from the cafeteria. The third violation occurred when plaintiff left for 20 to 25 minutes to check on the battery in his car. On both occasions, plaintiff left his work station only after he had finished welding and was waiting for the lead to cool. Two other employees verified plaintiff's assertion that other employees sometimes temporarily left their work station to go to the cafeteria."

We hold that the three violations which were the basis for plaintiff's discharge do not constitute misconduct within the meaning of MCL 420.29(1)(b).

Section 29(1)(b)

MISCONDUCT, Absence, Evidence, Illness

CITE AS: Lovell v Bedell's Restaurant, Inc., No. 74713 (Mich App March 20, 1985).

Appeal pending: No

Claimant: Olga Lovell
Employer: Bedell's Restaurant, Inc.
Docket No: B82 03183 RO1 83321

COURT OF APPEALS HOLDING: Plaintiff's failure to report for work may have been grounds for her dismissal, but it does not amount to misconduct.

FACTS: Plaintiff was a 15-year employee/waitress. Two weeks in advance she became aware that she was scheduled to work New Year's Eve along with the other waitresses. On December 30, claimant told the employer that she was ill. The employer made it clear to all waitresses that if they did not work New Year's Eve they would be fired. Claimant called in sick and was discharged. Claimant did not see a doctor.

DECISION: Claimant is not disqualified for misconduct.

RATIONALE: Relying on Linski v ESC, 358 Mich 239 (1959), the Court found that even though there was competent, material and substantial evidence on the whole record to support her refusal to work was motivated more by personal reasons that by illness, "it is clear that whether plaintiff's actions amounted to misconduct depends upon a finding that she was, in fact, not ill." The employer did not present evidence to show claimant was not ill. The employer has no right to depend upon a possibly ill employee working.

Section 29(1)(b)

MISCONDUCT DISCHARGE, Assault and battery, Burden of proof, Corroborated testimony,

CITE AS: MESC v Bourcki, No. 81-140409 AE, Wayne Circuit Court (June 30, 1982).

Appeal pending: No

Claimant: Arthur R. Bourcki
Employer: North Detroit General Hospital
Docket No: B78 11915 65930

CIRCUIT COURT HOLDING: Where an individual is involved in an assault and battery and is not the aggressor, the separation is not disqualifying.

FACTS: "The claimant had been verbally harassed and abused by a fellow employee in a confrontation at the time-card rack as claimant was preparing to leave work and the fellow employee was reporting to work ... During the course of the confrontation, the fellow employee called the claimant an obscene name. The unrebutted testimony of a witness was that the fellow employee was abusive to the claimant because of the report claimant had written. In addition, the fellow employee, at the moment he spoke the abusive words to claimant, put up his hands in an aggressive gesture. The unrebutted testimony of the witness was that the fellow employee was the aggressor."

DECISION: The claimant is not disqualified for misconduct discharge.

RATIONALE: "Where as here, the putative basis for disqualification is the misconduct of the employee, the burden of proof lies with the employer or charging party, Fresta v Miller, 7 Mich App 58 (1967) ... The only res gestae witness to the above described event appearing at the hearing was a fellow employee, Beck. Beck testified that Bradley verbally abused the claimant to provoke an incident and called the claimant a vile name ... The witness stated that Bradley assumed an aggressive posture throughout and that there was nothing defensive about his conduct."

"Mindful of the remedial purposes of the Act and further mindful of the burden of proof in such proceedings, see for example, Diepenhorst v General Electric, 29 Mich App 651, 653 (1971) the determination of the Board of Review 'that claimant is not disqualified for assault and battery' is affirmed."

Section 29(1)(b)

MISCONDUCT DISCHARGE, Absences, Burden of proof, Shifting burden of proof

CITE AS: Veterans Thrift Stores, Inc., v Krause, 146 Mich App 366 (1985).

Appeal pending: No

Claimant: Jayne A. Krause
Employer: Veterans Thrift Stores, Inc.
Docket No: B83 15758 93527

COURT OF APPEALS HOLDING: "Once the employer raises the issue of disqualification for misconduct under Section 29(1)(b) and submits evidence of a number of absences which, if unsupported by sufficient reasons, are so excessive as to constitute misconduct within the contemplation of this Section, then the burden is upon the claimant to provide a legitimate explanation for the absences."

FACTS: During November 15, 1982, to March 2, 1983, claimant logged six absences due to personal illness and one related to the illness of a relative. With one exception, claimant failed to submit documentation supporting the claimed illnesses.

DECISION: The burden of proof is upon the claimant; therefore, the case is remanded to the Board of Review.

RATIONALE: "The relevant facts are entirely in the hands of the claimant and, for all practical purposes, cannot be discovered by the employer."

Section 29(1)(b)

MISCONDUCT, Absence without notice, Alcoholism, Evidence

CITE AS: Helm v University of Michigan, 147 Mich App 135 (1985).

Appeal pending: No

Claimant: Paul Helm
Employer: University of Michigan
Docket No: B81 16305 80496

COURT OF APPEALS HOLDING: A therapist's letter in support of claimant's testimony is entitled to be given probative effect as "evidence of a type commonly relied upon by reasonably prudent men in the conduct of their affairs."

FACTS: Claimant, an alcoholic, blacked out during off-duty hours due to drinking and was hospitalized. The claimant's girl friend notified the employer. The employer's attempts to speak to the doctor were unsuccessful. Claimant was discharged for not calling in after three days. The employer, at the Referee hearing, submitted a letter purportedly from the therapist, which was not identified as to the author or his/her qualifications. The employer was aware of claimant's alcoholism.

DECISION: The credibility finding made by the Referee must be "adequately considered" by the Board of Review and the Circuit Court; therefore, the case is remanded to the Board of Review.

RATIONALE: The letter from the therapist was submitted by the employer, not the claimant. The letter was signed by the therapist and written on hospital stationery. No objection was raised to the submission of the letter at the hearing. Even without the letter ... plaintiff's testimony, if believed, constituted proof of his alcoholic blackout.

Section 29(1)(b)

MISCONDUCT DISCHARGE, Theft, De minimis doctrine, Dishonesty, Misappropriation of employer property, Prior warnings

CITE AS: Stratton v Fred Sanders, No. 20866, Wayne Circuit Court (December 1, 1965).

Appeal pending: No

Claimant: Vera Stratton
Employer: Fred Sanders
Docket No: B63 4573 31639

CIRCUIT COURT HOLDING: The absence of the intent to steal in the mishandling of a small amount of employer's property prevents the offense "from being misconduct and renders it de minimis."

FACTS: "[T]he night store manager, Mrs. Langlois, observed a bulge under the pillow on a cot in the employees' washroom. She lifted the pillow and discovered a purse. Upon opening the purse, four bunches of lollipops, store merchandise, were found in the purse. The purse was identified as claimant's, and she was questioned as to how she had obtained the lollipops. During the interview, claimant offered to pay for the lollipops. Subsequently, claimant stated that she had purchased the lollipops at another company store." Following the employer's review of the matter, claimant was discharged.

DECISION: "[T]here is no unequivocal finding of dishonesty in the handling of the employer's property. For this reason the case is remanded for a new trial."

RATIONALE: "When the misconduct charged involves the mishandling of company property of very small value, the legal principle ... from a review of all the pertinent cases ... is this: For misconduct there must be dishonest handling of the property. Otherwise, the absence of intrinsic gravity in the offense or the absence of serious impact upon the employer prevents the incorrect handling of employer's property from being misconduct and renders it de minimis."

"[I]f there is dishonest handling of the employer's property there is misconduct, no matter how small the amount. The de minimis rule does not mean that a little thievery is all right."

The factual issue to be decided on remand below is whether there was "a dishonest handling or an innocent mishandling without intent to steal."

Section 29(1)(b)

MISCONDUCT DISCHARGE, Act constituting a felony, Carrying concealed weapon, Elementary school teacher, Fear of bodily harm, Handgun

CITE AS: Streeter v River Rouge Board of Education, No. 54997 (Mich App October 12, 1981).

Appeal pending: No

Claimant: Johnnie Streeter
Employer: River Rouge Board of Education
Docket No: B79 03208 67059

COURT OF APPEALS HOLDING " ... section 29 does not make the commission of acts which might be the subject of criminal prosecution a reason for disqualification for benefits."

FACTS: An elementary school teacher was discharged for carrying a concealed .38 caliber pistol to school. She testified that she had been unable to obtain protection from the employer after being threatened by a parent who had been convicted of felonious assault.

DECISION: The claimant is not disqualified for misconduct discharge.

RATIONALE: "We first note, as did the referee, that it is irrelevant to our application of the term 'misconduct' in section 29 whether appellee's conduct may have been sufficient cause for her dismissal by appellant.

"The record reveals that the first thing that appellee did when threatened by the angry parent was to report it to the acting principal. Only upon his failure to take what appellee believed to be definitive measures to divert the anticipated confrontation did she seek her own protection. Although her reaction to the situation constituted a grave error in judgment, there is competent evidence to support the referee's conclusion that appellee's actions did not constitute a 'wilful or wanton disregard of [her] employer's interests.' Appellee's actions were motivated by personal fear, and she attempted in good faith to perform her duty properly before the misconduct took place."

Section 29(1)(b)

MISCONDUCT DISCHARGE, Outside activities, Standard of conduct, Connected with the work

CITE AS: Saugatuck Village v Bosma, No. 82-4417 AE, Allegan Circuit Court (March 16, 1983).

Appeal pending: No

Claimant: Thomas Bosma
Employer: Saugatuck Village
Docket No: B81 00101 78040

CIRCUIT COURT HOLDING: Where an employee is discharged for activities that occur while on medical leave, the separation is a non disqualifying discharge.

FACTS: The claimant was employed as a police officer. "While on medical leave, he was arrested and charged with two counts of assault and battery along with one count of driving under the influence of liquor." Following his convictions of assault and battery and of careless driving, the claimant's employment was terminated.

DECISION: The claimant is not disqualified for misconduct.

RATIONALE: "[C]ourts have consistently interpreted ... disqualifying misconduct as requiring that the misconduct be connected to the employee's work duties. Thus, in Reed v Employment Security Commission, 364 Mich 395; 110 NW2d 907 (1961), the Court determined that an employee discharged for violating a company rule which required discharge if the company were served with a second writ of garnishment was not disqualified from receiving unemployment benefits. The Court reasoned that, to be disqualifying under the Act, the 'rule and its violation must have some reasonable application in relation to the employee's task', 364 Mich 395, 397.

"[T]his Court agrees that the Claimant's activities were below the standards which the employer had a right to expect from the employee, and that his discharge was justified. However . . . the activities occurred (sic) while Claimant was on a medical leave, not while he was on duty or even eligible for such duty. Under the facts presented, this Court is unable to conclude that the ... decision that Claimant was not disqualified from receiving benefits for his 'misconduct' was contrary to law."

Section 29(1)(b)

MISCONDUCT DISCHARGE, Sleeping on the job, Credibility, Evidence

CITE AS: Countryside Care Center v Chenault, No. 83-32410 AE, Jackson Circuit Court (April 7, 1983).

Appeal pending: No

Claimant: Marjorie A. Chenault
Employer: Countryside Care Center
Docket No: B82 05347 84134

CIRCUIT COURT HOLDING: A dissenting opinion from the Board of Review was adopted ... " ... sleeping ... (w)as, of itself, of a sufficiently serious nature to justify the discharge for misconduct".

FACTS: The claimant, who worked as a nurses' aide, was fired for sleeping while on duty. The employer operated a nursing home for the elderly. Employer previously warned the employees that they were not to sleep at work. This was a verbal directive only and was not in writing.

DECISION: The claimant is disqualified under Section 29(1)(b) of the Act.

RATIONALE: The Court adopted the dissenting opinion of a Board of Review member who held:

"Despite claimant's denial, the record established that the claimant was, in fact, sleeping, and this conduct, without regard to the fact that other employees were also sleeping, was, of itself, of a sufficiently serious nature to justify the imposition of the disqualification provided by the discharge for misconduct section of the Act."

"Clearly, the claimant's conduct in this case exhibited the kind of disregard of the employee's duties and obligations to his employer which are considered misconduct under the definition of Carter v Employment Security Commission, 364 Mich 538 (1961), adopting the definition of misconduct set forth in Boynton Cab Co., v Neubeck, 237 Wisc 249."

Section 29(1)(b)

MISCONDUCT DISCHARGE, Absence without notice

CITE AS: Stephens v Howmet Turbine Components, No. 82-17057 AE, Muskegon Circuit Court (April 7, 1983).

Appeal pending: No

Claimant: Annie J. Stephens
Employer: Howmet Turbine Components
Docket No: B82 03101 82966

CIRCUIT COURT HOLDING: Claimant wilfully disregarded the interests of her employer by failing to appear at work for three consecutive work days, and by failing to properly notify her employer.

FACTS: Claimant was terminated for being absent three consecutive days. During these three days claimant failed to provide proper notification to her employer. The current Collective Bargaining Agreement, which establishes company policy, explicitly directs employees to contact the personnel department by telephone or in person and give notice of intended absence.

DECISION: Claimant is disqualified under Section 69(2)(b) of the Act.

RATIONALE: The Court adopted the definition of misconduct articulated in Carter v Employment Security Commission, 364 Mich 538, 541: 111 NW2d 8217 (1961).

A harsh ruling on the meaning of misconduct was handed down in Wickey v Employment Security Commission, 396 Mich 487 (1963). There, a seaman aboard a ship went ashore to attend a movie and failed to return to his ship before departure. This was his first offense but the Court stated that "an employer has a right to expect his employees to return on time." Thus, the Court found misconduct for one day may be sufficient to deny an employee benefits. The underlying principles of the Carter and Wickey kind of cases place a duty on an employee to present himself on a daily basis, or to inform his employer when he cannot do so. Violations of that duty demonstrate disregard both of employer's interests and of the employee's duties.

Section 29(1)(b)

MISCONDUCT, Discharge, Alcoholism as disease, Waiver of benefits, Discharge or voluntary leaving, Forced resignation, Ultimatum

CITE AS: Hislop (Cherry Hill School District), 1980 BR 66126 (B78-17083).

Appeal pending: No

Claimant: Robert Hislop
Employer: Cherry Hill School District
Docket No: B78 17083 66126

BOARD OF REVIEW HOLDING: (1) A claimant may not execute an enforceable agreement to waive the individual's rights to benefits. (2) An ultimatum to resign or be dismissed because of alcoholism is a discharge for reasons other than misconduct.

FACTS: The claimant was an elementary school principal. The school district gave him an ultimatum to resign or be discharged for alcoholism. The Referee stated: "The claimant executed an agreement with the employer in which he resigned his position and agreed that he would make no claim against his employer, including benefits under the Michigan Employment Security Act."

DECISION: (1) The waiver is void. (2) The claimant is not disqualified for misconduct discharge.

RATIONALE: The Board adopted the decision of the Referee, who held: "It should be noted that a claimant may not execute an enforceable agreement to give up his right to unemployment benefits under the provisions of subsection 31 of the Act." "There is no question but what the claimant was going to be discharged for what the employer alleged to be misconduct under the Act: to wit his addiction to alcohol. It has been held on numerous occasions that alcoholism is a disease and as such cannot be the basis for a discharge for misconduct under the Act."

Section 29(1)(b)

MISCONDUCT DISCHARGE, Confrontation with subordinate, False statement to employer, Plant shutdown, Hardship on employer, Profanity by supervisor, Racial insults by supervisor

CITE AS: Adams (Woolsey) v Chrysler Corp, No. 77-20043 AE, Ingham Circuit Court (March 5, 1979).

Appeal pending: No

Claimant: Thomas G. Adams (Woolsey)
Employer: Chrysler Corp.
Docket No: B73 8026 46162

CIRCUIT COURT HOLDING: Where a supervisor's use of profanity, racial insults, and the threat of bodily harm, compounded by denial of such conduct, leads to a plant shutdown, the claimant's resulting discharge is for misconduct.

FACTS: The claimant was a supervisor. In spite of a warning receive after a walkout, the claimant deliberately confronted an employee with profanity, racial insults and the threat of bodily harm. The claimant denied his conduct initially. After employees shut down much of the plant, he admitted the essential details and was discharged.

DECISION: The claimant was discharged for misconduct.

RATIONALE: "An important element in the examination of a misconduct situation is to view the level of responsibility the claimant owes to the employer and what hardship was caused the employer by the claimant's action. Wickey v Employment Security Commission, 369 Mich 487 (1963) at 502. Disqualification for misconduct may be based on one incident or a series of acts that evidence the requisite disregard for the employer's interest. Booker v Employment Security Commission, 369 Mich 547 (1963); and Giddens v Employment Security Commission, 4 Mich App 526 (1966). Conduct reported after a warning about the continuation of certain acts had constituted misconduct under the 'last straw' doctrine. Giddens, supra at 535. Michigan courts have also found misconduct in the use of foul, profane and provocative language. Miller v F.W. Woolworth, 357 Mich 342 (1960); Carter v Employment Security Commission, 364 Mich 538 (1961).

"Plaintiff was not acting as a 'reasonable person to great provocation,' but as the aggressor failed to abide by the higher standard of behavior demanded of management personnel. Furthermore, plaintiff lied to his superiors, which precluded them from averting an unnecessary and harmful plant "shutdown."

Section 29(1)(b)

MISCONDUCT DISCHARGE, False statement to Commission, Fraud, Connected with work, Misrepresentation, Rule of selection

CITE AS: General Motors Corp v Belcher, No. 78-832-459 AE, Wayne Circuit Court (October 3, 1979).

Appeal pending: No

Claimant: Frank Belcher
Employer: General Motors Corp.
Docket No: B77 3823 55598

CIRCUIT COURT HOLDING: A discharge from employment because of false statements to the Commission is not for reasons constituting misconduct connected with work.

FACTS: The Commission imposed the fraud penalty in Section 62(b) of the Act after finding that the claimant had misrepresented his eligibility for benefits by understating his earnings. The employer then discharged the claimant, in keeping with its standard practice in such cases.

DECISION: The claimant is not disqualified for misconduct discharge.

RATIONALE: "[W]e cannot expect the average factory worker, having notice of shop rules, such as shop rule (1) here involved, to understand that his unemployment payments are a result of contributions made by his employer, and that when he gives false information to the unemployment agent, he is ultimately causing detriment to his own employer.

"In sum, Mr. Belcher has already been penalized under Section 62(b) and has made full restitution, and General Motors has experienced minimal detriment. In line with the Douglas [Chrysler Corp v Douglas, Wayne Circuit Court, Case No 101-015, June 6, 1968] decision and those upon which it relied, Mr. Belcher's discharge was clearly not due to 'misconduct connected with his work.'"

Section 29(1)(b)

MISCONDUCT DISCHARGE, Arrest on felony charge, Contributing to delinquency, Criminal sexual conduct, Connected with work, Misdemeanor conviction, Telephone installer

CITE AS: Benaske v General Telephone Company of Michigan, No. 79 008439 AE, Isabella Circuit Court (March 5, 1980).

Appeal pending: No

Claimant: Raymond O. Benaske
Employer: General Telephone Co.
Docket No: B77 444 55273

CIRCUIT COURT HOLDING: Where an employer has not proved any connection between a claimant's work and the actual events resulting in the claimant's arrest, a charge of off-duty criminal conduct is not misconduct under the Act.

FACTS: A telephone installation and repair worker was discharged five days after he was arrested and charged with a felony, criminal sexual conduct in the third degree. The incident leading to the charge took place after working hours, and in a county outside the claimant's service area. The claimant later entered a plea of guilty to the misdemeanor or contributing to the delinquency of a minor.

DECISION: The claimant is not disqualified for misconduct.

RATIONALE: "To comply with the intent and language of the Act, the Board must restrict itself to standards that (A) put the burden on the employer to prove (B) a work connection by competent, material and substantial evidence. MESA, 38. Standards that demand less or consider extraneous factors are erroneous as a matter of law.

"The evidence does not support a finding that claimant was discharged for 'misconduct connected with his work.' Rather, he was discharged for merely having been accused of off-duty misconduct. Nor has the employer proved any connection between the actual events leading to claimant's arrest and claimant's work."

Section 29(1)(b)

MISCONDUCT, Discharge in anticipation of leaving

CITE AS: Miller (Visiting Nurse Association), 1978 BR 54236 (B76- 17052).

Appeal pending: No

Claimant: Linda Miller
Employer: Visiting Nurse Association
Docket No: B76 17052 54236

BOARD OF REVIEW HOLDING: A discharge in anticipation of voluntary leaving is a non-disqualifying separation.

FACTS: The claimant was employed as a secretary. "On May 11, 1976, the claimant notified her employer that she intended to quit on July 10, 1976. On June 23, 1976, the employer discharged the claimant because of the claimant's projected leaving."

DECISION: "It is held that the claimant's discharge on June 23, 1976 is non-disqualifying under Section 29 of the Act."

RATIONALE: "Appeal Board precedent on the issue of a discharge in anticipation of a quit is at odds. One view (followed by the Referee in this matter) is that the discharge is disqualifying under Section 29(1)(a). Eg, In re Farmer (Michigan Kitchen Distributors), B72 2870 41782. The other view is that such a discharge is a non-disqualifying separation. Eg, In re Howarth (Falvey Autos, Inc.), B65 3611 34164; In re Terry (Paul's Steak House), B64 5185 33210. See also Carter's Hamburgers, Inc. v Employment Security Commission, Case No 316, 234 (Wayne County Cir Ct 1961) and Hubert v Appeal Board, Case No 323, 171 (Wayne County Cir Ct 1962).

"In our opinion, the latter view is correct. Under Section 29(1)(a), a 'leaving' must be 'voluntary' to be disqualifying. When an employee is discharged for giving notice of an intent to leave his work at a future date, his leaving is involuntary. Absent proof to the contrary, the employee cannot be deemed to have chosen unemployment. Rather, his unemployment is the result of his employer's judgment about the efficiency of the firm."

Section 29(1)(b)

MISCONDUCT, Profanity/abusive language

CITE AS: Broyles v Aeroquip Corp, 176 Mich App 175 (1989).

Appeal pending: No

Claimant: Thomas Broyles
Employer: Aeroquip Corporation
Docket No: B86 05457 104075

COURT OF APPEALS HOLDING: Use of vulgar or abusive language can constitute employee misconduct depending on the totality of the circumstances.

FACTS: Claimant had a verbal confrontation with a supervisor, calling him an "asshole" and a "prick." Claimant asserted the language he used was common and considered "shop talk."

DECISION: Claimant was disqualified under the misconduct discharge provisions of 29(1)(b).

