17.00

EMPLOYEE STATUS

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Section 42

EXCLUDED EMPLOYMENT, Emergency room physician, Independent contractor

CITE AS: Socher v Allegan General Hospital, No. 70531 (Mich App December 29, 1983); lv den 422 Mich 882 (1985).

Appeal pending: No

Claimant: Robert Socher
Employer: Allegan General Hospital
Docket No: B81 07346 80683

SUPREME COURT HOLDING: In lieu of granting leave to appeal the Michigan Supreme Court reversed the Court of Appeals and trial court and reinstated the Board of Review decision because that decision was supported by competent, material and substantial evidence. The Board found the proper test to be applied is the "economic reality" test.

FACTS: Claimant, an emergency room physician, had an oral contract with the employer. Compensation was $25 per hour or 85% of the patient billings attributed to the claimant, whichever was greater. Taxes were not withheld, nor did he receive fringe benefits. The equipment, medication and instruments were provided by the hospital.

DECISION: The services involved were employment as defined by Section 42 of the MES Act

RATIONALE: The "economic reality" test looks to the totality of the circumstances surrounding the work performed and focuses on the relationship of the worker and his work to the employer's business operation. See McKissic v Bodine, 42 Mich App 203 (1972). The claimant was not subject to any control as to the manner in which he performed his professional services for any given patient but could assess fees therefor only within the limits prescribed by the hospital and who was obligated to report for work and continue working at such times and throughout such periods as directed by the hospital. He could not hire or fire anyone who assisted him but instead had to accept those provided by the hospital and, at least understood, that he could not perform professional services elsewhere. The claimant's services were a part of a larger common task, i e., the provision of hospital care to those in need. He was not an independent contractor.

Section 42

EMPLOYEE STATUS, Economic reality test, Carpet cleaners

CITE AS: Capital Carpet v MESC, 143 Mich App 287 (1985).

Appeal pending: No

Claimant: N/A
Employer: Capital Carpet Cleaning and Dye Company, Inc.
Docket No. L80-03459-R01-1683

COURT OF APPEALS HOLDING: Whether a business is an employer of a worker for purposes of the MES Act depends upon the economic reality of their relationship; under the economic reality test, among the factors to be used are (1) control of the worker's duties, (2) the payment of wages, (3) the right to hire and fire and the right to discipline, and (4) the performance of the duties as an integral part of the employer's business towards the accomplishment of a common goal.

FACTS: Carpet cleaners worked under a contractual agreement with Capital Carpet [CC]. They reported to CC every morning and received work assignments for the day. The cleaners used CC's office to make appointments.

The cleaners received a commission which ranged from 50-60%. All income was turned over to CC and the cleaners were given a paycheck. Income and social security taxes were not withheld. The cleaners rented equipment and purchased chemicals from CC. The costs were deducted from their paychecks. They could purchase their own equipment but chemicals had to be purchased from CC.

The cleaners were in control of the jobs themselves, were not supervised by CC and were responsible for hiring and paying their own help. The cleaners were encouraged to wear CC T-shirts. The cleaners represented themselves as associated with CC's business and promoted that business. None of the cleaners cleaned on their own or for any other company.

DECISION: The cleaners were employees for MESA purposes.

RATIONALE: CC controlled the overall direction of the cleaners' employment situation. Moreover, CC paid their wages, and the work done was so integral to CC's business, neither could exist without the other. In light of the principals of the "economic reality" test, it was clear they were employees.

7/99
5, 6, d1: N/A

Section 42

EXCLUDED EMPLOYMENT, Control, Covered employment, Independent contractor, Truck owner-operator

CITE AS: Edward C. Levy Co. v ESC, No. 78-1550 (Mich App January 22, 1979)

Appeal pending: No

Claimant: Willie Dubose
Employer: Edward C. Levy Co.
Docket No: B75 12933 52171

COURT OF APPEALS HOLDING: Where a truck owner-operator works almost exclusively for one company the claimant is an employee, even where the claimant considered himself or herself an independent contractor.

