DIGEST OF
MICHIGAN UNEMPLOYMENT INSURANCE
CASE LAW

2005 EDITION

(Revisions and other updates pending.)

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USER'S GUIDE

I. Introduction

This Digest is intended to serve as a research tool for claimants, employers, and agents or attorneys who are involved in the Unemployment Insurance appellate process. It is hoped the Digest will, by providing enhanced access to unemployment case law, assist parties and their representatives in the preparation and presentation of appeals before Unemployment Agency Administrative Law Judges (Referees), the Michigan Employment Security Board of Review and the Michigan courts.

II. How To Use This Digest

A. Overview

When preparing an appeal or presenting a case before an Unemployment Agency ALJ, the Board of Review, or a court, parties and their representatives try to make use of the most authoritative precedent they can find which supports their position. This Digest is a tool to help find those *cases.* It must be kept in mind unemployment cases are usually "fact specific" and it is unlikely cases in the Digest will match up precisely with the case the reader is preparing. The goal is to understand the general principles which emerge from the decisions and apply them to the case at hand.

There are two basic approaches to using the Digest - one, to select the chapter which covers the topic of interest, then review the cases collected in that chapter, or two, to use the Subject Word Index to help locate pertinent decisions. These methods are described below.

B. Chapter Organization

The Digest is arranged in twenty chapters each covering a broad topic. As indicated in the Table of Contents, each chapter focuses on cases arising under one or more related sections of the MES Act. The reader may wish to consult Michigan Compiled Laws Annotated (MCLA 421.1 et seq) or Michigan Statutes Annotated (MSA 17.501 et seq) for the text of the Act.

At the beginning of each chapter, there is a table listing the cases contained in that chapter.

Editor's Note: It must be kept in mind the Digest utilizes a one page/one case format. That is, each case appears only once. Cases are assigned to chapters by the editor depending on the issue which is considered most significant or useful for precedent purposes. Some cases involve multiple issues and secondary issues may be addressed in the Digest entry, however, they

may be in a chapter other than the "natural" chapter for that issue. It is recommended the Subject Word Index should routinely be consulted as a precaution.

C. Subject Word Index

This index is designed to guide the reader in locating cases by issue. The entries, arranged alphabetically, correspond to the "Heading" entry for each case contained in the Digest. Major categories, like "Misconduct" or "Voluntary Leaving" are followed by more specific sub-categories. The user should begin the case search by looking for one or more "issue" or "fact" words, for instance, "Burden of Proof" or "Profanity" which are related to the case with regard to which the research is being done. The pages referenced in the index after those key words will direct the reader to cases in the body of the Digest which deal with similar issues or facts. This process can then be repeated as needed.

D. Case Entries

The bulk of the Digest consists of case entries. A uniform format is used. Beginning at the top of each page the following information is provided:

1. Chapter/page number
2. MES Act Section number
3. Subject matter heading, e.g. "Voluntary Leaving", "Buy-out program", "Reasonable alternatives". These items correspond to the Subject Word Index.
4. Cite As: The entry provided reflects how the digested case should be identified if used in an appeal or written argument.

Editor's Note: Because relatively few unemployment cases are appealed to the Michigan Supreme Court or result in published Court of Appeals decisions, "lower" appellate authority is sometimes the "best" authority available. Supreme Court and published Court of Appeals decisions are collected in bound volumes available in law libraries. The hierarchy of the precedential or persuasive value of decisions is as follows, with examples of how each is cited:

a. Michigan Supreme Court: 250 Mich 800 (1990)

b. Published Michigan Court of Appeals: 250 Mich App 800 (1990)

c. Unpublished Michigan Court of Appeals: Case Names, Court of Appeals, January 31, 2000 (No. 156789) or Case Names, No. 100250 (Mich App January 1, 1990).

NOTE: Unpublished opinions of the Court of Appeals do not have binding precedential value. Moultrie v DAIIE, 123 Mich App 403 (1987).

d. Circuit Court opinions: Names, Wayne Circuit Court, No. 99-13200-AE (December 28, 1999).

e. Board of Review decisions: Claimant (Employer), 1990 BR 110500 (B88-15000).

5. Appeal pending: Whether or not an appeal from the digested decision is currently pending at the next appellate level.

6. Claimant/Employer/Docket number: Names of the involved claimant and employer and the Appeal Docket Number used by the Referee Division and Board of Review. This information is helpful in locating cases.

7. Holding: A brief statement of the key legal principle for which the summarized case stands.

8. Facts: A concise statement of the significant facts in the summarized case.

9. Decision: The actual result reached by the court in the summarized case.

10. Rationale: Related to the Holding, the Rationale provides a more elaborate explanation of the court's reasoning. The Rationale entry often consists of a quote excerpted from the decision itself.

At the risk of oversimplification, these pieces fit together like this - the Decision is what resulted when the Holding was applied to the Facts.

E. Tables of Cases

Two comprehensive tables of cases are also provided. If looking for a specific case and the claimant's name is known, consult the Claimant-Employer Table which lists the parties to all digested cases, in alphabetical order, with Claimants' names first. Similarly, the Employer-Claimant Table lists the parties in alphabetical order, with Employers' names first.

Again it should be kept in mind the Digest entries represent highly condensed summaries of longer decisions. Although every effort is made to extract the key elements of the decision for inclusion in the Digest, the unemployment researcher may wish to read the actual opinions in their entirety, or pursue research beyond the scope of the Digest at a law library or public library with a legal collection.

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PUBLIC POLICY

Section 2

PUBLIC POLICY, Liberal interpretation, Equal protection, Control

CITE AS: Godsol v M.U.C.C., 302 Mich 652 (1942).

Appeal pending: No

Claimant: John T.Willcox
Employer: Arnold H. Godsol d.b.a. Nu-Enamel Michigan Co.
Docket No: AB 4163 556

APPEAL BOARD HOLDING: The definition of "employer," under former MES Act Section 41(3), since amended, was not limited to situations where the "employer" had legally enforceable control over the employing unit. Section 41 was not violative of the equal protection provision of the Fourteenth Amendment.

FACTS: Claimant was employed by Nu-Enamel Michigan, owned by Arnold Godsol. Helen Godsol, Arnold's wife, operated Nu-Enamel Detroit. Neither of those businesses employed eight or more employees, the then requisite number for "employer" status under the MES Act. Combined they did have more than eight employees. Nu-Enamel Detroit was a sub-distributorship of Nu-Enamel Michigan and was established solely with Mrs. Godsol's separate funds. In operating the business Mrs. Godsol relied on her husband for advice and assistance. He frequently visited her stores, gave directions to employees, received daily business reports, hired and discharged employees.

At that time Section 41(3) provided for treatment of multiple employer units as a single employer, if owned or controlled, by legally enforceable means or otherwise, directly or indirectedly, by the same interests.

The MESC treated the businesses as a single employer. As a result claimant was eligible for benefits. The Godsols challenged the Commissions interpretation of the word "control" and also challenged then Section 41(3) on equal protection grounds.

DECISION: Section 41(3) is not unconstitutional. Employer is a covered employer under the Act. Claimant entitled to benefits if otherwise eligible and qualified.

RATIONALE: "The purpose of the unemployment compensation act is to relieve the distress of economic insecurity due to unemployment. It was enacted in the interest of public welfare to provide for assistance to the unemployed, and as such is entitled to a liberal interpretation."

EMPLOYER LIABILITY, TAX RATE, SUCCESSORSHIP

Sections 11(g), 13, 13a-13k, 15, 18-22, 41

2.01

Section 22

LIABILITY, Successorship, Leasehold interest, Organization, Accounts receivable

CITE AS: MESC v Arrow Plating, 10 Mich App 323 (1968)

Appeal pending: No

Employer: Arrow Plating Company, Inc.
Docket No: L66 176 1277

COURT OF APPEALS HOLDING: "If a vital integral part of the business is not transferred, regardless of how many people make up that integral part, so that the business could not continue, then there has not been a transfer of the 'organization' for the purposes of this Act."

FACTS: The employer bought much of the assets of Wade Boring Works. The main asset of Wade Boring was the right of possession to a building leased by Wade Boriinng because special zoning allowing the flushing of waste chemicals into the public sewer system. Wade Boring Works retained its phone number, customers, and the right to compete. Arrow's business was confined to plating operations, while Wade Boring had done both plating and sheet metal fabrication.

DECISION: The employer is not a successor employer under the Act.

RATIONALE: The critical wording of Sec. 41(2) is the phrase defining what must be acquired by a successor employer as "the organization; trade or business, or 75% or more of the assets." As for "trade or business" it is clear that Arrow did not assume the trade or business, since the clientele were different and the type of work performed by the two companies would appeal to different markets.

In accordance with standard accounting principles, accounts receivable are assets to be considered when computing the percentage of assets transferred.

Arrow Plating's right to use the building with favorable zoning was the primary concern, but such right was not assigned a value in the transfer. Poor accounting practices made it impossible for the Court to accurately determine the exact value of assets transferred and retained.

"'Organization' means the vital, integral parts which are necessary for continued operation. In this case, there was not a transfer of the vital, integral parts required for continued operation of the Wade Boring Works. Mr. Frank Beck constituted the entire managerial component of Wade Boring Works, and it could not have continued as a going business without managerial talent."

11/90
NA

Section 22

LIABILITY, Transfer of rating account, Due process

CITE AS: Valley Metal Company v Employment Security Commission, 365 Mich 297 (1961)

Appeal pending: No

Employer: Valley Metal Products Company
Docket No: L57 2347 1040

SUPREME COURT HOLDING: Transferred account means the rating account which the transferee has after the transferred account has been merged with its prior rating account.

FACTS: Valley Metal Products Company (Vampco) purchased assets from Industrial Machine Tool Company (Industrial). The Commission determined that a transfer of business within Section 22 had taken place. The rating account balance of the transferror, Industrial, was transferred to Vampco. Industrial had 2 divisions of operation - one was the manufacture of windows, the other, tools. Vampco bought all of the window business.

DECISION: The increased contributions which necessarily must be made in order to meet the benefit payments must of necessity fall upon the transferee.

RATIONALE: We believe the legislature had in mind devising a pro rata formula which would as between the parties, divide all the rate making factors involved on an identical basis. The unfavorable experience cannot be translated into increased contributions against Industrial since it has disposed of the business. Neither party could know at the time of the transfer the exact future experience. The party purchasing may protect itself by contract or by adjustment of the purchase price against such a contingency.

2.03

Section 41(2)

SUCCESSORSHIP, Value of assets, Value of lawsuit

CITE AS: MESC v Caberfae Associates, No. 115311 (Mich App May 24,1990).

Appeal pending: No

Employer: Caberfae Associates
Docket No: L83 13583 1846

COURT OF APPEALS HOLDING: The value of pending litigation was too speculative to be considered an asset. As such the employer acquired 75% or more of the predecessor and is a successor employer under Section 41(2).

FACTS: The predecessor corporation operated a ski resort. In 1982 it filed for Chapter 11 bankruptcy. The subsequent purchaser took over operation of the business under the supervision of the bankruptcy court and later purchased all of the assets except ski banks and boot lockers, and a cause of action known as the "Gary Airport Litigation", for $820,000. It was appellant's contention the litigation, which had been started ten years earlier seeking $300,000 in damages, was an asset worth that amount and that by not acquiring that asset appellant acquired less than 75% of the predecessor and as such was not a "successor" as defined in Section 41.

DECISION: The subsequent employer was a successor employer under Section 41(2).

RATIONALE: The value of the cause of action was speculative and had not been fixed by competent evidence. As such it is not to be considered an asset. The subsequent employer acquired more than 75% of the assets of the predecessor and is a successor under Section 41.

Section 19, 22(e)(3)

LIABILITY, Successorship, Statutory interpretation, Tax rate

CITE AS: Ha-Marque Fabricators, Inc., v MESC, 178 Mich App 470 (1989); lv den 435 Mich 877 (1990).

Appeal pending: No

Employer: Ha-Marque Fabricators, Inc
Docket No: L82 18210 1893

COURT OF APPEALS HOLDING: A weighted average of the tax rate of the employer's two predecessors which were merged into it must be used to determine the employer's tax rate under Section 19 and 22(e)(3).

FACTS: The employer, based in Illinois, acquired two Michigan subsidiaries and merged them into its operation during a corporate reorganization and then filed a registration report to determine liability with the MESC. MESC assigned a 9% tax rate for 1982. The MESC based its calculations on legislative amendments to the rate calculation provision. The legislature failed to amend Section 22(e)(3) to conform to the other amendments. MESC interpreted the law to require that in mergers the employer should be assigned a total of the former employer's rates.

DECISION: Employer's tax rate must be determined by a weighted average of the merged former employer's rates pursuant to Section 22(e)(3) and 19(a)(6) of the Act.

RATIONALE: "Although in this appeal, the MESC interprets Section 22(e)(3) to mandate a calculation of the employer's contribution rate based on the balances in the employer's experience account, we do not believe that the legislature intended such a construction. While we give respectful consideration to the MESC's interpretation of the statute, we are not bound by it and we decline to follow it here."

"We believe that the circuit court judge correctly interpreted Section 22(e)(3) as requiring that a weighted average approach be applied to determine Ha-Marque's contribution rate ... ."

2.05

Section 22

LIABILITY, Transfer of rating account, Appeal, Value of assets

CITE AS: Hillman Pallet Co., Inc. v MESC, No. 98600 (Mich App June 27, 1988).

Appeal pending: No

Employer: Hillman Pallet Co., Inc.
Docket No: L83 12948 1830

COURT OF APPEALS HOLDING: 1) Employer's protest of a determination which informed the employer it was a successor to a predecessor and therefore liable for all, or a share, of the predecessor's rating account preserved the tax rate issue even though the determination did not specify a rate.

2) Amount of assets retained by seller must be considered in determination of percentage of assets transferred.

FACTS: Mr. and Mrs. Smith, d/b/a Hillman Pallet Company, owned two sawmills. Plaintiff, Hillman Pallet Co., Inc. purchased part of the Smith's equipment. A second corporation purchased one sawmill and leased it to plaintiff. The Smiths retained other property, including a sawmill. The MESC issued a determination holding plaintiff a successor employer under Section 41(2) of the Act, liable under Section 15(g), and subject to a share of the Smith's rating account under Section 22(a). Plaintiff protested, alleging it had not acquired all the assets and should be taxed at the lower "new business rate."

DECISION: Remanded for further proceedings to determine percent of assets transferred.

RATIONALE: "Our review of the ... notice clearly indicates that a challenge to the determination of successorship must be made promptly, because the issue would not be reopened on an appeal of the actual rate imposed. One receiving this notice could reasonable conclude that any appeal must be made now. Plaintiff consistently challenged the rate transfer throughout the proceedings. It is apparent that the Commission's position throughout was that, once deemed a successor under Section 15(g), plaintiff's liability under Section 22 was assured."

"Under Section 22(b), if less than 75% of the assets were transferred, the rating account shall not be assigned without the approval of the transferror and transferee.... However, the referee erred as a matter of law in finding that the amount of retained property was not a consideration and in failing to make a finding on the percentage of assets transferred as required under Section 22(b)."

2.06

Section 22(e)(3)

LIABILITY, Tax rate, Successorship, Sequential or simultaneous transactions

CITE AS: MESC v ASC, Inc., No. 119777, (Mich App August 7, 1991).

Appeal pending: No

Claimant: NA
Employer: ASC, Inc.
Docket No: L82 22133 1825

COURT OF APPEALS HOLDING: Where a vertical merger takes place involving multiple corporate entities related as parent - subsidiary, the merger transactions occur in sequence, not simultaneously.

FACTS: Prior to June 1982, Wisco Corporation was a wholly owned subsidiary of Ultra International, Inc. In turn, Ultra was a wholly owned subsidiary of American Sunroof Corp. Heinz Prechter was the sole stockholder of Sunroof, and he was the sole director of all 3 corporations. At the time Wisco's contribution rate was 7.8% and Sunroof's rate was 5.5%. Without applying statutory limit provisions, both corporations would have had a rate of 9%. For economic reasons Sunroof dissolved both Wisco and Ultra into their parent corporations. The business name of Sunroof was changed to ASC, Inc. On June 23, 1981, Prechter signed 3 separate resolutions dissolving the 3 corporations into their parent business effective June 30, 1982. MESC notified ASC, Inc. that it was a successor of the other businesses and assigned a 9% contribution rate for 1982 pursuant to Section 22(e)(3) because it treated the transfer as "simultaneous".

DECISION: The mergers in this case were not "simultaneous", and Section 22(e)(3) is not applicable. The rate assigned to ASC is the same as Sunroof's - 5.5%.

RATIONALE: "We agree with the Board of Review and the circuit court that it was legally impossible for the transfer in this case to have occurred concurrently. If the assets of a subsidiary corporation are to be transferred to the parent corporation the subsidiary and parent may not both dissolve at the same time. The parent must remain in existence in order to accept the subsidiary's assets. Only after a subsidiary has dissolved and the parent has accepted its assets may that parent dissolve and transfer both its assets and its former subsidiary's assets to another corporation."

Section 22

LIABILITY, Successorship, Transfer of rating account

CITE AS: MESC v Allied Supermarkets, Inc., 10 Mich App 650 (1968).

Appeal pending: No

Claimant: NA
Employer: Allied Supermarkets, Inc.
Docket No: L64 4148 1251

COURT OF APPEALS HOLDING: When a chain store sells 3 of 126 stores and the purchaser continues to employ 90% of the seller's former employees, there is a transfer of business, and that part of the seller's rating account pertaining to the employees of the 3 stores must be transferred, pursuant to Section 22 of the Act, to the purchaser.

FACTS: Allied Supermarkets had a chain of 126 supermarkets. It sold 3, located in Bay City to Vay Foods. The sale included the furniture, fixtures, and equipment of all 3 stores. The beer, wine, and liquor licenses were also transferred together with merchandise. Allied retained 10% of the total merchandise. Allied assigned the leases on the stores to Vay. Allied closed the stores on Saturday. Vay opened them on Monday, manning them with former employees of Allied. The 3 former Allied managers continued in the same capacity with Vay. In the interim all identity of an Allied "Wrigley" store was removed and replaced with a Vay's "Vescio Supermarket" designation.

DECISION: There was a transfer of the business of Allied to Vay in the sale of the stores and that part of the ratings account transferred to Vay pursuant to Section 22.

Rationale: "We cannot agree with the finding of the referee that the only 'business' of Allied is the entire operation of 126 supermarkets in the State of Michigan and that a local market in the chain must be considered to be an integral part of the whole and not a singular business for purposes of this act. The logical extension of such reasoning could permit Allied to dispose of practically all of its chain store operations without affecting any change in the computation of its employment rating accounts, although it is clear that the employment situation would be quite different...."

Section NA

LIABILITY, Bankruptcy, Definition of tax

CITE AS: MESC v Patt, 4 Mich App 225 (1966).

Appeal pending: No

Claimant: NA
Employer: Fred Patt
Docket No: NA

COURT OF APPEALS HOLDING: The employer's contributions required under the Michigan Employment Security Act are a tax within the meaning of Section 17 of the Bankruptcy Act and are not discharged in a bankruptcy proceeding. As a result the employer is still liable for them.

FACTS: Employer was a Michigan employer for the years 1955, 1956, and 1957. It was subject to the provisions of the Michigan Employment Security Act. During the period employer paid no contributions as required by the Act.

In 1959 the Commission tried to collect this delinquent contribution in the state circuit court, and got a judgment by default for the delinquent contributions with interest. Employer filed for bankruptcy and obtained a discharge in 1964. In 1965, the MESC garnisheed defendant's employer to collect on its judgment. Defendant filed a motion to restrain the garnishment on the basis that the judgment had been discharged in bankruptcy.

DECISION: The discharge in bankruptcy did not discharge employer's obligation to pay the judgment for the delinquent contributions.

RATIONALE: "Regardless of the terminology used, an involuntary exaction, levied for a governmental or public purpose, can be held to be nothing other than a tax within the purview of the Federal bankruptcy act. The right of the State to collect such tax was duly protected by the Congress in the bankruptcy act."

2.09

Sections 21, 32a

LIABILITY, Tax Rate, Temporary Rate, Rate determination, Computation date

CITE AS: MESC v NL Industries (USA) Inc., Oakland Circuit Court, No. 93-459745-AE (January 5, 1994).

Appeal pending: No

Claimant: N/A
Employer: NL Industries (USA), Inc.
Docket No. L90-10851-2103

CIRCUIT COURT HOLDING: Where the MESC fails to issue rate determinations and, instead assigns temporary rates by means of quarterly contribution reports, for a period of years, those so-called temporary rates become final if the employer is not notified of a contribution rate within six months of the computation date (June 30).

FACTS: In 1985, MESC issued determination of successorship. No rate determination was issued, but employer's quarterly contribution reports showed rate of 2.7%. Sometimes a "T" appeared before the rate. Employer paid the 2.7% rate until October 27, 1989, at which time the MESC issued rate determinations covering 1985-89 of 9.1%, 8.7%, 7.8%, 7.3% and 6.6%. MESC's position was that the quarterly reports were not rate determinations and not subject to the finality provisions of Section 32a(2). Further, the statute and Administrative Rules do not provide for temporary rates and therefore, the rates shown on the quarterly contribution statements could not become final rates under Section 21(a).

DECISION: Decision of MES Board of Review affirmed. (Later MESC appeal to Court of Appeals withdrawn.)

RATIONALE: Under Section 21(a), employers are entitled to notification of contribution rate no later than six months after the computation date. This notification is mandatory, not discretionary. The computation date under Section 18(a) is June 30 of each year. Therefore, employers must be notified of rate by December 31 of each year. Otherwise the finality provisions of Section 32a(2) apply. A statement of a rate such as that on the quarterly contribution report is a "statement" of a rate determination pursuant to Section 21(a).

7/99
24, 12, 17: E

Section 22

SUCCESSORSHIP, Transfer of business, Transfer of rating account

CITE AS: Baxter Decorating and Painting Co. v MESC, 34 Mich App 380 (1971).

Appeal pending: No

Plaintiff: Baxter Decorating and Painting Co.
Employer: Grand Rapids Industrial Painting Co. (GRIPCO)
Docket No. L67-4414-1321

COURT OF APPEALS HOLDING: Where various business elements were transferred including some physical assets, disclosure of customers, gain of business from several customers of transferor, there was substantial evidence of a business transfer although the computation of the percentage of the rating account to be transferred was arbitrary.

FACTS: Pursuant to a contract GRIPCO transferred physical assets (painting and office equipment) to Baxter and right to use its customer list. In addition, the former general manager of GRIPCO accepted employment with Baxter. His role was to solicit former GRIPCO clientele for Baxter. Baxter paid $17,000 to GRIPCO in addition to making a separate financial arrangement with Mr. Harris. GRIPCO continued in business. Issues are: 1. whether transferee (Baxter) continued or resumed all or part of the business of transferor (GRIPCO), and 2. whether it was proper to transfer 95.5% of GRIPCO's rating account to Baxter.

DECISION: There was a transfer of a business within the meaning of Section 22(a). Remanded for purpose of determining what percentage of the assets were transferred.

RATIONALE: The test that must be met is whether there was a continuation or resumption of all or part of the transferor's business. The transfer need not result in an increase in business for the transferee or for that matter, in a successful continuation or resumption. "[T]he test... is not whether the successor employer made a good bargain."

Many factors besides physical assets must be evaluated to determine what percentage of the business was transferred. The physical assets and the business are not identical concepts. "A proper determination cannot be based solely on the value of the transferred physical assets, especially where the tranferor continues in business and retains most of its own employees and continues to be in competition with the tranferee."

7/99
N/A

2.11

Sections 15, 18

CONTRIBUTION RATE, Quarterly Report

CITE AS: Peter McCreedy Trucking Co. v MESC, unpublished memorandum Court of Appeals, August 26, 1994 (No. 156798).

Appeal pending: No

Claimant: N/A
Employer: Peter McCreedy Trucking Company
Docket No. L90-11810-RO1-2187

COURT OF APPEALS HOLDING: Circuit Court applied incorrect legal standard when it decided that maximum tax rate could not be imposed pursuant to Section 18(d)(2) unless MESC found that employer's failure to file quarterly reports was "willful" pursuant to Section 15 of the Act.

FACTS: Employer failed to file required quarterly reports for the years 1986, 1988 and 1989. The reports were not filed within 30 days of notice of contribution rate as required for recomputation of the rate. The employer's contribution rate was increased by the MESC pursuant to Section 18(d)(2). There was no evidence of misfeasance or malfeasance by the employer.

DECISION: Employer not entitled to redetermination of its contribution rate.

RATIONALE: Section 18 is a definitional section applicable to all employers. Section 15 is primarily a penalty section which sets forth alternative remedies available to the MESC when the employer's contribution remains unpaid. The sections have different purposes and both are to be applied as written.

7/99
19, 14: N/A

Sections 13a, 32a, 41

REIMBURSING EMPLOYER STATUS, Late protest, Finality, One year limit, Equitable relief

CITE AS: Contemporary Life Services v MESC, unpublished per curiam Court of Appeals, May 24, 1994 (No. 151027).

Appeal pending: No

Claimant: N/A
Employer: Contemporary Life Services
Docket No. L89-07129-2075

COURT OF APPEALS HOLDING: Where employer requested reclassification from contributing to reimbursing status more than one year after notice of determination of status was mailed, the one year limitation bars retroactive reconsideration of employer's status.

FACTS: Employer was classified as a contributing employer for failure to answer question 7 on form MESC 1010 even though elsewhere on that form the employer attested it was a tax exempt entity under 26USC 501(a). The instructions for question 7 specifically stated failure to answer would result in classification as a contributing employer. Determination of contributing employer status was mailed on January 31, 1986. Thereafter, employer failed to file quarterly reports and received notice of this lapse on March 8, 1989. Employer requested reclassification on March 16, 1989. Employer had accumulated arrearages of unpaid unemployment payroll taxes between 1985 and 1989. Employer argued one year time limit should be tolled until March 8, 1989, or that the time limit should be extended on equitable grounds.

DECISION: Employer's request for redetermination time barred under Section 32a.

RATIONALE: The March 16, 1989 letter was not filed within a year of the January 31, 1986 determination. Also, the employer was not entitled to equitable relief since it set the chain of events in motion by failing to properly complete form MESC 1010. Employer should have known when it received quarterly report forms that something was amiss. Employer is presumed to know the law as it relates to the operation of its business.

7/99
3, 11: N/A

Sections 11(g), 18(d),32a

INTERSTATE CLAIM, Contribution rate, One year limit

CITE AS: R.F. Molitoris, D.D.S. v MESC, Case No. 92-3446-AE, Macomb Circuit Court, (January 21, 1993).

Appeal pending: No

Claimant: Wanda Forbes
Employer: R.F. Molitoris, D.D.S.
Docket No.: L90-06544-2224

CIRCUIT COURT HOLDING: An interstate claimant's entitlement to benefits is determined by the state in which the claim is made. The Agency is not precluded from redetermining an erroneous contribution rate if such redetermination is made within one year of the issuance of the initial rate.

FACTS: Claimant Wanda Forbes worked for involved employer and another Michigan employer in 1981 before moving to Nevada where she worked, then filed a combined wage claim for benefits, in September 1982. The Michigan employers provided information but this employer was not notified of charges to its account until 1985. Employer challenged charges and an adjustment of $898 was made for 1986. Employer requested redetermination of rate in 1989 which was denied as untimely. Agency subsequently discovered employer had received $898 credit for years 1987 through 1990 in error. Nevertheless, the Agency only recalculated the 1990 rate because redetermination of others was time barred under 32a.

DECISION: Redetermination of 1990 rate affirmed.

RATIONALE: Employer lacked standing to challenge award of benefits because under MESA Section 11(g), which conforms with 26USC3304, her entitlement to benefits was controlled by laws of Nevada (paying state). Agency had the authority to redetermine employer's 1990 contribution rate within one year of its issuance. Erroneous rates for 1987 through 1989 could not be redetermined because of the one year time limit.

7/99
11, 3: N/A

Section 41

SUCCESSORSHIP, Contribution Rate, Bankruptcy

CITE AS: Bruce & Roberts, Inc. v MESC, Genesee Circuit Court, No. 92-1202-AE (April 21, 1993).

Appeal pending: No

Claimant: N/A
Employer: Bruce & Roberts, Inc.
Docket No. L91-15659-2150

CIRCUIT COURT HOLDING: The Chapter 7 bankruptcy trustee was an employing unit pursuant to Section 40 and, therefore, by definition an "employer subject to this Act" under Section 41(2)(a). Therefore, employer Bruce & Roberts Inc. is a successor, having acquired 75% or more of Balderstone assets by means of bankruptcy.

FACTS: On October 18, 1985, employer sold the business (Sherman's Lounge) to Balderstone for $160,000. On June 21, 1988, Balderstone filed for Chapter 11 Bankruptcy and for Chapter 7 on March 22, 1989. Employer re-acquired all the equipment and fixtures they sold in 1985 through foreclosure. Also, they purchased the liquor license and inventory from the Chapter 7 bankruptcy trustee. They reopened as Bruce & Robert's, Inc. on January 2, 1990. They were assigned 10% rate as successor employer, having acquired more than 75% of Balderstone's assets. Employer asserted it was not a successor and entitled to new employer tax rate of 2.7%.

DECISION: Employer is a successor to Balderstone and the 10% contribution rate was properly assessed.

RATIONALE: Employer acquired through foreclosure everything it had previously conveyed to Balderstone. Repossession after default has been found to be an acquisition even in the absence of a title transfer. The acquisition of assets from a debtor through bankruptcy proceedings also results in an acquisition for purposes of 41(2), based on the definitions in the Act of "employer" and "employing unit."

7/99
19, 11: N/A

2.15

Section 18(d)(2)

TAX RATE, Quarterly Report, Late filing, Good cause, Bookkeeper misconduct

CITE AS: MESC v Bennett Fuel Co, unpublished per curiam Mich App, May 30, 1995 (No. 160028).

Appeal pending: No

Claimant: N/A
Employer: Bennett Fuel Company
Docket No. L85-02360-RM1-2068

COURT OF APPEALS HOLDING: Good cause for late protest of contribution rate established by showing that delay in filing an appeal was due to the misconduct of employer's bookkeeper.

FACTS: In 1984 MESC raised employer's contribution rate from 1% to 10% because of a missing quarterly report for the 2nd quarter of 1983. Notice of the increased tax rate was mailed on April 10, 1984. Employer did not protest within 30 days. Failure to observe time limit to protest of contribution rate was due to dereliction of duty on the part of employer's bookkeeper--he had secreted a number of employer's business documents in his car, destroyed others. When the misconduct was discovered, employer fired the bookkeeper, filed the missing quarterly report and requested redetermination of its contribution rate.

DECISION: Employer is entitled to present evidence on merits of its case for redetermination of the contribution rate.

RATIONALE: Unemployment Agency Administrative Rule 270 provides that "good cause" is defined to include situations where "an interested party has newly discovered material facts which through no fault of its own were not available at the time of the determination." Gross misconduct of employer's bookkeeper prevented employer from filing a timely appeal of the 10% contribution rate. This amounted to "good cause" for the delay.

7/99
3, !4: C

Section 18(d)(2)

TAX RATE, Late protest, Employer negligence

CITE AS: MESC v Regis Associates, unpublished memorandum Mich App, May 27, 1994 (No. 162000).

Appeal pending: No

Claimant: N/A
Employer: Regis Associates
Docket No. L90-08433-2113

COURT OF APPEALS HOLDING: Where employer's agent advised it to file a late quarterly report and it nonetheless failed to do so, this was negligence on employer's part and it did not establish good cause for late protest of its contribution rate.

FACTS: Employer filed an untimely protest of its contribution rate. Employer claimed its agent was negligent for failing to timely file a quarterly report. However, the agent advised employer to file the late quarterly report within the 30 day extension period provided in Section 18(d)(2) but the employer failed to follow this advice.

DECISION: No good cause shown, contribution rate determination became final.

RATIONALE: "Had plaintiff filed the report when advised to do so by its agent, no protest would have been necessary under Section 18(d)(2) of the MESA."

Editor's Note: This case was decided one year before the court of Appeals decision in Bennett Fuel, see Digest 2.15. The Regis panel of the Court of Appeals expressly distinguished Bennett Fuel, which had been decided by the Kent Circuit Court and was then pending at the Court of Appeals, on the basis the Bennett Fuel employer did not receive the rate determination in question because of an employee's wrongful action.

7/99
19, 20: E

Section 41(2)

SUCCESSORSHIP, Contribution Rate, Cash Assets

CITE AS: Pioneer Cabinetry, Inc v MESC, unpublished per curiam Court of Appeals, September 27, 1994 (No. 145657).

Appeal pending: No

Claimant: N/A
Employer: Pioneer Cabinetry, Inc
Docket No. L88-08050-2003

COURT OF APPEALS HOLDING: Although cash should in some instances be treated as an asset, only those assets in a business' possession at the time of transfer are to be included in computing the total assets of the business.

FACTS: Employer is a manufacturer and wholesaler of kitchen cabinets. In 1986, employer purchased (under a single purchase agreement), assets from Flint Floors, Paradise Industries and Flint Floor Finishers (FFI) for $144,900. As a result, employer's contribution rate was set at 10%, because it had a acquired more that 75% of FFI's total assets. Employer contends it did not acquire 75% of FFI's assets because FFI retained $47,000 in cash after the sale. Another $64,000 in assets were sold to employer which could not be identified as coming from one of the three companies whose assets the employer acquired.

DECISION: Employer is a successor in that it acquired more than 75% of its predecessor's total assets.

RATIONALE: Employer produced no evidence that FFI had $47,000 in cash at the time of the business transfer. Therefore, such alleged cash assets were properly excluded from the computation of FFI's total assets. As to the $64,000 in unidentified assets - they were listed as sold to employer. If any were attributed to FFI they would only serve to increase the percentage of assets transferred from FFI to employer.

7/99
3, 11: N/A

Sections 18(d), 21

CONTRIBUTION RATE, Quarterly Report, Request for Extension

CITE AS: Trumble's Rent-L-Center v MESC, 197 Mich App 229 (1992).

Appeal pending: No

Claimant: N/A
Employer: Trumble's Rent-L-Center
Docket No. L88-14843-1985

COURT OF APPEALS HOLDING: Where employer submitted a missing quarterly report more than 30 days after the issuance of a rate determination, mere submission of the report did not amount to a request for an extension of time under Section 21(a).

FACTS: Employer failed to file a quarterly report for quarter ending September 30, 1985. MESC issued Notice of Contribution Rate on March 23, 1987 assessing 10% rate because of the missing report. The notice stated that if the missing report was provided within 30 days, the rate would be recomputed. The notice further stated that the rate determination would be final if not appealed within thirty days and that an additional thirty days would be granted upon written request. The employer filed the missing report on May 5, 1987-more than thirty days after mailing of the March 23, 1987 Notice. The employer contends that sending the report operated as a request for redetermination as it was submitted within the allowable extension period.

DECISION: The March 23, 1987 rate determination became final thirty days after it was mailed.

RATIONALE: Words or phrases in the statute are accorded their plain and ordinary meaning, unless otherwise defined. Filing a report is not equivalent to mailing a written request. Therefore, it cannot be found that a request for an extension of time was made. "The burden is not on the agency to discern the intent of its correspondents."

7/99
14, 4, d3: N/A

Sections 22, 41

SUCCESSORSHIP, Transfer of assets, Cash Assets, Leasehold Interest

CITE AS: Midway Stop-n-Shop, Inc., v MESC, Cass Circuit Court, No. 86-12638AA (March 29, 1990).

Appeal pending: No

Claimant: N/A
Employer: Midway Stop-N-Shop, Inc.
Docket No. L86-08390-RM1 (Bypassed Board of Review)

CIRCUIT COURT HOLDING: Where successor took over an ongoing business, including the real estate via lease, and continued in business with essentially all the assets except for a large amount of cash, the cash was properly disregarded in determining the percentage of assets transferred.

FACTS: In June 1985, employer acquired an ongoing business (convenience store). Acquisition of $47,000 in inventory, equipment and goodwill was not in dispute. Issue was whether or not $59,000 in leasehold improvements on the realty and $80,000 in cash assets not transferred by the predecessor should be considered in determining whether or not more than 75 percent of assets were transferred. The referee found that out of a total of $126,000 in assets available for transfer, $106,000 was transferred, or 84 percent. He included the leasehold improvements in the transfer. He found that $20,000 of the $80,000 was available for transfer but should not be considered as a transferable asset.

DECISION: Employer is a successor under Sections 22 and 41, having acquired more than 75 percent of the predecessor's assets.

RATIONALE: Transfer of a leasehold is the transfer of an asset for purposes of successorship because the transferee acquires an ownership interest in the property. With regard to cash assets, considering cash reserves (as opposed to receivables) as a transferable asset can lead to an absurd result of paying cash for cash. It could also lead to manipulation of the transaction for the purpose of, for example, reducing the amount of assets transferred as compared with the total assets.

7/99
N/A

Sections 18(d)(2), 32a

CONTRIBUTION RATE, Jurisdiction, One year limit.

CITE AS : MESC v Monkman Construction, unpublished per curiam Court of Appeals, May 7, 1996 (No. 176053).

Appeal pending: No

Claimant: N/A
Employer: Monkman Construction
Docket No. L92-02019-2287

COURT OF APPEALS HOLDING: Where employer failed to request redetermination of its tax rate for more than one year after issuance of rate determination, reconsideration was time barred and Referee properly dismissed case for lack of jurisdiction.

FACTS: Employer's contribution rate was set at 10 percent and a determination to that effect was issued on February 14, 1990. Employer failed to submit a quarterly report for 1989. The 30 day protest period ended March 16, 1990. Employer submitted the missing report on March 27, 1990, but did not request redetermination of its rate until November 19, 1991, more than a year after the determination was issued.

DECISION: Redetermination of tax rate denied due to lack of jurisdiction.

RATIONALE: Section 32a(2) bars appeals filed more than one year after prior decision or determination. Statutory time restrictions on seeking review of unemployment tax assessments are jurisdictional. As a result, the "good cause" analysis was inapposite.

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24, 17, d12: k

Section 32a

LIABILITY, Late protest, Good cause, MESC/UA Rule 270

CITE AS: Kirby Grill Management, Inc v MESC, unpublished per curiam Court of Appeals, July 28, 1995 (No. 166288).

Appeal pending: No

Claimant: N/A
Employer: Kirby Grill Management, Inc
Docket No. L91-00461-2192

COURT OF APPEALS HOLDING: Good cause for late protest of a determination of successorship may be found where the employer submitted a revised registration report containing additional or corrected information regarding the percentage of assets acquired.

FACTS: In May, 1990 employer submitted a Liability Registration Report in which it indicated it had acquired 100% of predecessor Kings Manor. Employer was mailed a Notice of Successorship on June 22, 1990, which indicated that employer had purchased more than 75% of the assets of its predecessor. This was not protested until September, 1990. Request for redetermination denied on October 5, 1990, because employer failed to protest within thirty days or establish good cause for late protest. Employer submitted revised registration report showing it only acquired 15% of Kings Manor instead of the 100% in the original registration. Employer's position is that submission of revised registration report meets good cause standard set forth in Unemployment Agency Administrative Rule 270(1)(b).

DECISION: Reversed and remanded for determination of whether good cause exists for reconsideration under Rule 270(1)(b).

RATIONALE: Under the statute, the Agency is authorized to redetermine a prior successorship determination for any "good cause" shown. The focus of a good cause inquiry is not limited to whether the employer could show good cause for not filing its protest within thirty days. Limiting the Agency's discretion to deciding if there is good cause for untimely filing is overly technical and bureaucratic especially as Rule 270 expressly indicates good cause can be established on the basis of "additional or corrected information." "That is, the additional or corrected information can provide the necessary good cause to reconsider the successorship determination and, hence, the all-important rate determination."

7/99
3, 11: N/A

Section 22

TAX RATE, Successorship, Res judicata, Collateral estoppel, Mailbox Rule

CITE AS: MESC v Park Lane Mgmt, No. 210592 (Mich App September 28, 1999)

Appeal pending: No

Employer: Park Lane Management
Docket No. N/A

COURT OF APPEALS HOLDING: The doctrines of res judicata and collateral estoppel may preclude relitigation of MESC administrative decisions that are adjudicatory in nature. The defendant's failure to timely appeal the MESC determination of successorship rendered that determination res judicata to any subsequent challenges.

FACTS: Defendant provided information to the MESC, from which the MESC was able to determine that defendant acquired 100% of its predecessor's Michigan assets. The MESC ruled that defendant was subject to the 10% unemployment tax rate. The MESC sent a notice of successorship determination to the defendant, which had 30 days to appeal. The defendant failed to timely appeal. Plaintiff sent revised 10% yearly rate notices to defendant's correct address. Defendant's witness denied seeing the notices but admitted that a secretary opened the mail and sent any tax-related documents to a firm that prepared defendant's taxes.

DECISION: Plaintiff was entitled to collect $23,698.02 in disputed unemployment insurance taxes.

RATIONALE: Plaintiff relied on the "mailbox rule" to prove that defendant received the notice of successorship and yearly tax notices. "[P]roper addressing and mailing of a letter creates a [rebuttable] legal presumption it was received." Stacey v Sankovich, 19 Mich App 688 (1969). Plaintiff's regularly conducted business included the mailing of 200,000 rate determinations and payment notices a year. In this matter, although direct proof that the notices were mailed to defendant was impractical due to the large volume of mailing plaintiff generated, "evidence of the settled custom and usage of the sender in the regular and systematic transaction of its business may be sufficient to give rise to a presumption of receipt by the addressee." Insurance Placements v Utica Mutual Ins, 917 SW2d 592, 595 (1996). Plaintiff presented sufficient evidence to give rise to the common-law presumption that defendant received the mailed notices, which defendant failed to rebut.

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BENEFIT COMPUTATION FACTORS

Sections 27(b)(c)(f), 46, 46a

Section 27(f)

PENSION OFFSET, Statutory construction, Retroactivity of amendments

CITE AS: Gormley v General Motors Corp., 125 Mich App 781 (1983).

Appeal pending: No

Claimant: Charles M. Gormley
Employer: General Motors Corporation
Docket No: B80 16457 74672

COURT OF APPEALS HOLDING: "It is a general rule in Michigan, as well as in other jurisdictions, that all statutes are prospective in their operation except in such cases as the contrary clearly appears from the context of the statute itself."

FACTS: The claimant was receiving a military pension prior to his layoff from General Motors in July, 1980. The statute in effect mandated that the claimant's unemployment benefits be reduced because of the existence of the military pension. At the time of the claimant's appeal, a newly enacted pension offset provision provided for a pension offset only if the pension came from a "base period employer." The claimant contended that the new provision should be applied retroactively.

DECISION: The statute in question is not retroactive.

RATIONALE: Nothing in the language or context of the 1980 amendment to the Federal Employment Tax Act suggests a congressional intent that the amendment was to apply retroactively.

A remedial statute may be applied retroactively. A remedial statute is related to remedies or modes of procedure which do not create new or take away vested rights, but only operate in furtherance of a remedy or confirmation of rights already existing. Kalamazoo Ed Ass'n v Kal Schools, 406 Mich 579, 601.

Prior to the amendment claimant was barred from receiving full unemployment compensation benefits. However, the 1980 amendment allows claimants to receive full unemployment compensation benefits beginning November 1, 1980. The latter amendment creates a new right in claimant and others in claimant's position and cannot be considered as being a remedial statute.

Section 27(f)

PENSION OFFSET, Cost of benefit

CITE AS: Horney v U S Post Office, No. 82-2657-AE-B, Berrien Circuit Court (May 12, 1983).

Appeal pending: No

Claimant: Alan A. Horney
Employer: U S Post Office
Docket No: UCF80 16132 75134

CIRCUIT COURT HOLDING: The cost of the benefit cannot be construed to mean the present actuarial value of the benefit. "This Court interprets the statutory use of the word "costs" in its plain and ordinary meaning that is, the amount actually spent for something (perhaps of much greater value)".

FACTS: Claimant and employer paid matching contributions to the retirement fund totaling $28,848. The ultimate value of the pension (based on an actuarial computation) would be $134,000. There is no showing that other costs, beyond the contributions and the respective interest on said contributions were actually paid into the fund.

DECISION: Claimant's benefits are not subject to reduction under Section 27(f).

RATIONALE: "That the amount actually contributed by both parties plus interest may not be sufficient to pay the ultimate possible pension benefits that might be received by appellant and that any such contingent balance may have to come from other sources (the amount of which is now underterminate and may be nothing) does not make such contingent balance a "cost of benefits" in determining and reducing the amount of unemployment benefits to which appellant otherwise is entitled.

Section 27(f)

PENSION OFFSET, Cost of benefit, Employee contribution

CITE AS: Polites v Flint Public Schools, 132 Mich App 609 (1984).

Appeal pending: No

Claimant: James R. Polites
Employer: Flint Public Schools
Docket No: B79 02190 66513

COURT OF APPEALS HOLDING: Claimant contributed less than half the cost of the retirement benefit. The determination of whether claimant's benefits are to be subject to reduction under Section 27(f) focuses on the amount of claimant's contribution towards the cost of the benefit not a comparision of what claimant contributed to the employer's contribution.

FACTS: Claimant was employed by respondent school district as a teacher for approximately 23 years, retiring July 1, 1978. During his employment claimant contributed $14, 615.13 to this retirement fund, while respondent contributed $3,223.80. Contributions to claimant;s retirement fund were also made by the State of Michigan. Claimant's monthyly retirement benefit consisted of an annuity funded entirely by claimant's contribution which paid claimant $31.13 monthly and a pension benefit of $533.45 monthly funded entirely by the employer and the State of Michigan.

DECISION: Claimant's weekly benefit rate was properly subject to adjustment under Section 27(f).

RATIONALE: "... it is clear that, if the employer, has contributed to the retirement plan, unless the employee also contributing to the plan provided more than half of the cost of the benefits, the employee's unemployment compensation benefits must be reduced. Nothing in the statute suggest that the legislature intended that the employer's contributions simply be compared to the employee's in determining if a reduction is proper."

Section 27(f)

PENSION OFFSET, Cost of benefit

CITE AS: Zajac v U.S. Post Office, No. 80-2340 AE, Macomb Circuit Court (February 9, 1981).

Appeal pending: No

Claimant: John Zajac
Employer: U. S. Post Office
Docket No: UCFE77 10907 56170

CIRCUIT COURT HOLDING: The "cost of the benefit" is the present actuarial value of the retirement benefit.

FACTS: Claimant worked for the U.S. Postal Service from 1942-1976. While claimant was employed, matching contributions were made by the claimant and the employer to the Federal Retirement Program. Claimant's total contributions to the fund were $15,939. Claimant receives a gross monthly annuity of $913. As of the date of claimant's separation, the total present value of the retirement benefit was $93,452.33.

DECISION: Claimant's weekly benefit rate is subject to adjustment under Section 27(f) despite the fact that claimant and employer made matching contributions.

RATIONALE: Claimant's contribution is less than 1/2 the present actuarial value of the retirement benefit.

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Section 27(f)

PENSION OFFSET, Employee contribution

CITE AS: Solgat v Accurate Mechanical, Dickinson Circuit Court, No. D94-8517-AE (June 29, 1995).

Appeal pending: No

Claimant: Clement Solgat
Employer: Accurate Mechanical
Docket No. B91-16599-123338W

CIRCUIT COURT HOLDING: Where union employees receive a lump economic package pursuant to a labor contract and they decide how much to allocate to wages and how much will be devoted to fringe benefits such as pensions, the contribution to the pension fund is entirely that of the employee.

FACTS: Claimant was denied benefits after being laid off for lack of work in November 1990, because he was receiving a pension. Claimant had been a union pipefitter for many years. His union negotiated labor contracts under which employers agreed to pay pipefitters a certain amount of money. The union members then decided how much of the hourly rate would be paid to them in wages and how much would go to pay for various fringe benefits including the pension fund. The employers paid the lump sum amount for fringes directly into a fringe benefit fund. The balance was paid in wages.

DECISION: Claimant is entitled to receive unemployment benefits.

RATIONALE: The fact that taxes were not deducted from the funds forwarded to the union does not alter the fact the earned funds of the employees in the hands of the employer belonged in total to the employees. The employer merely disbursed it as directed once it had been earned by the performance of labor. "The plan was that of the employee and the contribution to the plan, in total, was that of the employee."

7/99
24, 17, d12: J

Section 27(f)

PENSION OFFSET, IRA Rollover, Retirement Benefits Receipt

CITE AS: Koontz v Ameritech Services Inc, 466 Mich 304 (2002)

Appeal pending: No

Claimant: Nancy Koontz
Employer: Ameritech Services, Inc.
Docket No. B95-13491-138951

SUPREME COURT HOLDING: The governing statute, Section 27(f)(1), mandates coordination of claimant's unemployment benefits with her pension benefits.

FACTS: Claimant worked at employer's Traverse City office for 30 years until employer permanently closed that office. Claimant had the option of transferring to another location or retiring. Claimant chose to retire, and elected to roll over the lump-sum distribution of her employer-funded pension into her IRA instead of receiving a monthly annuity. Claimant applied for unemployment benefits and the Unemployment Agency determined her weekly benefit rate was subject to reduction under Section 27(f) by the pro-rated weekly retirement benefits the claimant would have received if she had taken the monthly annuity.

DECISION: Claimant's unemployment benefits are subject to reduction under Section 27(f).

RATIONALE: Section 27(f)(1) requires "narrow coordination," i.e. offset of unemployment benefits if the employer charged for unemployment benefits funded the retirement plan. In March 1980, Congress amended FUTA, 26 USC 3304(a)(15), to require "broad coordination," meaning unemployment benefits would be offset by retirement benefits regardless of whether the charged employer funded the retirement benefits. Michigan enacted Section 27(f)(5) to comply with the new federal law.

Congress then amended 26 USC 3304(a)(15) in September 1980 and returned to "narrow coordination," Michigan, however, did not similarly amend Section 27(f). Section 27(f)(1) "always requires coordination of pension benefits that the chargeable employer contributed." Section 27(f)(5) may require coordination of pension benefits based on previous work if required to conform to federal law.

"Liquidation" as used in Section 27(f)(4)(a)(ii) requires distribution of all assets held in a pension fund for all employees. Distribution of a single employee's vested interest is not liquidation of the pension fund. Claimant could have elected a monthly annuity.

Claimant "received" her retirement benefits within the meaning of Section 27(f)(1), notwithstanding the fact the employer transferred the funds to her IRA. The funds were transferred at her direction, she accepted them by directing their delivery to her account, and could still access the funds by making a withdrawal.

11/04

Sections 46(d), (now 46(g)); 46a(1)

CREDIT WEEKS, Proprietary interest, Alternative earnings qualifier, Statutory construction

CITE AS: Kulling v Kirk Design, Inc, Wayne Circuit Court, No. 89-910000-AE (February 1, 1990).

Appeal pending: No

Claimant: David Kulling
Employer: Kirk Design, Inc
Docket No. B87-16118-107903

CIRCUIT COURT HOLDING: The claimant was not entitled to establish a benefit year under Section 46a(1), the alternative earnings qualifier, because he owned more than a 50% proprietary interest in the employing unit and Section 46(d) (now 46(g)) controls.

FACTS: Claimant owned 100% of the employing corporation. On March 5, 1987 he stopped drawing his salary from the corporation. The corporation stopped operating on September 30, 1987. On October 25, 1987 the claimant filed for unemployment benefits. The MESC denied the claim because claimant had more than a 50% proprietary interest in the employing corporation, only established 18 credit weeks and thus could not establish a benefit year.

The claimant argued under the alternative qualifier provision, Section 46a(1), he should be able to establish a benefit year.

Section 46a(1) became effective on January 2, 1982 followed by Section 46(d) on July 24, 1983.

DECISION: The claimant was not entitled to establish a benefit year under Section 46a(1), the alternative qualifier.

RATIONALE: The court noted that Section 46(d) begins with the statement: "Notwithstanding subsection (a)..." and the fact subsection (d) was enacted after Section 46a and concluded the legislative intent of 46(d) was to limit an individual with a substantial interest in an employing unit from receiving benefits. Section 46a(1) operates as an exception to Section 46(a), not Section 46(d).

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

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TOTAL OR PARTIAL UNEMPLOYMENT

Sections 27(c), 44, 48

Section 48

REMUNERATION, Allocation of vacation pay, Circuit court, Judicial review, Jurisdiction, Layoff, Pro-rata vacation allowance

CITE AS: Brown v LTV Aerospace Corp, 394 Mich 702 (1975).

Appeal pending: No

Claimant: Russell W. Brown, et al
Employer: LTV Aerospace Corporation
Docket No: B70 773 38400 et al

SUPREME COURT HOLDING: (1) A pro-rata vacation allowance at the time of layoff is not a termination allowance and may be considered as vacation pay. (2) Where claimants are not numerous enough to require a class action, and their consolidated appeal is filed in a circuit other than Ingham, the appeal must be dismissed as to any claimant not residing in the circuit of filing.

FACTS: At the time of layoff, the claimants were paid a pro-rata share of their annual vacation pay. These payments were held to be remuneration under Section 48 of the Act. The claimants appealed to Macomb Circuit Court, where the appeal was dismissed as to claimant Boyer because he resided in Oakland County.

DECISION: (1) The pro-rata vacation pay was remuneration. (2) Boyer's appeal was properly dismissed.

RATIONALE: (1) Analysis of the union contract " ... indicates that the agreement speaks of vacation pay to an employee regularly employed, of one 'at the time of termination' and one 'terminated for lack of work and subsequently recalled' in exactly the same way. The emphasis is all on guaranteeing vacation pay in accord with credit earned because of time worked. The system is integral and it is no different 'at time of separation' from either regular annual anniversary payments or payments of allowances for those terminated and then recalled."

"The language of the statute is unambiguous, and it is clear that under [Section] 38 Boyer should have filed his appeal in either Oakland Circuit Court, the circuit court of the county in which he resided, or the Ingham Circuit Court.

"Section 38 is a statutory grant of jurisdiction to certain circuit courts; if an appeal is improperly filed in the wrong court, that court has no option but to dismiss the action for lack of jurisdiction."

Section 48

REMUNERATION, Allocation of vacation pay, Designation of vacation, Layoff, Severance pay

CITE AS: Hickson v Chrysler Corp, 394 Mich 724 (1975).

Appeal pending: No

Claimant: Joseph R. Hickson
Employer: Chrysler Corporation
Docket No: B70 5047 RO 39184

SUPREME COURT HOLDING: Where a labor agreement provides for the allocation of vacation pay to a portion of an indefinite layoff period, the payments are remuneration and not severance pay.

FACTS: "Soon after being laid off plaintiff received 28 days vacation pay from his employer in accordance with a Chrysler-UAW contract. The 28 days pay was comprised of:

> 1) 17-1/2 days vacation credit accrued in 1969 which prior to the layoff plaintiff and his employer had agreed the plaintiff would take between July 6 and July 29 and
> 2) 10-1/2 vacation days accrued in 1970 up to the time of the layoff which normally would not have been taken until 1971."

DECISION: The claimant's vacation pay constitutes remuneration under Section 48 of the Act.

RATIONALE: "In this case there can be no question that the Chrysler/UAW contract provided for the designation of the period for allocation of vacation pay."

"Receipt of 'termination, separation, severance, or dismissal allowances, and bonuses' suggests payment independent of and perhaps in addition to vacation payments. The payments in question were clearly 'for a vacation or a holiday.'"

Section 48

REMUNERATION, Allocation of vacation pay, Plant shutdown, Vacation pay

CITE AS: Van Wormer Industries v MESC, No. 84-2768 AE, Macomb Circuit Court (February 28, 1985).

Appeal pending: No

Claimant: Jerry L. McCullough
Employer: Van Wormer Industries
Docket No: B83 21674 96043W

CIRCUIT COURT HOLDING: Where an employer fails to properly allocate vacation pay to a period of lay-off, the vacation pay is not remuneration under Section 48 of the Act.

FACTS: On May 2, 1983, the employer posted a notice that the entire plant would be closed for a one week vacation period effective June 30, to July 11, 1983. The contract provided that employer could not shutdown the plant unless such action was announced by the employer not later than May 1st. May 1st was a Sunday. On May 2, 1983, the claimant requested and was granted vacation time for the period July 16, to July 31. Claimant filed for unemployment for the period of the plant shutdown.

DECISION: The claimant is eligible for benefits for the period of the plant shutdown under Section 48.

RATIONALE: "It is settled that an employer may lawfully designate a period during lay-off for the allocation of vacation, Brown v LTV Aerospace Corp, 394 Mich 702." In this case, the employer did not make a proper allocation.

"The terms of the collective bargaining agreement specify that the plant may be closed for a two week vacation period, announced by the employer not later than May 1st. (emphasis provided). It is undisputed that on May 2nd, the employer posted a notice stating the plant would be closed for a one week vacation period effective June 30, 1983 at 4:00 p.m. through July 11, 1983 at 7:30 p.m. The notice did not comply with specified requirements. ...

" ... it must be kept in mind that the Michigan Employment Security Act is remedial in nature and is to be liberally construed to provide coverage, and its disqualification provisions are to be narrowly interpreted. Kempf v Michigan Bell Telephone Co., 137 Mich App 574 (1974)."

Section 48

REMUNERATION, Unemployed, Attorney practicing law, Burden of proof, Compensation received, Eligibility

CITE AS: Phillips v UCC, 323 Mich 188 (1948).

Appeal pending: No

Claimant: Pleasant I. Phillips
Employer: Winters and Crampton Corp.
Docket No: B7 15029 8250

SUPREME COURT HOLDING: (1) The claimant has the burden of proof as to eligibility. (2) An attorney who practices law 8 to 12 hours per day is not unemployed. (3) Compensation earned, not compensation received, is the test of remuneration.

FACTS: The claimant, an attorney, began practicing law in 1900.He performed factory work " ... from August 12, 1944, until October 6, 1947, when he was laid off due to lack of work. He continued in the practice of law, maintaining a law office in which he spent from 8 to 12 hours per day." The receipts from the law office were $31.00 in the 7 weeks following the claimant's layoff.

DECISION: The claimant is not unemployed.

RATIONALE: "We believe that the words 'unemployed individual' are used in [Section] 28 in their ordinarily accepted sense and that, taken in that light, one who is engaged in rendering service for remuneration or who devotes his time to the practice of a profession by which a living is customarily earned cannot be said to be unemployed."

"Remuneration earned, not remuneration received, is the test under this section. Efforts expended in those weeks may well have earned fees paid at a subsequent date, a thing not at all unusual in a law practice."

"The burden was on plaintiff to prove his eligibility under [Section] 48. Dwyer v Unemployment Compensation Commission, 321 Mich 178. From the record it does not appear that he sustained that burden."

Section 44

REMUNERATION, Wages, Disability payments, Equal protection

CITE AS: Barnett v Good Housekeeping Shop, No. 58582 (Mich App March 14, 1983); lv den 418 Mich 873 (1983).

Appeal pending: No

Claimant: Rebekah Barnett
Employer: Good Housekeeping Shop
Docket No: O/P B78 53596 60992

COURT OF APPEALS HOLDING: The distinction in Section 44(5)(a) and (c) of the MES Act as to the treatment of disability payments as wages depending on whether the disability benefits are paid directly to an employee or through a disability plan does not constitute a denial of equal protection.

FACTS: Claimant, a 12 year employee, was on a medical leave and received 26 weeks of medical disability benefits through a disability insurance plan provided by the employer. When her disability ended claimant's employment was terminated. She applied for unemployment benefits but had insufficient credit weeks because the disability payments were not considered wages under Section 44(5) because they were paid through an insurance plan rather than directly to the employee.

DECISION: Claimant does not have sufficient credit weeks to establish a claim because disability payments she received do not constitute wages under Section 44 of the Act.

RATIONALE: "Equal protection in its guarantee of like treatment to all similarly situated citizens permits classification which is reasonable and not arbitrary and which is based upon material and substantial differences which have reasonable relation to the object or persons dealt with and to the public purpose or purposes sought to be achieved by the legislation involved. The equal protection clause does not forbid discrimination with respect to things that are different. Gauthier v Campbell, Wyant & Cannon Foundry Co, 360 Mich 510, 514; 104 NW2d 182 (1960). We find as did the trial court, that the legislative purpose in the distinction of section 44 is to encourage the establishment of plans and systems which would financially aid workers when they are ill and disabled and for which unemployment benefits are not payable because the individual employees are not qualified under section 28 of the act, because they are not able and available for work due to the sickness or disability."

Section 48

REMUNERATION, Allocation of vacation pay, Bonus, Contractual specification, Designation of vacation, Payment in lieu of vacation, Vacation shutdown

CITE AS: Blanding v Kelsey-Hayes Co, No. 80 022124 AE, Wayne Circuit Court (February 18, 1981).

Appeal pending: No

Claimant: James Blanding, et al
Employer: Kelsey-Hayes Co.
Docket No: B76 13949(1) 60456 et al

CIRCUIT COURT HOLDING: Where a contract requires payment of vacation pay in March of each year, and allows designation of a vacation shutdown period, the March payment is not remuneration.

FACTS: The claimants received their vacation pay in March of each year, as specified in the union contract. Section 19 of the contract allowed designation of a vacation shutdown period. "At various times in 1975 and 1976 the management at the three plants invoked the company's option, as provided in Section 19, to require vacations to be taken during a plant shutdown period."

DECISION: The payments in question are not remuneration under Section 48 of the Act.

RATIONALE: The Court cited Renown Stove Co v UCC, 328 Mich 436 (1950), and Hubbard v UCC, 328 Mich 444 (1950). "The lesson of the Hubbard and Renown Stove cases is that the questioned payments, being payable at the specific time and without regard to whether vacation time is also taken, do not qualify in the first instance under Section 48 as 'amounts paid ... for a vacation,' are bonuses instead, and are therefore not subject to the employer's right of allocation." "The rationale of the Supreme Court's interpretation of Section 48 seems clear. Although vacation pay is deemed remuneration, a payment cannot be considered remuneration for the period of unemployment if the employee is entitled to the payment in all events without regard to the period of unemployment."

Section 48

REMUNERATION, Back pay award, National Labor Relations Board, Payment of damages, Settlement agreement

CITE AS: Weideman v Interlakes Engineering Co, No. 744941 AE, Macomb Circuit Court (November 28, 1975).

Appeal pending: No

Claimant: William Weideman, et al
Employer: Interlakes Engineering Co.
Docket No: B73 3107 43951 et al

CIRCUIT COURT HOLDING: Back pay received as the result of an N.L.R.B. settlement agreement is remuneration under Section 48 of the Act, even where the amount is less than the claimed loss of wages.

FACTS: The claimants received $10,000.00 under a settlement agreement approved by the National Labor Relations Board. The claimants alleged their total wage loss was $26,000.00. "It is claimed that the Appellants assumed that the actual compensation for loss of wages was covered by their unemployment benefits from the MESC and that the $10,000.00 settlement was remuneration for loss of fringe benefits."

DECISION: The back pay is remuneration under the Act.

RATIONALE: The Court quoted the text of the settlement agreement:

> Paragraph 7 referred to states that the employer shall 'Make whole the below-named employees for any loss of pay they may have suffered by payment of a lump sum settlement of $10,000.00 ...' From the terms of the agreement it is clear that the stipulation and the order indicate that the lump sum settlement was a back pay award. Appellants claim that the stipulation is silent as to back pay. In addition this Court notes that the National Labor Relations Board has no authority to pay a discriminatee damages for anything other than lost wages.