RATIONALE: "In looking at the use of vulgar or abusive language, we conclude that the use of such language can constitute employee misconduct. ... [W]e believe an employer has the right to expect his employees to act with a certain amount of civility towards management personnel and, for that matter, fellow employees. Of course, every use of a vulgar epithet does not necessarily constitute misconduct. Rather, the totality of the circumstances of the case must be considered ..." Where words are directed at a supervisor, where the tone and content suggest an abusive intent, where the comments are made in the presence of others, where such conduct is not condoned in the work place, the use of such language violates standards of behavior that an employer can reasonably expect from employees.

Section 29(1)(b)

MISCONDUCT DISCHARGE, Mistake in dispensing drugs, Negligence, Pharmacist

CITE AS: Dennis v World Medical Relief, Inc, No. 80-203-174 AE, Oakland Circuit Court (January 16, 1981).

Appeal pending: No

Claimant: Walter T. Dennis
Employer: World Medical Relief, Inc.
Docket No: B78 17133 66997

CIRCUIT COURT HOLDING: Where the negligence of a pharmacist is coupled with an indifferent attitude toward error, the claimant is disqualified for misconduct discharge.

FACTS: A pharmacist was discharged by his employer. "Reasons given for Plaintiff's discharge were that he improperly labeled a prescription (confusing dalmane with valium) and that after being informed of this error, he reacted indifferently."

DECISION: The claimant is disqualified for misconduct discharge.

RATIONALE: "In the case at bar, the claimant's initial error might be simply deemed an innocent mistake in improperly filling a prescription and mislabeling the same. When the mistakes, however, were brought to the claimant's attention, he responded by saying that 'it wouldn't have hurt her anyway.'"

"The Referee found, and this Court agrees, that this was more than a matter of mere negligence. The negligence coupled with the indifferent attitude elevated the acts of the claimant to support a finding of manifest and intentional disregard of employee's duties."

Section 29(1)(b)

MISCONDUCT, Assault on co-worker, Evidence, Hearsay

CITE AS: Castion v MESC, No. 111005 (Mich App June 13, 1989).

Appeal pending: No

Claimant: Mary Castion
Employer: K Mart
Docket No: B86 13680 104625W

COURT OF APPEALS HOLDING: Admission of hearsay evidence of out-of-court statements by alleged victim was harmless error where testimony at the hearing was sufficient to establish misconduct.

FACTS: Claimant became involved in an argument with a co-worker which led to blows. Claimant was fired for allegedly striking Ms. Geer in the face. Claimant contended she was defending herself. Neither the co-worker nor the supervisor who fired claimant appeared at the hearing.

DECISION: Claimant was disqualified for misconduct.

RATIONALE: "Plaintiff testified to several reasons other than self defense for assaulting her co-worker. ... It is clear that the hearing referee could have based his decision on these portions of the record, ... Any error in admitting hearsay evidence was therefore harmless."

Section 29(1)(b)

MISCONDUCT, Consumption of alcohol during lunch period

CITE AS: Chirrup v Northwest Airlines, No. 99946 (Mich App April 12, 1988).

Appeal pending: No

Claimant: James D. Chirrup
Employer: Northwest Orient Airlines
Docket No: B86 01065 102146

COURT OF APPEALS HOLDING: Drinking alcohol during lunch hour in violation of the employer's rule and on the employer's premises constitutes misconduct.

FACTS: During his lunch hour claimant was observed with 2 others sitting in a car in the employer's parking lot. At the time, the observer, a sheriff's deputy, saw open containers of beer and marijuana. Claimant admitted drinking beer but denied smoking marijuana. Claimant was not arrested, only detained. Employer discharged claimant for violating its rules against consuming alcohol and absenteeism during work hours.

DECISION: Claimant disqualified under Section 29(1)(b).

RATIONALE: "Contrary to what plaintiff urges, we do not believe his actions of consuming alcohol during work hours constituted 'ordinary negligence or inadvertence' rather than an intentional or substantial disregard of his employer's interests. We are loath to understand how his actions were merely negligent or inadvertent. Did he accidentally or carelessly spill beer into his mouth as he was eating lunch? Thankfully, even he does not claim this. Instead, he admits to drinking the beer purposefully and to knowing that he was violating company rules. This, we believe, constitutes intentional disregard of Northwest's interests."

Section 29(1)(b)

MISCONDUCT DISCHARGE, Child care, Disruption of work, Insubordination, Lack of babysitter, Unauthorized absence

CITE AS: Law v Village of Union City, No. 80-03-198 AE, Branch Circuit Court (September 19, 1980).

Appeal pending: No

Claimant: Jon Law
Employer: Village of Union City
Docket No: B78 10786 66039

CIRCUIT COURT HOLDING: Where an employee refuses a verbal warning for absences, and informs the employer that the individual will be absent whenever a babysitter is unavailable, the claimant is disqualified for misconduct discharge.

FACTS: The claimant was a maintenance worker, under the supervision of James Spencer."The incident which precipitated the claimant's termination stemmed from the employer's efforts to counsel the claimant with regard to his attendance. Mr. Spencer related at the hearing that he sought to instruct the claimant that his attendance was unsatisfactory and was told simply by the claimant that if he found it necessary in the future to remain home to babysit with his children he would do so."

DECISION: The claimant is disqualified for misconduct discharge.

RATIONALE: The Court adopted the decision of the Referee, who held: "At the hearing of this appeal, the claimant testified that he had determined the nature of the work on which he had been placed was not pressing and further, that he would occasion an economic loss in the event that his wife had to remain home and care for his children as opposed to his doing so in the absence of a babysitter. In effect, the claimant informed his employer that he would appear when it was convenient for him to do so. If all other personnel were afforded similar latitude in the performance of their assignments, irrespective of whether they received compensation for the days on which they do not appear, it would be impossible for the employing unit to undertake any activities."

"In the opinion of this Referee, the claimant's assertion indicated a wilful and wanton disregard of the employer's interest."

Section 29(1)(b)

MISCONDUCT DISCHARGE, Auto mechanic, Compensation on commission basis, Correction of piece rate work, Insubordination, Poor performance, Refusal to check work

CITE AS: Stewart v Bill Crispin Chevrolet, No. 77-731-927 AE, Wayne Circuit Court (August 27, 1980).

Appeal pending: No

Claimant: Dallas J. Stewart
Employer: Bill Crispin Chevrolet
Docket No: B76 16171 52904

CIRCUIT COURT HOLDING: Where commission mechanics are required to correct any poor workmanship without pay, an employee who refuses to do so is disqualified for misconduct discharge.

FACTS: A mechanic was discharged for refusing an order to check the balance of each wheel on a car he had serviced twice. As a commission employee, the claimant was expected to correct poor workmanship without compensation.

DECISION: The claimant is disqualified for misconduct discharge.

RATIONALE: "There is, however, competent, material and substantial evidence on the whole record to support the conclusion of the Board of Review to the effect that the claimant's refusal to recheck and, if necessary, rebalance the wheels constituted work-related misconduct."

"A review of the record in this matter shows that the claimant has failed to produce any evidence rebutting the employer's assertion that the continuing problem with the vehicle involved in the incident resulting in his dismissal was due to claimant's faulty workmanship the first two occasions the vehicle was at the dealership for repair, and was not due to defective parts. Absent evidence on the record to the contrary, the court concludes the Board of Review was correct in finding that under the facts presented the claimant would not get paid since, as the employer's testimony indicates, the policy of the employer was that if the problem was one of workmanship or labor or that the wheel balance should not have come out of adjustment, then the claimant must redo the job without pay (R,51)."

Section 29(1)(b)

MISCONDUCT, Insubordination, Work rules

CITE AS: Dryer et al v MESC, No. 84456 (Mich App June 1, 1986).

Appeal pending: No

Claimant: Leonard B. Dryer and Dennis D. Ferguson
Employer: Hale Wood Products
Docket No: B84 06093 97061W

COURT OF APPEALS HOLDING: Where an employee, in violation of a known work rule, refuses an employer's instructions to return to work, the refusal is misconduct and benefits are properly denied.

FACTS: The employer warned employees that unless productivity improved, the employees' coffee break privileges would be terminated. On February 9, 1984 productivity not having improved, the employer announced the 2 paid coffee breaks would be eliminated. On February 10, 1984 all employees took their morning coffee break. The employer then warned that anyone taking the afternoon coffee break would be fired. Claimants and three other employees took the afternoon coffee break anyway and refused to return to work when requested to do so. All five employees were discharged.

DECISION: Claimants were discharged for misconduct and are disqualified for benefits.

RATIONALE: "Laying aside the cause of slipping work productivity, the facts - which petitioners do not dispute - establish that their employer warned them not to take a break, they did so anyway, and refused to go back to work when asked to do so. There was competent, material and substantial evidence on this record to support a finding of misconduct."

Section 29(1)(b)

MISCONDUCT, Conflict of interest

CITE AS: Elsey v Burger King Corporation, No. 106068 (Mich App July 28, 1989); lv den 434 Mich 883 (1990).

Appeal pending: No

Claimant: Terry Elsey
Employer: Burger King Corporation
Docket No: B86 08979 103499W

COURT OF APPEALS HOLDING: Refusal to sign and abide by a policy to avert conflicts of interest in misconduct within the meaning of Section 29(1)(b) of the Act.

FACTS: Claimant was hired as an accounting coordinator, but during the last three years of employment, worked as a systems analyst, primarily with point-of-sale companies in the employer's restaurants. While employed, claimant on an independent basis also helped set up computer systems for franchisees, some of which were similar to that of the employer's. The employer knew that claimant was doing this for two years and allowed it as long as claimant received waivers from franchisees stating that he was not working for the employer when providing such services.

The claimant was advised to discontinue his outside business and given a letter which listed nine points illustrating violations of ethical standards. These included employment in any capacity by a customer or franchisee of the employer and accepting gifts, compensation or benefits from a customer or franchisee. Claimant was advised he would be discharged unless he would sign and abide by the terms of the letter. Claimant refused to sign stating that the word "customer" might include someone who might purchase food from the employer. The employer agreed to delete the word "customer" but claimant still refused to sign the letter stating its language was too broad. The claimant was discharged.

DECISION: The claimant was discharged for work connected misconduct.

RATIONALE: The employer had a clear interest in maintaining the confidentiality and exclusivity of its computer system and information contained therein. The claimant was only required to do what another person in a similar position of trust or responsibility would be required to do.

Section 29(1)(b)

MISCONDUCT, Progressive disciplinary system, Terms of employment contract

CITE AS: Hagenbuch v Plainwell Paper Company, Inc., 153 Mich App 834 (1986).

Appeal pending: No

Claimant: Stephen Hagenbuch
Employer: Plainwell Paper Company
Docket No: B84 08943 97902

COURT OF APPEALS HOLDING: Actions which may not justify termination under some employment contracts may nonetheless constitute misconduct.

FACTS: Claimant was discharged by the employer for excessive absenteeism and tardiness. The collective bargaining agreement provided for a progressive discipline system which allowed an employee to be discharged after accumulating four warning slips within a 12-month period. Claimant accumulated four warning slips but contended that one should not have been issued, and therefore should not have been counted against him in the discharge decision.

DECISION: Claimant is disqualified for misconduct.

RATIONALE: "The MESC and circuit court should not be put in the position of evaluating and construing specific terms of collective bargaining agreements and other employment contracts to determine misconduct for the purposes of eligibility of unemployment compensation. Just as terms of labor agreements may provide for discharge for misbehavior less severe than that required under the law of misconduct, other agreements might be more lenient than the act. Accordingly, a claimant's behavior must be evaluated independently from the terms of his employment contract. Failure to review claims in such an objective manner would lead to the inevitable result that claimants dismissed from different employers for similar wrongdoings would be accorded different treatment under the act."

Section 29(1)(b)

MISCONDUCT DISCHARGE, Competing with employer, Conflict of interest

CITE AS: Whiting v The Upjohn Co, No. 732-367 A, Kalamazoo Circuit Court (January 17, 1975).

Appeal pending: No

Claimant: Edwin F. Whiting
Employer: The Upjohn Company
Docket No: B72 4501 41929

CIRCUIT COURT HOLDING: Where a claimant has responsibility for the production of a specific pharmaceutical product, and privately counsels an outsider on the establishment of a firm to manufacture the same drug in Canada, the employer has grounds for discharging the claimant for misconduct.

FACTS: The plaintiff is the claimant. He " ... was head of Chemical Services, Fermentation Products, Fine Chemicals Division. This department produced, among other things, a drug known as Lincomycin. It came to the attention of the Upjohn Company that the plaintiff was counseling with a friend of his who was seeking to establish a new company in Canada to produce drugs, one of which was to be Lincomycin. Plaintiff admits counseling with a Mr. Harris with reference to organization of such a company and soliciting monies from potential investors."

DECISION: The claimant was discharged for misconduct.

RATIONALE: "The proofs showed that plaintiff had been considering other employment and on his own time and without pay was assisting Mr. Harris in the organization of a company which would compete with the Upjohn Company and in soliciting monies from potential investors in order to get the company started. It is the opinion of this Court that the Appeals Board was correct in its determination inasmuch as this Court feels that the conduct of the plaintiff evidenced a wilful or wanton disregard of his employer's (Upjohn Company) interests."

Section 29(1)(b)

MISCONDUCT DISCHARGE, Disruption of work, Emergency leave, Hardship on employer, Illness of cohabitant, Unauthorized absence

CITE AS: Whittenberg v Norris Industries, Inc, No. 77-13001 AE, Washtenaw Circuit Court (January 8, 1979).

Appeal pending: No

Claimant: Ronald Whittenberg
Employer: Norris Industries, Inc.
Docket No: B75 12093 49612

CIRCUIT COURT HOLDING: Where a non-disruptive two-day absence is caused by the psychiatric hospitalization of the claimant's unrelated cohabitant, the absence is not misconduct where emergency leave is requested on the second day.

FACTS: The claimant was discharged after a two-day absence caused by the emergency psychiatric hospitalization of his cohabitant, whose doctor requested the claimant's presence. Contractual emergency leave was denied by the employer because the claimant made his request on March 18, 1975, the second day, and because his cohabitant was not a member of his family. The employer did not show that the absence disrupted company operations.

DECISION: The claimant is not disqualified for misconduct.

RATIONALE: "Given the nature of appellant's close relationship with the friend requiring emergency assistance, and the fact that it was emergency psychiatric attention that was required and appellant's presence was requested by a doctor, it seems logical that appellant's situation fits within the contemplated scope of the collective bargaining provision, the provision cannot be read so narrowly as appellee would desire."

The Court characterized the claimant's failure to request a leave on March 17, 1975 as a "good faith error." It added that the employer did not demonstrate that the claimant's absence disrupted its work or its right to control the work.

Section 29(1)(b)

MISCONDUCT, Insubordination, Race discrimination

CITE AS: Ham v County of Saginaw, No. 106698 (Mich App February 9, 1990).

Appeal pending: No

Claimant: Joseph N. Ham
Employer: Saginaw County
Docket No. B85 13807 102135

COURT OF APPEALS HOLDING: The contention that claimant was treated differently because of his race goes to the issue of whether or not he was justifiably discharged. However, unequal treatment does not create an exception or excuse for misconduct which would entitle claimant to benefits.

FACTS: Claimant was executive director of employer's Commission on Aging. His predecessor, a white man, had opened a "trips and tours" checking account using county funds. Employer's comptroller asked claimant to close the account because it was not under county control. Claimant did so but later reopened the account at another bank. The county commission fired claimant following an investigation for his actions of reopening the account and using public funds for unauthorized purposes. Claimant maintained that the directive to close the account was politically and racially motivated and that similar conduct with respect to use of the account on the part of the former, white director had been tolerated.

DECISION: Claimant was disqualified for work-connected misconduct.

RATIONALE: Where a claimant admits defying a direct order of employer and misusing public funds, the fact that such behavior on the part of a white predecessor was tolerated or condoned does not relieve a claimant from the sanction of disqualification under the misconduct discharge provisions of the MES Act.

Section 29(1)(b)

MISCONDUCT, Absence, Failure to call

CITE AS: Hernandez v First of America, No. 8994 (Mich App May 12, 1987).

Appeal pending: No

Claimant: Estrellita Hernandez
Employer: First of America
Docket No: B83 19184 96390W

COURT OF APPEALS HOLDING: While matters beyond a claimant's control may excuse an absence, the claimant's failure to notify the employer of the absence, if within his or her ability, may in and of itself be disqualifying.

FACTS: The claimant, a mortgage clerk, was returning to Michigan from a vacation in Texas. Along the way the claimant experienced difficulties with her vehicle which prevented her from returning to the work place in a timely fashion. Claimant was expected back at work on Monday, August 22. She did not call the employer until Friday, August 26. During her absence the claimant did not make any effort to notify the employer of her circumstances even though she readily could have done so, and she was aware the employer was short of staff at the time. She did not report back to work until August 31 when she was terminated.

DECISION: By affirming the circuit court the Court of Appeals also affirmed the findings of both the Board of Review and the Referee. Claimant is disqualified for misconduct.

RATIONALE: Employees have an obligation to be timely in their attendance. If they are not able to do so they are obliged to notify the employer. The failure to do so in this case supports a finding of misconduct.

Section 29(1)(b)

MISCONDUCT DISCHARGE, Connected with work, Simple negligence, Intentional acts

CITE AS: Grand Rapids Gravel Company v Appeal Board, No. 46189 Kent Circuit Court (January 29, 1960).

Appeal pending: No

Claimant: Leon Engel
Employer: Grand Rapids Gravel Company
Docket No: B56 611 22112

CIRCUIT COURT HOLDING: While the acts of an individual may justify discharge they do not necessarily constitute statutory misconduct.

FACTS: "The claimant was first employed with duties other than truck driving and within a period of about two years he incurred five non-driving accidents ... " His employer transferred him "to truck driving as a safeguard against further plant injuries. ... His record while driving for the company paralleled his earlier record ... and he had a series of ten accidents ... After the claimant's last accident, he was discharged.

DECISION: The claimant is not discharged for misconduct.

RATIONALE: "Of the accidents referred to and the conduct with reference thereto there are only three which can seriously be claimed to meet the test of misconduct. ... On none of these occasions, did the employer seek to discharge the employe. The last of the three occurred more than a year prior to the date of the [last] accident" ... which was due to simple negligence. "The employer cannot ... retain the employe for a period of more than a year and, without further evidence of misconduct, discharge on the basis of such stale evidence."

The Court adopted the decision of the Referee who held:

"As far as the Michigan Employment Security Act is concerned, the right to discharge an employe rests with the employer. However, the mere fact that the employer does discharge an employe does not establish that the discharge was for misconduct. That must be determined as stated above on the proven conduct of the claimant under the provisions of the Michigan Employment Security Act and,particularly, interpretation and definition of the term 'misconduct' as established by the courts of this state. When this is not done, the Referee has no alternative but to find that the act or acts of misconduct complained of have not been established by a preponderance of the evidence ... "

Section 29(1)(b)

MISCONDUCT, Conflict of interest, Connected with work, Off-duty relationship, Position of trust

CITE AS: Johnson v Ingham County, No. 84732 (Mich App March 12, 1987).

Appeal pending: No

Claimant: Alfred G. Johnson
Employer: Ingham County
Docket No: B83 12607 95981W

COURT OF APPEALS HOLDING: As an individual whose employment was dependent upon the maintenance of public trust the claimant's off-duty behavior was connected with his work and could be considered as a basis for disqualification under the misconduct provision of the MES Act, Section 29(1)(b).

FACTS: The claimant was employed as a court reporter. During the course of his employment the claimant dated an individual whose probation was being supervised by the court to which he was assigned. When the matter came to the attention of the judge, he advised the claimant the relationship constituted a conflict of interest and instructed the claimant to break off the relationship. The claimant promised to do so but, except for a brief interruption, continued to see the individual in question. When the matter again came to the judge's attention some months later the claimant was terminated.

DECISION: The claimant was found disqualified for benefits under the misconduct provision of the MES Act, Section 29(1)(b).

RATIONALE: The claimant was an individual whose job required the maintenance of public trust. By engaging in the relationship with an individual whose probation was being supervised by the court to which the claimant was attached the claimant engaged in a conflict of interest and created the appearance of impropriety. Further, the claimant continued in this relationship after being instructed to terminate it and after he indicated he would do so. The claimant's actions in this regard undermined his ability to maintain the public trust. Accordingly, the claimant's actions were found to be both work related and to have evidenced a wilful disregard for the employer's interest. Consequently the claimant was disqualified for benefits.

Section 29(1)(b)

MISCONDUCT, Incomplete medical information, Uncooperative attitude

CITE AS: Ries v Michigan State University, No. 85604 (Mich App November 14, 1985).

Appeal pending: No

Claimant: Esther V. Ries
Employer: Michigan State University
Docket No: B84 02891 96713W

COURT OF APPEALS HOLDING: An employee who provides medical documentation and attends a medical appointment set up with a third party physician will not be found to have engaged in misconduct solely because the information was not complete and her attitude was not cooperative.

FACTS: The claimant had been absent on a medical leave of absence. While on the medical leave the claimant was requested to submit physician's statements relative to her status. The notes provided by the claimant's physician were brief and did not provide all the information the employer had requested. Subsequently the employer arranged to have the claimant examined by an area physician and had the claimant transported to the physician's office, but the doctor refused to conduct an examination after the claimant advised him she was only there at the employer's insistence. As a result the claimant was discharged.

DECISION: The claimant is not disqualified for benefits under the misconduct provision of the MES Act, Section 29(1)(b) based on the two instances of alleged misconduct detailed in the record. Remanded for further fact-finding regarding other instances of alleged misconduct.

RATIONALE: The physicians involved in the claimant's care failed to provide the information desired by the employer and failed to examine the claimant. At no time did the claimant refuse to provide the information asked for or to submit to the examination requested. "Although claimant may not have acted properly and her actions may have been grounds for discharge, these actions do not rise to the level of 'misconduct' as defined in Carter."

NOTE: After the Mich. App. decision and remand described above, this matter was twice considered by the Menominee Circuit Court as to whether claimant was subject to disqualification under a "series of infractions" theory. It was concluded she was not "as her emotional problems were the reason for her termination, her actions could not rise to misconduct as define in Carter,". B84-02891-RM1-103180.

Section 29(1)(b)

MISCONDUCT, Employer directed wrongdoing

CITE AS: Applewood Nursing Center v Schulties, No. 111638 (Mich App October 18, 1989); lv den 434 Mich 918 (1990).

Appeal pending: No

Claimant: Annette Schulties and Janice R. Cornell
Employer: Applewood Nursing Center
Docket No: B86 12935 105129

COURT OF APPEALS HOLDING: An employee who is discharged by an employer in an attempt to cover up its own wrongdoing when the employee involved engaged in the alleged wrongdoing at the employer's request is not disqualified for benefits.

FACTS: The claimants were instructed by the employer to alter their time cards in order that the employer could bring itself into compliance with government mandated staff-to-patient ratio requirements. After the claimants had done so the employer discharged the claimants in order to cover up its own wrongdoing.