FACTS: The claimant, a truck owner-operator, considered himself an independent contractor. He worked for the Edward C. Levy Co. from 1962 to 1974. The claimant only performed services for other companies when Levy had no work for him.

DECISION: The claimant was an employee, and not an independent contractor.

RATIONALE: "There is little doubt that Mr. Dubose considered himself an independent contractor. However, his belief as to his status is not determinative. The Michigan Employment Security Act defines an employee, in part, as:

' ... [A]n individual who by lease, contract, or arrangement places at the disposal of a person, firm, or corporation a piece of motor vehicle equipment and under a contract of hire, which provides for the individual's control and direction, is engaged by the person, firm, or corporation to operate the motor vehicle equipment shall be deemed to be employment subject to this Act.' MCL 421.42; MSA 17.545. Mr. Dubose certainly placed his trucks at plaintiff's disposal and then operated them under the direction and control of plaintiff. It is true that plaintiff did not exercise direct day-to-day control over Mr. Dubose's operation, but it did control the overall direction of Mr. Dubose's employment situation."

Section 43(h)

EMPLOYEE STATUS, Excluded employment, Insurance agent

CITE AS: Berlin v Northwestern National Life Insurance Co., No. 77624 (Mich App February 26, 1986).

Appeal pending: No

Claimant: Steven Berlin
Employer: Northwestern National Life Insurance Company
Docket No: B81 14302 80900

COURT OF APPEALS HOLDING: Claimant was not an independent contractor under the "economic reality" test enunciated in Powell v ESC, 345 Mich 455 (1956).

FACTS: Claimant worked full-time for employer as an insurance agent and was paid $1600/mo. Social Security tax was withheld. Commissions generated by claimant amounted to $351.23, while he received total compensation in excess of $8000. Claimant worked exclusively for employer and reported to supervisors daily. He was provided with an office, secretarial help, computer, supplies, and training.

DECISION: Claimant was not in excluded employment under the MES Act.

RATIONALE: Employer provided extensive services and training. Claimant represented himself solely as employer's agent and employer exercised a significant amount of control over claimant's day-to-day activities. Claimant's work was an integral part of employer's business. Claimant was an employee under the "economic reality" test. The court distinguished this case from Farrell v Auto Club of America, 148 Mich App 165 (1986). "Here, claimant was apparently being paid by respondent at a steady rate during the development or probationary period. His income does not appear to have fluctuated according to the number of units he was able to sell."

Section 43(h)

EXCLUDED EMPLOYMENT, Insurance agent, Compensation on commission basis

CITE AS: Farrell v Auto Club of America, 148 Mich App 165 (1986).

Appeal pending: No

Claimant: Bruce Farrell
Employer: Auto Club of Michigan
Docket No: B82 14055 89503W

COURT OF APPEALS HOLDING: If the compensation depends upon Claimant's efforts and a sale being brought to a conclusion, the compensation is a commission.

FACTS: Claimant, as an insurance salesman for the employer, received compensation for selling insurance policies on a sliding scale, whereby fixed dollar amounts were assigned to various "units" of a policy. Ninety percent of Claimant's income was calculated on a fixed fee computation, instead of a percentage of the total amount of the policy sold.

DECISION: Claimant is excluded from covered employment.

RATIONALE: The court cited Smith v Starke, 196 Mich 311 (1917): "The word 'commission' implies a compensation to a factor or agent for services rendered in making a sale."

The court went on to cite American National Insurance Co v Keitel, 186 SW2d 447, "(the word 'commission, when used to denote compensation for work performed, as is ordinarily understood, means compensation paid upon results achieved')." [T]he distinguishing feature of a commission is that payment of a commission is contingent upon the successful completion of sale transactions."

EXCLUDED EMPLOYMENT, Symphony orchestra musician, Contract

CITE AS: Haas (Flint Institute of Music, Inc.) 1983 BR 1694 (L81 02161).