REMUNERATION, Back pay award, Civil Rights Commission, Eligibility, Good cause for redetermination, Jurisdiction, Settlement agreement

CITE AS: Walters v Kelsey Hayes Wheel Co, No. 74 005517 AE, Wayne Circuit Court (January 31, 1980).

Appeal pending: No

Claimant: Johnnie Walters
Employer: Kelsey Hayes Wheel Co.
Docket No: B73 1040 43943

CIRCUIT COURT HOLDING: Back pay received as the result of a Civil Rights Commission settlement agreement more than one year after benefits are paid, is remuneration under Section 48 of the Act and is good cause for redetermination of the claimant's eligibility.

FACTS: The claimant filed a complaint with the Michigan Civil Rights Commission in July, 1967, following his discharge by the employer. "On September 29, 1972, claimant and employer settled the Civil Rights claim by a stipulation which provided that the employer pay to the claimant back pay totaling $9,897.75." "On October 30, 1972, employer notified the MESC of the stipulated settlement and requested a redetermination of claimant's eligibility for benefits."

DECISION: The back pay is remuneration under the Act.

RATIONALE: "The Commission held that inasmuch as more than one year has elapsed since the time the benefit payments were paid, the Commission lacked jurisdiction to redetermine claimant's eligibility.

"The Referee reversed the Commission."

"The transcript of the proceedings before the Referee on February 28, 1973, makes it clear that the settlement of $28,609.31 specifically included $9,897.75 as back pay for the time which claimant had drawn unemployment."

Section 48

REMUNERATION, Allocation of holiday pay, Contractual specification, Designation of holidays, Vacation shutdown, Weekly holiday payment

CITE AS: Turner v Creative Industries of Detroit, Inc., No. 44061 (Mich App April 30, 1980).

Appeal pending: No

Claimant: Jimmy Turner, et al
Employer: Creative Industries of Detroit, Inc.
Docket No: B76 3548 (1) 53458 et al

COURT OF APPEALS HOLDING: Where holiday pay is distributed in every weekly paycheck, as a percentage of straight time earnings, it is not allocated to the designated holidays.

FACTS: The union contract and a supplemental agreement established a vacation shutdown from December 22 through January 2. "The contract further provided that holiday pay would no longer be distributed to employees at the time of the holiday. Instead, 'each employee's weekly paycheck ... [would] include an amount equal to 4.2 percent of his straight time hours worked.'"

DECISION: The claimants are eligible for benefits for the vacation shutdown period.

RATIONALE: "In the instant case, both Creative Industries and the Union agreed on the designation of the Christmas season holidays. At issue then is whether holiday payment was ever adequately allocated to those holidays, as required by the statute. See General Motors Corp v Unemployment Compensation Comm, 331 Mich 303; 49 NW2D 305 (1951). "In General Motors Corp, supra at 306-310, the Supreme Court held that holiday pay was remuneration in part where the bargaining parties had allocated funds to a specific day - December 25. In the present case, however, there has been no allocation of holiday pay to any specific holiday. Rather, the parties have agreed that each employee will receive 4.2 per cent of his straight time in each paycheck to cover all holidays."

Section 48

REMUNERATION, Allocation of vacation pay, Arbitration, Contractual specification, Designation of vacation, Layoff

CITE AS: McCaleb v Harbor Industries, Inc, No. 77-5202 (Mich App September 8, 1978).

Appeal pending: No

Claimant: Victor E. McCaleb, et al
Employer: Harbor Industries, Inc.
Docket No: B75 15530 50209

COURT OF APPEALS HOLDING: (1) Where contractual specification of vacation procedures includes designation of vacation periods but does not treat the allocation of vacation pay, the employer may allocate such pay as it chooses. (2) Arbitration has no role in the determination of eligibility for benefits.

FACTS: The employer allocated vacation pay to a week in which the claimants were on layoff. A subsequent arbitration decision dealt with the selection of a vacation period.

DECISION: The claimants received remuneration under Section 48 of the Act.

RATIONALE: The Court affirmed the Ottawa Circuit Court, which held: "We interpret Section 10.1 of the Collective Bargaining Agreement as dealing with the scheduling of vacations by the employer, and employee participation in selecting individual vacation periods. Nothing is said about the allocation of vacation pay to any particular period. Neither does the arbitrator's decision reach such issue. (Properly so, because arbitration has no place in the Michigan system of administrative and judicial determination as to eligibility for statutory employment compensation benefits.) We reject appellant's request to add contractual language by implication as being without justification, particularly in view of the statutory grant of power to the employer to allocate vacation pay as he chooses in the absence of 'contractual specification.'"

Section 48

REMUNERATION, Lay-off pay, Collective Bargaining Agreement

CITE AS: Miko v Wyandotte Cement, Inc., No. 82-233794-AE, Wayne Circuit Court (February 8, 1983).

Appeal pending: No

Claimant: David Miko
Employer: Wyandotte Cement, Inc.
Docket No: B81 07873 78457

CIRCUIT COURT HOLDING: A lay-off payment constitutes separation pay and is not remuneration under the Act.

FACTS: The claimant received a lay-off allowance pursuant to the Collective Bargaining Agreement equivalent to one week's wages.

DECISION: The claimant is eligible for benefits for the period covered by the lay-off allowance.

RATIONALE: "Separation pay may stem from a collective bargaining agreement or an individual contract between the employer and employee," Gaydos v White Motors Corp., 54 Mich App 143.

"[B]efore an individual will be deemed to be unemployed, two requirements must be met. First, no service may be performed for the employer and second, no remuneration may be paid. ... That [claimant] did not perform any work for his employer is clear; however [claimant] had received an allowance from his employer pursuant to the collective bargaining agreement. The allowance that [claimant] received was labeled lay-off pay.

"Separation pay is not payment for past wages earned, but rather is considered recognition of services rendered. If the allowance was simply remuneration for past services, then a claimant having earned it, would be entitled to it, regardless of the reason for separation.

"[I]t is the court's opinion that the lay-off payment constituted separation pay and therefore falls within the Section 48 exemptions from remuneration. The payment served as compensation for job loss in recognition of past employment and not as remuneration for past services rendered."

Sections 27(c), 48

REMUNERATION, Lost remuneration, Availability for work, Emergency call-in, Full-time work, Lack of telephone, Non-receipt of message, Short notice

CITE AS: Nelson v General Foods Corp, No. 80 67AV, Calhoun Circuit Court (June 18, 1980).

Appeal pending: No

Claimant: Nella L. Nelson
Employer: General Foods Corp.
Docket No: B78 716 60234

CIRCUIT COURT HOLDING: Where the lack of a "sufficient method of communication with the company" results in lost remuneration in excess of an individual's benefit rate, the claimant is ineligible under Section 48 and 28(1)(c) of the Act.

FACTS: A laid-off production worker could have earned $536.00 in two weeks, as a substitute for absentees. She missed the work because she had no telephone and the employer was unsuccessful in efforts to contact her via a relative whose telephone number she had given.

DECISION: The claimant is not eligible for benefits.

RATIONALE: "The Board of Review stated: 'The employer was not attempting to contact the claimant regarding full-time suitable work.'

"The Board of Review did not define 'full-time' work. Obviously 8 hours a day is full-time work that day, 40 hours a week is full-time work that week.

"The Board of Review stated: 'The MESC Act does not require an employee to be available at a moments notice for emergency call-in work.'

"The Board of Review interpreted the requirements of the act in a different fashion than the Referee, by simply characterizing the practice of the company by the use of terms of disparagement such as 'emergency,' 'assistance work' and 'moments notice.' Evidently neither the union nor the employees took exception to this practice."

Section 48

REMUNERATION, Discharge, Payment in lieu of notice, Severance pay

CITE AS: Hayman v S and H Travel Awards, No. 75 126038, Oakland Circuit Court (May 4, 1976).

Appeal pending: No

Claimant: Judith Hayman
Employer: S & H Travel Awards
Docket No: B74 11222 46917

CIRCUIT COURT HOLDING: Where an employer customarily asks its employees to leave on their dates of termination, and pays them "severance pay" determined by each person's salary and seniority, the additional money is not payment in lieu of notice.

FACTS: The Referee stated: "On the date of her dismissal, the claimant received three weeks of vacation and five weeks additional pay which has been considered by the employer to be payment in lieu of notice."

DECISION: The additional pay is not remuneration under the Act.

RATIONALE: The Court adopted the decision of the Referee, who held: "The testimony indicated that, because of the risk of former employees providing the names of prospective customers to competitors, whenever an employee's services were no longer needed, they were asked to leave employment on the same date that they were terminated. That is, employees were not given a certain time period as a notice of their termination during which they could seek other work. This being the case, the Referee does not find that the payment of five weeks of wages given to the claimant on her last day of employment could be considered payment in lieu of notice. The only time payment in lieu of notice could be given to an employee would be on occasions when it would be possible for notice to be given." "In addition, it appears from the testimony that the claimant was advised that the payment she would be receiving would be in the nature of a severance payment." "It also appears that the amount of the severance pay increased the longer an employee was employed by the company and the greater his or her, salary."

Section 48

REMUNERATION, Vacation pay, Commission Administrative Rule 302, Allocation of vacation pay

CITE AS: Tenneco Inc., v Briegar, No. 82-29572 AE, Jackson Circuit Court (December 30, 1983).

Appeal pending: No

Claimant: John J. Brieger
Employer: Tenneco, Inc. - Walker Mfg.
Docket No: B80 23129 RO1 76344

CIRCUIT COURT HOLDING: Where an employer allocates vacation pay to periods of lay-off, but fails to comply with the notice requirements of Commission Administrative Rule 302, the payment is not remuneration under Section 48.

FACTS: The claimant made a request for vacation pay. On June 6, 1980, he received a check representing his vacation pay with his vacation beginning the following week. The collective bargaining agreement provided that the company could schedule a shutdown of plant operations for a period in July or August, on the condition that 90 days prior notice be given. Written notice of a shutdown scheduled for August 28, was posted at plant locations on May 9, and July 2, 1980.

DECISION: The vacation payment is not remuneration under Section 48.

RATIONALE: "[T]he employment contract provides for plant closures, but makes no provision for allocation of vacation pay to those periods. The effectiveness of the allocation must hinge upon the company's compliance with the provisions of Rule 302."

Neither of the posted notices referred to the allocation of vacation pay or that employees might be ineligible for unemployment benefits upon receipt of the vacation pay.

"Since the notices in this case do not meet with the requirements of Rule 302, the decision of the MESC allowing benefits ... is affirmed."

Section 48

REMUNERATION, Vacation pay, Plant shut down, Commission Administrative Rule 302, Substantial compliance

CITE AS: Abbeg v Russell, Burdsall & Ward, Inc., No. 81-12-581 AE, Branch Circuit Court (October 5, 1982).

Appeal pending: No

Claimant: Clarence Abbeg, et al
Employer: Russell, Burdsall & Ward, Inc.
Docket No: B80 18840 75094, et al

CIRCUIT COURT HOLDING: Where "the employer complies substantially with the requirements contained in Commission Administrative Rule 302, the purpose of the notice is accomplished."

FACTS: The claimants were laid off from August 3 through August 16. The employer had scheduled a plant shut down for this period. "The claimants and their union president were given advance notice by the employer of the intended shutdown and on April 22, 1980, the employer posted notice on the plant's bulletin board which was followed by the employer's letter to the union president. ... [N]either of the written notices contained any statement regarding any possible effect of the shutdown or payment thereof on the (claimant's) eligibility for unemployment benefits."

DECISION: The notice was sufficient to comply with Commission Administrative Rule 302.

RATIONALE: "[T]he employer did comply substantially with the requirements contained in Rule 302 so that the purpose of the notice was accomplished. Written notices failed to mention any possible effect that the August, 1980 shutdown would have on the claimant's eligibility for unemployment compensation, but in other respects the notice was clear. The dates of shutdown were set forth as was the fact that this was considered a 'vacation' shutdown. The letter which the employer sent to the union president further clarified that employees would be required to take vacation during the shutdown to the extent that their vacation had been earned. Further, the employees must have understood the shutdown to be a vacation and circulated a petition of protest which showed they had such understanding." The payments in question are remuneration under Section 48 of the Act.

Section 48

REMUNERATION, Earnings, Voluntary services

CITE AS: MESC v Peterson, No. 59163 (Mich App September 29, 1982).

Appeal pending: No

Claimant: Doris C. Peterson
Employer: Eastern Michigan University
Docket No: B78 53074 65751

COURT OF APPEALS HOLDING: Monies given to the claimant by the employer for services which had been voluntarily rendered were not earnings and therefore could not be considered remuneration for purposes of Section 48.

FACTS: The claimant voluntarily agreed to work without pay on a two month research project. Approximately three months after the claimant had performed her voluntary services the employer gave the claimant $2000.00 for her efforts.

DECISION: The claimant was eligible for benefits during the period which she rendered voluntary services since no remuneration had been earned.

RATIONALE: When the claimant agreed to perform the services it was understood they were being provided on a voluntary basis. As a consequence the claimant had no enforceable claim for remuneration and the employer had no obligation to pay. Absent some enforceable claim or obligation monies received for services rendered cannot be considered remuneration for purposes of the MES Act.

Section 48

REMUNERATION, Severance pay

CITE AS: Jones (Gateway, Inc) 1983 BR 86593W (B82-18088).

Appeal pending: No

Claimant: Robert H. Jones
Employer: Gateway, Inc.
Docket No: B82 18088 86593W

BOARD OF REVIEW HOLDING: Where the claimant has no contractual entitlement to notice, any money paid by the employer upon termination is in the nature of a gift and therefore severance pay, which cannot be considered remuneration for purposes of Section 48.

FACTS: The claimant was employed as an executive director. The claimant received a call from the president of the employer's executive committee requesting that the claimant submit his resignation the following day. In the ensuing conversation, the claimant requested "severance pay" of 6 months, and the president said he did not anticipate that "severance" would be a problem. Thereafter an executive committee meeting was called and it was agreed to award the claimant a sum equal to three months wages even though the claimant's employment contract had no provision for notice in advance of discharge, pay in lieu of such notice or any severance arrangement.

DECISION: Claimant is entitled to benefits.

RATIONALE: The claimant had no contractual agreement entitling him to notice or to pay in lieu thereof. Therefore, he had no enforceable right to the money which was paid to him. Consequently, it was in the nature of a gift or bonus and as a result must be considered severance pay.

Section 48 and 50

REMUNERATION, Severance Pay, Payment in lieu of notice, Credit weeks

CITE AS: Hamilton v W.A. Foote Memorial Hospital, No. 84-33223-AE Jackson Circuit Court (October 3, 1984).

Appeal pending: No

Claimant: Joseph W. Hamilton
Employer: W. A. Foote Memorial Hospital
Docket No: B83 09754 93402W

CIRCUIT COURT HOLDING: Payments made to claimant after his separation and after he stopped performing services were severance pay, in light of the fact both parties characterized them as such and claimant had no right to payment in lieu of notice.

FACTS: The claimant worked for the employer as a controller. The employer requested the claimant's resignation. After the claimant resigned the employer continued to pay the claimant on a bi-weekly basis for a six month period. Notably, both parties referred to the payments as "severance pay". Upon filing for benefits the claimant asserted the monies received were remuneration under the Act and could be used to establish credit weeks.

DECISION: No remuneration was earned and no credit weeks could be established based on the payments in question.

RATIONALE: It is necessary to determine the understanding of the parties at the time of the separation. Here, both parties referred to the payment as severance pay. Further, the claimant did not perform any services during the six month period.

The court quoted from Bolta Products v Director of Employment Security, 356 Mass 684: "A payment in lieu of dismissal notice may be defined as a payment made under the circumstances where the employing unit, not having given an advance notice of separation to an employee, and irrespective of the length of service to the employee, makes a payment to the employee equivalent to the wages which he could have earned had he been permitted to work during the period of notice. Severance pay, on the other hand, may be defined as a payment to an employee at the time of his separation in recognition and consideration of the past service he has performed for the employer and the amount is usually based on the number of years of service."

Section 48

LEAVE OF ABSENCE, Waived rights leave

CITE AS: Urban (State of Michigan, 1986 BR 102223W (B85-13293).

Appeal pending: No

Claimant: Pamela A. Urban
Employer: Secretary of State (State of Michigan)
Docket No: B85 13293 102223W

BOARD OF REVIEW HOLDING: A "waived rights leave of absence" is not a leave of absence within the meaning of Section 48 of the MES Act.

FACTS: The claimant was a member of the Michigan State Employees Association. The contract executed between that organization and the State of Michigan provided for various types of leaves of absences. Article 16, Section D of that agreement provides that an employee may request a "waived rights leave of absence" of up to one year in those situations when an employee must leave his or her position for reasons beyond his or her control and for which a regular leave of absence is not granted. Employees requesting and granted a "waived rights leave of absence" do not have the right to return to state service at the end of the leave but will have the continuous nature of their service protected provided they return to work prior to the expiration of such leave.

In the instant matter the claimant sought and secured a "waived rights leave of absence". While on the "waived rights leave of absence" the claimant filed for unemployment benefits. The employer asserted the claimant was ineligible under Section 48(3) of the MES Act which reads "An individual shall not be deemed to be unemployed during any leave of absence from work granted by an employer either at the request of the individual or pursuant to an agreement with the individual's duly authorized bargaining agent, or in accordance with law."

DECISION: The claimant is not ineligible for benefits.

RATIONALE: In American Telephone and Telegraph Company v MESC, 376 Mich 271 (1965) the Michigan Supreme Court held that a leave of absence meant a temporary authorized release from one's duties for a stated period with the right or duty to return at the end of the period. The claimant in this matter had no right to return at the end of the period at issue. Therefore the Board found the claimant was not on a leave of absence as defined in American Telephone and Telegraph and consequently was not ineligible under Section 48(3).

Section 48, 62

REMUNERATION, Arbitration settlement, Back pay, Restitution

CITE AS: Cox v Tri-County Labor Agency, No. 85-1861AE, Calhoun Circuit Court (March 13, 1986).

Appeal pending: No

Claimant: Wayne O. Cox
Employer: Tri-County Labor Agency
Docket No: B84 06074 97817W, 97818W

CIRCUIT COURT HOLDING: Receipt of a lump sum settlement of an arbitration award constituted back pay and hence remuneration within the meaning of the MES Act.

FACTS: The claimant was employed as an executive director by the employer until his termination. After his termination an arbitrator issued a decision which reinstated the claimant and ordered the employer to pay the claimant back pay. Shortly after the claimant was reinstated the employer again terminated him. At this point the claimant and the employer negotiated an agreement whereby which the employer paid the claimant a sum in satisfaction of the arbitration award. Claimant was paid unemployment benefits while the arbitration was pending. After claimant received the arbitration settlement the MESC sought restitution of the benefits received.

DECISION: The sum received by the claimant in settlement of the arbitration award included back pay. Thus it constituted remuneration within the meaning of the MES Act and therefore claimant was ineligible for benefits during the relevant period. Restitution was properly ordered.

RATIONALE: The arbitration award specifically indicated the employer would both reinstate the claimant and pay him back wages. The back wages payable to the claimant would have been remuneration. The claimant's receipt of a sum in lieu of reinstatement and back wages must also be considered remuneration since it was received in satisfaction of the same.

Section 48

REMUNERATION, Allocation of vacation pay, Bonus, Contractual specification, Designation of vacation, Payment in lieu of vacation

CITE AS: Renown Stove Company v U. C. C., 328 Mich 436 (1950).

Appeal pending: No

Claimant: George Sheldon, et al
Employer: Renown Stove Company
Docket No: B8 5900 1 9580

MICHIGAN SUPREME COURT HOLDING: Where the option to receive vacation with pay or payment in lieu of vacation rests with the employee, a payment received during a period of unemployment will be deemed a bonus rather than vacation pay.

FACTS: One group of employees worked under a contract which provided for vacation pay and specified the vacation period from July 5 to July 18, 1948. There was no option for payment in lieu of vacation. The second group's contract also provided for vacation pay but their vacation period was not specified and these claimants had the right to receive pay in lieu of vacation. Both groups of employees were laid off for lack of work in April, 1948 and filed for and began receiving unemployment benefits. On June 28, 1948, they received checks equal to either 1 or 2 weeks of wages. The employer contested the payment of benefits for the period following July 5, 1948 asserting that the workers had vacation pay for the same period.

DECISION: The claimants covered by the first agreement received vacation pay and are not entitled to receive unemployment benefits for the same period. Those covered by the second agreement received a bonus and not vacation pay and are entitled to receive benefits with respect to the period beginning July 5 during which they did not work.

RATIONALE: The controlling question is whether the employer paid the employees for or with respect to the 1 or 2 week period beginning July 5. The first agreement specified that the period from July 5 to July 18 was a vacation period and those claimants were not entitled to the June 28 payment for any other reason. But, the claimants who worked under the second agreement had the option to take a vacation with pay or work, and in addition to wages for such work, receive a bonus in lieu of the vacation with pay. Since the option rested with the employees, the June 28 payment was a bonus and not vacation pay.

Section 48

UNEMPLOYED, Unpaid vacation, Leave of absence defined

CITE AS: Employment Security Commission v Vulcan Forging Co, 375 Mich 374 (1965).

Appeal pending: No

Claimant: Henry Czarnata
Employer: Vulcan Forging Co.
Docket No: B58 2338 21038

SUPREME COURT HOLDING: Claimants who were on unpaid vacation pursuant to a collective bargaining agreement were unemployed according to the Act for those weeks with respect to which they performed no services and received no remuneration.

FACTS: The plant where claimants worked was shut for vacation in accordance with a collective bargaining agreement but the instant claimants received no vacation pay because they had insufficient senority.

DECISION: The claimants were unemployed for purposes of the Act.

RATIONALE: The court expressly overruled I.M. Dach Underwear Co. v E.S.C., 347 Mich 465 (1956). The court concluded that claimants' unpaid vacation status was not equivalent to a "leave of absence" because a leave of absence "signifies an authorized temporary absence from work for other than vacation purposes."

Section 48

LEAVE OF ABSENCE, Definition, Right to return, Employed person

CITE AS: Golden v Huron Valley Schools, No. 83-258818-AE Oakland Circuit Court (April 25, 1984).

Appeal pending: No

Claimant: William P. Golden
Employer: Huron Valley Schools
Docket No: B82 03503 R01 85873W

CIRCUIT COURT HOLDING: A claimant is considered an employed person under Section 48 of the Act when a claimant's request for a leave of absence in lieu of being fired is granted even if the leave is for an indefinite period and with no guarantee of re-employment.

FACTS: Claimant worked for the employer from September, 1954 until June, 1980. In August, 1980 he was charged criminally with embezzlement and commingling of funds. He was suspended with pay from August, 1980 until August, 1981. In June, 1981 he was convicted of the charged felonies. A hearing was scheduled to discharge claimant, however, the claimant and the employer reached a settlement. It was agreed claimant would request a leave of absence and the employer would grant the leave of absence until all his appeal rights were exhausted. Claimant began a leave of absence August 3, 1981 which continued through the date of the Referee hearing on March 22, 1982.

DECISION: Claimant was employed under Section 48 on August 3, 1981 and thereafter while on an approved leave of absence and was therefore ineligible for benefits.

RATIONALE: "The phrase 'leave of absence' is not defined in the statute. Appellant's suggested strict limitation of its meaning to only those leaves of absence where the employee has an 'absolute right' to return to work apparently arises from his understanding of American T. & T. Co. v Employment Security Commission, 376 Mich 271 (1965), and a now repealed provision of the Act, former Section 29(1)(d) ... A plain reading of the statute does not justify such a limited definition.

Appellant's reliance on American T.&.T. Co. v Employment Security Commission, supra, is misplaced. This Michigan Supreme Court decision was controlled by a now repealed section of the Act providing for pregnancy leaves. Even assuming the provision was presently in effect, its definition of 'leave of absence' is clearly confined to pregnancy leaves."

12/91
14, 15:NA

Section 44(5)

SICK PAY, Wages and credit weeks, Average weekly wage.

CITE AS: MESC v Worth, Oceana Circuit Court, No. 94-004703-AE (February 13, 1995); lv den, Mich App, July 7, 1995 (No. 184836); lv den, Mich, April 29, 1996 (No. 103801).

Appeal pending: No

Claimant: Jane Worth
Employer: Michigan Department of State.
Docket No. B92-27803-124350W

CIRCUIT COURT HOLDING: Payments made from insurance, annuities or a fund for disability coverage are not remuneration or considered wages under the Michigan Employment Security Act. However, "sick pay" is remuneration and constitutes wages under the Michigan Employment Security Act and as such must be considered when computing benefit rates.

FACTS: The claimant worked for the employer from December 1976 until November 1991. She was laid off for lack of work. The employer did not include in its wage calculations submitted to the MESC the amounts paid the claimant in the form of sick pay. The employer's computation of the claimant's average weekly wage was $413.70 which would entitle the claimant to $224.00 a week in benefits. The claimant computed her average weekly wage as $445.47 which would entitle her to $240.00 a week in benefits. The claimant used her gross wages without deducting any amounts received in the form of sick payments. At issue was the $16.00 per week difference in benefits.

DECISION: "Sick pay" is wages and therefore, claimant's average weekly wage was $445.47 which entitled the claimant to $240.00 a week in benefits

RATIONALE: Payments made from insurance, annuities or on account of accidents are not wages any more than an accident, retirement or death benefit would be considered a wage. Similarly, sickness disability payments are either insurance benefits payments or a form thereof and are not wage payments. However sick pay amounts to a decision of an employer to pay the day wages to an employee when the employee is ill. The sick payments are remuneration and wages under the Michigan Employment Security Act.

7/99
12, 24: N/A

4.25

Section 48(2)

REMUNERATION, Pay in lieu of notice, Statutory construction

CITE AS: Vanderlaan v Tri-County Community Hospital, 209 Mich App 328 (1995)

Appeal pending: No

Claimant: James Vanderlaan
Employer: Tri-County Community Hospital
Docket No. B91-00104-117753

COURT OF APPEALS HOLDING: The MES Act does not require a contractual right to notice or payment in lieu of notice in order for monies received to be considered "amounts paid... in lieu of notice" thus rendering claimant ineligible for benefits.

FACTS: Claimant was discharged on June 14, 1990. Employee handbook provided that employer would give four weeks' notice to terminate, but could instead, pay four weeks' salary instead of notice. Claimant continued to receive regular pay checks for six weeks after he stopped working. The first four weeks were considered salary instead of notice by the employer and the last two were severance pay. The issue in this case was whether the four weeks pay were in lieu of notice and, therefore, remuneration. If so, claimant was not entitled to unemployment compensation for those weeks.

DECISION: Claimant received four weeks pay in lieu of notice (remuneration) following his termination and is ineligible for benefits.

RATIONALE: It is not necessary to prove a contractual right to notice in order to show pay in lieu of notice. The rules of statutory construction should be applied to give every word and phrase of Section 48(2) its plain and ordinary meaning. Contractual right is only one factor which may be considered in deciding whether or not claimant received remuneration. Other factors are employer's custom or policy and employee's expectation of payment.

7/99
14, 12, d3: N/A

Section 48

REMUNERATION, Salary continuation, Severance pay, Credit weeks

CITE AS: Ciaramitaro v Modern Hard Chrome Service, Macomb Circuit Court, No. 96-4644-AE (November 1, 1996).

Appeal pending: No

Claimant: Sam P. Ciaramitaro
Employer: Modern Hard Chrome Service
Docket No. B91-12323RR-131804W

CIRCUIT COURT HOLDING: Where claimant involuntarily retired and received a week's pay for each year he worked for employer, such pay was severance pay and was not remuneration under Section 48.

FACTS: Claimant retired involuntarily on February 2, 1990. As part of the early retirement package claimant received a 34 week "salary continuation" from February 8, 1990 through September 27, 1990. He did not apply for benefits until after those payments ended. The MESC held that the claimant received severance pay which is not remuneration and cannot be used to establish credit weeks.

DECISION: Claimant is ineligible for benefits because he had insufficient credit weeks in the 52 week period preceding his application to establish a claim.

RATIONALE: Claimant failed to prove that he was legally entitled to receive a continuing weekly salary if involuntarily retired. Claimant performed no services in exchange for the monies he received.

7/99
22, 24: F

REMUNERATION, Vacation pay, Allocation, Payment in lieu of vacation

CITE AS: Smith v Hayes Albion, 214 Mich App 82 (1995); lv den 453 Mich 912 (1996)

Appeal pending: No

Claimant: Bernard Smith, et al
Employer: Hayes Albion
Docket No. B86-11358-111657, et al

COURT OF APPEALS HOLDING: Where collective bargaining agreement allowed employer to allocate vacation pay to plant shutdown period, vacation payments made were remuneration for the shutdown period and rendered claimants ineligible for benefits.

FACTS: Under 1985 collective bargaining agreement, seniority employees were entitled to vacation or pay in lieu of vacation as specified in Paragraph 90. Paragraph 91 provided that employer could schedule all vacation during a plant shutdown period if certain procedures were followed, such as notification to employees. Pursuant to the contract payments for accrued vacation time were made in February and June, 1986. Employer scheduled a two week shutdown from June 30, 1986, through July 11, 1986. Notices were posted indicating the earned vacation time and pay would be allocated to the shutdown period and that the allocation might render the employees ineligible for unemployment benefits.

DECISION: Claimants are ineligible for benefits under Section 48(2).

RATIONALE: Under Paragraph 90 of the collective bargaining agreement, employees had the option of receiving pay in lieu of vacation. Under Paragraph 91, the employer could allocate vacation pay to plant shutdown period. The fact these provisions appear in separate paragraphs does not mean the payment in lieu of vacation provided for in Paragraph 90 is independent of the period of unemployment (vacation shutdown) provided for in Paragraph 91. Thus the contract did not preclude the employer from designating the vacation pay to the shutdown period. As the employer maintained that discretion, the claimants' option to take pay in lieu of vacation was extinguished when the employer exercised its Paragraph 91 authority. Therefore the payments were not "bonuses" under Brown v LTV Aerospace Corp., 394 Mich 702 (1975).

7/99
14, 12, d13: C

Section 48

UNEMPLOYED, Leave of Absence

CITE AS: Rice v International Health Care Management, Inc., Monroe Circuit Court, No. 95-3309-AE (December 30, 1996).

Appeal pending: No

Claimant: Gail Rice
Employer: International Health Care Management, Inc.
Docket No. B93-06823-R01-128754W

CIRCUIT COURT HOLDING: Where claimant was given choice between a leave of absence and termination after she notified employer of her pregnancy, she did not voluntarily request the leave of absence and was, therefore, unemployed and eligible for benefits under Section 48.

FACTS: Claimant worked for employer as housekeeper, nurse aide, laundress beginning in 1986. Claimant notified employer that she was pregnant and had some medical restrictions. Claimant requested work within her restrictions or light duty work. Employer refused and offered claimant a "voluntary" leave of absence as alternative to termination. Claimant testified her leave was not voluntary, i.e. was not requested by her.

DECISION: Claimant is not ineligible for benefits under Section 48(3).

RATIONALE: Neither the Agency, the Referee, nor the Board of Review addressed the issue of voluntariness. Claimant's unrebutted sworn testimony was that she accepted a so-called voluntary leave of absence to avoid termination. The record does not support the conclusion that the claimant voluntarily requested a leave of absence. Therefore, the conclusion that she was ineligible for benefits under 48(3) was erroneous as a matter of law.

7/99
22, 24: L

Sections 48, 44

EMPLOYED, Unemployed, Remuneration, Retroactive pay

CITE AS: Fletcher v Atrex Corp. , Macomb Circuit Court, No. 96-7137-AE (October 22, 1997).

Appeal pending: No

Claimants: Clare Fletcher
Employer: Color Custom Compounding, Inc., d/b/a Atrex Corp.
Docket No. FSC 95-00061-136470W

CIRCUIT COURT HOLDING: Where claimant spent her time performing services, though not paid for those services until after the fact, she was nonetheless employed and received remuneration.

FACTS: Claimant had a benefit year in effect in May 1992 when she began performing services for Universal Plastics. At that time, that employer was unable to offer her a paying job. Nonetheless, claimant continued to perform services until she was officially hired there August 1, 1992, at which time she informed the Agency that she was employed. After claimant was hired she was compensated retroactively for the services she performed between May and August 1992. When the Agency became aware of this a determination was issued holding claimant ineligible for the May - August period under Section 48.

DECISION: Claimant is ineligible for benefits for the period May 3, 1992, through July 11, 1992, under Section 48.

RATIONALE: Remuneration is compensation for personal services and is not limited by the statute as to when it is paid - it may be paid after the service is rendered and not in the form of an hourly or weekly rate. The substantial amounts claimant received in addition to her regular wages after she was hired were, in fact, remuneration for services rendered during the period in question.

7/99
12, 21: B

Section 48

UNEMPLOYED, Self-employment, Attachment to labor market

CITE AS: Kenkel v Tremec Trading Co., Oakland Circuit Court, No. 94-476557 (January 30, 1995).

Appeal pending: No

Claimants: Matthew Kenkel
Employer: Tremec Trading Co.
Docket No. B93-05246-126675W

CIRCUIT COURT HOLDING: Self-employment does not, per se, disqualify an individual from receiving benefits so long as they receive no remuneration and remain genuinely attached to the labor market.

FACTS: Claimant's job with employer was eliminated in April 1992. At that time, claimant purchased 50 percent interest in a real estate franchise. Claimant was not involved in day to day running of business, but did assist with long term planning. He received no compensation for services provided. He testified that he was at all times available for and seeking work. Any time he spent at the business was to increase the equity of his holding.

DECISION: Claimant was unemployed within the meaning of Section 48.

RATIONALE: Claimant's situation was compared and contrasted with that of claimants in Phillips v UCC, 323 Mich 188 (1948) and Bolles v ESC, 361 Mich 378 (1960). Found to be similar to facts of Bolles which enunciated test of whether or not claimant remained genuinely attached to the labor market despite his self-employment. Distinguish from Phillips, because claimant had not returned to a profession in which he had previously worked and he earned no remuneration. Citing Bolles, the court noted the intent of the Act is to foster industry and self-help, not idleness and inactivity.

7/99
22, 21: J

Sections 44, 48

REMUNERATION, Bonus, Strike settlement agreement

CITE AS: Jackson v General Motors Corp., Wayne Circuit Court, No. 01-119168-AE (July 8, 2002); lv den No. 242842 (Mich App January 13, 2003)

Appeal pending: No

Claimant: Willie Jackson, Jr., et al
Employer: General Motors Corporation
Docket No. MUL1999-57622 et al 154957

CIRCUIT COURT HOLDING: Where the source of a one-time payment is a strike resolution agreement, absent which there was no expectation of receiving monies for the relevant period, the payments are bonuses, not wages, and are excluded from "remuneration" under Section 48(2).

FACTS: In August 1998 employees received special payments for the lay-off period of June 28, 1998 through July 3, 1998. Employer paid the monies as part of a strike settlement and attempted to allocate the monies to that period of time. The payments were to compensate employees laid off due to interruption in the flow of parts caused by the labor dispute at the struck facilities.

DECISION: Claimants are eligible for unemployment benefits for the lay-off period.

RATIONALE: Section 44 defines "remuneration" under the MES Act. Section 48(2) has a narrower scope, and addresses how to treat "lost remuneration," i.e. remuneration that falls outside the course of ordinary pay. Under Section 48(2), bonuses do not qualify as remuneration. The court found the one-time payments were bonuses, not wages, as the source of entitlement was the agreement resolving the strike, and absent the agreement, the claimants had no expectation of receiving monies for the relevant period.

Section 44 speaks to remuneration in general. The court conceded the payments might appear to be "back pay." However, the court decided that the specific language of Section 44 precluded such a finding in this case.

[NOTES: Section 48(2) was amended effective April 26, 2002, and no longer includes bonuses in its exclusions to remuneration. Section 44(1) was amended effective April 26, 2002, and now includes "back pay" as remuneration.]

11/04

Section 48

UNEMPLOYED, Leave of absence defined

CITE AS: Motycka v General Motors, 257 Mich App 578 (2003).

Appeal pending: No

Claimant: Marvin Motycka, et al
Employer: General Motors Corporation
Docket No. MUL1999-78153-RM1-155516W

COURT OF APPEALS HOLDING: The phrase "leave of absence" as used in Section 48(3) denotes an authorized temporary release from work.

FACTS: Claimants were on a 'pre-retirement leave' for a two-year period as articulated in their collective bargaining agreement due to their plant closing. During the 'pre-retirement leave,' the claimants received 85% of their wages, retained health benefits, and accrued service credit towards retirement. At the conclusion of the two-year period, the claimants were required to retire.

DECISION: The claimants were not on a leave absence and were "unemployed."

RATIONALE: "In American Telephone Co v ESC, 376 Mich 271, 279 (1965), our Supreme Court held that the normally accepted meaning of leave of absence was a temporary authorized release from work. GM suggests that American Telephone, supra, is distinguishable from the instant case because it construes a former section of the MES Act dealing with pregnancy leaves that has since been rescinded. However, GM fails to recognize that the Supreme Court reaffirmed the concept that a leave of absence is a temporary release from work in ESC v Vulcan Forging Co, 375 Mich 374, 379 (1965)." Motycka, at 583. The Court in Vulcan, supra, further held that a "leave of absence" is an "authorized temporary release from work for other an vacation purposes." Motycka, at 583 quoting Vulcan, supra at 379.

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5.00

DENIAL PERIODS

Sections 27(i), (j), (o), (p)

Section 27(i)

DENIAL PERIOD, School hall monitor, Early severance by school, Equal protection, School district calendar, Successive academic years

CITE AS: Larkin v Bay City Public Schools, 89 Mich App 199 (1979); lv den, 406 Mich 979 (1979)

Appeal pending: No

Claimant: Mary A. Larkin
Employer: Bay City Public Schools
Docket No: B75 10784 50688

COURT OF APPEALS HOLDING: (1) The denial period for school employees is constitutional. (2) Advance notice of termination is not early severance for a school employee. (3) An academic year is not affected by a claimant's particular circumstances.

FACTS: The claimant, a hall monitor, did not work during the summer vacation periods. "By letter dated March 25, 1975, plaintiff was informed by the Bay City School District that it did not plan to rehire her for the 1975-1976 school year, and that her employment was terminated as of June 7, 1975." The claimant was denied benefits for the summer. She was recalled in September, 1975.

DECISION: The claimant is subject to the school denial period under Section 27(i) of the Act.

RATIONALE: "First, the most reasonable interpretation of Section 27(i)(3) requires that mere giving of notice of a future termination date does not serve to presently abrogate the employment relationship."

"Plaintiff contends that because she would not be reemployed in September, 1975, there is no succeeding academic year."

"The existence of an academic year, as envisioned by the legislature, is to be determined by the objective criteria of the calendar established by the district, and not by the individual's particular circumstances."

"Finally, the record shows that plaintiff did, in fact, resume her work in September of 1975, thus mooting her claim."

"[W]e conclude that the instant legislation is to be examined by the traditional rational basis standard under which it comes before us clothed with a presumption of constitutional validity."

Section 27(i)

DENIAL PERIOD, Principal administrator, Professional, Equal protection, Rational basis, State school named in Act, Substantial relation

CITE AS: Michigan State Employees Association v ESC, 94 Mich App 677 (1980); lv den, 408 Mich 952 (1980)

Appeal pending: No

Plaintiffs: Michigan State Employees Association, et al
Defendants: Michigan Employment Security Commission, et al
Date: January 9, 1980

COURT OF APPEALS HOLDING: Application of the school denial period to instructional, research, professional and principal administrative employees of three named state schools is permitted by the United States Constitution.

FACTS: "The individual plaintiffs are a class of employees described as classified civil service employees of the State of Michigan employed in instructional, research, professional or principal administrative capacities at the State Technical Institute and Rehabilitation Center, the Michigan School for the Blind, and the Michigan School for the Deaf. They are normally employed 42 or 46 weeks per year being laid off during the summer close down of these institutions."

DECISION: The plaintiffs' complaint is dismissed.

RATIONALE: "The state's failure to treat plaintiffs as it does other civil service employees who qualify for benefits during seasonal layoffs is not arbitrary and irrational. They are treated as are all other employees involved in the instruction and administration of local school and community college educational facilities. It appears that the legislature has uniformly excluded some seasonal employees from unemployment benefits for the purpose of protecting the fiscal integrity of the compensation program and possibly because the legislature held the opinion that employees know of the seasonal layoff well in advance (and may consider it an employment benefit) and are not faced with the same economic crunch' as those who are unpredictably laid off during the year.

"The challenged statutory provision meets not only the 'rational basis' test, but also bears a 'substantial relation' to the purpose of the law."

Section 27(i)

DENIAL PERIOD, Substitute teacher, Reasonable assurance, Full time contract teacher

CITE AS: MESC v Orchard View School District No. 82-16963 AV, Muskegon Circuit Court (January 12, 1983)

Appeal pending: No

Claimant: Susan D. Stone,
Employer: Orchard View School District
Docket No: ERB81 12652 80417

CIRCUIT COURT HOLDING: Substitute teachers are not excepted from the school denial provisions of the Act.

FACTS: Claimant, a contract teacher, was laid off for lack of work. She applied for unemployment benefits and began working as a substitute teacher for Orchard View and Mona Shores School Districts. Mona Shores School District provided one or two days a week of substitute teaching. She was given assurance that she would be on the substitute teachers' list for Mona Shores School District for the following semester.

DECISION: Claimant is ineligible for benefits.

RATIONALE: The Act itself does not spell out that substitute work for a contract full time teacher excepts Claimant from the denial provisions of the Act. "When exceptions are being dealt with, it is necessary that there be a strict interpretation of the Act."

Section 27(i)

DENIAL PERIOD, Past performance as a substitute, Reasonable assurance, Substitute teacher

CITE AS: Riekse v Grand Rapids Public Schools, 144 Mich App 790 (1985)

Appeal pending: No

Claimant: Nancy Riekse
Employer: Grand Rapids Public Schools
Docket No: B83 16325 93580W

COURT OF APPEALS HOLDING: If a teacher had a reasonable expectation of re-employment during the next academic year, unemployment compensation may be properly denied.

FACTS: Claimant had been a substitute teacher for the past seven years in the employer's school system. During the ending school year, claimant had taught 125 days. Claimant received a letter from the employer indicating that, "based upon the best financial data available and a comprehensive analysis of projected staffing needs," she could be reasonably assured that she would be offered a substitute teaching position during the incoming school year. Claimant returned an application for employment as a substitute and attended an in service meeting for teachers on September 6, 1983.

DECISION: Claimant is ineligible for unemployment benefits.

RATIONALE: Claimant had substantial and reasonable assurance that she would be re-employed. She had been employed as a substitute teacher for seven preceding years. The letter expressly stated claimant was reasonably assured of employment. Claimant had attended in service training. The term reasonable assurance does not require a formal written or oral agreement to rehire.

Section 27(i)

DENIAL PERIOD, Reasonable assurance, Tenured teachers, Millage vote

CITE AS: School District of the Village of Spring Lake, Ottawa County v Bassett, No. 81-5806-AV, Ottawa Circuit Court (June 10, 1983)

Appeal pending: No

Claimant: Charles Bassett, Deborah L. Boyink, et al
Employer: Village of Spring Lake
Docket No: B80 16573 R01 75319

CIRCUIT COURT HOLDING: As of June 30, 1980, claimants' employment status was insecure, uncertain and very much in doubt.

FACTS: The school district scheduled a millage vote for June 9, 1980. The millage vote failed. On June 2, 1980,the school district sent a letter to claimant(s) notifying them that they no longer had reasonable assurance of reemployment. A second millage vote was scheduled for August 26, 1980. The school district sent a letter to Claimant(s) on July 7, 1980, extending reasonable assurance based upon the potential passage of the millage.

DECISION: Claimants are eligible for benefits.

RATIONALE: Black's Law Dictionary defines "assurance" as "a pledge, guarantee, or surety, a representation or declaration tending to inspire full confidence, a making secure." The record discloses a number of facts that would make claimants insecure regarding their future employment: (1) The first millage vote failed. (2) The Superintendent of Schools prepared a "Tentative Lay-Off Roster-Professional Staff," which he shared with claimants. The roster stated that the claimants "will in all probability be placed on lay-off status as of June 2, 1980, in anticipation of uncertain employment ... " (3) Claimants' names were placed in the Board of Education minutes of June 23, 1980 as being those identified for layoff.

The statutory language recited in the July 7, 1981 letter was insufficient to alter ... the preceding circumstances.

11/90
10, 15:NA

Section 27(i)

DENIAL PERIOD, Reasonable assurance, Community college, Part time instructor

CITE AS: Hart v Lansing Community College, No. 82-30514-AE, Ingham Circuit Court (July 29, 1983)

Appeal pending: No

Claimant: Bennett W. Hart
Employer: Lansing Community College
Docket No: B81 00288 76742

CIRCUIT COURT HOLDING: The course of dealing between the parties reflects a mutual understanding that no guarantee of future employment could be made.

FACTS: Claimant was a part time instructor who had worked ten consecutive terms before his courses were cancelled for lack of enrollment. Claimant, as other part time faculty, receives his contract at the commencement of the term when the college is able to determine whether all classes planned for Claimant are going to "go."

DECISION: Claimant is not eligible for unemployment benefits.

RATIONALE: The Court cited the legislative history on the meaning of the term "reasonable assurance," as found in US CONG. AND ADMIN. NEWS, 94th Congress, 1976, Vol. 5 at 6036: "For purposes of this provision, the term 'reasonable assurance' means a written, verbal or implied agreement that the employee will perform services in the same capacity during the ensuing academic year or term. A contract is intended to include tenure status." (Emphasis added)

The term "reasonable assurance" must mean something less than a "contract," if the phrase is to have any legal significance. In this case, the course of dealing between the parties reflects a mutual understanding that no guarantee of future employment could be made. Reasonable assurance of employment is given in that, if a sufficient number of students registered for classes, Appellant would be employed. This is evidenced by publication of Appellant's name in the schedule book coupled with the consistency of his employment with the college. The Court cited Larkin v Bay City Schools, 89 Mich App 199 (1979) for the legislative policy and Michigan State Employees Association v MESC, 94 Mich App 677, 290 (1980).

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6, 15, d10:NA

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Section 27(i)

DENIAL PERIOD, Non-teaching employees, Custodial workers, Customary vacation period

CITE AS: Howell Public Schools v Billups, 167 Mich App 407 (1988).

Appeal pending: No

Claimant: Robert A. Billups, et al
Employer: Howell Public Schools
Docket No: B63 06942 R01 95895 et al

COURT OF APPEALS HOLDING: When non-teachers had a tradition of working from 12-26 thru 1-1 and the collective bargaining agreement provided for a 52 week work year, they had a reasonable expectation to work during that period and the layoffs in question did not occur during an established or customary vacation period under 27(i)(2)(b).

FACTS: The claimants were custodial and maintenance employees. Their unions' bargaining agreement with the employer provided for work on an hourly basis for 52 weeks per year not including holidays. Their work schedule included the days between Christmas and New Years, spring break, and summer vacation.

The claimants were notified of a 1 week layoff 12-26-82 thru 1-1-83. This had never occurred before during this time and the period was not an established holiday for the claimants although classes were not in session.

DECISION: The school denial period is not applicable. Claimants are entitled to benefits under Section 27(i)(2)(b) of the Act.

RATIONALE: Based upon their previous history and their collective bargaining agreement the claimants had a reasonable expectation of working between 12-26 and 1-1. While school may not have been in session, this is not the determinative factor as to what constitutes an "established and customary vacation period". Rather it refers to periods where the employees did not traditionally work and did not have a collective bargaining agreement to work.

Section 27(i)

DENIAL PERIOD, School bus driver, Teacher, Academic term, Academic year, Compensable week

CITE AS: Gillette v Jackson Public Schools, No. 79 017594, Jackson Circuit Court (July 14, 1980)

Appeal pending: No

Claimant: Kathleen A. Gillette, et al
Employer: Jackson Public Schools
Docket No: B76 19061 54930

CIRCUIT COURT HOLDING: Where Labor Day is the first day of a school district's academic year, the week of the holiday is a compensable week.

FACTS: These appeals involved 10 teachers and a school bus driver.

"Claimant's applications for Unemployment benefits for the week containing Labor Day were denied by the Michigan Unemployment Security Commission under Section 27(i)(2) and (4) of the Michigan Employment Security Act (MSA 17.529)(i)(2) and (4)."

DECISION: The week ending September 11, 1976 is a compensable week for the claimants.

RATIONALE: "Appellees base their position on Section 50(a) of the Act (MSA 17.554(a) which provides: 'Week' means calendar week, ending at midnight Saturday ... '"

"And Appellees argue that pursuant to Section 50(a) and then existing commission procedures, compensable weeks for unemployment benefits ran from Sunday through Saturday and if an individual was disqualified for one day of the week, he was disqualified for the entire week."

"Appellees' narrow interpretation of the Statute does not carry out the Declaration of Policy of the Act ... "

Section 27(i)

DENIAL PERIOD, Reasonable assurance, Substitute list

CITE AS: Wisniewski v Bay City Board of Education, No. 82-3591, Bay Circuit Court (June 25, 1984)

Appeal pending: No

Claimant: Debra A. Wisniewski
Employer: Bay City Board of Education
Docket No: B81 13659 79554

CIRCUIT COURT HOLDING: Reasonable assurance means that the chances ought to be fairly strong that the employee will come back to work.

FACTS: Claimant was informed that during the school year 1981-82, Claimant would perform services for the school district "as needed and when called." During the school year 1980-81, Claimant had performed "long term subbing" for the school district.

DECISION: Claimant is not subject to the school denial period.

RATIONALE: The school board could have set up a priorities list so that Claimants could have reasonable assurance that they would likely work, especially if the school board adds a statement as to its normal attrition rate or history. "All the employee got was a letter saying she had something which the letter did not provide to her ... she had nothing else to go on." The notice did not give the employee any reasonable assurance.

Section 27(i)

DENIAL PERIOD, Academic year, Migrant program

CITE AS: Bonnette, et al v West Ottawa Schools, 165 Mich App 460 (1987); lv den 430 Mich 870 (1988).

Appeal pending: No

Claimant: Julie Bonnette, et al
Employer: West Ottawa Public School
Docket No: B84 01754 96313

COURT OF APPEALS HOLDING: "Down time" in a school system's migrant education program does not qualify as a denial period for purposes of Section 27(i) of the Act where the beginning and end of the down time were not fixed in advance, but rather depended on the growing season for crops .

FACTS: Claimants were employed in a special migrant teaching program operated by employer. The program operated during two segments of the employers academic year. The first part ran from September through October, and the second from March through June.

DECISION: Claimants are not subject to the denial period provisions of Section 27(i) of the Act.

RATIONALE: "In the instant case, the period in question, i.e. the period between the fall and spring segments of the migrant program, while a predictable layoff period because of the history of the program, was not a recess period similar to the recess periods taken for summer vacation for recognized holidays. Rather, the period of unemployment was due to the lack of work resulting from a decrease in the student population. If the migrant population had unexpectedly stayed, West Ottawa would no doubt have continued the employment of Bonnette, Quintalla, and Romos in the program. Thus, we find that even though the period of layoff could be anticipated (since the decrease in the student population could be anticipated) it was not a period established as a customary 'vacation period' or holiday recess".

Section 27(i)

DENIAL PERIOD, Reasonable assurance, Guaranteed substitute work, Economic terms

CITE AS: Paynes v Detroit Board of Education, 150 Mich App 358 (1986).

Appeal pending: No

Claimant: Linda Paynes & Valerie Whalen
Employer: Detroit Board of Education & School Dist-City of Detroit
Docket No: B82 18913 86673 & B81 22828 81799

COURT OF APPEALS HOLDING: "Thus, we hold that to be denied unemployment benefits pursuant to MCL 421.27(i)(1)(a); MSA 17.529(i)(1)(a), the school denial period provision, a teacher must be (1) reasonably assured of reemployment the following year in an instructional, research or principal administrative capacity, and (2) the economic terms and conditions of the employment for the following year must be reasonably similar to those in the preceding year."

FACTS: During the 81-82 school year claimants Whalen and Paynes were both Regular Contract Teachers. Due to economic conditions both were notified they would not be regular teachers the following year. However, applications were provided for regular emergency substitute teacher (RES) positions. An RES is guaranteed employment every day school is open, however, the benefits and wages are substantially less than for contract teachers.

DECISION: Claimant Paynes did not receive reasonable assurance and is not subject to the school denial period. Remanded for additional fact-finding regarding claimant Whalen.

RATIONALE: The court specifically declined to incorporate the "suitability" criteria contained in Section 29(6) and (7) of the MES Act into the school denial provision of Section 27(i). However, the court said, "We agree with the MESC that wage disparity should be considered before denying a teacher unemployment benefits when a contract or reasonable assurance of employment in a instructional, research or principal administrative capacity is proffered for the successive academic year. We also agree ... that, for purposes of the school denial period provision, an offer or reasonable assurance to an employee previously employed in either an instructional, research or principal administrative capacity of reemployment for the following academic year in any of these three capacities is adequate with respect to the type of employment. Employment in any of these capacities is legislatively-deemed to be appropriate with respect to the type of proffered employment."

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1, 9:I
3, 14:NA

Section 27(i)

DENIAL PERIOD, Reasonable assurance, Millage vote rescheduled

CITE AS: Shane (Charlevoix Emmet Intermediate School District) 1983 BR 80508 (B81 16586).

Appeal pending: No

Claimant: Carole J. Shane
Employer: Charlevoix Emmet Intermediate School District
Docket No: B81 16581 80508

BOARD OF REVIEW HOLDING: Once a millage vote has been defeated, the employer must have more than the rescheduling of a second millage vote to support a claim that Claimant has reasonable assurance.

FACTS: Claimant was laid off at the end of the school year. A millage vote was defeated on June 8, 1981. On July 9, 1981, the employer informed the Commission that Claimant did not have reasonable assurance of employment for the fall. On July 14, 1981, the employer sent a "recall" letter to the claimant alleging reasonable assurance because a second millage vote was scheduled for September 8, 1981, which the employer was confident would be successful.

DECISION: Claimant is not subject to the denial period.

RATIONALE: The Commission, a Referee, or the Board itself cannot properly consider evidence as to the mood of voters or gauge electoral probabilities or the reasonableness of ballot proposals ... to "go behind" the proposal as it were. Claimant did not have reasonable assurance on July 14, 1981. The decision of the Referee is reversed by a majority of the full Board of Review.

Section 27(i)

DENIAL PERIOD, Academic year, Customary vacation periods, Adult education

CITE AS: Wilkerson v Jackson Public Schools, 170 Mich App 133 (1988); lv den 432 Mich 878 (1989).

Appeal pending: No

Claimant: Susan A. Wilkerson, et al
Employer: Jackson Public Schools
Docket No: B83 18600 96681

COURT OF APPEALS HOLDING: The summer breaks for this program for the years at issue were not periods between successive academic years or established and customary vacation periods. As such the provisions of 27(i) were not applicable.

FACTS: The claimants were teachers and aides in the Adult Basic Education program. Students may enroll at any time during the year. Some students complete the program in several class sessions, others take years. Advancement depends on the individual's progress. Prior to 1982 this program operated year-round with only a two week break in the summer. In 1982 this break was expanded to 4 weeks. In 1983 the break increased to 10 weeks. In the 1983-84 school year the program's summer instruction was eliminated and the program was to operate on the same schedule as the K-12 school program.

DECISION: Claimants are not ineligible under school denial period of Section 27(i).

RATIONALE: "The length of the ABE instructional periods is determined by budgetary constraints rather than by the length of time needed to complete the requirements of a particular grade or course. Students do not, as a matter of plan, complete any particular grade or course within any specified time period and they re-enter the program after each break at the same instructional level as when class sessions ended. See Bonnette, 165 Mich App at 472-473. We believe that, as a matter of law, the break periods in the ABE program cannot be classified as periods between two successive academic years.... We also conclude that the summer breaks between 1982 and 1984 cannot be considered established and customary vacation periods.... The summer break schedule changed each year during the three-year transition, making the length of the break too unpredictable to be considered established and customary. We agree with the trial court that the legislative purpose of MESA was to protect workers from the 'economic crunch' caused by unexpected periods of unemployment such as those created by the school district in this case."

Section 27(i)

DENIAL PERIOD, Academic Year, Delayed school opening, Unjust enrichment

CITE AS: Rogel v Taylor School District, 152 Mich App 418 (1986)

Appeal pending: No

Claimant: Ann Rogel, et al
Employer: Taylor School District
Docket No: B81 88405 87051

COURT OF APPEALS HOLDING: The employer cannot unilaterally alter the definition of the academic year set by the terms of a collective bargaining agreement merely for budgeting reasons.

FACTS: Claimants' union and the employer negotiated a collective bargaining agreement requiring the school year to commence on September 1, 1981. Because of financial problems created by millage defeats, employer postponed the start of the school year until September 28, 1981. The employer continued the school year through June 1982 for a period equal to the time lost at the beginning of the year.

DECISION: Claimants entitled to benefits pursuant to Section 27(i)(1) and (4) when the employer unilaterally delays the start of the academic year for budgetary considerations.

RATIONALE: "Seizing on the phrase 'as defined by the educational institution,' the school district now argues that the 1981-1982 school year should be defined under Section 27(i)(4) as beginning on September 28. Acceptance of that argument would mean that a school district could unilaterally change the beginning and ending dates of the school year at any time without its employees being able to collect unemployment benefits. Such an interpretation would defeat the purpose of the MESA, which was intended to soften the economic burden of those who through no fault of their own, find themselves unemployed. See General Motors Corp. v Erves (On Rehearing), 399 Mich 241, 252; 249 NW2d 41 (1976); MCL 421.2; MSA 17.502. The school year was defined by contract as beginning September 1. When claimants did not start work on September 1, their period of unemployment began not in a 'period between successive academic years,' but rather during an academic year. The denial period did not apply."

Section 27(i)

DENIAL PERIOD, Reasonable assurance, Budget information

CITE AS: MESC v Falkenstern, No. 98730 (Mich App February 23, 1988); lv den 431 Mich 911 (1988).

Appeal pending: No

Claimant: Ann Falkenstern, et al
Employer: Grand Rapids Public Schools
Docket No: B81 85301 82424

COURT OF APPEALS HOLDING: In order to impose a school denial period ineligibility upon school district employees who have been given an assurance of employment for the upcoming school year, such assurance must be reasonable in light of the information upon which it was based.

FACTS: In March, 1981 in anticipation of severely strained resources, the employer sent layoff notices to 625 low seniority staff. Afterwards the economic situation worsened, but in June, 1981 letters of reasonable assurance were sent to 266 teachers which stated without explanation "it is anticipated that you will be offered a teacher position for the 1981-82 school year." In August, some, but not all, the claimants were sent another letter rescinding the earlier assurance of reemployment. Subsequently, the Board of Review held in favor of the claimants on the basis the employer did not have "sufficiently certain budgetary data to offer such assurance".

DECISION: Claimants did not receive reasonable assurance and are not subject to the school denial period.

RATIONALE: "Although the term 'reasonable assurance' does not require a formal written or oral agreement to rehire (Riekse v Grand Rapids Public Schools, 144 Mich App 790, 792; 376 NW2d 194 [1985]), Section 27(i)(1) explicitly states that the assurance must be reasonable. To determine whether the assurance was reasonable, the MESC must necessarily consider the information upon which it was based. The MESC is not required to accept on blind faith any assurance given by a school district to one of its employees. If this were so, the school district could unilaterally render Section 27(i)(1) meaningless and frustrate the underlying purpose of the Michigan Employment Security Act."

Section 27(i)

DENIAL PERIOD, Reasonable assurance, Question of fact, Totality of circumstances

CITE AS: Lansing School District v Beard, unpublished per curiam Court of Appeals November 29, 1990 (No. 118334).

Appeal pending: No

Claimant: Dan F. Beard
Employer: Lansing School District
Docket No. B87-16460-107488

COURT OF APPEALS HOLDING: Whether there is reasonable assurance is a question of fact to be determined in light of the totality of the circumstances.

FACTS: The claimant was a vocational data processing teacher. Because he was not certified as a vocational education teacher, the claimant was subject to annual authorization. On May 5, 1987, the claimant received a letter requesting that he make plans for obtaining his temporary or permanent vocational educational certification. In this letter, the claimant was informed that all jobs held by teachers who were not vocationally certified by July 1, 1987, would be posted for other applicants. On May 22, 1987, the claimant received a memorandum stating that unless specifically notified to the contrary, he had reasonable assurance of employment for the following school year.

DECISION: The claimant was not ineligible under Section 27(i).

RATIONALE: The May 22, 1987, memorandum did not constitute adequate assurance as a matter of law. Whether there was reasonable assurance was a question of fact. The ambiguity contained in the May 22, 1987, memorandum and the existence of the May 5, 1987, memorandum indicated that the claimant had not received adequate assurance of continued employment sufficient to bar his claim for benefits.

7/99
11, 13: N/A

Section 27(i)

DENIAL PERIOD, Non-school work site, Academic term, Public library

CITE AS: Minick v Ann Arbor Public Schools, Washtenaw Circuit Court, No. 90-39906 AE (May 1, 1991).

Appeal pending: No

Claimant: Timothy Minick
Employer: Ann Arbor Public Schools
Docket No. B89-10215-113204W

COURT OF APPEALS HOLDING: A school district claimant may be subject to the school denial period even if employed at a non-school location if his or her employment is linked to the academic year.

FACTS: Claimant was employed as a "library community assistant" by the Ann Arbor Community Schools. He enforced rules of behavior at the Ann Arbor Public Library which was operated by the school district. His contract provided he would work a maximum of 191 days, from the start of the school year until its conclusion. On May 22, 1989, the claimant was informed his last day of service would be May 31, 1989, and that he would be re-employed in the fall with his first day to be determined. He returned to work on September 1, 1989.

Claimant asserted he should not be subject to the school denial period. He argued the denial period had been expanded into an area not contemplated by the legislature -- a public library system serving the public at large on a year-round basis. He further argued his services were in no way linked to the academic cycle. He contended Section 27(i) was intended to be applied to personnel whose services were linked to the academic year.

DECISION: The claimant was subject to the school denial period of the MES Act, Section 27(i).

RATIONALE: The court found a link existed between the claimant's job and the academic year. The record indicated the need for library security coincided with the library's use by students during the school year. The court also found that the claimant's job category fell within the provisions of Section 27(i)(2) and that he was given reasonable assurance as he was informed his job would again be available in the fall.

7/99
11, 13: B

Section 27(i)

DENIAL PERIOD, Economic terms, School bus driver

CITE AS: Thompson v Chippewa Valley School District, Macomb Circuit Court, No. 96-7631-AE (August 28, 1997).

Appeal pending: No

Claimant: Frances A. Thompson
Employer: Chippewa Valley School District
Docket No. B93-15538-131205

CIRCUIT COURT HOLDING: A claimant is ineligible under Section 27(i) where she has received reasonable assurance of re-employment, despite the fact the assigned employment included a 7% pay reduction.

FACTS: After a millage failure it was anticipated that bus drivers could expect a reduction of one hour to an hour and a half per day in the following year. Thereafter, the school system gave the claimant and other drivers a letter of assurance which indicated the employer believed it would re-employ them in positions similar to what they had in the prior academic year. Claimant asserted she would be experiencing a substantial reduction in hours. But claimant's hourly earnings were raised from $13.38 to $14.32. The net reduction would be 7%, from $501 to $465 weekly. There was no adverse impact on her fringe benefits.