The employer asserted the claimants should be disqualified for benefits because even if their actions were done at its request they were fraudulent and therefore should be considered to be misconduct.

DECISION: Claimants were not discharged for acts of misconduct and are not disqualified.

RATIONALE: "Suffice it to say that in determining whether an individual's conduct constitutes misconduct, we view the conduct in light of the employer's interests. Here, claimants' conduct was not in disregard of Applewood's interests. Claimants acted pursuant to Applewood's administrator's orders. Even if the orders did not come directly from the owner of Applewood, nothing in the record indicates that claimants thought they might be disregarding his interests or standards of behavior. In fact, claimants' conduct seemingly was coterminous with Applewood's interests.

Moreover, the referee found that claimants were discharged in an attempt by Applewood to cover up its own wrongdoing. And, Applewood does not now dispute that finding. Therefore, under the plain language of the statute, claimants were not discharged for their misconduct, even if they in fact engaged in misconduct."

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Section 29(1)(b)

MISCONDUCT DISCHARGE, Off duty, Wire tapping, Connected with work

CITE AS: Michigan Bell Telephone v Spoelstra, No. 84-43602 AE, Kent Circuit Court (January 8, 1985).

Appeal pending: No

Claimant: Robert D. Spoelstra
Employer: Michigan Bell Telephone Co.
Docket No: B82 18225 RM1 95148W

CIRCUIT COURT HOLDING: Off-duty conduct can be work connected misconduct as a matter of law.

FACTS: Claimant was asked by a "casual acquaintance" to install a tape recording device on a home telephone. The device was installed, with the assistance of the home owner, on a Saturday, when the claimant was off duty. The employer testified that the installation violated personnel policy.

DECISION: Claimant is disqualified for misconduct.

RATIONALE: The court cited numerous cases from other jurisdictions where off-duty misconduct disqualified claimants from unemployment benefits. The court particularly relied on Gregory v Anderson, 109 NW2d 675 (Wis 1961) which found that, "Because of the nature of certain employments, conduct of employees during off-duty hours may harm or tend to harm the interests of the employer." (109 NW2d 675, 679).

Section 29(1)(b)

MISCONDUCT DISCHARGE, Alcoholism, Intoxication

CITE AS: Jackson v General Motors Corporation, No. 85-502315 AE, Wayne Circuit Court (July 26, 1985).

Appeal pending: No

Claimant: Ernest Jackson
Employer: General Motors Corporation
Docket No: B84 05495 R01 97336W

CIRCUIT COURT HOLDING: There is no alcoholism defense when an employee is intoxicated on the job.

FACTS: Claimant, a rail car operator, reported for work in an unsafe condition due to alcohol. Claimant had three previous suspensions for alcohol related instances and was diagnosed as an alcoholic. Claimant's speech was slurred and rambling and he staggered when he walked. Claimant admitted to drinking alcohol before reporting to work . Claimant's defense was that alcoholism is an occupational disease.

DECISION: Claimant is disqualified for misconduct.

RATIONALE: "The Board of Review has allowed alcoholism as a defense to disqualification of benefits, but typically that defense has been used when an employee is discharged for absenteeism or tardiness that is due to alcoholism." The court cited Moore v Frederick E. Herrud, Inc.,No 83 319859 AE, Wayne County Circuit Court (February 21, 1984). "The legislature made a clear judgment in M.C.L.A. 421.29(1)(b) that employees who are dismissed for being intoxicated while at work are properly disqualified."

Section 29(1)(b)

MISCONDUCT, Series of incidents, Single incident

CITE AS: H & L Manufacturing Company v Stevenson, No. 90417 (Mich App December 15, 1987).

Appeal pending: No

Claimant: Max L. Stevenson
Employer: H & L Manufacturing Company
Docket No: B83 10271 91871

COURT OF APPEALS HOLDING: Misconduct may be based on a single incident demonstrating an intentional disregard of the standard of behavior an employer has the right to expect of an employee or a series of derelictions and infractions none of which by itself, rise to the level of misconduct.

FACTS: Claimant was discharged for asking another employee to punch his time card for him. He received a written reprimand for this four days earlier which indicated he would be discharged if he broke the rule again. The employer also considered the claimant's prior disciplinary history which included warnings for throwing parts, ignoring a safety rule and swearing on the job.

DECISION: The claimant was discharged for misconduct within the meaning of Section 29(1)(b) of the Act.

RATIONALE: "We conclude that the circuit court's reversal of the Board of Review's decision was proper, because that decision was contrary to law. Claimant's deliberate disregard of the time card rule, after he was warned that another violation would lead to discharge, constituted disqualifying misconduct. See Carter, supra."

"Furthermore, we note that, even if claimant's second violation of the time card rule did not constitute disqualifying misconduct, the series of incidents that led up to claimant's discharge would serve to disqualify him from receiving benefits. A series of derelictions and infractions, no one of which, by itself, rises to the level of misconduct, may provide the basis for a finding of misconduct, Christopherson v Menominee, 137 Mich App 776, 780-781; 359 NW2d (1984), lv den 422 Mich 876 (1985)."

Section 29(1)(b)

MISCONDUCT DISCHARGE, Carelessness/negligence, Definition of misconduct, School bus driver

CITE AS: Williams v Special Transportation, Inc., No. 52036 AE, Ingham Circuit Court (March 8, 1985).

Appeal pending: No

Claimant: Verlee Williams
Employer: Special Transportation, Inc.
Docket No: B82 02013 83723

CIRCUIT COURT HOLDING: The elements of misconduct are not present where there is no undertaking, design or scienter present.

FACTS: The employer alleged that claimant was warned for: speeding, failure to report a damaged vehicle, failure to check her run book, lateness, leaving special equipment for a wheelchair, inappropriate use of a vehicle and failure to pick up a student. She was placed on a 30-day suspension and then discharged after failing to pick up a student on time. These incidents occurred from November 14, 1980 to October 19, 1981.

DECISION: Claimant is not disqualified for misconduct.

RATIONALE: Relying on Carter v ESC, 364 Mich 538 (1961), the court stated that "there must be a measure of culpability going beyond mere continued negligent behavior. In examining the record, this court can find no instance which falls within the Carter definition of 'misconduct' ... this series of instances spanning some ten months, even considered as a whole, does not manifest the required wrongful intent or evil design."

Section 29(1)(b)

MISCONDUCT, Connected with work, While laid off, Profanity

CITE AS: Sibley v Nugent Sand Co., No. 113491 (Mich App May 24, 1990).

Appeal pending: No

Claimant: Kelley L. Sibley
Employer: Nugent Sand Co.
Docket No: B86 02621 R01 102624W

COURT OF APPEALS HOLDING: The use of vulgar and obscene language on the employer's premises by a claimant in layoff status constitutes misconduct because claimant was there to obtain a paycheck and that renders his actions work related.

FACTS: Claimant was laid off and came to the employer's office to pick up a paycheck. He became upset when the employer refused to pay him holiday pay and uttered obscenities in front of office staff.

DECISION: Claimant is disqualified under 29(1)(b).

RATIONALE: "Plaintiff went to defendant's office to retrieve his check. The basis of the disagreement concerned why plaintiff had not received holiday pay. We believe that such matters were uncategorically work related and thus plaintiff's misconduct arose out of factors pertaining to his employment. The fact that plaintiff was laid off when the incident occurred is not relevant. Plaintiff's lay off status was deemed temporary and plaintiff was given a specific date (January 13, 1986) to return to work. Plaintiff was not terminated at the time his misconduct occurred and was still an employee of defendant."

Section 29(1)(b)

MISCONDUCT, Removal of property, Single incident, de minimis doctrine

CITE AS: Tuck v ESC, 152 Mich App 579 (1986)

Appeal pending: No

Claimant: Dave W. Tuck
Employer: Ashcraft's Market, Inc.
Docket No: B82 16690 86509W

COURT OF APPEALS HOLDING: Breach of rules, negligence, or good faith error in judgment with respect to a single incident does not necessarily rise to the level of misconduct under the Carter definition. Claimant is not disqualified for misconduct because of the unauthorized removal of property of an employer which has de minimis value.

FACTS: Claimant, a meat cutter, removed two cartons of fish from employer's premises without authorization. Claimant had observed that the fish was thawed and unsaleable and took it upon himself to deal with its disposal since the regular manager was unavailable. He removed the fish via the back door of the supermarket which was strictly against employer's rule and took it home to use as bear bait.

DECISION: Claimant was not disqualified under the misconduct discharge provisions of 29(1)(b) of the MES Act.

RATIONALE: Not every breach of company rules rises to a level of misconduct sufficient to disqualify an employee for unemployment benefits as defined in Carter.

Section 29(1)(b)

MISCONDUCT, First Amendment, Religious conversation

CITE AS: Vander Laan v Mulder, 178 Mich App 172 (1989).

Appeal pending: No

Claimant: Sharlyn Vander Laan
Employer: J.B. Mulder, D.D.S.
Docket No: B86 05311 102838W

COURT OF APPEALS HOLDING: As the state did not condition the receipt of unemployment benefits upon conduct proscribed by claimant's religious faith, claimant is properly subject to disqualification.

FACTS: Claimant was a dental hygienist who continued to work in the dental practice purchased by employer. She persisted in "sharing" her religious faith with patients despite repeated admonitions from employer not to do so. Employer fired claimant after losing business, receiving complaints and dealing with patients who refused to have their teeth cleaned by claimant.

DECISION: Claimant was disqualified for misconduct.

RATIONALE: Claimant's actions were clearly inimical to the employer's interests. Claimant's "sharing" was personally motivated and was not required by her religious belief. This case is therefore distinguishable from those where benefits were denied because of conduct mandated by religious belief. Claimant did not have to choose between adhering to her religious convictions or losing her job.

Section 29(1)(b)

MISCONDUCT, Horseplay

CITE AS: Tetsworth v Eberhard Foods, Inc., No. 110964 (Mich App August 16, 1989).

Appeal pending: No

Claimant: Richard A. Tetsworth
Employer: Eberhard Foods, Inc
Docket No: B86 13633 104876W

COURT OF APPEALS HOLDING: Claimant's conduct may be evaluated independent of employer's work rules governing "horseplay."

FACTS: Claimant and another employee forced a co-worker into a machine used for baling cardboard to frighten him. Claimant was discharged. He claimed his actions were merely "horseplay", that the same thing had been done on other occasions, that employer knew of these incidents and did not discipline anyone.

DECISION: Claimant was discharged for misconduct.

RATIONALE: Claimant's conduct was so clearly dangerous to the safety and life of another individual that he should be disqualified regardless of whether or not his behavior is within the parameters of employer's definition of "horseplay".

Section 29(1)(b)

MISCONDUCT, Negligence, Serious consequences, Single instance

CITE AS: Reynolds v Mueller Brass Company, No. 81349 (Mich App January 30, 1986).

Appeal pending: No

Claimant: Kenneth Reynolds
Employer: Mueller Brass Company
Docket No: B82 06371 83760

COURT OF APPEALS HOLDING: Serious actual and potential harmful results of a claimant error can support a finding of misconduct based on a single act of negligence.

FACTS: Claimant worked in Mueller's Port Huron water treatment department. His duties included controlling the flow of hydrochloric acid into a tank and shutting the valve at the end of the day. On 2-2-82 he forgot to shut the valve. As a result 1000 to 2000 gallons of acid overflowed and started to enter the city sewage system. One employee was endangered by having to enter into an area where there were fumes. The acid destroyed pumps and gratings and will continue to affect plant equipment. Claimant was discharged because of this single incident.

DECISION: Claimant is disqualified for misconduct under Section 29(1)(b).

RATIONALE: The court reviewed Michigan case law and noted that in Wickey v ESC, 369 Mich 487 (1963) the Supreme Court quoted with approval the following from the Referee decision in Wickey: "'In determining whether or not an individual has committed an act of misconduct for which he is discharged we must take into consideration all of the facts and particularly the degree of responsibility the claimant owes to the employer and what his infraction of the rules means as far as hardship or trouble to the employer. 369 Mich 502, 503.'"

The court went on to observe, "It is clear from these cases that actual 'intent' to harm an employer is not required, and that under special circumstances, ordinary negligence can be so egregious that it constitutes disqualifying misconduct. Reynolds was well aware of the hazards to property and life that his handling of hydrochloric acid entailed. We agree with the MESC determination that the extremely harmful, and potentially disastrous, result of his negligence could well elevate Reynolds' forgetfulness to the level of statutory misconduct."

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Section 29(1)(b)

MISCONDUCT DISCHARGE, Discharge, Connected with the work, Medical leave

CITE AS: Fulton v Ring Screw Division, No. 83174 (Mich App January 13, 1986); lv den 426 Mich 866 (1986).

Appeal pending: No

Claimant: Caroll Fulton
Employer: Ring Screw Division
Docket No: B83 00815 90628W

CIRCUIT COURT HOLDING: Claimant's failure to obey an order of the employer is not disqualifying misconduct when claimant was on a medical leave at the time and the employer suffered no harm as a result.

FACTS: Due to an injury, claimant was placed on a medical leave of absence. Claimant went to the plant to get his vacation check. Employer told claimant that his check was not available at that time because his collection of unemployment benefits required that the check be recalculated. Claimant became angry. When claimant started to exit the building, he was told not to leave through the production area without safety glasses. Claimant refused, and eventually during the heated discussion, shoved the employer.

DECISION: Claimant is not disqualified for misconduct.

RATIONALE: "The board of review con
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constitutes statutory misconduct be
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Section 29(1)(b)

MISCONDUCT, Single instance, Falsification of records, Curbstoning

CITE AS: Johnson v Michigan Consolidated Gas Co., No. 91185 (Mich App July 10, 1987); lv den 429 Mich 880 (1987).

Appeal pending: No

Claimant: Rene Johnson
Employer: Michigan Consolidated Gas Co.
Docket No: B85 02164 99380W

COURT OF APPEALS HOLDING: A single instance of falsification of records can support a disqualification for misconduct.

FACTS: Claimant was employed on a fulltime temporary basis as a collector. Her duties involved going to the homes of delinquent customers and either collecting the amount due or turning off the gas service and locking the meter. Claimant was discharged for leaving her route without permission, falsifying her records, and "curbstoning" a lock - a practice of reporting a shut off of gas service and the locking of a meter when in fact that did not occur. Claimant had not been disciplined for any prior violations of the employer's work rules.

DECISION: Claimant is disqualified under Section 29(1)(b).

RATIONALE: The court of appeals did not dispute the findings of fact that claimant had left her route without permission and altered her work records to reflect stops she did not make. Nevertheless the court concluded those violations did not amount to disqualifying misconduct under Carter.

The court did find the single instance of "curbstoning" to be misconduct. Although conceding there may have been legitimate reasons the claimant was unable to shut off the meter in question, claimant proceeded to report she had terminated gas service to that location though she had not. As a result the customer received two months of gas service. As demonstrated by the fact the employer maintains a special investigation unit to handle gas thefts, this is a matter of serious concern to the employer. Further, incorrect records can aid in the theft of gas and also contribute to billing errors and customer dissatisfaction. Taking all of these factors into account, misconduct was established.

Section 29(1)(b)

MISCONDUCT, False statement to Commission, Fraud, Connected with work

CITE AS: Staples (General Motors Corp), 1991 BR 114261 (B89-10370).

Appeal pending: No

Claimant: Sophia R. Staples
Employer: General Motors Corp
Docket No: B89 10370 114261

BOARD OF REVIEW HOLDING: Intentional misrepresentation of an unemployment benefit claim is as a matter of law work connected misconduct and disqualifying under Section 29(1)(b).

FACTS: Claimant worked for the employer from September, 1987 until May, 1989. In September, 1988 claimant called in ill one day and reported to the MESC claiming she was laid off. She continued to work and received benefit checks for weeks ending October 8, 1988 and October 22, 1988. Claimant specifically told the MESC she was laid off and was not an employee during this period. On March 9, 1989 the Commission issued a determination that was not appealed which found that claimant owed restitution and a penalty for intentionally misrepresenting her work situation in order to receive benefits. As a result of claimant's misrepresentation to secure benefits while employed, she was discharged.

DECISION: Claimant is disqualified for benefits under Section 29(1)(b).

RATIONALE: The courts are split on the interpretation of whether falsification of an application for unemployment benefits constitutes misconduct. In GMC v Belcher, No 78-832-459-AE (October 3, 1979) and Chrysler Corp. v Douglas, No. 10-1015 (June 6, 1968), the Wayne Circuit Court found that this was not sufficiently work connected and claimant was not disqualified.

However, in Chrysler Corp. v Hartman, Wayne Circuit Court, No. 10-0157 (May 2, 1968) and Chrysler Corp. v Williams, Wayne Circuit Court, No. 10-0070 (May 2, 1968) and most recently in GMC v Hemphill, Washtenaw Circuit Court, No. 86-31122-AE (November 14, 1986), the courts felt that as a matter of law, falsification of an unemployment benefit application document constitutes misconduct against the employer.

The Board noted that none of the above cited cases were a precedent on the Board. After a review of these cases, the Board adopted the analysis of Hemphill and held as a matter of law that intentional misrepresentation of an unemployment benefit claim is work connected misconduct and disqualifying under Section 29(1)(b) of the MES Act.

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Section 29(1)(b)

MISCONDUCT, Alcoholism, Substance abuse program, Absences

CITE AS: General Motors Corp v Chaffer, No. 90-40210-AE-3, Saginaw Circuit Court (September 28, 1990).

Appeal pending: No

Claimant: Morris R. Chaffer
Employer: Saginaw Division, GMC
Docket No: B88 11350 110563

CIRCUIT COURT HOLDING: An alcoholic with a history of chronic absenteeism who fails to take advantage of an available treatment program evidences a wilful disregard for the employer's interest.

FACTS: The claimant, an alcoholic, had an absentee rate of over 40%. The bulk of claimant's absences were alcohol related.

In an effort to address the claimant's difficulty the employer made available to him a substance abuse program. The claimant refused to participate and was consequently discharged.

DECISION: The claimant evidenced a wilful disregard for the employer's interest and was therefore disqualified for benefits under the misconduct provision of the MES Act, Section 29(1)(b).

RATIONALE: The court recognized that the claimant's absences were due to alcoholism and therefore beyond his control. Accordingly, those absences could not be considered disqualifying under Washington v Amway Grand Plaza, 135 Mich App 652 (1984). However, the court reasoned the claimant's failure to take advantage of an available substance abuse treatment program in order to address his alcoholism and the resulting absenteeism evidenced a substantial disregard for the employer's interest. Hence, the claimant was disqualified for benefits under the misconduct provision of the MES Act, Section 29(1)(b).

Section 29(1)(b)

MISCONDUCT, Absences, Alcoholism

CITE AS: Grisdale v Michigan Consolidated Gas Co, No. 88-4742-AE, Isabella Circuit Court (December 22, 1989).

Appeal pending: No

Claimant: Gerald Grisdale
Employer: Michigan Consolidated Gas Co
Docket No: B87 02741 105586

CIRCUIT COURT HOLDING: Claimant's alcoholism did not mitigate against disqualification when his pattern of behavior showed an intentional disregard for the employers interest.

FACTS: Claimant worked for the employer from 1964 until discharged in December, 1986. He had a substantial disciplinary record as a result of his drinking. His first disciplinary layoff was in 1970. His second in August, 1976. He received disciplinary layoffs in December, 1976 and June, 1978 also related to drinking. In June, 1979 he was discharged and later reinstated under an agreement that further drinking would result in discharge.

Claimant entered treatment for alcoholism on September 28, 1986. He returned to work on November 11, 1986 and was reminded of the previous agreement on November 18, 1986. He walked off the job without permission twice and did not return to work after the lunch break. Claimant was subsequently discharged.

DECISION: Claimant is disqualified for misconduct under Section 29(1)(b).

RATIONALE: Claimant received numerous warnings about his drinking and the employer gave claimant numerous opportunities to correct his behavior. Claimant leaving work twice without the employer's permission constituted an intentional disregard for the standard of behavior an employer has a right to expect. The court rejected Hislop (Cherry Hill School District), B78-17083-66126.

Section 29(1)(b)

MISCONDUCT, Burden of proof

CITE AS: Fresta v Miller, 7 Mich App 58 (1967).

Appeal pending: No

Claimant: Geraldine V. Miller
Employer: Rosario Fresta & Rosaria Fresta & Guiseppe Ravida and Rosina Ravida d/b/a Eastman's Cocktail Lounge
Docket No: B64 2541 RO 32857

COURT OF APPEALS HOLDING: The employer has the burden of proving that a claimant's discharge was for disqualifying misconduct.

FACTS: Claimant informed the employer she had injured her back and was not able to work in her position as a waitress. The claimant was subsequently seen elsewhere having a drink at a bar and going on a boat ride on days she had refused to work because of her back injury. Claimant was discharged.

DECISION: Claimant is not disqualified under Section 29(1)(b).

RATIONALE: Generally the burden of proof is on the party establishing eligibility for benefits. However, statutory misconduct is the employer's defense to claimant's claim for benefits and the facts to prove misconduct are within the knowledge and control of the employer. The employer has the burden to establish misconduct.

MISCONDUCT, Series of incidents, Last straw doctrine, Evidence, Business records, "Last straw"

CITE AS: Giddens v Employment Security Commission, 4 Mich App 526 (1966).

Appeal pending: No

Claimant: Marlin E. Giddens
Employer: General Motors (Fisher Body Division)
Docket No: B63 6519 31993

COURT OF APPEALS HOLDING: A series of acts, considered together, can establish a wilful disregard for the employer's interest and be disqualifying misconduct.

FACTS: Claimant was an employee from 1955 to his discharge in October, 1963. Claimant had been warned and placed on several disciplinary suspensions for being absent without cause, careless workmanship, abusive language, refusal to do assigned jobs, and tardiness. In May, 1963 he signed a "last chance" statement. Claimant was absent without notice on October 17, and 18, 1963. He reported to work on his next scheduled day and was discharged.

DECISION: Claimant is disqualified for misconduct under Section 29(1)(b).

RATIONALE: Claimant contends the referee erred in accepting the employer's records into evidence. The court held the documents were properly admitted. "[O]ther circumstances regarding the records, specifically lack of personal knowledge ... may be shown to affect its weight by not its admissibility."

The court found claimant's prior acts were not so remote or dissimilar to his last acts as to avoid disqualification: "We find no mandate that the incident ultimately resulting in discharge must be closely allied in time or tenor. There is no requirement they all be of the same nature or the same type of infraction of rules. Indeed, if we were to sum up the latitude to be permitted an employer in dealing with a recalcitrant employee who has consistently demonstrated disregard for the employer's interests, we might call it a "last straw" doctrine in which the final infraction, though unrelated to previous infractions, is of such a nature that it demonstrates conclusively the employee's utter disregard for the employer's interests."

last straw doctrine

NOTE: See Christophersen v Menominee, 137 Mich App 776 (1984) Digest page 12.07 for clarification of Giddens.