Appeal pending: No

Claimant: Marc W. Haas
Employer: Flint Institute of Music, Inc.
Docket No: L81 02161 1694

BOARD OF REVIEW HOLDING: The test of employment is one of "economic reality" and not "control and direction" exclusively.

FACTS: Claimant signed a contract with the employer for the 1979-1980 concert season, which incorporated the provisions of the master contract between the American Federation of Musicians and the employer. The claimant furnished his own instrument and clothing. Claimant was paid $25 for each rehearsal and performance. Claimant also performed with the Michigan Chamber Orchestra, the Detroit Symphony Orchestra, and also offered his services as a teacher.

DECISION: Claimant's services are not excluded under Section 42(1) and (5) of the MES Act.

RATIONALE: McKissic v Bodine, 42 Mich App 203, 208 (1972) sets forth the principal factors to be considered in determining whether there is an employment relationship: First, what liability, if any, does the employer incur in the event of the termination of the relationship at will? Second, is the work being performed as an integral part of the employer's business which contributes to the accomplishment of a common objective? Third, is the position or job of such a nature that the employee primarily depends upon the emolument for payment of his living expenses? Fourth, does the employee furnish his own equipment and materials? Fifth, does the individual seeking employment hold himself out to the public as one ready and able to perform tasks of a given nature? Sixth, is the work or the undertaking in question customarily performed by an individual as an independent contractor? Seventh, control, although abandoned as an exclusive criterion upon which the relationship can be determined, is a factor to be considered along with payment of wages, maintenance of discipline and the right to engage or discharge employees. In this case, the integrity of Claimant's services to the employer's overall objective was persuasive.

Section 42

EXCLUDED EMPLOYMENT, Economic reality test, Independent contractor, Nurse-anesthetist

CITE AS: City of Sturgis v Messner, No. 78-590, St. Joseph Circuit Court (February 27, 1979)

Appeal pending: No

Employer: City of Sturgis
Docket No: L77 7267 1531

CIRCUIT COURT HOLDING: Where a nurse-anesthetist declines employee status, signs a contract to provide services at a hospital as an independent contractor, and retains the right to perform services elsewhere, the doctrine of "economic reality" does not apply, and the claimant is an independent contractor.

FACTS: Ann Messner was a full-time nurse-anesthetist at Sturgis Hospital. A written contract specified her status as "independent contractor". She declined status as an employee. The hospital purchased her supplies and scheduled her hours on duty. She received 25 percent of patient billings. Ms. Messner was required to remain on call and to maintain malpractice insurance.

DECISION: The claimant was an independent contractor, and not an employee.

RATIONALE: "[T]his Court finds that it is clear from all of the testimony and evidence that claimant Messner was at all times an independent contractor; that she was not an employee; that she had a free choice of whether she would be an employee or an independent contractor and she, after consulting with independent legal counsel, opted to be an independent contractor instead of choosing to be an employee; that over and aside from her acknowledging that she was and her choosing to be an independent contractor above her written signature, all of the evidence establishes that is exactly what she was, along with another nurse anesthetist named Thaddeus Juszckak; that she had the right to perform her services at other hospitals and was not restricted to the Sturgis hospital; that in the opinion of this Court this case is not at all close on the facts as to whether she was an independent contractor or an employee."

"In the opinion of this Court, the 'economic reality' doctrine has no application to personnel of this type, or to the facts in this case."

Section 42

EXCLUDED EMPLOYMENT, Construction laborer, General contractor, Independent contractor, Ownership of tools, Payment for material, Subcontractor

CITE AS: Wiggers v Olsen Seawall Construction Co., No. 79-13578 AE, Muskegon Circuit Court (April 21, 1980)

Appeal pending: No

Claimant: David Wiggers
Employer: Olsen Seawall Construction Co.
Docket No: L77 6884 1537

CIRCUIT COURT HOLDING: Where a construction laborer is hired and paid by a subcontractor, and the tools and material are furnished by the general contractor, the laborer is not an employee of the general contractor.

FACTS: The Referee stated: "[T]he partners hired one Tom Nelson as a subcontractor to provide labor for the construction work. He hired the labor for the jobs, kept the time, and each Friday he paid the men in cash." The claimant was one of the laborers.