DECISION: Claimant is ineligible under the school denial provisions of Section 27(i).

RATIONALE: Denial of benefits to a school district employee is authorized under Section 27(9) if she was reasonably assured of re-employment and the economic terms and conditions of employment in the new year were reasonably similar to those of the preceding year.

7/99
24, 16, d12: F

Section 27(i)

DENIAL PERIOD, Reasonable assurance, Multiple employers

CITE AS: Brannen v Grand Rapids Public Schools, Kent Circuit Court No. 95-5003-AE (June 14, 1996).

Appeal pending: No

Claimant: Malcolm E. Brannen
Employer: Grand Rapids Public Schools
Docket No. B92-30594-R01-124781W

CIRCUIT COURT HOLDING: Assurance of re-employment at 50% of the preceding years' earnings is not a reasonable assurance of re-employment.

FACTS: The claimant was employed concurrently by two educational institutions. One was the Grand Rapids Public Schools [GRPS]. The other was Grand Rapids Community College [GRCC]. Seventy percent (70%) of his total earnings were the result of his work with the GRPS. The remaining 30% were from GRCC. In July 1992 the claimant was informed his position with the GRPS was being eliminated. At the end of the 1991-1992 academic year GRCC informed him he had a "reasonable assurance" of re-employment in the fall of '92. However, his earnings would be reduced from $14,000 to $7,000 a year if he was not re-employed by the GRPS. The claimant filed a claim for benefits on July 2, 1992. On July 30, 1992 he was recalled by the GRPS. On August 12, 1992 he was offered [and later accepted] a position as a full-time employee of the GRCC at $14,000 per year.

DECISION: The claimant was not subject to the school denial period contained in Section 27(i).

RATIONALE: GRPS conceded that with respect to the GRPS there was no reasonable assurance of continued employment. However, the GRPS asserted claimant should not receive benefits for the period between academic years as he had received "reasonable assurance" from GRCC. The court found that the GRCC had only guaranteed re-employment at half his previous earnings. The court concluded that the, "reasonably assured economic terms of his continued employment would by no stretch of the imagination be reasonably similar to those in the preceding year."

7/99
21, 16, d12: B

Section 27(o)

DENIAL PERIOD, Seasonal employment, Work beyond seasonal period

CITE AS: Bernabe v Cornerstone Ag Enterprises, Van Buren Circuit Court, No. 98-44-392-AE-B (September 14, 1998).

Appeal pending: No

Claimant: Ygnacio Bernabe
Employer: Cornerstone Ag Enterprises
Docket No. B98-01921-147951

CIRCUIT COURT HOLDING: An employee who works outside of the designated season is not ineligible for benefits by operation of the seasonal employment denial period set forth in Section 27(o) of the MES Act.

FACTS: The employer operates a blueberry farm. It applied for and received a seasonal employer designation relative to the period June 14 through September 27, 1997. The claimant worked for the employer ten [10] days longer than the season designated by the Unemployment Agency.

DECISION: The claimant was not ineligible under Section 27(o) and may collect benefits during the denial period if otherwise eligible.

RATIONALE: To be ineligible the employee must only receive wages during the season designated by the Agency. Here, the claimant received wages for ten [10] days beyond that period. Consequently, he does not fit the definition of a "seasonal worker."

7/99
24, 16, d23: k

Section 27(i)

DENIAL PERIOD, Layoff notice, Collective bargaining agreement

CITE AS: Hofmeister v Armada Area Schools, Macomb Circuit Court No. 96-3916AE (November 20, 1996) lv den Mich App No. 199806 (June 9, 1997).

Appeal pending: No

Claimant: Patricia Hofmeister
Employer: Armada Area Schools
Docket No. B93-00816-R01-131220

CIRCUIT COURT HOLDING: Notice of prospective tentative layoff does not negate reasonable assurance contained in collective bargaining agreement.

FACTS: Claimant was a school teacher during the 1991-1992 school year. Her employment was governed by a collective bargaining agreement. The school district was operating with a deficit. A millage election was scheduled for June 8, 1992. As a contingency, teacher layoffs were discussed and the union was so notified.

The June 8, 1992 millage increase failed. Another election was scheduled for September 14, 1992. On June 12, 1992 the school board sent a letter to the union that listed the claimant and others as employees who would be laid off if the millage again failed. On August 19, 1992, pursuant to the bargaining agreement, a letter was sent to the claimant notifying her she would be laid off on September 29, 1992 if the millage did not pass. But, the millage did pass and on September 15, 1992 the claimant and others were notified they were no longer subject to the possibility of layoff.

DECISION: The claimant was subject to the school denial period set forth in Section 27(i)(1).

RATIONALE: The claimant's employment was governed by a contract, the CBA. The CBA provided for employment until layoff notices were provided and became effective. Layoff notices were not provided until August 19, 1992. The claimant would not have been laid off until September 29, 1992. Thus, during the period for which claimant was seeking unemployment benefits she had a contract for the 1992-93 school year, which provided reasonable assurance. Consequently, she was not entitled to benefits.

7/99
21, 16, d12: B

Section 27(i)

DENIAL PERIOD, Economic terms, Contract

CITE AS: Kentwood Schools v Marks, Kent Circuit Court, No. 99-02921-AE (April 7, 2000)

Appeal pending: No

Claimant: Esther D. Marks
Employer: Kentwood Schools
Docket No. B94-14964-134450W

CIRCUIT COURT HOLDING: Under Section 27(i)(1), whether the terms and conditions of claimant's employment are similar to previous work for the employer, is irrelevant to the issue of eligibility when a claimant has a contract in fact for the following school year.

FACTS: Claimant had been a paraprofessional reading instructor. Employer laid claimant off due to budget and personnel cutbacks. Claimant was able to bid on different positions, with equivalent pay, conditions and benefits. Given her seniority claimant was assured work in one of those positions if she wanted it. Instead claimant chose a non-instructional position with a significant decrease in hours and benefits. Claimant had a contract for employment for the following school year.

DECISION: Claimant is ineligible for benefits under 27(i).

RATIONALE: "Even where there exists a reasonable assurance of continued employment, benefits may not be denied unless the terms and conditions of such employment are reasonably similar to those of the previous year." Paynes v Detroit Board of Education, 150 Mich App 358 (1986). But, the existence of a contract negates any requirement for such similar terms and conditions. Paynes, supra, at 372, 373 and 378.

As the claimant had a contract for the following school term, the terms and conditions of claimant's new employment were irrelevant on the issue of eligibility. The benefit ineligibility provisions of Section 27(i)(1) apply where there is 1) an actual contract or work, or, 2) reasonable assurance of work under similar terms and conditions in an instructional, research or principal administrative capacity.

11/04

6.00

ELIGIBILITY - SEEKING WORK

Section 28(1)(a)

6.01

Section 28(1)(a), 28(1)(c)

SEEKING WORK, Waiver of seeking work, Availability

CITE AS: Haberman v The Stroh Brewery Co, 1981 BR 57623 (B77 3056).

Appeal pending: No

Claimant: Charles Haberman
Employer: The Stroh Brewing Co.
Docket No: B77 3056 57623

BOARD OF REVIEW HOLDING: When a seeking work waiver is in effect the fact that a claimant is not actively seeking work cannot be the basis of an adverse finding under the able and available provision.

FACTS: Following a period of light duty work after an injury, the claimant's employment came to an end because of a mandatory retirement policy. The employer contested claimant's eligibility for benefits under the able and available provisions of the Act. During the course of the hearing it was established claimant had contacted only three possible employers during 10 months of unemployment. A waiver of the seeking work requirement was in effect during the period in question.

DECISION: The claimant was not ineligible for benefits under Section 28 except for a period he admitted he was not attached to the labor market.

RATIONALE: The entire Board cited Hinga v Brown Co., No. 78 3585 (Mich App June 25, 1980) for the principle that a claimant's failure to seek work cannot be used as a criterion of availability when the seeking work requirement has been waived by the Commission. Three Members of the Board went on to say that the principle of Hinga applies even if the claimant does not have actual knowledge of the waiver.

12/91
3, 6, 5, 14, 15:NA

Section 28(1)(a)

SEEKING WORK, Legal secretary

CITE AS: Lothian v Rifkin, Shultz & Kingsley, P.C., No. 47129 (Mich App August 18, 1980).

Appeal pending: No

Claimant: Janice Lothian
Employer: Rifkin, Shultz & Kingsley, P.C.
Docket No: B76 10412 52303

COURT OF APPEALS HOLDING: The claimant failed to establish that she was conducting an exhaustive employment search and was therefore ineligible for unemployment benefits.

FACTS: Claimant had been employed as a legal secretary. During the 12 week period of unemployment, she sought work only a few times, mostly by telephone. She physically visited the offices of prospective employers on only two occasions. Claimant did not seek the assistance of employment agencies and did not use the Detroit Legal News, the publication through which she had obtained her last employment.

DECISION: The claimant was ineligible for unemployment benefits.

RATIONALE: Claimant did not establish that she was genuinely seeking work of a character which she was qualified to perform by past experience and training and for which she had previously received wages.

ELIGIBILITY - ABLE & AVAILABLE

Section 28(1)(c)

Section 28(1)(c)

AVAILABILITY, Employed, Self employment, Attachment to labor market

CITE AS: Bolles v Employment Security Commission, 361 Mich 378 (1960)

Appeal pending: No

Claimant: Lewis F. Bolles
Employer: Continental Motors Corporation
Docket No: B56 362 18231

SUPREME COURT HOLDING: ... the test properly to be employed is that of genuine attachment to the labor market.

FACTS: Claimants were laid off by the employer. Each had been trained in watch repair work and each had at one time or another engaged in this occupation. Consequently, they pooled their resources, rented a building, remodeled and redecorated, and opened it for business under the name of Muskegon Jewelers. They advertised and they did what work they could get. It wasn't much. Each averaged about a dollar a day over the period in question.

During the period of seven weeks' operation from October 30 through December 17, the period here involved, the claimants reported a total gain each of around $60.00 although some doubt is cast upon the accuracy of such figures as "gain" since additional expenses of almost the same amount had not been included in the computation. During this same period both claimants were actively seeking work in industry; both applied, unsuccessfully, for jobs referred to them by the Employment Security Commission, and both drew their unemployment compensation.

DECISION: Claimants were unemployed within the meaning of Section 48 of the Act.

RATIONALE: ... all courts would undoubtedly agree that the Act was not intended to place a premium on idleness, to stifle initiative, or to penalize a laid-off worker's attempt to make his time economically productive. The claimants before us, subsequent to their lay-off, continued seeking work. Each of them accepted referrals to other industrial employment. Each was ready, willing, able, and anxious to continue work in industry. They were genuinely attached to the labor market, neither casually nor as a matter of transition. There meager efforts to augment their unemployment checks did not break their genuine attachment to the labor market.

Section 28(1)(c)

AVAILABILITY: Burden of proof, Eligibility, Failure to attend Referee hearing

CITE AS: Dow Chemical Company v Quinn, No. 82-001391-AE-G, Midland Circuit Court (June 10, 1985).

Appeal pending: No

Claimant: Wilbur F. Quinn
Employer: Dow Chemical Company
Docket No: B74 5033(4) 65240

CIRCUIT COURT HOLDING: An unemployment claim does not prove itself. Claimant has the burden to prove eligibility for unemployment compensation.

FACTS: Claimant successfully established the termination of his labor dispute disqualification. However, claimant did not appear at the Referee hearing with regard to his eligibility. The determination and redetermination were in favor of the claimant. The Board of Review remanded for testimony, but once again the claimant failed to appear. The employer argued that the burden of proof is in claimant to affirmatively provide beyond the application itself that he is eligible.

DECISION: Claimant, having failed to meet his burden, should be denied benefits.

RATIONALE: Citing Ashford v Unemployment Compensation Commission, 328 Mich 428 (1950), the court placed the responsibility on claimant to move forward in support of his claim for unemployment benefits. Claimant cannot rely on the determination or redetermination where the Commission had found him entitled to benefits.

Section 28(1)(c)

AVAILABILITY, Afternoon shift, Child care, Customary hours, Personal reason, Shift limitation, Twenty-four-hour availability

CITE AS: Ford Motor Co. v UCC, 316 Mich 468 (1947)

Appeal pending: No

Claimant: Drusilla Koski
Employer: Ford Motor Co.
Docket No: B4 3872 1751

SUPREME COURT HOLDING: "There is nothing in the statute to justify the conclusion that the legislature intended a claimant might limit his employment to certain hours of the day where the work he is qualified to perform is not likewise limited."

FACTS: A bench hand on the afternoon shift was laid off for lack of work. She limited her availability to her customary shift, because she wished to be home when her two children prepared for school each day.

DECISION: The claimant is ineligible for benefits.

RATIONALE: "It will be noted that [S.] 28(c) of the statute, quoted above in part, contemplates availability for work of the character that a claimant is qualified to perform and further requires availability for full-time work. The central thought in the subdivision has reference to the character of the labor for which a claimant is available. There is nothing in the statute to justify the conclusion that the legislature intended a claimant might limit his employment to certain hours of the day where the work he is qualified to perform is not likewise limited. It may be assumed that, in a so-called 'around-the-clock' operation, the work on different shifts does not vary in character. When claimant stated she would not accept work except on the afternoon shift, she clearly made herself unavailable for work of the character that she was qualified to perform."

Section 28(1)(c)

AVAILABILITY, Burden of proof, Eligibility, Mental attitude, Seeking work

CITE AS: Dwyer v UCC, 321 Mich 178 (1948)

Appeal pending: No

Claimant: John Dwyer
Employer: Packard Motor Car Co.
Docket No: B6 18326 5058

SUPREME COURT HOLDING: (1) The claimant has the burden of proof as to eligibility. (2) A person who is genuinely attached to the labor market will make a reasonable attempt to find work.

FACTS: The claimant sought work only 3 or 4 times during 19 months of unemployment. He did not seek police work, which he had performed for 25 years.

DECISION: The claimant is ineligible for benefits.

RATIONALE: "(T)o prevail, the claimant must have sufficient proofs offered in his behalf to establish that he meets the conditions of eligibility. To this extent he has the burden of proof."

"Whether or not a claimant is in fact available for work depends to a great extent upon his mental attitude, i.e., whether he wants to go to work or is content to remain idle. Indicative of such mental attitude is evidence as to efforts which the person has made in his own behalf to obtain work. A person who is genuinely attached to the labor market and desires employment will make a reasonable attempt to find work and will not wait for a job to seek him out."

Section 28(1)(c)

AVAILABILITY, Religious conviction, Seventh Day Adventists

CITE AS: Swenson v MESC, 340 Mich 430 (1954)

Appeal pending: No

Claimant: Bessie Swenson
Employer: Battle Creek Food Company
Docket No: B1 1131 13361

SUPREME COURT HOLDING: Claimants are not unavailable for benefits because they cannot work from sundown Friday to sundown Saturday.

FACTS: Claimants, packers for Battle Creek Food Company, were laid off due to lack of work. The Commission denied benefits to Claimants, Seventh Day Adventists, on the basis that they were unavailable for work, since their religion forbid them from working from sundown Friday to sundown Saturday. Claimants had not been offered any employment, and therefore had never refused any.

DECISION: Claimants are eligible for benefits under the availability provision of the MES Act.

RATIONALE: The Supreme Court adopted the reasoning of the trial judge, stating that:

"To exclude such persons would be arbitrary discrimination when there is no sound foundation, in fact, for the distinction, and the purposes of and theory of the act are not thereby served. Seventh Day Adventists, as a matter of fact, do not remove themselves from the labor market by stopping work on sundown Friday and not resuming work until sundown Saturday, as is apparent from the reason that employers do hire them."

Section 28(1)(c)

AVAILABILITY, Non-union work, Supervisory position, Waiver of seeking work, Work history

CITE AS: Hinga v Brown Co., No. 78 3585 (Mich App, January 25, 1980)

Appeal pending: No

Claimant: Edward G. Hinga
Employer: Brown Co.
Docket No: B76 2157 50644

COURT OF APPEALS HOLDING: Where an individual seeks supervisory and non-union work, but is willing to accept non-supervisory and union work, such preferences do not make the claimant unavailable for work.

FACTS: The claimant had previously worked as an unskilled laborer and as a shipping supervisor. He concentrated his work search on supervisory and non-union positions. The claimant contacted four employers in seven months. A waiver of seeking work was in effect.

DECISION: The claimant was available for work.

RATIONALE: "We hold, after reviewing the record as a whole, that the referee's conclusion that plaintiff removed himself from the labor market is not supported by competent, material, and substantial evidence. The undisputed evidence showed that while plain tiff preferred supervisory work, he would take other work and while he preferred non-union work, he would accept union work. The referee erred when he held that this removed plaintiff from the labor market."

"[T]he commission waived the seeking work requirement as to all claimants in Kalamazoo County from 5/25/75 to 7/17/76. Thus, plaintiff was entitled to rely on the representation that he need not seek work in order to be eligible for benefits."

Section 28(1)(c)

AVAILABILITY, Annual salary, Remuneration, Co-owner of golf course, Officer of corporation, Permanent work, Seasonal work, Unemployed, Unpaid service

CITE AS: Mikolaicziak v ESC, 40 Mich App 61 (1972)

Appeal pending: No

Claimant: Leo J. Mikolaicziak, et al
Employer: Twin Oaks Golf Club, Inc.
Docket No: B69 573 37067

COURT OF APPEALS HOLDING: (1) Unpaid service as a corporate officer is not employment. (2) A claimant need not be available for permanent work. (3) Weekly compensation for seasonal work is not an annual salary.

FACTS: Three claimants served as unpaid corporate officers of a golf course. Each owned one-third of the shares of the corporation. All performed manual labor and managerial duties, on a rotating basis, during the ten months of annual operation and maintenance. They were paid weekly for their work during the operating season. The claimants received no compensation in the two remaining months, but were available for temporary work then.

DECISION: The claimants are unemployed and available for work.

RATIONALE: "Since the claimants received absolutely no remuneration or compensation for serving as the corporate officers of the Twin Oaks Golf Club, they were not 'employed' in such capacities within the meaning of Section 42(1) of the Michigan Employment Security Act. See Great Lakes Steel Corporation v Employment Security Commission, 381 Mich 249 (1968)."

"(R)emuneration was paid to them on a 'weekly' basis during the months that the golf course was open to the public." The Act ". . . does not require an unemployed person to be available for and seek 'permanent' full-time work, but rather full-time work."

Section 28(1)(c)

AVAILABILITY, Reasonable restriction, Seeking work, Smoke and dust, Voluntary retirement, Work history

CITE AS: Chrysler Corp. v Sellers, 105 Mich App 715 (1981)

Appeal pending: No

Claimant: Woodrow W. Sellers
Docket No: B76 9783 RM 58420
Employer: Chrysler Corp.

COURT OF APPEALS HOLDING: Where a retired auto worker excludes auto plants from his or her active work search, to avoid further exposure to smoke and dust, but seeks other work which the individual has performed, the claimant is available for work and seeking work.

FACTS: "Prior to working at Chrysler, claimant had acquired work experience as a service station attendant and janitor. After retiring, claimant sought work at service stations, hospitals and small shops or factories, but he did not seek employment in an auto factory because of his previous exposure to smoke and dust at such jobs." He testified to having sought work three or four times each week.

DECISION: "This case is remanded to the Commission for a hearing at which the claimant's eligibility for benefits, in relation to his pension, will be determined under MCL 421.27(f); MSA 17.529(f)."

RATIONALE: The Court cited McKentry v ESC, 99 Mich App 277 (1980). "According to McKentry, claimant's failure to actively seek a job like his last one does not constitute a material restriction of his availability under the Act. Just as the claimant in McKentry did not actively seek employment as a teacher's aide because it aggravated her physical condition, claimant in the instant case did not actively seek work in a large auto factory because he wished to avoid further exposure to smoke. Viewing the evidence as a whole, we do not find the claimant's failure to apply for auto plant work so significantly impaired his availability for work as to permit reversal." "Viewing the evidence in its entirety, we find that the Board of Review's conclusion regarding the claimant's efforts to secure employment was based upon competent, material and substantial evidence."

7.09

Section 28(1)(c)

AVAILABILITY, Civil Service exams, Placement agencies, Placement counselor, Seeking Work

CITE AS: Walls v Career Consultants, No. D 774 00 476 AV, Kalamazoo Circuit Court (April 6, 1978)

Appeal pending: No

Claimant: Sharon Walls
Employer: Career Consultants
Docket No: B76 613 RO 53037

CIRCUIT COURT HOLDING: A seeking work waiver does not excuse a claimant from being available under 28(1)(c).

FACTS: Claimant worked for the employer on commission as a placement counselor, finding work for others. After she became pregnant, she started missing work. She quit her employment although she was still physically able to work. Claimant took several Civil Service exams and had registered at a number of places -- among them, some temporary agencies like Manpower, and at least one placement agency.

DECISION: Claimant is ineligible for benefits.

RATIONALE: "This Court is unable to see the distinction appellant claims between (a) seeking work and (c) available for work. Certainly they are two separate requirements under the statute and if there was a waiver in effect, as the appellant claims, she probably did not have to seek work under 28(1)(a) but the waiver would not excuse her being available under 28(1)(c). Since her mental attitude was in issue, this court feels the referee properly considered her seeking work to determine her credibility in saying she was available for work. We cannot look into her mind to see her mental attitude, but her conduct throws some light on her mental attitude."

Section 28(1)(c)

AVAILABILITY, Ability to work, Seeking work, Sitting, Voluntary retirement

CITE AS: Heikkinen (Ore-Ida Foods, Inc.), 1980 BR 58612 (B77 18316).

Appeal pending: No

Claimant: Mabel B. Heikkinen
Employer: Ore-Ida Foods, Inc.
Docket No: B77 18316 58612

BOARD OF REVIEW HOLDING: (1) Where a redetermination refers only to Section 28(1)(c) of the Act, the Referee may not rule on Section 28(1)(a). (2) Voluntary retirement is not inconsistent with subsequent attachment to the labor market.

FACTS: The Commission found a voluntary retiree ineligible under Section 28(1)(c) of the Act. The claimant testified she would give up her Social Security benefits, and would travel 30-35 miles, for full time work.

"Further, the claimant's testimony indicates that she was not able to perform the job to which she was last assigned (T, p. 5), however, she is able to do work where she could sit down part of the time (T, p. 10)."

DECISION: The claimant is able and available for work. The finding on seeking work is vacated.

RATIONALE: "[I]t is noted that the referee states (page 2 of his decision) that '(I)t is generally conceded that voluntary retirement ... discloses a mental attitude inconsistent with ... attachment to the labor market.' This statement appears to be unsupported by the Act or by authority. McKinney (Chrysler Corp.), 1977 AB 53130 (B76-15034)."

Section 28(1)(c)

AVAILABILITY, College student, Competent proof, Eligibility

CITE AS: Duell (St. Joseph Hospital), 1978 BR 54926 (B76 14767 RO).

Appeal pending: No

Claimant: Keith P. Duell
Employer: St. Joseph Hospital
Docket No: B76 14767 RO 54926

BOARD OF REVIEW HOLDING: A full-time college student's credible testimony of willingness to change courses or quit school, to accept full-time employment, is competent proof of the claimant's eligibility.

FACTS: The claimant resigned his position at a Grand Rapids hospital because he was living, and attending full-time college courses in East Lansing. He testified he would change his class schedule or drop out of school in order to accept permanent full-time work.

DECISION: The claimant is eligible for benefits.

RATIONALE: "The referee, in his reasons for decision, indicated that he tended to believe the claimant's testimony with respect to dropping his classes if he had been offered full-time work. However, the referee stated that it must be established by competent proof that the individual has actually dropped out of school in order to obtain full-time work in the past. The referee indicated that the case In the Matter of the Claim of Robert B. Burandt, Appeal Docket No. B72-9541-RO-44541, stands for this proposition for the reason that otherwise the testimony of the individual that he would drop out of school in order to obtain full-time work is self-serving testimony, and not competent proof to establish the fact without some evidence that this has occurred in the past."

"The majority of the Board of Review believes that the case entitled Michael S. Breshgold v Michigan Employment Security Commission, Civil Action No. 77-708893-AE (Circuit Court for the County of Wayne, 1978), is controlling. The holding in the Breshgold case states that because a claimant is a full-time student does not categorically mean that the student has necessarily placed limitations on his availability so as to remove him from the labor market. Under that case, the testimony of the claimant, to the effect that he would adjust his hours or quit school to accept full-time employment, would be sufficient, if credible."

Section 28(1)(c)

AVAILABILITY, First Amendment, Religious conviction, United States Constitution, Wednesday night observance, Worship services

CITE AS: Winstead v ESC, No. 79 17067 AE, Washtenaw Circuit Court (February 19, 1980)

Appeal pending: No

Claimant: Mary Winstead
Employer: Michigan Employment Security Commission
Docket No: B76 18265 57846 et al

CIRCUIT COURT HOLDING: Insistence on time off to attend Wednesday night church services does not make a claimant unavailable for work.

FACTS: "In each of these decisions, the Board of Review affirmed decisions of referees which had held, in effect, that Ms. Winstead had not been 'available to perform suitable full-time work' within the meaning of the statute by reason of her insistence on attending Wednesday night worship services held by her church."

DECISION: The claimant is available for work.

RATIONALE: "The MESC decisions below do not square with Sherbert v Vernor, 374 U.S. 398, 83 S. Ct. 1790, 10 L. ed. 2d 965 (1963), and therefore are violative of the First Amendment to the United States Constitution. The decisions are also contrary to Swenson v MESC, 340 Mich 430, 65 NW2d 709 (1954), where the Michigan Supreme Court held that Seventh Day Adventists who could not work from sundown Friday to sundown Saturday were 'available for work' within the meaning of the statute. The decisions are thus contrary to the law of this state as well as the Constitution of the United States."

Section 28(1)(c)

AVAILABILITY, Customary occupation, Geographical area, Long distance move, Relocation while unemployed, Voluntary retirement

CITE AS: Toney (General Motors Corp.), 1979 BR 60610 (B77 19640).

Appeal pending: No

Claimant: Albert Toney
Employer: General Motors Corp.
Docket No: B77 19640 60610

BOARD OF REVIEW HOLDING: Where an individual's principal occupation has been machine operator, and the claimant voluntarily retires and moves to an area in which such work is unavailable, the claimant is not available for work.

FACTS: "The claimant voluntarily retired from his employment as a machine operator with the involved employer on June 30, 1977." He moved to Titusville, in Brevard County, Florida. "Claimant also testified that the area in Florida to which he relocated did not have any machine shops which offered the type of employment in which claimant had former work experience (T. of March 29, 1978 hearing p. 8)."

DECISION: The claimant does not meet the availability requirements of Section 28(1)(c) of the Act.

RATIONALE: "Claimant retired and moved to Florida. In doing so, he took himself out of a labor market which had substantial employment opportunities for persons in claimant's job classification (machinist). He moved from an area of high job concentration in his employment classification to an area of low industrialization and few, if any, opportunities for a machinist. From the record, it is obvious that claimant was not genuinely attached to the labor market and not genuinely desirous of finding work which by previous experience he was qualified to perform."

Section 28(1)(c)

AVAILABILITY, Customary hours, Daytime work, Full-time work, Secretary, Teacher, Weekday work

CITE AS: Meader v Spence, Smith and Forsythe, No. 74-02745-AE-3, Saginaw Circuit Court (November 2, 1978)

Appeal pending: No

Claimant: Carol A. Meader
Employer: Spence, Smith and Forsythe
Docket No: B73 9562 45322

CIRCUIT COURT HOLDING: Where a claimant's occupations are teacher and secretary, the claimant is not required to be available for work at night or on Saturday and Sunday.

FACTS: The claimant held a teaching certificate and had worked as a secretary. She actively sought full-time teaching and secretarial work, but limited her availability to daytime hours for personal reasons. She also ruled out Saturdays and Sundays, "Because jobs in my class are not encountered those days, either teaching or secretarial work, unless it happened to be, you know, some special circumstance."

DECISION: The claimant was available for full-time work.

RATIONALE: "Clearly, the courts today appear to be departing from the traditional belief that 'availability' must be of 24 hour duration. This trend is evidenced by the recent case of UAW v Governor, 50 Mich App 116 (1973), on remand from the Supreme Court of Michigan, 388 Mich 578. In that case, the Court of Appeals was called upon to define the 'fulltime' requirement of members of the Appeal Board of the Michigan Employment Security Commission."

"The decision in UAW v Governor ". . . requires appeal board members to perform their duties during ordinary office hours 'which constitutes an 8 hour day, Monday through Friday, falling within the period of 7:30 a.m. to 6:30 p.m.'" The Court concluded that the claimant cannot be held to a standard of availability for full-time work which is more stringent than the one covering Appeal Board members.

Section 28(1)(c)

AVAILABILITY, Attachment to labor market, Restrictions on availability, Voluntary retirement

CITE AS: Chrysler Corp. v Brown, No. 79 907 580, Wayne Circuit Court (September 26, 1979)

Appeal pending: No

Claimant: Virgil Brown
Employer: Chrysler Corporation
Docket No: B77 9002 56154

CIRCUIT COURT HOLDING: Where a claimant whose customary work has been in heavy manufacturing voluntarily retires and limits availability to light janitorial work, the claimant is not attached to the labor market.

FACTS: The claimant voluntarily retired after working 30 years doing "heavy work" in an auto plant. Claimant began seeking light work in a janitorial capacity. He had experience as a janitor prior to employment with Chrysler Corporation.

DECISION: The claimant does not meet the availability requirements of Section 28(1)(c) of the Act.

RATIONALE: "In the present case, Brown unduly restricted his availability to the single job preference of janitorial work. This constituted availability for about 17% of the jobs he was qualified to perform by past experience or training. This does not constitute genuine attachment to the labor market."

"The fact that Brown had unilaterally determined that he no longer preferred to perform heavy work did not make heavy work legally unsuitable."

"In summary, there is nothing in the statute nor in case law that permits a claimant to define the labor market for his skills based solely on his subjective preference for a particular job as opposed to his objective qualifications for a labor market."

Section 28(1)(c)

AVAILABILITY, Fine imposed by union, Hiring hall, Plumber, Seeking work, Travel, Union work

CITE AS: Doe (Robert Carter Corp.), 1980 BR 61033 (B78 02345).

Appeal pending: No

Claimant: Arvin N. Doe
Employer: Robert Carter Corp.
Docket No: B78 02345 61033

BOARD OF REVIEW HOLDING: (1) A plumber's use of union hiring halls satisfies the availability and seeking work provisions of the Act. (2) Travel to a Florida home on a Sunday and Monday, and return travel to a Michigan home on a Friday and Saturday, does not affect the eligibility of a union plumber who contacts hiring halls in both states.

FACTS: Under penalty of a $500.00 union fine, a plumber limited himself to union work, obtained through union hiring halls. He traveled to his Florida home on a Sunday and Monday, contacted three union locals, and later returned to his Michigan home on a Friday and Saturday.

DECISION: The claimant is eligible for benefits.

RATIONALE: "[I]n Lange v Knight Newspapers, Inc., No. 63387 (Wayne Circuit Court, 1967), the court affirmed a unanimous appeal board decision that a claimant had satisfied the eligibility requirements of the MES Act by awaiting a telephone call from his local union for a work assignment where this was the customary way he had obtained employment in the past."

"Obviously, while Mr. Doe was driving between his two homes he was not instantaneously available for and seeking work. But this is not the end of the analysis. If it were, serious eligibility questions would be posed by sleep, dining out, or going to the movies."

Section 28(1)(c)

AVAILABILITY, Ability to work, Lack of counsel, Late appeal, Medical restriction, Request for reopening, Self employment, Sitting, Work history

CITE AS: Bateman v Jackson Industrial Manufacturing Co., No. 80 29462 AE, Kent Circuit Court (May 5, 1980).

Appeal pending: No

Claimant: Robert L. Bateman
Employer: Jackson Industrial Manufacturing Co.
Docket No: B77 10805 RO2 62489

CIRCUIT COURT HOLDING: (1) Where a medical restriction limits an individual to seated work, which the claimant has never performed for wages, the claimant is not able and available for work. (2) Lack of counsel is not good cause for reopening. (3) A late appeal to the Board may be treated as a request for reopening.

FACTS: An equipment painter became medically restricted to seated work, which he had never performed for wages. He appeared before the referee without an attorney. His late appeal to the Board was treated as a request for reopening.

DECISION: The claimant is ineligible for benefits.

RATIONALE: "The Board of Review was within its authority in rejecting the so-called Delayed Appeal for lack of jurisdiction because of untimely filing and did properly refer it back to the Referee for a rehearing."

"The claimant was fully advised of his rights to counsel.."

"[A]fter May 18, 1977 claimant was released and permitted by his doctor to perform 'seated work only.' Claimant did not meet the test of able and available for work requirements. The claimant's testimony at the hearing indicated that all his work experience training and background has been in heavy work active jobs and not seated work."

Section 28(1)(c)

AVAILABILITY, Definition of labor market, Geographical area, Responsibility for transportation, Walking distance

CITE AS: Ditmore v Terry's Lounge, No. 78-838-555-AE, Wayne Circuit Court (April 20, 1979)

Appeal pending: No

Claimant: Grace Ditmore
Employer: Terry's Lounge
Docket No: B77 6663 55827

CIRCUIT COURT HOLDING: Where a claimant with limited work experience last worked five miles from home, but limits his or her availability to jobs within walking distance, even after 18 consecutive weeks of unemployment, the claimant is not available for work.

FACTS: Claimant was laid off from a job as a pizza cook five miles from her home. Her eligibility was questioned when 18 weeks later, she was referred to but declined a cook's position located seven or eight miles from home. Allegedly because of transportation uncertainties claimant restricted her availability to restaurants within walking distance.

DECISION: The claimant does not meet the availability requirements of Section 28(1)(c) of the Act.

RATIONALE: Transportation is the responsibility of the claimant. "[C]ases cited by the appellee support the position of this Court, namely, In Re Barcomb, 315 A2d 476 (1974), and the conclusions of these jurisdictions appear clear that availability' and hence the applicable 'labor market' in which an applicant must be 'available' is a function of the individual applicant. An individual must offer his services in a market, and that market must be a sufficient geographical area to provide or encompass employers who use the type of services offered by this applicant."

"In brief, for the claimant to restrict her availability for work as a pizza cook to a walking distance from her home was certainly unreasonable. By this restriction, she did not genuinely expose herself to jobs in her labor market. It must be emphasized that the record made before Referee Berk would indicate that the claimant did have transportation, that is the same transportation she possessed when she worked at Terry's."

Section 28(1)(c)

AVAILABILITY, Attachment to labor market, Self-employment

CITE AS: High Scope Educational Research Foundation v Easton, No. 78 15844 AE, Washtenaw Circuit Court (September 25, 1979)

Appeal pending: No

Claimant: Nick J. Easton
Employer: High Scope Educational Research Foundation
Docket No: B77 8 55981

CIRCUIT COURT HOLDING: Where an unemployed person becomes the proprietor of an antique shop, but remains able and available and continues to seek work, the claimant is still attached to the labor market.

FACTS: The claimant was laid off from full-time employment in June, 1976. While still unemployed, he invested $3,500 and opened an antique shop. The claimant continued to look for employment at numerous places, made arrangements to have someone fill in for him if necessary, and was willing to give up the shop if he found suitable employment.

DECISION: The claimant was genuinely attached to the labor market.

RATIONALE: The Court followed the reasoning adopted by the Michigan Supreme Court in Bolles v ESC, 361 Mich 378; 105 NW2d 192 (1960), and concluded: "In the instant case, Mr. Easton was not 'content to remain idle,' and so opened the antique store. During the period in question, he lost money in all but one week. High Scope attempts to distinguish Bolles on the ground that Mr. Easton had a 'large' inventory (approximately $3,500.00) tied up in the store, and so could not ignore his store obligations, making him effectively unavailable for full-time employment. This court does not agree. The claimants in Bolles also had a substantial investment in their jewelry store. No figure is mentioned, but they did pay for the remodeling and redecoration of the building which they rented and paid for advertising. The Bolles court did not mention the investment by claimant as a factor for consideration."

"There was ample evidence in the instant case that Mr. Easton had made arrangements to cover his shop obligations in the event he found a job. Further, this court does not consider $3,500.00 such a substantial inventory investment to preclude Mr. Easton from accepting a full-time job."

Section 28(1)(c)

AVAILABILITY, Acceptance of lower wage, Completion of requalification, Excessive wage demand, Inclusion of overtime pay, Length of unemployment, Prior annual earnings, Reduction of expectations, Rule of reason

CITE AS: Silverstein (Chrysler Corp.), 1979 BR 61400 (B78 04755).

Appeal pending: No

Claimant: Myer M. Silverstein
Employer: Chrysler Corp.
Docket No: B78 04755 61400

BOARD OF REVIEW HOLDING: Where an individual's prior employment involved substantial overtime, and the claimant has requalified for benefits after a disqualifying separation, the claimant's availability can no longer be limited to work which would provide at least as much in annual earnings as the preceding job did.

FACTS: "Here, the claimant testified that he was earning approximately $20,000 per year at Chrysler Corporation prior to his retirement. He added that he was available for employment that paid a similar wage (T, p. 13). A review of the record indicates that claimant did earn wages at a weekly rate that would amount to $20,000 annually (Exhibit No. 2). The claimant earned $7.69 per hour, therefore, it appears that he was including over-time pay in his wage total."

DECISION: The claimant is not eligible for benefits subsequent to the requalification period.

RATIONALE: "Surely the claimant here should not be penalized because he initially expected to find employment at a wage comparable to that which he most recently earned. However, in light of the fact that his wage requirements were somewhat inflated due to the inclusion of over-time pay, and the fact that at some point his wage demands became excessive, we must find that he was required to lower his 'sights' after a reasonable period of time. We find that during the period of requalification, it was not unreasonable that the claimant expected to find employment at his previous rate. However, after requalifying and then being qualified to collect unemployment benefits, he was required to 'lower his sights' and accept a lower wage. By applying this 'rule of reason,' the majority of the Board panel is of the opinion that the claimant was given ample time to test the waters of the market and obtain employment at his previous rate during his requalification period."

11/90
5, 7, d3:NA

Section 28(1)(c)

AVAILABILITY, Attachment to labor market, Fixed-term layoff, Travel

CITE AS: McCauley (Service Systems Corporation), 1978 BR 55189 (B77 3812).

Appeal pending: No

Claimant: Mary McCauley
Employer: Service Systems Corporation
Docket No: B77 3812 55189

BOARD OF REVIEW HOLDING: A claimant who is placed on a fixed-term layoff of short duration is not required to remain in the employer's locale.

FACTS: "The claimant was placed on a fixed-term layoff due to the Christmas holiday period on December 22, 1976 and personally instructed to return on January 3, 1977. During the layoff period, the claimant visited her ill mother in Louisiana." She reported at a branch office in Louisiana, and returned to work on schedule.

DECISION: The claimant meets the availability requirements of Section 28(1)(c) of the Act.

RATIONALE: This is a 3-2 decision. The majority states: "The purpose of the eligibility requirements of Section 28 of the Act is to insure that the recipient of unemployment benefits is genuinely attached to the labor market. See Dwyer v Michigan Employment Security Commission, 321 Mich 178 (1948). In determining labor market attachment, the law does not require the performance of a useless act. Here, nothing in the record suggests that any work would be (or was) offered by the employer to the claimant at any other site during her fixed-term layoff. As a result, it would have served no purpose for her to have remained in the locality of her employer during this period."

"As a result of unavailable suitable work in the claimant's locality during the period in issue, a waiver by the Commission of seeking work was in effect."

11/90
5, 7, 14, d3 & 15:NA

Section 28 (1)(c)

AVAILABILITY, Ability to work, Heavy lifting, Leave of absence, Maternity leave, Medical restriction, Pregnancy, Reasonable restriction, Unilateral placement on leave

CITE AS: Buczek v Meijer Thrifty Acres, No. 79 928 311 AE, Wayne Circuit Court (December 21, 1979)

Appeal pending: No

Claimant: Catherine Buczek
Employer: Meijer Thrifty Acres
Docket No: B76 19230 55251

CIRCUIT COURT HOLDING: Where a pregnant woman is medically restricted from heavy lifting, and only one of her several assignments is affected, but the employer unilaterally places the claimant on leave, the claimant is unemployed and available for work.

FACTS: The claimant did not request maternity leave, but did submit a doctor's note restricting her from heavy lifting during her pregnancy. Only one of the claimant's several assignments required heavy lifting. The employer put the claimant on leave unilaterally.

DECISION: The claimant was unemployed and available for work during the unilateral leave.

RATIONALE: "[W]here an employer decides to place an employee on a maternity leave of absence for a reason other than one contained in MCLA 421.48, the employee, though on an employer imposed leave of absence, is not on a Section 48 leave of absence for purposes of determining her employment status under the Act."

"She was available for suitable work for which she was qualified except for the heavy lifting limitation. This limitation affected only a portion of one job duty, i.e., lifting groceries into the shopping cart, and neither would have detracted from her ability to perform her other job duties at Meijer nor the office work she was qualified to perform by past experience or training as these jobs did not require heavy lifting within the doctor's restriction."

Section 28(1)(c)

AVAILABILITY, Lack of automobile, Transportation

CITE AS: Van Sloten (Sea Ray Boats), 1979 BR 58611 (B77 19555).

Appeal pending: No

Claimant: Theresa Van Sloten
Employer: Sea Ray Boats
Docket No: B77 19555 58611

BOARD OF REVIEW HOLDING: "Nowhere does it state in the Act that possession of an automobile is a prerequisite for collecting benefits."

FACTS: The referee found the claimant ineligible for benefits for a period during which she did not have an operable automobile. "All the elements necessary for availability and attachment to the labor market were satisfied and found to exist by the referee. Despite all the efforts made by claimant to secure employment, the referee felt the lack of an automobile would preclude her from being eligible for benefits."

DECISION: The claimant meets the availability requirements of Section 28(1)(c) of the Act.

RATIONALE: "Nowhere does it state in the Act that possession of an automobile is a prerequisite for collecting benefits. A claimant had to make a reasonable effort to secure employment and in this case this was done by the claimant."

Sections 28(1)(c), 33

ELIGIBILITY, Burden of proof, Prosecution of appeal

CITE AS: Ashford v Appeal Board, 328 Mich 428 (1950).

Appeal pending: No

Claimant: Violet Ashford
Employer: Kelsey Hayes
Docket No: B8 4320 8947

SUPREME COURT HOLDING: The introduction into evidence of the file materials for a claim for unemployment benefits does not, by itself, operate to prove the claim. The burden of proof is on the party asserting the affirmative of the issue involved.

FACTS: Claimant filed for unemployment benefits and the Commission determined she was entitled. The employer appealed to the Referee. The claimant appeared in person, the employer by counsel. Claimant's file materials were made part of the record over employer's objections. Employer requested the claimant be questioned as to her eligibility. "[T]he Referee held that, because claimant was not represented by counsel, she might not be permitted to testify unless the employer called her for cross examination under the statute and agreed that her testimony should become the employer's testimony, binding upon the latter."

Employer contended claimant had the burden to establish her claim, even if the employer did not offer any evidence in opposition. The Referee held a prima facie case was established by entering claimant's file into the record, and that the employer, by failing to offer evidence in opposition, had failed to prosecute its appeal, which was dismissed.

DECISION: Dismissal for lack of prosecution was error. Remanded for hearing on the merits.

RATIONALE: "The statute does not provide ... a rule that in cases of employer appeals to referee the employer shall be held to have failed to prosecute its appeal unless it assumes the burden of the evidence and proceeds at the very outset to offer proofs in opposition to ... the claimant.... [T]he employer was present by counsel who stated its position on the law, ... and objected to the referee's ruling that plaintiff might testify only as employer's witness. In so doing, the employer did prosecute its appeal."

"Introduction of that claim ... into evidence did not operate to establish it. The claim does not prove itself.... [T]he obligation of the claimants is to establish the truth of their claims by a preponderance of the evidence."

Section 28(1)(c)

AVAILABILITY, College student

CITE AS: Breshgold v MESC, No. 77-708893-AE, Wayne Circuit Court (February 24, 1978).

Appeal pending: No

Claimant: Michael S. Breshgold
Employer: U S Navy
Docket No: UCX75 14953 RO 49887

CIRCUIT COURT HOLDING: In order to be eligible for unemployment benefits, an individual must be unemployed and make reasonable efforts to find work. An individual need not be idle and is not required to look for work daily for 8 hours a day.

FACTS: Claimant was enrolled as a full time student, taking daytime college courses (17 credits). He asserted he was available for full time work and would rearrange his class schedule or quit school if he found full-time employment. He testified that he had worked full-time and attended school full-time in the past. The Referee found, and the Board of Review majority agreed, that claimant was primarily a student and was not genuinely attached to the labor market because he only searched for employment when this did not interfere with his schooling.

DECISION: Remand for hearing on claimant's job seeking efforts.

RATIONALE: Where a claimant asserts he is actively seeking work, it is incumbent on the trier of fact to explore those job seeking efforts. Availability cannot be determined solely by the fact that a claimant is pursuing educational goals while unemployed. Attachment to the labor market is largely a function of the individual's efforts to obtain employment.

Section 28(1)(c)

AVAILABILITY, Union work only, Suitability

CITE AS: Spohn v Appeal Board, 342 Mich 432 (1955).

Appeal pending: No

Claimant: James N. Spohn
Employer: J.A. Utley Co
Docket No: B53 1530 15235

SUPREME COURT HOLDING: Claimant is able and available to perform full time work if the non-union work he rejects would entail the acceptance of substandard wages and conditions.

FACTS: After being laid off, claimant only applied for work at his union hall and the employment security office. Employer's position was that claimant restricted his availability and was ineligible. There was non-union work advertised. Claimant did not apply if job was non-union. Claimant's business agent told him he could not take non-union work. The advertisements referred to by the employer required several carpenters to bid on a job and assume the risk that they would earn substandard rates. Claimant's previous employment had been for fixed wages.

DECISION: Eligibility affirmed.

RATIONALE: The issue was not claimant's refusal to accept non-union work, but the suitability of the work offered in the ads. The type of commission work offered was unsuitable i.e. "the remuneration ... or other conditions ... are substantially less favorable to the individual than those prevailing for similar work in the locality."

Section 28(1)(c)

ABILITY, Evidence, Medical restrictions, Procedure, Waiver of issue

CITE AS: Taylor v United States Postal Service, 163 Mich App 77 (1987).

Appeal pending: No

Claimant: Geneva Taylor
Employer: United States Postal Service
Docket No: UCF84 13552 98942W

COURT OF APPEALS HOLDING: A claimant must establish she is physically capable of performing work of a type for which she has received wages in the past. Claimant's unsubstantiated assertion she could perform work permitted by medical restrictions imposed by her physician is insufficient to establish that she is able to work.

FACTS: Claimant worked as a postal carrier until medical restrictions due to pregnancy made her unable to meet the physical demands of that employment. Claimant worked previously as a salesclerk and asserted that she could perform sales work. However, she was restricted from lifting, pushing or pulling anything over 20-25 pounds, sitting more than 2 hours, standing more than 2 hours, excessive bending, stooping or stretching and could perform inside work only. Claimant acknowledged that salespeople usually stand on their feet all day, but opined she could sit or stand.

DECISION: Claimant is not eligible for benefits because she is not able to perform suitable full time work.

RATIONALE: "In this case, it was factually determined that plaintiff was unable to do the work for which she had previously received wages, including both postal-related employment or any type of sales related employment, because of the restrictions imposed by her physician."

SECONDARY ISSUE: Claimant asserted on appeal that the Referee did not satisfy his duty to assist an unrepresented party. Citing Ackerberg v Grant Community Hospital, 138 Mich App 295 (1984) the Court of Appeals stated: "the failure to raise an issue to the Board of Review precludes raising the issue on review before this court. ...as it has been waived."

Section 28(1)(c)

ABILITY, Physical condition, Prolonged standing, Teacher aide, Work history

CITE AS: McKentry v Employment Security Commission, 99 Mich App 277 (1980)

Appeal pending: No

Claimant: Bessie McKentry, et al
Employer: Muskegon Area Intermediate School District
Docket No. B76 5853 52582

COURT OF APPEALS HOLDING: "A plain reading of the statute does not indicate that a claimant must be able to perform his last job but only that 'he is able and available to perform full-time work for which has previously received wages.'"

FACTS: The claimant, a teacher aide, was treated for knee trouble.

"[P]laintiff testified that she could not return to work for defendant school district because she could not stand on her feet all day. However, she also testified that there was work which she had performed in the past which she could still do, such as working for the telephone company or for Misco Corporation."

DECISION: The claimant is eligible for benefits.

RATIONALE: "The lower court and the administrative agency focused on the fact that the plaintiff could not perform the job she last held with defendant school district in determining that plaintiff was not able and available to perform full-time work. A plain reading of the statute does not indicate that a claimant must be able to perform his last job but only that 'he is able and available to perform full-time work for which he has previously received wages.'"

Sections 28(1)(c), 48

UNEMPLOYED, Availability, Self-employment, Attachment to labor market, Fraud

CITE AS: Koehler v General Motors, Oakland Circuit Court No. 96-532329-AE (May 6, 1997).

Appeal pending: No

Claimant: Carl Koehler
Employer: General Motors Corporation
Docket No. B94-10946-134361W and FSC94-00569-134392W

CIRCUIT COURT HOLDING: Where a claimant worked full-time for a self-owned business he was not unemployed within the meaning of Section 48 of the MES Act. Moreover, where a claimant is preoccupied with developing his own business, putting in hours equivalent to full-time work, he is not available within the meaning of Section 28(1)(c).

FACTS: The claimant was a part-owner of an irrigation company. While collecting unemployment benefits, the claimant worked for his company in excess of 40 hours per week and received distributions from profits. During this period the claimant sought other work but his efforts were infrequent and indifferent. Claimant did not receive a paycheck from this company but did pay personal expenses out of the business' account.

DECISION: The claimant was not unemployed within the meaning of Section 48 and was not available within the meaning of Section 28(1)(c). Claimant was properly subject to the penalties for fraud.

RATIONALE: Where the claimant is not ready, willing, able and anxious to resume work in industry, his efforts should be considered startup as opposed to self-help. With respect to availability, the claimant's indifferent job search efforts established he was not truly attached to the labor market and therefore not available within the meaning of Section 28(1)(c). Claimant's testimony was inconsistent and self-serving and therefore unreliable. In light of his representations to the Agency that he was not employed and his failure to disclose his connection to or responsibilities with his business, the assessment of penalties and sanctions was correct.

7/99
12, 24: H

Sections 28, 54(b)

AVAILABILITY, Attachment to labor market, Seeking work, Self employment, Intentional misrepresentation

CITE AS: Postema v Grand Rapids Diecraft Inc., Ottawa Circuit Court, No. 95-23141-AA (September 19, 1996).

Appeal pending: No

Claimant: James Postema
Employer: Grand Rapids Diecraft Inc.
Docket No. B93-06258-127231W

CIRCUIT COURT HOLDING: Where claimant was primarily engaged in establishing his own business, his mental attitude was not one of genuine attachment to the labor market. Where the claimant only sought work via networking with potential customers and other industry contacts, he was not "seeking work" and was not "available to work."

FACTS: Claimant was laid off from an executive position in February, 1992. He received regular benefits then extended benefits until December 12, 1992. Claimant started his own tool and die business on August 15 as 51% owner. Corporate status was established week of August 9, 1992. During the first week the business grossed $24,000. After that, expenses exceeded profits. Claimant received no wages. For weeks ending August 29, 1992, and September 5, 1992, claimant failed to report self employment. Thereafter, he reported self employment but zero earnings. For week ending September 12, 1992, claimant reported 70+ hours at his business, but thereafter reported only 20 hours. Claimant sought work primarily through "networking" with contacts who were also potential customers. He never actually filled out any job applications.

DECISION: Claimant ineligible for benefits for period August 9, 1992, through December 12, 1992. Claimant must pay restitution and penalties only for some of the weeks in question as for the most part claimant disclosed his interest in self employment and the nature of his job seeking efforts.

RATIONALE: Claimant's own testimony demonstrated that he was not diligently searching for employment or truly available for work. "His 'mental attitude' was not that of someone attached to the labor market; rather, it was that of an entrepreneur spending his time and energy trying to make his business successful."

7/99
21, 16, d12: B

Section 28(1)(c)

AVAILABILITY, Attachment to labor market, Full time work, College student

CITE AS: Schontala v Engine Power Components, Ottawa Circuit Court, No. 86-8221-AE (October 27, 1987).

Appeal pending: No

Claimant: Timothy Schontala
Employer: Engine Power Components
Docket No. B85-11974-101743W

CIRCUIT COURT HOLDING: Where claimant asserted he was available for full time work but showed by his actions that, in fact, he was not, he did not meet the availability requirement for eligibility under Section 28(1)(c).

FACTS: After working full time for the employer for over a year, claimant requested reduction to part-time work so he could return to school. Claimant was granted part-time status but shortly thereafter was laid off due to lack of work for part-time employees. Claimant was attending school and placed numerous applications for part-time work. He applied for benefits while still in school when he could not find any part-time work. Claimant asserted that he would accept full-time employment but Referee did not find his testimony credible.

DECISION: Claimant is ineligible for benefits.

RATIONALE: Determination of genuine attachment to the labor market is made by means of a subjective test which looks at the actions of the individual. In this case, claimant quit his full time employment, requested part-time status, enrolled in school nearly full-time, and subsequently applied for part-time work. See test enunciated in Dwyer v UCC, 321 Mich 178, 189 (1948).

7/99
14, 3: N/A

Section 28(1)(c)

AVAILABILITY, Attachment to labor market, Self employment, Unpaid Service

CITE AS: Anulli v Easy Cut Tool Corp., Macomb Circuit Court, No. 89-3688-AE (November 8, 1990).

Appeal pending: No

Claimant: Ettore Anulli
Employer: Easy Cut Tool Corp.
Docket No. B87-15460-107554W

CIRCUIT COURT HOLDING: Where claimant spent time answering phones and giving quotes for 20 hours a week for a company in which he had substantial investment, and also was unable to show he was seeking work, he did not establish he was available for full time work.

FACTS: Claimant had a 51 percent ownership interest in the involved employer. It was decided to dissolve the business. Claimant filed for benefits. While collecting benefits claimant spent 20 hours per week at Vance, Inc., another business in which he had a substantial investment.

DECISION: Claimant is ineligible under Section 28(1)(c).

RATIONALE: Court cites Dwyer v. UCC, 321 Mich 178 (1948). Claimant spent substantial amount of time at Vance, Inc. while drawing benefits, although he wasn't paid. He also failed to demonstrate that he was seeking work and therefore was unable to show a genuine attachment to labor market.

7/99
3, 11: N/A

Section 28(1)(c)

AVAILABILITY, Attachment to Labor Market, Geographical area, Agoraphobia, Customary occupation

CITE AS: Gallant v W.B. Doner Co., Oakland Circuit Court, No. 94-476350-AE (January 4, 1995).

Appeal pending: No

Claimant: Jeri Gallant
Employer: W.B. Doner Co.
Docket No. B92-02016-122380W

CIRCUIT COURT HOLDING: Where claimant placed undue restrictions on where she would work and what type of work she would do, she made herself unavailable within the meaning of the statute.

FACTS: Claimant suffers from agoraphobia (fear of being in open or public places) and advised the MESC that there were limitations on where she would seek or accept employment. She was held ineligible due to her failure to establish unrestricted availability. She had a "comfort zone" of locations she was willing to work in and that zone did not include the Detroit metropolitan area. Furthermore, claimant was qualified to do advertising work but was only seeking work in retail because she wanted to make a career change.

DECISION: Claimant is ineligible for benefits under Section 28(1)(c).

RATIONALE: Claimant was desirous of obtaining employment but restricted her availability for certain types of work which she was qualified to perform and restricted the geographical locations to which she was willing to travel. She only wanted to work in communities that were familiar to her. She did not seek advertising work for which she was qualified and limited her job search to certain Detroit suburbs.

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

Section 28(1)(c)

AVAILABILITY, Full-time work

CITE AS: Allessio v Quasarano, Macomb Circuit Court, No. 97-1083-AE (August 1, 1997).

Appeal pending: No

Claimant: Marie Allessio
Employer: Laura Quasarano & Nancy Lucido
Docket No. B96-10527-142392W

CIRCUIT COURT HOLDING: Where claimant testified before the Referee that she would work a maximum of 30 hours per week and this was consistent with her pre-hearing statements that she did not want full-time work, she did not meet the eligibility requirements of the Act.

FACTS: Claimant quit her job because her employer cut her hours. She told the Agency and the Referee she was able to work 20 - 25 hours per week and no more than 30 hours per week. The Referee reversed a disqualification under Section 29(1)(a) but held claimant ineligible because not available for full-time work. When claimant appealed to the Board of Review, she asserted she misunderstood the question regarding availability and that she was available for full time work.

DECISION: Claimant is ineligible for benefits under Section 28(1)(c).

RATIONALE: Claimant consistently made statements she was not available to work full-time. Therefore, the Board of Review was justified in concluding she was ineligible for benefits under Section 28(1)(c).

7/99
22, 21: N/A

8.00

FILING FOR BENEFITS, REPORTING

Sections 28(1)(b), 32

Section 28(1)(b)

FILING FOR BENEFITS, Timeliness in filing claim, Good cause, Union grievance, Unfamiliarity with the Act, Justifiable reason

CITE AS: Kuprashuk v Greyhound Lines, No. 83-334785-AE, Wayne Circuit Court (November 2, 1984).

Appeal pending: No

Claimant: Helen V. Kuprashuk
Employer: Greyhound Lines
Docket No: B82 02234 82880

CIRCUIT COURT HOLDING: Waiting for the employer to respond to a union grievance and unfamiliarity with Commission filing procedures do not constitute good cause for late filing.

FACTS: The claimant filed her claim late because she had initiated steps to return to her job by filing a grievance which the employer failed to answer immediately and because of unfamiliarity with the Commission filing procedures.

DECISION: The claimant did not have good cause for late filing.

RATIONALE: The Court adopted the decision of the Referee, as affirmed by the Board, which held that "[T]he reasons for [claimant's] late filing were not contained in Rule 210(2) of the Administrative Rules of the Commission ... and in addition, the fact that the claimant alleges unfamiliarity with the Act, and the fact that claimant was waiting for a response to her union grievance, do not constitute justifiable reasons for failing to file a timely claim."

Section 32

FILING FOR BENEFITS, Timeliness, Illiteracy, Interpreter

CITE AS: Alasri v MESC, No. 69891 (Mich App March 13, 1984).

Appeal pending: No

Claimant: Ali M. Alasri
Employer: Chrysler Corporation
Docket No: TRA81 10471 79796

COURT OF APPEALS HOLDING: The MESC is not required to provide an illiterate claimant with verbal instructions about the filing process or an interpreter where the Commission was not aware of the illiteracy problem.

FACTS: A claimant of Arabic background who did not read English well was late in filing for TRA training benefits. Notification of the training benefits program was mailed to the claimant.

DECISION: Denial of training benefits was affirmed.

RATIONALE: "Plaintiff has produced no evidence that the MESC was aware of his illiteracy at the time the notice was sent. We therefore concluded that the responsibility for translating the notice rested with plaintiff, who should have acted in some way to inform himself of its contents."

Section 28(1)(a), 32

REPORTING FOR BENEFITS, Missed appointment, Length of ineligibility, MESC Rule 210.

CITE AS: Wambaugh (Harvey Home), 1980 BR 68029 (B79-06575).

Appeal pending: No

Claimant: Margie M. Wambaugh
Employer: Harvey Home
Docket No: B79 05675 68029

BOARD OF REVIEW HOLDING: The period of ineligibility for failing, without good cause, to report to a Commission office as scheduled on a continued claim, is limited to weeks preceding the week of the appointment.

FACTS: Claimant had an on-going (continued) unemployment benefits claim. She reported to an MESC branch office to certify as to her eligibility on January 9, 1979. She was given a next appointment date of January 23, 1979 but for various reasons did not report on that date or until February 9, 1979. The MESC held her ineligible for the four week period from January 7, 1979 - February 3, 1979, including the two preceding weeks ending January 13 and 20 for which she could have certified on January 23 and the subsequent two weeks because by failing to report she did not "establish the effective date of the next succeeding benefit period."

DECISION: Claimant is not ineligible pursuant to the reporting requirements of Sections 28 and 32 because the Board found claimant had good cause for failing to report. (Editor's Note: Although in light of that finding the Board's holding may appear to be dicta, various panels of the Board have since repeatedly followed the principle of Wambaugh.)

RATIONALE: MESC Rule 210(9) "is arbitrary and capricious....

The second function, that of establishment of the effective date of the next succeeding benefit period as a condition to the entitlement for benefits for such succeeding period, is meaningless. For example, the elements of eligibility for benefits can always (and only) be established at the conclusion of the week or weeks in question. Therefore, we hold that an individual who misses a bi-weekly reporting date without good cause shall forfeit only his entitlement to the prior two weeks of benefits, that is "the completed week or weeks of unemployment" referred to in Rule 210(9)."

Section 28(1)(b)

FILING FOR BENEFITS, Late filing, Employer advice

CITE AS: MESC v Wisneski, Macomb Circuit Court No. 78-8670-AE (March 14, 1980).

Appeal pending: No

Claimant: Sylvester Wisneski
Employer: Inland Tool and Manufacturing, Inc.
Docket No. B77-4712-54924

CIRCUIT COURT HOLDING: Good cause in late filing situations means an inability to personally appear at an Unemployment Agency branch office. The claimant had a duty to go to the branch office to verify the employer's advice.

FACTS: Claimant's job terminated without notice on July 31, 1976. On leaving, the claimant received checks of one month's salary and 2 weeks vacation pay. The employer told claimant he had to wait 6 weeks before filing for unemployment benefits because of the 2 checks. As a result, claimant did not file for benefits until September 15, 1976. The Referee held the claimant ineligible for benefits for the 6 week period prior to September 15, 1976, and the employer's incorrect advice did not satisfy the good cause requirement for late filing.

DECISION: The claimant is ineligible for benefits for the period of July 25, 1976 to September 11, 1976 because he lacked good cause for late filing.

RATIONALE: MESC Rule 210 defines "good cause" as a "justifiable reason determined in accordance with a standard of conduct expected of an individual acting as a reasonable person in light of all the circumstances" and sets out examples. The court found in applying the Rule that "good cause" "deals with situations a claimant has no control over, reliance on the erroneous advice of an employer certainly does not fall within this category."

7/99
N/A

8.05

Section 28(1)(b)

FILING FOR BENEFITS, Late filing, Employer advice

CITE AS: Long v General Motors Corp., Wayne Circuit Court, No. 98-82160 (January 29, 1999).

Appeal pending: No

Claimant: Deborah Long
Employer: General Motors
Docket No. B96-05442-140554

CIRCUIT COURT HOLDING: A claimant who was misinformed by the employer as to the date of her layoff had good cause to excuse her late filing of a claim for benefits.

FACTS: Claimant worked half a day on Friday March 8, 1996 and was sent home and told by her foreman she was laid off effective Monday March 11, 1998. Claimant relied on this representation and information she received from her union in a letter which advised her to file her claim the week following her lay-off. She checked with several other union officials and employees and all advised her to "Go by the union letter." The claimant did not file her claim until Monday March 18, 1996

DECISION: The claimant had good cause for late filing and is not ineligible under Section 28(1)(b) of the Michigan Employment Security Act.