Section 29(1)(b)

MISCONDUCT, Standard of conduct, Constructive voluntary leaving

CITE AS: Wickey v Employment Security Commission, 369 Mich 487 (1963).

Appeal pending: No

Claimant: Robert Wickey
Employer: Chicago, Duluth, & Georgian Bay Transit Co
Docket No: B59 4276 24021

SUPREME COURT HOLDING: The doctrine of constructive voluntary leaving was rejected and claimant's failure to return to the ship was not disqualifying as a voluntary quit. However, claimant's actions were disqualifying misconduct.

FACTS: Claimant was night watchman aboard the SS South American, a passenger ship. While the ship was docked and Wickey was off duty, he went to shore and attended a movie, which resulted in his failure to return to the ship in time for her departure. Claimant traveled to the next port of call. He waited two days for the ship, which had been delayed, then went home. Two day's later he contacted the employer's office and was told he was discharged.

DECISION: The Court concluded Wickey's failure to return to the ship constituted disqualifying misconduct.

RATIONALE: Accepting claimant's testimony, he had a duty to return to the ship by 8:30, he disregarded this duty and did not return until 9:15. This was a wilful disregard of the employer's interest.

The Court noted the special responsibilities of the claimant's position as watchman, given the hazards to life and property from an undetected fire at sea. It quoted with approval the following reasoning of the referee: "There are times of course and different types of jobs that carry with them considerable more responsibility than others, for instance night work or fireman in a plant has exceeding responsibility that does the ordinary worker in the plant. What might be a violation of misconduct as far as a watchman is concerned might not be for another employee.... In determining whether or not an individual has committed an act of misconduct for which he is discharged we must take into consideration all of the facts and particularly the degree of responsibility the claimant owes to the employer and what his infraction of the rules means as far as hardship or trouble to the employer."

degree of responsibility important in determining misconduct

6/91
NA

Section 29(1)(b)

MISCONDUCT, Insubordination, AIDS patient

CITE AS: Cook v Hackley Hospital, No. 84-19275-AE, Muskegon Circuit Court (May 15, 1985).

Appeal pending: No

Claimant: Jill M. Cook
Employer: Hackley Hospital
Docket No: B83 18855 94518W

CIRCUIT COURT HOLDING: Claimant discharged for refusing to treat an A.I.D.S. patient was not disqualified for misconduct when she had not been assured the disease could not be transmitted by personal contact with the patient.

FACTS: Claimant was employed as an LPN-2. Her duties included physical care of patients such as bathing, feeding, changing dressing on wounds and other treatments as needed. She had not previously been disciplined. She was fired for insubordination.

On the day of the incident in question claimant was assigned to two (2) areas, one of which was an isolation unit. Claimant was informed there was an A.I.D.S. patient in the area. She consulted with her supervisor and informed them that due to health and safety reasons, she could not work with an A.I.D.S. patient. She requested a transfer of assignments which was denied. She was informed if she refused her assigned duties she would face disciplinary action. She refused and was subsequently terminated.

DECISION: Claimant is not disqualified for misconduct under Section 29(1)(b).

RATIONALE: "The claimant feared for her personal safety and health since she had not been assured that the disease could not be transmitted by personal contact with the patient ... The employer has failed to prove misconduct connected with work within the meaning of MCL421.29(1)(b)."

12.65

Section 29(1)(b)

MISCONDUCT, Poor performance

CITE AS: Davis v Plastics Technologies, Inc, No. 96845 (Mich App December 28, 1987).

Appeal pending: No

Claimant: Pleasie Davis
Employer: Plastics Technologies, Inc
Docket No: B85 09719 101071W

COURT OF APPEALS HOLDING: Claimant is disqualified for misconduct where she had been given prior warnings and a suspension, and, despite a demonstrated ability to properly perform her duties, then produced defective parts amounting to 70% of her output, even though the defects were readily detectable.

FACTS: Claimant had previously received a written warning and, a week later, a suspension for producing excessive scrap or careless workmanship.

Claimant was assigned to a press inserting a number of screw inserts into a part. These inserts were to be flush, and it was claimant's job to inspect and report to supervision if there were problems. At the start of her shift she complained to the supervisor, but was able with instruction to run the parts correctly. At the end of her shift claimant had produced 220 parts, of which 150 were defective - missing the screw inserts or the inserts not being flush. These defects would have been easily detected by visual inspection.

The normal scrap on that part would have been 5 to 7%.

DECISION: Claimant is disqualified for misconduct under Section 29(1)(b) of MES Act.

RATIONALE: Claimant's actions reflect a substantial unexplained neglect of her duty to inspect the parts. This was such a wanton disregard of her obligations to be the equivalent of wilful or deliberate disregard for the employer's interest.

6/91
6, 15, d11:E

Section 29(1)(b)

MISCONDUCT DISCHARGE, Labor dispute, Illegal strike, Air traffic controllers

CITE AS: Conaway v Federal Aviation Administration, No. 90-002695 AE, Wayne Circuit Court (October 30, 1990).

Appeal pending: No

Claimant: Steven Conaway, et al
Employer: Federal Aviation Administration
Docket No: UCF81 89419 RO1 94173

CIRCUIT COURT HOLDING: Participation by public employees in an illegal strike is disqualifying misconduct under Section 29(1)(b).

FACTS: Claimants were air traffic controllers. On August 3, 1981 the Professional Air Traffic Controllers Organization (PATCO) called a strike. President Reagan announced that controllers who failed to report to work before expiration of a 48-hour grace period on August 5 would be terminated. Claimants did not report and were discharged. At the time of hire, Federal employees, including air traffic controllers, are required to execute an affidavit to the effect they will not participate in a strike against the government. In addition, Title V U.S.C. 7311 contains a prohibition against Federal employee strikes, violation of which is punishable by criminal sanctions. (In related cases the Board of Review held that the labor dispute disqualification ended during the week ending August 8, 1981, the week claimants were discharged. Savage (FAA) 1985 BR 94344 (UCF81-87803 RO1).

DECISION: Claimants are disqualified for misconduct.

RATIONALE: The circuit court quoted from the Board of Review decision: "During the summer of 1981, the air traffic controllers were reminded of the oath they took and the illegality of a strike. Nevertheless, they went on strike on August 3, 1981.... [T]hese claimants made a deliberate choice not to return and only after they failed to return to work were they discharged. Under these circumstances, we find misconduct."

Section 29(9)

MISCONDUCT, Negligence, Serious Consequence, Single instance, Truck driver

CITE AS: Golembiewski v Complete Auto Transit, No. 89-1046-AE, Genesee Circuit Court (April 2, 1990).

Appeal pending: No

Claimant: Arthur Golembiewski
Employer: Complete Auto Transit
Docket No: B88 12018 110101

CIRCUIT COURT HOLDING: Claimant's accident occurred for reasons of negligence in that claimant was distracted by a malfunction in his equipment and forgot to lower a ramp. The fact that this single act of negligence caused so much damage does not raise the negligence to the level of misconduct.

FACTS: Claimant worked as an over-the-road driver of a car-hauling truck. On April 12, 1988 the truck which claimant was driving struck an overpass causing damage in excess of $16,000. On April 12, 1988 the employer gave claimant a disciplinary layoff. The accident was caused by claimant's negligence. The claimant had no prior major accidents.

DECISION: Claimant's layoff not for reasons amounting to misconduct pursuant to Section 29(9).

RATIONALE: "Now, I have recognized that the employer says, well, it costs us a lot of money; our insurance rates have probably gone through the roof. How can we forget to lower ramps and hit overpasses? I understand all of that, but you're talking here about misconduct and I don't think it exists. And I think that the Board of Review abused their discretion -- I should say they applied the wrong standard for misconduct, and as a result of it it should be reversed and the benefits paid to the claimant...."

Section 29(1)(b)

MISCONDUCT, Absences and tardiness, Credibility

CITE AS: Hale v Aetna Industries, Inc., No. 101931 (Mich App May 8, 1989).

Appeal pending: No

Claimant: Richard Hale
Employer: Aetna Industries
Docket No: B84 08736 97718W

COURT OF APPEALS HOLDING: Frequent and unexcused absenteeism over a relatively short period of time may constitute misconduct.

FACTS: Employer had a progressive disciplinary procedure for dealing with habitual absenteeism. Based upon a number of unexcused absences, claimant reached the 3rd and final step of termination after being absent 3 times without an acceptable excuse in March 1984. On March 10, 1984, claimant failed to appear to work mandatory Saturday overtime. He had been on a disciplinary lay off the preceding week but came to the plant to pick up his check on Friday, March 9th. He claimed that an unidentified individual in personnel told him there was no mandatory overtime on Saturday. That testimony was disputed by the employer's witnesses. Claimant said his car battery died on Monday, March 12 and as a result he did not work that day. He did not provide any documentation to support his explanation. On March 23, claimant's son called in to say claimant was ill. Claimant did not see a doctor. Pursuant to the employer's attendance policy claimant was fired in April 1984 for having 3 unexcused absences during March. The Referee found the employer's testimony to be more credible than claimant's.

DECISION: Claimant was discharged for disqualifying misconduct within the meaning of Section 29(1(b) of the MES Act.

RATIONALE: Claimant's testimony was found not credible by the trier of fact as to the three absences which precipitated his discharge. Claimant had clearly been put on notice of employee's interest and concern relative to his attendance by means of the previous discipline imposed. A reviewing court should not disturb the credibility finding of the fact-finder absent corroborating evidence to the contrary.

Section 29(1)(b)

MISCONDUCT, Series of incidents, Poor performance

CITE AS: Watson v Holt Public Schools, No. 92348 (Mich App March 26, 1987).

Appeal pending: No

Claimant: Paul Watson
Employer: Holt Public Schools
Docket No: B85 02146 99580W

COURT OF APPEALS HOLDING: A disqualification for misconduct may be supported by leaving work 15 minutes early in light of an unsatisfactory work record and prior discipline.

FACTS: Claimant worked for employer as a custodian. During two and one-half years of employment he received 8 reprimands, mostly for unsatisfactory work performance. One was for leaving work 2.5 hours early without permission. Subsequent to compiling this unfavorable record, claimant was observed leaving work 15 minutes early. He was suspended and ultimately discharged for a second offense of leaving work early coupled with an unsatisfactory work record.

DECISION: The claimant is disqualified for misconduct.

RATIONALE: Claimant's actions collectively amounted to misconduct under the statute. Claimant knew employer was dissatisfied with his performance and still left work early. That in itself was evidence of a disregard for the employer's interests.

Section 29(1)(b)

MISCONDUCT, Seven day work week, Religious beliefs, Circuit court standard of review

CITE AS: Detroit Gravure v Emp. Sec. Comm., 366 Mich 530 (1966).

Appeal pending: No

Claimant: Leon C. Curry
Employer: Detroit Gravure Corp.
Docket No: B60 2055 24760

SUPREME COURT HOLDING: The claimant's discharge from employment because of his refusal to work on Sunday is not disqualifying.

FACTS: The claimant was hired in January of 1957 as the employer's pressroom porter. Claimant's duties required him to work 7 days a week. He was paid overtime for working Saturdays and Sundays. In early 1960 claimant informed his superintendent that he wanted some Sundays off to attend church. He was not given a definite answer. On February 6, 1960 claimant was instructed to be at work the following Sunday. Claimant refused and informed the superintendent that he would no longer work on Sundays. Claimant was discharged.

DECISION: Claimant is not disqualified.

RATIONALE: The Commission's finding that claimant's refusal to work on Sundays was not misconduct as defined by Cassar v Employment Security Commission, 343 Mich 380 is not contrary to the law.

"Some day, hopefully before we meet in the sweet bye and bye according to the old hymn, all lawyers and judges - and possibly all others who work themselves into a pluperfect tizzy every time this Court divides on the decisional rock of an umemployment compensation case - will have learned that administrative decisions have to be left to the broad discretion of appointed administrators and that the courts may interfere and reverse only when it is found judicially that some controlling rule of law quite unfounds what such administrators have done. Which is to say again that our circuit judges should not, nor should we in turn, hear and decide unemployment benefit cases de novo."

12.71

Section 29(1)(b)

MISCONDUCT, Loyalty oath, Union organizing

CITE AS: Standard Automotive Parts Co. v MESC, 3 Mich App 561 (1966).

Appeal pending: No

Claimant: Ronnie Romans
Employer: Standard Auto Parts Company
Docket No: B61 8480 28089

COURT OF APPEALS HOLDING: A claimant who was summarily discharged because he refused to sign a "loyalty oath" until after consulting with the union about his status, is not disqualified for misconduct.

FACTS: Towards the end of his employment, claimant was put in charge of the lathe department. He supervised production and quality control. He handled minor discipline, recommended merit increases. He was paid 20 cents more per hour than his lathe operators. When the AFL-CIO sought to organize at employer's shop, claimant's name appeared on a list of prospective organizers. Employer demanded that claimant sign a document promising to remain neutral and not to engage in any union organizing activities. Claimant asked to make a phone call to ascertain his rights prior to deciding whether or not to sign. He was refused permission to make the call and was told to sign or be dismissed. Claimant refused to sign and was fired.

DECISION: Claimant is not disqualified.

RATIONALE: Claimant was not fired because of the fact that he was a supervisor who was engaged in aiding and abetting union organizing activities or doing anything else inimical to his role. He was fired solely for his refusal to sign an oath of loyalty to employer. Claimant was given a peremptory order to sign a document disavowing any union organizing activity. The employer took the position such activity by claimant would subject the employer to charges of unfair labor practices under the provisions of the Labor-Management Relations Act of 1947, as amended. Employer further took the position that as a supervisor, claimant could be expected to sign the document and his refusal was an act of misconduct. Claimant's status as supervisor is not the issue. The issue is the nature of what claimant was asked to do and the circumstances under which he was asked to do it.

Section 29(1)(b)

MISCONDUCT, Failure to maintain a prerequisite of employment, Driver's license, Loss of license, Taxi driver

CITE AS: Phillips v E.S.C., 373 Mich 210 (1964).

Appeal pending: No

Claimant: Jefferson Clay
Employer: Eunice Phillips
Docket No: B61 5772 27453

SUPREME COURT HOLDING: Failure to maintain a necessary prerequisite for employment such as a chauffeur's license is a form of misconduct in connection with work.

FACTS: Claimant drove a taxicab for employer until his driver's license was revoked by the Secretary of State.

DECISION: Claimant was disqualified for misconduct within the meaning of the misconduct discharge provisions of the MES Act.

RATIONALE: The fact that claimant lost his license to operate a taxicab because he violated conditions upon which the license was granted and as a result was unable to continue driving, justified his disqualification for unemployment benefits. Claimant deliberately committed the acts which resulted in the loss of his license.

Section 29(1)(6)

MISCONDUCT, Garnishment, Connection with work, Rule of selection

CITE AS: Reed v MESC, 364 Mich 395 (1961).

Appeal pending: No

Claimant: Willie Reed
Employer: Grant Brothers Foundry Company
Docket No: B57 5250 RO 20493

SUPREME COURT HOLDING: Claimant is not disqualified for misconduct in connection with his work within the meaning of the MES Act.

FACTS: Employer had a rule that an employee would be discharged if his wages were garnished more than once. Four garnishments of claimant's wages were served on the employer within a 9 month period. Claimant was fired.

DECISION: Claimant is not disqualified under the misconduct discharge provisions where no connection with the work was established.

RATIONALE: Even if claimant's going in debt and failure to pay were misconduct, those acts were not connected with his work. "We do not suggest that infraction of a company rule governing conduct on the job or connected with the work may never amount to disqualifying misconduct. Here, however, we have a rule of selection rather than one of conduct. That is to say, the rule does not govern an employee's conduct connected with his work, but rather, sets forth a condition of employment and continuance therein. It covers the selection and retention of employees, not their conduct on the job or connected with their work. Breach thereof may entitle the employer to discharge his employee, but such discharge is not for misconduct connected with his work as contemplated by the statute."

Section 29(1)(b)

MISCONDUCT, Absences and tardiness, Lack of warning

CITE AS: Lynch v Highland Appliance, No. 111410 (Mich App September 11, 1989).

Appeal pending: No

Claimant: Michael Lynch
Employer: Highland Appliance
Docket No: B85 06593 100612

Disqualifying Misconduct? Series of acts clmt not warned job in jeopardy

COURT OF APPEALS HOLDING: Disqualifying misconduct may be based on a series of infractions even if the claimant is not warned his or her job is in jeopardy.

FACTS: Claimant was chronically tardy and absent and received numerous warnings. Claimant received a written warning on January 2, 1985 for 9 consecutive tardies. He reported late on January 3 and was discharged on January 4, 1985.

DECISION: Claimant is disqualified under Section 29(1)(b).

RATIONALE: Claimant's position was that he was never told his job was in jeopardy because of his attendance and therefore, his act of being late on January 3 was not misconduct. Claimant did not dispute that he had a history of unexcused absences and tardiness. It is well established a finding of misconduct may be based on claimant's actions as a whole even though one infraction by itself might not arise to the level of misconduct. There is no support under Michigan law for the proposition that an employee must be warned their job is in jeopardy in order for the discharge to be disqualifying.

12.75

Section 29(1)(b)

DISCHARGE, Drug testing, Evidence

CITE AS: Sullivan v MESC, No. 88-15431-AE, Monroe Circuit Court (November 20, 1989).

Appeal pending: No

Claimant: Susan Sullivan
Employer: Manpower Inc. of Southeastern Michigan
Docket No: B84 10878 98346, et al

CIRCUIT COURT HOLDING: One unconfirmed drug test is not enough to satisfy the burden of proving that drugs were used by the claimant and does not conclusively establish acts of misconduct connected with her work.

FACTS: Claimant was an employee of Manpower, Inc. and was assigned to work at Detroit Edison's Fermi 2 Nuclear Power Plant as a procedure writer. In compliance with Edison's requirements, all Manpower employees were required to submit to a drug screen of a urine sample. Manpower reserved the right to make employment decisions based on an analysis of the sample. The claimant submitted a specimen which was subject to an immunoassay procedure which revealed a "presumptively positive" result for the presence of marijuana. Although more reliable, no confirmatory test by gas chromatography, radioimmuno-assay, or high pressure liquid chromatography was performed. The claimant was discharged as a result of the test.

DECISION: The claimant is not disqualified from receiving unemployment benefits.

RATIONALE: The Court adopted the opinion of the dissenting members of the Board of Review which noted that no evidence of use, possession or impairment from illegal drugs was presented and which emphasized that the employer's physician witness acknowledged that a "presumptively positive" result from the immunoassay procedure should be confirmed by other testing methods.

12/91
3, 13, 4; d11, 14:E

Section 29(1)(b)

MISCONDUCT, Tape recording

CITE AS: Kunz v Mid-Michigan Regional Medical Center, unpublished per curiam Court of Appeals, December 6, 1991 (No.181965).

Appeal pending: No

Claimant: Hazel Kunz
Employer: Mid-Michigan Regional Medical Center.
Docket No. B91-18373-121595W

COURT OF APPEALS HOLDING: Claimant's secret taping of a private conversation between herself and her supervisor was deliberately done to discredit her supervisor and is disqualifying misconduct.

FACTS: Claimant had been suspended after repeated failures in work performance. Upon returning to work the claimant requested to meet with her supervisor. She came into the meeting carrying a concealed tape recorder and secretly recorded the meeting. After the meeting was concluded she played the recording for her husband and told a co-worker she had taped the meeting with her supervisor. The claimant testified she taped the meeting because after previous conversations with her supervisor, her supervisor could not recall what he said. This way she could keep the record straight.

DECISION: The claimant is disqualified for misconduct.

RATIONALE: The Referee summarized the reasons claimant gave for recording the meeting. He did not expressly state whether he did or did not believe the claimant, however, this does not mean the Referee did not consider her explanation in reaching his conclusion.

The claimant's conduct of secretly recording her conversation with her supervisor was deliberate. The fact she immediately shared this information with her husband and a co-worker reveals her intent was offensive rather than defensive. It was done to discredit her supervisor and involve a co-worker in her scheme. This was not a good faith error in judgment.

7/99
24, 17, d12: F

12.77

Section 29(1)(b)

MISCONDUCT, Insubordination, Single incident

CITE AS: Garden City Osteopathic Hospital v Marsh, Wayne Circuit Court No. 91-125850-AE (February 27, 1992).

Appeal pending: No

Claimant: Diane Marsh
Employer: Garden City Osteopathic Hospital
Docket No. B89-12647-114878

CIRCUIT COURT HOLDING: The claimant's refusal to work a midnight shift she had previously worked and her refusal to supply medical documentation to justify that refusal was disqualifying misconduct.

FACTS: The claimant worked for the employer as an assistant in the laboratory which operated 24 hours a day. For a period of time employees, including claimant, were scheduled to rotate through a midnight shift on weekends. An employee was subsequently hired to work the midnight shift. A year later the midnight shift employee needed to be absent for a medical procedure and the employer again scheduled the employees, including claimant, for a rotation through the midnight shift on the weekends. The claimant refused to work the midnight shift. She first indicated she was busy and later refused because it allegedly made her ill. She was told to bring in medical verification that working the midnight shift made her ill so it could be reviewed by the hospital. The claimant refused to work the midnight shift or bring in the medical verification and was fired.

DECISION: The claimant is disqualified for misconduct.

RATIONALE: The claimant's position description and the employer's handbook made it clear the employer reserved the right to schedule the claimant as needed. The claimant previously worked the midnight shift. The reason the employer needed to rotate the claimant to the midnight shift was because of the medical problems and resulting three month absence of the regular midnight shift employee. The claimant's refusal to work as requested was disqualifying misconduct. An employer is not obliged to accept an employee's protestations at face value but is entitled "to ask for some modicum of evidence of the claimant's asserted disability..." Insubordinate behavior need not be repeated to be disqualifying misconduct.

7/99
14, 12, d3

12.78

Section 29(1)(b)

MISCONDUCT, Last-chance agreement, Connected with work, Rule of selection

CITE AS: Trevino v General Motors Corp, Ingham Circuit Court, No. 95-81144-AE (April 17, 1996).

Appeal pending: No

Claimant: Dario Trevino
Employer: General Motors Corporation
Docket No. FSC94-00243-131704W

CIRCUIT COURT HOLDING: It is not disqualifying misconduct where a claimant violated a last-chance agreement and the requirement or rule in such contract is not connected with the claimant's work.

FACTS: The employer discharged the claimant for failing to document his attendance at Alcoholics Anonymous meetings as set forth in a last-chance agreement. The claimant admitted he had an alcohol abuse problem. He attended four or five AA meetings per week. He did not provide written verification of his attendance at most of the meetings because he did not remember being told to do so. The claimant was illiterate and did not understand the last-chance agreement.

DECISION: The claimant is not disqualified for benefits under Section 29(1)(b).