DECISION: The claimant was not an employee of Olsen Seawall Construction Co.

RATIONALE: "Testimony is that the workers, after 1974, were completely hired and fired by Mr. Nelson and under his direction for the entire time. The Olsen Seawall Company was still the one the cottage owner dealt with and Olsen did indicate where to put the seawall and how long it was to be. There is testimony that on occasion the per foot costs were changed, and these were discussed with Mr. Nelson, which would be consistent with an independent contractor since if he is to obtain the labor cost as his portion of the contract then he would be consulted, and if he were paid on an hourly basis there would be no basis for consulting with him. It was testified that this was varied when the jobs were difficult or easy. This is also consistent with the independent contractor. The fact that the tools are owned by the Olsens and the fact that they paid for the lumber and additional nuts and bolts which were included in the bid and the pricing method, is not inconsistent with the concept of the independent contractor; and the fact that one of the Olsens would occasionally assist when he was present at the work-site, is not inconsistent with an independent contractor relationship."

EMPLOYEE STATUS, Taxi drivers

CITE AS: Foster v MESC, 15 Mich App 96 (1968).

Appeal pending: No

Claimant: NA
Employer: Vern Foster, d/b/a Livonia Yellow & Red Cab
Docket No: L65 1247 1262

COURT OF APPEALS HOLDING: The court remanded because the Appeal Board incorrectly applied the "right to control test" rather than the statutory test. Also, the Board failed to make an explicit finding of whether the drivers followed a pattern of operation established by the employer and were controlled by employer in the performance of their work.

FACTS: Employer owned 5-10 cabs. Anyone who had a City of Livonia taxi license could lease one of the cabs. Employer had no established work schedule for the drivers. Cabs were assigned to driver's on a "first come first serve" basis. To get a cab a driver put down a $10 refundable deposit. Employer provided the cab in a clean condition with the motor oil checked and replaced if needed. An oral lease provided that the drivers would return the cab within 12 hours in the same condition. The cab could be returned at any time less than 12 hours. The driver retained 40% of the fares, and employer kept 60%. Employer did not have a dress code but did prohibit the use of alcohol. Livonia set the meter rates. The city required drivers to prepare and submit a trip sheet, detailing each run. Employer never gave the driver orders, nor did he "field check" them. Drivers could refuse runs.

DECISION: Remand for further evidence and new decision.

RATIONALE: "The critical question is whether the drivers whose wages it is sought to tax did conform to the employer's pattern by leaving their radios on, taking radio calls and gravitating to the cab stands where they could obtain telephone calls...."

Section 42

EMPLOYEE STATUS, Independent contractor

CITE AS: Nordman v Calhoun, 332 Mich 460 (1952).

Appeal pending: No

Claimant: Ardath Calhoun
Employer: Charles E. Nordman d/b/a Top Notch Soda Bar
Docket No: BO 2905 12445

SUPREME COURT HOLDING: Mr. Date Scofield was an employee under the Section 42 definition of employment - service performed for remuneration or under an oral or written contract for hire.

FACTS: Mr. Scofield, a retired postal employee provided janitorial services to employer's predecessor for $10/week. When the employer took over, Mr. Scofield continued performing the same duties at the same salary. Employer required him to finish his work by 10 a.m. when the business was open. He worked 6 days/week for approximately 1.5 hours each day.

Mr. Scofield also worked at a hardware store 2-3 times/year installing and removing screens and storm windows, and he also performed similar jobs for others. For such work he charged by the hour. Mr. Scofield could quit at any time. Employer laid him off in October, 1949.

DECISION: Mr. Scofield was an employee pursuant to Section 42. As a result of that finding, the employer was determined to be a liable employer under the then applicable criteria in the Act. Consequently the claimant, Ms. Calhoun, was able to pursue her claim for benefits against the employer.