RATIONALE: The claimant clearly relied on the representations of the employer and her union. This reliance is allowed under MESC Administrative Rule 210(2)(c)(ii). The claimant reasonably relied on the employer's representation that even though she was sent home early on March 8, 1996 her lay off did not begin until Monday March 11, 1996. The court found "Although it may also have been reasonable to follow a different course of action, appellant (claimant) did not act unreasonably because she did not do so."

7/99
21, 16, d23: F

Section 28

LATE FILING, Good cause, Duty to inquire

CITE AS: Mitchell v BOC Car Assembly, Ingham Circuit Court, No. 89-63386-AE (March 29, 1990).

Appeal pending: No

Claimant: Gerald Mitchell
Employer: BOC Car Assembly
Docket No. B88-05151-108575W

CIRCUIT COURT HOLDING: Claimant's assertion that he was confused about the proper method of filing is not good cause for failure to file a timely claim.

FACTS: Claimant was temporarily laid off for two weeks. He failed to contact the MESC about filing a claim until a week after he returned to work. The claimant said he was confused as to how to file because he believed he would be contacted and/or would be able to file by mail.

DECISION: Claimant is ineligible for benefits under Section 28(1)(b).

RATIONALE: It was claimant's responsibility to get clarification about how to file a claim. While the rules and procedures may be confusing, the Agency could not provide information or clarification if claimant did not seek it.

7/99
11, 3: N/A

Section 28(1)(b)

LATE FILING, Late Reporting, Good cause, Illiteracy, UA Rule 210

CITE AS: Coley v GMC, Oldsmobile Division, Ingham Circuit Court, No. 88-61653-AE (October 12, 1988).

Appeal pending: No

Claimant: Ruby Coley
Employer: GMC, Oldsmobile Division
Docket Nos. B87-09107-106330W
B87-09106-106331W

CIRCUIT COURT HOLDING: Where a claimant sat on her rights for seven months after relying on a family member's interpretation of an Agency document, she cannot claim she had good cause for her failure to timely report and file.

FACTS: Claimant was fired by employer on December 13, 1982. She applied for and received benefits for some time. Claimant was denied benefits for period February 20, 1983 through October 22, 1983, due to failure to report and failure to file a continued claim without good cause. Claimant's position was that she stopped reporting after receiving a determination denying her benefits on or about March 8, 1983. Claimant is illiterate. Her daughter read the determination and advised her she no longer needed to report.

DECISION: Claimant is ineligible for benefits under Section 28(1)(a) and (b).

RATIONALE: Under MESC Rule 210(2)(b) - in order to establish "good cause" claimant must show she acted as a reasonable person in light of all the circumstances. Claimant's decision not to report was the result of an exercise of free will. There is no separate standard for illiterate claimants. Claimant waited seven months before investigating her rights and responsibilities with respect to the determination. That behavior does not comport with the meaning of good cause.

7/99
14, 13: N/A

9.00

PRESERVATION OF CREDIT WEEKS

Section 28a

Section 28a

PRESERVATION OF CREDIT WEEKS, Medical leave

CITE AS: Flier v White Consolidated Industries, Inc., No. 74623 (Mich App, October 19, 1984).

Appeal pending: No

Claimant: Louise J. Flier
Employer: White Consolidated Industries, Inc.
Docket No: B82 13685 RO1 88611W

COURT OF APPEALS HOLDING: Where an individual fails to comply with the specific requirements of Section 28a the individual is ineligible to preserve credit weeks.

FACTS: Claimant was employed in February, 1981, when she was injured at work. She was unable to work until June, 1981, at which time she was released by her doctor to return to work. After working for three weeks, claimant was again forced to leave work due to illness. She was not permitted to return to work until June, 1982. Immediately after her return to work, claimant was laid off. During claimant's absence from work, she did not apply for unemployment benefits because she had been told by her employer that she could not receive both worker's compensation and unemployment benefits.

DECISION: The claimant is ineligible to preserve her credit weeks.

RATIONALE: "After having reviewed the record and the Board of Review's decision ... we conclude that decision properly applied the specific requirements of the statute, MCL 421.28a; MSA 17.530 (1), as it read at the time of the decision. We therefore conclude that the Board of Review's decision was not contrary to law."

PRESERVATION OF CREDIT WEEKS, Medical leave, Disability payments

CITE AS: Kempf v Michigan Bell Telephone Co., 137 Mich App 574 (1984); lv den, 424 Mich 857 (1985).

Appeal pending: No

Claimant: Maureen Kempf
Employer: Michigan Bell Telephone Co.
Docket No: B81 03615 77481

COURT OF APPEALS HOLDING: The purpose of Section 28(a) is to prevent a person from being penalized when the sole cause of the individual's inability to establish a benefit year is due to a period of continuous disability.

FACTS: Claimant was on a medical leave of absence from December 21, 1979, until December 25, 1980. On December 26, 1980, claimant's doctor released her to return to work. Three days later, she was dismissed from her job. Claimant was denied unemployment benefits due to insufficient credit weeks.

DECISION: The claimant is eligible to have her credit weeks preserved.

RATIONALE: Since "it was the legislature's intent to allow a person in plaintiff's position to come within the purview of section 28a(6), it must be assumed that Section 48's provision, which deems a person on a leave of absence not unemployed, was not intended to qualify the terms 'unemployed' or 'unemployment' as used in subsection 6. Rather, it is the conclusion of this Court that subsection 6's reference to section 48 was intended to refer only to section 48's general provision which deems a person 'unemployed' with respect to any week during which he performs services and with respect to which no remuneration is payable to him. According to this provision, plaintiff was 'unemployed' while on disability leave.

"This provision requires that plaintiff file her request for preservation of credit weeks 'within 45 days after the commencement of the unemployment' unless she is medically unable to, which is not the case here. ... When plaintiff went on disability leave she expected to return to work when she was well. Until she lost her job she would have no reason to inquire about or take action under the Michigan Employment Security Act.

"[T]his Court holds that plaintiff has 45 days after her job loss to file her request for preservation of credit weeks. Since plaintiff complied with this requirement, she is entitled to have her credit weeks preserved."

Section 28a

PRESERVATION OF CREDIT WEEKS, Substantial compliance, Medical disability, Inability

CITE AS: Michigan Overhead Door Sales and Service, Inc., v Gowen, No. 84-419470-AE Wayne Circuit Court (November 8, 1984).

Appeal pending: No

Claimant: Charles Gowen
Employer: Michigan Overhead Door Sales and Service, Inc.
Docket No: B83 04091 89560

CIRCUIT COURT HOLDING: The clear language of the statute requires that one disabled file with the Commission within 45 days of the commencement of the disability except when a medical inability exists.

FACTS: The claimant last worked on July 1, 1981, when he incurred work related injuries. He was hospitalized for 12 days thereafter and received Worker's Compensation benefits until November 22, 1982.On January 6, 1983, exactly 45 days after he received his last Worker's Compensation payment, claimant filed for preservation of credit weeks. On that date, he was given a physician's statement, which was subsequently signed by his physician on January 10, 1983 and returned to the Commission on January 14, 1983. The statement indicated that the claimant's disability was terminated on September 20, 1982.

DECISION: The claimant is ineligible to preserve his credit weeks.

RATIONALE: The use of the word inability, instead of disability, is important to an understanding of the statute. Inability means unable to file the application and submit the physician's statement, due to the medical disability. The claimant's 12 day hospitalization was clearly a medical inability. While the medical disability continued at least until September 20, 1982, at which time the claimant's physician released him to return to work, there is no evidence of a medical inability to comply with the statute.

The record clearly shows that following the claimant's hospitalization, he visited his physician and looked for work. "It must be concluded that a patient who visits his physician while disabled, and seeks employment, is medically able to comply with the M.E.S.C. requirements of making written application and submitting a physician's statement within the time limits set by statute."

Section 28a

PRESERVATION OF CREDIT WEEKS, Disability, Constructive knowledge of statutes

CITE AS: Heath v CPG Products-Fundimensions, No. 83-3950 AE, Macomb Circuit Court (February 25, 1985).

Appeal pending: No

Claimant: Gloria J. Heath
Employer: CPG Products-Fundimensions
Docket No: B82 02335 82671

CIRCUIT COURT HOLDING: "The public is charged with constructive knowledge of the provisions of statutes of the State of Michigan."

FACTS: The claimant was disabled for nine months prior to her application for benefits and did not know that she was required to preserve her credit weeks pursuant to MCL 421.28(a) within 45 days of the end of her disability or layoff. The information booklet given at the time of her application for benefits failed to contain information regarding preservation of credit weeks.

DECISION: The claimant has insufficient credit weeks to establish a benefit year.

RATIONALE: "The record is clear that claimant had insufficient credit weeks to obtain benefits and failed to apply for preservation of the credit weeks as required by the act. The court cannot say the MESC erred when it merely applied the plain and unambiguous language of the statute in effect at the time of claimant's application for benefits. The excuse for her failure to act that claimant advances on appeal are raised for the first time on appeal and do not state legally sufficient excuses for not complying with the act. The MESC had no duty to inform claimant of the requirement that she preserve her credit weeks. Further, the public is charged with constructive knowledge of the provisions of statutes of the State of Michigan. The failure of the MESC to insert this information in the booklet given to claimant during the time in question does not relieve claimant from constructive notice of the provisions."

Section 28a

PRESERVATION OF CREDIT WEEKS, Estoppel, Misled by Commission employees

CITE AS: Michigan Bell Telephone Co. v Wiersma, 156 Mich App 176 (1986).

Appeal pending: No

Claimant: Linda Wiersma
Employer: Michigan Bell Telephone
Docket No: B82 5578 84393

COURT OF APPEALS HOLDING: Even though claimant failed to request to preserve credit weeks within 45 days, she made diligent attempts to file and was misled by the MESC. As such the MESC is estopped from denying her entitlement to preserve credit weeks.

FACTS: On 1-26-81 claimant was placed on an approved disability leave for back problems until 4-4-81. Claimant was then on 3 weeks vacation and subsequently began a pregnancy related disability leave. While on leave, claimant was told the employer was closing the office where she had worked. Claimant contacted the MESC by phone and twice in person and was informed she needed to be willing and able to work and be unemployed; and 10-1-81 was the last day she could file for benefits. Her child was born 9-27-81 and she was released to return to work 12-3-81. When claimant applied for benefits she was denied because of insufficient credit weeks. Despite opportunities before and after she applied, the MESC never explained to her about preservation of credit weeks.

DECISION: Claimant is entitled to preserve credit weeks under Section 28a.

RATIONALE: Claimant diligently sought to preserve her rights, but she was affirmatively misled by the MESC. "We hold, under the circumstances of this case, that the MESC cannot misinform a claimant in regard to her rights or the appropriate procedures to take and then deny her benefits because she did not know her rights or because she took inappropriate procedural steps. Second, the MESC may be equitably estopped in this case. An equitable estoppel arises where: (1) a party by representations, admissions or silence induces another party to believe facts; (2) the other party detrimentally relies and acts on this belief; and (3) the other party will be prejudiced if the first party is allowed to deny the existence of the facts.... Information regarding a claimant's ability to obtain benefits may well be considered a "fact" in this context where the bureaucracy of an administrative agency is involved."

Section 28a

PRESERVATION OF CREDIT WEEKS, Benefit year

CITE AS: Gentris v City of Detroit, Wayne Circuit Court No. 91-129268-AE (September 1, 1992).

Appeal pending: No

Claimant: Ellis Gene G. Gentris
Employer: City of Detroit
Docket No. B90-09803- 116335W

CIRCUIT COURT HOLDING: A benefit year for a claimant who has preserved credit weeks begins the date the individual is both disabled and unemployed, not the date they file for benefits. Benefits cannot be paid for any week more than 156 weeks after the beginning of the benefit year.

FACTS: Claimant last worked for the employer in January, 1985. Later she was on a disability leave. She was dismissed March 25, 1986. Claimant filed for benefits June 4, 1986, but was denied due to insufficient credit weeks. Claimant filed again on October 27, 1986 and was allowed to preserve credit weeks. Pursuant to Section 28a(6) the claimant's Benefit Year began January 13, 1985. On May 22, 1989, the date she was released by her doctor, claimant sought to collect benefits. She was found ineligible pursuant to Section 28a(4) which prohibits payment of benefits for preserved credit weeks more than 156 weeks after the first week of the benefit year.

Claimant argued it was error for her benefit year to start January 13, 1985. She asserted her benefit year should start the week of filing in May, 1989 as Section 46 provides a benefit year commences the week the application for benefits is filed. Claimant argued Sections 46 and 28a(6) were inconsistent and Section 46, not Section 28a, should prevail.

DECISION: Claimant is ineligible for benefits under Section 28a.

RATIONALE: The Board and the Referee found Section 28a(6) was a specific exception to Section 46. The Board noted the preservation of credit weeks is a specific provision of the statute which allows a person who is unable to establish a benefit year in the normal course because she is unemployed and unable to work for medical reasons to establish a benefit year and preserve credit weeks until she is eligible to draw benefits. Here that date should have been March 25, 1986, not January 13, 1985, but nevertheless more than 156 weeks before May, 1989. The Board and Referee found that when the legislature amended the Act by adding Section 28a, it intended specific exceptions to any provisions of the Act which conflicted with Section 28a. The Board cited Kempf v Michigan Bell Telephone Co., 137 Mich App 574 (1984).

7/99
14, 3: N/A

Section 28a

PRESERVATION OF CREDIT WEEKS, Continuous disability, Pre-existing condition

CITE AS: Bowman v MESC, Macomb Circuit Court No. 93-1482 AZ (July 7, 1994).

Appeal pending: No

Claimant: Ronald V. Bowman
Employer: Eastern Airlines
Docket No. B92-0388-122358W

CIRCUIT COURT HOLDING: Two separate disabilities may be aggregated so as to establish one single "continuous disability" where the second was a pre-existing condition.

FACTS: Claimant was employed by Eastern Airlines. He was placed on a medical leave of absence in May, 1987. The leave ended on July 11, 1988. On November 12, 1988 the claimant underwent surgery for hernia repair. The period of disability for the hernia extended from September 29, 1988 through January 12, 1989. The claimant returned to work in January, 1989 and on March 2, 1989 the claimant found himself without work. He sought unemployment benefits on March 23, 1989.

DECISION: The claimant could preserve credit weeks.

RATIONALE: In order to have sufficient credit weeks to establish a claim, claimant needed those credit weeks earned prior to his original disability which commenced in May, 1987. Credit weeks may be preserved under Section 28a so long as the claimant has a "continuous disability." In the instant matter, there was a gap in disability; specifically, between July 11, 1988 and September 29, 1988, a period of 79 days. The court observed that the claimant's hernia condition did not arise on September 29, 1989, but rather pre-existed. Because it pre-existed, the two medical conditions were at one time contemporaneous. Therefore, there was a continuous disability sufficient to satisfy Section 28a.

7/99
12, 24: C

Section 28a

PRESERVATION OF CREDIT WEEKS, Time limits

CITE AS: Gary v Eaton Corp, Kalamazoo Circuit Court, No. B98-3371-AE (January 4, 2001)

Appeal pending: No

Claimant: Stuart L. Gary
Employer: Eaton Corporation
Docket No. B1999-07363-RO1-153433W

CIRCUIT COURT HOLDING: A claimant must apply for preservation of credit weeks within the mandatory 3-year period set out in Section 28a(10). Claimant's belief he would be returning to work and have any wage loss paid by employer does not excuse his failure to seek to preserve credit weeks within the 3-year period.

FACTS: In May 1989, claimant injured his right hand. In May 1993, he went on disability leave to have surgery. On November 1, 1993, his physician released him to return to work with restrictions, and suggested employer provide him with a new job because his past work fell outside those restrictions. The employer did not provide a new job to claimant but did not discharge him. In 1994, claimant filed suit against employer, which led to arbitration. Claimant's employment ended February 15, 1999 by way of the arbitrator's decision. From when claimant filed suit to the arbitration decision, claimant was on leave without pay but with benefits. Claimant filed for unemployment benefits 10 days after the arbitration decision as issued.

DECISION: Claimant is not entitled to preservation of credit weeks.

RATIONALE: Section 28a(4) provides specific time limitations as to when a claimant may seek to preserve work credits, and provides that "benefits shall not be payable . . . for any week that commences more than 156 weeks after the first week of the benefit year." Section 28a(10) provides that a "request for preservation of credit weeks must be made within 3 years after the date the disability began." The unemployment benefits the claimant sought were designed to remedy his situation in 1993. The claimant made a strategic decision not to apply for unemployment benefits because it might have weakened his lawsuit against his former employer. Having made that choice, he cannot obtain benefits several years after the deadline for preserving credit weeks.

11/04

10.00

VOLUNTARY LEAVING

Section 29(1)(a)

Section 29(1)(a)

VOLUNTARY LEAVING, Constructive voluntary leaving, Pay reduction, Permanent closing

CITE AS: Copper Range Co v UCC, 320 Mich 460 (1948).

Appeal pending: No

Claimant: James W. Austin, et al
Employer: Copper Range Co
Docket No: B5 9204 2910

SUPREME COURT HOLDING: Where employees are threatened with the loss of their jobs if they refuse a pay cut, their action in rejecting the proposal, followed by the permanent closing of the facility, does not constitute voluntary leaving.

FACTS: The market price of the employer's product fell sharply at the end of World War II. The 539 claimants were asked to accept a reduction in their wage scale, and were told the company would not continue operations at the existing pay rates. The employees voted down the pay cut. The employer closed the facility permanently.

DECISION: The claimants are not disqualified for voluntary leaving.

RATIONALE: "(W)e are not as yet prepared to accept and apply the doctrine of constructive voluntary leaving, particularly in the light of the circumstances of the instant case."

"To place the stamp of judicial approval upon the contentions of appellee in the instant case would be tantamount to the issuance of a notice to all employers in Michigan that, whenever they are confronted with economic loss, they can demand an abrogation of their working agreements and reduce compensation to a point unacceptable to employees, and thereby absolve themselves of the responsibilities imposed upon them by the unemployment compensation act."

Section 29(1)(a)

VOLUNTARY LEAVING, Good cause, Uncertainty of compensation

CITE AS: Muns v Glassman Oldsmobile, Inc., No. 84721 (Mich App December 12, 1986).

Appeal pending: No

Claimant: Terry J. Muns
Employer: Glassman Oldsmobile, Inc.
Docket No: B83 10704 91510

COURT OF APPEALS HOLDING: Claimant had good cause attributable to the employer where he worked as a salesman and was regularly paid a "draw" against commissions and quit when the employer made statements which suggested continuation of this compensation arrangement was uncertain.

FACTS: Claimant worked as a new car salesperson. He worked 50 hours a week and was paid on a commission only basis. He did receive $175.00 a week as a draw against commissions and the employer did not attempt to recoup the draw if sufficient commissions were not earned. Claimant failed to "make his draw" only one week out of 26. In January, 1983 he experienced problems related to diabetes which affected his productivity and caused him to miss work. He was hospitalized for a month. Upon his return he was in a meeting with the vice president and sales manager. During that meeting claimant was told the employer "intended to talk to Terry every single week to determine whether or not he had accumulated enough commissions to warrant the draw and if he hadn't, we were going to review whether a draw would be appropriate for that particular week." Claimant then quit because he could not afford to work without a draw.

DECISION: Claimant is not disqualified for voluntary leaving.

RATIONALE: "[U]nder the reasonable person test of Carswell, supra, we do think the employer's statements gave the claimant good cause to leave his employment.

Both the hearing referee and the board of review found that the employer's sales manager (or the vice president) did use language suggesting to Muns that he would not receive his draw should his sales fail to justify a draw in the future. Should Muns have been required to stay on and risk that the employer would choose not to pay him if he made insufficient sales in a 50 hour week? We think not. The employer's statements, as testified to by Muns and the sales manager, constituted at least a substantial change in the method of determining Muns' pay. Courts in other states have found a substantial pay reduction 'good cause' for leaving employment."

Section 29(1)(a)

VOLUNTARY LEAVING, Average employee standard, Fear of prejudice, Social relationship

CITE AS: Schultz v Grede Foundries, Inc, No 78 3191 (Mich App September 11, 1979); lv den 407 Mich 958 (1980).

Appeal pending: No

Claimant: Rosemarie Schultz
Employer: Grede Foundries, Inc.
Docket No: B76 7742 51982

COURT OF APPEALS HOLDING: Good cause for voluntary leaving exists " ... where an employer's actions would cause a reasonable, average and otherwise qualified worker to give up his or her employment."

FACTS: The claimant voluntarily resigned because of the employer's manner of filling a vacancy. Although the claimant was eventually selected, on the basis of seniority, a co-worker who had a social relationship with a supervisor was improperly offered the transfer first. The claimant expressed a fear that prejudice would be shown to her.

DECISION: The claimant is disqualified for voluntary leaving.

RATIONALE: "On appeal, plaintiff claims that the circuit court erred in adopting the 'average person' test as the standard for determining whether she left her employment without good cause attributable to defendant."

"Plaintiff was not under any legal, economic, or physical compulsion to leave her job, nor is there any evidence in the lower court record indicating that she did so unintentionally."

"We find that the 'average employee' standard properly effectuates the legislative intention behind MCL 421.29 (1)(A), MSA 17.531 (1)(A). Under that standard, 'good cause' compelling an employee to terminate his employment should be found where an employer's actions would cause a reasonable, average and otherwise qualified worker to give up his or her employment."

Section 29(1)(a)

VOLUNTARY LEAVING, Bona fide residence, Prerequisite of employment, Residency requirement, Misconduct discharge

CITE AS: City of Saginaw v Lindquist, sub nom Parks v ESC, 427 Mich 224 (1986).

Appeal pending: No

Claimant: Nancy A. Lindquist
Employer: City of Saginaw
Docket No: B81 06822 RO1 78455

SUPREME COURT HOLDING: Failure to sufficiently comply with a condition of employment constitutes a voluntary leaving without good cause attributable to the employer.

FACTS: The claimant was working for the involved employer when she moved from Saginaw to Lupton with her husband and children. She lived in Saginaw a few days a week to be close to work but never intended the Saginaw address to be her permanent address. The claimant was terminated for failing to maintain a bona fide residence in the City of Saginaw as required by its Administrative Code.

DECISION: The claimant is disqualified pursuant to Section 29(1)(a) of the MES Act.

RATIONALE: Although the claimant did not resign because of the change in the location of her residence, her failure to sufficiently comply with the residency requirement, a condition of her employment, constituted a voluntary leaving without good cause attributable to the employer. The court was not persuaded that claimant's attempts to comply with the requirement constituted wilful "misconduct connected with work." The claimant is treated "as if she had done that which was presumably required under the circumstances -- resigned because of the relocation of her permanent residence."

10.05

Section 29(1)(a)

VOLUNTARY LEAVING, Involuntary, Distance to work

CITE AS: Laya v Cebar Construction, 101 Mich App 26 (1980).

Appeal pending: No

Claimant: David Laya
Employer: Cebar Construction
Docket No: B76 10141 54586

COURT OF APPEALS HOLDING: "Voluntary" as used in Section 29(1)(a) must connote a decision based upon a choice between alternatives which ordinary men would find reasonable.

FACTS: The claimant lived in Warren, Michigan with his family. In 1976 he was laid off and could not find work in his local area. Through his union he learned of work in Cincinnati, Ohio. He accepted the job, lived in Ohio during the week and drove home (272 miles) on weekends. The distance created difficulties within the family and trouble in making the drive. He quit after 25 days.

DECISION: Claimant is not disqualified for benefits pursuant to Section 29(1)(a).

RATIONALE: Where the claimant was not faced with a choice between alternatives that ordinary persons would consider reasonable, his choice was "no choice at all," and his leaving was involuntary and non-disqualifying.

6/91
3, 7, d5:NA

Section 29(1)(a)

VOLUNTARY LEAVING, Condition of employment, High risk insurance, Restricted driver's license, Truck driver

CITE AS: Michael v City Sewer Co, No. 47314 (Mich App October 29, 1980).

Appeal pending: No

Claimant: James E. Michael
Employer: City Sewer Co.
Docket No: B77 17151 57756

COURT OF APPEALS HOLDING: Where a person with a restricted driver's license is employed as a driver, on the condition that the employee will pay the additional cost of high risk insurance, a large increase in the cost of the insurance is not good cause for voluntary leaving.

FACTS: When the claimant began driving a truck for the employer he had a restricted driver's license. He was required to pay $75.00 for the extra cost of high risk insurance for one year. When the additional cost rose to $600.00 for six months, the claimant voluntarily resigned.

DECISION: The claimant is disqualified for voluntary leaving.

RATIONALE: "The Supreme Court has stated in Echols v Employment Security Comm, 380 Mich 87, 92; 155 NW2d 824 (1968); " ... the loss of a claimant's prerequisites for continued employment, especially through his own negligence, is a voluntary leaving without good cause attributable to the employer."

"Plaintiff was not subjected to additional requirements by the employer, rather it was plaintiff's failure to maintain the prerequisite license and insurance which resulted in his job loss."

"[F]rom the very beginning plaintiff paid the insurance, and had he not done so, he would not have been hired to drive a truck."

Section 29(1)(a)

VOLUNTARY LEAVING, Burden of proof, Dissatisfaction with duties, Lack of work assignments, Non-productive time, Quantity of work, Question of law

CITE AS: Cooper v University of Michigan, 100 Mich App 99 (1980).

Appeal pending: No

Claimant: Margaret Cooper
Employer: University of Michigan
Docket No: B76 12784 54167

COURT OF APPEALS HOLDING: (1) The employer does not bear the burden of proof concerning disqualification for voluntary leaving. (2) Dissatisfaction with a lack of work assignments does not constitute good cause for voluntary leaving.

FACTS: The claimant left a clerical position, stating that her work assignments were not sufficient to keep her busy.

DECISION: The claimant is disqualified for voluntary leaving.

RATIONALE: "While we are clearly presented with a disqualification question, we disagree with plaintiff's position that the employer bears the burden of proof in all cases involving an employee's disqualification for unemployment benefits."

"Plaintiff herein left work because she was dissatisfied with the amount of work assigned to her. In light of the undisputed facts attending the plaintiff's cause, whether this motivation constitutes 'good cause attributable to the employer or employing unit' is a question of law, Thomas v Employment Security Comm, 356 Mich 665, 668, 97 NW2d 784 (1959).

"In Albright v Unemployment Compensation Board of Review, 106 A 2D 879 (Pa 1954), a bookkeeper quit his job because he did not have enough to do. The court held that the plaintiff was not entitled to unemployment benefits."

10.08

Section 29(1)(a)

VOLUNTARY LEAVING, Good cause, Personality conflict

CITE AS: VanDuinen v S-2 Yachts, Inc., Alpena Circuit Court No. 85-007113 AE (F) (August 26, 1986).

Appeal pending: No

Claimant: Thomas VanDuinen
Employer: S-2 Yachts, Inc.
Docket No. B84-07402-R01-98084

CIRCUIT COURT HOLDING: Standing alone, a personality conflict between a claimant and his supervisor will not support a finding of good cause to leave work.

FACTS: Claimant was a supervisor in charge of materials handling. Prior to his separation, the claimant had several meetings with a personnel official regarding a personality conflict which existed between himself and his immediate supervisor, the vice president of operations. Despite his meetings the conflict went unresolved. As a consequence, the claimant left his employment.

DECISION: The claimant is disqualified for voluntary leaving.

RATIONALE: Employees often disagree with management's philosophies and orders. These disagreements occasionally stem from personality conflicts. Personality conflicts are common in the work place and in every day life. Good cause can "only be established when the external pressures are so compelling that a reasonably prudent person, exercising ordinary common sense and prudence, would be justified in quitting work under similar circumstances. These situations occur when there is discrimination, sexual harassment, abusive language accompanied by additional mistreatment, illegal or unethical practices by the employer, or the like." The personality conflict in the instant case does not rise to such a level.

7/99
11, 15: N/A

Section 29(1)(a)

VOLUNTARY LEAVING, Burden of proof, Residency requirement

CITE AS: Zausner v City of Kalamazoo, No. 70876 (Mich App June 26, 1984).

Appeal pending: No

Claimant: Nancy Zausner
Employer: City of Kalamazoo
Docket No: B81 07242 78438

COURT OF APPEALS HOLDING: Reasonable efforts to comply with a city's residency requirement are insufficient to avoid disqualification from unemployment benefits for voluntarily leaving work.

FACTS: When Plaintiff was hired by the employer, she acknowledged the city's residency requirement. She did not, however, move into the city within six months, as required. At her request, defendant city granted an extension of an additional six months. When Claimant did not move into the city after the end of the extension, she was terminated.

DECISION: Claimant is disqualified for voluntary leaving.

RATIONALE: The burden of proof is on claimant where potential disqualification for benefits required inquiry into whether behavior causing termination of employment was voluntary, Cooper v University of Michigan, 100 Mich App 99, 103 (1980). In Echols v Employment Security Commission, 380 Mich 87 (1968), the Supreme Court held that a cab driver whose license was suspended for accumulating too many points, causing the loss of his job, was disqualified for voluntary leaving. "The within case is like Echols, in that there was a certainty that assumption of a known risk would result in the loss of her job, namely, failure to establish residency in the city within the specified time . . . Because of this certainty, it may fairly be said that she voluntarily left her job without good cause attributable to her employer."

Section 29(1)(a)

VOLUNTARY LEAVING, Involuntary leaving, Good faith effort to find permanent employment, Temporary employment.

CITE AS: Pizunski v Fastening House, No. 73255 (Mich App December 27, 1984).

Appeal pending: No

Claimant: Ed M. Pizunski
Employer: Fastening House
Docket No: B81 08232 78656

COURT OF APPEALS HOLDING: Where an individual quits a job that he never intended to be more than temporary, the separation is disqualifying.

FACTS: "Plaintiff, a Canadian citizen, was a member of the Muskegon Mohawk hockey team until January, 1981. In February, 1981, plaintiff's wife's employer temporarily transferred her to Ontario, Canada. Plaintiff accompanied his wife to Ontario and there accepted a job as a truck driver with defendant, Fastening House. In March, 1981, plaintiff's wife completed her assignment in Ontario and returned to Muskegon. Plaintiff and his wife knew before going to Ontario that her assignment there would last only three to five weeks. The couple owned a home in the Muskegon area, and plaintiff had filed the papers necessary to obtain a "green card" which would enable him to work in the United States. The couple never intended that they would stay in Canada."

DECISION: The claimant is disqualified for voluntary leaving.

RATIONALE: The Court relied on Laya v Cebar Construction Co., 101 Mich App 26 (1980), in reaching its decision. In Laya, the court "emphasized that the plaintiff before it had made a good faith effort to find permanent employment but had failed for reasons beyond his control."

"Here, in contrast, plaintiff took the job in Canada knowing that his stay in Canada would be brief. Plaintiff here did not abandon as unworkable an experiment undertaken in good faith, but instead quit a job he never intended to be more than temporary. Under these circumstances, plaintiff's decision to quit cannot be characterized as involuntary ... "

Section 29(1)(a)

VOLUNTARY LEAVING, Constructive voluntary leaving, Discharge, Leave of absence

CITE AS: Ackerberg v Grant Community Hospital, 138 Mich app 295 (1984).

Appeal pending: No

Claimant: Karla Ackerberg
Employer: Grant Community Hospital
Docket No: B81 07538 78982

COURT OF APPEALS HOLDING: The employer must show that the claimant falls within the expressed terms of one of the disqualifications stated in the unemployment act.

FACTS: Plaintiff submitted a leave of absence form requesting an unpaid, personal leave beginning March 27, 1981, and extending for one and one-half years. The employer countered with an offer to give plaintiff a 30-day leave of absence. Plaintiff refused a 30-day leave and believed she was rightfully allowed the leave she requested. Plaintiff informed the employer she intended to begin her leave as requested by her with or without approval. The employer terminated plaintiff's unemployment immediately.

DECISION: Claimant is not disqualified for voluntary leaving.

RATIONALE: Relying on Thomas v Employment Security Comm., 356 Mich 665 (1959) and Copper Range Co. v UCC, 320 Mich 460 (1948), the court declined to find a constructive voluntary leaving when the claimant was actually discharged by the employer. Because the employer discharged the claimant on March 23, we can only speculate as to what the claimant would have done on March 27. The Act does not permit disqualification on the basis of speculation as to what an individual would have done if he or she had not been discharged.

Section 29(1)(a)

VOLUNTARY LEAVING, Good cause attributable to employer, Change in working conditions

CITE AS: Payne v Colony Bar, No. 1-11 AE, St. Clair Circuit Court (September 27, 1984).

Appeal pending: No

Claimant: Mary L. Payne
Employer: Colony Bar
Docket No: B83 17556 93994W

CIRCUIT COURT HOLDING: Good cause for voluntary leaving exists where there has been a substantial change in the working conditions.

FACTS: Claimant voluntarily left her employment with the Colony Bar after approximately nineteen years. She left because of a substantial change in working conditions, i.e., the introduction of loud, rock-type music which changed the very nature of the establishment and its clientele.

DECISION: The claimant is not disqualified for voluntary leaving.

RATIONALE: The Court adopted the standard set forth by McGinnis v Moreau, 149 502d 188.

"Mere dissatisfaction with working conditions does not constitute "good cause" for quitting the employment unless the dissatisfaction is based upon discriminatory or unfair or arbitrary treatment, or is based upon a substantial change in working conditions from those in force at the time the claimant's employment in his position commenced, so as to render the work unsuitable to the claimant, considering the worker's physical fitness, qualifications, earning ability, and the like.

"'Good cause' compelling an employee to terminate his employment should be found where an employer's actions would cause a reasonable, average and otherwise qualified worker to give up his or her employment. Schultz v Grede Foundries, Inc., No. 79-391, (Mich App.September 11, 1979).

"The separation from employment here was not considered in the light of the foregoing standard. An aging, long-time employee (who might also be reasonable, average and otherwise qualified per Schultz) was entitled to a careful assessment of the physical and emotional impact of the employer's substantial change of musical format, clientele and the general ambience of the place of employment."

Section 29(1)(a)

VOLUNTARY LEAVING, Good cause, Living wage

CITE AS: Setta v Chrysler Corp, No. 301-977, Wayne Circuit Court (September 3, 1959).

Appeal pending: No

Claimant: Richard Setta
Employer: Chrysler Corporation
Docket No: B58 6122 22034

CIRCUIT COURT HOLDING: A claimant who makes a good faith attempt at earning a living but is unable to earn a living wage is not disqualified for benefits pursuant to Section 29(1)(a) when he quits.

FACTS: Claimant was laid off from Chrysler for lack of work. He later obtained work as a salesman for the Brown Company. Claimant began his sales job with a salary and commission. After 6 weeks he went to straight commission. After he shifted to commission, the claimant's income dropped so low he could not earn a living wage. The drop of wages was not the result of any lack of effort on the claimant's part.

DECISION: Claimant not disqualified pursuant to Section 29(1)(a).

RATIONALE: "The 2nd and 29th sections of the Michigan Statute when taken together, suggest that the test intended by the voluntary quit provision of Section 29 is this: Was the employee driven to leave by external pressures rather than subjective conveniences or desires. If the external pressure is great enough to make it perfectly reasonable to quit, then Section 29 of the statute does not seem to me to impose any disqualification. When one earns only $21.00 a month with nothing better in prospect, the alternatives are simple; either to starve or to quit. Under such circumstances, is there really any choice? And, when one is compelled to take the only available course, can he be said to have voluntarily done anything? Where, as in the Setta case, the pressure stems from lack of earnings sufficient to provide one's family with the barest necessities, and with nothing better in prospect, it seems to me that there is external pressure great enough to make quitting a perfectly reasonable, indeed, an inescapable, act. Under these circumstance, either there is not a voluntary leaving of work or there is good cause for voluntarily quitting which is attributable to the employer."

Section 29(1)(a)

VOLUNTARY LEAVING, Good Cause, Verbal abuse from foreman

CITE AS: Dexter v Winter's Sausage, No. 80626 (Mich App January 16, 1986); lv granted 425 Mich 872 (1986); lv den 428 Mich 897 (1987).

Appeal pending: No

Claimant: Joyce A Dexter
Employer: Winter's Sausage
Docket No: B83 11386 92075W

COURT OF APPEALS HOLDING: "An employer's screaming at the employee does not constitute good cause attributable to the employer for the employee to terminate the employment relationship."

FACTS: The claimant testified that she quit her job because she could not tolerate being constantly yelled at by her foreman. Two witnesses corroborated the claimant's allegations of constant yelling. One witness testified that claimant received more abuse than the other employees. The other witness testified that she had occasionally seen and heard the foreman yelling and cursing at claimant from across the room. The office manager testified that the foreman involved yelled at all the employees, and that his screaming was merely part of his work habits.

DECISION: The claimant is disqualified for voluntarily leaving her job.

RATIONALE: "In Butler v Newaygo, 115 Mich App 445, 449; 320 NW2d 401 (1982), this Court found that neither a reprimand nor "the mere fact that the claimant felt personally affronted" by his employer's conduct constituted good cause to leave his job. In a like vein, we conclude that voluntary unemployment for "good cause" must be limited to instances where the unemployment is caused by events so compelling that reasonable men and women would conclude they constitute a valid reason for giving up employment. See Dueweke v Morang Drive Greenhouses, Inc, 411 Mich 670, 679-680; 311 NW2d 712 (1981), Anno: Unemployment Compensation: Harassment or other Mistreatment by Employer or Supervisor as "Good Cause" Justifying Abandonment of Employment, 76 ALR3d 1089 and cases cited therein. The referent is the average person, not the super-sensitive."

"We cannot say as a matter of law that the supervisor's conduct is so compelling that reasonable persons of average sensibilities would conclude that plaintiff had a valid reason to give up her employment. ... A harmonious relationship with a supervisor helps to make an employee's work pleasant, but the Employment Security Act was designed to address the evil of involuntary economic insecurity and not to compensate the worker who has an imperfect supervisor."

10.15

Section 29(1)(a)

VOLUNTARY LEAVING, Consumer Protection Act, Good Cause, Illegal work activities

CITE AS: Hibbard v Tuff Kote Dinol Rustproof, No. 82-17148 AE, Muskegon Circuit Court (May 17, 1983).

Appeal pending: No

Claimant: Thomas Hibbard
Employer: Tuff Kote Dinol Rustproof
Docket No: B82 13562 85191W

CIRCUIT COURT HOLDING: " ... An employee whose work duties include activities which require the employee to violate federal, state or local laws has demonstrated good cause attributable to the employer or employing unit."

FACTS: Claimant terminated his employment because his company advertised to the public a "two-step" rust proofing process which involved the application of both a penetrant and a sealant; however, the management of the firm often instructed claimant to apply only the penetrant or only the sealant to an automobile. Claimant felt that he was "cheating the public" and not doing the rust-proofing jobs properly or as advertised, and that numerous customer complaints resulted from this practice. After protesting to management about this improper and inadequate procedure, claimant resigned.

DECISION: The claimant is not disqualified for voluntary leaving.

RATIONALE: The employer's occasional practice of requiring claimant to utilize a one-step rust proofing process when the employer advertised to the public a two-step rust proofing process compelled claimant to participate in practices which were in clear violation of the Michigan Consumer Protection Act, MCLA 445.901 et seq, MSA 19.418(1) et seq.

The Court adopted the reasoning of the Commonwealth Court of Pennsylvania in Zinman v Unemployment Compensation Board of Review, 8 Pa Cmwlth 649, 305 A2d 380 (1973), in which the Court held that a legal duty to obey laws may constitute appropriate circumstances for an employee to voluntarily terminate employment and still qualify for unemployment compensation benefits. Claimant acted in good faith and as a reasonable person in terminating his employment rather than continue in an illegal practice. Claimant had good cause to resign, and this good cause was directly attributable to the employer.

11/90
1, 6, d14:NA

Section 29(1)(a)

VOLUNTARY LEAVING, Quit in anticipation of discharge, Reasonable person standard

CITE AS: Carswell v Share House, Inc, 151 Mich App 392 (1986).

Appeal pending: No

Claimant: Elizabeth Carswell
Employer: Share House, Inc
Docket No: B83 10743 91926W

COURT OF APPEAL HOLDING: An employee who tenders a resignation effective immediately rather than work a two week notice period offered by the employer has voluntarily terminated employment. A reasonable person standard should be applied when determining "good cause" under Section 29(1)(a).

FACTS: Claimant, a secretary, had expressed dissatisfaction about her wages. After being told she would not be getting an increase, she expressed her intention to look elsewhere for employment. Several days later the employer gave claimant a letter accepting her "offer to voluntarily quit". The letter went on to indicate claimant's replacement would start in two weeks and claimant could work until then. Later that same day claimant submitted a letter of resignation effective immediately.

DECISION: Claimant voluntarily left her employment. Remanded by the court for fact finding as to whether claimant had good cause attributable to the employer.

RATIONALE: "[W]e find that there is little doubt that plaintiff left her employment voluntarily. Although she had an opportunity to continue her employment for two weeks, she tendered her resignation effective immediately. Plaintiff was not under any legal, economic, or physical compulsion to leave her job, nor is there any evidence in the lower court record indicating that she did so unintentionally."

"The real question presented to us is whether plaintiff's leaving of her job was 'without good cause attributable to the employer.' ... 'Good cause' as used in MCL 421.29(1)(a); MSA 17.531(1)(a), has not been defined.... We find that the 'reasonable man' standard properly effectuates the legislative intention behind MCL 421.29(1)(a); MSA 17.531(1)(a). Under that standard, 'good cause' compelling an employee to terminate his employment should be found where an employer's actions would cause a reasonable, average, and otherwise qualified worker to give up his or her employment."

Section 29(1)(a)

VOLUNTARY LEAVING, Detrimental reliance, Estoppel barring revocation, Hiring of replacement, Notice of leaving, Withdrawal of resignation

CITE AS: Engel v Derthick Associates, Inc, No. 78-179125 AE, Oakland Circuit Court (July 6, 1979).

Appeal pending: No

Claimant: Blanche Engel
Employer: Derthick Associates, Inc.
Docket No: B77 875 55320

CIRCUIT COURT HOLDING: Where an employee is not permitted to withdraw a resignation after the employer has hired a replacement, the claimant is disqualified for voluntary leaving.

FACTS: The claimant gave notice of leaving her employment. She later attempted to withdraw her resignation, but the employer had already hired a replacement. The employer allowed the resignation to stand as submitted.

DECISION: The claimant is disqualified for voluntary leaving.

RATIONALE: "The referee apparently concluded that claimant was estopped to withdraw her resignation because the employer had placed advertisements, had interviewed, and in fact had hired claimant's replacement. The question of estoppel is essentially a question of fact, Pursell v Wolverine-Pentronix, INc, 44 Mich App 416, 420 (1973."

"Once an employee knowingly and voluntarily sets in motion processes which ultimately result in her replacement, she cannot reasonably expect those processes to grind to a halt because she changes her mind. Certainly it is the policy of the Employment Security Act to minimize the effects of unemployment. However, the Act cannot be so broadly construed as to require businesses to be run at the whims of the employees. The Act was never intended to make employers into social welfare agencies. Thus, once an employer, such as Derthick in this case, begins to act on an employee's resignation, that employer cannot be required to honor an employee's attempt to withdraw a resignation."

Section 29(1)(a)

VOLUNTARY LEAVING, Administrative order, Civil Rights Commission, Collateral estoppel, Equal employment opportunity, Res judicata, Sex discrimination

CITE AS: Webber v Lansing Insurance Agency, No. 78-22105 AA, Ingham Circuit Court (April 18, 1980).

Appeal pending: No

Claimant: Bobbi Webber
Employer: Lansing Insurance Agency
Docket No: B77 7500 55662

CIRCUIT COURT HOLDING: Good cause for voluntary leaving may be found where the claimant felt discriminated against, even where a final order of the Michigan Civil Rights Commission has found no actionable discrimination.

FACTS: The claimant resigned and filed a Civil Rights Commission complaint alleging sex discrimination. An M.E.S.C. referee found good cause for voluntary leaving. The Civil Rights complaint was dismissed, but the Board of Review subsequently affirmed the referee.

DECISION: The claimant is not disqualified for voluntary leaving.

RATIONALE: "The binding effect of administrative rulings has been dealt with by the Court of Appeals in the case of Strachan v Mutual Aid Club, 81 Mich App 165 265 NW2D 66 (1978)." "The court illustrates that once an administrative order becomes final, res judicata will attach." "The Michigan Employment Security Commission is barred from making an actual finding of fact that actionable discrimination here exists." "[T]he Referee did not determine that there was actionable discrimination. Rather, the decision is founded upon appellee's belief that her employer had discriminated against her." "This determination is a far cry from a finding of actionable discrimination, and that is the only holding which can be barred by res judicata."

Section 29(1)(a) and 29(8)

VOLUNTARY LEAVING, Good Cause, Promise of increased compensation, Labor dispute, Acting in concert

CITE AS: Degi v Varano Glass Co., 158 Mich App 695 (1987)

Appeal pending: No

Claimant: Paul G. Degi
Employer: Varano Glass Company
Docket No: B84 09066 97679W

COURT OF APPEALS HOLDING: Where an employer has promised additional compensation to a claimant for taking on new duties, the employer's failure to provide that additional compensation constitutes good cause attributable to the employer. A worker, who is not acting in concert with other employees and is discharged after protesting wages, hours, or working conditions is not engaged in a labor dispute.

FACTS: Claimant worked in the employer's flat glass department. On his own claimant had acquired skills in making beveled and stained glass. The employer decided to start an art glass department. Claimant agreed to work there. An increase in claimant's wages was discussed. Claimant had a proposed employment contract prepared and presented it to the employer. Claimant spent 2 months performing tasks related to art glass work but did not receive a wage increase. Claimant advised the employer he would not continue in the art glass department without a contract. The employer advised him to continue working in the art glass department or punch out. Claimant punched out and did not return.

DECISION: Claimant is not disqualified for voluntarily leaving his employment since he had good cause attributable to the employer for leaving.

RATIONALE: "On the facts of this case, a reasonably prudent person would be justified in giving up employment. The employer's activity would motivate the average able-bodied and qualified worker to give up his or her employment in such a situation."

"We conclude that a worker who is not acting in concert with other employees, but rather who is individually protesting wages, hours and working conditions to his employer and who is summarily discharged, is not engaged in a "labor dispute" as that phrase is used in Section 29()[sic]. To hold otherwise would be to unduly broaden the commonly understood meaning of the phrase 'labor dispute'".

Section 29(1)(a)

VOLUNTARY LEAVING, Layoff, Leaving to accept employment, Reasonable assurance, Resignation during layoff, School denial period, Teacher aide

CITE AS: Makela (Waterford School District), 1980 BR 66562 (B79 01484).

Appeal pending: No

Claimant: Eve Makela
Employer: Waterford School District
Docket No: B79 01484 66562

BOARD OF REVIEW HOLDING: Where an individual is on a layoff for lack of work, and resigns to accept work with another employer, the claimant is not disqualified for voluntary leaving.

FACTS: The claimant, a teacher aide, was laid off in June. She received reasonable assurance or reemployment in the fall. While on layoff, the claimant accepted office work with another employer, and resigned the teacher aide position.

DECISION: The claimant is not disqualified for voluntary leaving.

RATIONALE: "Prior Board decisions have consistently held that in order for the disqualification provisions of Section 29(1)(a) to apply the claimant must be actually in employment or that the employment relationship continues as in the case of a leave of absence or labor dispute. Here, the claimant was not in employment when she quit and, therefore, is not subject to the disqualification provisions of the Act. See Wright (Packard Motor Car Co), Appeal Docket No. B9-1771-9898 (1949)."

Section 29(1)(a)

VOLUNTARY LEAVING, Good cause, Part-time work, Pay reduction

CITE AS: Wasolaskus (Tom's Grandville Station), 1978 BR 55248 (FSB76 13211).

Appeal pending: No

Claimant: Dennis Wasolaskus
Employer: Tom's Grandville Station
Docket No: FSB76 13211 55248

BOARD OF REVIEW HOLDING: A seventeen (17) percent reduction in wages is good cause for voluntarily leaving part-time work.

FACTS: The claimant was a part-time attendant at a filling station. He worked 20 hours per week at $2.50 per hour. The claimant's pay was subsequently reduced about $40.00 per month by his removal from the Saturday work schedule. The claimant resigned as a result.

DECISION: The claimant is not disqualified for voluntary leaving.

RATIONALE: "Jack Desser, d/b/a/ Jack Desser Biscuit Company v Appeal Board, Wayne County Circuit Court, No. 324-748 (July 5, 1962), held that a 'substantial reduction' in wages can constitute 'good cause' for quitting one's employment. The 'substantial reduction' in Desser consisted of a 20 percent reduction in claimant's gross commissions. The curtailment of hours imposed by employer upon claimant in this case would have reduced his income by approximately 17 percent if he had continued his employment. The reduction ir wages was 'substantial.'

"The part-time nature of claimant's employment does not, per se alter the substantiality of the reduction in claimant's wages."

Section 29(1)(a)

VOLUNTARY LEAVING, Collective bargaining agreement, Mandatory retirement

CITE AS: Dolce v Ford Motor Company, sub nom Parks v ESC, 427 Mich 224 (1986).

Appeal pending: No

Claimant: Dominick Dolce
Employer: Ford Motor Company
Docket No: B78 52393 R01 59916

SUPREME COURT HOLDING: An individual who is forced to leave work pursuant to mandatory retirement provisions of a collective bargaining agreement is not disqualified under Section 29(1)(a) of the MES Act.

FACTS: The claimant was separated from his employment, at age 68, by operation of a mandatory retirement provision of the collective bargaining agreement.

DECISION: The claimant is not disqualified for voluntary leaving.

RATIONALE: "We do not believe that the drafters intended to deny benefits from persons unemployed due to being mandatorily retired. We recognize that under Michigan law the union is the collective bargaining agent for all the employees and in many respects the employee is bound by and accountable for the actions of its bargaining agent. However for purposes of determining voluntariness under the MESA, the collective bargaining process is too remote from the individual employees who come and go under it to allow those legislative presumptions under the state's scheme of labor law to transform a forced retirement into a voluntary leaving."

"The statute disqualifies those who have left work voluntarily. Dolce did not leave work voluntarily, but was forced to leave. ... Dolce was helpless to stave off the aging process and his eventual termination. The presence of a union agreement with the employer does not change the relationship between the employee and employer with respect to this statutory inquiry. The language of the statute directs the inquiry to whether the worker left voluntarily and does not address any agreements between the employer and third parties."

Section 29(1)(a)

VOLUNTARY LEAVING, Burden of proof

CITE AS: Borg v MUCC, No. 277, 192 Wayne Circuit Court (February 28, 1955).

Appeal pending: No

Claimant: Edgar Borg
Employer: Ansaldi Tool & Engineering
Docket No: B54 749 15677

CIRCUIT COURT HOLDING: "On the question of disqualification for voluntarily leaving without good cause attributable to the employer, it appears to the court that the burden of proof is upon the employer to establish that voluntary leaving took place."

FACTS: Claimant worked for the employer until November 25, 1953. Claimant testified he did not work between that date and December 4, 1953 because there was no work. Claimant testified that the employer promised to call when work was available, but did not do so. The employer contended that claimant was unwilling to work full time and had voluntarily quit.

DECISION: Claimant is not disqualified.

RATIONALE: The employer did not establish that claimant's leaving was voluntary.

Section 29(1)(a) & (b)

VOLUNTARY LEAVING, Discharge in anticipation of leaving

CITE AS: Stephen's Nu-Ad, Inc v Green, 168 Mich App 219 (1988).

Appeal pending: No

Claimant: Howard Green
Employer: Stephen's Nu-Ad, Inc
Docket No: B86 02424 102397W

COURT OF APPEALS HOLDING: Claimant's immediate termination by the employer after having given notice of intent to quit is not disqualifying under Section 29(1)(a). However, since claimant made it clear and was unwaivering that he intended to quit after his two week notice, claimant is disqualified after the date he intended to quit under Section 29(1)(a).

FACTS: On 2-3-86 claimant informed the employer that on 2-15-86 he would no longer be working for the employer. Claimant was asked to continue the employment relationship, but he declined. Later that day the employer told claimant his employment was being immediately terminated.

DECISION: Claimant is not disqualified for the period of 2-3-86 to 2-15-86 under Section 29(1)(a) but claimant is disqualified after 2-15-86 under Section 29(1)(a).

RATIONALE: Claimant's leaving on 2-3-86 was not voluntary. "The notice of an intention to permanently leave work in two weeks is not notice of an intention to permanently leave work immediately. If an employer so chooses to treat the former identically with the latter -- which, of course, is an employer's prerogative -- this does not transmute, for purposes of the Michigan Employment Security Act or otherwise, the employee's premature separation from his or her job into a voluntary action on the part of the employee."

However, due to claimant's persistent and irrefragable declarations that under no circumstance would he work for the employer after 2-15-86, claimants unemployment after 2-15-86 was voluntary and disqualifying under Section 29(1)(a).

Section 29(1)(a)

VOLUNTARY LEAVING, Good cause, Economic necessity, Living wage, Stop-gap employment

CITE AS: Holmquist (Swiss Colony Store), 1978 BR 54085 (B76 9343).

Appeal pending: No

Claimant: Garth H. Holmquist
Employer: Swiss Colony Store
Docket No: B76 9343 54085

BOARD OF REVIEW HOLDING: Where economic pressure motivates a claimant to leave stop-gap employment which does not pay a living wage, the separation is not disqualifying.

FACTS: "In this case, the claimant obtained stop-gap employment in a Madison, Wisconsin food shop while attempting to obtain employment commensurate with his educational and career objectives. The job provided about twenty hours of work per week, paid only $2.20 per hour, and was to end around January 1, 1976." The claimant quit on December 19, 1975 to return to Michigan. He testified that he had been unable to find permanent work in Wisconsin and could not afford to remain there. His wife was unemployed as well.

DECISION: The claimant is not disqualified for voluntary leaving.

RATIONALE: "Where an employee is unable to earn a living wage at his job, his leaving the job is involuntary and not disqualifying. Brainard v Employment Compensation Commission of Delaware, 76 A2d126, cited approvingly by Justice Edwards in Lyons v Employment Security Commission, 363 Mich 201 (1961)."

Section 29(1)(a)

VOLUNTARY LEAVING, Compensation, Failure to pay overtime, Underpayment of wages, Wage and hour statute

CITE AS: Yoder (ABC Heating and Supply), 1980 BR 62185 (B78 07654).

Appeal pending: No

Claimant: David Yoder
Employer: ABC Heating and Supply
Docket No: B78 07654 62185

BOARD OF REVIEW HOLDING: Where a wage and hour statute requires payment of time and a half for hours in excess of 40 hours per week, failure to pay that rate is good cause for voluntary leaving.

FACTS: "One of the reasons given by claimant for quitting his job was that he was not receiving time and one-half pay for his overtime work.

"Mr. Smith, representative of the employer, reviewed his records at the hearing and admitted that he owed the claimant additional money. He stated that the claimant did work over- time hours and did not receive time and one-half and that he would see to it that the claimant received his money."

DECISION: The claimant is not disqualified for voluntary leaving.

RATIONALE: The Board adopted the decision of the Referee, who held: "Michigan law generally provides that employers who have four or more employees over the age of 18 are required to pay time and one-half for hours in excess of 40 hours. Since in the instant case, the employer did not pay the claimant according to the State law, the claimant did have a good cause attributable to the employer for quitting his job and he is not disqualified for benefits under Section 29(1)(a) of the Act."

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Section 29(1)(a)

VOLUNTARY LEAVING, Failure to use grievance procedure, Alternate remedies

CITE AS: Johnides v St. Lawrence Hospital, 184 Mich App 172 (1990).

Appeal pending: No

Claimant: Tim A. Johnides
Employer: St. Lawrence Hospital
Docket No: B87 04342 106605W

COURT OF APPEALS HOLDING: A claimant may establish good cause for voluntary leaving despite having failed to pursue a grievance procedure available to him prior to quitting.

FACTS: Claimant asked for a transfer from his night shift position in employer's psychiatric unit A. He was placed on administrative leave for two weeks while employer attempted to find another position for him. When claimant returned to work, employer only agreed to pay him for four of the days he was off. Claimant quit and filed in small claims court. He was awarded compensation for the full period of his administrative leave.

DECISION: Claimant was not disqualified for voluntary leaving.

RATIONALE: "In deciding whether the failure to pursue an available grievance procedure will operate to disqualify an employee from receiving unemployment benefits, many factors should be considered. First, the nature of the grievance procedure should be analyzed. For instance, where there exists a formal employer-employee negotiated grievance procedure, such as that under a collective bargaining agreement, the reasons for requiring an employee to abide by the terms of the agreement, and therefore first resort to the grievance procedure, are much more compelling than in the case where there exists merely an informal employer-imposed procedure. Further, the nature of the dispute should be analyzed in light of the procedure available. That is, it should be determined whether the procedure is one likely to resolve the dispute or whether the dispute at issue is of the type contemplated by the grievance procedure. If not, then a failure to resort to the procedure should not affect a claimant's eligibility for unemployment compensation. Finally, other variables, such as whether resort to the grievance procedure would be a mere futility, should also be examined. Each of these considerations should be analyzed in light of all the other relevant facts of the case in determining whether a reasonable, average, and otherwise qualified worker would feel compelled to give up his of her employment without first resorting to an available grievance procedure."

Additionally, the court observed: "Nowhere does the act require, nor does it suggest, that a claimant must first file a complaint in either a judicial forum or with the Department of Labor in order to preserve his eligibility for unemployment compensation."

Section 29(1)(a)

VOLUNTARY LEAVING, Agricultural labor, Circuit Court review, Justiciable issue, Leaving to accept employment, Maximum benefit entitlement, Moot issue, Non-liable employing unit

CITE AS: Miller v Hoffmaster Farms, No. 79-1282 AV, Allegan Circuit Court (January 11, 1980).

Appeal pending: No

Claimant: L. Scott Miller
Employer: Hoffmaster Farms
Docket No: EB76 17267 55335

CIRCUIT COURT HOLDING: (1) An individual who leaves a non-liable employing unit to accept work with a liable employer is disqualified for voluntary leaving. (2) A disqualification is not made moot by a claimant's subsequent receipt of the maximum benefit entitlement.

FACTS: The claimant tended a dairy herd, on a part-time basis, for a non-liable agricultural employing unit. He was disqualified for leaving to accept full-time work with a liable employer, but subsequently received benefits for the maximum number of weeks.

DECISION: The claimant is disqualified for voluntary leaving.

RATIONALE: "While another party, one actually deprived of benefits, may have better standing to present the issue involved in this case, the claimant should be entitled to a circuit court review of the record ... ".

"[A]n employing unit can be composed of agricultural labor, but such a unit, at least during the period that appellant worked for Hoffmaster Farms, cannot be subject to the terms of MCLA 421.41; MSA 17.543 defining 'employer.'"

"It should be pointed out that MCLA 421.29 (5); MSA 17.531 (5) waives the disqualification period when an individual leaves an employer, even though working part-time, to take a full-time job with another employer. Presumably, because not all employing units are employers, this waiver is not extended to those individuals who leave an employing unit to take a job with an employer."

Section 29(1)(a)

VOLUNTARY LEAVING, Condonation, Grievance procedure, Harassment, Persona non grata, Sarcasm

CITE AS: Giebel v State of Michigan, No. 3863, Midland Circuit Court (October 1, 1974).

Appeal pending: No

Claimant: Richard A. Giebel
Employer: State of Michigan
Docket No: B71 2038 40969

CIRCUIT COURT HOLDING: Where supervisory sarcasm and co-worker harassment make an employee persona non grata in the work place, the entire course of conduct becomes attributable to the employer, and may constitute good cause for voluntary leaving, even where the claimant does not use the grievance procedure.

FACTS: The claimant worked as a Public Welfare Trainee in the Department of Social Services. The Court adopted the Referee's findings, and said:

"In summary, it appears that the claimant made certain objections to the conduct of fellow employees with regard to drinking beer in the offices and taking home shoes which had been donated for indigents. These complaints, going over the head of supervisors in some instances, and personality idiosyncrasies of the claimant made him persona non grata with co-employees and supervisors. They engaged in a course of conduct which claimant describes as harassment."

The Referee found that when the claimant asked for a day off, "The employer stated that he was permitted to take the day off. She further stated that he did not need written permission. His supervisor then said, 'Just go away and stay away and don't bother to come back.'" The claimant resigned, without filing a grievance, after staff members ransacked his office, put a mental health manual on his desk and posted a religious caricature on his office door, to teach him a lesson.

DECISION: The claimant is not disqualified for voluntary leaving.

RATIONALE: "The brief of the Appellee admits only the 'sarcastic statement by an irritated superior on one occasion,' but when that statement is placed in the time sequence of the other acts of harassment the entire course of conduct becomes attributable to the employer. Passive employer approval can be sufficient. Taylored Products, Inc. v MESC, Berrien Circuit #C-3963-H (1966), 5 CCH Unemployment Insurance Reporter Section 1975.949."

Section 29(1)(a)

VOLUNTARY LEAVING, Good cause, Sexual harassment

CITE AS: Luke v Jemco, Inc., No. 81157 (Mich App March 19, 1986).

Appeal pending: No

Claimant: Mary L. Luke
Employer: Jemco, Inc.
Docket No: B80 11464 R01 84773

COURT OF APPEALS HOLDING: Employees who have voluntarily left their employment for reasons of sexual harassment need not prove they sought to remedy the situation before quitting in order to avoid disqualification.

FACTS: Claimant quit after employer accused her of conspiring and fabricating with other employees. This was the culmination of a series of objectionable actions on employer's part, primarily consisting of degrading, sexually explicit statements directed to claimant. Claimant did not complain to employer about his behavior. When it escalated to an intolerable level, she quit.

DECISION: Claimant was not disqualified for voluntary leaving.

RATIONALE: In cases of sexual harassment, particularly where the employer personally is the source of such harassment, claimants should not bear a burden of proof beyond that of proving that the reasons for leaving constituted good cause attributable to the employer.

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Section 29(1)(a)

VOLUNTARY LEAVING, Return to same work, Sexual harassment

CITE AS: Reeves v Mike's Famous Ham Place, No. 77532 (Mich App July 5, 1985).

Appeal pending: No

Claimant: Sharon Sue Reeves
Employer: Mike's Famous Ham Place
Docket No: B83 03316 89615W

COURT OF APPEALS HOLDING: When a claimant over the course of several years leaves and then returns to the employer's employ on a number of occasions under the exact same conditions, the claimant's own actions evidence the fact conditions were not such that any reasonable person in the claimant's position would feel compelled to leave.

FACTS: The claimant had worked as a waitress in the employer's restaurant. Over the course of a number of years the claimant had left the work place only to return at a later date under the same conditions. The claimant's final leaving was prompted by a critical assessment of her work by the employer. However, when the claimant applied for benefits she insisted that a pervasive pattern of sexual harassment had existed in the work place and provided her with a good cause for her voluntary leaving.

It should be noted that on each occasion that the claimant returned to the work place she left other gainful employment to do so.

DECISION: The claimant was disqualified for benefits under the voluntary leaving provision of the MES Act, Section 29(1)(a).

RATIONALE: By freely choosing to return to the work place with a full understanding of the conditions present the claimant by her own behavior evidenced that the situation was not harassing and therefore not all reasonable persons in her position would have felt compelled to leave.

Section 29(1)(a)

VOLUNTARY LEAVING, Abandonment of employment, Leaving without authorization, Notice of leaving, Withdrawal of resignation

CITE AS: McGee v Jervis B. Webb, Co., No. 80-004405 AE, Wayne Circuit Court (June 4, 1980).