RATIONALE: The employer had to show the claimant deliberately violated the provision of the last-chance agreement by failing to provide written verification of his attendance at AA meetings. The most that was established was the claimant failed to understand what was expected of him. The claimant's "admitted alcoholism and his failure to abide by the last-chance agreement's requirement of written verification of his attendance at AA meetings were not work-related and thus could not constitute statutory misconduct."

7/99
24, 16, d12: J

12.79

Section 29(1)(b)

MISCONDUCT, Drug testing, Treatment program

CITE AS: Breeding v Layne-Northern Co, Berrien Circuit Court No. 96-3726-AE-T (February 24, 1997)

Appeal pending: No

Claimant: Carl R. Breeding
Employer: Layne-Northern Company
Docket No. B95-11686-138540

CIRCUIT COURT HOLDING: An employee's refusal to participate in an EAP when participation is required for the employee to return to work, is disqualifying misconduct.

FACTS: The employer suspended and later discharged the claimant for testing positive on a random drug screen for marijuana and for refusing to participate in an Employee Assistance Program (EAP). The employer had a random drug testing policy pursuant to Department of Transportation regulations. Under the employer and DOT policy, if an employee tested positive for drugs, the employee is suspended and must participate in an EAP to return to work. The employer allowed an employee with a positive drug test to have the sample retested at the employee's expense if the retest was positive. The claimant denied using marijuana but did not request a retest. The claimant met with a counselor. The counselor concluded the claimant had a drinking problem rather than a drug abuse problem. The counselor recommended the claimant attend drug counseling and AA meetings. The claimant refused.

DECISION: The claimant is disqualified for benefits under Section 29(1)(b).

RATIONALE: The phrase "work connected" is not to be narrowly construed so as to apply only to misconduct occurring at the workplace. Parks v MESC, 427 Mich 224, 238 (1986). The claimant's refusal to participate in an EAP resulted in his inability to return to work. These actions were misconduct in wilful or wanton disregard of the employer's interests.

The claimant raised a number of constitutional issues on appeal to the circuit court that had not been before the Referee or Board of Review. The court declined to consider those issues as its scope of review was limited only to questions of law and fact on the record before the Referee and Board of Review.

7/99
24, 16, d12: K

Section 29(1)(b)

MISCONDUCT, Insubordination, Medical test

CITE AS: Swafford v Bronson Methodist Hospital, Allegan Circuit Court, No. 96-19617-AE (September 23, 1996); lv den Mich App No. 198426 (March 25, 1997)

Appeal pending: No

Claimant: Dean J. Swafford
Employer: Bronson Methodist Hospital
Docket No. B94-10537-133439W

CIRCUIT COURT HOLDING: Claimant's conduct cannot be found to evince wilful or wanton disregard of the employer's interest where the record does not establish that the spirometer test did not contravene the advice of the employee's physician or that he did not reasonably and in good faith believe that compliance would jeopardize his safety.

FACTS: Claimant worked as a security guard in the employer's parking lot. In October of 1993, the claimant began working inside as a greeter due to a respiratory problem. Exhaust fumes and cold temperatures irritated his respiratory system causing illness. The claimant was off work part of January due to illness. The employer arranged for the claimant to undergo a spirometer test to determine which temperatures the claimant could tolerate. The employer's physician initially secured permission from the claimant's physician to perform the test. Later the claimant's physician withdrew his permission due to concern over subjecting the claimant to adverse conditions. Claimant's physician gave the claimant a note restricting him from taking the test. The claimant attempted to submit the note to the employer, but it was refused. On February 21, 1994, the employer made taking the test a condition of employment. Claimant refused and the employer discharged him.

DECISION: The claimant is not disqualified for benefits under Section 29(1)(b).

RATIONALE: Employee refusals to comply with an order are justified where such order contravened the advice of the employee's physician or where the employee established he reasonably and in good faith believed that compliance would jeopardize his safety. The claimant testified his physician advised him not to take the test. This was confirmed by the testimony of the employer's physician. The testimony of the employer's physician established the test was potentially dangerous, since he intended to test the claimant ten feet away from an emergency room in case of problems.

7/99
24, 16,d22: N/A

12.81

Section 29(1)(b)

MISCONDUCT, False statement on employment application, Illiteracy

CITE AS: Betts v Okun Brothers Shoes, Kalamazoo Circuit Court No. E 94-3073-AE (April 14, 1995)

Appeal pending: No

Claimant: Jimmy Betts
Employer: Okun Brothers Shoes
Docket No. B93-07727-129023W

CIRCUIT COURT HOLDING: Failing to disclose criminal record information on an employment application, even if the application was completed by another person, demonstrates a wilful or wanton disregard for the employer's interest.

FACTS: The employer hired the claimant, relying on statements the claimant made in his employment application and personal interview. More than two years later, the employer had a security check done on all warehouse employees, including the claimant, due to problems with theft. The employer discharged the claimant after receiving the security report showing six different felony convictions before the claimant's date of hire. The claimant asserted he was illiterate and did not complete the employment application. The claimant asserted his girlfriend completed the application on his behalf, filled out the form on her own, and was unaware of his criminal record. The claimant admitted he did not inform the employer during the interview about his criminal record, and he did not intend to provide that information unless specifically asked.

DECISION: The claimant is disqualified for benefits under Section 29(1)(b).

RATIONALE: The claimant's failure to disclose his criminal record can "be interpreted as a conscious scheme to avoid providing that information to the prospective employer." The court noted that the claimant's argument "might be more compelling if his girlfriend had asked him various questions on the application form and inaccurately completed them, rather than just filling in the form on her own." "The obvious purpose of an employment application is to obtain truthful information about the applicant so the employer can make an informed decision about whether to hire the applicant. It is the potential employee's obligation to make sure that the application is accurate." The claimant is responsible for "false information provided to the employer even if the application was completed by someone else on his behalf."

7/99
24, 18, d22: N/A

12.82

Section 29(1)(b)

MISCONDUCT, Condonation, After-acquired evidence

CITE AS: Fleet Engineers, Inc v Smith, Muskegon Circuit Court, Docket No. 95-32894-AE (December 21, 1995)

Appeal pending: No

Claimant: Kirk Smith
Employer: Fleet Engineers
Docket No. B92-27669-RO1-125153

CIRCUIT COURT HOLDING: When the employer by its own conduct over a substantial period of time revealed it had no interest in preventing the acts which caused claimant's discharge, those acts cannot form the basis of a finding of misconduct. The "after-acquired" evidence rule is contrary to the language of Section 29(1)(b) since the employee was obviously not discharged for the complained of act.

FACTS: The employer discharged the claimant for allegedly intentionally ramming the forklift he was operating into another moving forklift. The record showed accidental and intentional bumping of forklifts by other forklifts "was a common occurrence, was known by supervisors to occur, and was considered so insignificant to plant safety that it was ignored by supervisors." The employer alleged subsequent to the Referee decision that it discovered the claimant was wrongfully selling company scrap and kept sale proceeds. The Referee denied the employer's request to put the "after-acquired" evidence on the record.

DECISION: The claimant is not disqualified for benefits under Section 29(1)(b) of the Michigan Employment Security Act.

RATIONALE: The claimant's "act of bumping the forklift could hardly be construed as constituting 'misconduct' as defined in Carter v Employment Security Commission, 364 Mich 538, 541 (1961)." The claimant's conduct could not constitute 'wilful and wanton disregard of an employer's interests' when the employer "by its conduct over a substantial period of time revealed that it had no interest in preventing lift trucks from occasionally bumping each other, either intentionally or accidentally." The court declined to apply the "after-acquired" evidence rule to the "sphere of unemployment compensation benefits cases" because "a judicial adoption of such a rule would be contrary to the plain language" of the statute which provides that "an individual shall be disqualified for benefits in cases in which the individual was discharged for misconduct." Since the claimant was not discharged for the "misconduct of embezzlement" the alleged embezzlement "cannot be a basis for a denial of unemployment benefits."

7/99
12, 24: B

12.83

Section 29(1)(b)

MISCONDUCT, After-acquired evidence

CITE AS: Children's Hospital of Michigan v Craddock, unpublished per curiam Court of Appeals, May 19, 1998 (No. 201014)

Appeal pending: No

Claimant: Patricia Craddock
Employer: Children's Hospital of Michigan
Docket No. B94-02013-131071

COURT OF APPEALS HOLDING: The plain meaning of Section 29(1)(b) limits the misconduct disqualification to conduct that formed the basis for the discharge.

FACTS: The employer discharged the claimant on October 4, 1993, for excessive tardiness and absenteeism. Four days later, the employer discovered that important computer files had been deleted the early morning of September 21, 1993. The employer concluded the claimant was responsible for deleting the records since she was the only employee on the premises with access to the records at that time.

DECISION: The claimant is not disqualified for benefits under Section 29(1)(b).

RATIONALE: The claimant's absences were due to illness, and not disqualifying. The employer did not discover the deleted computer files until after discharging the claimant. Deletion of the computer files was not a factor in the employer's decision to discharge the claimant. The employer argued the "after-acquired" evidence doctrine was applicable. The court noted that Section 29(1)(b) "plainly provides for disqualification from benefits for those discharged for misconduct connected with the individual's work." The court found that the "legislature is presumed to have intended the meaning it plainly expressed." The misconduct disqualification is limited to "conduct that formed the basis for the discharge. ...To broaden the misconduct disqualification to include allegations that did not bear on the decision to discharge the employee would be to fail to construe the disqualification narrowly, and to fail to respect the plain meaning of the words used."

7/99
21, 22: H

Section 29(1)(b)

MISCONDUCT, Drug testing, Evidence, Hearsay

CITE AS: Sortor v Ford Motor Company, Monroe Circuit Court No. 94-2456-AE (April 4, 1995)

Appeal pending: No

Claimant: Richard E. Sortor, Sr.
Employer: Ford Motor Company
Docket No. B93-05392-126985W

CIRCUIT COURT HOLDING: A drug test report is admissible hearsay since it is evidence of the type commonly relied on by reasonably prudent persons in the conduct of their affairs and carries an inherent reliability for administrative purposes.

FACTS: On February 29, 1992, the employer disciplined the claimant for illegal substance use and suspended him for a month. The employer required the claimant to sign a waiver allowing the employer to administer random drug tests during the next twelve month period. The waiver provided that if the claimant failed a subsequent drug test he would be discharged. On February 5, 1993, the employer discharged claimant after he failed a random drug test administered pursuant to the waiver. The claimant maintained he was taking a medication that interfered with the test results. A confirmation test was performed, which resulted in a positive finding.

DECISION: The claimant is disqualified for benefits under Section 29(1)(b).

RATIONALE: The claimant alleged the drug test reports were inadmissible hearsay because the employer failed to establish a proper foundation for admission. An administrative agency may consider evidence of a type commonly relied on by reasonably prudent persons in the conduct of their affairs. MCL 24.275; Spratt v Dept of Social Services, 169 Mich App 693 (1988). The court found that the "drug test is evidence of the type commonly relied upon by reasonably prudent persons in the conduct of their affairs." The court noted that the "urine test is of the type commonly relied upon by Employers for the detection of illegal substances in the body when employees have previously been disciplined for drug use while on the job." The court concluded "the tests carry an inherent reliability for administrative purposes." The claimant's violation of the waiver demonstrates a "disregard of standards of behavior which the employer has the right to expect of his employee."

7/99
24, 17, d12: B

12.85

Section 29(1)(b)

MISCONDUCT, Drug testing, Intoxication

CITE AS: Korzowski v Pollack Industries, 213 Mich App 223 (1995)

Appeal pending: No

Claimant: Ronald Korzowski
Employer: Pollack Industries
Docket No. B91-12778-120428W

COURT OF APPEALS HOLDING: Evidence the claimant had red glassy eyes and was observed smoking marijuana was insufficient to find the claimant intoxicated. The evidence must show the claimant's physical or mental faculties were disturbed by his alleged use of marijuana to find him intoxicated and subject to disqualification.

FACTS: The claimant and two other employees went to an employee's home for lunch. One employee testified the claimant smoked marijuana, the other employee was not sure if the claimant smoked marijuana. Later that afternoon the three employees were questioned and told they needed to take a drug test because the employer believed they were under the influence of something. Neither the collective bargaining agreement nor the employer's policy addressed drug testing. The claimant refused to take the test and was fired. The Board found the claimant was intoxicated and disqualified the claimant under Section 29(1)(b) of the Act.

DECISION: The Court reversed the Board's conclusion that the claimant was disqualified under Section 29(1)(b) for being intoxicated at work and remanded to the Board on the question of whether the claimant's refusal to take the drug test was disqualifying misconduct.

RATIONALE: Intoxication is an abnormal state induced by a chemical agent and requires a disturbance of mental or physical capacities. The evidence at the Referee hearing did not establish the claimant was intoxicated.

Editor's Notes:
1) On remand the Board found the claimant's refusal to take the drug test was disqualifying work-connected misconduct.
2) this case was adjudicated under Section 29(1)(b), before the addition of Section 29(1)(m) to the MES Act.

7/99

24, 17, d12: N/A

MISCONDUCT, Religious beliefs

CITE AS : Bournique v Department of Justice (FBI), Marquette Circuit Court, No. 90-25216-AE (March 1, 1991).

Appeal pending: No

Claimant: Robert Bournique
Employer: Department of Justice, Federal Bureau of Investigation
Docket No. UCFE89-01338-111929

CIRCUIT COURT HOLDING: A claimant who refused to perform work because of the dictates of his religion or his sincere belief that his religion required him to refuse to perform the work in question was not disqualified for benefits.

FACTS: The claimant worked for the FBI as a special agent. Over a period of time he changed his religious beliefs and concluded he should no longer be responsible for taking anyone's life. He decided he would no longer carry a weapon as required by FBI regulations. He also decided he would not participate in investigations which might lead to the imposition of the death penalty. The claimant requested an alternative assignment. Instead the employer asked for his resignation. He would have been discharged if he had not resigned. The claimant resigned under that duress.

DECISION: The claimant is not disqualified under Sections 29(1)(a) or 29(1)(b) of the Michigan Employment Security Act.

RATIONALE: The Board erred in concluding the claimant's testimony established that it was his individual convictions and not the dictates of his religion which prompted his resignation. But, even if the decision had been made as a result of the personal belief, conscience, or personal religious persuasion the court found the claimant had a right to unemployment benefits. The court noted:

> A person has a right to unemployment compensation benefits as long as the person had a sincere belief that religion required him or her to refrain from the work in question; it matters not whether that sincere belief has its source in a tenet of a particular religious sect, or whether that sincere belief has some other source.

7/99
13,14: N/A

12.87

Section 29(1)(b)

MISCONDUCT, Patient abuse, Circumstantial evidence

CITE AS : Michigan Osteopathic Hospital v Kelly, Wayne Circuit Court, No. 92-212327-AE (September 24, 1992).

Appeal pending: No

Claimant: Gregory Kelly
Employer: Michigan Osteopathic Hospital
Docket No. B89-18261-115723W

CIRCUIT COURT HOLDING: Disqualifying misconduct can be based on circumstantial evidence despite the claimant's denials.

FACTS: Claimant worked for the employer as a child care worker at a facility for emotionally disturbed children. He was fired and the employer offered circumstantial evidence of three incidents of patient abuse. The claimant was the only witness before the Referee with first hand knowledge of the incidents and he denied they occurred as alleged. The Referee found the claimant disqualified for misconduct. The Board reversed because the employer did not provide witnesses with personal knowledge of the incidents. The court found the Board erred as a matter of law when it ruled the employer could not meet its burden of proof without providing direct evidence of the incidents. The Board disregarded the circumstantial evidence provided by the employer.

DECISION: Claimant is disqualified for misconduct.

RATIONALE: Patient abuse if proven is disqualifying misconduct. The employer has the burden of proving the claimant committed the patient abuse. However, the Board erred when it applied the wrong legal standard. The Board reversed the Referee because the employer did not provide witnesses with personal knowledge of the alleged patient abuse to rebut the claimant's denials of any abuse. The Board ignored the circumstantial evidence provided by the employer in support of its claim the claimant engaged in patient abuse. The court cited Zolton v Rotter, 321 Mich 1, 8 (1948) as follows; "Circumstantial evidence in support of or against a proposition is equally competent with direct."

7/99
11, 12, d3: N/A

Section 29(1)(b)

MISCONDUCT, Poor performance, Slacking off

CITE AS : Fettig v Soundtech, Inc, unpublished per curiam Court of Appeals, May 19, 1995, (No. 168208).

Appeal pending: No

Claimant: Donald Fettig
Employer: Soundtech, Inc
Docket No. B91-10663-R01-120317W

COURT OF APPEALS HOLDING: A recurring intentional "slacking off" when the claimant was previously able to meet the employer's standards is disqualifying misconduct

FACTS: The claimant worked for the employer as a machine operator. The claimant's performance fluctuated. He was fired for failing to maintain adequate production levels. He was warned and for a short period would resume adequate performance followed by a period of unsatisfactory performance. The claimant was unable to explain his recurring poor performance. He admitted he would do more than enough one day and then slack off on occasion.

DECISION: The claimant is disqualified for misconduct.

RATIONALE: This case falls between insubordination and mere inefficiency. There was a confluence of factors which point to the claimant's intentional and substantial disregard for the employer's interests. The claimant was able to meet the employer's expectations. There was no dispute he was repeatedly warned to improve his performance Despite these warnings the claimant's performance dwindled. By his own testimony he decided to "slack off." This amounted to refusing to perform his job and was not mere inefficiency.

7/99
19, 20: C

Section 29(1)(b)

MISCONDUCT, Connected with work, Drug usage, Off duty

CITE AS: Johnson v Kent County, Kent Circuit Court, No. 92-76078-AE (August 17, 1992).

Appeal pending: No

Claimant: Bryant Johnson
Employer: Kent County
Docket No. B89-01223-118113W

CIRCUIT COURT HOLDING: A guard at a juvenile detention center who admitted he used cocaine at home committed work connected misconduct.

FACTS: Claimant worked as a guard at a county juvenile detention center. He was employed by the Juvenile Court. The claimant sought in-patient treatment for cocaine dependence. The employer agreed to retain the claimant as an employee if he would adhere to a rehabilitation program. The claimant agreed and signed a last chance agreement and was reinstated after completing treatment. Six months later claimant was fired as a result of a random drug test which was positive for cocaine. The claimant admitted he had used cocaine at home a couple days before the test.

DECISION: The claimant is disqualified for work connected misconduct.

RATIONALE: The court applied Bowns v Port Huron, 146 Mich App 69(1985) lv app den 424 Mich 899(1986) and found the off duty illegal conduct of an officer of the court was work connected misconduct. The court found at page 2 as follows:

> Having an employee who is using a substance the acquisition and use of which is always illegal, especially, an employee whose job brings him in constant and close contact with troubled children, poses a very serious risk of undermining the credibility of the Juvenile Court in the public eye, thereby jeopardizing public acceptance of its philosophy of treating children not just warehousing and punishing children. Without that acceptance, that Court cannot function. ...[C]laimant's misconduct risked more than embarrassing his employer; it risked severely compromising the employer's interests.

7/99
3, 12, d14: N/A

Section 29(9)

DISCIPLINARY SUSPENSION, Length of disqualification

CITE AS: Simon v General Motors Corporation, Wayne Circuit Court No. 97-738079 AE (April 16, 1998).

Appeal pending: No

Claimant: William Simon
Employer: General Motors Corporation
Docket No. B94-09282-RM9-140196

CIRCUIT COURT HOLDING: The claimant is disqualified from the date of suspension through the date of his return to work.

FACTS: The claimant was discharged on November 15, 1993. He grieved the discharge. The claimant's union and the employer settled the grievance by converting the discharge to a disciplinary suspension. The grievance was settled on November 23, 1993, but the claimant did not return to work until March, 1994. This was because the settlement provided the claimant could not return to work until the first Monday following ratification of the 1993 local contract. Notably, the claimant's work record was only to show a two week disciplinary layoff for purposes of future progressive discipline and he did not receive back pay for the interim period between the suspension and return to work. The claimant contended the disqualification should be limited to that two week period.

DECISION: The claimant was disqualified for benefits pursuant to Section 29(9) for the entire period he was off work.

RATIONALE: The reason the claimant was out of the plant until the contract was ratified was because he was being disciplined. Accordingly, he is disqualified through the date of his reinstatement.

7/99
21, 12: H

Section 29(1)(b)

MISCONDUCT, Court order, Social worker

CITE AS: Hupy v Department of Social Services, Menominee Circuit Court No. D97-8278 (June 19, 1998).

Appeal pending: No

Claimant: Kathi Hupy
Employer: Department of Social Services
Docket No. B97-05143-145538W

CIRCUIT COURT HOLDING: Failure to immediately investigate whether foster care placement was made in a manner consistent with a judicial order, and subsequent failure to take corrective action constituted misconduct.

FACTS: The claimant was employed as a social worker by the Family Independence Agency. In that capacity she was responsible for overseeing the placement of a minor child. A probate court entered an order requiring the minor to be placed in a particular foster care residence. At the time the child was living in a private home not licensed for foster care. The claimant failed to immediately investigate whether placement was made in a manner consistent with the judicial order, and when she found out it was not, took no corrective action, not even to update agency records. The claimant acknowledged this failure and conceded she had not followed proper procedure. She explained she thought the living arrangement which had manifested itself was in the best interests of the child.

DECISION: The claimant was disqualified under Section 29(1)(b).

RATIONALE: Regardless of what the claimant believed to be in the best interests of the child, the court had ruled on the matter and the claimant had a legal obligation to act in a manner consistent with that ruling. By failing to take positive corrective action, the claimant misled and deceived her employer. This conduct evidenced a willful and wanton disregard of the employer's interests and was in disregard of the standards of behavior that the employer had a right to expect.

7/99
12, 24: F

Section 29(1)(b)

MISCONDUCT, Burden of proof, Hearsay, Business records

CITE AS: DMC Nursing and Convalescent Center v Erhquart, Wayne Circuit Court No. 98-813175-AE (September 22, 1998).

Appeal pending: No

Claimant: Teresa Erhquart
Employer: DMC Nursing and Convalescent Center
Docket No. B97-09643-145970

CIRCUIT COURT HOLDING: Business records may be sufficient to establish a prima facie showing of misconduct and thereby shift the burden of proof to the claimant.

FACTS: The claimant failed to appear for the Referee hearing, however, the employer's human resources coordinator was present. Through the use of business records the human resources coordinator established the claimant had been disciplined for absenteeism and tardiness on numerous occasions. In her statement to the MUA the claimant had indicated her last absence was caused by an illness. The human resources coordinator indicated she was unaware whether the claimant's assertion with respect to her last absence was valid. On this record the Referee concluded the employer had failed to meet its burden of proof and the claimant could not be subject to disqualification under the misconduct provision. The Board of Review affirmed the Referee's finding.