RATIONALE: "The only issue in the case at bar is to determine whether Date Scofield was an employee or an independent contractor. In the case at bar Date Scofield was hired for an indefinite period and could have severed his employment at any time. Moreover, his employer could have discharged him at any time, with or without cause. The fact that the employer did not find it necessary to exercise any detailed supervision over the performance of the employee's duties is not determinative of the employer-employee relationship, nor does the fact that Date Scofield was a part-time employee bring him within the exception found in the act. In view of the fact that the services performed by Date Scofield are undisputed, we hold as a matter of law that he was an employee... ."

Section 42

EMPLOYEE STATUS, Economic reality test

CITE AS: Industro-Motive Corp. v Wilke, 6 Mich App 708 (1967).

Appeal pending: No

Claimant: Carroll F. Wilke
Employer: Industro-Motive Corp.
Docket No: B64 4965 R0 33382

COURT OF APPEALS HOLDING: The economic reality test is to be used in unemployment compensation cases dealing with whether a person is an employee or independent contractor.

FACTS: Claimant was a designer of model automobiles. Claimant and the employer entered into a written agreement. Under the agreement each project was to be completed within 60 days of commencement. Claimant was to be paid a salary of $150 weekly plus a royalty of 1 cent for each model sold. Claimant worked in his basement, used his own tools but was reimbursed by the employer for materials. The contract could be terminated with 90 days written notice from either party. When claimant did not complete a project on schedule the employer stopped paying him and the claimant applied for unemployment benefits.

DECISION: Claimant was an employee and the remuneration he received was wages under the Employment Security Act.

RATIONALE: "By adoption of Justice Talbot Smith's dissent in Powell v Employment Security Commission (1956), 345 Mich 455, 462 (see Tata v Muskovitz /1959/, 354 Mich 695, and Goodchild v Erickson /1965/, 375 Mich 289), our Supreme Court has abrogated the use of the common law definition of "control" in interpreting social legislation, which we hold includes employment security legislation as well as workmen's compensation legislation. Control in the sense of right to control (see majority opinion in Powell, supra) is only one of many factors to be considered. Now 'The test employed is one of economic reality. It looks at the task performed, whether or not it is part of a larger common task, 'a contribution to the accomplishment of a common objective'. (citing authority) The test is far from the common-law test of control, since 'the act concerns itself with the correction of economic evils through remedies which were unknown at the common law.'"

Section 43(o)

EXCLUDED EMPLOYMENT, Policymaking position
CITE AS : Ballenger v Michigan Department of Agriculture, Ingham Circuit Court No. 87-60066-AE (August 10, 1989).

Appeal pending: No

Claimant: William Ballenger
Employer: Michigan Department of Agriculture
Docket No. B85-13688-RO1-103090W

CIRCUIT COURT HOLDING: Claimant's employment as the State Racing Commissioner was a major non-tenured policymaking or advisory position and therefore excluded employment under Section 43(o)(3)(v) of the Michigan Employment Security Act.

FACTS: The claimant was appointed by Governor Milliken to be the Racing Commissioner. He worked in that position from September 1982 until August 1985 when Governor Blanchard appointed a successor. He filed a claim for unemployment benefits.

DECISION: The services the claimant performed were excluded from consideration as employment under the Michigan Employment Security Act. The claimant was ineligible for benefits.

RATIONALE: The claimant was appointed to the position of Racing Commissioner by the Governor. A position is "major" if filled by gubernatorial appointment. The position was not covered by the Civil Service system and as such was non-tenured. The claimant admitted the position was policymaking or advisory. The policymaking/advisory nature of the position was confirmed by the position description submitted by the claimant. Thus the position was a major, non-tenured, policymaking or advisory position and was properly excluded from consideration as covered employment.

7/99
14, 3, 8: A

17.13

Sections 42, 43(o)

COVERED EMPLOYMENT, Excluded employment, Medical residency

CITE AS: Detroit Medical Center Corp. v Yff, Emmet Circuit Court, No. 97-4502-AE (June 18, 1998); lv den Mich App No. 213896 (December 30, 1998).