Appeal pending: No

Claimant: James McGee
Employer: Jervis B. Webb Co.
Docket No: B78 54246 61954

CIRCUIT COURT HOLDING: An employee " ... does not have a unilateral right to rescind his resignation at will."

FACTS: The claimant told his employer he was quitting his job. He then left work without authorization. "It is undisputed that later in the day the appellant thought better of his decision to walk of the job in a huff and attempted to revoke his resignation. His employer, however, would not concur."

DECISION: The claimant is disqualified for voluntary leaving.

RATIONALE: "Based upon the authorities called to my attention, the decision involving facts most closely analogous to the facts in this case is the decision of the Michigan Supreme Court in Jenkins v Employment Security Commission, 364 Michigan 379 (1961). In Jenkins, the Michigan Supreme Court held that the employee had left work voluntarily without good cause attributable to the employer."

"It would seem to this Court that, once an employee manifests the intention to his employer to quit permanently, that the employer has a right to accept such manifestation at face value. It seems to this Court to be both fair and logical to conclude that the employee does not have a unilateral right to rescind his resignation at will."

Section 29(1)(a)

VOLUNTARY LEAVING, Domestic problems

CITE AS: Rutherford v Payan, No. 87265 (Mich App July 15, 1986).

Appeal pending: No

Claimant: Barbara R. Rutherford
Employer: Ardeshir Mofahkam Payan
Docket No: B82 18102 91682W

COURT OF APPEALS HOLDING: Personal problems which result from reasonable and ordinary work requirements will not support a finding of good cause attributable to the employer.

FACTS: The time demands of the claimant's employment were such that they caused her spouse to become suspicious that the claimant was having an affair with her employer. As a result the claimant's husband became angry and resentful. The husband eventually demanded that the claimant leave her employment and she did so.

DECISION: The claimant is disqualified for benefits under the voluntary leaving provision of the MES Act, Section 29(1)(a).

RATIONALE: While the claimant had marital and domestic problems which resulted from demands of her job it cannot be said that the claimant's personal problems were directly attributable to the employer. Rather, it would seem as if any employment would have caused the same difficulties and therefore there was no distinct connection between the claimant's personal problems and her work. Further, even if there had been, it is questionable whether personal problems which are not directly incident of work place responsibilities can form a basis for a finding of good cause.

Section 29(1)(a)

VOLUNTARY LEAVING, Good cause, Personal work quality standards

CITE AS: Ryan v Macomb-Oakland Regional Center, No. 92138 (Mich App May 22, 1987).

Appeal pending: No

Claimant: Michael Ryan
Employer: Macomb-Oakland Regional Center
Docket No: B82 23667 90219

COURT OF APPEALS HOLDING: The employer's failure to meet internal performance standards which were higher than those required by law does not provide a basis for a finding of good cause for voluntarily leaving as it was not established an average, reasonable claimant would be compelled to leave work under such circumstances.

FACTS: The claimant was employed as an assistant program director for the Macomb-Oakland County Regional Center and was responsible for developing and implementing programs for the center's severely retarded residents. The claimant voluntarily left his position. He resigned because he felt that the residents were receiving inadequate care. The claimant did not assert that the employer's standards were below those required by the State and there was no evidence in the record to indicate the situation was such. Rather, the claimant attempted to show that the employer violated its own standard of providing habilitative, social, recreational and educational services to promote the individual growth of the residents.

DECISION: The claimant was disqualified for benefits under the voluntary leaving provision of the MES Act, Section 29(1)(a).

RATIONALE: While the claimant may have felt that the employer could have done a better job providing services there was nothing in the record to indicate the services actually rendered were in any way substandard. Consequently, the claimant was without good cause for his leaving and therefore was disqualified for benefits.

Section 29(1)(a)

VOLUNTARY LEAVING, Health or physical condition, Pregnancy

CITE AS: Watson v Murdock's Food and Wet Goods, 148 Mich App 802 (1986).

Appeal pending: No

Claimant: Michelle Watson
Employer: Murdock's Food and Wet Goods
Docket No: B83 13107 92389W

COURT OF APPEALS HOLDING: A separation due to a disabling medical condition attributable only to a claimant's circumstances is a voluntary leaving without good cause attributable to the employer.

FACTS: Claimant, a waitress, became pregnant and was diagnosed as suffering from a separation of the pubic bone. Her physician restricted her from work involving lifting or bending. When she presented the restrictions to the employer, he read the note and walked away and the claimant left. She assumed he understood she could no longer work. She had no intention of returning after giving birth.

DECISION: The claimant is disqualified.

RATIONALE: The court stated the MES Act "was intended to provide relief to those persons 'able and available' to perform work but who are prevented from doing so by economic forces beyond their control" and "not intended to provide a form of mandatory health or disability insurance at the expense of the employers who fund the system." The court interpreted the statutory term "voluntary" as follows:

"The question presented here can be posed more specifically as whether Section 29(1)(a) is applicable, i.e., has plaintiff 'left work voluntarily without good cause attributable to the employer. ...' Obviously, the word 'voluntary', taken alone, is capable of two meanings under these facts. In a sense, plaintiff's separation from employment was involuntary since she did not choose to suffer from a medical condition which requires that she avoid the bending and lifting required in her job. On the other hand, the absence can be construed as a voluntary and wise decision based upon the advice of her doctor. The question, then, is which meaning was intended by the Legislature. We believe that the answer can be derived from the modifying phrase "without good cause attributable to the employer.' In the case before us, it certainly cannot be denied that plaintiff left with good cause. Her own health and that of her baby were at stake. Thus, if the modifying phrase did not include the portion emphasized above, Section 29(1)(a) would be clearly inapplicable. However, when the emphasized portion is included, it becomes clear that plaintiff was intended to be disqualified by this section. Although her termination was for good cause, it can be attributed only to her own circumstances, and not to her employer."

Section 29(1)(a)

VOLUNTARY LEAVING, Burden of proof, Discharge, Hearsay

CITE AS: Ilitch v City of Livonia, No. 84-407788 AE, Wayne Circuit Court (July 3, 1984).

Appeal pending: No

Claimant: Joanne M. Ilitch
Employer: City of Livonia
Docket No: B82 07871 RO1 84138

CIRCUIT COURT HOLDING: Where an employee concludes on the basis of subjective convictions that the employment is terminated and leaves, the separation is disqualifying.

FACTS: The claimant was employed as a home delivery meals coordinator under a contract of employment that was to expire September 30, 1981. On September 23, 1981, claimant was called into the office of Mr. Duggan and advised that her contract would not be renewed. Because of some past experience with Mr. Duggan, claimant interpreted this interview as an immediate discharge and left the job site. The claimant, in fact, alleged that she was discharged. The employer testified that claimant quit her employment and that claimant was never told that her employment was terminated on September 23, 1981.

DECISION: The claimant is disqualified for voluntary leaving.

RATIONALE: "It can only be construed to be a perfectly reasonable approach on the part of a supervisor to call in a contract employee at a time when the term of the contract will soon be expiring and discuss with her the status of the program. On the other hand, it is entirely unreasonable for a contract employee, who has but one week left in the term of the contract under which she is working, to enter such a meeting and, without receiving any objective indication of immediate termination of her employment, to conclude entirely on the basis of her subjective convictions, that her employment was then and there being terminated. If ever there was competent, material and substantial evidence of simply 'walking off the job,' i.e., voluntary quit, the entire record in this case establishes that type of employment termination.

"Claimant had the burden of proof to show that she was not disqualified from benefits and ... she failed to meet that burden of proof."

Section 29(1)(a)

VOLUNTARY LEAVING, Good cause, Seven day work week

CITE AS: Hansen v Fox Haus Motor Lodge No. 84-402-940 AE, Wayne Circuit Court (August 21, 1984)

Appeal pending: No

Claimant: Jean Hansen
Employer: Fox Haus Motor Lodge
Docket No: B83 10869 91613W

CIRCUIT COURT HOLDING: Good cause attributable to the employer was shown for voluntary leaving where the record was barren of any standard of employment in the motel/inn industry or business.

FACTS: Claimant worked six days a week during the first eleven months of employment; but then she was required to work seven days per week, as well as on call at night, and without any vacation, except Christmas day.

DECISION: Claimant is not disqualified for voluntary leaving.

RATIONALE: "The record is barren of any standard of employment in the motel/inn industry or business. Absent extraordinary reasons for respondent to operate in such a fashion, the court finds this testimony appalling. Respondent's requirement to have claimant perform the listed duties on a daily basis -- except perhaps on a slow Christmas day -- is tantamount to twentieth century slavery."

Section 29(1)(a)

VOLUNTARY LEAVING, Buyout program, Alternatives

CITE AS: Coleman v MESC, No. 117120 (Mich App March 21, 1990).

Appeal pending: No

Claimant: William N. Coleman
Employer: General Motors
Docket No: B87 02913 105830

COURT OF APPEALS HOLDING: Where a claimant who is given a choice among reasonable alternatives decides to accept a "buy-out" he is subject to disqualification for voluntary leaving.

FACTS: Claimant began working for the employer in 1978 at a GM warehouse near his home. In 1986, GM announced it was closing this warehouse at the end of the year. GM tried to relocate the employees, and offered to pay relocation expenses for employees relocating more than 35 miles from home. Claimant was given three options (1) to accept a transfer to the GM Tech Center approximately 50 miles away; (2) a lay-off with benefits for one year; (3) a buy-out of approximately $50,000.00. Claimant chose the buy-out.

DECISION: Claimant is disqualified for voluntary leaving.

RATIONALE: "The board found that if plaintiff would have accepted the job at the Warren technical center his seniority and pay would not have been affected. While the location was further from plaintiff's home, plaintiff's reason for not accepting the job was the lack of job security. The board concluded that plaintiff has as much security as any other employee and, therefore, plaintiff was presented with a choice between accepting a job and signing the special incentive separation agreement. Hence, plaintiff had a choice of reasonable alternatives and chose to quit without good cause attributable to his employer. ... We agree with the board's decision that plaintiff's options presented reasonable alternatives and, therefore, made plaintiff's decision to quit a voluntary one."

Section 29(1)(a)

VOLUNTARY LEAVING, Corroborated testimony, Good cause, Pattern of conduct, Self-serving testimony, Shortened hours

CITE AS: Leonard v Dimitri's Restaurant, No. 84-1550 AE Macomb Circuit Court (October 25, 1984).

Appeal pending: No

Claimant: Rosemary Leonard
Employer: Dimitri's Restaurant
Docket No: B81 16355 83802

CIRCUIT COURT HOLDING: The testimony reveals a believable pattern of sexual harassment and conduct unacceptable in the employer-employee relationship.

FACTS: Claimant quit after employers fondled her and made suggestive comments to her. The waitresses uniforms were changed to "very brief" uniforms. Claimant's hours were cut while the claimant was attending her boyfriend who was terminally ill. The hours were not restored. Moreover, claimant was threatened with repercussions if she did not tell her girlfriend not to return to the restaurant. The incidents of sexual harassment were corroborated by other waitresses who had worked for the employers. The employers denied actively taking part in any of the incidents and related that the claimant harassed them.

DECISION: Claimant is not disqualified for voluntary leaving.

RATIONALE: The totality of the circumstances ... including the sexual improprieties, the threatening talk with regard to her friend's conduct, the cutting of her hours ... constituted good cause attributable to the employer. The employer's testimony lacked credibility and/or credible corroboration.

Section 29(1)(a)

VOLUNTARY LEAVING, Alternatives, Overtime, Pay reduction, Personal reasons for leaving

CITE AS: Chmielewski v General Dynamics, No. E834-00-606 AE, Kalamazoo Circuit Court, (January 2, 1985).

Appeal pending: No

Claimant: Anthony Chmielewski
Employer: General Dynamics
Docket No: B83 06554 90342W

CIRCUIT COURT HOLDING: The claimant's decision to quit was based on economic considerations and was voluntary.

FACTS: The employer cut down on claimant's overtime. Claimant decided to quit because: (1) his wife had suffered a heart attack and her physician lived in Kalamazoo; (2) claimant desired to use his wife's health insurance; (3) claimant's reduced pay made the cost of living away from Portage too prohibitive.

DECISION: Claimant is disqualified for voluntary leaving.

RATIONALE: "Basic purpose of the Michigan Employment Security Act is to provide relief to the unemployed worker and his family from the burden of unemployment ... " The claimant had a real choice - to move his family to Detroit as he had planned before his wife's heart attack and the cut in overtime - or to quit.

Section 29(1)(a)

VOLUNTARY LEAVING, Alternatives, College student, Overtime

CITE AS: Toner v Physician's Bookkeeper, Inc., No. 75551 (Mich App January 15, 1985).

Appeal pending: No

Claimant: Debbie Toner
Employer: Physician's Bookkeeper, Inc.
Docket No: B81 11228 69170

COURT OF APPEALS HOLDING: Substantial evidence supports the conclusion that plaintiff quit her job.

FACTS: Plaintiff, a full-time student, was asked to work eight hours of overtime, along with the other employees, because of a temporary backlog of work. Plaintiff tried several alternatives in attempting to work the overtime hours, but could not avoid a conflict with her school work. The plaintiff told the employer she believed she would have to quit work. The employer asked whether she wanted to give her notice at that time or wait until the second semester. Plaintiff elected to give notice at that time.

DECISION: Claimant is disqualified for voluntary leaving.

RATIONALE: "The Board's decision turned on resolution of an evidentiary conflict, namely whether plaintiff quit her job or whether she was dismissed. The manager testified that plaintiff quit. Plaintiff admitted experiencing difficulty in reconciling her work hours with her college class schedule. The employer tried to accommodate the needs of the employee. This is not an instance in which the employer coerced the claimant to abandon employment by leaving her with no tenable alternative."

Section 29(1)(a)

VOLUNTARY LEAVING, Abuse of discretion, Adjournment of hearing, Discharge, Due process, Resignation

CITE AS: Rosewarne, d/b/a/ Crossroads Imports v Dyktor, No. 82-28690 AE, Ingham Circuit Court (February 26, 1985).

Appeal pending: No

Claimant: Denise R. Dyktor
Employer: Mary Anne Rosewarne, d/b/a Crossroads Imports
Docket No: B81 01118 76258

CIRCUIT COURT HOLDING: (1) An employee who gives notice of an intent to quit should not be penalized with a loss of wages by termination prior to the intended date of separation. (2) Since claimant was the party seeking review and the one unemployed, it was not an abuse of discretion to deny the employer's request for an adjournment.

FACTS: The employer discharged claimant in anticipation of the claimant's projected departure.

DECISION: Claimant is not disqualified for voluntary leaving.

RATIONALE: The court, agreeing with Miller v Visiting Nurses Association, 1978 BR 54326, stated that notice of an employee's intention to quit is a benefit to the employer. Thus, it makes no sense to discourage this practice by allowing the employer the prerogative of deciding the employee's last date. "This court is merely acknowledging notions of fundamental fairness ... The giving of notice ... is appropriate behavior by an employee. Such behavior should not be penalized with a loss of expected wages."

Section 29(1)(a)

VOLUNTARY LEAVING, Alternatives, Shift change, Discharge

CITE AS: Davidson v Globe Security Systems, No. 82-10158 AW Monroe Circuit Court (January 25, 1985).

Appeal pending: No

Claimant: Dennis Davidson
Employer: Globe Security Systems
Docket No: B81 02428 76380

CIRCUIT COURT HOLDING: Claimant was laid off when the employer unreasonably deprived claimant of work.

FACTS: The employer decided to eliminate the day shift of guards and to continue the afternoon and night shifts. The seniority of some day guards entitled them to bump a corresponding number of afternoon and night guards. Claimant could not immediately answer when he was asked whether he wanted afternoon or night shift, and replied that he wanted time to think. The employer treated this response as a quit.

DECISION: Claimant is not disqualified for voluntary leaving.

RATIONALE: "The employer gave the claimant a right to choose. The effect on a person's lifestyle in choosing one shift as opposed to the other could and probably would be very great. The employer reasonably had three options: to make an immediate assignment to either shift; to fix time for the employee to consider; to tell the employee he must make an immediate choice or be deemed to have quit. The employer followed none of these options, but opted unreasonably to deprive the employee of any work."

Section 29(1)(a)

VOLUNTARY LEAVING, Ill spouse, Personal reasons

CITE AS: Leeseberg v Smith-Jamieson Nursing, Inc., 149 Mich App 463 (1986).

Appeal pending: No

Claimant: Judy Leeseberg
Employer: Smith-Jamieson Nursing, Inc.
Docket No: B83 20309 94897

COURT OF APPEALS HOLDING: An employee is subject to disqualification for voluntary leaving when she deliberately fails to report to work for compelling personal reasons with foreknowledge her employment might end if she fails to report.

FACTS: Claimant's husband sustained serious injuries in an accident. Claimant twice phoned her employer to inform them she desired to remain home to care for him. She requested an indefinite leave of absence but the request was denied. She was told her position could not be held open and a replacement would be hired.

DECISION: Claimant is disqualified for voluntary leaving.

RATIONALE: "'Voluntary' connotes a choice between reasonable alternatives, Lyons v E.S.C., 363 Mich 201 (1961) ... Plaintiff chose to face termination because she wanted to care from her injured husband. While plaintiff's choice was prompted by compelling personal reasons, a good personal reason does not equate with good cause under the statute."

10.45

Section 29(1)(a)

VOLUNTARY LEAVING, Free training, Offer of full-time work, Part-time work

CITE AS: Skalecki v Anslow, M.D., P.C., No. 85-546 AE, Macomb Circuit Court (September 26, 1985).

Appeal pending: No

Claimant: Jo Ann L. Skalecki
Employer: Richard Anslow, M.D., P.C
Docket No: B83 21682 96585W

CIRCUIT COURT HOLDING: "Claimant cannot be charged with voluntarily terminating her employment without good cause attributable to the employer where she is required to accept new full-time employment for which she is not trained or experienced."

FACTS: Claimant worked for Dr. Anslow on a part-time basis as a medical assistant. Employees performing the functions of transcriber and billing officer left the employment of Dr. Anslow. The claimant was offered the opportunity of working full time as the transcription and insurance processing person. Claimant was unable to type. The employer, at its expense, offered to send claimant to school for stenographic-transcription typing skills. Claimant indicated she was not interested in the training for full-time work.

DECISION: Claimant is not disqualified for voluntary leaving.

RATIONALE: Inasmuch as claimant is not trained or experienced, claimant did not have to accept this position even if free training was offered.

Section 29(1)(a)

VOLUNTARY LEAVING, Early retirement, Contract negotiations

CITE AS: Clark Equipment Co. v Schultz, No. 88079 (Mich App October 15, 1987).

Appeal pending: No

Claimant: John A. Schultz
Employer: Clark Equipment Co.
Docket No: B83 15815 93709W

COURT OF APPEALS HOLDING: Claimants made a choice between reasonable alternatives and are disqualified for voluntary leaving where they retired early to take advantage of a retirement program in an existing contract rather than risk a change of benefits resulting from contract negotiations.

FACTS: The involved claimants were eligible for early retirement under an existing collective bargaining agreement scheduled to expire 6-17-83. Because of their seniority they were assured of continued employment. Claimants received information from their union regarding what their pension rights would be after the contract expired. Although the employer "threatened" during negotiations to cancel the pension plan, that "threat" was not conveyed to the claimants, nor were they advised to retire by the union representative. Uncertain about their pension benefits after expiration of the contract, claimants elected to retire effective May 31, 1983.

DECISION: Claimants are disqualified for voluntary leaving.

RATIONALE: "Voluntariness must connote a decision based upon reasonable alternatives not merely acquiescence to a result imposed by physical and economic facts utterly beyond an individual's control. Lyons v Employment Security Comm, 363 Mich 201, 216; 108 NW2d 849 (1961); Laya, supra, 32. Here, claimants were not faced with economic pressures which created untenable alternatives. Cf., Larson v Employment Security Commission, 2 Mich App 540; 140 NW2d 777 (1966); Laya, supra. Rather, they had a choice between retiring and taking the substantial pension benefits already negotiated or postponing retirement and taking their chances on newly negotiated pension benefits which might be more or less favorable."

10.47

Section 29(1)(a)

VOLUNTARY LEAVING, Good Cause, Co-worker behavior, Profanity

CITE AS: Smith v Andrews on the Corner, No. 94071 (Mich App July 22, 1987).

Appeal pending: No

Claimant: Ollie Smith
Employer: Andrews on the Corner
Docket No: B85 02586 99533W

COURT OF APPEALS HOLDING: Claimant quit work without good cause attributable to the employer where she quit without notice because of a co-worker's profanity and anger and refused to continue work despite the employer's offer to change the co-worker's schedule.

FACTS: Claimant was employed as a part time cook for two years. Throughout that period she experienced frustration with the full time co-worker who was in charge of the kitchen. Claimant was upset by the co-worker's frequent profanity and angry moods. The employer attempted to intervene on occasion, without success. Only the claimant had difficulty with the co-worker. Eventually the claimant quit without notice. She refused to return to work despite an offer from the employer to change the co-worker's schedule.

DECISION: Claimant is disqualified for voluntary leaving.

RATIONALE: "In this case, we have no difficulty in concluding that claimant's disqualification is amply supported by competent, material and substantial evidence on the record. Despite the Biblical injunction to 'swear not at all,' we are not unmindful that, as observed by Mark Twain, 'In certain trying circumstances, urgent circumstances, desperate circumstances, profanity furnishes a relief denied even to prayer.' ... In our estimation, claimant's precipitous and unannounced termination from employment was not a reasonable reaction to her workplace discomfiture. Clearly, the employer was amenable to implementing scheduling changes in order to accommodate claimant's wounded sensibilities. ... [W]e believe reasonable efforts were made to eliminate the periodic conflicts between the employees. ... The employer was yielding, while claimant was inflexible; we feel that under the circumstances in this case, this inflexibility was unreasonable."

Section 29(1)(a)

VOLUNTARY LEAVING, Discharge or leaving, Prerequisite of employment, State licensing requirement

CITE AS: Clarke v North Detroit General Hospital, 437 Mich 280 (1991).

Appeal pending: No

Claimants: Edna T. Clarke; Toni R. Dawson
Employers: North Detroit General Hospital; Detroit Receiving Hospital
Docket Nos: B85 06161 100961; B85 06779 100382W

SUPREME COURT HOLDING: The claimants did not leave work voluntarily when they were discharged after failing the nursing board licensing examination.

FACTS: Both claimants were graduates of college-based nursing programs. Following their graduations they obtained temporary state nursing licenses as required by statute which permitted them to work as graduate nurses. In order to obtain a permanent license as a registered nurse, both were required to take and pass the state licensing exam. Both took the exam. Both failed. As a result they both lost their temporary licenses and employment as graduate nurses, consistent with the policies of their employing hospitals. Neither quit nor willingly resigned.

DECISION: The claimants are not disqualified from receiving unemployment compensation benefits.

RATIONALE: The claimants did not voluntarily leave their employment. Rather, they were discharged by the employers after failing the licensing examination. The employers did not allege misconduct, negligence or illegal acts and there was no evidence that either claimant was negligent in preparing for or taking the examinations. Fault cannot be ascribed to the claimants merely because they failed the examination.

6/91
6, 15, d11:E
3, 6, d9:NA

10.49

Section 29(1)(a)

VOLUNTARY LEAVING, Loss of license, Driver's license, Prerequisite of employment

CITE AS: Echols v MESC, 380 Mich 87 (1968).

Appeal pending: No

Claimant: Bruce Echols
Employer: John Kraus, d.b.a. Checker Cab
Docket No: B63 5770 31807

SUPREME COURT HOLDING: "[T]he loss of a claimant's prerequisites from continued employment, especially through his own negligence is a voluntary leaving without good cause attributable to the employer . ... [T]he claimant lost his operator's license through no fault of the employer and it is our opinion that his leaving was not constructive but purely a voluntary leaving and he should be disqualified."

FACTS: Claimant was a taxicab driver. His driver's license was suspended for 90 days as the result of the accumulation of 12 points or more. Claimant therefore was unable to work as a taxicab driver. Claimant was not discharged by his employer. The employer indicated at the Referee hearing that claimant could return to work as soon as he had his license restored.

DECISION: Claimant is disqualified for voluntarily leaving his employment without good cause attributable to the employer.

RATIONALE: "The employee because of his negligent operation of an automobile was unable to obtain a license from the Secretary of State's office, and it was incumbent upon him to have a license to be employed." "... to put a stamp of approval on unemployment benefits for a man who had been violating the law and say a man who violates the law and lost his license as a result of his negligence, should be paid unemployment benefits, ... goes far and beyond what the intention of the unemployment compensation act was." (Quoting with approval from the decisions of the Appeal Board and the Wayne County Circuit Court.)

Section 29(1)(a)

VOLUNTARY LEAVING, Voluntariness

CITE AS: Larson v MESC, 2 Mich App 540 (1966).

Appeal pending: No

Claimant: Paul A. Larson
Employer: Campbell, Wyant & Cannon Foundry
Docket No: UCX63 3742 31606

COURT OF APPEALS HOLDING: "Claimant was forced to cease working because of his work connected injury. His signature on the combined resignation and settlement represents the act of a necessitous man faced with only one tenable alternative. This is not the 'voluntary' termination of employment contemplated by the statute.

FACTS: Claimant suffered a work related back injury which caused him to stop working on April 3, 1963. His doctor authorized him to perform light work but the employer had no such work available. On May 17, 1963 claimant signed an agreement to resign and waive his seniority with the employer in exchange for the redemption of his Worker's Compensation claim in the amount of $1142.

DECISION: Claimant is not disqualified.

RATIONALE: "We do not deny that the claimant undoubtedly knew what he was doing when he signed this instrument, but it is another thing to say that he had a tenable alternative. Signing a settlement agreement under the circumstances in which Paul A. Larson found himself does not equate with leaving work voluntarily."

"One spectre looms throughout this entire transaction: economic straits. The Employment Security Act was intended to protect just such a person as claimant from the subtly coercive effects of economic pressure, and to prevent just such a consequence as we have here."

Section 29(1)(a)

VOLUNTARY LEAVING, Out-of-state employment, Voluntariness, Personal reasons

CITE AS: Lyons v MESC, 363 Mich 201 (1961).

Appeal pending: No

Claimant: Charles Lyons
Employer: Chrysler Corporation
Docket No: B57 5079 20232

SUPREME COURT HOLDING: Section 29(1)(a) is applicable to separations from work outside of Michigan. The finding that claimant left work voluntarily without good cause attributable to the employer was supported by the evidence.

FACTS: The claimant was laid off from one of the employer's Michigan plants. After receiving a few weeks of unemployment benefits, he accepted work at the employer's Indiana plant, 273 miles from home. The car he relied on broke down, the friend with whom he planned to commute quit, he did not receive expected overtime, and he learned his minor son had left home. He resigned the Indiana employment to return to Michigan. He was denied further benefits as his leaving was voluntary without good cause attributable to the employer.

DECISION: The claimant is disqualified for voluntary leaving.

RATIONALE: The application of Section 29(1)(a) to separations from work outside of Michigan is consistent with the language of that Section as well as those parts of the Act which provide for reciprocal agreements between states for one state to pay accrued benefits to an employee after he has moved to another state and become unemployed. A contrary interpretation would impose more stringent standards on employees working wholly in Michigan than those whose employment takes them outside the state.

The justices split on the question of the voluntariness of the leaving. Three justices stated the leaving was for wholly personal reasons and, as a matter of law, was voluntary and without good cause attributable to the employer. Two justices agreed with the disqualification but viewed the issue of voluntariness as one of fact which had been decided against the claimant on the basis of evidence which supported the finding. Three justices, in an opinion by Justice Edwards, concluded that, as a matter law, the leaving was involuntary. (See Laya v Cebar Construction Company, 101 Mich App 26 (1980), Digest page 10.05. Therein, the court adopted Justice Edwards' standard for determining the voluntariness of a separation.)

VOLUNTARY LEAVING, Constructive

CITE AS: Miller v Soo Coin Wholesale Vending Co, No. 78-12255-AE, Muskegon Circuit Court (July 6, 1979).

Appeal pending: No

Claimant: Roxanne Miller
Employer: Soo Coin Wholesale Vending Company
Docket No: B76 17106 RO 54539

CIRCUIT COURT HOLDING: Claimant was terminated. Therefore her leaving cannot be described as voluntary.

FACTS: After missing several days of work, claimant was told that she would have to be replaced. She was told that she could return to train her replacement and help catch up on other work, but she did not return.

DECISION: Claimant is not disqualified.

RATIONALE: To characterize claimant's termination as a voluntary quit is akin to "constructive voluntary leaving" which has been rejected and criticized by the Michigan Supreme Court. Wickey v Michigan Employment Security Commission 369 Mich 487 (1959). "'Claimant did not quit but was, in fact, discharged because of her absences from work. The fact that claimant could have trained her replacement does not convert claimant's termination into a voluntary leaving ...'" (Quoting dissenting opinion of Board of Review Member).

Section 29(1)(a)

VOLUNTARY LEAVING, Health or physical condition

CITE AS: Wynne (Michigan Department of Social Services), 1988 BR 103153W (B86-07148).

Appeal pending: No

Claimant: Ruth M. Wynne
Employer: Michigan Department of Social Services
Docket No: B86 07148 103153W

BOARD OF REVIEW HOLDING: A leaving due to established illness which is at the direction of a physician is involuntary and does not subject the claimant to disqualification under Section 29(1)(a).

FACTS: The claimant found her work stressful and suffered from hypertension, tension headaches and colitis. She unsuccessfully sought a transfer. She left her employment on the advice of her doctor.

DECISION: The claimant's leaving was involuntary and therefore not disqualifying under Section 29(1)(a). Decided by entire Board.

RATIONALE: The majority analyzed the construction of Section 29(1)(a) as well as former decisions dealing with involuntary leaving, i.e. Lyons v ESC, 303 Mich 201 (1961), Larson v ESC, 2 Mich App 540 (1966), and Laya v Cebar Construction, 101 Mich App 26 (1980). It concluded the Referee's application of Watson v Murdock's Food and Wet Goods, 148 Mich App 802 (1989) was erroneous as the claimant's leaving, due to illness and at the direction of her physician, was involuntary.

A minority of the Board noted Watson was distinct precedent on Section 29(1)(a) and concluded in order for a separation, voluntary or involuntary, to be non-disqualifying, the separation must be with good cause attributable to the employer. But, a claimant who leaves work for health reasons may avoid disqualification if it is established (1) the medical problem arose out of the work environment, (2) the claimant approached the employer to alleviate the condition causing the problem, or to find a way of retaining employment despite the problem, (3) the employer created the condition or, having knowledge of the condition, was unable or unwilling to alleviate it or to provide alternative employment and, (4) the claimant was still able to perform work within the medical restriction if the conditions in the work environment causing or aggravating the medical problem were abated.

These Members concluded the claimant's separation was with good cause attributable to the employer and not disqualifying.

Section 29(1)(a), 29 (1)(b)

VOLUNTARY LEAVING, Discharge or voluntary leaving, Notice of intent to quit

CITE AS: Kmiec v Ole Tacos, No. 78-4545-AV, Ottawa Circuit Court (August 22, 1979).

Appeal pending: No

Claimant: Charles M. Kmiec
Employer: Ole Tacos
Docket No: B77 2254 56841

CIRCUIT COURT HOLDING: To determine whether a termination is a leaving or a discharge, the total facts of the matter must be assessed to determine the "proximate cause" of the termination.

FACTS: Claimant notified the employer that he was unhappy in his job and would give the employer two weeks notice of intent to quit when he had obtained another job. The employer notified the claimant he should set a definite separation date. After the claimant and employer discussed the matter, they agreed upon the date that claimant would end his employment.

DECISION: Claimant is disqualified for benefits pursuant to Section 29(1)(a) of the Act.

RATIONALE: "Our reading of the Referee's opinion leads us to conclude that the Referee extended his consideration of facts and circumstances to those events occurring after claimant's original notice to his employer that he intended to quit at some undetermined date in the future, and prior to the actual separation. ... The Referee recognized that he was obliged to determine whether or not claimant was "primarily responsible" for his unemployment. We believe that such language is substantially synonymous with "proximate cause", and that it goes beyond one who merely introduces the topic of a possible future separation."

Section 29(1)(a)

VOLUNTARY LEAVING, Good cause, Union contract, Wage concessions

CITE AS: Warblow v Kroger Co, 156 Mich App 316 (1986).

Appeal pending: No

Claimant: Jeffrey J. Warblow
Employer: The Kroger Company
Docket No: B85 01356 RO1 99512W

COURT OF APPEALS HOLDING: "Good cause attributable to the employer is not established where an employee quits due to a majority of his union agreeing to accept wage concessions, presumably in return for retaining jobs for its members."

FACTS: Claimant worked for Kroger for approximately 9 years until April 1984 when he took a medical leave of absence. While he was on leave, claimant's union negotiated a new contract with the employer which called for various concessions including a reduction in wages. When claimant was certified as being able to return to work he notified the employer he was quitting because of the contract concessions.

DECISION: Claimant is disqualified for voluntarily leaving his employment without good cause attributable to the employer.

RATIONALE: "In the instant case, plaintiff [claimant] was bound as a member of the union, by the terms of the collective bargaining agreement. He knew that the union was authorized to make decisions which were binding on all of its members. Plaintiff was constrained to accept the burdens as well as the benefits of such membership."

VOLUNTARY LEAVING, Good cause, Religious beliefs, Abortion

CITE AS: Meyers v Northwest OB-GYN Assoc., P.C., No. 84-281749-AE, Oakland Circuit Court (July 22, 1986).

Appeal pending: No

Claimant: Patricia D. Meyers
Employer: Northwest OB-GYN Assoc., P.C.
Docket No: B83 17579 93897W

CIRCUIT COURT HOLDING: Claimant did not establish good cause for voluntary leaving where she objected to the employer's practice of performing abortions because of her religious beliefs, but continued to work for a year, and the employer attempted to accommodate her beliefs.

FACTS: Claimant was employed as a medical assistant. At the time of hire abortions were performed at another employer location and claimant expressed a willingness to assist. By the time that procedure was started at claimant's work location she had experienced a change in religious committment, and when asked if she would assist, she declined for religious reasons. In order to avoid conflicts with claimant's beliefs the employer attempted to work around the situation. Those efforts included bringing in another employee on an ad hoc basis to assist, as well as adjusting patient schedules and other staff schedules. On three occasions claimant did assist with abortions when no one else was available. After a year of this arrangement the claimant apprised the employer the situation was "not working out". A separation followed, though the parties disputed how the departure date was determined.

DECISION: Claimant is disqualified for voluntary leaving.

RATIONALE: The circuit court affirmed a split (5-2) decision by the full Board of Review. The court found the employer could employ the claimant in a way that did not conflict with her religious beliefs and in fact took "extreme measures" including adjustment of employee schedules to accommodate those beliefs. Claimant worked for a year under those circumstances and, in light of the disputed separation date, was willing to work longer. As a result the court concluded claimant's "religious beliefs were not in such conflict with her employment duties that she was forced to resign."

10.57

Section 29(1)(a)

VOLUNTARY LEAVING, Withdrawal of resignation

CITE AS: Schultz v Oakland County, No. 113057 (Mich App January 22, 1991).

Appeal pending: No

Claimant: Arthur Schultz
Employer: Oakland County
Docket No: B87 06344 106226W

COURT OF APPEALS HOLDING: An unconditional resignation by an employee is effective immediately and if without good cause attributable to the employer, is disqualifying, notwithstanding an attempt to rescind the resignation prior to the last day of employment.

FACTS: Claimant was an Oakland County sheriff's deputy. Because of stress claimant was on a medical leave of absence scheduled to end December 8, 1986. On November 24, 1986 he had submitted a letter of resignation to the employer stating that he intended to change his career. Two days later he sought to withdraw the resignation letter, but to employer refused to allow him to do so. Claimant applied for unemployment benefits in April, 1987 but was denied. On appeal the claimant argued that his resignation was involuntary because he had not been allowed to withdraw it.

DECISION: Claimant was disqualified pursuant to Section 29(1)(a) of the Act.

RATIONALE: "Even in the light of the remedial purpose of the Michigan Employment Security Act, the majority of jurisdictions, with which we align ourselves, appear to deem the resignation of an employee, which is unconditional in its terms, immediately effective for unemployment compensation purposes, a voluntary leaving of the employment without good cause attributable to the employer and, thus, an act which renders the employee ineligible for unemployment benefits. This is so notwithstanding a subsequent attempt to rescind the notice of resignation prior to the actual last day of employment...."

Section 29(1)(a)

VOLUNTARY LEAVING, Voluntariness, Good cause attributable to the employer

CITE AS: DCA Food Industries, Inc. v Karr, No. 81665 (Mich App January 24, 1986).

Appeal pending: No

Claimant: John L. Karr
Employer: DCA Food Industries, Inc.
Docket No: B81 03019 77378

COURT OF APPEALS HOLDING: "Because of the phrase attributable to the employer, 'good cause' cannot be found for purely personal reasons under Section 29(1)(a)."

FACTS: Claimant worked for the employer and also was a volunteer fire fighter. He reported for work exhausted after fighting a fire and asked his group leader if he could leave work early. Later, claimant and his union representative met with his supervisor and the personnel supervisor. The employer expressed concerns about the fire fighting duties interfering with claimant's work and asked claimant if his job at the fire department was more important. Claimant became angry and expressed an intention to quit. Several times the employer asked him to reconsider. Claimant then signed a "voluntary quit" statement. Later, he requested his job back, but the employer refused to rehire him except as a new employee.

DECISION: The claimant is disqualified for voluntarily leaving his work without good cause attributable to the employer.

RATIONALE: The claimant made a choice between working and not working for the employer. He did not acquiesce in a result beyond his control and therefore his leaving was voluntary. Laya v Cebar Construction Co., 101 Mich App 26 (1980).

The claimant may have believed that the choice presented by the employer was between voluntary fire fighting, on which he placed great importance, and employment. While his leaving may have been for "good cause" for personal reasons, Section 29(1)(a) requires that the "good cause" be attributable to the employer. Dueweke v Morang Drive Greenhouses, 411 Mich 670 (1981) (adopting Judge Levin's dissent in Keith v Chrysler Corp, 41 Mich App 708 (1972).

10.59

Section 29(1)(a)

VOLUNTARY LEAVING, Involuntary, Non-resident alien, Visa expiration

CITE AS: Detroit Receiving Hospital v Arnoldi, No. 90-012313-AE Wayne Circuit Court (December 28, 1990).

Appeal pending: No

Claimant: Eva Arnoldi
Employer: Detroit Receiving Hospital
Docket No: B88 12307 109719W

CIRCUIT COURT HOLDING: Because changes in the U.S. immigration laws were beyond her control, a Canadian alien could not be disqualified for voluntary leaving when she resigned because her visa was not renewed.

FACTS: Claimant is a citizen of Canada. For sixteen years she worked as a registered nurse at Detroit Receiving Hospital. On 1-10-88 she applied to have her visa renewed but was denied because a new law limited the length of time non-resident aliens could work in the U.S. to five years and the claimant had already worked twelve. Unable to work in the U.S. any longer, the claimant resigned. She then filed for unemployment benefits.

DECISION: The claimant did not voluntarily leave her employment therefore was not disqualified for U.I.

RATIONALE: Claimant's resignation was due to changes in the immigration law beyond her control and was therefore involuntary.

10.60

Section 29(1)(a)

VOLUNTARY LEAVING, Reasonable person standard, Spouse as employer, Procedure, Burden of legal argument

CITE AS: Sempliners Formalwear v Leifer, Bay Circuit Court No. 94-3420-AE, February 14, 1995

Appeal pending: No

Claimant: Debra J. Leifer
Employer: Sempliners Formalwear
Docket No. B92-31007-124907W

CIRCUIT COURT HOLDING: Claimant is not subject to disqualification where she left her employment, and the state, to ensure her personal safety from her husband who was also co-owner of the employer.

FACTS: The claimant worked for the employer from February 1990, to February 1992. The claimant was married to the president and part-owner of the employer. The claimant and her husband wintered in their home in Florida. The claimant had the practice of working full-time for the employer out of her Florida home. In spring of 1991, the claimant and her husband returned to Michigan. The claimant's husband became threatening towards her and other employees. The employer took steps to remove the claimant's husband from his office and to prohibit him from entering the business. The claimant informed the employer she planned on staying in Florida permanently because she feared for her safety and wanted to avoid her husband. Her husband hit her at work, threatened her, closed their joint checking account, changed the locks on their Michigan residence, and confiscated her car.

DECISION: The claimant is not disqualified for benefits.

RATIONALE: This matter is an "unusual and unique case in that the claimant's employer is her husband." This unique relationship resulted in the employer, through the claimant's husband, exerting an inordinate amount of control over the claimant's professional and personal life. The claimant had the practice of staying in Florida during the winter months and working out of her Florida home. The claimant did not intend to resign but informed the employer she intended to work from Florida as was her practice. The employer did not notify the claimant that she would compromise her employment by remaining in Florida.

It is the duty and responsibility of a party, not the court, to search for and uncover legal authority in support of the party's argument.

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12, 17, d24: H

Section 29(1)(a)

VOLUNTARY LEAVING, Quit in anticipation of layoff

CITE AS: City of Three Rivers v Baker, St. Joseph Circuit Court No. 97-1128 AE (June 10, 1998).

Appeal pending: No

Claimant: William Baker
Employer: City of Three Rivers
Docket No. B96-01929-R01-140906W

CIRCUIT COURT HOLDING: If an individual leaves work in order to avoid a layoff the leaving is voluntary but with good cause attributable to the employer.

FACTS: The claimant was employed as a captain in the employer's fire department. In March 1995, the employer announced it would be downsizing and as a result the claimant would be laid off as of August. Recognizing that his wife's salary would not be enough to support their family once he was laid off, claimant and his wife both began looking for other employment. The wife found and accepted another position out of state at a significantly better rate of pay. Thereafter, claimant was notified the layoffs would no longer be necessary and he could continue working. By that point, claimant had relocated his family and disposed of his assets in Michigan. Therefore, claimant gave written notice of his resignation and left his employment two weeks later.

DECISION: The claimant was not disqualified for benefits for voluntary leaving.

RATIONALE: When an employer notifies an employee that the employee will be laid off at a designated future date, that employee must take that notice as a recommendation from the employer that he begin a search for new employment. Although claimant was later notified circumstances had changed and he could continue his employment, at that juncture claimant had no reasonable choice but to move to be with his family. It is not reasonable for a claimant to choose to remain employed, in an insecure job that had just threatened him with layoff, at the cost of his family.

7/99
21, 12: H

Section 29(1)(a)

VOLUNTARY LEAVING, Good cause, Shift rotation

CITE AS: Mapes v Alreco Metals, Inc., Berrien Circuit Court No. 86-1287-AE-H (August, 1989)

Appeal pending: No

Claimant: John W. Mapes
Employer: Alreco Metals, Inc.
Docket No. B85-04697-99955

CIRCUIT COURT HOLDING: A rotating work shift arrangement may constitute good cause attributable to the employer

FACTS: When hired, claimant was told he could expect to work one "swing shift" every 13 weeks. Shortly afterwards his union entered into a new contract whereby the employer could establish a "grasshopper shift". Claimant was placed on the "grasshopper shift." As a consequence, he was required to rotate among the three shifts every two to three days. During a twenty-eight day cycle claimant experienced nine shift changes.

Claimant completed three twenty-eight day cycles. He had sought reassignment to other shifts on other lower paying positions. Those requests were denied. As a consequence, claimant decided to leave his employment. The claimant indicated the constant change in shifts had adversely affected both his physical and mental health. No medical documentation was submitted to support his contention.

DECISION: Claimant was not disqualified for voluntary leaving

RATIONALE: The court found the claimant's leaving was with good cause attributable to the employer. It reasoned the constant shift change was more than distasteful and caused physical distress. The court stated, "a choice between working a job which one cannot perform without substantial physical difficulty and leaving that job is really no choice at all." Notably, the court found the fact that the collective bargaining agreement allowed the employer to establish such a shift was not dispositive.

7/99
14, 6, d3: G

Section 29(1)(a)

VOLUNTARY LEAVING, Good cause, Sarcasm

CITE AS: Levesque v Meijer Thrifty Acres, unpublished per curiam Court of Appeals July 24, 1989 (No. 111618).

Appeal pending: No

Claimant: Nancy Levesque
Employer: Meijer Thrifty Acres
Docket No. B87-02390-105594

COURT OF APPEALS HOLDING: Good cause was not established where claimant's leaving was triggered by her personal affront and hurt feelings due to her supervisor's rude and sarcastic comments.

FACTS: Claimant was employed for approximately two years as a secretary to the store's incumbent director. She voluntarily left her employment. She contends her leaving was with good cause because the store director was allegedly rude and sarcastic to her.

DECISION: Claimant is disqualified for voluntary leaving.

RATIONALE: It was found that the store manager's "quick wit" may have been unpleasant for the claimant but was not such that it would have caused an average employee to leave his or her employment. The court reasoned that feeling personally affronted by an action taken by one's supervisor does not constitute good cause, citing Butler v City of Newaygo, 115 Mich App 445 (1982) and, citing cases from other states, observed that hurt feelings engendered by a supervisor's sarcasm have not been found to rise to the level of good cause entitling a person to receive unemployment benefits. Similarly, hurt feelings caused by a supervisor's ignoring an employee also do not amount to good cause.

7/99
3, 11: A

Section 29(1)(a)

VOLUNTARY LEAVING, Leaving or discharge, Evidence of intent, Fact-finding, Substantial evidence

CITE AS: Kirby v Benton Harbor Screw Co., unpublished per curiam Court of Appeals June 16, 1995 (Docket No. 163513).

Appeal pending: No

Claimant: Michael J. Kirby
Employer: Benton Harbor Screw Co.
Docket No. B90-10197-116367W

COURT OF APPEALS HOLDING: The Board of Review decision must be affirmed if based on competent, material, substantial evidence in the record and in accordance with the law.

FACTS: The parties disagreed as to the proper characterization of the separation.

On February 15, 1990, his last day of work, the claimant received an unfavorable evaluation. He finished his shift that day and went home. He returned to the plant later that evening. While there, he went to his office, reconciled his petty cash account, left documentation of his expense account, cleared his personal belongings from his desk and left his company keys. He also asked two co-workers to witness these acts and verify he was only taking his personal effects. While departing the claimant mumbled an obscenity and stated, "I'm leaving." Thereafter, the claimant appeared to work at his regular time the following Monday only to discover he had been replaced.

DECISION: Claimant is disqualified for voluntary leaving.

~~RATIONALE: Although the circuit court and Court of Appeals may have~~ reached a different conclusion given the facts in the record, the circuit court decision was reversed and the Board of Review decision reinstated because there was competent, material and substantial evidence to support the Referee and Board's finding that the claimant had voluntarily left his employment.

7/99
11, 19: F

Section 29(1)(a)

VOLUNTARY LEAVING, Good cause, Profanity.

CITE AS: Frankenstein v Independent Roofing & Siding, Delta Circuit Court No. 88-8956-AE (June 16, 1989)

Appeal pending: No.

Claimant: Terry J. Frankenstein
Employer: Independent Roofing & Siding
Docket No. B87-12977-106695W

CIRCUIT COURT HOLDING: Foul, vulgar, sexually oriented outbursts, not directed at the claimant, but tolerated by her for five years, do not constitute good cause attributable to the employer.

FACTS: Claimant worked for the employer from July 1982, until August, 1987. She resigned at that time because of what she considered the employer's "extremely foul language." The language itself did not substantively change during the period of the claimant's employment. However, the claimant perceived it was worse near the end because of what she felt was an increased frequency. During her employment the claimant had only complained about the language once.

DECISION: Claimant is disqualified for voluntary leaving.

RATIONALE: Upon a review of the entire record, the circuit court found that the claimant had indeed listened to foul, vulgar and sexually oriented outbursts from her employer over a period of five years. But, this language was not directed at her nor did she feel fear or sexual hostility and had only complained once during the course of her five years of employment. In light of these facts, the court found the record supported the findings of the Board of Review.

7/99
13, 4, d14: G

Section 29(1)(a)

VOLUNTARY LEAVING, Good cause, Unethical behavior

CITE AS: Bongiorno v Orchard Ford/Lincoln, Berrien Circuit Court No. 88-214-AL-Z (April 25, 1989).

Appeal pending: No

Claimant: Randy Bongiorno
Employer: Orchard Ford/Lincoln
Docket No. B87-03625-105495W

CIRCUIT COURT HOLDING: Unethical, but not illegal or unconscionable, business practices do not constitute good cause for leaving if they would not cause an average, reasonable, qualified worker to give up his or her employment.

FACTS: The claimant was employed as a used-auto salesperson. He left his employment because he could no longer tolerate sales practices which he believed were misleading and deceptive. The employer acknowledged some of the tactics may have been misleading and deceptive but denied they were fraudulent or illegal. The practices had been in place since the claimant began his employment and he had not complained about them prior to his departure.

DECISION: Claimant is disqualified for voluntary leaving.

RATIONALE: The court acknowledged illegal business practices would support a finding of good cause. But, the court refused to apply an Oregon Court of Appeals case which held that requiring an employee to participate in unethical business practices constituted good cause if the acts were unconscionable and so morally offensive they would be intolerable to a reasonable person. Here, the sales techniques were not illegal nor anything other than standard industry practice.

7/99
14, 13: G

10.67

Section 29(1)(a)

VOLUNTARY LEAVING, Employment environment, Unethical behavior

CITE AS: Corney v Amstaff PEO, Inc, Wayne Circuit Court, No. 96-645985-AE (April 28, 1997)

Appeal pending: No

Claimant: Joan G. Corney
Employer: Amstaff PEO, Inc., and MESA
Docket No. B96-00644-139329

CIRCUIT COURT HOLDING: An employee's leaving is non-disqualifying when under the totality of the circumstances, the employer's course of conduct precludes the employee from performing the job in an effective and efficient manner.

FACTS: The claimant was the only sales representative for the employer, a food service company. The claimant called on prospective clients for vending machine and cafeteria food service. The employer excluded the claimant from information concerning changes in the business and changes in clientele. The event causing the claimant to leave concerned a tour of the employer's plant for a prospective client. On the day of the tour, the claimant's manager informed her the employer would no longer prepare its own food. The claimant felt the proposal she wrote for the prospective client, which stated the employer prepared the food, and which was submitted to her manager a week before the tour, was a sham, and the decision not to inform her about the change an insult to her credibility.

DECISION: The claimant is not disqualified for benefits.

RATIONALE: The court looked at the cumulative effect of the employment environment to which the claimant testified. "Specifically, the court finds compelling the Appellant's testimony about the hostile attitude of her superiors, the changes in her working conditions, the lack of support from her immediate supervisor, including the failure to keep the Appellant apprised of changes in the company's products which she was supposed to be selling, and finally the major change in the operation of the business that precipitated the Appellant's quitting . . . ." The court does not believe that a reasonable person should be required to lie or otherwise dissemble to prospective clients as a condition of employment. The claimant's supervisor testified at the hearing and stated "he did not believe it was necessary to inform the Appellant of a major change in the business operations," despite the fact he knew she was making a presentation. The court also concluded that the claimant did not have to follow any complaint process pursuant to Johnides v St Lawrence Hospital, 184 Mich App 172 (1990).

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

Section 29(1)(a)

VOLUNTARY LEAVING, Good cause, Pay reduction, Loss of overtime, De novo fact finding.

CITE AS: Mann v H & H Wholesale, Inc., Wayne Circuit Court No. 89-910064-AE (September 14, 1989)

Appeal pending: No

Claimant: Earl Mann
Employer: H & H Wholesale, Inc.
Docket No. B88-00843-108076

CIRCUIT COURT HOLDING: A 15% reduction in pay does not constitute good cause attributable to the employer.

FACTS: While employed, claimant had earned $8.00 per hour and worked 47 1/2 hours per week. Near the end of claimant's employment the employer became aware it was obligated to pay the claimant time and a half for overtime. The employer informed the claimant he would receive all back pay owed and the claimant's schedule would be reduced to 40 hours per week. The reduction in hours would have resulted in a net decrease in the claimant's pay of 15%. Claimant quit.

DECISION: Claimant is disqualified for voluntary leaving.

RATIONALE: In contrast to other cases involving greater reductions in pay, the court found as a matter of law the 15% reduction was not substantial enough to constitute good cause to leave employment.

Note, in reaching its' decision, the circuit court observed that it was reviewing the facts as found by the Board, as the Board is the ultimate fact-finder, not the Referee.

7/99
3, 4, d14: E

10.69

Section 29(1)(a)

VOLUNTARY LEAVING, Good Cause, Request for resignation

CITE AS: Johnston v Smith, unpublished per curiam Court of Appeals May 26, 1993 (No. 139979)

Appeal pending: No

Claimant: Henry Smith
Employer: George L. Johnston
Docket No. B89-10825-113573

COURT OF APPEALS HOLDING: The employer's actions in asking the claimant for his resignation "in the absence of proof of misconduct would have induced an average, reasonable, and otherwise qualified worker to leave" the employer's employment.

FACTS: Employer accused the claimant of theft after observing items used in the employer's business in the claimant's vehicle. Claimant denied the accusation and had a witness to corroborate his story. Employer did not believe the claimant, and asked him to resign. The claimant refused, and asked the employer to discharge him. The employer did not discharge the claimant because it lacked proof the claimant committed theft. Claimant failed to report for his next scheduled shift, and applied for benefits four days later. The Referee concluded the employer's suggestion that he resign constituted good cause attributable to the employer.

DECISION: The Court of Appeals affirmed the holdings of the lower tribunals and found the claimant not disqualified for benefits under Section 29(1)(a).

RATIONALE: "Good cause attributable to the employer exists 'where an employer's actions would cause a reasonable, average, and otherwise qualified worker to give up his or her employment.' Johnides v St. Lawrence Hospital, 184 Mich App 172, 175 (1990) (quoting Warblow v The Kroger Co, 156 Mich App 316, 321 (1986)). For example, where an employer advised an employee to 'do it the employer's way or punch out,' the court agreed that there was good cause attributable to the employer for the employee's resignation. Degi v Varano Glass Co, 158 Mich App 695, 697, 699 (1987)."

7/99
13, 11: N/A

Section 29(1)(a)

VOLUNTARY LEAVING, Leaving or discharge, Teacher, Evaluation

CITE AS: Imlay City Community Schools v Merillat, Lapeer Circuit Court, No. 86-011243 AE(B) (August 22, 1988)

Appeal pending: No

Claimant: Calvin Merillat
Employer: Imlay City Community Schools
Docket No. B85-05959-99964

CIRCUIT COURT HOLDING: Where claimant, a non-tenured teacher, initiates his resignation after receiving an unfavorable, but grievable, evaluation, he is disqualified for voluntary leaving.

FACTS: The claimant was employed as a probationary teacher for one school year. Because of his probationary status, the claimant did not have rights under the Teacher Tenure Act. The high school principal evaluated the claimant's performance. The evaluation indicated the claimant's performance was unsatisfactory and recommended that the Board of Education not renew the claimant's contract for the following school year. Upon reviewing his evaluation, the claimant resigned rather than let the evaluation and recommendation be forwarded to the School Board. There was a grievance procedure in place which would have allowed the claimant to contest the unfavorable evaluation or a decision by the School Board not to renew his contract.

DECISION: Claimant is disqualified for benefits under the voluntary leaving provision.

RATIONALE: The Board of Review found that since the principal had recommended the claimant's contract not be renewed, the claimant had in effect been discharged. The court found this ruling to be erroneous as the claimant initiated the idea of resignation. The court observed that not only was the evaluation contestable through a grievance procedure, but the principal had no authority to discharge the claimant. Moreover, the School Board could have refused to follow the principal's recommendation, or, if they had not renewed his contract, that decision itself could have been subject to grievance.

7/99
11, 6, d15: N/A

10.71

Section 29(1)(a)

VOLUNTARY LEAVING, Shift change

CITE AS: Kerrison v Flint Memorial Park Assoc, Genesee Circuit Court No. 94-33568-AE (August 18, 1997)

Appeal pending: No

Claimant: Christine Kerrison
Employer: Flint Memorial Park Association
Docket No. B93-15828-RM9-137646W

CIRCUIT COURT HOLDING: An employer's "refusal to change an employee's shift does not as a matter of law constitute good cause for quitting."

FACTS: The claimant simultaneously held two separate positions with the employer. During the day she worked as an office supervisor at 40 hours per week alternating between working from 9:00 a.m. to 5:00 p.m. or 11:00 a.m. to 7:00 p.m. During the evening the claimant worked as a cleaning person twenty hours per week. The claimant went on a maternity leave. Before going on leave, the claimant requested to return to work on a part-time basis. On returning to work, the claimant worked the office job from 3:00 p.m. to 7:00 p.m. She requested additional hours, which the employer granted. The claimant also requested to return to the shift she worked before taking a maternity leave. The employer denied the request because that position was not available. The claimant then gave two weeks notice she was quitting the office position. Afterwards, the claimant was terminated from the cleaning position.

DECISION: The claimant is disqualified from receiving unemployment benefits.

RATIONALE: The claimant initially chose to limit her hours since she requested to return part-time after her maternity leave ended. When she requested more hours, the employer attempted to accommodate her. The claimant then insisted on returning to a position that was no longer available as the result of her choice to limit her hours. The claimant's leaving is not with good cause attributable to the employer.

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

Section 29(1)(a)

VOLUNTARY LEAVING, Loyalty oath

CITE AS: MacKintosh v MESC, Wayne Circuit Court No. 95-509950-AE (September 11, 1995)

Appeal pending: No

Claimant: Nancy MacKintosh
Employer: Forham Johnston Realty, Inc.
Docket No. B93-13467-129308

CIRCUIT COURT HOLDING: An employee's refusal to sign a confidentiality agreement and subsequent resignation is not with good cause attributable to the employer when the employer's request is reasonable.

FACTS: The claimant worked as the employer's office manager, and as a result had unique access to the employer's confidential information. The claimant's husband worked as an independent contractor for the employer, but resigned to accept a position with a competitor. The employer requested the claimant sign a confidentiality agreement. The claimant failed to do so. After three and a half weeks passed, the employer again requested she sign the confidentiality agreement. The claimant submitted a resignation. The employer requested she reconsider, but claimant decided to leave.

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

RATIONALE: The claimant was the only employee married to an employee of a competitor. The claimant had no right to reveal the employer's confidential information. The employer has the right to take reasonable precautions to protect its confidential information.

7/99
21, 18, d12: L

10.73

Section 29(1)(a)

VOLUNTARY LEAVING, Non-tenured teacher

CITE AS: Burross v Croswell Lexington Schools, Macomb Circuit Court Docket No. 94-2995-AE (April 11, 1995)

Appeal pending: No

Claimant: Mary M. Burross
Employer: Croswell Lexington Schools
Docket No. B92-30364-124904

CIRCUIT COURT HOLDING: When the claimant, a teacher, tenders a resignation on the advice of the school's principal, the leaving is not considered disqualifying since the claimant did not initiate the separation.

FACTS: The claimant worked as a high school special education teacher, having previously worked in an elementary school. She was under a one-year written contract as a probationary employee. The claimant received a negative evaluation. The school's principal informed her that he would recommend the claimant not be offered another contract. The claimant met with the principal and two union officials. The principal told the claimant if she submitted a resignation she could have the evaluation stricken from her record which would increase her chances of finding employment. Claimant understood the principal did not have the final say as to whether she would be offered a new contract. Nevertheless, the claimant took this advice and submitted a resignation.

DECISION: The claimant is not disqualified for benefits.

RATIONALE: The court distinguished the present matter from Imlay City Community Schools v Merillat, unpublished opinion Ingham County Circuit Court, August 27, 1988 (Docket No. 86-011243-AE). In Merillat the claimant initiated the resignation idea, and decided to tender his resignation after reflecting on the advantages and disadvantages. In the present matter, "there was unrefuted evidence that claimant was told she should resign to preserve her employment record." The claimant did not "initiate the discussion regarding her resignation."

7/99
24, 17, d2: J

Section 29(1)(a)

VOLUNTARY LEAVING, Involuntary leaving

CITE AS: Mercy Memorial Hospital Corp v Tompkins, Monroe Circuit Court, No. 94-2923-AE (May 4, 1995)

Appeal pending: No

Claimant: Rhonda L. Tompkins
Employer: Mercy Memorial Hospital Corp.
Docket No. B93-00829-126935

CIRCUIT COURT HOLDING: An involuntary separation due to serious health problems and hospitalization is not a voluntary leaving and the disqualification provision of Section 29(1)(a) is inapplicable.

FACTS: The claimant began working for the employer on December 13, 1991. On June 22, 1992, she was hospitalized for hypermesis relating to her pregnancy. The claimant maintained contact with her employer and provided medical documentation regarding her illness. On July 15, 1992, the employer terminated the claimant, retroactive to June 15, 1992. The employer terminated the claimant because, as a probationary employee, she was not entitled to a medical leave of absence. The employer contended the claimant quit, the claimant contended she was involuntarily terminated. The claimant's physician precluded her from doing any work until August 1, 1992, when the restrictions were lifted.

DECISION: The claimant is not disqualified for benefits.

RATIONALE: The burden of establishing the separation was involuntary or voluntary with good cause attributable to the employer rests with the claimant. Cooper v University of Michigan, 100 Mich App 99 (1980). The court distinguished Watson v Murdock's Food and Wet Goods, 148 Mich App 802 (1986), and Leeseberg v Smith-Jamieson, 149 Mich App 463 (1986). In the present matter the court noted the record did not indicate the claimant intended to leave work after her baby was born, unlike the claimant in Watson who did not intend to return. The court distinguished Leeseberg since the claimant in the present matter was herself ill. In Leeseberg claimant's spouse was ill. The claimant "involuntarily left work due to her serious heath problems and hospitalization." Section 29(1)(a) is inapplicable. The employer did not discharge the claimant for misconduct pursuant to Washington v Amway Grand Plaza, 135 Mich App 652 (1984).

7/99
24, 12: N/A

10.75

Section 29(1)(a)

VOLUNTARY LEAVING, Good cause, Remedial action

CITE AS: Munley v Child Care Plus, Inc., unpublished per curiam Court of Appeals March 30, 1994 (No. 150603).

Appeal pending: No

Claimant: Mary Anne Munley
Employer: Child Care Plus, Inc.
Docket No. B89-07785-112696

COURT OF APPEALS HOLDING: If the underlying reason for a resignation is fully resolved by the employer before the effective date of resignation, there is no good cause for leaving.

FACTS: On February 9, 1989 the employer's manager advised the claimant that effective Monday, February 13, 1989 her work hours would be reduced to 4.5 hours a day -- a reduction in excess of 40%. At that time, the claimant verbally advised the employer she would have to resign her employment to pursue full-time work. Her manager responded "okay." On Friday, February 10, 1989 the claimant submitted a written notice of resignation with an effective date of February 24, 1989. On Wednesday, February 15, 1989 the employer reconsidered and decided the claimant could continue as a full-time teacher through June 9, 1989. When notified, the claimant indicated it was still her intention to leave, and she did so on February 24, 1989.

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

RATIONALE: The question to be resolved was whether the claimant's leaving was with good cause attributable to the employer. The Court of Appeals found it was not. The Court of Appeals found the employer's actions would not have caused an otherwise qualified worker to give up her employment until June 9, 1989. While not expressly stated in the decision, it appears the court concluded that if the reason for a resignation is fully addressed before the effective date of resignation there is no good cause for leaving. In the underlying Board of Review decision, the Board found the good cause had been "extinguished" by the employer's change of position.