DECISION: The claimant was disqualified for benefits under Section 29(1)(b).

RATIONALE: The human resources coordinator had offered competent and uncontradicted evidence that the claimant had been absent or tardy on 29 days over 11 months. This was sufficient to meet its burden of proof.

7/99
22, 16, d24: F

12.93

Section 29(1)(b)

MISCONDUCT, Profanity

CITE AS: Towns v Smeltzer Enterprises, Wayne Circuit Court No. 98-804170-AE (August 27, 1998).

Appeal pending: No

Claimant: Carol M. Towns
Employer: Smeltzer Enterprises
Docket No. B97-11143-146293W

CIRCUIT COURT HOLDING: Per Broyles v Aeroquip Corp, 176 Mich App 175, 179 (1989), the context in which the comment is made must be examined. Specifically, "whether the words were directed at a fellow employee, supervisor, or a customer, whether the tone in context suggests an abusive intent or friendly badgering, whether the comments were made in private conversation or in the presence of others, and whether such conduct had been condoned in the past."

FACTS: The claimant was discharged for arguing and using profanity during a confrontation with a co-worker and later when a supervisor intervened to defuse the situation. Shop rules provided that profanity directed at fellow employees or management constituted a major rule infraction and could result in dismissal. Notably, there had been a prior similar incident between the claimant and her co-worker.

DECISION: The claimant was disqualified under Section 29(1)(b).

RATIONALE: The claimant admitted she used profanity and refused the direct order of her supervisor. Her vulgar language alone would have supported the Board's finding of misconduct. When this profanity was combined with a refusal to cooperate with her supervisor, the Board's finding of misconduct was well established and could not be found contrary to law.

7/99
21, 16, d22: J

Section 29(1)(b)

MISCONDUCT, Credibility

CITE AS: Turnbow v City of Flint, Genesee Circuit Court, No. 91-1128-AE (November 21, 1991).

Appeal pending: No

Claimant: Verlon Turnbow
Employer: City of Flint
Docket No. B89-01891-111882W

CIRCUIT COURT HOLDING: A Referee does not have to explain why he found a witness not credible.

FACTS: The claimant was a fire fighter for the City of Flint. Due to previous problems the claimant was offered, and signed, a "last chance" agreement. The agreement provided if the claimant tested positive for illegal drugs or controlled substances he would be terminated. The claimant was subsequently fired when he tested positive for cocaine. The claimant did not contest the test results but asserted a friend, Mr. Pendleton, put cocaine in the claimant's cola drink. Mr. Pendleton testified for the claimant that he put the cocaine in the claimant's drink. The Referee without any explanation found Mr. Pendleton not believable.

DECISION: Claimant is disqualified under Section 29(1)(b).

RATIONALE: Mr. Pendleton's testimony raised questions as to whether Mr. Pendleton still used cocaine. The Referee found Mr. Pendleton was not telling the truth about his use of cocaine and concluded he was also not truthful about spiking the claimant's drink. There was no error in finding Mr. Pendleton not credible. The court indicated:

> [T]he court does not find that the referee is required to make a record of why he finds a witness not credible. This court does not find that it should substitute its opinion on credibility for that of the referee who was present while the witness testified. Nor does the court find that the case should be remanded to have the referee issue an opinion explaining why he found Mr. Pendleton's testimony not believable.

7/99
3, 14: N/A

12.95

Section 29(1)(b)

MISCONDUCT, Connected with work, Felony

CITE AS: James River Paper Co. v Clopton, unpublished per curiam Court of Appeals May 6, 1993 (No. 143610).

Appeal pending: No

Claimant: Leon Clopton
Employer: James River Paper Co.
Docket No. B89-02593-111600

COURT OF APPEALS HOLDING: Pursuant to a collective bargaining agreement, a felony conviction for off-duty drug trafficking constitutes work connected misconduct.

FACTS: Claimant was discharged following a felony conviction for off-duty delivery of a controlled substance. The discharge was in accordance with the provisions of the collective bargaining agreement.

DECISION: Claimant is disqualified for work connected misconduct.

RATIONALE: The court stated:

> Conduct occurring outside the workplace may, depending on the conduct, be sufficiently connected to work and sufficiently involve the employer's interests as to constitute misconduct to warrant disqualification for unemployment benefits. See Parks v Employment Security Comm, 427 Mich 224, 239; 398 NW2d 275 (1986). In the case at bar, we believe that the employer's interests are sufficiently involved to warrant a conclusion that claimant's conduct constituted misconduct even though his conviction may have arisen from activity which occurred away from the workplace. ...
> Second, given the nature of claimant's conviction in this case, we find the employer's interests also adversely affected. An employer certainly has an interest in maintaining a drug-free workplace and to minimize the dangers presented by employee drug use. It is consistent with those interests to preclude from employment those individuals who are known drug dealers. While claimant's conviction was for activity which occurred off the premises, he clearly represented a danger to plaintiff's interests in bringing drugs onto the workplace. Therefore, violation of the collective bargaining agreement by engaging in illegal drug trafficking affects the employer's interests and further constitutes misconduct within the meaning of the act.

Supreme Court

7/99
13, 14: E

Section 29(1)(b)

MISCONDUCT, Handgun, False statement on employment application

CITE AS: Miller Petroleum, Inc. v Beatty, Benzie Circuit Court No. 84-2643-AE (January 27, 1986).

Appeal pending: No

Claimant: Earnest R. Beatty
Employer: Miller Petroleum Inc.,
Docket No. B83-21172-95087

CIRCUIT COURT HOLDING: Claimant's conduct of bringing a handgun into work on two occasions is disqualifying misconduct.

FACTS: The claimant worked for the employer as a cashier/clerk at a convenience store, sometimes handling large sums of money. The employer became aware the claimant brought a handgun to work on at least two days, contrary to the employer's implied policy. Claimant admitted to the essence of the allegations when confronted and was fired. The claimant's application for employment did not disclose the claimant had a previous criminal conviction for malicious destruction of a former co-worker's property. The application also omitted two former employers.

DECISION: The claimant is disqualified for misconduct.

RATIONALE: While Section 29(1)(b) is to be liberally construed, the court was "not inclined to construe Section 29(1)(b) of the MES Act so liberally as to foster the bringing of handguns into the workplace." The court also found "common sense and sound public policy dictate a finding that even a remedial statute, such as Section 29(1)(b) of the MES Act ought not be read so broadly as to foster endangerment of lives." The court distinguished Streeter v River Rouge Board of Education, Wayne Cty Cir Ct, 1980, (No.80-017-522-AE) on the basis Streeter involved a single instance where the claimant had been threatened and there was a genuine direct and immediate concern for the claimant's safety. Additionally the claimant's actions of falsifying his application by neglecting to include items of importance to the employer was substantial enough by itself to constitute an act of misconduct and when the handgun incidents are coupled with the falsification of the claimant's application for employment they necessarily amount to disqualifying misconduct.

7/99
9, 6, d3: N/A

12.97

Section 29(1)(b)

MISCONDUCT, Due process, Witnesses, Issues not raised waived

CITE AS: Royal Oak Name Plate Co. v Pielecha, unpublished memorandum opinion Court of Appeals, May 3, 1991, (No. 127547).

Appeal pending: No

Claimant: Bruce A. Pielecha
Employer: Royal Oak Name Plate Co
Docket No. B88-08501-109660

COURT OF APPEALS HOLDING: The employer was not denied a fair hearing when the claimant did not appear at the Referee hearing. The issue was not raised before the administrative tribunal and was waived.

FACTS: The claimant was discharged after six months of employment because he was slow, was tardy four or five times, his work quality was poor, he spent too much time talking to other employees and failed to fill out his time sheets. The employer offered the claimant another position at a lower wage rate which the claimant declined. The employer made notes of these incidents but the claimant was not issued any formal discipline, or written warnings. Only the employer appeared at the Referee hearing.

DECISION: The claimant is not disqualified for misconduct.

RATIONALE: The only issue properly before the Referee was misconduct. Therefore the burden of proof rested with the employer. That being the case, the employer "could not have been denied a fair hearing by Pielecha's absence." Further, the denial of due process issue was not raised below and was therefore waived. As to the misconduct issue, the employer only proved inefficiency by the claimant.

7/99
3, 14: C

Section 29(1)(b)

MISCONDUCT, Insubordination, Job description, Evidence, Objections, Burden of proof, Witnesses

CITE AS: Williams v Hughes Plastics, Inc., Berrien Circuit Court No. 86-3082-AE-Z (December 10, 1987).

Appeal pending: No

Claimant: Karen M. Williams
Employer: Hughes Plastics, Inc.
Docket No. B86-03599-102599W

CIRCUIT COURT HOLDING: Repeated refusal to do part of an employee's job is insubordination and disqualifying misconduct even if the duty is not specified in the job description.

FACTS: Claimant worked as a janitor. It was undisputed the claimant twice refused to shovel snow when directed to do so. The claimant believed it was not part of her duties. When she objected the first time she was told shoveling snow was part of her duties and in the future she would have to perform this duty. She refused again and was fired.

DECISION: The claimant is disqualified under Section 29(1)(b) of the Michigan Employment Security Act.

RATIONALE: The claimant's "outright refusal, absent evidence of an inability or incapacity to perform, shows a willful disregard of the employer's interests." The claimant "had an obligation to her employer to at least try to do that what was expected of her or risk the consequences." "The finding was not dependent upon a written job description... . In the workplace, the employer has a right to expect its employees to carry out reasonable assignments whether it's specifically mentioned in the job description or not."

The claimant asserted on appeal the Referee erred in allowing into the record hearsay evidence. The court found "[o]bjections to the admissibility of evidence not raised at the hearing cannot be later asserted on appeal or considered by this Court. Marietta v Cliffs Ridge, Inc., 385 Mich App 364 (1971)."

The employer was not obligated to call as a witness the plant manager. The claimant asserted the plant manager told her that shoveling snow was not part of her job. While the burden of proving misconduct rests with the employer, there is no "rule which obliges an employer to produce particular employees as witnesses, either to establish its position or on behalf of claimant."

7/99
11, 15: E

12.99

Section 29(1)(b)

MISCONDUCT, Negligence

CITE AS: Hauser v Gateway Expedition, Gladwin Circuit Court, No. 97-13242-AE (December 28, 1998)

Appeal pending: No

Claimant: John Hauser
Employer: Gateway Expedition
Docket No. B94-16985-135159

CIRCUIT COURT HOLDING: Failure of a truck driver to perform one part of a required pre-trip inspection prior to using a truck was not gross negligence.

FACTS: Claimant was an over-the-road truck driver. As part of his duties he was required to make a pre-trip inspection of the truck before he drove it. On his last day of work the claimant completed all of the inspection except forgot to check the water pressure by looking under the hood. Had he done so he would have found the radiator and alternator had been removed. Claimant drove the vehicle on a 30 mile trip and it overheated, causing damage in the amount of $4,500.00. The Referee found credible the claimant's testimony that his failure to inspect under the hood was an oversight.

DECISION: Claimant was not disqualified for benefits under Section 29(1)(b) of the Michigan Employment Security Act.

RATIONALE: Unintentional failure of a truck driver to do one part of a pre-trip inspection was not gross negligence. There was no evidence the failure to check under the hood was intentional. The court noted in Black's Law Dictionary, 5th Ed. pp. 931,932 gross negligence is defined as "an intentional failure to perform a manifest duty in a reckless disregard for the consequences." The court found gross negligence consists "of a conscious and voluntary act or omission which is likely to result in grave injury in the face of a clear and present danger of which the individual is aware," or a "conscious indifference to the rights and welfare of [others]."

Here the claimant simply overlooked by inadvertence the duty of checking underneath the hood. There was no evidence this was intentional, or a conscious and voluntary omission. It was not a conscious indifference to the employer's interests. It was not gross negligence and the claimant cannot be found disqualified for misconduct under Section 29(1)(b) of the Michigan Employment Security Act.

16, 21 d12: B

12.100

Section 29(1)(b)

MISCONDUCT, Intoxication, Evidence

CITE AS: Smith v Centerline Public Schools, Macomb Circuit Court No. 97-5843-AE (May 8, 1998).

Appeal pending: No

Claimant: Roger Smith
Employer: Centerline Public Schools
Docket No. B96-12907-R01-143397W

CIRCUIT COURT HOLDING: A finding that the claimant was intoxicated is supported by competent, material and substantial evidence when there is testimony the claimant's eyes were bloodshot, his speech was slurred, he had alcohol on his breath and had admitted consuming alcohol during his break.

FACTS: The claimant was employed as a custodian by Centerline Public Schools. On his final day of employment, the claimant was ticketed during his lunch break by a public safety officer for open alcohol in a public place. Upon being informed of the incident, his supervisor discussed the matter with the claimant when he returned. During the discussion the claimant admitted he had consumed alcohol. During this conversation the supervisor noted the claimant's eyes were bloodshot, his speech was slurred, his breath smelled of alcohol and he appeared nervous and agitated during the conversation. The testimony of the employer's witness was not rebutted.

DECISION: The claimant was disqualified under Section 29(1)(b).

RATIONALE: The court found that the fact that the claimant smelled of alcohol, had bloodshot eyes, had slurred speech, had admitted consuming alcohol and was nervous and agitated was sufficient to support a conclusion he was intoxicated.

7/99
24, 16, d22: F

12.101

Section 29(1)(b)

MISCONDUCT, Drug testing, Treatment program

CITE AS: Shotwell v Joe Ricci Dodge, Inc, Wayne Circuit Court No. 97-723063-AE (December 23, 1997).

Appeal pending: No

Claimant: Patrick Shotwell
Employer: Joe Ricci Dodge, Inc.
Docket No. B96-02274-140043W

CIRCUIT COURT HOLDING: The employee's failure to attend rehabilitation, when required to do so pursuant to a valid employer policy to remain in employment, is disqualifying under Section 29(1)(b).

FACTS: The employer required the claimant to attend an outpatient drug rehabilitation program after the claimant tested positive for marijuana on a random drug screen. The claimant initially agreed to attend the program. After the claimant missed the first meeting, the employer suspended him for two weeks and told the claimant he had to attend the program to keep his job. When the claimant failed to attend rehabilitation a second time, the employer discharged him.

DECISION: The claimant is disqualified for benefits under Section 29(1)(b).

RATIONALE: The employer had a random drug screening policy, under which an employee was required to attend rehabilitation if the employee tested positive for controlled substances. The claimant was aware of the policy. The claimant alleged he did not have to attend rehabilitation since he was attending Alcoholics Anonymous. The court found that was not relevant. The court found the employer's drug screening and rehabilitation policy was valid. The claimant argued the results of the drug screen were inadmissible hearsay. However the court concluded it did not have to reach that issue as the employer discharged the claimant for failing to attend rehabilitation and not a positive drug screen. "Whether the test results are admitted or not, there is still competent, material and substantial evidence to support the Board of Review's finding that the Appellant [claimant] engaged in misconduct for failing to attend rehabilitation."

7/99
21, 16, d12: B

12.102

Section 29(1)(b)

MISCONDUCT, Labor dispute, Connected with work

CITE AS: Bright v Detroit Newspaper Agency, Macomb Circuit Court No. 97-2360-AE (November 17, 1997).

Appeal pending: No

Claimant: Ronald Bright
Employer: Detroit Newspaper Agency
Docket No. B96-01168-139959W

CIRCUIT COURT HOLDING: Actions performed during a strike that demonstrate a willful or wanton disregard for the employer's interests constitute disqualifying misconduct.

FACTS: The claimant's collective bargaining unit was on strike against the involved employer. The employer discharged the claimant for an incident that occurred October 29, 1995. At 1:00 a.m. on that date, the claimant, together with other striking employees, left the union hall and drove to a parking lot. The only other vehicle in the parking lot was occupied by two security guards, who worked for the employer. The claimant drove his own vehicle, and positioned it in a manner as to prevent the vehicle driven by the security guards from escaping. The other striking employees then assaulted the security guards and the vehicle driven by the security guards. The record did not establish the claimant actually took part in the assault, except for his using his vehicle to prevent the security guards from easily escaping.

DECISION: The claimant is disqualified from receiving benefits under Section 29(1)(b).

RATIONALE: The claimant admitted he drove his vehicle. Testimony from a security guard established the claimant parked his vehicle behind the security guards' vehicle blocking it from backing out. The claimant also ran his vehicle into the side of the security guards' vehicle when the guards attempted to flee. The testimony established the claimant intended to participate in the ambush-style attack on the security guards. No evidence was presented to infer the incident would not have occurred but for the security guards' connection with the employer because of the strike. The claimant's participation in the incident was connected to his work.

7/99
21, 16, d12: H

12.103

Section 29(1)(b)

MISCONDUCT, Burden of proof

CITE AS: Underwood v Corrigan Air & Sea Cargo Systems, Wayne Circuit Court No. 96-600063-AE (June 25, 1996).

Appeal pending: No

Claimant: Mark Underwood
Employer: Corrigan Air and Sea Cargo Systems
Docket No. B94-15047-134435W

CIRCUIT COURT HOLDING: The employer's absence from the Referee hearing does not require the conclusion the employer failed to meet its burden of proof under Section 29(1)(b) when the claimant's testimony establishes the discharge was for disqualifying reasons.

FACTS: The employer did not appear at the Referee hearing. The only evidence presented was the claimant's testimony. The claimant testified that under the collective bargaining agreement there was a five step disciplinary procedure. A violation of the fifth step resulted in discharge. The claimant admitted he had been through four of the five steps in the disciplinary process. The last incident resulted in the claimant being in violation of the fifth step. The last incident was the claimant's absence due to illness. The employer required substantiation by verification of a visit to physician or hospital. The claimant failed to present a note from a physician to verify his absence.

DECISION: The claimant is disqualified for benefits.

RATIONALE: The claimant's testimony clearly indicated he violated both the collective bargaining agreement and the employer's policies regarding absences. The fact that the employer failed to appear at the Referee hearing does not, in and of itself, support a conclusion that it failed to sustain its burden of proof.

7/99
24, 16, d12: F

12.104

Section 29(1)(b)

MISCONDUCT, Drug testing, Evidence, Hearsay

CITE AS: Perkey v Aetna Industries, Macomb Circuit Court No. 96-7393-AE (August 21, 1997).

Appeal pending: No

Claimant: Gary A. Perkey
Employer: Aetna Industries
Docket No. MUL94-51225-133247W

CIRCUIT COURT HOLDING: Drug test results are admissible since such documents are of a type commonly relied on by reasonably prudent persons in the conduct of their affairs.

FACTS: The employer discharged the claimant after he tested positive for marijuana through a urine test. At the time he was hired, the claimant agreed to abide by the employer's work rules which prohibited drug use on the job or reporting to work under the influence. The claimant asserted the drug test results were inadmissible hearsay and improperly admitted at the Referee hearing.

DECISION: The claimant is disqualified for benefits under Section 29(1)(b).

RATIONALE: "Administrative agencies are given more discretion in admitting evidence than a trial court. An agency may admit and give probative effect to evidence of a type commonly relied upon by reasonably prudent men in the conduct of their affairs." See also MCL 24.275. The court thus concluded the Referee made no reversible error in admitting the drug test results into evidence. The court also concluded that testing positive for marijuana showed the claimant was under the influence while on the job.

7/99
21, 16, d22: H

12.105

Sections 29(1)(b), 29(1)(m)

MISCONDUCT, Drug testing, Off duty

CITE AS: Lathrop v Guardian Industries Corporation, Monroe Circuit Court, No. 96-5236-AE (June 25, 1997).

Appeal pending: No

Claimant: Eugene Lathrop
Employer: Guardian Industries Corporation
Docket No. B94-03772-131761W

CIRCUIT COURT HOLDING: Claimant's failure to correct his drug abuse problem, even though such usage was off-duty, demonstrates a willful or wanton disregard for the employer's interests when the employer grants the opportunity to correct the drug abuse problem.

FACTS: The claimant worked for the employer from August, 1990, to December, 1993, when he was discharged. The claimant was on a medical leave of absence beginning September 1, 1993. On November 3, 1993, the claimant took a drug test as part of a return to work policy. The test result was positive for cocaine and the employer placed the claimant on rehabilitative leave. The claimant took additional drug tests, and the results were inconclusive. The last test was on December 21, 1993 and showed a positive result for marijuana. The claimant admitted using marijuana. The employer discharged the claimant.

DECISION: The claimant is disqualified from receiving benefits under 29(1)(b).

RATIONALE: "Reality and good sense require employers to maintain employees able to work. Claimant has openly admitted to using marijuana after taking multiple drug tests. Claimant's actions were intentional, irresponsible, and a substantial disregard of Guardian's interests. Claimant could not be a productive employee while on leave or suspension. Guardian invested time and expense during the various drug tests. The use of marijuana indicates to this Court the regard Claimant held for his employment and his employer's interests."

7/99
21, 16, d12: H

12.106

Section 29(1)(b)

MISCONDUCT, Burden of proof, Agency proof

CITE AS: Rebuilding Services, Inc v Lewandowski, Tuscola Circuit Court No. D96-1550-AE (September 18, 1997).

Appeal pending: No

Claimant: Kenneth Lewandowski
Employer: Rebuilding Services, Inc.
Docket No. B91-16079-RO1-122293

CIRCUIT COURT HOLDING: Where a primary employer contracts with a secondary employer, and the secondary employer discharges the claimant, the primary employer must show whether its employment relationship with the claimant ended.

FACTS: The claimant worked for the employer, Rebuilding Services. Rebuilding Services was the primary employer, and purportedly had a contractual relationship with Wilkie Bros., Inc., the secondary employer. Rebuilding Services assigned the claimant to work for Wilkie Bros. The appeal to the Referee was filed by someone from Wilkie Bros. and only witnesses from Wilkie Bros. appeared at the Referee hearing. No Wilkie Bros. witness submitted evidence of an agency relationship with Rebuilding Services. The claimant contended he was discharged after being absent due to illness. Wilkie Bros. alternately contended the claimant quit after obtaining new employment or was treated as a quit for unexcused absences.

DECISION: The claimant is not disqualified for benefits under Section 29(1)(b).

RATIONALE: An agent cannot self-proclaim its agency. Wilkie Bros. did not submit an appearance to act on behalf of Rebuilding Services, and did not offer any documentary evidence establishing a contractual relationship between the two. Moreover, the employer's appeal letter to the Board indicated that while Wilkie Bros. could discharge a contracted employee, Rebuilding Services could reassign or release the employee. Thus simply because there was a separation from Wilkie Bros. does not mean there was a separation from Rebuilding Services. The Wilkie Bros. witnesses could not testify as to what transpired between the claimant and Rebuilding Services. The employer did not meet its burden of proof.

7/99
22, 21: B

12.107

Section 29(1)(b)

MISCONDUCT, Drug testing, Evidence, Hearsay

CITE AS: Baker v Hancor, Inc, Saginaw Circuit Court No. 93-57541-AE (October 31, 1994).