Appeal pending: No

Claimant: Michael Yff
Employer: Detroit Medical Center Corp.
Docket No. L97-00001-2658

CIRCUIT COURT HOLDING: Even though the primary function of the medical residency was to provide additional training, the claimant functioned as an employee. Furthermore, his services were not statutorily excluded.

FACTS: Claimant filed for unemployment benefits after completing his medical residency. He had worked for employer pursuant to a written contract for his services in exchange for compensation of $30,000+ per year with benefits. He was required by his contract to provide medical services to clients of employer at its facility.

DECISION: Claimant's services are in covered employment under Section 42 and are not excluded under Section 43(o).

RATIONALE: Section 43(o)(5) does not apply to the claimant, claimant was not involved in an unemployment work-relief or work-training program financed by a governmental entity. Claimant worked under the express direction and control of the employer. Services provided by claimant fit the definition of employment in all pertinent respects.

7/99
22, 16, d24: J

Sections 42, 44

EMPLOYEE STATUS, Independent contractor, Psychologists

CITE AS: Psychological Services v MESC, Kent Circuit Court, No. 89-64789-AE, (May 4, 1990).

Appeal pending: No

Claimant: N/A
Employer: Psychological Services
Docket No. L87-07843-RO1-1978

CIRCUIT COURT HOLDING: Where several licensed psychologists paid to use space and clerical services provided by the clinic owner, but conducted separate practices serving clients, they were not employees of the clinic but were independent contractors.

FACTS: Dr. Charles Laufer operates a clinic which provides psychological services. Several individuals who are licensed psychologists see clients at his facility, use the office suite, present their billing information to the office manager employed by Dr. Laufer and pay Dr. Laufer a 40% share of their receivables. Dr. Laufer provides testing supplies and clerical services in addition to office space. These are no written contracts. IRS 1099 forms are issued to the claimants. Dr. Laufer advertises the clinic in the yellow pages under his name. Some of the claimants are not fully licensed (i.e. have limited licenses) and must practice in a fully licensed establishment.

DECISION: Services provided are not in employment and remuneration received was not wages under Section 42 and 44.

RATIONALE: MESC relied on inadequate evidence in reaching its conclusion that services performed by 4 psychologists were in employment. The fact that each contributed 40% of their billings to pay for the overhead does not establish that there was an employer-employee relationship. Reliance on a form filled out only by Dr. Laufer while ignoring his sworn testimony regarding the form was error. Applying the economic reality test yields the conclusion that the psychologists did little more than share expenses at the clinic.

7/99
11, 13: N/A

Section 42

INDEPENDENT CONTRACTOR, Salespeople

CITE AS: Memorial Park Cemetery Sales v MESC, Oakland Circuit Court, No. 80-200-878-AE (October 15, 1980).

Appeal pending: No

Claimant: N/A
Employer: Memorial Park Cemetery Sales
Docket No. L-76-18035-1564

CIRCUIT COURT HOLDING: When salespeople had no set hours, sales quotas or specific territory to cover, and are paid only on a commission and bonus basis, the salespeople are not under the "control or direction" of the employer and, hence, are not employees.

FACTS: Memorial Park Cemetery Sales is the exclusive selling agent for lots and memorials at White Chapel Cemetery. Memorial Park engages the services of sales representatives for the purpose of selling cemetery lots and memorials under the terms and conditions established by White Chapel. The sales representatives are paid on a commission and bonus basis set by White Chapel. The salespeople set their own hours, use such sales aids and equipment as they desire, are assigned no specific sales territory, furnish their own transportation, and are not required to report to the office at all. The relationship was terminable at will.

DECISION: The services provided by the salespersons were not in covered employment under Section 42 of the Michigan Employment Security Act.

RATIONALE: While the public policy of the Act (Section 2) is directed against involuntary unemployment and in favor of encouraging employers to provide stable employment, the sales representatives here are not under the control or direction of the employer. "As noted above, the relations involved herewith are terminable at will, the salesmen set their own hours and are not required to report to the office at all. The work in question leaves the stability strictly up to the salesmen." This is not a relationship of the type to be protected under Powell v ESC, 345 Mich 455, (1956).