7/99
3, 11, 12: N/A

Section 29(1)(a)

VOLUNTARY LEAVING, Good cause, Discipline, Absence beyond control

CITE AS: Farnsworth v Michigan Masonic Home, unpublished per curiam Court of Appeals January 17, 1992 (No. 130244).

Appeal pending: No

Claimant: Paula M. Farnsworth
Employer: Michigan Masonic Home
Docket No. B88-08686-109087W

COURT OF APPEALS HOLDING: Discipline imposed for legitimate absences and other factors beyond a claimant's control may provide good cause for leaving.

FACTS: The claimant had been ill with mononucleosis and was off of work. Upon her return, the claimant was disciplined. Although acknowledging her absences were either the result of illness or pre-approved annual leave, the employer disciplined her for being excessively absent. It also criticized her appearance and slurred speech. The claimant's slurred speech was the result of a congenital birth defect. The employer believed it was indicative of alcohol use. Shortly thereafter, the claimant submitted her resignation.

DECISION: The claimant was not disqualified under Section 29(1)(a).

RATIONALE: The claimant reasonably believed she would be subjected to further discipline for legitimate absences and other factors beyond her control.

7/99
14, 4, d13: N/A

Section 29(1)(a)

VOLUNTARY LEAVING, Sale of business, Owner-employee

CITE AS: Rashid v R.G.R., Inc., Oakland Circuit Court No. 84-284496 AE (April 3, 1986)

Appeal pending: No

Claimant: Robert Rashid
Employer: R.G.R., Inc.
Docket No. B84-05596-97032W

HOLDING: Voluntary sale of a business and resulting unemployment of the business' employee-owner disqualifies the employee-owner from unemployment benefits under 29(1)(a).

FACTS: The claimant was the sole shareholder and principal corporate officer of a corporation which operated a car wash. The claimant sold his interest in the enterprise to a competing entity. It was understood by the claimant at the time of sale that if he sold the business he would not be retained as an employee by the new owner.

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

RATIONALE: The claimant contended he sold out to his competitor because he was left with no other business alternative. However, as of the date of sale the business was earning a sizable profit and was in no immediate danger of failure. The claimant was not forced to sell his business. Rather he sold it because it was more profitable to sell for the offered price than to compete for available business. The claimant had a choice between reasonable alternatives. Therefore, both the sale of his business and the resulting unemployment were voluntary.

7/99
3,11: N/A

Section 29(1)(a)

VOLUNTARY LEAVING, Plant closing, Retirement, Burden of proof

CITE AS: Tomei v General Motors Corporation, 194 Mich App 180 (1992).

Appeal pending: No

Claimant: Edwardo J. Tomei
Employer: General Motors Corporation
Docket No. B88-03087-108810W

COURT OF APPEALS HOLDING: In plant closing cases, the burden of proof for demonstrating the voluntariness of a claimant's decision to leave or retire falls first on the employer. The employer must show that the choices it offered were reasonable, viable and clearly communicated.

FACTS: In 1985, GMC announced closure of it's BOC Flint body assembly plant. Claimant had 17 years seniority and was 64 years old. He understood he could transfer to a Buick plant in Flint, wait and transfer at a later time, or stay where he was. Claimant believed he lacked seniority and was too old to retain a job if he transferred, so he stayed put. Two years later (December 1987) when the plant closed, he was involuntarily retired. It turned out, that claimant could have held a job if he'd gone to Buick. Also he could have elected to take a layoff for up to two years when his plant closed, during which time he could have collected sub-pay benefits. He could then have retired at the end of two years instead of retiring when the Flint plant closed.

DECISION: Claimant is not disqualified for voluntary leaving.

RATIONALE: Claimant was forced to rely on information provided by employer in making his employment decision. The information necessary for claimant to make an informed choice lay within the knowledge and control of the employer. Therefore, it is up to the employer to show that the options offered are not unreasonable, untenable or illusory. In this case, claimant's decision to retire when his plant closed rather than accept a two year layoff with uncertain prospects for recall and an uncertain impact on future retirement rights, was not a voluntary severance of employment. Claimant "was forced to choose between untenable options in the face of an indeterminate future. While employment decisions are difficult under the best of circumstances, the mystery and confusion surrounding the decisions plaintiff had to make rendered it nearly impossible to make an informed, sensible choice."

7/99
4, 13, d14: N/A

10.79

Section 29(1)(a)

VOLUNTARY LEAVING, Buyout program

CITE AS: McArthur v Borman's, 200 Mich App 686 (1993).

Appeal pending: No

Claimant: Robin McArthur
Employer: Borman's Inc.
Docket No. B88-04285-108675W

COURT OF APPEALS HOLDING: Where employer, pursuant to plan authorized by collective bargaining agreement, gave claimant option of accepting a buyout accompanied by monetary incentives or remaining on the job and facing a permanent reduction to part-time work two years hence, she had reasonable alternatives from which to choose and her decision to leave was voluntary and for personal reasons.

FACTS: Under a 1987 collective bargaining agreement, employer could reduce up to 50% of its full-time work force to part-time in August, 1989. Claimant did not have enough seniority to maintain her full-time position after August, 1989. Claimant accepted buyout of $16,000 in exchange for resigning prior to December 31, 1987.

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

RATIONALE: "The state has a substantial interest in reserving unemployment benefits for those who became unemployed 'due to forces beyond their control.' 'Voluntary' connotes a choice between alternatives that ordinary persons would find reasonable. Unemployment benefits are not designed to protect those who receive large cash settlements following voluntary separations, but to assist those who become unemployed through no fault of their own." (citations omitted) Claimant's decision to accept buyout was voluntary because she could have continued to work full-time for two more years and earned more in that time than the value of the buyout. There was no immediate threat of reduction in hours. Claimant was offered a significant monetary incentive to leave her job. Therefore, her reasons for leaving were personal and not for good cause attributable to the employer.

7/99
13, 4, d14: N/A

Section 29(1)(a)

VOLUNTARY LEAVING, Involuntary leaving, Health, Pregnancy, Attempt to return

CITE AS: Warren v Caro Community Hosp, 457 Mich 361(1998).

Appeal pending: No

Claimant: Cindy Warren
Employer: Caro Community Hospital
Docket No. B91-00630-118357

SUPREME COURT HOLDING: When a claimant is willing to continue working but is advised by a doctor not to work because of a temporary or short-term, self-limited medical condition properly documented by the treating physician, the claimant did not voluntarily leave work by following the doctor's advice. If an employer refuses to allow the employee to return as soon as medically possible, the employee is entitled to unemployment compensation.

FACTS: As she neared the end of her pregnancy, claimant submitted a request for a medical leave. The request was denied as under the collective bargaining agreement it was the employer's policy to refuse leaves to employees who had not been employed a year. Shortly thereafter, the claimant gave birth and consequently failed to report to work. When released by her physician, she sought to return to work at the hospital. but was refused. She did not seek unemployment benefits for the period that she was medically unable to work. Rather, she only sought to return to work following her pregnancy.

DECISION: Claimant is not disqualified for voluntary leaving.

RATIONALE: "[W]e continue to hold that whether a person is entitled to unemployment benefits is a two-part inquiry. Under the first prong, we must determine whether plaintiff voluntarily left her position. If we find that she left her position involuntarily, the inquiry ends and she is entitled to unemployment compensation. ... However, if the court finds that plaintiff left her position voluntarily, we must advance to prong two to determine whether her leaving was 'without good cause attributable to the employer.'" The claimant was advised by her doctor not to work beyond a certain date. Fault should not be ascribed to the claimant simply because a medical condition rendered her temporarily unable to work. Because she received medical advice not to work, she did not voluntarily leave, and thus is entitled to unemployment benefits for the period she was medically able to work, but her employer refused to allow her to return. Note the Court distinguished this case factually from Watson v Murdock's Food, 148 Mich App 802 (1986) on the basis Ms. Watson had no intention of returning to work and was seeking benefits for the period when medically unable to work.

7/99
11, 12, d19: H

Section 29(1)(a)

VOLUNTARY LEAVING, Concurrent employment

CITE AS: Dickerson v Norrell Health Care, Inc, Kent Circuit Court No. 95-1806-AE September 21, 1995.

Appeal pending: No

Claimant: Florence Dickerson
Employer: Norrell Health Care, Inc.
Docket No. B93-11864-127766W

CIRCUIT COURT HOLDING: A claimant who had simultaneous full-time and part-time employment, who left the part-time job for disqualifying reasons, and later unexpectedly lost the full-time job for non-disqualifying reasons, is not disqualified from receiving benefits under Section 29(1)(a). This claimant can be said to have "left work" only if "quitting resulted in total unemployment, not one less job."

FACTS: From December, 1992, to April, 1993, the claimant worked two jobs. One job was full-time for Luther Home, the other job was part-time for Norrell Health Care. The claimant quit the part-time job with Norrell Health Care due to family obligations. About a month later, she lost her full-time job. The claimant applied for benefits and was denied. Nothing about the loss of the full-time job was disqualifying. However, the claimant's quit of her part-time job was held to disqualify her from the benefits she would otherwise have received as the result of the loss of her full-time job.

DECISION: The claimant is not disqualified from receiving benefits.

RATIONALE: The court relied on cases from other states which it found identical to the present case. See McCarthy v Iowa Employment Security Commission, 76 NW2d 201 (1956); Brown v Labor & Industrial Relations Commission, 577 SW2d 90 (1979); Gilbert v Hanlon, 335 NW2d 548 (1983); and Merkel v HIP of New Jersey, 573 A2d 517 (1990). In those cases, the reviewing courts held that an "employee can be said to have left work only if quitting resulted in total unemployment, not one less job." The court found this interpretation is "more reasonably in accord with the Legislature's intent because common sense as well as the rules on construction . . . says that the Legislature intended" that result. Richards v American Fellowship Ins Co, 84 Mich App 629, 634 (1978), lv app den 406 Mich 862 (1979). The Board of Review's interpretation "undermine[s] the core premise of the Michigan Employment Security Act without accomplishing anything other than providing an unearned windfall to employers at the expense of employees."

7/99
21, 12: K

Section 29(1)(a)

VOLUNTARY LEAVING, Discharge in anticipation of leaving

CITE AS: Walsh v First Metropolitan Title, Oakland Circuit Court No. 97-551063-AE (January 26, 1998).

Appeal pending: No

Claimant: Kathleen Walsh
Employer: First Metropolitan Title
Docket No. B97-01169-RO1-144003W

CIRCUIT COURT HOLDING: The claimant's immediate termination by the employer is disqualifying under Section 29(1)(a) when the claimant failed to provide a two week notice and was uncooperative when asked if the claimant had accepted employment with a competitor.

FACTS: The claimant worked as a title examiner for the involved employer. On September 17, 1996, the claimant informed the employer she was resigning to accept employment with another title company effective September 20, 1996. The employer was concerned the claimant was going to work for a competitor, and asked the claimant where she was going, but she declined to disclose the identity of the new employer. The employer indicated there is a lot of pirating of employees in this industry. The employer discharged the claimant immediately pursuant to its practice to accept an employee's resignation as immediately effective when the employee refuses to disclose the identity of the new employer.

DECISION: The claimant is disqualified from receiving benefits under Section 29(1)(a) of the Michigan Employment Security Act.

RATIONALE: The court noted the Referee distinguished this matter from Stephen's Nu-Ad, Inc v Green, 168 Mich App 219 (1988), because the claimant did not give the employer the benefit of a two week notice. The court stated "[i]t appears from the record that [claimant]'s poor handling of her resignation, including her failure to give her employer the courtesy of a two week notice, and the fact that she appeared to be going to work for a competitor led to her termination on September 17, 1996." The court found those facts supported the conclusion that the claimant's separation was "the result of an unrestrained, volitional, freely chosen or willful action on her part."

7/99
24, 16, d22: J

Section 29(1)(a)

VOLUNTARY LEAVING, Health, Reasonable alternatives, Involuntary leaving

CITE AS: Haynes v Flint Painting, Stripping and Derusting, Genesee Circuit Court, No. 94-32420-AE (August 16, 1995).

Appeal pending: No

Claimant: Maggie M. Haynes
Employer: Flint Painting, Stripping and Derusting
Docket No. B93-13254-128491

CIRCUIT COURT HOLDING: "When an individual is caught between a rock (leaving her employment) and a hard place (risking her health), the decision to act one way rather than the other is not a voluntary leaving."

FACTS: The claimant worked for the employer for two years before learning she had breast cancer. The claimant's job involved heavy lifting and extensive manual labor. The claimant requested an alternate position because of the strain that type of work would have on her health. The employer informed the claimant that no alternative position was available and her request could not be accommodated. The claimant also requested a medical leave of absence for surgery and chemotherapy. The employer denied the request stating company policy did not provide for medical leaves of absence. The employer informed the claimant could return to work after completing therapy. The claimant did not return to work and filed a claim for unemployment benefits.

DECISION: The claimant is not disqualified from receiving benefits under Section 29(1)(a).

RATIONALE: In light of the totality of circumstances, claimant acted reasonably when she chose to leave rather than endanger her health. She was not in the position of exercising any reasonable alternatives. Laya v Cebar Construction, 101 Mich App 26 (1980). The court found this matter distinguishable from Watson v Murdock's Food and Wet Goods, 148 Mich App 802 (1986), because the claimant approached the employer and requested alternative work, unlike the claimant in Watson who intended to leave her employment due to complications with her pregnancy. The claimant in the present matter left work after learning that alternative work would not be available. The claimant was "forced from a position that her health would not allow her to perform, and employment which her employer did not take steps to continue."

7/99
21, 18, d12: K

Section 29(1)(a)

VOLUNTARY LEAVING, Sexual harassment

CITE AS: Mathews v Transportation Management, Inc, Kalamazoo Circuit Court No. B95-0144-AE (February 9, 1996).

Appeal pending: No

Claimant: Mary Mathews
Employer: Transportation Management, Inc.
Docket No. B93-01271-126090W

CIRCUIT COURT HOLDING: When the employer is aware of a complaint of sexual harassment, fails to take steps to rectify the problem after adequate notice and the problem is likely to persist or repeat, the leaving is with good cause attributable to the employer.

FACTS: The claimant was sexually harassed by two male co-workers. She informed her supervisor, and the men's supervisor, about the harassment. The claimant admitted she did not specifically state that she was being sexually harassed to her supervisor. After she complained to her supervisor the harassment ceased until the supervisor departed. The claimant's manager, an employer witness, was aware of the claimant's complaint. Sexual comments were regularly made over the employer's radio. The employer was aware obscene objects were left in the workplace, and while the employer removed the objects it made no effort to investigate. During claimant's exit interview, the manager revealed to the claimant she was aware of the claimant's sexual harassment complaint. When the claimant threatened to file a complaint with the Michigan Department of Civil Rights, the manager laughed and told her to go ahead.

DECISION: The claimant is not disqualified from receiving benefits.

RATIONALE: The manager was aware of the claimant's complaint to her supervisor. The claimant's reference to the Civil Rights Commission indicates the complaint concerned sex discrimination. Since the manager responded by laughing, it was "reasonable for the claimant to assume the employer was not going to rectify the hostile work environment after adequate notice, and that repetition of the episode was likely to occur."

7/99
12, 8, d21: F

Section 29(1)(a)

VOLUNTARY LEAVING, Constructive voluntary leaving

CITE AS: Devyak v Faygo Beverages, Wayne Circuit Court, No. 88-815646-AE (May 1, 1989).

Appeal pending: No

Claimant: Beverly J. Devyak
Employer: Faygo Beverages
Docket No. B87-12781-106535W

CIRCUIT COURT HOLDING: An employer cannot unilaterally decide that an employee has voluntarily quit. There must be substantiation from the employee that the employee intended to sever the employment relationship.

FACTS: The claimant experienced medical problems which led to surgery. She returned to work, but experienced surgical complications. The claimant's workload, working hours, fatigue, a sinus infection and headaches caused her great stress. The claimant was entitled to a two week vacation. When claimant inquired about scheduling a vacation her supervisor told her she could not take any vacation time. She went to higher management without success. Claimant told her supervisor "this is horseshit," laid down her Blue Cross card and her pass. Claimant left, taking her purse and calendar, but did not clean out her desk. A few hours later she contacted the employer's president who directed her to report her illness to her supervisor. She contacted her supervisor who told her she was considered a voluntary quit. She attempted to return to work and provide proof of her illness.

DECISION: Claimant is not disqualified for benefits under Section 29(1)(a).

RATIONALE: While the evidence shows the claimant "blew up" on June 4, 1987, there is nothing in the record to show she intended to quit her job. The claimant did not say she was resigning, she did not clean out her desk, she called the president of the company the same day to inform him of her illness, she notified her supervisor of her illness and produced proof of her illness in an attempt to return to work. The employer "cannot, on its own, decide that an employee has voluntarily quit a job without sufficient substantiation from the employee." Wickey v ESC, 369 Mich 487 (1963). The doctrine of "constructive voluntary leaving" does not exist under Michigan unemployment compensation law.

7/99
13, 14: N/A

Section 29(1)(a)

VOLUNTARY LEAVING, Mandatory training, Reasonable person standard

CITE AS: Bis v Electronic Data Systems, unpublished per curiam Court of Appeals, March 8, 1995 (No. 156482).

Appeal pending: No

Claimant: Lawrence C. Bis
Employer: Electronic Data Systems Corporation
Docket No. B90-16245-117532W

COURT OF APPEALS HOLDING: The employer did not make working conditions so unpleasant that a reasonable person in the claimant's shoes would have felt compelled to resign for reasons attributable to the employer.

FACTS: As a condition of hire, the employer required claimant to complete a three-phase training program. The claimant successfully completed the first phase but resigned after completing two weeks of the second phase. The second phase required participants to work fifteen to sixteen hours per day, seven days per week, for ten weeks, to test their physical and mental stamina. The employer allowed three warnings regarding performance during the second phase before a participant would be discharged. Claimant experienced physical and emotional problems during the second phase, but did not inform his supervisor. Rather, he expressed doubts about his ability to continue and requested to return to phase one. The claimant had not fallen behind in the second phase or received a performance warning. The claimant's supervisor informed him that if he did not complete the second phase he would be terminated. The claimant concluded he had no choice but to resign or face termination, so he decided to resign.

DECISION: The claimant is disqualified for benefits.

RATIONALE: The "good cause" standard essentially asks "whether an employee left work with 'cause of a necessitous and compelling nature.'" Cooper v University of Michigan, 100 Mich App 99, 105 (1980). The claimant's self-doubts ultimately led him to resign. The claimant was entitled to three performance warnings, and had not received any warnings before resigning. His supervisors believed he could successfully complete the program. Nothing indicated the claimant was incapable of successfully completing the second phase.

7/99
11, 3: F

Section 29(1)(a)

VOLUNTARY LEAVING, Prerequisite of employment, Constructive voluntary leaving

CITE AS: Lee v Bermex, Inc, Wayne Circuit Court No. 93-324459-AE (January 27, 1994).

Appeal pending: No

Claimant: Christopher A. Lee
Employer: Bermex, Inc.
Docket No. B91-3452-RO1-121313W

CIRCUIT COURT HOLDING: A loss of a prerequisite of employment through one's own inaction is a purely voluntary leaving, not a constructive leaving.

FACTS: Claimant worked as a meter reader. As a requirement of employment, the claimant was expected to have a vehicle. The claimant met this requirement when hired, but later "totaled" his vehicle. The employer allowed the claimant to use public transportation or car-pool with another employee until he found a replacement vehicle. This accommodation continued for seven months. The employer gave the claimant an advance pay-out of vacation time to purchase a vehicle. The employer was unable to continue to accommodate the claimant's lack of a vehicle. The claimant failed to obtain a vehicle. The employer discharged the claimant.

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

RATIONALE: The court distinguished this matter from Clarke v North Detroit General Hosp, 437 Mich 280 (1991). Unlike the nurses in Clarke who took steps to meet their condition of employment by preparing for an examination, the claimant in the present matter "made no effort to meet his condition of employment." The claimant's discharge "resulted from his decision not to do anything about his situation for a lengthy period of time." His leaving "could reasonably be characterized as volitional, freely chosen and willful - in short, voluntary." The court found applicable Echols v MESC, 4 Mich App 173 (1966), and City of Saginaw v Lindquist, 139 Mich App 515 (1984), which hold that a loss of a prerequisite of employment through one's actions is a voluntary leaving without good cause attributable to the employer.

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

Section 29(1)(a)

VOLUNTARY LEAVING, Good cause, Tenured teacher, Discipline, Constructive discharge

CITE AS: Gebhardt v Lapeer Community Schools, unpublished per curiam Court of Appeals September 17, 1992 (No. 132176).

Appeal pending: No

Claimant: Barbara J. Gebhardt
Employer: Lapeer Community Schools
Docket No. B87-12530-110516W

COURT OF APPEALS HOLDING: 1) An employer's decision to discipline based on a legitimate policy or procedure does not constitute good cause for leaving. 2) A school system's request that a school board dismiss a tenured teacher does not constitute constructive discharge.

FACTS: The claimant was a tenured school teacher. She was charged with first degree criminal sexual conduct. This prompted the employer to suspend the claimant with pay. When the claimant was convicted the employer requested that the Board of Education dismiss the claimant. Pursuant to the employer's request, a hearing was noticed. The hearing resulted in a negotiated settlement whereby the claimant would resign her position, the employer would withdraw the tenure charges and the claimant would receive a cash settlement. The claimant asserted her leaving was a constructive discharge. (Note: after her separation, but prior to the Referee hearing, claimant's conviction was set aside.)

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

RATIONALE: Referral to the school board was a procedure designed to protect the claimant, not injure her. Consequently, the hearing could not be characterized as a working condition that would force a reasonable person to resign. Accordingly, there was no constructive discharge. The court also rejected the argument that claimant would have lost her job with or without a hearing as the employer was determined to terminate her employment, therefore she was not required to pursue a futile course of action. The court observed that while the employer was zealous, its actions were not merely vexatious. Since the Teacher Tenure Act provides possible appellate relief, that option was not futile. Moreover, when an employer reprimands or relieves an employee of his or her duties based on a legitimate policy or procedure, it does not give an employee good reason to resign.

7/99
11, 13: N/A

Section 29(1)(a)

VOLUNTARY LEAVING, Layoff notice, Resignation

CITE AS: Cooper v Mount Clemens Schools, Barry Circuit Court, No. 98-194-AE (December 29, 1998).

Appeal pending: No

Claimant: Cyntheal Cooper
Employer: Mount Clemens Schools
Docket No. B97-12037-146470

CIRCUIT COURT HOLDING: A person who "resigns" after losing their job to a layoff has not voluntarily terminated their employment.

FACTS: On April 24, 1997 the claimant received a notice she would be laid off at the end of the contract year. On April 28, 1998 the claimant submitted a letter to the employer that indicated the claimant would not return to work for the employer in the next school year.

DECISION: The claimant is not disqualified for voluntary leaving.

RATIONALE: The Board of Review erred by finding the claimant left her position voluntarily. Claimant could not leave a job she already lost. "A person who 'resigns' after losing their job to a layoff has not voluntarily terminated their employment."

7/99
24, 16, d22: F

Section 29(1)(a)

VOLUNTARY LEAVING, Leave of absence

CITE AS: Sherwood v Michigan Bell Telephone Co., Wayne Circuit Court No. 99-914657AE (October 28, 1999).

Appeal pending: No

Claimant: Thomas Sherwood
Employer: Michigan Bell Telephone Company
Docket No. B98-07068-149398

CIRCUIT COURT HOLDING: Claimant left employment voluntarily without good cause attributable to employer because he did not apply for a leave of absence even after he received a letter from the employer warning him his employment was about to be terminated. Turning in doctor's notes was not sufficient action to maintain employment.

FACTS: Claimant was injured on the job and was off on a medical LOA from August 1997 to January, 1998, at which time he was assigned to The Toledo office, a 50 mile commute one-way. Claimant was suffering back pain associated with the injury. He provided the employer with doctor's notes limiting his driving distance and time because driving aggravated his back pain. After failing to report to work for several days, the claimant was terminated. He had not applied for a medical leave of absence. Employer had sent the claimant a warning letter (of impending termination) but the claimant ignored it.

DECISION: The claimant is disqualified for voluntary leaving. Circuit court affirmed Board of Review in its reversal of the Referee decision, albeit for different reasons.

RATIONALE: Claimant initiated his separation by failing to report to work and failing to apply for a medical leave of absence to cover his absences. Claimant had valid medical restrictions but failed to demonstrate that they prevented him from reporting to work.

21, 16, d23: L

Section 29(1)(a)

VOLUNTARY LEAVING, Good cause, Threat, Co-worker behavior, Failure to communicate

CITE AS: Lakeshore Public Academy v Scribner, No. 03-004110-AE, Oceana Circuit Court (May 10, 2004)

Appeal pending: No

Claimant: Patricia A. Scribner
Employer: Lakeshore Public Academy
Docket No. B2003-06865-RO1-170206

CIRCUIT COURT HOLDING: Claimant established good cause for leaving. Employer did not complete the process of handling the claimant's complaint by communicating to her that it was investigated and what action would or would not be taken in response. The claimant reasonably concluded the employer was unable or unwilling to discipline a co-worker who violated employer's rule against threatening behavior.

FACTS: Claimant worked as a teacher. Another teacher and his wife, confronted claimant in her classroom regarding her discipline of their child on the previous day. Claimant testified the other teacher put his finger in her face, glared at her, and made intimidating comments. This happened as students were entering the classroom. Claimant reported this incident to the employer, and indicated she could not work under those conditions. Employer had a policy prohibiting threatening behavior toward staff which provided that if a threat occurred, the perpetrator would be disciplined. Employer's witness investigated the incident, but could not reconcile differing statements from claimant and the other teacher, so the teacher was not disciplined. After not hearing anything more from the administration, claimant resigned a couple weeks later.

DECISION: Claimant is not disqualified for voluntary leaving.

RATIONALE: "The ALJ's decision turned on the failure of the Academy to complete the normal and expected handling of an employee's grievance by communicating to the employee the results of the investigation and what, if any, action would be taken in response to the complaint." It is the manner in which employer handled the complaint, not the failure to impose discipline, that leads to a finding of non-disqualification.

11/04

Section 29(1)(a)

VOLUNTARY LEAVING, Concurrent employment, Part-time work

CITE AS: Mitchell v Wal-Mart Associates, No. 02-31816-AE, Allegan County Circuit Court (November 22, 2002).

Appeal pending: No

Claimant: Denise M. Mitchell
Employer: Wal-Mart
Docket No. B2001-15958-RO1-162871W

CIRCUIT COURT HOLDING: A claimant who voluntarily leaves part-time employment to save her full-time employment is not disqualified under Section 29(1)(a) if she is subsequently laid-off by the full-time employer.

FACTS: The claimant worked part-time for Wal-Mart, and simultaneously worked for a full-time employer. She was working more than 65 hours/week total. Claimant left her part-time employment due to conflicts with her work schedule with her full-time employer. The full-time employer unexpectedly laid her off the following day.

DECISION: The claimant is not disqualified pursuant to Section 29(1)(a).

RATIONALE: "Given the conflict in work schedules between the two jobs…,Wal-Mart's actions of staffing and continuing operations at times threatening to the claimant's full-time job would cause a reasonable and average person to choose between the two." Claimant reasonably chose her full-time job. The court found non-binding support from another circuit and two other states in Dickerson v Norrell Health Care Inc, No. 95-1806-AE, Kent Circuit Court (September 21, 1995); Merkel v HIP of New Jersey, 573 A2d 517 (1990); and, Gilbert v Hanlon; 335 NW2d 548 (1983). In those cases, "the courts found that technical interpretations of "work" worked an injustice to the purpose and intentions of each state's respective law by equating one's reasonable decision to leave a part-time job with the unreasonable quest to leave employment altogether."

11/04

Section 29(1)(a)

VOLUNTARY LEAVING, Concurrent employment, Part-time work

CITE AS: Hilton (Meijer Stores Limited), 2004 BR 170939 (B2003-09139)

Appeal pending: No

Claimant: Akira Hilton
Employer: Meijer Stores Limited
Docket No. B2003-09139-170939

BOARD HOLDING: A claimant who has simultaneous employment with a part-time employer and a full-time employer, who leaves her part-time job because it conflicts with the full-time job, is disqualified under Section 29(1)(a) because her leaving was not attributable to the part-time employer.

FACTS: Claimant worked for Meijer on a part-time basis, and simultaneously worked full-time for Wallside Windows. Claimant voluntarily left her employment with Meijer because it conflicted with her full-time employment. Ten days later, Wallside Windows discharged the claimant for non-disqualifying reasons.

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

RATIONALE: In Dickerson v Norrell Health Care, Inc., Kent Circuit Court No. 95-1806-AE September 21, 1995, (Digest 10.81), the circuit court addressed what presents itself as a gross inequity: that although claimant had been laid off from a full-time job for non-disqualifying circumstances, the claimant was nevertheless ineligible for benefits solely because the claimant had just voluntarily left an unrelated part-time job. The court's conclusion that a claimant could not be found to have "left employment" unless her leaving resulted in **total** unemployment is at odds with the plain and unambiguous language of the statute. The court also ignores that the employer the claimant quit faces charges to its account and tax rate increases even though it in no way contributed to the job separation. Additionally, if such a claimant quit only one of her jobs, she could receive unemployment benefits provided she still worked at least part-time and thus was not **totally** unemployed. Then the former full-time employer's account would be charged for the benefits paid, and the current part-time employer would also be charged for a portion of the benefits, even though neither employer in any way contributed to the claimant's job separation. The Board notes that circuit court decisions are not binding precedent. Due to the potential unintended consequences of Dickerson, if a change in the statutory language is necessary, it should come from the legislature.

11/04

Section 29(1)(a)

VOLUNTARY LEAVING, After-acquired evidence, Illegal work activities

CITE AS: Spence v The Dakota Corp., No. 00-1666-AE, Isabella Circuit Court (October 30, 2000)

Appeal pending: No

Claimant: Edwin Spence
Employer: The Dakota Corporation
Docket No. B1999-04176-152773

CIRCUIT COURT HOLDING: A truck driver required to violate USDOL regulations to meet the employer's schedule, but who notifies the employer about the potential violations, has good cause attributable to the employer for a voluntary leaving if the employer fails to take remedial action.

FACTS: Claimant worked for the employer as a truck driver for three years. Claimant drove a minimum of seven hours between Grand Haven, Michigan and Windsor, Ontario, delivering five loads of sand in four days. Claimant also commuted two and a half hours one-way to work, and spent four hours loading and unloading sand. The driving schedule resulted in claimant getting little or no sleep. Claimant falsified his travel logs to meet USDOT regulations. He complained to the employer that the schedule was taxing, illegal, compromised health and safety of the public, and that another employee also falsified logs. Claimant left after the employer failed to alter his schedule. Later the USDOT fined the employer $2100 for violations, including the false report of records of duty status.

DECISION: Claimant is not disqualified for voluntary leaving.

RATIONALE: Claimant realized he was harming his health working in an illegal manner, violating USDOT regulations, and if he were caught he would be individually responsible for the fine. While claimant repeatedly informed employer that employer was forcing him to drive illegally and that he falsified his logs to maintain an appearance of legality, employer insisted the schedule was legal and refused to review claimant's documentation. Employer told claimant he was on his own if he was caught with falsified logs. Employer should have known the schedule could not be done legally.

11/04

Section 29(1)(a)

VOLUNTARY LEAVING, Definition of layoff, Characterization of separation

CITE AS: Dushane v Bailey T L DDS, No. 00-40206-AE, Muskegon Circuit Court (February 6, 2001)

Appeal pending: No

Claimant: Tracy L. Dushane
Employer: Bailey T L, DDS
Docket No. B1999-13378-154400

CIRCUIT COURT HOLDING: The nature of the separation determines whether the claimant is laid off or voluntarily quit, not the labels used by the parties. A layoff is a separation of an employee from employment (a) at the will of the employer, (b) due to a lack of work, and (c) which is at least initially understood by the employer and the employee to be temporary.

FACTS: Claimant approached the employer and asked to be laid off so that she could look for other employment. Employer had work available for claimant. Claimant stated in her application for benefits that she was "laid off due to lack of work." Claimant admitted in her testimony that it was her choice to leave the job.

DECISION: Claimant is disqualified for voluntary leaving.

RATIONALE: The question to be resolved is whether or not the facts of this matter demonstrate an actual layoff of the claimant as defined by Michigan courts. The Board is not "bound by the words used by the employer and employee to describe the separation." I.M. Dach Co. v ESC, 347 Mich 465, 489 (1956). The Court of Appeals in MESC v General Motors Corp, 32 Mich App 642, 647 (1971) held that, "A layoff is a termination of employment at the will of the employer, without prejudice to the worker. Layoffs may be due to lack of orders, technical changes, or failure of flow of parts or materials to the job, as needed." "A 'layoff', as distinguished from a discharge, contemplates a period during which a working man is temporarily dismissed . . .." MESC v General Motors Corp, supra, at 648. In Chrysler Corp v Washington, 52 Mich App 229, 234-235 (1974), the court defined "layoff" as, "To cease to employ (a worker) usually temporarily because of slack in production and without prejudice to the worker usually distinguished from a fire." In this matter, the claimant admitted she asked for a "layoff" and said she would leave and not come back.

11/04

Section 29(1)(a)

VOLUNTARY LEAVING, Good Cause, Terms of employment contract, Handbook, Non-compete clause, Substantial change

CITE AS: Human Capability Corp. v Carson, No. 03-331656-AE, Wayne Circuit Court (April 6, 2004)

Appeal pending: No

Claimant: Barbara D. Carson
Employer: Human Capability Corporation
Docket No. B2003-02940-169363

CIRCUIT COURT HOLDING: Where the employer unilaterally changed the terms and conditions of employment by altering the employee handbook to include non-competition and prohibition of outside employment provisions, the claimant had good cause for voluntary leaving.

FACTS: In January 2002, employer updated the policies contained in its 1998 employee handbook. The 2002 employee handbook contained a non-competition provision and prohibited outside employment. The claimant refused to sign and was separated from employment. The 1998 employee handbook prohibited outside work on employer's time, and lacked an express provision barring work with a competitor after separating from employer's employ.

DECISION: Claimant is not disqualified for voluntary leaving.

RATIONALE: The employer did not dispute that claimant left work voluntarily. The employer asserted claimant lacked good cause for leaving because claimant was an at-will employee, who lacked an employment contract or a legitimate expectation that employer would not alter the terms and conditions or employment. The court held that employer's argument was misplaced - that claimant's employment status and employer's right to alter the terms and conditions of work would be pertinent if the enforceability of a common-law employment contract were at issue. Toussaint v Blue Cross & Blue Shield of Michigan, 408 Mich 579 (1980). The court found that Toussaint and its progeny do not govern administrative proceedings when the issue is whether the claimant left with good cause attributable to employer under Section 29(1)(a) of the Act.

The addition of the moonlighting prohibition, and anti-compete clause were a substantial and material change in the terms of employment.

11/04

Section 29(1)(a)

VOLUNTARY LEAVING, Good cause, Threat

CITE AS: Simpson v MBS Commercial Printers, Inc, Bay Circuit Court, 99-3129-AE-B (August 25, 2000).

Appeal pending: No

Claimant: Darren H. Simpson
Employer: MBS Commercial Printers, Inc.
Docket No. B98-00846-148280W

CIRCUIT COURT HOLDING: A death threat made by employer, coupled with past abuse from the employer, and the employee's reasonable belief that employer was capable of acting on the threat, constitutes good cause attributable to the employer for voluntary leaving.

FACTS: On the claimant's last day, he had an argument with the owner, which the owner initiated. Claimant testified the owner threatened to kill him, which the employer denied. The ALJ failed to make a credibility finding. Claimant had difficulty with the owner in the past - physical and verbal abuse by the owner, and a physical assault by the owner's brother. The owner owned guns; claimant believed he would carry out the death threat and later filed a police report. The claimant worked the balance of his shift before leaving.

DECISION: The claimant is not disqualified from receiving benefits.

RATIONALE: Claimant finished his shift on Friday, and notified employer that he quit the following Monday. Instead of provoking employer in an environment employer controlled, claimant opted to notify employer of his leaving at a later time, allowing for a period of "cooling down." Claimant chose the prudent course, which in no way diminishes the seriousness of employer's threat. Good cause exists where the circumstances which prompted the claimant's departure would have caused an average, reasonable, and otherwise qualified worker to leave. Carswell v Share House, Inc., 151 Mich App 392 (1986). The employer made a death threat. Employees should not have to labor under the threat of murder.

11/04

11.00

LEAVING TO ACCEPT

Section 29(5)

Section 29(5)

LEAVING TO ACCEPT, Permanent work, Length of successive employment

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

Appeal pending: No

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

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

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

DECISION: The claimant is not disqualified for voluntarily leaving.

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

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

Section 29(5)

LEAVING TO ACCEPT, Performs Services

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

Appeal pending: No

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

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

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

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

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

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

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

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Sections 29(5), 40, 41

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

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

Appeal pending: No

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

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

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

DECISION: Claimant is disqualified from benefits.

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

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

Section 29(5)

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

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

Appeal pending: No

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

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

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

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

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

Section 29(5)

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

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

Appeal pending: No

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

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

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

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

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

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

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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.

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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."

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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.

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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."

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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."

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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
to the level 'wilful or wanton disr
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.

12.59

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

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

13.00

REFUSAL OF WORK

Sections 29(1)(c)(d)(e), 29(6)

Sections 29(1)(d), 29(6)

REFUSAL OF WORK, Failure to report for interview, Good cause, Loss of recall rights, Seniority, Suitable work

CITE AS: Keith v Chrysler Corp, 390 Mich 458 (1973).

Appeal pending: No

Claimant: John Keith
Employer: Chrysler Corporation
Docket No: B69 4276 38096

SUPREME COURT HOLDING: A one-year employee's dislike for assembly work, and his desire to keep his status at another plant, are not good cause for failing to interview for work which meets the requirements of suitability in a general manner.

FACTS: Mr. Keith was a washer-degreaser at the Detroit Tank Plant, with one year of seniority, when he was laid off. He was told verbally and by telegram to report for an interview at the Hamtramck Assembly Plant, but he failed to appear. "The basis of his inaction was dislike for assembly work and his desire not to lose his status at the Tank Plant."

DECISION: The decision in 41 Mich App 708 (1972) is affirmed by an evenly divided court. "We cannot find that in the case of a worker with slightly more than one year's seniority such dislikes and desires establish good cause for failure to merely attend an interview.

RATIONALE: "The establishment of suitable work under (Section) 29(1)(d) ... does not demand the specificity and in depth inquiry of (Section) 29(1)(e). When a claimant refuses to attend an interview, and bases this refusal on the unsuitability of the work that would probably be offered to him, the employer need only demonstrate that the probable employment meets in a general manner the requirements of (Section) 29(6). Cf. Michigan Tool Co. v Employment Security Commission, 346 Mich 673, 679-680; 78 NW2d 571 (1956)."

13.02

Sections 29(1)(d), 29(6)

REFUSAL OF WORK, Offer of former job, Personal reason, Recall after resignation, Successive disqualification, Suitable work,

CITE AS: Dueweke v Morang Drive Greenhouses 411 Mich 670 (1981)

Appeal pending: No

Claimant: Eric R. Dueweke
Employer: Morang Drive Greenhouses
Docket No: B75 17239 51074

SUPREME COURT HOLDING: The Board must pass on the suitability of the former work offered, and also (and separately) weigh the reasonableness of a claimant's refusal of it.

DECISION: Reversed and remanded to the Michigan Employment Security Board of Review for reconsideration.

FACTS: The claimant was disqualified in May, 1975 for voluntarily leaving his work as a retail supervisor. He was also disqualified again in October, 1975 for refusing, for personal reasons, to return to his former position.

RATIONALE: The Supreme Court declined to hold that former work can never be suitable since that work would probably meet the statutory criteria for suitable work. "However, the reasons for refusing to return to the work, including the fact that claimant previously quit the job offered, go to the question of good cause for refusing the offer." The Court cited Sec. 29(6) factors on suitability before the 1980 amendment: "[T]he Commission shall consider the degrees of risk involved to his health, safety, and morals, his physical fitness and prior training, his experience and prior earnings, his length of unemployment and prospects for securing local work in his customary occupation, and the distance of the available work from his residence." MCL 421.29(6); MSA 17.531(6).

Evidence should be considered regarding allegations by Claimant that overtime payment procedures violate the Federal Fair Labor Standards Act, 29 USC 207(a)(1), and the Michigan Minimum Wage Law of 1964, as amended, MCL 408.384; MSA 17.255(4a). The Court found implicit in the statute that an offer of work involving illegal working conditions would render the work unsuitable. Personal reasons may constitute good cause under 29(1)(e) of the MESA.

Section 29(b)

REFUSAL OF WORK, Distance to work, Recall rights, Suitable work

CITE AS: Gilliam v Chrysler Corp, 72 Mich App 538 (1976).

Appeal pending: No

Claimant: James Gilliam, et al
Employer: Chrysler Corporation
Docket No: B71 5700 41051

COURT OF APPEALS HOLDING: In determining the suitability of offered work, the loss of recall rights to local work must be considered. Further, a job is not automatically suitable because the distance is less than 45 miles.

FACTS: The claimants lived in Monroe and Newport, and worked in Trenton. One commuted 15 miles each way and the other drove 21 miles. Both were laid off and subsequently notified of work at other plants. The Monroe resident lived 44 miles from the Hamtramck plant at which he was offered work. The Newport resident was called by a Detroit plant, 42 miles from his home. Both claimants refused the offered work, citing the distance. If the claimants had accepted the offered work they would have lost their recall rights at the Trenton facility.

DECISION: The claimants are not disqualified for refusal of work.

RATIONALE: "In determining whether distance makes a job offer unsuitable the commission, referee and appeal board should consider where relevant, the age and health of the individual employee, the hours during which travel will be required, the time involved in traveling, traffic conditions and availability and reliability of a means of transportation, as well as any other facts which may relate to the distance factor and its bearing upon the suitability of the employment."

"Offered employment which is otherwise suitable may be unsuitable if it jeopardizes good prospects for recall to local work in an individual's customary occupation."

Section 29(1)(d)

REFUSAL OF WORK, Current address, Failure to report for interview, Good cause, Non-receipt of telegram, Notice of interview

CITE AS: Chrysler Corp v Devine, 92 Mich App 555 (1979).

Appeal pending: No

Claimant: Kevin Devine
Employer: Chrysler Corporation
Docket No: B74 11199 47179

COURT OF APPEALS HOLDING: A former employee is not disqualified for failure to report for an interview unless the claimant had actual notice of the interview request.

FACTS: The claimant was laid off from the employer's Warren Tank Plant. Five months later, the employer sent him a telegram asking him to report for an interview at the Warren Truck Assembly Plant. The claimant did not receive the telegram, because his mother forgot to give him the notice of attempted delivery, and he no longer lived with his parents.

DECISION: The claimant is not disqualified for failure to report for an interview.

RATIONALE: The employer argued that since Devine had given the employer his mother's address, "she became his agent and that her receipt of notice should be imputed to him." The Court found the general principles of agency inapplicable and further held:

"The undisputed facts show that claimant was at all times ready and willing to attend a job interview upon receiving notice of such an appointment, and to return to work whenever it became available.

"Given the good faith of the claimant in this matter, actual non-receipt of the notice constituted good cause for his non attendance."

13.05

Section 29(6)

REFUSAL OF WORK, Offer of former position as a long term substitute, Substitute teacher, Suitable work

CITE AS: Zielinski v Bay City Public Schools & MESC No. 58867 (Mich App October 12, 1982).

Appeal pending: No

Claimant: Karen Zielinski
Employer: Bay City Public Schools
Docket No: B79 00344 66220

COURT OF APPEALS HOLDING: Work which is unsuitable at the beginning of unemployment may become suitable when consideration is given to the length of unemployment and the prospects of securing accustomed work.

FACTS: Claimant, a full time first and second grade teacher for three years, was laid off. After approximately eight months of unemployment, Claimant was hired as a long term substitute teacher at a salary of $42 per day. She was laid off at the end of the school year. In November, Claimant was again offered a position as a long term substitute teacher for a duration of six weeks. Claimant refused the work because she had no prior experience teaching physical education classes to sixth graders. Claimant was elementary certified to teach all subjects in grades one through six.

DECISION: Claimant is disqualified for refusal of work.

RATIONALE: The Court considered all the relevant statutory criteria in Sec. 29(6) of the Act in accordance with Dueweke v Morang Drive Greenhouses, Inc., 411 Mich 670, 678; 31 NW2d 712 (1981). "An offer of employment need not be identical to claimant's prior employment, and her apparent inexperience in teaching higher grade levels does not render the offered work unsuitable."

The Court cites Grace v Maine Employment Security Comm., 398 A2d 1233 (1979) to support the disqualification where a claimant is unable to secure a full time teaching position after more than two months of unemployment, and is unaware of any prospects for such employment.

11/90
7, 15, d5:NA

13.06

Sections 29(1)(e), 29(6)

REFUSAL OF WORK, Fear of crime, Geographical area, Offer of former job, Personal reason, Recall after resignation, Successive disqualification, Suitable work

CITE AS: Allied Building Service v ESC, 93 Mich App 500 (1979).

Appeal pending: No

Claimant: Stanley Stachow, Jr.
Employer: Allied Building Service Co.
Docket No: B76 914 50792

COURT OF APPEALS HOLDING: Where fear of the neighborhood is not sufficient cause for voluntary leaving, refusal of reemployment is disqualifying, especially if more security is offered.

FACTS: The claimant worked alone in an office at Woodward Avenue and Sproat Street in Detroit. After being threatened twice and robbed twice, he quit and was disqualified for voluntary leaving. Five days after leaving, the claimant was asked to return, with the addition of inside parking and escort service. He refused the offer.

DECISION: The claimant is disqualified for refusal of work.

RATIONALE: "Good cause to refuse work cannot be based upon purely personal reasons since the underlying policy of the Employment Security Act is to provide benefits for persons unemployed through no fault of their own, Losada v Chrysler Corp, 24 Mich App 656; 180 NW2d 844 (1970), LV DEN, 383 Mich 827 (1970).

"The Referee found that the claimant was aware of plaintiff's offer to provide security protection for his car and himself. Yet, claimant still refused to work for fear of the neighborhood. This fear was found to be insufficient cause for his quitting the job in the first place and does not constitute good cause for refusing the offer of reemployment, especially in light of the employer's offer to provide more security."

Section 29(1)(e)

REFUSAL OF WORK, Food handler's permit, Condition of employment, Tuberculin test, Recall from medical leave

CITE AS: King v K-Mart Corp, No. 50121 (Mich App April 15, 1981).

Appeal pending: No

Claimant: Rosemary King
Employer: K-Mart Corp
Docket No: B77 3814 55040

COURT OF APPEALS HOLDING: Where a recovered employee refuses to return from medical leave, and fails to obtain a required tuberculin test and food handler's permit, the claimant is disqualified for refusal of work.

FACTS: The claimant took a medical leave of absence because her hands had broken out in a rash. She was later released to return to work, but she refused, saying she lacked the required tuberculin test and food handler's permit.

DECISION: The claimant is disqualified for refusal of work.

RATIONALE: "[A]n employer's request of a claimant that he return to his former position is treated as an offer of suitable employment under (S) 29(1)(e). Allied Building Service Co. v MESC, 93 Mich App 500 (1979)." "Plaintiff's reason for leaving the position no longer existed, and the additional reasons advanced for her failure to return (lack of a required T.B. test and food handler's permit) appear to be excuses rather than reasons, since plaintiff could have obtained the test and permit if she had desired and since it was apparent from the circumstances that sanctions would not be imposed if she had returned to work."

13.08

Section 29(1)(e), 29(6)

REFUSAL OF WORK, Good cause, Length of unemployment, Recall rights, Physical fitness, Seniority, Suitable work

CITE AS: Lyscas v Chrysler Corp, 76 Mich App 55 (1977).

Appeal pending: No

Claimant: Henry B. Lyscas
Employer: Chrysler Corporation
Docket No: B74 6163 46125

COURT OF APPEALS HOLDING: Short unemployment, physical limitation and the desire to retain several years seniority in specialized work may constitute good cause for refusal of assembly work where the employer has not proven that the offered work is suitable for the claimant.

FACTS: The claimant was a grinder operator at a Dearborn plant, with several years experience, when he was laid off. Thirteen (13) days later the employer offered him assembly work at a Hamtramck facility. The claimant refused, citing his small stature and his desire to retain his seniority at the Dearborn location. The Referee found the claimant to be less than 5 feet tall and under 120 pounds.

DECISION: The claimant is not disqualified for refusal of work.

RATIONALE: "Acceptance of the offered employment would have required the claimant to lose the benefits of his prior training and experience. Certainly a temporary requirement that he do this should be weighed differently than a permanent one in determining the suitability of the offered employment. And a permanent loss of the benefit of one's prior training and experience would affect suitability differently if the period of unemployment had been lengthy and the prospects for recall were slight than it would if the period of unemployment had been brief and the prospects for recall were good. Loss of recall rights was, therefore a fact which in this case had a bearing on some of the [Section] 29(6) factors and should have been considered by the appeal board.

The Court cited Gilliam v Chrysler Corp, 72 Mich App 538 (1976), as authority.

11/90
NA

Sections 29(1)(e), 29(6)

REFUSAL OF WORK, Good cause, Lack of transportation, Suitable work

CITE AS: Nelson v Beverly Manor, No. 78-296 AE, Genesee Circuit Court (January 10, 1979).

Appeal pending: No

Claimant: Denise A. Nelson
Employer: Beverly Manor
Docket No: B76 12761 54305

CIRCUIT COURT HOLDING: Lack of transportation must be considered in determining both the suitability and good cause elements of refusal of work.

FACTS: The claimant was a nurse's aide on the second shift. She rode to work with a co-worker. Following a medical leave of absence, the claimant was told to report for work on the first shift. Her previous position had been filled. The claimant refused the first-shift offer because she had no transportation for that shift.

DECISION: The claimant is not disqualified for refusal of work.

RATIONALE: The Court held that the decision of the Board of Review, " ... is contrary to law insofar as it totally excludes appellant's lack of available transportation from all consideration in determining both the suitability and good cause elements under Section 29(1)(e) of the Michigan Employment Security Act, Gilliam v Chrysler Corp., 76 Mich App 55 (1977), and for the reason that the same is not supported by competent, material, and substantial evidence on the whole record inasmuch as there is no evidence in the record relative to the full statutory criteria for determining the suitability of offered work under the Michigan Employment Security Act. Chrysler v Losada, 376 Mich 209 (1965); Lasher v Mueller Brass, 62 Mich App 171 (1975); Lyscas, supra."

Section 29(1)(e), 29(6)

REFUSAL OF WORK, Suitability, Wage differential

CITE AS: Youmans v Chelsea Community Hospital, No. 97579 (Mich App November 17, 1987).

Appeal pending: No

Claimant: Kathy Youmans
Employer: Chelsea Community Hospital
Docket No: B83 15104 93297

COURT OF APPEALS HOLDING: The offered work was not suitable under Section 29(6) because of the wage rate and travel distance, but even if it were suitable, claimant had good cause to refuse the offer because of the increase in her transportation and child care costs.

FACTS: Claimant worked for 2 years as a Child Development Services Coordinator for employer. Previously, she had been a teacher. Claimant's job was eliminated. Employer offered her a teaching position on a full-time basis at $5.50/hr. She had been earning $6.92/hr. and worked only 24 hours a week. Claimant refused because of the hourly wage reduction and because of extra travel and child care costs associated with full time work.

DECISION: Claimant is not disqualified for benefits pursuant to Section 29(1)(e) of the Act.

RATIONALE: "Clearly, however, the decisive factor at all levels below has been the wage differential between plaintiff's part-time coordinator job and the offered full-time teaching position. Plaintiff's prior earnings were $6.92 per hour, 24 hours per week, or $166.08 per week. The offered job paid $5.50 per hour, 40 hours per week, or $220.00 per week. The referee focused on the hourly pay differential of $1.42 per hour. The Board of Review, on the other hand, did not consider the hourly wages involved, but instead looked at weekly pay, a $54 increase. We believe that the Board of Review erred as a matter of law in looking exclusively at weekly pay without taking into account the number of working hours needed to generate the pay. Plaintiff's "prior earnings" were $166 for 24 hours' work. This compares with a $54 per week increase provided plaintiff worked 16 additional hours. We do not think that a job offering in excess of 20 percent less pay for a comparable number of hours of work can as a matter of law, be deemed 'suitable', even with enhanced benefits of specified value."

6/91
1, 6, d9:C

Section 29(1)(e)

REFUSAL OF WORK, Burden of proof, Suitable work, Unrefuted testimony, Unsworn written statement

CITE AS: Wilkins v Ice Cream Parlor, No. 8-250, St. Clair Circuit Court (April 19, 1978).

Appeal pending: No

Claimant: Ilene Wilkins
Employer: Ice Cream Parlor
Docket No: B75 10698 49416

CIRCUIT COURT HOLDING: The employer has the burden of proving a refusal of suitable work; an unsworn written statement will not meet this burden where the claimant testifies that the work is not suitable, and offers the testimony of a witness.

FACTS: The claimant was laid off after working on the first shift for some time. The employer later offered her a position on the second shift. The claimant declined. "Her testimony was that she refused this work because she was unable to perform it due to her health and that there was a difference in duties between the first shift and the second shift at the employer's Ice Cream Parlor." The only evidence from the employer was an unsworn written statement.

DECISION: The claimant is not disqualified for refusal of work.

RATIONALE: "The record reflects that no testimony was entered before the referee in behalf of defendant and that further testimony which was offered in behalf of plaintiff was not accepted based on witness's possible bias.

"It is the opinion of this Court that this case falls within the guidelines of Court of Appeals case Dann v Employment Security Commission, 38 Mich App 608 (1972)."

"Since in the instant case, defendant offered no testimony of any nature at the hearing and in fact did not even appear at the hearing, this Court fails to understand how he could meet the burden of proof as established by the Court of Appeals."

Sections 29(1)(e), 29(6)

REFUSAL OF WORK, Distance to work, Offer of former job, Recall after resignation, Suitable work

CITE AS: Korhonen v Brown and Winckler, No. 23110, Ingham Circuit Court (December 20, 1979).

Appeal pending: No

Claimant: Joan I. Korhonen
Employer: Brown and Winckler
Docket No: B76 21570 RO 60787

CIRCUIT COURT HOLDING: Where an individual leaves nearby work and moves 75 miles away for personal reasons, the separation is disqualifying but a refusal to return to the former employment is not disqualifying.

FACTS: The claimant worked as a legal secretary. She was disqualified for voluntarily leaving a Lansing position in order to move from Lansing to Northville. The claimant requalified, but refused an offer of recall to the Lansing job, because the distance from her home was 75 miles.

DECISION: The claimant is not disqualified for refusal of work.

RATIONALE: "The appellants assert that she had a job here in Lansing which was open, available to her which she could come to and earn a wage. That, therefore, she was not seeking work pursuant to the statute because she did not accept the employment with them.

"The Court finds, contrary to the assertion of the appellants, however, that she need not be available for work in Lansing because of the distance which exists between Northville, Michigan and Lansing, Michigan."

"The Commission correctly found, the Referee correctly found, and the Board of Review correctly found that the work offered to the claimant by the appellant was unsuitable because of the distance involved which she would have to travel to in order to enjoy that work."

Sections 29(1)(e), 29(6)

REFUSAL OF WORK, Burden of proof, Good cause for refusing employment with former employer, Suitability factors

CITE AS: Munising Memorial Hospital v Mary J. Ward No. 83-1415 AE, Alger Circuit Court (April 2, 1984).

Appeal pending: No

Claimant: Mary J. Ward
Employer: Munising Memorial Hospital
Docket No: B83 10109 91302W

CIRCUIT COURT HOLDING: Where Claimant, who had been the Director of Nursing, was discharged and refused reemployment as a Supervisor with the same employer, and the position meets the statutory suitability factors, Claimant is disqualified, unless a valid reason exists for rejecting the work.

FACTS: Claimant was discharged as Director of Nursing because she had so many job related responsibilities that she became ineffective as the Director. Claimant was offered three other positions, one of which was Supervisor of OR, ER and Central Supply. There would have been no reduction of pay or fringe benefits, but the position did not have the authority, control, or status of the former job. Claimant refused the work.

DECISION: Claimant is disqualified for refusal of work.

RATIONALE: The issues are (1) whether the claimant was offered suitable work; and (2) if she was offered suitable employment, whether it was refused with good cause. Citing Dueweke v Morang Greenhouses, 411 Mich 670 (1981), the Court found that the offer of work did not involve risk to Claimant's health, safety, morals, and physical fitness; nor did it compromise prior training, experience, prior earnings, length of unemployment, prospects for securing local work in the customary occupation or distance to work from residence, MCL 421.29(6); MSA 17.531(6). As for good cause, the Court found that the claimant's reason for rejecting the proffered employment was totally personal and not attributable to the employer. A personal reason may constitute good cause for rejecting offered employment, but only when it "would be determined by reasonable men and women valid and not indicative of an unwillingness to work."

Section 29(1)(e), 29(6)

REFUSAL OF WORK, Refusal to cross picket line, Fine imposed by union, Interim employment, Labor dispute, Recall during strike, Suitable work, Termination of disqualification

CITE AS: Anderson v Top O'Michigan Rural Electric, 118 Mich App 275 (1982).

Appeal pending: No

Claimant: Noah E. Anderson, et al
Employer: Top O'Michigan Rural Electric
Docket No: B79 12197 RO1 70219

COURT OF APPEAL HOLDING ... Refusal to accept an offer of work from an employer who is involved in a labor dispute will not work a Section 29(1)(e) disqualification.

FACTS: The claimants were each employed as line trade employees or as field technician employees. A third bargaining unit made up of office workers was also a member of the union. The office workers went on strike. Claimants refused to cross the office workers' picket line.

When the claimants initially applied for benefits under the Michigan Employment Security Act they were found to be disqualified under Section 29(8)(iv) because they were involved in a labor dispute in progress.

Claimants thereafter obtained employment with employers other than Top O'Michigan. When claimants were laid off from those jobs they applied for benefits. At that time the MESC determined that under Section 29(8) the prior disqualification had been terminated.

Top O'Michigan wrote to claimants stating that their jobs were available to them. Claimants refused that offer of work. The labor dispute was still in progress.

DECISION: The work offered was not suitable work under Section 29(7) and the disqualification of Section 29(1)(e) of the MES Act does not apply.

RATIONALE: To read the Act as the employer has done would render wholly ineffective the provision contained in Section 29(8) for terminating a labor dispute disqualification.

The Court used the language of Great Lakes Steel Corp. v Employment Security Commission, 6 Mich App 656 at 662; 150 NW2d 547 (1967) that striking workers who are laid off after obtaining interim employment are entitled to receive unemployment benefits.

11/90
6, 14, d3:G

Section 29(1)(e)

REFUSAL OF WORK, Attachment to labor market, Restrictions on availability, Substantial field of employment, Burden of proof

CITE AS: Pritchett (PCHA Outer Drive Hospital) 1982 BR 61289 (B78-52550).

Appeal pending: No

Claimant: Mamie Pritchett
Employer: PCHA Outer Drive Hospital
Docket No: B78 52550 61289

BOARD OF REVIEW HOLDING: Good cause for refusal of work may be found where a claimant can demonstrate that there exists no reasonable alternative means for discharging domestic duties, such as child care, during the hours of the proffered work.

FACTS: Claimant, a nurse's aide on the midnight shift, became unemployed for lack of work. The employer offered weekend work on the afternoon shift from 3:00 P.M. to 11:30 P.M. Claimant had three children and two grandchildren residing with her. The eighteen year old was subject to seizures and could not be left unattended; the seventeen year old had a weekend job and could not be home at night until 9:30 P.M. Claimant was separated from her husband, who was also an invalid.

DECISION: Claimant is not disqualified for refusal of work nor ineligible for benefits under availability provisions.

RATIONALE: The Board of Review followed the rationale of the California Supreme Court in Sanchez v Unemp. Ins. Appeals Bd., Sup., 141 Cal. Rptr. 146 (Cal. Sup. Ct. 1978) wherein that Court said: "We conclude that a claimant who is parent or guardian of a minor has 'good cause' for refusing employment which conflicts with parental activities reasonably necessary for the care or education of the minor if there exist no reasonable alternative means of discharging those responsibilities."

As for eligibility, the Board of Review cited the Court's holding in Sanchez, supra, that: "Availability for work ... requires no more than (1) that an individual claimant be willing to accept suitable work which he has no good cause for refusing and (2) that the claimant thereby make himself available to a substantial field of employment " 141 Cal. Rptr. at 154. The Commission did not establish that Claimant had limited herself to an insubstantial field of employment.

The decision of the Referee is reversed by a majority of the full Board of Review.

11/90
5, 6, 14, 15, d3:NA

Sections 28(1)(c), 29(1)(e), 29(6)

REFUSAL OF WORK, Offer of former job, Distance, Out of state, Residence, Requalification

CITE AS: Bingham v American Screw Products Co, 398 Mich 546 (1976).

Appeal pending: No

Claimant: Arlie K. Bingham
Employer: American Screw Products
Docket No: B70 2410 38743

SUPREME COURT HOLDING: 1. Claimant who established credit weeks in Michigan can requalify for benefits by being able and available in Kentucky. 2. Since claimant resided in Kentucky his previous Michigan employer's offer of work was not suitable as it was too distant from his residence in Kentucky.

FACTS: Claimant left a Michigan job because he could not find adequate housing at a price he could afford. He was disqualified for voluntary leaving. He returned home to Kentucky, and registered for work with the appropriate employment office there. Thereafter he diligently sought and made himself available for suitable work, but turned down a job offer from his former Michigan employer due to the distance from his Kentucky residence.

DECISION: (1) Claimant requalified for benefits after serving the period of disqualification under the Act, and (2) was not disqualified for refusing his former employer's job offer because the offer was not an offer of "suitable work" due to the fact the job was too distant from his residence.

RATIONALE: 1. When a claimant moves to a locality other than where he earned credit weeks, his being able and available should be determined by whether he was genuinely attached to the labor market in his new locality.

2. In determining whether the Michigan employer's offer of work was suitable the Court found claimant's residence was in Kentucky as this is where he actually lived. The Court of Appeals erred in holding the Michigan employment offer was suitable, when it determined claimant's residence as a matter of law was both where he resides and where he earned credit weeks. To hold otherwise would restrict an unemployed person's right of freedom of movement to seek a job where it is best for him.

Section 29(1)(e)

REFUSAL OF WORK, Suitable work, Part-time work, Fringe benefits

CITE AS: Jarvis (Peoples State Bank), 1982 BR 78618 (B81 08578).

Appeal pending: No

Claimant: Patricia Jarvis
Employer: Peoples State Bank
Docket No: B81 08587 78618

BOARD OF REVIEW HOLDING: A claimant may refuse an offer of work without disqualification if acceptance of the offered work would result in an immediate and substantial economic loss.

FACTS: Claimant worked for the employer and its predecessor as a full-time bank teller for eight years. Her full-time status entitled her to a package of fringe benefits, including paid vacation, medical insurance, sick pay and a pension plan. As a result of a merger and consolidation of offices, claimant's full-time position was eliminated. While still on the employer's payroll she was offered a part-time position without fringe benefits, which she refused.