Appeal pending: No

Claimant: Michael Baker
Employer: Hancor, Inc.
Docket No. B92-25032-124242

CIRCUIT COURT HOLDING: The employer must establish a foundation for the admission of a document purporting to show the claimant's drug test result when the sole basis for the discharge was the claimant's alleged positive drug test.

FACTS: The employer discharged the claimant solely for testing positive on a random drug screen for marijuana and cocaine, a violation of the employer's substance abuse policy. The employer conceded the claimant's off-duty drug use did not affect the claimant's job performance. The Referee admitted, over the claimant's objection, hearsay evidence regarding the test results, as well as the test result.

DECISION: The claimant is not disqualified for benefits.

RATIONALE: "A proper foundation must be laid for admitting documentary evidence at a MESC hearing. See generally, Vulcan Forging Co v Employment Security Comm, 368 Mich 594 (1962). In this case, the referee admitted the report without proper foundation being laid." The employer failed to present a witness with personal knowledge to testify how the test was performed. The evidence that the claimant ingested drugs in violation of the employer's policy was inadmissible.

7/99
24, 17, d12: N/A

12.108

Section 29(1)(b)

MISCONDUCT, Series of incidents, Dangerous environment

CITE AS: McKinstry v State Prison of Southern Michigan, unpublished per curiam Court of Appeals, August 31, 1995 (No. 171336)

Appeal pending: No

Claimant: Valeria D. McKinstry
Employer: State Prison of Southern Michigan
Docket No. B92-23281-123256W

COURT OF APPEALS HOLDING: The claimant was properly determined to be guilty of disqualifying misconduct under Section 29(1)(b) for willful disregard of the employer's interests based on two incidents involving inattention to duty and dereliction of duty in a peculiarly hostile and dangerous environment.

FACTS: The claimant worked as a corrections office from 1987 to 1992. The employer disciplined the claimant three times. In 1990 the employer suspended the claimant for ten days for dereliction of duty and misappropriation of state property. In 1991 the employer suspended the claimant for thirty days for falling asleep in a cell block. The last incident occurred on January 11, 1992. The employer disciplined the claimant for inattention to duty for playing pool in the prison's gym area instead of observing and guarding prisoners. Claimant contended this last incident lasted no more than three minutes and that no prisoners were present at the time.

DECISION: The claimant is disqualified for benefits under Section 29(1)(b).

RATIONALE: The record presented a history or pattern of misconduct which, taken as a whole, jeopardized the safety and security of the claimant, other guards and prisoners.

7/99
24, 17, d12: N/A

Section 29(1)(b)

MISCONDUCT, Poor judgment, Work rules

CITE AS: Shaffer v Total Petroleum, Inc, Kent Circuit Court, No. 92-79538-AE (June 25, 1993).

Appeal pending: No

Claimant: Thomas Shaffer
Employer: Total Petroleum, Inc.
Docket No. B92-01922-121851W

CIRCUIT COURT HOLDING: Where claimant violates an employer rule in the course of a good faith effort to assist a co-worker, his conduct should be characterized as an isolated error of judgment, rather than as misconduct.

FACTS: Claimant managed an employer gas station. His duties included preparing the station's cash receipts for deposit. The employer's policy required that cash receipts be prepared for deposit in a locked office. If he had to leave the office that cash was to be locked away and the door to the office locked. On the day in question, a "marauding band of thieves" entered the station. The cashier asked the claimant for assistance, and he left his office to assist her. The claimant left the cash on a desk in a bank deposit bag. When he returned to the office, the cash was gone. The claimant reported the theft. The police investigation exonerated the claimant, but the employer discharged him for violating company policy.

DECISION: The claimant is not disqualified for benefits under Section 29(1)(b).

RATIONALE: The employer alleged the claimant propped the door to the office open. The claimant denied that allegation. The court could not conclude whether or not the claimant propped the door open, but found that based on the facts that did not impact its holding. The court distinguished this matter from Bell v Employment Security Commission, 359 Mich 649(1960), because the claimant was acting in the employer's best interests when he left the office to assist the cashier. If he failed to assist the cashier he would have been subject to criticism or discipline. While he probably should have taken the time to secrete the cash, and should have checked to make sure the door locked, it is not clear whether there was a reasonable opportunity to do so. The claimant made an isolated error in judgment in deciding to help the cashier in a manner that violated another employer policy.

7/99
11, 19: N/A

12.110

Section 29(1)(b)

MISCONDUCT, Series of incidents, Intentional acts, Negligence

CITE AS: Johnson v White Lake Landco, Muskegon Circuit Court, No. 92-29632-AE (June 8, 1993).

Appeal pending: No

Claimant: Joseph P. Johnson
Employer: White Lake Landco
Docket No. B92-02274-121925

CIRCUIT COURT HOLDING: The combination of 5 incidents of ordinary negligence and 2 incidents of intentional wrongdoing within an 18 month period constitutes disqualifying misconduct.

FACTS: The claimant worked for the employer for an 18 month period. The employer disciplined the claimant for 6 incidents - removing another employee's property, damaging a door, using a company truck for personal business, getting into an accident, carelessness in his work, falsely reporting to a supervisor that an assignment was completed. The employer discharged the claimant after he failed to report for work.

DECISION: The claimant is disqualified for benefits under Section 29(1)(b).

RATIONALE: While five incidents (removing the other employee's property, damaging a door, getting into an accident, carelessness in work, and failing to report) are arguably acts of ordinary negligence, five acts of ordinary negligence cannot be said to be isolated instances of negligence. Two acts (use of company truck for personal business, falsely reporting to a supervisor that an assignment was completed) are deliberate violations or disregard of standards of behavior which the employer has the right to expect. Those two latter acts occurred approximately ten months and three months prior to the discharge. Nevertheless, the combination of these five acts of ordinary negligence and the two acts of intentional wrongdoing, all within an 18-month period, constitute "competent, material, and substantial evidence on the whole record" to conclude the claimant is disqualified for benefits under Section 29(1)(b).

7/99
19, 11: C

12.111

Section 29(1)(b)

MISCONDUCT, Criminal sexual conduct, Connected with work

CITE AS: Strong v Liberty Lawn Care, Macomb Circuit Court No. 96-4109 AV (August 9, 1996) lv den Court of Appeals, February 14, 1997 (No. 198173); lv den 456 Mich 899 (1997).

Appeal pending: No

Claimant: Wayne Strong
Employer: Liberty Lawn Care
Docket No. B94-10084-RO1-133700W

CIRCUIT COURT HOLDING: Disqualifying misconduct connected with work can be reasonably inferred from the evidence that the claimant's criminal act occurred during the course of work connected activities.

FACTS: The employer discharged the claimant following a conviction on act of indecent exposure committed during working hours. The record established the claimant and the employer had an oral agreement that criminal behavior would not be tolerated on the job. The employer asked the claimant to visit a customer who had an outstanding balance. The claimant left to visit the customer at 3:00 p.m., and the criminal incident occurred between 3:00 p.m. and 3:30 p.m. The employer investigated the criminal incident before discharging the claimant.

DECISION: The claimant is disqualified from receiving benefits under Section 29(1)(b).

RATIONALE: Even in the absence of an explicit agreement, an employee has a common law duty to refrain from "criminal conduct destructive to the morale of his fellow employee his employer's business." Calvert v General Motors Corp, 120 Mich App 635, 639-640 (1982) quoting Todd v Hudson Motor Car Co, 328 Mich 283, 289 (1950). The Referee could reasonably infer from the evidence that the claimant's misconduct was connected with work since the act occurred after the claimant left to visit the customer.

7/99
24, 16, d22: F

Section 29(1)(b)

MISCONDUCT, Insubordination, Single incident, Scope of review

CITE AS: Bernhardt v Active Tool & Mfg. Company, Wayne Circuit Court, No. 87-713560-AE (February 1, 1988).

Appeal pending: No

Claimant: James M. Bernhardt
Employer: Active Tool & Manufacturing Co.
Docket No. B85-09648-101462

CIRCUIT COURT HOLDING: A single instance of insubordination may constitute disqualifying misconduct.

FACTS: The claimant was fired for refusing to follow a direct order. The claimant was told by his foreman to abide by the work leader's instructions. The work leader wanted to use a particular area the claimant was using. The claimant refused to give up that area. The foreman repeatedly told the claimant to either follow the instructions or he would be considered to have quit or be fired. The claimant was again asked what he was going to do and he picked up his tools and left.

DECISION: Claimant is disqualified for misconduct.

RATIONALE: The court found as follows:

> Although an employer's direction as to the performance of job-related tasks may not seem to the employee to be the best or most effective way of accomplishing the assigned task, if the directions are reasonable and safe, the employer has a right to expect those directions to be carried out, and the wilful failure of an employee to do so is a deliberate violation of the standards of behavior which an employer has the right to expect of his employee. Further, although the employee may believe that he has a better plan, an employee's persistent and wilful failure to obey reasonable job-related and safe directions of the employer invades the employer's province of managing and controlling his business. As such, it is a wilful disregard of the employer's interests.

Before reaching the merits, the court also noted the Board's scope of review is broader than that of a circuit court. "The Board then is given the power to substitute its findings of fact and decisions for those of the referee freely and on the basis of its own review of the evidence, and may assign its own weight to such evidence."

7/99
3, 6, d14: N/A

Section 29(1)(b)

MISCONDUCT, Best Evidence rule, Videotape

CITE AS: Bondy v Perry Drug Stores, Wayne Circuit Court, No. 83-334738AE (April 11, 1985).

Appeal pending: No

Claimant: Joseph Bondy
Employer: Perry Drug Stores
Docket No. B83-11183-91633W

CIRCUIT COURT HOLDING: The Best Evidence rule is applicable in Unemployment Agency referee hearings under some circumstances and in this case requires the introduction of the videotape rather than testimony as to what the videotape allegedly portrays.

FACTS: The employer installed a videotaping system. The employer's witness testified he viewed a tape of the claimant which showed five customers left the premises with the claimant's knowledge without paying for their merchandise. The witness also alleged the claimant, after viewing the tape, admitted he allowed the customers to leave the store without paying for their merchandise in order that they might "try it out." There was no documentation about missing inventory.

The claimant denied the events occurred as the employer alleged. He also denied he made any admission in conjunction with the viewing of the videotape.

DECISION: The matter was remanded to the Referee to supplement the record by admission of the videotape.

RATIONALE: Although the rules of evidence are not to be rigidly imposed upon administrative tribunals, the Board's decision needs to be supported by clear, competent and substantial evidence. In this case the court observed: 1) The videotape itself was the best evidence of its contents. 2) Its non-production was not explained. 3) The admission of that testimony was not inconsequential or harmless. Accordingly, the matter must be remanded.

7/99
3, 9: N/A

Section 49(1)(b)

MISCONDUCT, Burden of proof, Claimant testimony

CITE AS: Essenmacher v Midwest Rubber Division, Sanilac Circuit Court, No. 90-19139-AA (May 9, 1991).

Appeal pending: No

Claimant: Vernon Essenmacher
Employer: Midwest Rubber Division
Docket No. B89-00780-R01-111782W

CIRCUIT COURT HOLDING: Misconduct can be established by the claimant's own testimony.

FACTS: Claimant was told by his foreman to perform a specific operation during his slack time. This assignment was consistent with the claimant's classification and had been routinely performed in the past by the claimant. Later in the shift the claimant stopped to talk with another person and was told by his foreman to perform the operation. The claimant refused because he believed others were equally available to perform the operation. The claimant was told to punch out, which he did. The claimant did not return to work thereafter and the employer had no further contact with the claimant.

The employer witness asserted the claimant was only sent home to cool off. As such he was not fired, but rather quit when he did not return. The claimant asserted he was fired when told to punch out. The employer witness, operating under the theory this was a voluntary leaving, offered no evidence of claimant misconduct; however, the claimant testified he refused to perform the operation in question.

DECISION: The claimant is disqualified for misconduct.

RATIONALE: The proof of the claimant's misconduct can come from the claimant's testimony. The court noted under Miller v F.W.Woolworth Co., 359 Mich 342 (1960), the Michigan Rules of Evidence apply at MESC hearings. The claimant's testimony that he refused to perform an assignment can provide the competent evidence necessary to find the misconduct.

7/99
13, 14: N/A

12.115

Sections 9 and 29(9)

DISCIPLINARY SUSPENSION, Fifth Amendment

CITE AS: Genesee County v Patrick, Genesee Circuit Court No. 81-459-AE (December 2, 1982).

Appeal pending: No

Claimant: Doris Patrick
Employer: Genesee County
Docket No. B79-13236-69136

CIRCUIT COURT HOLDING: Claimant's refusal to answer questions in an investigation was disqualifying misconduct. Claimant's refusal to testify at the Referee hearing because claimant believes the testimony may incriminate her does not rebut a prima facia case against the claimant.

FACTS: The claimant worked for the county in a federally funded work experience program. The employer became aware the claimant may have worked at United Parcel Service (UPS) while receiving wages from the county. The claimant was called into an investigation and refused to answer whether she had contemporaneous employment with UPS. She refused to sign a release authorizing UPS to provide the county information about her potential employment at UPS. The claimant was suspended indefinitely for refusing to cooperate during the investigation. The employer subsequently confirmed the claimant worked at UPS while working for the county.

At the Referee hearing the claimant was placed under oath and asked if she had been employed at UPS contemporaneous with her employment with the county. The claimant refused to answer since a response might incriminate her.

DECISION: The claimant was disqualified under Section 29(9) for the period of the suspension.

RATIONALE: The court found the employer's prima facia case established the claimant was employed at UPS. The employer had a right to know if the claimant was working for the employer and not some other employer during working hours. Claimant's act of working for another employer during the same hours she was supposed to be working for the involved employer is misconduct. The claimant failed to rebut the employer's evidence. Section 9 of the Act provides no one is excused from testifying at a Referee hearing, but no one shall be prosecuted based on the compelled testimony upon claiming her privilege not to testify. Claimant did not claim that Section 9 privilege during the hearing.

7/99
5, 6, d3: N/A

12.116

Section 29(1)(b)

MISCONDUCT, Single incident, Negligence, Higher duty

CITE AS: Special Transportation Management v Ashley, unpublished memorandum opinion Court of Appeals, March 29, 1993 (No. 141590).

Appeal pending: No

Claimant: Shirley Ashley
Employer: Special Transportation Management
Docket No. B88-0955-110001W

COURT OF APPEALS HOLDING: The claimant's isolated neglect was not disqualifying misconduct. The higher standard of care for special needs children did not convert isolated negligence into misconduct.

FACTS: The claimant drove a bus for special needs children. At the conclusion of a trip the claimant went toward the rear of the bus to aid a child whose braces were entangled in a seat. She saw another child go towards the front of the bus and believed that child exited the bus. The child had not, but instead went to the back of the bus and fell asleep. The claimant untangled the one child and saw that child exit. She looked around in the seats as she returned to the front of the bus. She saw no other children and believed the bus was empty. She was in a hurry because she needed to use the restroom. She drove the bus to her home to use the restroom and then found out one child was still in a rearward seat, asleep.

DECISION: The claimant was not disqualified for misconduct.

RATIONALE: The Board found the claimant's isolated neglect was not disqualifying misconduct. The Board fully considered the high level of responsibility the claimant had for the welfare and safety of special need wards. The Court of Appeals adopted the circuit court's analysis. The circuit court noted that Wickey v Employment Security Commission, 369 Mich 487, (1963) did not alter the Carter definition of misconduct so as to convert mere negligence in some occupations into misconduct in other "high responsibility" occupations. Rather it noted the Referee could properly take into account the degree of responsibility the claimant owes to the employer and what his infraction of the rules means as far as hardship or trouble to the employer. Wickey did not expand the definition of misconduct "to require an assessment of varying degrees of employee responsibilities."

7/99
3, 14: N/A

12.117

Section 29(1)(b)

MISCONDUCT, Standard of conduct

CITE AS: Cline v Willow Run Schools, Washtenaw Circuit Court No. 85-29474-AE (February, 6, 1986).

Appeal pending: No

Claimant: Earl Cline
Employer: Willow Run Schools
Docket No. B81-15811-RM9-88649

CIRCUIT COURT HOLDING: Misconduct can be established by deliberate violations of standards of behavior even absent proof of wrongful intent.

FACTS: Claimant worked as a bus driver. The claimant transported a school bus of "handicapped" children on the expressway to a Special Olympics event. The employer's witnesses testified the claimant was speeding excessively, which the claimant denied. The claimant and employer witness agreed the claimant stopped for gas and kept the bus engine running while he filled the tank. The witnesses disagreed whether the children were on the bus or removed from the bus while he refueled.

DECISION: The claimant is disqualified for misconduct.

RATIONALE: The Referee erred when he found "the claimant's actions do not exhibit malice, hostility, or reckless disregard for the employer's interests, nor was there any bad purpose or intent to do harm." Rather the court noted in Carter v Employment Security Commission, 364 Mich 538 (1961) there is a distinction between deliberate misconduct and negligent misconduct. The court found "[d]eliberate violations of standards of behavior rise above good faith errors or carelessness by the nature of their deliberateness. There is an element of culpability inherent in deliberate violations of behavior standards. Thus, the additional proof of wrongful intent or evil design is not required." Under the standard developed in Bell v Employment Security Comm., 359 Mich 649 (1960), to be guilty of misconduct the claimant "must intend only those actions which create risk of danger." Here the claimant deliberately kept the bus running while filling it with gasoline. There is no need to determine if the actions had a wrongful intent or evil design.

7/99
9, 6, d1: N/A

12.118

Section 29(1)(b)

MISCONDUCT, Strike related activity

CITE AS: Winters v Severance Tools Inc., unpublished per curiam Court of Appeals, June 20, 1995 (Case No. 164032).

Appeal pending: No

Claimant: Ken Winters
Employer: Severance Tools Inc.
Docket No: B90-14939-117439W

COURT OF APPEALS HOLDING: Claimant's intimidation of a part-time worker who crossed a picket line during a strike was disqualifying misconduct.

FACTS: Claimant's bargaining unit went on strike against the employer and the members were picketing the employer. A sixteen year old co-op employee crossed the picket line after leaving work just as the claimant arrived at the picket line. Two fellow strikers got into the claimant's truck and told him to follow another truck of strikers because the driver of the other truck was going to get into a fight. Claimant followed the truck to the co-op employee's home. When the co-op employee arrived at his home he got out of his vehicle. Both the claimant and the other driver slowed their vehicles. The driver of the other truck yelled threats at the co-op employee. They drove past the home. They came by the home a second time and the other driver knocked over the co-op employee's trash cans with the truck he was driving.

DECISION: Claimant is disqualified for misconduct under Section 29(1)(b) of the Michigan Employment Security Act.

RATIONALE: The obvious inference from the claimant's admitted conduct is that the claimant followed the truck to assist the other driver in intimidation of an employee who had crossed a picket line. Even assuming the claimant did not personally threaten the employee, the claimant intimidation of the employee who crossed picket line was sufficient to find disqualifying misconduct.

7/99
20, 19, d12: E

12.119

Section 29(1)(b)

MISCONDUCT, Sarcasm

CITE AS: Hamade v Cats Co., unpublished per curiam Court of Appeals, April 6, 1995 (No.168588).

Appeal pending: No

Claimant: Jamal Hamade
Employer: Cats Company
Docket No. B89-02808-111522

COURT OF APPEALS HOLDING: Claimant's loud sarcastic response and display of mock subservience to his employer was not disqualifying misconduct.

FACTS: Claimant was a computer programming consultant. The claimant and the employer's vice president became involved in a heated and loud discussion about a programming method the claimant was using. The employer's president walked in and told the claimant to lower his voice. The claimant sarcastically said "yes sir" or "yes master," and made gestures of mock subservience. The claimant was fired.

DECISION: The claimant is not disqualified for misconduct.

RATIONALE: In looking at the totality of the circumstances the court found, unlike in Broyles v Aeroquip Corp., 176 Mich App 175 (1989), that the instant claimant's loud discussion and sarcastic remarks do not rise to the level of intentional and substantial disregard for the employer's interests. "[T]he context of the discussion and remarks do not suggest friendly badgering, neither do they suggest a vulgar or abusive intent. Rather we believe the claimant's remarks and conduct constituted unsatisfactory conduct."

7/99
3, 11: C

12.120

Section 29(1)(b)

MISCONDUCT, Threat

CITE AS: St. Mary's Medical Center v Palmer, Saginaw Circuit Court, No. 98-022584-AE-1 (July 21, 1998).

Appeal pending: No

Claimant: Brenda Palmer
Employer: St. Mary's Medical Center.
Docket No. B97-01269-144783

CIRCUIT COURT HOLDING: A comment to a supervisor threatening a "drive-by shooting" was disqualifying misconduct.

FACTS: Employer decided to change the employee break schedule to ensure patient coverage. Claimant was informed by her supervisor to take her break at the new time. Claimant refused to take her break at the new time and said: "I'll take my break when I usually take my break." The claimant then added: "If this gets back to Jill, I'll know where it came from, and there's going to be a drive-by shooting." Claimant's supervisor asked "What?" and the claimant responded "There's going to be a drive-by shooting." Claimant gave no indication she was joking or kidding. Claimant was suspended and only then did she indicate she intended her statement as a joke. Claimant was subsequently fired.

DECISION: Claimant is disqualified for misconduct.

RATIONALE: This case parallels the facts in Carter v MESC, 364 Mich 538 (1961) where the court found a refusal of an employee to carry out a reasonable order of his foreman, coupled with a threat to punch him in the nose was disqualifying misconduct. In this case the Referee and Board determined the claimant had made the threat but found that because the supervisor did not appear to be put in fear by the claimant, the claimant was not disqualified for misconduct. The court indicated "The analysis utilized to mitigate the threat's impact on [the claimant's supervisor] was both unnecessary under law, and unwarranted given the substantial evidence of the threat coupled with the claimant's insubordination. The proofs show claimant deliberately chose the words she used." The court found the claimant's statement about a drive-by shooting was a threat and as such was disqualifying misconduct.

24, 22: J

Section 29(9)

DISCIPLINARY SUSPENSION, Insubordination, Sexual harassment, First Amendment

CITE AS: Bonnell v Macomb Community College, Macomb Circuit Court, No. 04-1132-AE (August 23, 2004)

Appeal pending: No

Claimant: John Bonnell
Employer: Macomb Community College
Docket No. B2001-19625-RM1-171007W

CIRCUIT COURT HOLDING: Claimant's refusal to comply with employer's legitimate requests to refrain from disseminating materials regarding a student's sexual harassment complaint against claimant is not protected free speech, and is disqualifying misconduct.