7/99
5, 7, d15: N/A

Sections 43(m), 43(q)(2) [now 43(q)(ii)]

EXCLUDED EMPLOYMENT, Co-op student

CITE AS: General Motors Corp. v Walworth, Genesee Circuit Court, No. 88-000970-AV (November 22, 1989).

Appeal pending: No

Claimant: Renee Walworth
Employer: General Motors Corp.
Docket No. B87-06444-105587

CIRCUIT COURT HOLDING: Services performed by the claimant through a co-op program were excluded from covered employment under the Michigan Employment Security Act.

FACTS: The claimant was an accounting student at the University of Michigan, Flint. In September of 1985 the claimant, through the school's co-op program, applied and was hired for a position in a General Motors Corp. accounting and financial department at the Flint Truck and Bus Assembly Plant. In the Spring of 1986 the claimant enrolled in a class at school entitled "Management Cooperative Experience" for which she received three credits. Later the claimant was laid off and applied for unemployment benefits. The school's director of co-op programs wrote a letter to verify the claimant was considered a co-op student and was placed in a co-op position at General Motors Corp while she was enrolled in business administration and accounting course work.

DECISION: The claimant was ineligible for benefits under Section 43(m) and 43(q)(2) of the Michigan Employment Security Act.

RATIONALE: Claimant would not have gotten the job if she was not designated a co-op student. She received three credits for a class because of these work experiences. She did not need to receive co-op credit for her entire work experience to be excluded under the Act. Rather, she needed only to be involved in a full-time program at the school. Further, although the school's letter used the term "verify," it satisfied the "certification" requirement contained in Section 43(m).

The Referee also observed the class claimant took appears to fit exactly into Section 43(q)(2) [now 43(q)(ii)] of the Michigan Employment Security Act.

7/99
3, 11: N/A

Sections 42, 43(o)(3)(v) Note: 43(o)(3)(v) is now 43(o)(iii)(E)

EXCLUDED EMPLOYMENT, Policymaking positions, Statutory exclusions from "employment"

CITE AS: Maguire v Charter Township of Shelby , Macomb Circuit Court, No. 95-1828-AE (February 28, 1996).

Appeal pending: No

Claimants: Joseph Maguire, Frances Gillett, Kirby Holmes
Employer: Charter Township of Shelby
Docket No. L91-11605-2320

CIRCUIT COURT HOLDING: Where claimants resigned from non-tenured policymaking/advisory positions to which they were elected and were then hired or appointed to tenured, non-policymaking, non-advisory positions, their services were not excluded even if they essentially continued the same type of work as before.

FACTS: Claimants were elected to positions as township clerk, supervisor and treasurer in November 1988. They all resigned in June 1989, and were appointed to subordinate positions within the township. They were all removed following the November 7, 1990, election. Employer argues the claimants should be denied benefits because of the Section 43(o)(3)(v) exclusion of high level policymakers in that they were performing policymaking functions even after they left office for their appointed positions and could no longer vote at trustee meetings.

DECISION: The claimants' employment was not statutorily excluded under Section 43(o)(3)(v).

RATIONALE: Claimants no longer had ultimate policymaking authority after June 1989, even though they may have rendered great assistance to the policymakers who replaced them.

24, 12, 18: J

Section 43(d)

EXCLUDED EMPLOYMENT, Agricultural labor

CITE AS: Apple Crest Farms v Gardner, Wayne Circuit Court, No. 90-002881-AE (June 4, 1990).

Appeal pending: No

Claimant: Timothy Gardner
Employer: Apple Crest Farms
Docket No. B87-16551-109686

CIRCUIT COURT HOLDING: The services the claimant performed (cutting the grass and cleaning the grounds of a plot of land where no active farming had taken place for several years) were not agricultural labor and therefore, not excluded "employment."