DECISION: Claimant is not disqualified for refusal of work.

RATIONALE: When evaluating a refusal of work situation, the suitability of the work, in light of various factors, including prior earnings, must be considered. "[T]he claimant was not yet unemployed when she refused the offer of part-time work. She was under no duty to bury her financial sights instantaneously. We hold that the offered work was unsuitable. By excluding paid vacations, medical insurance, life insurance, sick leave and participation in a pension plan, the offer was immediately and substantially below the claimant's prior earnings."

Section 29(1)(e), 29(6)

REFUSAL OF WORK, Burden of proof, Suitability

CITE AS: Lasher v Mueller Brass Co, 62 Mich App 171 (1975).

Appeal pending: No

Claimant: Gary Lasher
Employer: Mueller Brass Company
Docket No: B70 6233 39380

COURT OF APPEALS HOLDING: The burden of proving disqualification for refusal of work, including that the offered work was suitable, is on the employer. Suitability of offered work is to be determined at the time when the offer was made.

FACTS: Claimant was laid off in May, 1970. At the time of lay off he was classified as a "center list grinder, set-up service and operator" earning $3.54 per hour. In July, 1970 the employer offered claimant a job as a janitor at $2.80 per hour.

Claimant, his union representative and the personnel manager all expected he would be recalled to his old job within two weeks. In fact, he subsequently was called back two weeks later, on July 20, 1970.

On July 6th, however, claimant refused the janitor job. This refusal was partly based upon the personnel manager's advice that refusal would only jeopardize his unemployment benefits for one week. On July 13th, claimant notified the company he would take any work available.

DECISION: Appeal Board decision reversed. The matter was remanded for further evidence on the suitability of the work offered.

RATIONALE: The Appeal Board incorrectly relied on claimant's July 13th statement he would take any position as determinative the July 6th job offer was "suitable". The court held the determination as to whether the work was suitable must be confined to the time the offer was made. As such, the matter must be remanded because the Board applied the improper standard. On remand the burden of proving disqualification is on the employer. The Board is to first determine if the work offered was suitable, then determine the question of good cause, if necessary.

13.19

Section 29(1)(e)/29(6)

REFUSAL OF WORK, Suitable work, Fringe benefits, Preferred occupation.

CITE AS: Vandervoort v B.S. Greenhouses Corp., Wayne Circuit Court, No. 95-531278-AV (May 9, 1996).

Appeal pending: No

Claimant: Phyllis Vandervoort
Employer: B.S. Greenhouses Corporation
Docket No. B93-01574-127092W

CIRCUIT COURT HOLDING: Where claimant was offered a full-time position doing work she had been performing on a part-time basis, the work was suitable and claimant did not have good cause to refuse the offer because no fringe benefits were offered and claimant wanted to look for work in "her field."

FACTS: Claimant worked part-time for employer and full-time as a caregiver in a group home. When claimant lost her full-time job she applied for and received unemployment benefits. Employer offered claimant full-time work with no benefits. Claimant declined offer because of lack of benefits, low pay and desire to look for job in her "field" - as a caregiver. Employer discharged her from her part-time position for refusing to make herself available for full-time hours.

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

RATIONALE: The work offered claimant was plainly "suitable" because she had already been doing it when it was offered on a full-time basis. Lack of fringe benefits does not render work unsuitable nor does it amount to good cause to refuse the work. Need for time to look for employment in her preferred "field" also does not provide claimant with good cause to refuse.

7/99
22, 21: K

Section 29(1)(e)

REFUSAL OF WORK, Suitable work, Pay reduction.

CITE AS: Anthony v Nottawa Gardens, Branch Circuit Court, No. 85-03-160AE (May 6, 1986).

Appeal pending: No

Claimant: David Anthony
Employer: Nottawa Gardens
Docket No. B84-09806-97986W

CIRCUIT COURT HOLDING: Where employer had work available and offered claimant re-employment at a lower wage than he previously received to perform the same or similar job, the work offered was suitable and claimant did not have good cause to refuse it.

FACTS: The claimant quit his job with employer to pursue other opportunities. Subsequently, he applied for benefits at which point the employer offered him his position but at a lower rate of pay. The claimant refused the offer because of health and safety concerns and because he was offered $1.00 less per hour than he had previously earned. Claimant further alleged that the offer was a sham and made only for the purpose of avoiding charges to employer's account.

DECISION: Claimant is disqualified for refusing an offer of suitable work without good cause.

RATIONALE: The fact that employer offered re-employment coincidentally to claimant's effort to obtain benefits does not render the offer a "sham" so long as employer actually had work available that claimant could do. Claimant had no right to expect same pay as he received previously because he quit for personal reasons. Claimant had not complained of health and safety conditions prior to quitting so they cannot be raised later to show work offered is unsuitable.

7/99
3, 11: N/A

Section 29(1)(e)

REFUSAL OF WORK, Suitable work, Wage differential, Child care, Availability, Shift limitation

CITE AS: Koetje v Teamwork, unpublished per curiam Court of Appeals May 26, 1998 (No. 200118).

Appeal pending: No

Claimant: Marie Koetje
Employer: Teamwork, Inc.
Docket No. B95-09004-137801

COURT OF APPEALS HOLDING: 1) A substantially similar position paying approximately 20% less is not unsuitable. 2) The fact that an employee might incur additional child care expenses because of a shift change does not provide good cause for refusal of suitable employment. 3) By limiting herself to first shift work, the claimant was not fully available.

FACTS: The claimant applied for work with the involved employer and was assigned to a client as a general factory laborer. Wages for the assignment began at $8.00 per hour and increased to $9.49 three months later. They remained at that level until her assignment terminated. Shortly thereafter the employer offered to place the claimant in a similar position on second shift at a rate of $7.80 per hour. The claimant declined the assignment, indicating that not only would the second shift assignment require her to incur day care expenses for both her children but would pay her less. Subsequently, another position was offered to the claimant at $7.00 per hour which she also declined.

DECISION: The claimant was disqualified under 29(1)(e) and held ineligible under Section 28(1)(c).

RATIONALE: 1) The two offers of work at a reduced wage "were appropriate given [claimant's] qualifications and previous experience as well as the available job market." 2) Under the circumstances the need for additional child care did not provide the claimant with good cause as the Department of Social Services would have helped her defray any additional expenses. 3) One who restricts her employment to certain hours of the day is not "available" for work if the work for which she is qualified is not likewise limited.

Note: The court declined to consider the length of claimant's unemployment when evaluating the suitability of the work offered. Also, Section 29(6) of the Act has been amended since the facts of this case arose.

7/99
24, 16, d12: N/A

Sections 29(1)(c), 29(1)(e)

REFUSAL OF WORK, Bona fide offer, Posting

CITE AS : Health Alliance Plan of Michigan v Graham, Wayne Circuit Court, No. 89-908418-AE (October 17, 1989).

Appeal pending: No

Claimant: Sandra Graham
Employer: Health Alliance Plan of Michigan
Docket No. B87-13500-107918

CIRCUIT COURT HOLDING: Claimant cannot be disqualified under Section 29(1)(e) when a job was posted but not specifically offered to her.

FACTS: Claimant was laid off from her non-medical secretary position on August 4, 1987. Previously claimant requested a job upgrade but could not be offered the upgraded position without meeting the minimum job qualifications including typing 60 wpm. Claimant refused to take a typing test. Also, as required by contract, employer posted the upgraded position so that all of its employees could bid on it. On July 31, 1987, claimant interviewed for a non-medical secretary position in a different department but declined the position because she considered it primarily receptionist rather than secretarial. Furthermore, it required evening hours which were unacceptable to claimant for personal safety reasons.

DECISION: Claimant is not disqualified for benefits under Sections 29(1)(c) or 29(1)(e) of the MES Act.

RATIONALE: The provisions of 29(1)(c) are not applicable. Therefore, the Referee properly framed the issue in terms of whether or not the claimant refused an offer of suitable work. General posting of a position is not an offer of work within the meaning of 29(1)(e). Claimant was not offered the upgraded position. As it is undisputed the claimant was laid off, her unwillingness to take the typing test does not convert the separation into a voluntary leaving. As to the other position for which claimant interviewed, her undisputed, credible testimony was that the position was of a lesser stature and, therefore, not suitable.

7/99
14, 4, d3: N/A

13.23

Section: 29(1)(e)

REFUSAL OF WORK, Suitable work, Statutory construction

CITE AS : Klok v Caretec, Inc., Kalamazoo Circuit Court, No. 93-3161-AE (May 5, 1995).

Appeal pending: No

Claimant: Christina Klok
Employer: Caretec, Inc.
Docket No. B92-01514-121853W

CIRCUIT COURT HOLDING: Where claimant was offered a job similar to one she held previously, even though there were some changes in benefits and other conditions of employment, the work offered was suitable and claimant did not establish good cause to refuse it.

FACTS: Claimant's employer was bought by Caretec and claimant was offered a job by the new employer, which she declined. Claimant believed her job would be phased out, that all material terms and conditions of the employment were not disclosed when the offer was made, and that the offer was not suitable because there was no assurance the work would be substantially similar to her former job. There was to be an increase in her premium for health insurance.

DECISION: Claimant is disqualified for refusing an offer of suitable work without good cause.

RATIONALE: Claimant was aware of what her job duties would be even though a job description was not provided at the time of the offer. The work offered must be suitable but under Section 29(6) - it need not be "substantially similar" to former job. Increase in bi-weekly premium for insurance was minor issue since new employer eliminated the deductible. Final clause of Section 29(1)(e) concerning "direction by the commission" refers to self-employment and not to the acceptance of suitable work clause.

7/99
19, 17, d22: N/A

Sections 28(1)(c)and 29(1)(e)

REFUSAL OF WORK, Good cause, Eligibility, Ability, Last job

CITE AS: Henry Ford Health System v Morin, Macomb Circuit Court, No. 2000-1462-AE (January 2, 2001)

Appeal pending: No

Claimant: Anne E. Morin
Employer: Henry Ford Health System
Docket No. B1999-02088-RM1-152194W

CIRCUIT COURT HOLDING: Where claimant's refusal of offered work did not indicate an unwillingness to work, but demonstrated a "reasonable concern for her immediate health and safety and adherence to her physician's directives," she is not disqualified under Section 29(1)(e). A claimant is not required to be able and available to perform her last job under 28(1)(c).

FACTS: Claimant worked as a full-time patient care counselor in employer's psychiatric hospital. Claimant took a medical leave of absence due to stress and anxiety in February, 1998 brought on by two incidents with violent patients. Claimant was also concerned for her safety due to staff shortages. Claimant's physician released her to return to work in September, 1998 without restrictions. In November employer offered claimant a position as a full-time patient care counselor in the same facility and same capacity she worked in before the leave of absence. Claimant declined the offer asserting the position would jeopardize her health and safety. In December claimant's physician submitted a medical statement to the Agency indicating that claimant could work as a patient care counselor but not in the same work environment.

DECISION: Claimant is eligible and not disqualified for benefits.

RATIONALE: Accepting employer's offer would have "compelled claimant to disregard her doctor's advice." In light of her doctor's statement, and claimant's strong belief returning to the same work would jeopardize her health and safety, claimant had good cause to refuse employer's offer under 29(1)(e).

Section 28(1)(c) "does not mandate that a claimant must be able to perform his last job, but only that he is able and available to perform full-time work for which he has previously received wages." Claimant's doctor's statement allowed claimant to work as a patient care counselor in a different environment. Claimant sought work as a social worker, "work of a character generally similar to" work as a patient care counselor.

11/04

Section 29(1)(c)

REFUSAL OF WORK, Offer, Posting

CITE AS: Cass County Medical Care Facility v Williams, Cass Circuit Court, No. 99-561-AE (January 12, 200)

Appeal pending: No

Claimant: Anitha Williams
Employer: Cass County Medical Care Facility
Docket No. B1999-00201-151653W

CIRCUIT COURT HOLDING: The employer must establish that it made a specific offer of work to the claimant. Where the employer is engaged in a reorganization, the mere posting of open positions without specifically advising employees of the consequences of failing to apply, is not an offer of suitable work.

FACTS: Claimant worked for employer in its dietary department as a full-time aide. Employer reorganized the dietary department, cutting full-time positions. Employer posted a notice to the employees that there was a reorganization of the jobs and the employees were to sign up. Under the reorganization, claimant's job was converted to part-time status. Claimant did not sign up for any openings. Another employee, who signed up, got the part-time aide job. Claimant did not sign up for any of the full-time openings because the employees who signed up had more seniority. She did not sign up for a part-time opening because she could not afford to work part-time. Employer told claimant she could apply for a position in another department but she would have to start as a new hire.

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

RATIONALE: Employer must demonstrate that an offer of work was communicated to claimant. While employer had several positions open, none were offered to claimant. The postings did not inform claimant that if she failed to sign up for an opening that she would not have a job in the department. Claimant was not told she could combine part-time jobs to work full-time or that her full-time job was in jeopardy. The employer did not establish it made a specific offer of suitable work to claimant.

11/04

14.00

DISQUALIFICATIONS - OTHER

Section 29(1)(f)-(j)

Section 29(1)(h)

ASSAULT AND BATTERY, Dispute concerning back pay, Provocation by supervisor, Refusal of pass to first aid, Striking supervisor

CITE AS: Ashford v Motor Wheel, Inc. No. 74-9229 AE, Washtenaw Circuit Court (March 3, 1976).

Appeal pending: No

Claimant: William H Ashford
Employer: Motor Wheel, Inc.
Docket No: B74 493 45311

CIRCUIT COURT HOLDING: Provocation is not a defense to assault and battery.

FACTS: Two supervisors testified that the claimant struck one with his hand, and hit the other with his fist while jerking the victim by his necktie. The claimant testified that he was provoked by disputes regarding back pay and a pass to first aid.

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

RATIONALE: "The MESC Appeal Board properly refused to remand this matter for more testimony concerning the issue of provocation because provocation, based upon the contentions of the appellant, is not a valid defense to assault. In Goucher v Jamieson, 124 Mich 21 (1900), the court upheld a judgement for the plaintiff in a suit to recover $65.00 for assault and battery. The defendant contended that he was provoked by the plaintiff's derogatory language to the defendant's sons, who appears to have picked some berries on the plaintiff's land. In reaching its decision, the court stated:

"The court instructed the jury that mere words, though insulting, do not justify an assault and battery, and that 'no assault is justified, unless by some assault performed by the other party.' ... The instructions given were, in our opinion, proper, under the circumstances of the case. 124 Mich at 22."

Section 29(1)(h)

ASSAULT AND BATTERY, Profanity by supervisor, Provocation, Reasonable person standard, Striking supervisor, Unreasonable anger

CITE AS: Caldwell v Chrysler Corp, No. 74-038-714 AE, Wayne Circuit Court (March 31, 1976).

Appeal pending: No

Claimant: Philip Caldwell
Employer: Chrysler Corp.
Docket No: B74 3703 45737

CIRCUIT COURT HOLDING: Provocation is not a defense to assault and battery.

FACTS: The claimant's testimony indicated that ... "Foreman Tomaszewski yelled profane words to claimant on four (4) different occasions in an effort to get claimant to work faster; that claimant then struck Foreman Tomaszewski with his fist, 'lost complete control' and started chasing the foreman and struck him again after he was 'on the ground.'"

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

RATIONALE: "Provocation is not a defense to an assault, see People v McKay, 46 Mich 439 (1881); People v Pearl, 76 Mich 207 (1889)." "This Court also has reference to Welch v Weir, 32 Mich 77, p 86 (1875); 'The law in its application to this subject, takes full account of the infirmities of human nature, and holds no one to any impossible or unreasonable standard. But on the other hand, it cannot, for the safety of society, be tolerated that anyone can claim exception from responsibility by reason of excitement, when his anger is unreasonable, and results from a neglect to use ordinary self-control. No one has the right to allow his temper to become uncontrollable.'"

14.03

Section 29(1)(h)

ASSAULT AND BATTERY, Striking supervisor, Burden of proof, Preponderance of evidence, Standard of proof, Weight of the evidence

CITE AS: Waite v Chrysler Corp, No. 74-030301 AE, Wayne Circuit Court (November 14, 1975).

Appeal pending: No

Claimant: Lewis H. Waite
Employer: Chrysler Corp.
Docket No: B73 9378 45211

CIRCUIT COURT HOLDING: A disqualification for misconduct discharge or assault and battery does not require proof beyond a reasonable doubt, but it must "... be supported at least by a convincing preponderance of evidence."

FACTS: The claimant's supervisor testified, " ... that the claimant struck him with his palm over his left eye, causing his glasses to break." The claimant and his witness testified that no such incident occurred between the claimant and the supervisor.

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

RATIONALE: The Court adopted the decision of the Referee, who held: "After thoughtful consideration of the entire record in this appeal, the Referee concludes that there is a lack of sufficient, persuasive and dominant evidence to support a proper finding that the claimant was discharged under circumstances which would subject him to disqualification under either Subsection 29(1)(b) or Subsection 29(1)(h) of the Act.. Since both of these provisions of the statute are in the nature of penalties, the Referee believes that there must be a high quality of proof in the record to warrant the application of either Subsection. By this, we do not mean to imply that the provisions of the Employment Security Act are subject to any of the criminal tests of the weight of evidence in that proofs must be 'beyond a reasonable doubt.' However, even in these proceedings, a disqualification should be supported at least by a convincing preponderance of evidence. The record, in this instance, lacks that quality."

Section 29(1(j)

THEFT, Discovered after discharge, Causal connection

CITE AS: Old Farm Shores v Borghese, No. 61554 (Mich App March 28, 1983).

Appeal pending: No

Claimant: Sally Borghese
Employer: Old Farm Shores
Docket No: B79 03563 R01 68880

COURT OF APPEALS HOLDING: There must be a direct causal connection between the act complained of and the decision to discharge before disqualification can be imposed as a result of that act.

FACTS: Claimant managed an apartment complex. The employer became dissatisfied with claimant's performance and gave her notice her employment would be terminated after two weeks with pay. During the notice period the claimant allegedlyembezzled $5,100 from the employer. The employer did not become aware of the theft until after claimant's employment ended.

DECISION: Claimant is not disqualified under Section 29(1)(j) for theft in connection with her work.

RATIONALE: "Because the alleged embezzlement did not occur until after notice of termination and was not discovered until after the employment ended it played no part in the discharge decision. In Section 29(1) the legislature has enumerated those limited circumstances wherein payment of unemployment benefit is to be disallowed or restricted. ... The disqualification provisions are not to be construed as a means of punishment or penalty for alleged violations of either contractual or statutory provisions concerning the employer-employee relationship, Peaden v Employment Security Commission, (Smith, dissenting), 355 Mich 613, 638-639; 96 NW2d 281 (1959); nor should they be used as a means of punishment or penalty for alleged civil or criminal tort.

Should the legislature have deemed it proper, as a matter of policy, to preclude payment of unemployment benefits in all instances of employment-related theft, it could have so provided. Where the legislature has clearly spoken, however, it is not for the courts or the administrative agencies of this state to substitute their notions of preferable policy under the guise of interpretation."

Editors Note: Also see Section 29(1)(m) which was added to the MES Act subsequent to the adjudication of Borghese.

11/90
7, 14, d3:NA

Section 29(1)(h)

ASSAULT & BATTERY, Name calling, Provocation, Connected with work

CITE AS: Harris v Ford Motor Company, No. 89184 (Mich App April 29, 1987).

Appeal pending: No

Claimant: Roy S. Harris
Employer: Ford Motor Company
Docket No: B83 09343 90901

COURT OF APPEALS HOLDING: Mere words, no matter how offensive, do not justify an assault. Further, a fight over union affairs between two employees, one of whom is off-duty can be work connected and disqualifying if it negatively affects the employer's interests.

FACTS: While an off-duty worker was soliciting signatures for a union matter the claimant, himself a union member, got involved in a dispute with the individual. This took place inside an employer plant. During the discussion the other person called claimant a "lying ass". Claimant responded by hitting him in the face. Both employees were terminated.

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

RATIONALE: "Mere words, however, do not justify an assault or constitute a defense to liability for assault, and it is the general rule that, apart from statute, no provocative acts, conduct, former insults, threats, or words, unless accompanied by an overt act of hostility, will justify an assault, no matter how offensive or exasperating, nor how much they may be calculated to excite or irritate."

In Banks v Ford Motor Company, 123 Mich App 250 (1983) "... this court focused on the location of the assault and its potential to harm the employer's interests.

More recently, this court has held that an employee's misconduct need not arise from his or her official work duties to disqualify him or her from unemployment compensation benefits, so long as the misconduct negatively affects the employer's interests. Bowns v Port Huron, 146 Mich App 69, 76; 379 NW2d 469 (1985), lv den, 424 Mich 898 (1986) . ... This case offers an even stronger example of a work-related assault than the Banks case, because the assault and battery occurred inside defendant's plant, as opposed to its parking lot. Therefore, plaintiff's assault and battery created a greater potential for disruption of defendant's interests than the assault in Banks. Also, as the circuit court pointed out, the dispute in the instant case was not entirely a personal matter between plaintiff and Jackson. It arose out of their affiliation with the union which represented defendant's employees."

Section 29 (1)(h)

ASSAULT AND BATTERY, Proof

CITE AS: Yount v Hoover Chemical Co, No. 61747 (Mich App July 13, 1983).

Appeal pending: No

Claimant: Bennie D. Yount
Employer: Hoover Chemical Co
Docket No: B76 12792 RM1 RO 69001

COURT OF APPEALS HOLDING: There is no requirement under the statute for a separate proceeding to determine if claimant committed an assault and battery in order for claimant to be disqualified under Section 29(1)(h).

FACTS: Claimant approached his chief steward concerning a grievance he wished to make against the employer. An argument ensued and claimant tweaked the steward on the cheek. She knocked his hand aside and he slapped her face; knocking her glasses off, spinning her around and nearly knocking her down. As a result the employer discharged claimant.

DECISION: Claimant is disqualified for assault and battery under Section 29(1)(h).

RATIONALE: The court found there was sufficient evidence for the referee to find claimant was guilty of assault and battery on his shop steward. Claimant had not previously preserved the issue of whether Section 29(1)(h) of the MES Act required a separate judicial determination. However, the court would not be inclined to interpret the statute to require a separate proceeding, presumably criminal, to determine whether claimant committed an assault and battery. Additionally, the fracas occurred on the employers premises during working hours and in front of other employees. This was disruptive and sufficiently work connected to find claimant disqualified under Section 29(1)(h).

14.07

Section 29(1)(f)

INCARCERATION, Disciplinary suspension

CITE AS: Alexander v MESC, 4 Mich App 378 (1966).

Appeal pending: No

Claimant: Ben Alexander, Jr.
Employer: Continental Motors Corp
Docket No: B64 1365 RM 32738

COURT OF APPEALS HOLDING: A discharge which results from absences due to an incarceration for a non-traffic related offense is absolutely disqualifying.

FACTS: The claimant was sentenced to sixty days in jail for a non-work related assault and battery. He served fifty days. While jailed the claimant was discharged for being a three day no-call no-show. After his release the claimant's union was able to get the claimant's discharge reduced to a disciplinary suspension and have the claimant reinstated.

DECISION: The claimant was disqualified for benefits.

RATIONALE: The incarceration provision is meant as an absolute bar to the receipt of benefits in all cases except traffic violations which result in less than ten (10) days of consecutive absence or sentences which provide for day parole and is "not something which the employer and union could later negate by agreement."

Section 29(1)(f)

INCARCERATION, Traffic violation

CITE AS: Ellis v Employment Security Commission, 380 Mich 11 (1968).

Appeal pending: No

Claimant: Esau Ellis
Employer: Campbell, Wyant & Cannon Foundry Company
Docket No: B64 686 32165

SUPREME COURT HOLDING: An employee who because of a traffic violation is incarcerated and absent from work less than ten full days cannot be disqualified for benefits.

FACTS: The claimant was incarcerated for a traffic violation, and as a result he was absent from work for nine consecutive days. The claimant also missed most of his shift on the tenth day. However, two or three hours before the end of his shift he did appear but was not allowed to work.

DECISION: The claimant was not disqualified for benefits by operation of the traffic violation provision contained in Section 29(1)(f).

RATIONALE: ALthough the claimant was not present at the start of the tenth day he was not absent for ten complete days. Therefore, since he was incarcerated as the result of a traffic violation he could not be disqualified for benefits. The court noted with approval the following from the circuit court opinion 'If our legislature intended ... to disqualify a claimant where his confinement resulted in his absence from work, for nine and a fraction consecutive days, it would have very readily so stated.'

14.09

Section 29(1)(f)

INCARCERATION, Day parole

CITE AS: Galaszewski v MESC, No. 64863 (Mich App July 15, 1983).

Appeal pending: No

Claimant: Terry Galaszewski
Employer: GMC Fisher Body Plant #1
Docket No: B79 03879 67143

COURT OF APPEALS HOLDING: Because an order of work release was never issued the claimant was not exempt from disqualification by operation of the day parole provision contained in Section 29(1)(f).

FACTS: The claimant was sentenced to jail for a non-work related offense. During sentencing the judge mentioned he might be amenable to day parole/work release if it was requested. While incarcerated the claimant did petition for and receive day parole so he could attend school. However, no such petition was filed relative to work release.

DECISION: The claimant was disqualified for benefits.

RATIONALE: It is the actuality of work release and not the possibility of it which exempts an incarcerated claimant from disqualification. There being no order granting work release the claimant was disqualified under Section 29(1)(f).

Editor's Note: The Court of Appeals decision contains dicta to the effect that an employer's refusal to participate in work release would not subject a claimant to disqualification if such an order would have been otherwise issued.

Section 29(1)(f)

INCARCERATION, Civil contempt

CITE AS: Millege v Roofing Man, Inc., Saginaw Circuit Court No. 92-51067-AE-5 (March 30, 1993).

Appeal pending: No

Claimant: Jerry W. Millege
Employer: Roofing Man, Inc.
Docket No. B91-10727-119923W

CIRCUIT COURT HOLDING: Section 29(1)(f) of the MES Act does not apply to incarcerations resulting from civil contempt.

FACTS: Claimant was discharged after he was absent four days. The absence was the result of the claimant having been incarcerated because he had fallen behind in child support payments.

DECISION: Claimant is not subject to disqualification under Section 29(1)(f).

RATIONALE: Section 29(1)(f) of the MES Act provides for disqualification where a claimant is discharged as a result of absences caused by an incarceration stemming from a conviction for a violation of law. Contempt proceedings in child support cases are considered civil in nature. Sanctions for civil contempt are remedial in nature and are intended to compel compliance with the court's directives by imposing a conditional sanction until the contemptor complies or no longer has the ability to comply. The statute was never intended to be applicable to civil contempt for disobeying the orders of the court.

7/99
20, 19, d12: N/A

14.11

Section 29(1)(i)

THEFT, Definition of theft

CITE AS: Ginez v University of Michigan Medical Center, Washtenaw Circuit Court No. 98-10274-AE (April 21, 1999).

Appeal pending: No

Claimant: Purificacion O. Ginez
Employer: University of Michigan Medical Center
Docket No. B98-01381-147739W

CIRCUIT COURT HOLDING: Claimant is not subject to disqualification under Section 29(1)(i) unless the common law elements of theft are established.

FACTS: Claimant worked for the employer from 1979 to November 10, 1997. On November 7, 1997 at the end of her shift she experienced an asthma attack. Claimant went to a "satellite" pharmacy near her ward for medication. The pharmacy belonged to the employer. Though the pharmacy was closed, claimant knew where the medication was kept and prepared an inhaler for her use. Her supervisor approached and asked if she was acting appropriately. Claimant felt she was acting appropriately because she had been allowed to use inhalers from the pharmacy in the past. Her supervisor had no knowledge of that, and checked with a nurse manager. The employer's policy was that employees in similar situations should seek treatment in an emergency room. Claimant used the inhalant and left the unused portion. As a result, the employer suspended, then ultimately discharged her.

DECISION: Claimant is not disqualified from receiving benefits under Section 29(1)(i).

RATIONALE: Theft is not defined in the M.E.S. Act. Black's Law Dictionary defines "theft" as a "popular name for 'larceny'." Larceny is prohibited by MCL 750.356 et seq, but is not defined by that statute and the elements must be found in common law. The elements of larceny are laid out in People v Gimotty, 216 Mich App 254, 257-258 (1996), as the "taking and carrying away of the property of another, done with felonious intent and without the owner's consent." The court found the claimant took the inhaler with the intent to deprive the employer of some value. The issue was whether the employer consented to the claimant's use of the inhaler; if so, then her actions cannot be considered theft. While the employer had a policy disallowing such actions, the claimant's supervisor was not aware of that policy. The court concluded the "record does not contain substantial and competent evidence of the elements of theft, nor is there an articulated finding on these questions." The court rejected the Board's additional rationale that a disqualification was justified "because the product taken was a prescription drug in a hospital setting."

7/99
21, 16, d23: B

Section 29(1)(i)

THEFT, Burden of proof, Intent

CITE AS: Crawford v Capstar Management Co, LP, Washtenaw Circuit Court, No. 99-10866-AE (March 24, 2000)

Appeal pending: No

Claimant: Leon Crawford
Employer: Capstar Management Co, LP
Docket No. B1999-01951-RO1-151858W

CIRCUIT COURT HOLDING: Employer has the burden of proving a claimant actually committed a theft for the actions to be disqualifying. That means employer must establish all of the elements of theft; including establishing ownership of the involved property and that the taking was done with felonious intent.

FACTS: Claimant worked in employer's hotel as a houseman. Employer discharged claimant for stealing a "Bic" lighter valued at $0.89. Claimant testified employer had a "finder-keeper" policy for items left by hotel guests. Under employer's policy, the employee would turn in an item left by a guest, employer would put the employee's name on the item, and employer would give the item to the employee if unclaimed after a waiting period. Claimant found a jacket and turned it in; after the waiting period expired it was unclaimed. Claimant discovered the jacket had not been marked with his name. He looked through the pockets for the owner's identification and found a "Bic" lighter. Claimant took the lighter, informed his supervisor, and she told him she was glad he found the lighter. Claimant testified he believed he was acting in accordance with employer's policy. Employer was not at the hearing.

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

RATIONALE: Theft is not defined in the M.E.S. Act. Under common law, larceny is the "taking and carrying away of the property of another, done with felonious intent and without the owner's consent." People v Gimotty, 216 Mich App 254 (1996). The Referee described claimant's actions as "tantamount to theft," conceding that he did not actually commit theft. The record did not establish the legal "owner" of the property. It was not clear whether the owner consented to claimant's actions. Employer, "by virtue of its policy of allowing employees to keep item found, essentially disclaimed ownership rights to the property. Claimant lacked the required felonious intent because he believed employer was holding the item for him subject to a waiting period and claim by the rightful owner.

11/04

Section 29(1)(f)

INCARCERATION, Convicted and sentenced

CITE AS: Kalaher v Leprino Foods Company, Ottawa Circuit Court, No. 03-45769-AE (September 29, 2003)

Appeal pending: No

Claimant: Scott T. Kalaher
Employer: Leprino Foods Company
Docket No. B2002-17489-167407W

CIRCUIT COURT HOLDING: Where claimant is separated from employment while confined to jail for failure to post bond he has not lost his job for being "convicted and sentenced." Therefore Section 29(1)(f) is inapplicable and claimant is not disqualified.

FACTS: In May 2002 claimant was free on bond awaiting trial on a charge of driving while intoxicated. Claimant worked on May 14. On May 15, claimant had a mandatory court appearance, and the court increased the amount of his bond. Claimant chose not to post the higher bond and was remanded to jail. A week later the employer notified claimant he had been discharged effective May 16. On June 11 claimant was convicted of OUIL, second offense, and sentenced to 90 days in jail.

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

RATIONALE: On the date the employer discharged the claimant, May 16, 2002, he was not absent from work because he had been convicted of a violation of the law and sentenced to jail. The claimant was not convicted and sentenced until June 11, 2002. Therefore Section 29(1)(f) is inapplicable.

11/04

Section 29(1)(i)

THEFT, Burden of proof, Intent

CITE AS: Livingston v Lac Vieux Desert Public, Gogebic Circuit Court, No. G-00-27-AV (January 26, 2001)

Appeal pending: No

Claimant: Bernard A. Livingston
Employer: Lac Vieux Desert Public Enterprise and Finance Committee
Docket No. B1999-08904-152992W

CIRCUIT COURT HOLDING: To meet its burden of proof under Section 29(1)(i), the employer must establish the elements of theft, including that the claimant had the "intent to steal."

FACTS: Employer discharged claimant from his position as a security guard for allegedly stealing $20.00 of a $30.00 tip he received. A security camera showed the claimant received a $30.00 tip, pocketed $20.00 and put $10.00 in the tip jar. Claimant knew he was being recorded; the money in question was returned before he left the premises. Claimant had been objecting to employer's policy on tips, specifically the failure of management to follow the tip policy. Employer did not appear at the Referee hearing. Claimant testified that he did not intend to keep the money or deprive the rightful owner of the money, rather it was his intent to incur disciplinary action to further object to management's failure to follow the policy on distribution of tip monies.

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

RATIONALE: The elements of "theft" must be analyzed in the light of facts of the case. Section 29(1)(i) refers to "theft." In criminal law, civil law and common parlance the concept of theft or larceny "denotes not just the taking of property; but the taking of property fraudulently, with the intent to appropriate it to one's own use or benefit, and depriving the owner of such use or benefit." The definition of larceny includes 'intent to steal.' The absence of proof and findings on the required element of intent to steal is dispositive. The claimant's intent was not to use the $20.00 for his own purposes, but to be caught; his intent was to protest the employer's practices.

11/04

15.00

LABOR DISPUTES

Section 29(8)

Section 29(8)

LABOR DISPUTE, Burden of proof, Controversy, Disguised layoff, Expiration of contract, Lockout, Peaceful negotiations, Substantial contributing cause

CITE AS: Smith v ESC, 410 Mich 231 (1981); Doerr v ESC, 410 Mich 231 (1981).

Appeal pending: No

Claimant: Gary Smith, et al
Employer: Imerman Screw Products Co., et al
Docket No: B76 699 51312 et al

SUPREME COURT HOLDING: "[A] lockout may be a manifestation of a 'labor dispute in active progress' as that term is utilized in the ESA."

FACTS: "In both of these cases, the employer locked out its employees upon the expiration of their collective bargaining agreement after negotiations to arrive at a new agreement had been unsuccessful."

DECISION: (1) The claimants in Smith are disqualified under Section 29(8) of the Act. (2) Doerr is remanded to the Board of Review.

RATIONALE: "The definition of the term 'labor dispute' as set forth in Part 3A requires that there be a controversy."

"An employer may not use the failure to reach an agreement as a pretext for charging a labor dispute when it would otherwise have curtailed operations because of economic conditions."

"In conclusion, we hold that a lockout may be a manifestation of a 'labor dispute' in active progress' as that term is utilized in the ESA. If a claimant cannot work because of a lockout, 'in the establishment in which he is or was last employed', and if the substantial contributing cause of the lockout is a labor dispute, then the claimant falls within the purview of the disqualification of [S.] 29(8)."

Section 29(8)

LABOR DISPUTE, Same establishment, Single facility, Truck drivers

CITE AS: Noblit v The Marmon Group, 386 Mich 652 (1972).

Appeal pending: No

Claimant: Walter G. Noblit, et al
Employer: The Marmon Group
Docket No: B66 3622 RM 35552

SUPREME COURT HOLDING: Where an employer has only one facility, truck drivers who deliver the finished product are employed at the same establishment as inside workers.

FACTS: The employer had only one location, a foundry from which the firm shipped finished products on trucks operated by company employees. The claimants were truck drivers who became unemployed because of a strike by the foundry workers. The drivers belonged to a different union, and did not honor the picket lines of the foundry workers.

DECISION: The claimants are disqualified from receiving benefits.

RATIONALE: "There is only one establishment in this case. All of the defendant's employees are employed at that one establishment. Were we to engage in fancy linguistic footwork to conclude otherwise, we would be defeating, not advancing, the declared legislative policy."

"That policy is not only to relieve from involuntary unemployment, but to do so in a manner calculated to avoid any encouragement of work stoppages arising out of labor disputes. This, the legislature has chosen to do in part by declaring a conclusive presumption that there is such a community of interest between the employees of a single establishment that it is impractical to attempt to distinguish between those employees whose unemployment is due to the vicissitudes of the market place, and those whose unemployment is due to the breakdown of internal labor management relations."

Section 29(8)

LABOR DISPUTE, Direct interest, Financing, Participation

CITE AS: Burrell v Ford Motor Co., 386 Mich 486 (1971).

Appeal pending: No

Claimant: Bartholomew Burrell, et al
Employer: Ford Motor Company
Docket No: B65 3701 34711

SUPREME COURT HOLDING: Where contract issues have been resolved by a claimant's local and by the national union, but new contracts have not been executed, and the claimant's unemployment is caused by strikes at integrated facilities, the strike fund portion of the claimant's regular union dues is not regarded as financing the labor dispute, but the claimant is deemed to have a direct interest in the labor dispute.

FACTS: Following the reopening of contract negotiations, the claimants were laid off from their jobs at nine Ford plants in Michigan because of strikes at other integrated facilities in six states. All relevant issues had been resolved at the national level and at each of the claimants' locals. New contracts were not signed until the labor disputes ended at the other plants. The regular union dues included an amount allocated by the union to its strike fund.

DECISION: The claimants are disqualified from receiving benefits.

RATIONALE: "As to plaintiffs, all issues, local or national, had been agreed to. Any local demands won at the struck plants would not be implemented at the claimants' plants. We find no basis for disqualification on the ground of participation."

As to financing, the Court adopted the finding of the Appeal Board: "The facts in the instant matter clearly show that the Union did not increase the amount of its dues nor re-designate any portion thereof after the inception of the labor dispute on June 1, 1964."

"The Collective Bargaining Agreements, both national and local, pertaining to claimants had 'expired', they had been 'opened by mutual consent', and their terms could have been 'modified, supplemented or replaced' (even though they were not) until such time as the newly negotiated agreements became fully effective by formal execution."

Section 29(8)

LABOR DISPUTE, Burden of proof, Eligibility, Lockout, Slowdown

CITE AS: Michigan Tool Co v ESC, 346 Mich 673 (1956).

Appeal pending: No

Claimant: Joseph Chile, et al
Employer: Michigan Tool Co.
Docket No: B53 2302 15424

SUPREME COURT HOLDING: As a general rule, a claimant has the burden of establishing eligibility; one exception is that an employer has the burden of proving that unemployment is caused by a labor dispute.

FACTS: The 129 claimants were locked out for approximately two weeks. The employer had accused them of organizing a slowdown and thus causing a sharp decline in production. The employer contended that the closing of the plant was forced by the drop in the workers' output.

DECISION: The claimants are entitled to receive benefits because the stoppage of work did not result from a labor dispute.

RATIONALE: "Under the proofs which were submitted to it, the appeal board properly found that employer had failed to establish a slowdown, and we cannot say that this finding was contrary to the great weight of the evidence. Employer's notice to its employees that its plant was being closed gave as the only reason for this action, with the resulting stoppage of work, that plant production was not maintained at its proper level and that claimants had failed to give a fair day's work."

"Employer asserts that the burden of establishing eligibility for benefits under the act is upon claimants. This broad principle is a correct general statement of the law. Cassar v Employer Security Commission, 343 Mich 380. It is, however, subject to certain exceptions. The facts which would prove a slowdown were peculiarly within the knowledge and control of employer, and under such circumstances the burden was upon it to produce competent and convincing evidence that there had in fact been a slowdown."

15.05

Section 29(8)

LABOR DISPUTE, Shutdown-start up operations, Lay off, Labor dispute in active progress

CITE AS: Scott v Budd Co, 380 Mich 29 (1978).

Appeal pending: No

Claimant: Clarence Scott, et al
Employer: The Budd Company
Docket No: B64 1637(1) 32860

SUPREME COURT HOLDING: ..."[I]ndividuals who become unemployed because of shutdown or start-up operations caused by a labor dispute in the establishment in which they are employed" are disqualified for unemployment benefits.

FACTS "On Wednesday, October 30, 1963, a number of employees in the foundry section of the brake drum manufacturing operation of the Budd Company ... walked off the job in protest of disciplinary action taken by management against two employees. As a result, production of castings was substantially curtailed. Through negotiations to settle the matter, start-up operations began in the foundry section on ... November 1, 1963. ... Because castings for some lines were not available from the foundry or from the bank, the company began laying off employees on those lines. Around 64 employees were laid off on November 4 and an additional 21 on November 5. The majority were recalled on November 11 and 12 and all were back at work by the 18th."

DECISION: The claimants are disqualified because of the labor dispute.

RATIONALE: Under Section 29(8) there are "three time intervals" relative to a disqualification: "(1) the time while a labor dispute is in active progress, (2) the time during which shutdown operations take place, and (3) the time during which start-up operations occur. These time periods may overlap in a given situation or each might be a separate segment of time. Each is a ground for disqualification if the requisite causal connection is established with a claimant's unemployment.

"[T]o adopt the construction ... that the shutdown and start-up clauses are operative only while the labor dispute is in active progress, would be to render those provisions without meaning in the statute because employees whose unemployment is due to a labor dispute then in active progress are disqualified by virtue of that fact. The court does not impart a nugatory meaning to words in a statute if the words are susceptible to being made effective."

11/90
NA

Section 29(8)

LABOR DISPUTE, Building trades, Contractor association, Contractor/employer, Separate establishment.

CITE AS: Peterson v Bechtel Corporation, No. 70457 (Mich App December 19, 1984).

Appeal pending: No

Claimant: Reuben Peterson, et al
Employer: Bechtel Corporation
Docket No: B78 62256 72839

COURT OF APPEALS HOLDING: "Bechtel was the 'establishment' in which plaintiffs were employed and in which the labor dispute occurred, plaintiffs are involved by definition 'directly involved' under Section 29(8)(a)(10)."

FACTS: Bechtel contracted with Cleveland Cliffs to engineer and construct an iron ore facility. As contractor/employer, Bechtel hired from various building trades and was a member of the Michigan Chapter of Associated General Contractors,(MAGC). A majority of craft union contracts expired with MAGC. Negotiations reached an impasse and picketing began by the carpenter union. Claimants honored the pickets, though not members of the carpenter union. Bechtel, deferred to by Cleveland Cliffs, closed the facility. Claimants argue that Bechtel was not the establishment in which claimants were employed, but either MAGC or Cleveland Cliffs.

DECISION: Claimants are disqualified under the labor dispute provisions of the Act.

RATIONALE: Bechtel, an active member of MAGC, was the employer/ establishment against which the strike activity was directed. Bechtel, not Cleveland Cliffs, made decision to close the facility and thereby continue the effects of the strike.

Section 29(8)

LABOR DISPUTE, Adjacent plants, Refusal to cross picket line, Threats, Voluntary leaving

CITE AS: Kalamazoo Tank & Silo Company v UCC, 324 Mich 101 (1949).

Appeal pending: No

Claimant: Eli W. Adams, et al
Employer: Kalamazoo Tank & Silo Company
Docket No: B6 794 3360

SUPREME COURT HOLDING: ... [C]laimants were entitled to benefits since the situation confronting claimants was the creation of and attributable to employer and claimants were unemployed through no fault of their own.

FACTS: A picket line was established by a union, to which claimants did not belong, around both the plant where the picketers worked as well as around the adjacent plant at which claimants worked. While some employees of employer crossed the picket line, others did not do so because personal safety was threatened.

DECISION: Claimants are not disqualified for benefits due to voluntary leaving.

RATIONALE: Claimants were denied safe access to the plant. They had nothing to do with or say about the location of the two plants of the common parking space and entrance or the joint use of the property by the employees of the two plants. At no time did employer offer claimants the free and safe access to the plant to which they are entitled.

Section 29(8)

LABOR DISPUTE, Refusal to cross picket line, Picket line violence

CITE AS: Dynamic Manufacturers, Inc. v UCC, 369 Mich 556 (1963).

Appeal pending: No

Claimant: Vernon Mason
Employer: Dynamic Manufacturers, Inc.
Docket No: B60 2976 25478

SUPREME COURT HOLDING: Whether the refusal of claimants to cross the picket line disqualified them (for benefits) was a question for administrative, rather than judicial, determination.

FACTS: A labor dispute arose at employer's work place with immediate work stoppage and picketing. Claimants who were laid-off employees were recalled to work. Claimants reported to the work site but each was deterred from crossing the picket line by threats of violence and fear of personal harm.

DECISION: Claimants are not disqualified for benefits either for failure to accept suitable work or because of the existence of a labor dispute.

RATIONALE: Justice Souris - Concurring:

> "The Referee and appeal board found as a fact that claimants refused to cross the picket line because of violence. That factual finding is not against the great weight of the evidence. Having so found, the Referee and appeal board correctly concluded that neither asserted disqualifying provisions of the Act was legally applicable."

Section 29(8)

LABOR DISPUTE, Interim employment

CITE AS: Great Lakes Steel Corp v Employment Security Commission, 381 Mich 249 (1968).

Appeal pending: No

Claimant: Thomas Moceri, et al
Employer: Great Lakes Steel Corporation
Docket No: B60 1064 24588

SUPREME COURT HOLDING: " ... claimants are eligible for benefits because of layoffs by their interim employers."

FACTS: Claimants were employed by Great Lakes Steel. Claimants, among others, went on strike because of a labor dispute at Great Lakes Steel. Subsequent to the commencement of the strike, claimants obtained interim employment. From this employment, claimants were laid off before the strike at Great Lakes Steel had ended. Claimants seek benefits for the period of unemployment between the time they were laid off by the interim employers and the time they returned to work at Great Lakes Steel.

DECISION: Claimants are not disqualified for benefits due to a labor dispute in the establishment in which they were last employed.

RATIONALE: The Court adopted the reasoning used by the Court of Appeals, Great Lakes Steel Corporation v Employment Security Commission 6 Mich App 656 (1967):

> "We have previously held that although an employer - employee relationship did so exist between Great Lakes and the claimants for certain purposes, the interim employer became the 'establishment in which he is or was last employed,' when employment with such employer had been obtained. In our view, the interim employer then also became the 'employing unit' within the meaning of section 48."

Editor's Note: Section 29(8)(b) of the MES Act was amended after Great Lakes Steel. See Empire Iron Mining Partnership at Digest 15.35.

Section 29(8)

LABOR DISPUTE, Misconduct, Collective bargaining agreement, Commission neutrality

CITE AS: Lillard v Employment Security Commission, 364 Mich 401 (1961).

Appeal pending: No

Claimant: Freddie Lillard
Employer: Chrysler Corporation
Docket No: B58 817 20795

SUPREME COURT HOLDING: " ... [I]t is not the role of the Michigan Employment Security Commission or the Courts to judge the merits of a labor dispute."

FACTS: Claimant was discharged for an unauthorized walkout. The walkout contravened provisions of the contract in force between employer and claimant's union. The claimant was a member of a department where, as a result of newly automated process, jobs were being eliminated. Claimant's walkout was in protest of job elimination by employer without consultation with the union.

DECISION: The labor dispute section of the statute applies and it is in error in applying the misconduct provision.

RATIONALE: " ... This appeal represents still another attempt to make use of a public act, the Michigan employment security act, as a disciplinary measure to enforce a private collective bargaining agreement. ... The full measure or discipline provided by the collective bargaining agreement has been applied to this claimant. As far as the private collective bargaining agreement is concerned, claimant has lost his job and his case."

"Nothing appears more certain than that this was a labor dispute. This was a disagreement between some employees of the Chrysler Corporation and their employer over job elimination and work standards. Lack of union sanction for the stoppage does not change the nature of the difficulty. The labor disputes disqualification should have been applied."

Section 29(8)

LABOR DISPUTE, Financing, Special strike fund dues, Meaningful connection, Significant amounts, Proximate relation, Foreseeability of unemployment

CITE AS: Baker v General Motors Corp, 420 Mich 563 (1984); Aff'd 478 US 621 (1986).

Appeal pending: No

Claimant: A. G. Baker, et al
Employer: General Motor Corporation
Docket No: B69 3117 40569

SUPREME COURT HOLDING: A meaningful connection between financing a labor dispute and unemployment exists where the worker engages in financing in significant amounts and at times proximately related to the dispute which caused the worker's unemployment.

FACTS: The relevant national and local agreements expired in September, 1967. The claimants paid special increased strike fund dues in the following two months. Workers at several functionally integrated plants struck the employer in January, 1968 and drew strike pay. The claimants became unemployed when the strikers caused a shut down of operations at their locations.

DECISION: Plaintiffs are disqualified because they financed a labor dispute meaningfully connected with their unemployment.

RATIONALE: Plaintiffs paid emergency dues "for the purpose of supporting labor disputes. It was foreseeable that the dues would be used to support local strikes. Because the operation of General Motors is comprised of a series of interrelated production units ... it was foreseeable that a strike against one plant would result in layoffs at plants not involved in the dispute ... The amount of emergency dues when considered in the aggregate, in terms of the plaintiffs contributions and in terms of the effect on the strikers, was significant and demonstrates a meaningful connection with the dispute that caused the unemployment." Payment of the emergency dues immediately preceded the dispute that caused the unemployment, the time lag being minimal when considered in the light of the method employed.

After remand, the decision of the Board is affirmed by an equally divided court.

NOTE: The U.S. Supreme Court held the "financing" disqualification in the Michigan statute as construed by the state Supreme Court is not preempted by federal law. While federal law protects the employees' right to authorize a strike, it does not prohibit a state from deciding whether or not to compensate employees who thereby cause their own unemployment.

Section 29(8)

LABOR DISPUTE, Misconduct discharge, Contract penalty, Statutory construction

CITE AS: Linski v ESC, 358 Mich 239 (1959).

Appeal pending: No

Claimant: William Linski
Employer: Wood Fabricating Co.
Docket No: B57 1602 19509

SUPREME COURT HOLDING: Where there is in the same statute a specific provision, and also a general one which would include matters embraced in the former, the rule of statutory construction requires application of the specific section, as opposed to the general section.

FACTS: Appellant was the union steward. He was discharged after calling a strike which was unauthorized by the union, and in violation of the contract.

DECISION: The claimant is disqualified under the labor dispute section of the Act.

RATIONALE: "The statute provides 2 alternative disqualification provisions possibly applicable to the present situation. The labor dispute disqualification is specific. The misconduct disqualification is more general ... The most ordinary rule of statutory construction demands application of the specific section, as opposed to the general section.

"On the surface of this matter, the episode we deal with has all of the appearances of a labor dispute ... We do not hold that a finding that a labor dispute exists necessarily excludes application of the misconduct penalty. What would be misconduct is not cured by the fact that it occurred in the course of a labor dispute. What we deal with here, however, is peaceful cessation of work. Claimant's action is termed wrong because it was not in accordance with the terms of the contract concerned. The record discloses this to be true. And the record also shows that the contract penalty of discharge has been applied. We can find no warrant for adding to the contract penalty for breach still another penalty not squarely spelled out in the statute. See T. R. Miller Mill Co., Inc., v Johns, 261 Ala 615."

15.13

Section 29(8)

LABOR DISPUTE, Permanent replacements, Termination of labor dispute disqualification

CITE AS: Plymouth Stamping, Div of Eltec Corp. v Lipshu, 436 Mich 1 (1990).

Appeal pending: No

Claimant: Mike Lipshu, et al
Employer: Plymouth Stamping Div of Eltec Corp.
Docket No: B81 84901 84830 et al

SUPREME COURT HOLDING: "[A]ny striker who is permanently replaced is entitled to benefits from that time forward unless and until some succeeding event again renders the labor dispute a substantial contributing cause of the unemployment."

FACTS: Claimants began striking after the labor contract expired. The employer began hiring replacement workers and notified the union that the strikers had been permanently replaced. Later, it notified the union that there were seven positions that the sixteen strikers could immediately fill if the union accepted the employer's last contract offer. The union advised that the strikers would return only as a group and only after the employer fired or laid off all replacement workers.

DECISION: The labor dispute disqualifications terminated when the employer notified the strikers that they had been permanently replaced.

RATIONALE: When the employer notified the claimants that they had been permanently replaced, the labor dispute ceased to be a substantial contributing cause of their unemployment. Baker v General Motors Corp, 409 Mich 369 (1980). However, the claimant's refusal of a subsequent offer of employment could again cause the labor dispute to become a substantial contributing cause of their unemployment. The matter was remanded to the Commission for further factual development regarding the availability of specific positions after the replacement workers became permanent employees, the claimant's eligibility to fill any such positions, and what notification, if any, was given to the union, and to consider any other bases on which the claimants may or may not be eligible for benefits.

Section 29(8)

LABOR DISPUTE, Flight personnel, Ground personnel, Same establishment

CITE AS: McAnallen v ESC, 26 Mich App 621 (1970).

Appeal pending: No

Claimant: Carole J. McAnallen, et al
Employer: United Air Lines
Docket No: B67 309 35243

COURT OF APPEALS HOLDING: Flight personnel who work in an airplane, are not employed in the same establishment as the ground personnel of an airline.

FACTS: The claimants worked as cabin attendants and pilots. "They were laid off for a month in July-August, 1966, because of a nationwide strike of the ground personnel of the airline."

DECISION: The claimants are not disqualified for benefits because of a labor dispute.

RATIONALE: "In Northwest Airlines, Inc. v Employment Security Commission (1966), 378 Mich 199, the claimants were Michigan-based ground service employees of Northwest Airlines who were laid off from work as a result of a strike by flight engineers who were domiciled in Minneapolis and Seattle but who were attached to aircraft which flew from place to place throughout the airline system, including Michigan. The issue there, as here, was whether the claimants' unemployment was the result of a strike 'in the establishment' where they were employed. It was held that the non-striking ground personnel were not employed in the establishment of the striking personnel."

"The flight personnel, who work in the airplane as it flies from one place to another, constitute a work force separate and apart, physically and functionally from the ground personnel at the airport. Focusing on the character of the 'worker's employment and the character of the place in which it was performed,' viewing the matter 'from the standpoint of the worker's employment' (Northwest, p 133), we conclude that the plaintiffs, who perform their services in an airplane, were not employed in the airport or the establishment where the striking ground personnel were employed."

Section 29(8)

LABOR DISPUTE, Controversy, Lockout, Termination of contract

CITE AS: Salenius v Jim Cullen, Inc., 33 Mich App 228 (1971).

Appeal pending: No

Claimant: Robert A. Salenius, et al
Employer: Jim Cullen, Inc.
Docket No: B68 3343 36845

COURT OF APPEALS HOLDING: Where union members terminate their contract upon its expiration but continue to work, and the employer agrees to adopt whatever contract terms result from negotiations between the union and other employers, a subsequent lockout is not a labor dispute.

FACTS: The employer was a Wisconsin-based construction firm which had one Michigan work site but no ties to the Michigan Chapter of the Associated General Contractors, whose member companies had been struck by the General Laborers' Union. The Union's contract with the employer had been terminated, but its members stayed on the job. The employer agreed to accept the terms of the contract being negotiated with the M.A.G.C. After three weeks without a contact the employer locked out its workers.

DECISION: The lockout was not due to a labor dispute.

RATIONALE: "Clearly there was the requisite controversy between MAGC and the Laborers' Union. However, since Cullen was in no way affiliated with the MAGC and did not participate in any capacity in the negotiations between the Union and MAGC, the latters' dispute cannot be transposed to Cullen and those of its employees who were members of the Laborers' Union."

"Competent, material and substantial evidence must establish that the employer and at least one group of his employees expressed, prior to or during the lockout, differing view on wages, and the like. After Cullen informed the Union that it would accept the terms of a contract negotiated by MAGC, there were no negotiations between Cullen and its employees."

"The termination by the Laborers' Union of its contract with Cullen did not constitute a labor dispute."

Section 29(8)

LABOR DISPUTE, Actual violence, Refusal to cross picket line, Picket line violence

CITE AS: Holdridge v Tecumseh Products Co, 80 Mich App 310 (1977).

Appeal pending: No

Claimant: Arthur L. Holdridge, et al
Employer: Tecumseh Products Co.
Docket No: B75 4555 49678

COURT OF APPEALS HOLDING: "[E]mployees who decline to cross a picket line and attend work during a strike because of reasonable fear of violence are nonetheless entitled to unemployment compensation benefits."

FACTS: The claimants were employed as supervisors. Workers at their plant went on strike and began picketing. The employer told the claimants to report for work.

"The foremen testified before the hearing Referee that they were subjected to threats of violence. One of the foremen testified that when he attempted to drive across the picket line, his vehicle was forced to a stop by one of the strikers who 'crawled out of his truck, ripped his coat off and jerked me out of the car.' The foremen decided to not cross the picket line for fear of physical harm."

DECISION: The claimants are not disqualified under Section 29(8) of the Act.

RATIONALE: "The lower court and administrative bodies rule that since plaintiffs were employed in the 'same establishment,' and could have gone to work, 'but for' the labor dispute, plaintiffs were ineligible for benefits. While we acknowledge the rule that a peaceful strike at a single place of employment bars even non-striking employees from unemployment compensation benefits, Noblit v The Marmon Group, 386 Mich 652; 194 NW2d 324 (1972), we hold it inapplicable to these facts calling for application of the ' Actual violence' exception to the general rule that workers involved in a labor dispute are not entitled to unemployment compensation benefits."

"For claimant to be entitled to unemployment benefits during a strike, the claimant must show the following: '(1) That he was willing to cross a peaceful picket line, (2) that he made a reasonable attempt to cross the picket line in question, or (3) that his sole reason for failing to cross the picket line was a well-founded and reasonable apprehension of violence to his person.'"

11/90
NA

Section 29(8)

LABOR DISPUTE, Lockout, Notice requirement, Fair Employment Practices Act

CITE AS: Metropolitan Detroit Plumbing & Mechanical Contractors Association v ESC, 425 Mich 407 (1986).

Appeal pending: No

Claimant: Paul G. Beauvais, et al
Employer: Glanz & Killian, Inc.
Docket No: B75 7176 61578

SUPREME COURT HOLDING: The notice provision of the Michigan Labor Mediation Act is preempted by the National Labor Relations Act, and thus may not be construed to permit payment of unemployment compensation in this case.

FACTS: On May 31, 1974, the contract between the Union and the Association expired. The parties agreed to continue work on a day-to-day basis. During July, two Association members alleged that they were the "objects of selective strike action." On July 29, 1974, a lockout by members of the Association went into effect. Individual employees were notified of the lockout upon reporting to work on July 31, 1974. They were not given the ten day notice required by the Michigan Labor Mediation Act.

DECISION: The claimants are disqualified because of the labor dispute.

RATIONALE: In a unanimous opinion, the Supreme Court held: "The notice provision of the Michigan Labor Mediation Act is preempted by the National Labor Relations Act, and thus may not be construed to permit payment of unemployment compensation in this case. A lockout is one form of labor dispute which will disqualify a worker from receiving unemployment benefits where, as in this case, the unemployment was due to a labor dispute in which the worker was directly involved. The association was not required to give a ten-day notice before instituting the lockout, and the employees are not entitled to unemployment compensation." But cf. Baker v General Motors Corp, 420 Mich 563 (1984); Aff'd, 54 LW 5037 (1986).

Section 29(8)

LABOR DISPUTE, Termination of labor dispute disqualification, Permanent replacements

CITE AS: Wohlert Special Products v MESC, 202 Mich App 419 (1993)

Appeal pending: No

Claimant: Bruce Behnke, et al
Employer: Wohlert Special Products, Inc.
Docket No. B89-52300-117085 et al

COURT OF APPEALS HOLDING: In a labor dispute situation where the strikers' positions were never filled by permanent replacement workers and the strikers could have returned to work at any time, the labor dispute did not cease to be a contributing cause of their unemployment.

FACTS: On January 30, 1989, union employees went on strike after one and a half years of contract negotiations. The employer did not implement a lockout and offered employees the opportunity to continue working. The employer hired some temporary replacements and continued to operate. On May 28, 1989 the employer announced the hiring of permanent replacement workers. Nonetheless, the employer never managed to replace all the strikers and always had numerous unfilled positions. Some workers who applied for benefits after May 25 were granted benefits on the basis that the labor dispute disqualification ended when the employer began hiring permanent replacements.

DECISION: The claimants are disqualified under Section 29(8).

RATIONALE: This case is factually distinguishable from Plymouth Stamping, Division of Eltec Corp v Lipshu, 436 Mich 1; 461 NW2d 859 (1990). In that case, strikers were held eligible for benefits when their positions were permanently replaced, because at that point, the labor dispute was no longer a substantial, contributing cause of their unemployment. They could reapply as new employees after the strike was settled and were subject to rehire as positions became available. In the case at bar, the strikers always had the option of accepting reinstatement to their former positions. Their refusal to return to work precludes them from receiving benefits.

7/99
14, 12, d3:

Section 29(8)

LABOR DISPUTE, Employed, Hearsay rule exception, Sympathy strike

CITE AS: Vickers v ESC, 30 Mich App 530 (1971).

Appeal pending: No

Claimant: Victor L. Vickers, et al
Employer: Asplundh Tree Expert Company
Docket No: B66 3457 35162

COURT OF APPEALS HOLDING: " ... Unemployment is the indispensable, essential element or ingredient which brings into being and sets into motion all of the other provisions of the Act."

FACTS: Claimants were employees of a power line clearance company which had a contract with Detroit Edison. Claimant's union struck the Edison Company. However, only Edison employees were on strike. Claimant's contract was not at issue in the strike. Work was available for each of the claimants during the period of the strike; they knew the work was available, but did not report for work; the union did not want them to work.

DECISION: Claimants are not unemployed as defined by Section 48 of the MES Act.

RATIONALE: The fact that Edison and Asplundh each hold union contracts with the same union is coincidental; but that does not create a unity of entity of the two employing units. The union removed claimants from their jobs in sympathy with the strikers. Claimants lost the benefit of employment in available work and earnings during the period of the Edison strike for reasons other than the employer's failure to furnish full-time regular work.

Section 29(8)

LABOR DISPUTE, Direct involvement, Non-union member, Unemployment notice

CITE AS: Totman v School District of Royal Oak, No. 83-259-023 AE, Oakland Circuit Court (December 21, 1984).

Appeal pending: No

Claimant: Frederick H. Totman
Employer: School District of Royal Oak
Docket No: B82 60001 88326W

CIRCUIT COURT HOLDING: Claimant was unemployed in an establishment where he last worked as a result of a labor dispute.

FACTS: Claimant, a non-union teacher, received an unemployment notice from the employer with no explanation detailed thereon. A strike had been called against the district. Claimant argues that he should not be disqualified, since he was not involved or interested in the labor dispute.

DECISION: Claimant is disqualified under the labor dispute provision of the Act.

RATIONALE: Section 29(8) provides four bases for determining direct involvement in a labor dispute. To establish disqualification, the unemployment [must] be due to a labor dispute in the establishment at which claimant is employed and claimant's unemployment is caused by the dispute. There is no requirement that claimant be directly notified that his unemployment is caused by a strike.

Section 29(8)

LABOR DISPUTE, Bakery workers, Driver salesperson, Lockout, Regional warehouse, Same establishment, Separate union contract

CITE AS: Kovalcik (Grocers Baking Co.), 1980 BR 61434 (B77 16121).

Appeal pending: No

Claimant: Joseph J. Kovalcik
Employer: Grocers Baking Co.
Docket No: B77 16121 61434

BOARD OF REVIEW HOLDING: A wholesale driver salesperson, operating from a regional baked goods warehouse and working under a separate union contract, is not employed in the same establishment as inside workers at the central bakery.