FACTS: Claimant worked for employer as an English instructor. In November 1998, employer received a complaint from a student alleging that claimant's conduct and use of profanity in his class was sexual harassment. Claimant posted the complaint letter and his response on a bulletin board and gave the documents to students, in violation of employer's policy and bargaining agreement. Employer suspended claimant on January 5, 1999 for a three-day period. On January 8, 1999, employer warned claimant not to post, distribute or discuss the complaint or his response. Claimant then distributed the documents to a local newspaper, television station, all of the instructors at the college, and at least one more student. Claimant filed suit in federal court against the employer alleging employer's actions restrained his "freedom of speech." The U. S. Sixth Circuit Court of Appeals held the employer had not infringed on claimant's First Amendment rights. Bonnell v Lorenzo, 241 F3d 800 (2000); cert den 534 US 951 (2001). Employer suspended the claimant without pay from August 15, 2001 to December 4, 2001; claimant sought benefits for this period.

DECISION: Claimant is disqualified under Section 29(9) for the period of suspension.

RATIONALE: Claimant was aware of the January 8, 1999 directive; he referred to the directive in his testimony at the Referee hearing as the "gag order." Claimant blatantly and purposefully disobeyed employer's directives. The directives furthered the "legitimate and necessary objectives of maintaining the confidentiality of student sexual harassment complaints, disciplining teachers who retaliate, and creating an atmosphere free of faculty disruption," Bonnell, supra, 823; and in serving employer's interests in conforming with the Family Educational Rights and Privacy Act.

11/04

Section 29(1)(b)

MISCONDUCT DISCHARGE, Insubordination, Pay dispute

CITE AS: Barbaro v The Meade Group, Inc, No. 97-2828-AE, Macomb Circuit Court (November 7, 1997)

Appeal pending: No

Claimant: Joseph J. Barbaro
Employer: The Meade Group, Inc.
Docket No. B96-13616-RO1-143588W

CIRCUIT COURT HOLDING: An employee's refusal to perform assigned duties is not disqualifying where the employer has failed to provide a meaningful avenue to resolve an on-going pay dispute.

FACTS: Employer discharged claimant for failing to deliver a vehicle to a customer. Claimant refused to make deliveries because the employer shorted his pay. This had happened four or five times in less than six months. Claimant testified his general manager had no explanation for his pay being short and told him to talk to the leasing manager. Claimant testified that employer had not corrected deficiencies in his pay when he previously complained to the leasing manager.

DECISION: Claimant is not disqualified from receiving benefits.

RATIONALE: Claimant's refusal to deliver the vehicle cannot be considered disqualifying insubordination under the circumstances of this case. The undisputed evidence indicates claimant had a serious and long running pay dispute for which employer offered no reasonable avenue to resolve. Claimant's refusal to perform arises from circumstances which go to the core of any employment contract. Such a reasonable refusal is distinguishable from Carter v ESC, 364 Mich 538 (1961).

11/04

Section 29(1)(b)

MISCONDUCT, Evidence, Hearsay, Nolo Contendere plea, Connected with work

CITE AS: Lootens v Chrysler Corp, Macomb Circuit Court, No. 98-3409-AE (April 21, 1999)

Appeal pending: No

Claimant: Randall Lootens
Employer: Chrysler Corporation
Docket No. MUL1998-52202-RO1-144738W

CIRCUIT COURT HOLDING: A nolo contendere plea to criminal charges for activity off the employer's premises may be considered in deciding whether claimant engaged in work-connected misconduct.

FACTS: Employer discharged claimant for violating company rules, which prohibited possession, distribution and/or sale of controlled substances on employer's property. Claimant pled nolo contendere to a misdemeanor charge for behavior that did not occur on employer's property.

DECISION: The claimant is disqualified under Section 29(1)(b).

RATIONALE: The Referee did not err in admitting and considering claimant's nolo contendere plea. The general rules of evidence do not govern administrative proceedings. Doyle v Kammeraad, 310 Mich 233, 241 (1965). An administrative agency may consider and rely on hearsay evidence in making decisions. Spratt v Dep't of Social Services, 169 Mich App 693, 701 (1988). The nolo contendere plea agreement to one charge involved the dismissal of a second charge of possession with intent to deliver cocaine. That second charge was predicated on employer's witness purchase of crack cocaine from claimant inside employer's facility. Employer's witness also witnessed other instances of illegal activity involving claimant - his purchase of stolen items from another employee, his offer to sell Quaaludes to employer's witness, and his sale of Tylenol 4 pills to employer's witness. This demonstrates work-connected misconduct.

(Note: Also see Michigan Rules of Evidence (MRE) 404(b)(1) as to the admissibility of evidence of other crimes and 410(2) as to the admissibility of a plea of nolo contendere.)

11/04

Section 29(1)(b)

MISCONDUCT, Last-chance agreement, Drug testing, Connected with work

CITE AS: Chojnacki v Chrysler Corp, Macomb Circuit Court, No. 2000-4556-AE (April 13, 2001).

Appeal pending: No

Claimant: Terrence E. Chojnacki
Employer: Chrysler Corp.
Docket No. B2000-04858-RM1-156400W

CIRCUIT COURT HOLDING: Claimant's violations of a last-chance agreement were work-connected misconduct.

FACTS: Employer terminated claimant, but reinstated him pursuant to the terms of a "last chance agreement." Under the terms of the agreement, the claimant had to meet regularly with a therapist for substance abuse, submit documentation showing regular attendance at therapy sessions, and submit to random drug testing. Claimant failed to attend therapy sessions, failed to submit documentation of attendance at therapy sessions, failed to submit to random drug testing and violated employer's attendance policy. Claimant changed therapists; his first therapist reported that he was not making progress; claimant missed two appointments with his second therapist in short succession and had not called to cancel or change the appointments.

DECISION: Claimant is disqualified under 29(1)(b).

RATIONALE: Claimant had it within his control to meet regularly with his therapist and attend counseling sessions, his failure to do so violated his obligations under the terms of the last chance agreement with the employer and constitutes work connected misconduct. The violations between claimant and his therapist directly affected his obligations under the last chance agreement, and the agreement was related to his work.

11/04

Section 29(1)(b)

MISCONDUCT, Tardiness, Medical condition

CITE AS: Sparrow Hospital v Mackiewicz and BWUC, Ingham Circuit Court, No. 03-902-AE (March 3, 2004)

Appeal pending: No

Claimant: Susan Mackiewicz
Employer: Sparrow Hospital
Docket No. B2002-10570-M2R-168083

CIRCUIT COURT HOLDING: Repeated tardiness due to a medical condition, a circumstance beyond the claimant's control, is not disqualifying misconduct.

FACTS: The employer discharged the claimant for excessive tardiness. The claimant was a 52-year-old registered nurse with rheumatoid arthritis, which afflicted both of her knees. The claimant was tardy 37 times between December 2000 and February 2002. The instances of tardiness ranged from one to eight minutes. Importantly, the employer discouraged punching-in early. Claimant testified that on many dates of tardy arrival she sat in her car rubbing her knees to prepare to walk to her department from the parking lot. Claimant's immediate supervisor was aware of her health problems.

DECISION: Claimant is not disqualified under 29(1)(b).

RATIONALE: Hagenbuch, cited by the employer clearly states "[I]t is well established that excess absenteeism and tardiness for reasons not beyond the employee's control constitutes misconduct . . ." 153 Mich App 834, 837 (1986) (emphasis added) Here it was reasonable for a 52-year-old woman with rheumatoid arthritis and a forty-five minute commute to linger in her car to stretch and massage her knees before beginning the long walk to her department and where early punch in was discouraged.

11/04

Section 29(1)(b)

MISCONDUCT, Absence without notice, Personal reasons, Domestic violence

CITE AS: Resetz v Gratiot Community Hospital, No. 252901 (Mich App May 17, 2004).

Appeal pending: No

Claimant: Debra Resetz
Employer: Gratiot Community Hospital
Docket No. B2002-17218-166818W

COURT OF APPEALS HOLDING: A three-day absence without notice is not disqualifying when the absence results from circumstances beyond the employee's control.

FACTS: Employer discharged claimant for failure to call in or report to work on three consecutive days, a violation of its work rules. Prior to the three-day absence, the claimant had an exemplary attendance record. Employer's rules provided that three consecutive days of absence without appropriate notice could result in disciplinary action, but did not mandate discharge. The claimant called in on the third day of her absence. The claimant was in Georgia; she fled from a domestic dispute and feared for her life. Claimant notified her supervisor two weeks before fleeing to Georgia that she had been forced from her home due to a domestic dispute. Her supervisor contacted the police on the first day of claimant's absence out of concern for her safety.

DECISION: Claimant is not disqualified for benefits.

RATIONALE: An absence from work that results from circumstances beyond the employee's control does not constitute "misconduct" under the MES Act so as to disqualify the employee from benefits. Washington v Amway Grand Plaza, 135 Mich App 652 (1984). Here, the claimant, "who had no history of absenteeism or disciplinary problems, provided a sufficient, good cause explanation for her absence." Employer's policy did not mandate discharge for the type of conduct in which the claimant engaged, she had no notice that she could lose her job.

11/03

Section 29(1)(b)

MISCONDUCT, Error in judgment or discretion

CITE AS: Enright v Saturn Retail of Michigan, Ingham Circuit Court, No. 03-1374-AE (January 30, 2004).

Appeal pending: No

Claimant: Kevin G. Enright
Employer: Saturn Retail of Michigan
Docket No. B2002-17365-RO1-167652

CIRCUIT COURT HOLDING: Errors arising out of the natural consequence of the discretionary character of claimant's position do not constitute disqualifying misconduct under the MES Act.

FACTS: Claimant worked for employer ten years, for the last five years he supervised the dealership's service department. Employer first reprimanded claimant, after ten years of service, on July 27, 2002 for failing to administer lunch hour punches on subordinates' time cards. Employer reprimanded claimant on August 8, 2002 for erroneously recording a subordinate was at work; suspended claimant for three days, then discharged him on August 13. Employer discharged claimant for inability to perform his job.

DECISION: The claimant is not disqualified under 29(1)(b).

RATIONALE: Claimant avoided confrontation in favor of consensus, so he would make corrections to employees' time cards as necessary rather than confront them. He relied on his rapport with employees to resolve discrepancies. Claimant's alleged misconduct is a natural consequence of the discretionary character of his position as service manager. Carter v MESC, 364 Mich 538 (1961) expressly provides that "good-faith errors in judgment or discretion are not deemed 'misconduct' within the meaning of the statute." Unlike the claimant in Christophersen v City of Menominee, 137 Mich App 776 (1984), who had more then six months and four written reprimands to conform his conduct, this claimant had 17 days. "This court will not impede Saturn's right to choose its management team as it sees fit, but in doing so it cannot expect to avoid its responsibilities under, or frustrate the purpose of, the [Act]."

11/04

Section 29(1)(b)

MISCONDUCT, Drug testing

CITE AS: Massey v Ace Trucking Co, Kent Circuit Court, No. 03-00363-AE (February 3, 2004)

Appeal pending: No

Claimant: Clettes J. Massey
Employer: Ace Trucking Company
Docket No. B2002-08393-164928W

CIRCUIT COURT HOLDING: Failure to timely report for drug testing, when directed by the employer, is disqualifying when the reasons for tardiness demonstrate an intentional and substantial disregard for the employee's duties and obligations to the employer.

FACTS: Claimant worked as a full-time truck driver. Employer discharged claimant for failing a drug test, but reinstated him with the understanding that he had completed a rehab program. In fact he had not, so the employer sent him to a program. On March 1, 2002, claimant was at the end of the program. He called employer at 9:30 am and was told to report for drug testing. Claimant reported for drug testing at 12:50 pm after taking lunch, and the test result came back as diluted. On March 5, 2003 at 3:50 pm, employer told claimant to report immediately for another drug test. The claimant did not directly report for drug testing, instead he talked to a co-worker for 15-20 minutes. He testified that while driving to the drug testing facility he was in a car accident, and then went to McDonald's. Claimant admitted he was told to immediately report for drug testing, but failed to do so. Claimant reported at 6:00 pm on March 5, 2003 for the test; the test result came back as diluted. Employer's rules, and USDOT rules, required an employee to immediately report for drug testing when directed, to avoid altering the test results.

DECISION: Claimant is disqualified under 29(1)(b).

RATIONALE: Claimant engaged in misconduct in failing to immediately report for drug testing when directed by the employer. Employer discharged claimant after he twice deliberately delayed reporting for drug testing, with the result that the accuracy of those tests was compromised. Claimant's tardiness in reporting for testing was not due to reasons beyond his control or otherwise with good cause, which would have been non-disqualifying. His actions were found to have been a direct and intentional effort to avoid taking a drug test that would yield an accurate reading.

11/04

Section 29(1)(b)

MISCONDUCT, Work Rules, Drug Usage, Prescription, Standard of Conduct

CITE AS: Bronson Methodist Hospital v Triezenberg, Kalamazoo Circuit Court, No. D03-000689-AE (October 15, 2004)

Appeal pending: No

Claimant: Amy Triezenberg
Employer: Bronson Methodist Hospital
Docket No. B2002-19519-RM9-170170

CIRCUIT COURT HOLDING: Claimant's use of a prescription pain medication and her failure to notify her employer she was using it, in violation of the employer's rules, constituted a disregard of the standards of behavior which the employer has the right to expect of its employees.

FACTS: Claimant worked as a patient care assistant. Her duties included providing basic care to patients and monitoring cardiac monitors. Claimant was found unconscious in the cardiac monitor room. She tested positive for opiates. Claimant later told her supervisor she was prescribed Vicodin for pain due to a recent biopsy but took the drug to alleviate leg pain. Employer's drug policy prohibited an employee from being on the employer's premises while under the influence of a drug which could impair an employee's functioning. Employer's policy also required an employee notify the employer when taking a prescription medication. Employer discharged claimant for violating its policies.

DECISION: Claimant is disqualified from receiving benefits.

RATIONALE: Possible side effects of Vicodin include "dizziness, light-headedness, nausea, sedation and vomiting;" and "make some drowsy, less alert, or unable to function well physically." Employer's policy specifically required claimant to disclose that she was taking a medication which was known to, or might, impair her work performance. "Clearly the taking of Vicodin would require an employee working in a hospital, especially one whose daily duty it is to monitor patient heart rhythms, to disclose to employer when she is taking Vicodin." Also, claimant took the Vicodin for a reason other than as prescribed. Claimant's intentional conduct deviated from that which the employer had a reasonable right to expect and evidenced a substantial disregard for employer and its patients.

11/04

MISCONDUCT, Absences and tardiness, Point system

CITE AS: Krug v IBP Foods, Kent Circuit Court, No. 02-05652-AE, (December 13, 2002)

Appeal pending: No

Claimant: David L. Krug
Employer: IBP Foods
Docket No. B2001-16302-161934W

CIRCUIT COURT HOLDING: Under a no-fault attendance policy the accumulation of enough points to warrant discharge does not necessarily require disqualification for unemployment benefits. Without evidence as to each instance of tardiness or absence, it cannot be concluded that there were an excessive number of incidents or whether the incidents were due to events within the employee's control.

FACTS: Employer discharged claimant pursuant to its no-fault attendance policy, which provided for discharge if an employee accrued 14 points in a 12-month period. Claimant had already accrued ten points, and employer assessed additional points for two absences due to illness, an unexcused absence, an incident of tardiness and failing to timely call in. Claimant failed to timely call because his alarm clock malfunctioned and he was ill.

DECISION: Claimant is not disqualified under 29(1)(b).

RATIONALE: The loss of unemployment benefits is intended to be a "penalty imposed in addition to . . . discharge." Jenkins v ESC, 364 Mich 379 (1971). "The governing principle in Veterans Thrift Stores, Inc., Hagenbuch; and Washington was that what is beyond an employee's control cannot qualify as disqualifying misconduct. Therefore, a work rule violation beyond an employee's control is, for purposes of defining disqualifying misconduct, no different than an absence or tardiness beyond the employee's control." As the employer did not offer specifics with regard to the ten points already assessed to claimant, there is "no principled basis to say that those 10 points establish more than a few absences over the year."

11/04

MISCONDUCT, Drug testing, Evidence, Hearsay

CITE AS: Banktson v Rowe International, Inc, Kent Circuit Court, No. 98-02888-AE (October 21, 1998)

Appeal pending: No

Claimant: Gordon A. Banktson
Employer: Rowe International, Inc.
Docket No. B97-03373-144189W

CIRCUIT COURT HOLDING: Where the record reflects a negative drug test (urine), simultaneous with a positive drug test (hair follicle), the employer did not prove the claimant should be disqualified.

FACTS: The employer required claimant to enter into a last chance agreement after an altercation. Claimant was subject to random drug testing. Two years later, after submitting urine and hair follicle samples, claimant tested negative on the urine test but positive for marijuana on the hair follicle test. Employer suspended claimant for six months. Employer did not have a witness from the testing laboratory at the Referee hearing, but the Referee admitted the test results. Employer's human resources representative testified she was told that marijuana remains in hair longer than in urine.

DECISION: Claimant is not disqualified under Section 29(9).

RATIONALE: "It was not improper for the referee to have received into evidence and considered the testing laboratory's report. While that report is hearsay, it is 'evidence of a type commonly relied upon by reasonably prudent men in the conduct of the affairs,' the standard of admissibility at administrative hearings." Helm v University of Michigan, 147 Mich App 135, 138-139 (1985).

The record also included a simultaneous negative urine test. "That negative test constitutes… 'substantial evidence,' that marijuana use by claimant had not been adequately established." "There being 'substantial evidence' on both sides of the issue, this Court cannot substitute its judgment for the Board of Review's assessment of that conflicting evidence that misconduct was not proven."

11/04

Section 29(1)(b)

MISCONDUCT, Credibility

CITE AS: Torres v Sempliners Formalwear, No. 99-3788-AE-B, Bay Circuit Court (February 28, 2000)

Appeal pending: No

Claimant: John G. Torres
Employer: Sempliners Formalwear
Docket No. B1999-05961-152280W

CIRCUIT COURT HOLDING: Where the ALJ found disqualifying misconduct based on an evaluation of witness credibility, but credibility was only an issue as to non-material facts, the ALJ decision cannot be sustained.

FACTS: On December 11, 1998 claimant reported his absence from work due to a doctor appointment for his knee. Claimant's doctor kept him off work until December 21. On December 21 claimant saw his doctor, who sent him for a test and kept him off work until December 30. On December 30 claimant underwent an MRI and his doctor told him he would need to be off until January 6. On January 6, 1999 claimant saw his doctor, and was told he had to be off until January 21. Claimant contacted the employer each time his doctor kept him off work. When claimant reported to employer on January 6 he was told to provide medical documentation. On January 15, 1999 employer sent claimant a letter discharging him for failure to provide medical documentation. Claimant turned in his uniform, and had medical documentation regarding his absences, but employer refused it. Claimant alleged he had not previously been told to provide medical documentation. Employer alleged this request had been made each time claimant reported that he needed to be off, but never gave claimant a time frame to submit the documentation.

DECISION: Claimant is not disqualified.

RATIONALE: The underlying ALJ decision made a credibility finding; however, this claimant's entitlement to benefits is not an issue that should be resolved on the basis of the witnesses' credibility. A witness' credibility is relevant when facts are in dispute. The only fact in dispute was how many times employer requested medical documentation; this disputed fact has little bearing on the issue of whether claimant engaged in misconduct, as employer never gave claimant a time frame to submit medical documentation, and did not warn claimant that failure to provide the documentation would result in his discharge.

11/04

Sections 29(1)(b), 38

MISCONDUCT, Definition of misconduct, Last straw doctrine, Failure to remedy, Appeals, Court of Appeals standard of review

CITE AS: Osborn v Superior Data Corp, No. 207997 (Mich App November 30, 1999)

Appeal pending: No

Claimant: Billy J. Osborn
Employer: Superior Data Corporation
Docket No. B96-04777-RO1-141178W

COURT OF APPEALS HOLDING: Claimant's failure to come up with a solution for his attendance problem, despite repeated requests he do so, constituted a "last straw" and revealed a complete indifference to the employer's interests."

FACTS: Two months before the discharge, employer put claimant on notice that he had to correct his attendance. He had 28 attendance infractions in the previous three months, attributed to his children's illnesses and a custody dispute. Employer asked claimant to develop a plan to remedy his absences; claimant refused to do so and was discharged.

DECISION: Claimant is disqualified under 29(1)(b).

RATIONALE: The issue of misconduct concerned claimant's inability to develop a remedy for his absenteeism, not the absenteeism itself. The components of the definition of misconduct provided by Carter v ESC, 364 Mich 538, 541 (1961) are:

"Misconduct" . . . is limited to conduct evincing such willful or wanton disregard of an employer's interest as is found:

(1) in deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee, or

(2) in carelessness or negligence of such degree or recurrence as to
  (a) manifest culpability, wrongful intent or evil design, or
  (b) show an intentional and substantial disregard of
    (i) the employer's interests, or
    (ii) the employee's duties and obligations to his employer.

"[W]e read the Carter requirements in the disjunctive, . . . any single one of the descriptions of misconduct is sufficient to deny benefits. . ."

11/04

Sections 29(1)(b), 29(1)(m)

MISCONDUCT, Drug testing, Reason for discharge

CITE AS: Roberts v Americhem Sales Corp., Kent Circuit Court, No. 02-10788-AE (April 11, 2003)

Appeal pending: No

Claimant: John D. Roberts
Employer: Americhem Sales Corporation
Docket No. B2002-06554-164443

CIRCUIT COURT HOLDING: Where the sole reason offered for discharge was claimant's failure to pass a drug test, but a Section 29(1)(m) disqualification is not supported by the record, claimant cannot be disqualified under Section 29(1)(b) for alleged conduct for which he was not discharged.

FACTS: Employer repeatedly warned and disciplined claimant for poor job performance, failing to follow instructions, and insubordination. Employer required claimant to submit to drug and alcohol testing due to the continued pattern of behavior. Claimant was initially told the test results were negative, but four days later he was told he tested positive for cocaine. Claimant demanded a second test, but it was not performed. Employer discharged him for testing positive for cocaine, a violation of its employee handbook.

DECISION: Claimant is not disqualified under 29(1)(m) or 29(1)(b).

RATIONALE: Failure to administer a confirmatory test when the employee disputes the test results bars disqualification under Section 29(1)(m). Employer's witness testified claimant was discharged for testing positive on the drug test. Employer alleged on appeal that claimant was discharged for additional reasons tantamount to misconduct. However, this testimony came only in response to a leading question by employer's counsel. Employer's witness lacked personal knowledge of the reason for claimant's discharge.

That the Legislature dealt separately with testing positive for illicit drugs confirms that it is different from "misconduct." If the only reason for a claimant's discharge is failing a drug test, then this compels the conclusion that the claimant was not fired for misconduct. An employee cannot be disqualified "from benefits for conduct for which he or she was not discharged."

11/04