FACTS: The employer consists of a 300 acre parcel of land with fruit trees, three houses and surrounding grounds. Seven years prior to the period in question, the orchard produced over 100,000 bushels of apples, peaches and pears annually. The production of fruit was discontinued. The claimant worked for the employer maintaining the grounds, weed cutting, grass cutting, clearing out trees and throwing out dead wood. At the time claimant became unemployed there was no active production of agricultural products on the farm and it was unknown if the orchard would ever resume production.

DECISION: The claimant was performing services in employment under the Michigan Employment Security Act and was eligible to receive benefits.

RATIONALE: The claimant maintained the grounds and trees. He performed work of cutting the grass and cleaning an estate-like plot of land. There is not, nor has there been for the past several years, any farming activity on the land. This was not "agricultural labor."

7/99
3, 14, 4: N/A

EXCLUDED EMPLOYMENT, Medical residency

CITE AS: Canto v McLaren Regional Medical Center, St Clair Circuit Court, No. 01-00382-AE (July 23, 2002)

Appeal pending: No*

Claimant: Emmanuel Canto, MD
Employer: McLaren Regional Medical Center
Docket No. L1999-00047-2736

CIRCUIT COURT HOLDING: Participation in an accredited medical residency program is excluded from the MES Act definition of "employment" pursuant to Sections 43(o)(5) and 43(q)(2).

FACTS: Claimant completed employer's 3-year family practice residency program. The residency program includes didactic work, classroom work, lectures and supervised clinical experience. The residency program was created to develop resident's clinical skills and train physicians. Residents cannot bill for patient care; Medicare/Medicaid compensates the hospital separately. Residents' stipends are reimbursed by federal sources. There was no relation between the number of hours worked and the amount claimant was paid. There is no expectation of employment after completion of the residency.

DECISION: The services claimant rendered are exempt from coverage under Sections 43(o)(5) and 43(q)(2).

RATIONALE: Section 43(o)(5) excludes from employment those individuals who are participants in a work-training program that is assisted or financed in whole or in part by a federal agency. Residency programs are "work-training" programs as they impart clinical skills to physicians, which allow them to properly perform their work. These programs are federally funded. Section 43(q)(2) excludes from the definition of employment, "services performed by a college student of any age, but only when the student's employment is a formal and accredited part of the regular curriculum of the school." In this matter, claimant was involved in a program that was part of an accredited program of instruction.

*Note an appeal in another case involving this same issue is currently pending at the Michigan Court of Appeals: Bureau of Worker's Unemployment Compensation v Detroit Medical Center, Mich App Case No. 252777-D

11/04

Section 43(u)

EXCLUDED EMPLOYMENT, AmeriCorps participant

CITE AS: Dana v American Youth Foundation, 257 Mich App 208 (2003)

Appeal pending: No

Claimant: Candice Dana
Employer: American Youth Foundation
Docket No. B97-00302-RO1-147335W

COURT OF APPEALS DECISION: Service in an Americorps program is not exempt from coverage under Section 43(o)(v). **(See statutory amendment described below.)**

FACTS: Claimant served in the AmeriCorps program in a program administered by employer. Claimant received a monthly stipend, health insurance, childcare allowance, and an educational award. When she completed her term of service, claimant applied for unemployment benefits.

RATIONALE: The Michigan Court of Appeals held the claimant's services to be covered employment under Section 43(o)(v). Under Section 43(o)(v) work-relief and work-training programs are exempt from coverage. The Court held that service in the AmeriCorps program was not a work-relief or work-training program and is not exempt from coverage under Section 43(o)(v).

**However,** AmeriCorps Service is exempt under Section 43 if the service ended on or after July 23, 2004, the effective date of Act 243 Public Acts 2004. The amendment added a new subsection to Section 43-Section 43(u) which provides:

> Except as otherwise provided in section 42(6), the term "employment" does not include any of the following:
>
> (u) Service performed in an Americorps program but only if both of the following conditions are met:
>
> (i) The individual performed the service under a contract or agreement providing for a guaranteed stipend opportunity.
>
> (ii) The individual received the full amount of the guaranteed stipend before the ending date of the contract or agreement.