FACTS: A wholesale driver salesperson for a baking company, working from a regional warehouse, was laid off after the employer locked out a group of workers at its central bakery. The labor dispute did not involve the claimant, whose union contract was separate.

DECISION: The claimant is not disqualified for benefits because of a labor dispute.

RATIONALE: "In the case of Graham v Fred Sanders Company, 11 Mich App 361 (1968), the Court of Appeals found that all of the employees in the retail outlets maintained by Sanders were not employed in the same establishment even though there was functional integrality and overall executive supervision; the court held that there was no relationship between the striking bakery employees and the nonstriking employees. One of the factors which the Court looked at in making its decision that the retail employees were not employed in the same establishment was the difference in job skills and working conditions. In the case at hand, the board finds the factual situation to be very similar to Graham v Sanders, supra. This claimant was employed as a wholesale driver salesman who operated out of the regional warehouse which was controlled by the regional manager. The terms and conditions of this claimant's employment were different than those of the bakers who were involved in negotiations which resulted in a lockout. This claimant's employment relationship with the employer was governed by a completely different contract."

Section 29(8)

LABOR DISPUTE, Hourly employees, Production workers, Same establishment, Separate union contracts, Single facility, Skilled trades, Salaried technicians

CITE AS: Dixon (Kelvinator, Inc), 1980 BR 68643 (B79 08055).

Appeal pending: No

Claimant: Roger Dixon
Employer: Kelvinator, Inc.
Docket No: B79 08055 68643

BOARD OF REVIEW HOLDING: Where an employer has only one facility, and a strike by skilled trades and production workers results in the unemployment of salaried technicians covered by a separate union contract, the technicians are employed at the same establishment as the strikers.

FACTS: The Referee stated: "The facts show that the employer has one establishment in Michigan. The claimants in this case are technical salaried people and worked at the same place where the labor dispute occurred. Their unemployment in this case is clearly and concededly due to the strike by skilled trades and industrial workers who were employed at the one and only plant of this employer. The claimants were not involved in this strike, did not refuse to cross picket lines and there is no question that their unemployment was involuntary."

DECISION: The claimants are disqualified because of a labor dispute.

RATIONALE: The Board adopted the decision of the Referee, who held; "[T]here is no question that the involuntary unemployment of the claimants was a category of involuntary unemployment which the legislature has specifically excluded from eligibility for unemployment compensation benefits. There was only one establishment in this case. All of the claimants-employees are employed at that establishment. Were we to engage in fancy linguistic footwork to conclude otherwise, we would be defeating, not advancing, the declared legislative policy. That policy is not only to relieve from involuntary unemployment, but to do so in a manner calculated to avoid any encouragement of work stoppages arising out of labor disputes."

Section 29(8)

LABOR DISPUTE, Disguised lay off, Impasse, Lockout, Strategy, Substantial contributing cause

CITE AS: Alti v Whirlpool Corporation, No. 83-2598 AE-Z, Berrien Circuit Court (May 20, 1985); lv den Mich App March 6, 1986; lv den 425 Mich 881 (1986).

Appeal pending: No

Claimant: Toni Alti, et al
Employer: Whirlpool Corporation
Docket No: B77 1217(1) 62081, et al

CIRCUIT COURT HOLDING: "The lockout by Appellee was not a 'disguised layoff' and the labor dispute was a substantial, contributing cause of appellant's unemployment, (even though it may not have been the only cause)." Claimants disqualified.

FACTS: The collective bargaining agreement expired and subsequent negotiation reached an impasse. The employer locked out the employees. All assembly was transferred to another plant where a third shift was added, plus overtime. Prior to lockout, 10,200 units were produced. After the lockout, 8,600 units were produced.

DECISION: The reduced production during the lockout could have been the result of the conditions from the lockout as well as changing market conditions. To speculate on what effect market conditions had would be just speculation in light of the testimony presented.

RATIONALE: In Smith v MESC, 410 Mich 231 (1981) the Supreme Court held that a lockout was one form of a "labor dispute." The lockout was a strategy to win concessions in the labor dispute.

Section 29(8), 48

LABOR DISPUTE, Lost remuneration, Safety during labor dispute

CITE AS: Roesner (Limbach Company), 1977 BR 52993 (B76 6467).

Appeal pending: No

Claimant: Gregory S. Roesner
Employer: Limbach Company
Docket No: B76 6467 52993

APPEAL BOARD HOLDING: Where there is no violence or threat of violence, an employee who honors the picket line of a union to which he does not belong suffers a loss of remuneration.

FACTS: The claimant was a plumber and a pipe fitter for a subcontractor on a construction project. Union carpenters set up a picket line as part of a strike against the general contractor. Neither the claimant nor his union were involved. The claimant refused to cross the picket line, and so did not work during the strike. Work was available for him, and some plumbers did work while the strike was in effect. The claimant declined to use an alternate entrance designated by his employer.

DECISION: The claimant lost remuneration, under Section 48 of the Act, by his refusal to cross the picket line.

RATIONALE: "The Referee considered this matter under the 'lost remuneration' provisions of Section 48 of the Act. He concluded, on the basis of Michigan Supreme Court decisions Kalamazoo Tank and Silo Co. v Unemployment Compensation Commission, 324 Mich 101 and Dynamic Manufacturers, Inc., v Employment Security Commission, 369 Mich 556, that the employer had failed to provide the claimant an assurance of safety in crossing the picket line and, therefore, that work was not genuinely available for the claimant so as to justify the application of the 'lost remuneration' concept within the meaning of Section 48 of the Act."

"The Appeal Board does not agree with the Referee's finding that the claimant should not be required to cross the picket line in this matter. It is noted that the Michigan Supreme Court decisions on which the Referee relies in reaching his conclusion in this regard, are cases where it was found that the refusal was based on 'violence or the threat of violence.' These cases are distinguished from the present case because there is no showing on the record in this matter that any violence or concrete threat of violence was associated with the carpenter's picket line."

11/90
NA

Section 29(8)

LABOR DISPUTE, Strike, Substantial contributing cause, Partial shutdown

CITE AS: Ide v Four Star Corporation, No. 82-4981 AE, Wexford Circuit Court (March 22, 1984).

Appeal pending: No

Claimant: Lynn Ide, et al
Employer: Four Star Corporation
Docket No: B80 68001 74062

CIRCUIT COURT HOLDING: A partial shutdown by the employer does not terminate a labor dispute.

FACTS: "[A]n existing labor contract ended on September 15, 1979 and a strike followed, terminating after the negotiation of a new contract on February 15, 1980 ... On or about November 9, 1979, after the employer had made its final offer to the union, the employer moved a substantial portion of its machinery, equipment and operation from the Cadillac plant to the Mesick plant some 20 miles away. Most of the management personnel who had been located at Cadillac also moved to Mesick, but some activity remained at the Cadillac plant". In mid November, the company erected a For Sale Sign outside the Cadillac plant. Claimants contend that their unemployment after November 9, 1979, was not due to a labor dispute, but due to a lack of work since the plant was effectively closed and there existed no employment opportunity for them.

DECISION: The claimants are disqualified because of a labor dispute.

RATIONALE: "The claimants were unemployed due to a labor dispute. The claimants were not terminated or discharged by the employer, not locked out by the employer, and the Cadillac plant was not closed ... in November or anytime thereafter."

"The labor dispute ... is a substantial contributing cause of the unemployment" Smith v Employment Security Commission, 410 Mich 231 (1981).

Section 29(8)

LABOR DISPUTE, Direct interest, Non-teaching employees, Same establishment, School district, Teachers

CITE AS: Chadwell v School District of the City of Flint, No. 426 Genesee Circuit Court (April 1, 1981).

Appeal pending: No

Claimant: Anna M. Chadwell, et al
Employer: School District of the City of Flint
Docket No: B78 02421 62957

CIRCUIT COURT HOLDING: Where a teachers' strike causes the unemployment of school secretaries, clerks and food service workers, who can reasonably expect to benefit from the strike, these non-teaching employees have a direct interest in the labor dispute.

FACTS: "The question presented in this case is whether these secretaries, clerks and food service workers are entitled to unemployment benefits to be paid by the Board for the two weeks, approximately, that their 1977 summer vacation was extended by the teachers' strike."

DECISION: The claimants are disqualified because of a labor dispute.

RATIONALE: "Dann v Employment Security Commission, 38 Mich App 608, 196 NW2d 785 (1972) was relied upon by the Board of Review. That case, which never made much sense and which should never have been applied to a school strike, has been discredited by Baker v Gen Motors Corp, 409 Mich 639 (1980)."

"Although the majority of the Board of Review did not consider these issues, I am satisfied that the secretaries and clerks were directly involved as employees in the same establishment as the striking teachers and that all of the claimants reasonably expected to benefit eventually, in direct proportion to the improvement achieved by the teachers' strike and negotiations and that, therefore, they were directly interested and so directly involved."

Section 29(8)

LABOR DISPUTE, Controversy, Employer association, Expiration of contract, Functionally integrated establishments, Lockout, Selective strike

CITE AS: Bedger v Brooks Lumber Co, No. 80-006100 AE, Wayne Circuit Court (April 8, 1981).

Appeal pending: No

Claimant: Norman A. Bedger
Employer: Brooks Lumber Co.
Docket No: B76 18613 56233

CIRCUIT COURT HOLDING: Employees who are locked out are disqualified where " ... the lockout was in direct response to the union's attempt to impact contract negotiations through the use of a selective-strike strategy."

FACTS: The employer belonged to an employer association. "The parties entered into labor contract negotiations which resulted in an impasse. At this time the union chose to strike only one of the association members, Erb Lumber. The association, pursuant to its by-laws, deemed the union action as a strike against all its members and therefore proceeded to lock-out all local 458 employees".

DECISION: The claimant is disqualified under Section 29(8) of the Act.

RATIONALE: "This issue was directly addressed by the Michigan Supreme Court in its reversal of the Court of Appeals decision in Smith decided February 3, 1981 S Ct DKT #62991."

"The Supreme Court said, (at p 6 of slip opinion):

> We hold that a lockout is one form of a 'labor dispute' as that term is used in (S) 29(8). Furthermore, we find that (S) 29(8) exempts lockouts from the labor dispute disqualification only when the labor dispute occurs in functionally integrated establishments operated by the same employing unit.

Clearly these separately owned and operated businesses are not 'functionally integrated' establishments."

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7, 14, d3:NA

Section 29(8)

LABOR DISPUTE, Direct involvement, Non-union member, Unemployment notice

CITE AS: Totman v School District of Royal Oak, No. 83-259-023 AE, Oakland Circuit Court (December 21, 1984).

Appeal pending: No

Claimant: Frederick H. Totman
Employer: School District of Royal Oak
Docket No: B82 60001 88326W

CIRCUIT COURT HOLDING: Claimant was unemployed in an establishment where he last worked as a result of a labor dispute.

FACTS: Claimant, a non-union teacher, received an unemployment notice from the employer with no explanation detailed thereon. A strike had been called against the district. Claimant argues that he should not be disqualified, since he was not involved or interested in the labor dispute.

DECISION: Claimant is disqualified under the labor dispute provision of the Act.

RATIONALE: Section 29(8) provides four bases for determining direct involvement in a labor dispute. To establish disqualification, the unemployment [must] be due to a labor dispute in the establishment at which claimant is employed and claimant's unemployment is caused by the dispute. There is no requirement that claimant be directly notified that his unemployment is caused by a strike.

Section 29(8)

LABOR DISPUTE, Termination of labor dispute, Discharge

CITE AS: Knight-Morley Corp v ESC, 352 Mich 331 (1958).

Appeal pending: No

Claimant: Carlton D. Semos
Employer: Knight-Morley Corp
Docket No: B54 2412 16805

SUPREME COURT HOLDING: Striking workers are not subject to disqualification under Section 29(8) if they are discharged.

FACTS: Claimants went on strike September 30, 1953. As they left they were told that if they struck they were fired and replacements would be hired. They were sent a letter that if they did not report to work by October 5 they would be considered to have quit. Beginning October 5 the employer permanently replaced the striking workers, removed their time cards, cancelled group insurance coverage, and published a notice in a newspaper that the claimants were "no longer employees of this company."

DECISION: Claimants are not disqualified under Section 29(8).

RATIONALE: "It would be difficult to conceive of language and accompanying course of action by an employer more expressive of a present intent to discharge employees or more effective to accomplish that end."

Claimants were still employees while on strike until discharged by the employer. The labor dispute disqualification terminates when the employee is discharged, even though on strike at the time.

Section 29(8)

LABOR DISPUTE, Same establishment

CITE AS: Park v ESC, 355 Mich 103 (1959).

Appeal pending: No

Claimant: Alexander Park, et al
Employer: Ford Motor Co
Docket No: B53 2548 (1) 16396

SUPREME COURT HOLDING: Functional integration, general unity and physical proximity of an employer's plants do not, standing alone, make them a single "establishment" within the meaning of Section 29(8) of the MES Act.

FACTS: Claimants were employed at three Ford plants in the Detroit area. A strike at Ford's Canton, Ohio forge plant resulted in a shortage of necessary parts, and, as a consequence, claimants were laid off. There was no strike vote, walkout or picketing at the three affected plants, and other employees, not affected by the shortage of parts, continued to work.

DECISION: Claimants are not disqualified under Section 29(8).

RATIONALE: At the time, Section 29(8) provided for disqualification if a labor dispute was in "the establishment" where claimants worked. The court concluded the terms "employing unit" and "establishment", are not synonymous, with "employing unit" being the broader, more inclusive term. The court reviewed decisions from other states and quoted the following with approval:

> "... the test of functional integrality, general unity, and physical proximity should not be adopted as an absolute test in all cases of this type. No doubt, these factors are elements that should be taken into consideration in determining the ultimate question of whether a factory, plant, or unit of a larger industry is a separate establishment within the meaning of our employment and security law. However, there are other factors which must also be taken into consideration." Nordling v Ford Motor Co., 231 Minn 68 (1950).

(Note: Section 29(8) was amended in 1963. The amendment did not change the definition of "establishment", but did provide for disqualification in cases of a labor dispute in any other establishment within the United States functionally integrated with the subject establishment and operated by the same employing unit.)

Section 29(8)

LABOR DISPUTE, Same establishment, Direct interest, Bakery workers, Retail workers

CITE AS: Graham v Fred Sanders Co, 11 Mich App 361 (1968).

Appeal pending: No

Claimant: Margaret Graham, et al
Employer: Fred Sanders Company
Docket No: B65 278 33786

COURT OF APPEALS HOLDING: Claimants, non-striking retail employees who worked at diverse locations, were not employed in the "same establishment" as striking bakery production workers.

FACTS: Claimants were employed as retail salespeople at bakery concessions operated by the employer at more than 50 grocery stores throughout the Detroit area. A strike by bakery production workers at the employer's main plant resulted in the layoff of claimants. The two groups of employees belonged to different unions and operated under separate collective bargaining agreements. The employer had a central administrative office adjacent to its manufacturing plant and all personnel and industrial relations decisions were made there. The functions of the bakery workers and retail employees were integrated to the extent neither group could operate without the other.

DECISION: Claimants are not subject to disqualification under Section 29(8).

RATIONALE: "The act contemplates that one employing unit may operate more than one establishment, and that nonstriking employees employed in other establishments will not necessarily be disqualified for benefits. Unity of management, overall executive supervision and functional integrality cannot be determinative because if they are then there would be few, if any, separate establishments.... The bakery employees, who worked in the factory, constituted a work force separate and apart, physically and functionally, from plaintiffs who worked in supermarkets scattered throughout the metropolitan Detroit area.... The relationship of the plaintiffs and of the bakery employees to their units of employment is entirely different. One work force was engaged in production, another in sales. Perhaps most importantly, the aptitudes, skills and labor required of, and working conditions affecting, one work force are entirely different from those in respect to the other."

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Section 29(8), 32(d)

LABOR DISPUTE, Termination of disqualification, Statutory construction, Retroactivity of amendment

CITE AS: Dow Chemical Co. v Curtis, 431 Mich 471 (1988).

Appeal pending: No

Claimant: Irvin Curtis, et al
Employer: Dow Chemical Co.
Docket No: B74 5287 63858

SUPREME COURT HOLDING: An amendment to Section 29(8) of the MES Act is not effective retroactively. The amended eligibility requirements do apply to benefit weeks after the effective date of the amendment.

FACTS: From March 18 - September 9, 1974, the 486 claimants involved in this matter engaged in a strike against the employer. The involved claimants were held disqualified for benefits by the MESC under the labor dispute provision of the MES Act. In accordance with Section 29(8) as then worded, and as construed in Great Lakes Steel Corp v ESC, 381 Mich 249 (1968), claimants "requalified" by securing short term interim employment with other employers. This interim employment lasted less than two days, and each claimant's earnings were nominal. While the strike was in progress the legislative enacted an amendment to Section 29(8), effective June 9, 1974. The amendment provided that in order to terminate disqualification under Section 29(8) a claimant had to perform services with an employer in at least two consecutive weeks and earn wages in each of those weeks in an amount at least equal to his weekly benefit rate.

DECISION: The MESC properly charged employer's account for benefit weeks prior to the effective date of amendment. Employer's account is not to be charged for subsequent weeks. Claimants are not required to make restitution because of a three year statutory bar.

RATIONALE: "In the absence of any clear indication from the legislature that retrospective operation was intended ... we conclude that the MESC properly charged Dow's rating account ... with respect to benefit weeks prior to the effective date of the amendment." However, as eligibility is determined on a weekly basis and Dow timely protested, "[C]laims made for benefit weeks after June 9, 1974, were controlled by the new criteria set forth in the amendment."

"The MESA is so structured that if the law changes or if facts change, an interested party has the right to demand that eligibility or qualification, or both, be determined anew."

6/91
3, 14:G

Section 29(8)

LABOR DISPUTE, Merits of the labor dispute

CITE AS: Lawrence Baking Co. v Unemployment Compensation Commission, 308 Mich 198 (1944).

Appeal pending: No

Claimant: Voyle English, et al
Employer: Lawrence Baking Company
Docket No: 6820 769 7024

SUPREME COURT HOLDING: "The public purpose of the unemployment compensation law is to alleviate the distress of unemployment, and the payment of benefits is not conditioned upon the merits of the labor dispute causing unemployment."

FACTS: Fifteen minutes after 16 of the employer's 38 employees went on strike and interrupted operations, the employer hired new employees and resumed operations without further interruption. The strikers filed for unemployment benefits for weeks after they had been notified that they had been replaced for their participation in the strike.

DECISION: The claimants are not disqualified from receiving benefits.

RATIONALE: This case was decided prior to the 1963 amendments to the labor dispute disqualification provisions of the Act. Prior to such amendments, disqualification would be imposed if the unemployment was due to a stoppage of work existing because of the labor dispute in the establishment. The claimants were held not disqualified because there was no stoppage of operations in the establishment during the weeks for which they were claiming benefits. This decision is included in the Digest because of the significance of the "HOLDING" above.

Section 29(8)

LABOR DISPUTE, Unsafe work conditions, Grievance procedure

CITE AS: Erickson v Universal Oil Products Corp, 36 Mich App 466 (1971).

Appeal pending: No

Claimant: Harold F. Erickson, et al
Employer: Universal Oil Products Corporation
Docket No: B68 4528 (1-65) 37142 thru 37206

COURT OF APPEALS HOLDING: The Employment Security Appeal Board erred in denying benefits without considering claimants' assertion that the changes in the signalling procedures created such an imminent danger to life or limb as to justify their refusal to work.

FACTS: After the employer unilaterally charged the procedures used in signalling the hoist engineer during the raising and lowering of the mancar used to transport the men into and out of the mine, the miners refused to enter the mine. Subsequently, an arbitrator found that the new signalling method was more hazardous than the old method and was, therefore, unsafe within the meaning of the labor agreement in effect.

DECISION: The Court of Appeals remanded the matter to the Appeal Board which again held the claimants disqualified. On appeal of that decision the circuit court reversed stating that the claimants had good cause for leaving their employment. Erickson, et al v Universal Oil Products, No. 78 3657 A, Houghton County Circuit Court (9-21-78).

RATIONALE: "In the ordinary case where the change in working conditions represents a limited hazard, public policy, as expressed in the legislative enactment favors the use of the grievance procedure thereby avoiding a work stoppage. However, in an extraordinary case where there has been a significant increase in the dangers involved in the employment, the Legislature did not expect the men to continue to work at the serious risk of immediate loss of life or limb."

15.35

Section 29(8)

LABOR DISPUTE, Requalification, Interim employment, Objective requirements, "Make-work"

CITE AS: Empire Iron Mining Partnership v Orhanen, 455 Mich 410 (1997)

Appeal pending: No

Claimant: Peter Orhanen et al; Donald Asmund et al
Employer: Empire Iron Mining Partnership
Docket No. B91-02538-RO1-118700W

SUPREME COURT HOLDING: Workers who obtain short term interim employment during a labor dispute can requalify for benefits if they satisfy the objective requirements of Section 29(8)(b). Work for multiple employers does not bar requalification under Section 29(8)(b). There is no subjective "good faith" requirement imposed on the Section 29(8)(b) criteria.

FACTS: During a strike which lasted from July 31-December 1, 1990, sixteen striking employees obtained interim employment for at least two weeks and earned wages equal to or greater than their benefit rate. Some of the employees got jobs through the union hall and worked for multiple employers. When laid off from these interim jobs these workers applied for unemployment benefits. The questions raised are (1) whether or not employment with multiple employers satisfies the statutory requirement that the individual perform services with "an employer" and (2) whether or not there is an implicit requirement that the interim work be accepted in "good faith" and not solely for the purpose of perfecting an unemployment claim.

DECISION: Claimants met the requalification requirements and are entitled to benefits.

RATIONALE: The Act does not require claimants to work for a single employer in order to requalify via rework under Section 29(8)(b). When read in the context of other sections of the MES Act, it is apparent that "an employer" includes multiple employers. There is no implicit requirement that claimants have to show they accepted interim employment in "good-faith." The requirements for requalification are objective and the Act does not contemplate investigation of a claimant's subjective motivation. "Given the remedial purpose of the MEA and the potential to overload the system if subjective criteria were adopted, we will not tread where the Legislature has refused to go. Inquiry into the subjective elements of an employee's employment is outside the bounds of the act."

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11, 12, d3: H

Section 29(8)

LABOR DISPUTE, Lockout, Disguised layoff, Substantial contributing cause

CITE AS: Alexander v A.P. Parts Manufacturing Co., unpublished per curiam Court of Appeals, February 23, 1996 (No. 168700).

Appeal pending: No

Claimant: David J. Alexander, et al
Employer: A.P. Parts Manufacturing Co.
Docket No. B90-60000-119070 et al

COURT OF APPEALS HOLDING: Where, in the context of contract negotiations, the employer increased production in order to build up inventory, then locked out its union employees while negotiations continued, there was evidence sufficient to support the conclusion that claimants' unemployment was substantially related to a labor dispute.

FACTS: Contract between employer and claimants' union (UAW) was to expire February 8, 1990. Since October 1989, employer had been warehousing parts sufficient to cover 2-3 month period following expiration of contract. Additional employees were hired. On December 8, 1989 employees were notified that layoffs were likely as of February 8, 1990 if a contract was reached, because of the stockpiled inventory. On February 8, 1990, employer's final contract offer was rejected. Employees notified of shutdown on February 9th and February 12th for inventory adjustment. On February 13th the employer locked out its union employees. On March 30th the employer gave notice plant would reopen and lockout cease on April 2, 1990. Tentative contract reached May 5, 1990, ratified May 15, 1990.

DECISION: Claimants were subject to disqualification under Section 29(8).

RATIONALE: "Here the parties do not contest whether a labor dispute existed. Therefore, we need only determine whether substantial evidence exists to connect the labor dispute with the lockout." That evidence was supplied by employer testimony the lockout was designed to improve the employer's bargaining position and to narrow the distance between the parties. Warehousing of inventory gave the employer the option of using a lockout as a tactic if negotiations soured.

7/99
19,20, d12:N/A

PROCEDURE/APPEALS

Sections 32, 32a, 33-36, 38

PROCEDURE/APPEALS cont.

APPEALS, Benefit check protest, Collateral estoppel, Determination, Failure to protest determination, Final order, Reconsideration, Res judicata

CITE AS: Roman Cleanser Co v Murphy, 386 Mich 698 (1972).

Appeal pending: No

Claimant: William J. Murphy
Employer: Roman Cleanser Company
Docket No: B68 2459 36521

SUPREME COURT HOLDING: When a determination is not protested it becomes a final order which is protected by res judicata and collateral estoppel; unless good cause for reconsideration is established a subsequent protest to a benefit check will not result in a redetermination of the original determination.

FACTS: On March 13, 1968, the Commission mailed a determination holding the claimant eligible for benefits. No protest was made within the 15-day period provided in the Act. A benefit check protest was filed in a letter dated May 17, 1968. On June 13, 1968, the Commission redetermined that the claimant was still eligible. The employer appealed, and prevailed on the merits in circuit court. The Court of Appeals affirmed.

DECISION: The original determination is final.

RATIONALE: "All of the questions raised in this case were properly discussed and disposed of in the well-reasoned minority opinion of Judge Charles L. Levin in the Court of Appeals. We adopt the following portion of that opinion as the opinion of this Court:

> '[I] do not think we can properly reach the meritorious question; the determination of March 13, from which no appeal was taken and which thereupon became final, is, by reason of the doctrines of res judicata and collateral estoppel, not subject to collateral attack.'"

Section 32a

APPEAL, Final order, Good cause for reconsideration, Notice of denial, Restitution determination, Subsequent claim for benefits

CITE AS: Mracna v Chrysler Corp. No. 80-035-442 AE, Wayne Circuit Court (February 24, 1981).

Appeal pending: No

Claimant: Bruce A. Mracna
Employer: Chrysler Corp.
Docket No: B79 04568 71371

CIRCUIT COURT HOLDING: Where a new claim for benefits triggers a protest of a restitution determination which has become final, the request for reconsideration must be denied.

FACTS: When the claimant filed an application for benefits in February, 1979, he was asked to repay $48.50 to the Commission. He then protested the restitution determination, which was issued in October, 1976.

DECISION: The restitution determination is final.

RATIONALE: "[I]t is apparent that the referee was correct in holding that the appellant had not timely requested the reconsideration of the original determination." "Under Section 32(a)(2) of the Michigan Employment Security Act the appellant seeks to reopen a matter two years beyond the one year limitation period." "It is the opinion of this Court the referee and the Board of Review were correct in their holdings in this matter; therefore, affirms the decision of the Board of Review and dismisses the appellant's appeal for lack of timely prosecution under Section 32(a)(2) of the Michigan Employment Security Act."

APPEALS, Check copy determinations, Finality of determinations and redeterminations

CITE AS: Kwit (Manufacturing Data Systems, Inc.) 1984 BR 89652 (B82 17032 R01).

Appeal pending: No

Claimant: Steven W. Kwit
Employer: Manufacturing Data Systems, Inc.
Docket No: B82 17032 R01 89652

BOARD OF REVIEW HOLDING: The Referee lacks jurisdiction to consider either an issue that has become final for lack of a protest or an issue not set forth in the notice of hearing unless the Referee advises the claimant of the new issue and secures a knowing and informed waiver.

On September 7, a redetermination was issued holding claimant ineligible for the week of August 15, which only the claimant appealed. The notice of hearing did not refer to the period in the redetermination, but the Referee defined the scope of the hearing as the period covered in the redetermination. However, the Referee held the claimant ineligible for the period from July 4, through October 21.

DECISION: The Referee did not have jurisdiction to consider the issue of claimant's eligibility for any week other than the week of August 15.

RATIONALE: Section 32(d) allows the employer to protest check determinations after the date of the determination or redetermination allowing the benefits which are the subject of the appeal before the Referee up to the date of the Referee hearing. The employer did not protest or appeal from a determination or redetermination allowing benefits. "Therefore, benefits paid to the claimant became final after the statutory twenty day period and were not "subject to further consideration pursuant to MES Section 33." The Referee was thus time barred from reviewing the claim ant's eligibility with the exception of the one week denial protested by the claimant ... "

"MES Board of Review rule 206(2) prohibits, absent a knowing and informed waiver, the taking of any evidence on an issue of which the parties have not been placed on notice by means of the notice of hearing. Thus, even if benefit checks had been issued shortly before the Referee hearing but with regard to which the check copy determinations had not yet become final by the date of that hearing, we would nevertheless reverse the Referee's findings as to those weeks and find the claimant had satisfied the availability requirements of Section 28(1)(c)."

EDITOR'S NOTE: Also see Rule 206 of the Rules of Practice, which has been revised since Kwit.

APPEAL, Timeliness of request for reconsideration to Commission, Newly discovered evidence, Good cause

CITE AS: Herman v Chrysler Corporation, 106 Mich App 709 (1981).

Appeal pending: No

Claimant: James F. Herman, et al
Employer: Chrysler Corporation
Docket No: B74 12159 49662

COURT OF APPEALS HOLDING: A "late discovery that a good case existed for appealing the MESC ruling" is not "newly discovered evidence."

FACTS: "[Claimant] was out of this state seeking work when the October 15, 1974, determination was delivered to her home but her mother informed her over the telephone that it arrived. [Claimant] did not file a timely request for reconsideration of the October 15 determination. However, sometime later she inadvertently saw one of the other [claimants] and an attorney and was informed by them that there might be a basis for an appeal. Therefore, on March 1, 1975, she filed a request for a reconsideration with MESC."

DECISION: Claimant's appeal is dismissed.

RATIONALE: "[Claimant's] 'newly discovered evidence' consists of her late discovery from another claimant and her attorney that a good case existed for appealing the MESC rulings pertaining to her case. This, however, is not 'newly discovered evidence.'"

"[Claimant] received actual notice of the MESC order disqualifying her for benefits in a telephone conversation with her mother. She did not attempt to appeal that decision within the 15-day appeal period. All facts pertinent to determining whether she should or should not have appealed the MESC redetermination were available to her at the time that she received notice of her disqualification for benefits. She chose not to seek legal assistance at that time. Her late attempt to do so does not amount to 'newly discovered evidence' constituting good cause to reopen her case."

APPEALS, Timeliness of appeal to Appeal Board, Filing appeal by mail, Mailing not filing

CITE AS: King v Calumet & Hecla Corp, 43 Mich App 319 (1972).

Appeal pending: No

Claimant: Bruce D. King
Employer: Calumet & Hecla Corporation
Docket No: B69 671 37597

COURT OF APPEALS HOLDING: Mailing does not constitute filing of an appeal from a Referee decision; filing requires delivery to, and receipt by, the Appeal Board.

FACTS: The claimant's last day for appealing a Referee decision was May 5, 1969. The circuit court stated; "The undisputed record shows that the envelope containing the notice or claim of appeal addressed to the Appeal Board at its Detroit office was stamped and postmarked at the Post Office at Hancock, Michigan, on May 5th, 1969, and was stamped as received at the office of the Appeal Board two days later on the 7th of May, 1969."

DECISION: The claimant did not file a timely appeal from the Referee decision.

RATIONALE: "Defendant, Michigan Employment Security Commission, contends that inasmuch as 'mailing' generally has been held not to constitute 'filing', the plaintiff-claimant, on the basis of the record, must be deemed to have filed his claim of appeal on May 7, 1969. On that date, according to the record, said claim was delivered to and received by the Appeal Board. It cites, among other cases, Beebe v Morrell, 76 Mich 144 (1889); People v Madigan 223 Mich 86 (1923); and Detroit United Railway v Department of Labor and Industry, 231 Mich 539 (1925), all of which support defendant's position as herein advanced.

In Beebe v Morrell, it is stated at p 120: 'A paper is said to be filed when it is delivered to the proper officer, and by him received to be kept on file ...'"

Section 33

APPEALS, Constructive notice, Good cause, Legal advice, Timeliness of appeal to the Board of Review

CITE AS: Whitcomb v Stow Davis Furniture, No. 78827 (Mich App May 2, 1985).

Appeal pending: No

Claimant: Wayne Whitcomb
Employer: Stow Davis Furniture
Docket No: B82 11192 RO1 86744W

COURT OF APPEALS HOLDING: Delay in seeking legal advice does not constitute good cause for reopening a Referee's decision.

FACTS: Plaintiff failed to file a timely appeal to the Board of Review and, subsequently, sought to obtain an order from the Referee to reopen the decision. The Referee denied that request. The Board of Review affirmed, as did the circuit court. Plaintiff claimed that he contacted a lawyer because he did not know he could protest a restitution order. Moreover, claimant argues that he received the decision late, beyond the twenty-day appeal period, because he had moved and had not made the required address changes.

DECISION: Claimant's request to reopen is denied.

RATIONALE: Plaintiff has no one but himself to blame for his failure to leave a forwarding address. A person is charged with constructive notice where he had the means of obtaining knowledge but does not use them. Failure to receive a decision under these circumstances cannot constitute good cause. Ignorance of the law resulting from delay in seeking legal advice is not good cause.

APPEALS, Notice of hearing, Waiver of adjournment, Issue before Board of Review, Admissible evidence

CITE AS: Szypa v Kasler Electric Co., 136 Mich App 116 (1984).

Appeal pending: No

Claimant: William Szypa
Employer: Kasler Electric Company
Docket No: B82 05600 83572

COURT OF APPEALS HOLDING: Where the notice of hearing limits itself to an issue, where neither party requests an adjournment for further development of additional issues, where the Board of Review does not remand for the taking of further testimony on such additional issues and, where a knowing and informed waiver of an adjournment of the referee hearing was not obtained from the parties, the decision of the referee must be limited to the issue contained in the notice of hearing.

FACTS: The Referee limited his decision to the issue contained in the notice of hearing which was voluntary leaving. Employer attempted to introduce evidence of claimant's misconduct. Employer appealed to the Board of Review. The appeal did not mention the misconduct discharge issue. The Board of Review decided that claimant was discharged for misconduct connected with work. The Circuit Court reversed the Board of Review because the decision was based upon an issue not properly before the Board.

DECISION: The Referee's decision was appropriate based upon the admissible evidence presented; and the decision of the Circuit Court reversing the Board of Review was correct.

RATIONALE: " ... if the notice of hearing does not place the parties on notice of an issue which is raised at the referee hearing the hearing shall either be adjourned for a reasonable time if requested by either party, or in any event, evidence shall not be taken on the issue nor a decision be made thereon unless a knowing and informed waiver of adjournment is obtained from the parties.

"The employer and the referee had the opportunity to adjourn the hearing to allow the employee to gather rebuttal evidence on the misconduct issue and they failed to do so. The Board had the authority to remand the case for further testimony and it failed to do so. The employee had the right to assume that the only issue before the referee was whether he had voluntarily quit ... "

EDITOR'S NOTE: Also see Rule 206 of the Rules of Practice, which has been revised since Szypa.

Section 33

APPEALS, Appeal to court from remand order, Final order, Interlocutory appeal, Superintending control

CITE AS: Radke v ESC, 37 Mich App 104 (1971)

Appeal pending: No

Claimant: Herman Radke
Employer: Nelson Mill Company
Docket No: B68 3396 37329

COURT OF APPEALS HOLDING: Where an employer fails to appear at either the Referee hearing or the Appeal Board hearing, but the Appeal Board remands the matter for the employer's testimony, the remand order is not a final order, but it is a clear abuse of discretion which entitles the claimant to " ... circuit court review under the power of superintending control."

FACTS: A Commission redetermination held the claimant disqualified under the labor dispute provision of the Act. The employer made no appearance at the Referee hearing. The Referee reversed the redetermination, and an Appeal Board hearing was scheduled at the employer's request. The claimant and his attorney attended; the employer did not. The Appeal Board remanded the matter for the employer's testimony. On appeal by the claimant, a circuit court reversed the remand order.

DECISION: The claimant is " ... entitled to circuit court review under the power of superintending control."

RATIONALE: "Upon inspection, we find that the Genesee County Circuit Court could not properly entertain an appeal pursuant to MCLA 421.38; MSA 17.540. But, even if the Appeal Board's remand order is not a final order appealable under statute, we may view an appeal to circuit court as an application for an order of superintending control."

"We hold that upon this factual situation, there was a clear abuse of discretion by the MESC Appeal Board and, consequently, claimant was entitled to circuit court review under the power of superintending control. For us to rule otherwise would be an endorsement that the MESC Appeal Board has the right to place multiple stumbling blocks in front of a claimant in order to recover benefits but excuse the most extravagant and indefensible neglect of the entire proceedings by an employer."

Section 32a

APPEAL, Timeliness of request for reconsideration, Delay in checking mail, Negligence, Non receipt of redetermination, Post office box, Request for reconsideration

CITE AS: Golembiewski v Kysor Industrial Corp, No. 76-20218 AE, Kent Circuit Court (August 23, 1978).

Appeal pending: No

Claimant: Hope Golembiewski
Employer: Kysor Industrial Corp.
Docket No: B75 3449 48053

CIRCUIT COURT HOLDING: Where a party uses a post office box for receiving mail, negligence in checking the box is not good cause for reconsideration.

FACTS: A redetermination was mailed to the claimant on December 16, 1974. "On January 13, 1975, appellant filed a statement protesting redetermination and stating, 'I am late with this request because we have post office box and my husband did not pick up the mail.'"

DECISION: The redetermination is final.

RATIONALE: "Twenty-eight (28) days after the redetermination was mailed by the M.E.S.C., appellant filed a request for reconsideration pursuant to Sec. 32a." "Regulation 270 issued by the M.E.S.C. pursuant to the Act defines what constitutes good cause for reconsideration of a prior determination where there has been an untimely filing." "In his decision, the Referee stated:

> 'The claimant states she and her husband had a post office box since April, 1974. She further states that during this period of time neither she nor her husband went to the post office to pick up their mail. The redetermintion was mailed to the proper address, and the claimant's negligence in not getting the mail is attributable solely to her for her failure to protest timely.'"

Section 32a

APPEAL, Good cause, Lack of written notice, Personal service of document, Record of receipt, Substantial evidence, Testimony of non-receipt, Timeliness of protest, Verbal notice

CITE AS: Donahoo v Michigan Department of Social Services, No. 79- 17785 AE, Washtenaw Circuit Court (March 3, 1980).

Appeal pending: No

Claimant: Leonard Donahoo
Employer: Michigan Department of Social Services
Docket No: B78 50580 61097

CIRCUIT COURT HOLDING: Where there is no substantial evidence that a party received a copy of a determination, the party has good cause for a late protest.

FACTS: The Commission denied the claimant's late request for a redetermination. The Referee stated:

"The claimant testified that he never received a copy of the determination dated November 30, 1977. However, the Branch Office copy of the Determination (Exhibit #6) indicates that it was personally served on November 30, 1977."

"The claimant stated that even though he was not given a copy of the determination on November 30, 1977, he was verbally advised that it was unfavorable and that he would be sent a copy."

DECISION: The appeal is remanded for a Referee hearing on the merits.

RATIONALE: "Upon reading the Briefs and hearing oral argument in the above cause, the Court finds that there is no competent, material and substantial evidence to support a finding that the Plaintiff/Appellant was ever served with a Determination Notice by the Michigan Employment Security Commission. Absent such evidence, the 20 day statutory appeal period was not and could not have been triggered. The court further finds that the Plaintiff's appeal was timely and/or that he has established good cause for a late appeal."

APPEALS, Filing appeal, Loss of mail, Manner of filing appeal, Non receipt of determination, Timeliness of appeal to Referee

CITE AS: Mellor v Pro-Golf of Royal Oak, No. 80-205 AE, Macomb Circuit Court (June 19, 1980).

Appeal pending: No

Claimant: Craig Mellor
Employer: Pro-Golf of Royal Oak
Docket No: B78 11552 65901

CIRCUIT COURT HOLDING: Non receipt of a mailed request for appeal is not good cause for late filing of an appeal.

FACTS: "Mr. Mellor claims that on June 19, 1978 he mailed a timely appeal request to the MESC. On July 27, 1978 he personally appeared at the MESC offices and requested a reconsideration of the June 8th redetermination. The MESC contends that it never received the June 19th request and, therefore, the July 27th request was tardy and of no effect."

DECISION: The redetermination is final.

RATIONALE: "The effect of the MESC's nonreceipt of the June 19th letter is governed by King v Calumet & Hecla Corporation, 43 Mich App 319 (1972). The claimant in King had 15 days in which to file an appeal with the MESC Appeal Board. He mailed his appeal on the 15th day and, consequently, the Commission did not receive it until the 15 day appeal period had expired. The King court held that mailing did not constitute filing and that the Commission was justified in denying the claimant's appeal as untimely."

"The MESC contends and the Court agrees that, 'The "good cause" provision was intended to protect those who, absent culpable fault, were unable to present the merits of their case by making a timely request for redetermination or appeal.' Appellee's brief P 10."

Section 32a, 33

APPEAL, Timeliness of appeal to Referee, Negligence, Good cause

CITE AS: Terry v Capitol Area Comprehensive Health Planning Association, No. 74-16447 AE, Ingham Circuit Court (January 30, 1985).

Appeal pending: No

Claimant: Dorothy L. Terry
Employer: Capitol Area Comprehensive Health Planning Association
Docket No: B73 5291 44482

CIRCUIT COURT HOLDING: "Negligence in filing an appeal is not good cause ... "

FACTS: "A review of the record on appeal from the Michigan Employment Security Commission in this case along with briefs by the parties clearly indicates to this Court that Dorothy L. Terry did not file her original appeal within the fifteen day period. That the referee and the appeal board found that good cause did not exist in her delay in filing said appeal."

DECISION: "The claimant's request for an appeal is denied."

RATIONALE: "A careful review of this case and the record indicates that the decision of the appeal board and the referee is supported by competent, material and substantial evidence on the whole record and that said order or decision is not contrary to law."

"Negligence in filing an appeal is not good cause and the record clearly shows that she had no new and material evidence to present on the merits of her claim which would be good cause for a rehearing and it is clear that she was present and had knowledge of her right to appeal based upon the ruling of the referee from the case as he heard it. The mere failure to avail oneself of a right to appeal within the appeal period and later determining that you should appeal, whatever the reason, does not in and of itself constitute good cause."

APPEALS, Referee bias

CITE AS: Berry v APCOA, No. 104859 (Mich App March 15, 1989).

Appeal pending: No

Claimant: Nizar M. Berry
Employer: APCOA, Inc.
Docket No: B86 01519 RM1 103536W

COURT OF APPEALS HOLDING: A referee need not be disqualified merely because he has worked with a party's attorney in the past.

FACTS: Claimant was observed leaving work before the end of his shift on four separate occasions in an eight-day period. Claimant's time cards were stamped to falsely indicate that he left work later than observed. Claimant contended that he went home for lunch and returned later to punch out, but his testimony was contradicted by observations of employer's witnesses which the referee found more credible. Claimant also asserted that he was engaged in surveillance work for employer, but presented no credible testimony in this regard. During the hearing claimant's attorney moved to disqualify the Referee because the Referee had worked with the employer's attorney in the past. The Referee declined to disqualify himself. The Referee found the claimant disqualified for misconduct. In a petition for rehearing the claimant's attorney again raised the Referee disqualification issue and also alleged the employer's attorney and Referee spoke to each other after the hearing for ten minutes.

DECISION: Claimant was disqualified for misconduct. The Referee was not required to disqualify himself from deciding the appeal.

RATIONALE: While actual bias or prejudice need not be shown, allegations of bias must be supported by facts. "A hearing before an unbiased and impartial decisionmaker is a basic tenant of due process. ... Actual bias or prejudice is not required to be shown. Where the situation is one which 'experience teaches that the probability of actual bias on the part of a decisionmaker is too high to be constitutionally tolerable,' then a decisionmaker must be disqualified. City of Livonia v DSS, 423 Mich 466, 509; 378 NW2d 402 (1985), citing Withrow v Larkin, 421 US 35, 47; 95 S Ct 1456; 43 L Ed 2d 712 (1975). In Crampton, supra, p 351 our Supreme Court stated: Among the situations identified by the [Withrow] Court as presenting that risk are where the judge or decisionmaker (1) has a pecuniary interest in the outcome; (2) 'has been the target of personal abuse or criticism from the party before him'; (3) is 'enmeshed in [other] matters involving petitioner...'; or (4) might have prejudged the case because of prior participation as an accuser, investigator, factfinder or initial decisionmaker. We find that the present claim does not fall within any of the above circumstances."

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3, 9:A

APPEAL, Timeliness of appeal to Board, Administrative clerical error, Delay of mail, Filing appeal by mail, Good cause, Postal delay,

CITE AS: Bertels v Ironwood Products Co., No. 74-133 AE, Gogebic Circuit Court (January 25, 1978).

Appeal pending: No

Claimant: Joseph H. Bertels
Employer: Ironwood Products Co.
Docket No: B73 1567 RO RO 46033

CIRCUIT COURT HOLDING: Where an appeal is late because the United States Postal Service took nine days to deliver a letter of appeal betweeen two cities in Michigan, and there is other evidence of poor mail service between the two points, the postal delay constitutes an administrative clerical error.

FACTS: The claimant mailed a letter of appeal in Bessemer, Michigan, on October 23, 1973. The deadline for appealing was October 26, 1973. The letter was delivered to the Appeal Board in Detroit on November 1, 1973. The appeal was rejected as untimely. A subsequent request for reopening was denied by the Referee. The claimant's copy of the order of denial was apparently lost in the mail. The Appeal Board affirmed the denial.

DECISION: The claimant has good cause for late appeal.

RATIONALE: "[W]hile I assume that the provisions of Regulation 270 relating to administrative clerical errors relates to the M.E.S.C., the fact that the United States Postal Service took nine days to deliver a letter from Bessemer, Michigan, to Detroit, Michigan, containing the Claim of Appeal of the Plaintiff here, it certainly could constitute a clerical error of some kind insofar as the Postal Service is concerned."

"[I]t would appear at least, that mail communication between Bessemer, Michigan, and Detroit, Michigan, leave much to be desired. As stated in the brief of the Defendant, M.E.S.C., the term good cause as used in the Act presents a mixed question of law and fact. This court does not believe that one administrative agency of our State Government can hold the failure of an administrative agency of the Federal Government to promptly deliver mail does not constitute good cause for reopening ... "

Section 38

APPEALS, Circuit Court standard of review

CITE AS: Cummings Realty Apartments v Houston, No. 91016 (Mich App February 18, 1988).

Appeal pending: No

Claimant: Everett Houston
Employer: Cummings Realty Apartments
Docket No: B83 09820 91646

COURT OF APPEALS HOLDING: The Circuit Court applied the correct standard of review to review and affirm the decision of the Board of Review.

FACTS: The employee discharged the claimant for intoxication on the job. The Referee held the claimant not disqualified under Section 29(1)(b) because the employer failed to meet its burden of proof since the evidence was conflicting. The Referee also found the claimant not disqualified because the employer had condoned and tolerated claimant's intoxication in the past thereby requiring the employer to warn claimant before discharge. The Board of Review and the Circuit Court affirmed.

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

RATIONALE: "From our consideration of the record, it is clear that the circuit court correctly considered and applied the foregoing standards. The evidence presented at the referee hearing on claimant's alleged misconduct conflicted... . After recognizing the conflict in the testimony, deciding that he was faced with 'equal testimony,' and correctly assigning the burden to show misconduct to the employer, Tuck, supra, p 588, the hearing referee concluded that the employer failed to meet its burden. The circuit court found that the hearing referee's decision, and the MESC's board's affirmation of that decision, was authorized by law and supported by competent, material and substantial evidence. Since this is the proper standard, and it was correctly employed by the lower court, we affirm the circuit court determination."

Section 34, 38

APPEALS, Appeal to court from Board remand order, Adequate remedy, Appeal on the merits, Circuit court review, Final order, Interlocutory appeal, Superintending control

CITE AS: Baldwin v Hubbard Apiaries, Inc, No. 79-11-708, Lenawee Circuit Court (February 1, 1980).

Appeal pending: No

Claimant: Lu Ann Baldwin
Employer: Hubbard Apiaries, Inc.
Docket No: B76 19013 RO 58074

CIRCUIT COURT HOLDING: A remand order of the Board is not appealable to circuit court. The order is not final, and a party " ... has an adequate remedy by appeal if an adverse decision on the merits makes it necessary."

FACTS: A Referee denied the claimant's request for reopening. "The Board of Review 'set aside' the 'denial of reopening and Referee decision and remanded for a hearing on the merits of the redetermination of October 8, 1976.'" The employer sought circuit court review of the remand order.

DECISION: The appeal to circuit court is dismissed.

RATIONALE: The Court based its decision on the holding in Ashford v UCC, 328 Mich 428 (1950). The Court distinguished the present case from the facts in Radke v ESC, 37 Mich App 104 (Reh den 1972).

"Nothing in the instant case indicates the attempted use by the employee of anything amounting to the 'subtly coercive effects of economic pressure.' Furthermore, at the time of the Radke decision GCR 1963, 711.2 prohibited the use of superintending control, 'if another plain, speedy and adequate remedy is available to the party seeking the orders.' Radke p110. This now has been amended and superintending control may not be used 'if another adequate remedy is available to the party seeking the order.' GCR 1963 711.2. The employer has an adequate remedy by appeal if an adverse decision on the merits makes it necessary."

Section 32a

APPEALS, Proof of service, Time limits, One year limit

CITE AS: McBride v Americana Mobile Home Park, Inc., 173 Mich App 275 (1988).

Appeal pending: No

Claimant: Jimmie McBride
Employer: Americana Mobile Home Park, Inc.
Docket No: B85 04773 100673

COURT OF APPEALS HOLDING: When there is no proof of service of a determination on a party, the 30-day period in which to protest the determination is tolled, and even if the protest is filed more than 1 year later, Section 32a does not bar the Commission from considering and ruling upon it.

FACTS: Employer filed a protest to a determination issued July 23, 1982 on March 14, 1985. Employer alleged non-receipt of the determination as its basis for failure to timely protest. The Referee and the Board of Review found that employer was entitled to no relief because it filed more that 1 year after the determination was issued.

DECISION: Employer has 30 days from the date of the Court of Appeals decision to file a protest to a determination more than 2 years old.

RATIONALE: "We believe that in order to reflect compliance with the statutory mandate relative to notice, the MESC file should contain some proof reflecting the fact that defendant was personally served with or sent a copy of the determination. We are simply unable to conclude that there was compliance with the notice provisions of the statute in this case.

We are therefore constrained to conclude that there was no competent, material and substantial evidence on the whole record to support the implicit finding that the defendant had been notified of the MESC determination and that, therefore, the applicable appeal periods began running. There being no proof that notice of the determination was sent to the defendant, defendant has the now applicable 30-day appeal period in which to file an application for review of the determination."

APPEALS, Board of Review, de novo fact finding

CITE AS: Sprowl v Village of Merrill, No. 80822 (Mich App August 25, 1986).

Appeal pending: No

Claimant: Harold Sprowl
Employer: Village of Merrill
Docket No: B82 18119 R01 89984W

COURT OF APPEALS HOLDING: It is within the statutory authority of the Board of Review, solely upon a review of the record, to make findings of fact different from those made by a Referee.

FACTS: A police officer was discharged after he damaged a door in the employer's police department and locked himself in an office for 3 hours while enraged over receiving 2 additional reprimands for other infractions. The MESC Referee found disqualifying conduct. The Board reversed.

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

RATIONALE: "While neither statute expressly provides that the MESC board of review is to exercise de novo review of a referee's decision, they do give the board of review wide power and authority. We conclude that the Legislature granted the MESC board of review the power of de novo review pursuant to Sections 34 and 35 of the Michigan Employment Security Act, and left to the appeal board to decide whether such de novo review would occur on the basis of only the written record, or whether additional testimony would be taken."

Section 32, 32a

APPEALS, Failure to protest determination, Collateral estoppel, Final order, Issue before referee, Res judicata, Restitution determination

CITE AS: Van Tuhl v Henry Vroom and Son, Inc, No. 80-019-307 AE, Wayne Circuit Court (October 31, 1980).

Appeal pending: No

Claimant: Richard Van Tuhl
Employer: Henry Vroom and Son, Inc.
Docket No: EB78 07923 67964

CIRCUIT COURT HOLDING: A disqualification determination which has become final may not be reopened by protesting a restitution determination which results from the disqualification.

FACTS: The claimant did not protest the determination which found him disqualified for misconduct discharge. He did protest a subsequent determination which held that he had received benefits during a period of disqualification.

DECISION: The disqualification determination is final.

RATIONALE: "As the determination had become final, the only issue before the Referee in Case Number EB78 07923 67964, which is the disqualified matter of this appeal, was whether the claimant had received benefits during the period of requalification, which have to be repaid."

"The Referee properly did not consider the question raised by the determination of June 19, 1978, that is, the separation issue stemming from the claimant's discharge by the Hale Area Schools. In Roman Cleanser Co. v Murphy, 386 Mich 598, 703-704 (1972), the Supreme Court held that the doctrine of res judicata and collateral estoppel applied to administrative matters, and an issue once settled in a determination, redetermination, or decision, which has become final is not subject to collateral attack."

APPEALS, Timeliness, Good cause for late protest, Average reasonable claimant, Definition of good cause, Misunderstanding of procedure, Notice of denial

CITE AS: Jaeger v Sears, Roebuck and Co, No. 80-010-766 AE, Wayne Circuit Court (July 18, 1980).

Appeal pending: No

Claimant: Catherine Jaeger
Employer: Sears, Roebuck and Co.
Docket No: B78 52058 59617

CIRCUIT COURT HOLDING: A party's lack of understanding of the appeal process can constitute good cause for a late protest.

FACTS: The claimant was found disqualified and ineligible. She continued to report to the branch office, but did not protest the determination until three months later. The claimant said she had not understood the protest procedure. A Notice of Denial was issued.

DECISION: The claimant has good cause for a late protest.

RATIONALE: "[T]he parameters of 'good cause' are not rigidly defined. The record in this case clearly demonstrates a rigid definition by the Commission to the effect that 'good cause' is limited to the situations defined in the regulation."

"The Board of Review has taken the position that a party's lack of understanding of the determination or of the appeal process cannot constitute good cause. This is an erroneous conclusion of law. A factual determination, as was made in this case, that there was a good faith misunderstanding by a lay person of the 20-day time limit on appeal, where the appeal is immediately filed when there is awareness within time parameters such as those existing in this case, can constitute good cause within the meaning of the Act and the regulation. The standard of conduct to be applied in determining such matters is the standard of conduct of the average reasonable claimant in light of all the circumstances, not the standard of conduct of the average Referee or Board of Review member."

Section 38

APPEALS, Circuit Court standard of review

CITE AS: Starr v Southwicke Square Cooperative, No. 102931 (Mich App October 21, 1988).

Appeal pending: No

Claimant: Lora Starr
Employer: Southwicke Square Cooperative
Docket No: B85 12577 101680

COURT OF APPEALS HOLDING: The Circuit Court exceeded its authority in reversing the Board of Review. A reviewing court may reverse the findings made by the Board of Review only if the decision is contrary to law or is not supported by competent, material and substantial evidence on the whole record.

FACTS: Claimant worked as resident manager of a cooperative housing development. Her performance was reviewed by an independent accountant who recommended she be discharged. Claimant eventually resigned because of alleged harassment. The Referee awarded benefits to her but the Board of Review reversed. The Circuit Court reversed the Board "stating, 'ultimately, I guess it's on the basis that this is not spurious, it's not frivolous, and she should be entitled to her unemployment worker's compensation.'"

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

RATIONALE: "This Court has described 'substantial evidence' as 'evidence which a reasoning mind would accept as sufficient to support a conclusion,' adding that '[w]hile it consists of more than a mere scintilla of evidence it may be substantially less than a preponderance of the evidence ...' [citations omitted]. Thus, this Court has acknowledged that it is not the function of a court of review to resolve conflicts in the evidence or to pass on the credibility of witnesses ... [citations omitted] ..."

"Under the limited scope of review applicable to appeals from Board of Review decisions, the circuit court was not at liberty to reverse the Board's decision unless it found that that decision was not supported by competent, material and substantial evidence on the whole record."

Section 32a

APPEAL, Good Cause, Timeliness of appeal to Referee

CITE AS: Jones v Showcase, No. 81-103221 AE, Wayne Circuit Court (November 5, 1981).

Appeal pending: No

Claimant: Gwendolyn Jones
Employer: Showcase Corporation
Docket No: B79 07537 67950

CIRCUIT COURT HOLDING: Good cause implies a situation out of the claimant's direct control.

FACTS: The Commission mailed a redetermination on October 12, 1978, which held the claimant disqualified. The claimant requested a Referee hearing on April 9, 1979, based on the fact that she had "just made up [her] mind that racial discrimination was a good and justified reason for quitting."

DECISION: The claimant failed to establish good cause for the untimely appeal.

RATIONALE: Good cause is not defined in the Act. MESC regulation 270(4) lists the following: 1) newly discovered material facts which through no fault of the claimant were not available at the time of the determination 2) when MESC has additional or corrected information 3) when an administrative clerical error has been discovered.

Regulation 210(2)(b) and 270 and Rule 109 also define good cause. Good cause under these rules includes acts of God (such as floods, storms or other natural disasters), work, reliance on a promise of work, or seeking work where a reasonable indication that work is available exists, the closing of MESC offices, physical incapacity, attendance at a funeral, incarceration or jury duty.

"The examples given for good cause in the MESC rules and regulations, while not meant to be definitive or exclusive, clearly imply a situation out of the claimant's direct control. Procedural deadlines would be meaningless if claimants could bring appeals months after the expiration of time limitation simply because they have changed their minds about taking action."

Section 11(b)

APPEALS, Collateral estoppel

CITE AS: Storey v Meijer, Inc., 431 Mich 368 (1988).

Appeal pending: No

Claimant: William F. Storey
Employer: Meijer, Inc.
Docket No: NA

SUPREME COURT HOLDING: MESC determinations are not to be used to collaterally estop the litigation of issues in a subsequent civil suit but are limited to the purpose of determining a claimant's eligibility for benefits.

FACTS: Claimant was denied benefits by the MESC because of theft connected with his work. The Referee concluded there was neither theft nor discharge, but that finding was reversed by the Board of Review. While that appeal was pending at the Board, claimant filed a wrongful discharge action in circuit court. Employer moved for summary disposition on the basis the Board's factual findings regarding claimants disqualification collaterally estopped him from relitigating those issues. The circuit court granted summary disposition and the court of appeals affirmed.

DECISION: The circuit court's summary disposition in favor of the employer is reversed. Remanded for further proceedings.

RATIONALE: "We find that Section 11(b)(1) clearly and unambiguously prohibits the use of MESC information and determinations in subsequent civil proceedings unless the MESC is a party or complainant in the action.

Furthermore, our decision in this case advances the legislative purpose of the unemployment compensation system and is supported by considerations of public policy that underly the exceptions to the application of collateral estoppel. ...

Due to the full range of remedies available in a civil action, the parties have a greater incentive to fully litigate the civil claim than the claim for unemployment benefits. If collateral estoppel is applied to determinations of the MESC, both claimants and employers will be forced to fully litigate the administrative claim, potentially delaying the determination of benefit rights and burdening the unemployment compensation system."

Section 38

PROCEDURE/APPEALS, New Issue, Remand, Scope of Review

CITE AS: Rybski v Mt. Carmel Mercy Hospital, No. 95927 (Mich App June 25, 1987).

Appeal pending: No

Claimant: Judith A. Rybski
Employer: Mt. Carmel Mercy Hospital
Docket No: B85 03717 99829

COURT OF APPEALS HOLDING: Where the redetermination and notice of hearing only referenced a voluntary leaving issue, where there was no informed waiver of adjournment to permit consideration of a misconduct issue, and where the Board did not remand, the circuit court erred in remanding for a new hearing on the additional issue.

FACTS: The redetermination issued by the MESC held claimant disqualified under Section 29(1)(a) for voluntary leaving. The notice of hearing only referenced Section 29(1)(a). The Referee held claimant not disqualified under Section 29(1)(a) and also not disqualified for misconduct under Section 29(1)(b). The Board reversed and held claimant disqualified for misconduct. Because the Board had not given the claimant an opportunity to present evidence on the misconduct issue, the circuit court remanded for further proceedings on the misconduct issue.

DECISION: Claimant is not disqualified for voluntary leaving. Remand for proceedings regarding the discharge issue is set aside.

RATIONALE: In reversing the circuit court's remand the Court of Appeals relied on Szypa v Kasler Electric Co., 136 Mich App 116; (1984), and found the only issue before the Referee was voluntary leaving.

"The circuit court in this case determined that, in the interest of justice, the matter should be remanded to the referee for a hearing on the issue of whether plaintiff was guilty of misconduct within the meaning of Section 29(1)(b). We are not persuaded that justice required remand in this case. ... The employer had an opportunity to request an adjournment of the referee hearing so that the issue of misconduct could be properly developed, or to ask that the Board of Review remand for further evidence. It did neither. Plaintiff was on notice that the sole issue was whether she was disqualified under Section 29(1)(a). Justice does not require that the employer be given yet another opportunity to present the misconduct issue."

11/90
3, 6, d14:NA

Section 32a

PROCEDURE/APPEALS, Timeliness, Mailing not filing

CITE AS: Midwest C.O.M. Systems, Inc. v MESC, No. 87383 (Mich App August 28, 1986); lv den 428 Mich 882 (1987).

Appeal pending: No

Employer: Midwest C.O.M. Systems, Inc.
Docket No: L83 08498 1778

COURT OF APPEALS HOLDING: A protest of a determination may not be the basis for a redetermination unless the appeal is received by the MESC within one year of when the determination was issued.

FACTS: The employer failed to submit a required quarterly report and as a result its unemployment tax rate was increased from 4.8% to 9.0% by means of a determination issued March 27, 1981. The missing report was provided to the MESC in May, 1981. The employer alleged it submitted a request for redetermination of the March 27 determination on June 2, 1981, but there was no evidence that protest was ever received by the MESC. The employer did request a redetermination by a letter sent in May, 1982 which was received by the MESC. Because that protest was received more than 1 year after the determination the MESC denied the employer's request for redetermination.

DECISION: The MESC properly denied the employer's request for a redetermination where that request was received by the MESC more than 1 year after issuance of the disputed determination.

RATIONALE: "The Board of Review's decision is supported by competent, material, and substantial evidence. The board correctly held that the mailing of the June 2, 1981 request does not constitute a filing. King v Calumet & Hecla Corp, 43 Mich App 319, 326; 204 NW2d 286 (1972). The only written request for redetermination that was actually received by MESC was a letter sent in May 1982, past the one-year deadline for filing an appeal. Thus, the Board of Review correctly denied plaintiff's request for redetermination."

The court went on to reject the employer's contention that filing of the missing report in May, 1981 constituted a request for redetermination. "MCL 421.32a(2) states that a request for redetermination must be filed. Merely sending missing reports does not constitute a request for redetermination."

Section 16, 32a

APPEALS, Time limits, One year limit, Disputed issue

CITE AS: Lee v ESC, 346 Mich 171 (1956).

Appeal pending: No

Employer: Vincent Lee d/b/a Master Polishing & Buffing Co
Docket No: L53 1161 880, 881

SUPREME COURT HOLDING: The one year statute of limitations on challenging determinations in Section 32a does not bar an employer from collecting a refund of erroneously collected contributions made more than one year after the determination setting the contribution rate, because even though Section 32a bans any protest of a legally contested issue, it is not applicable to a request for refund of contributions voluntarily paid and accepted. Section 16 allows a claim for refund of overpayment up to 3 years afterwards, if paid erroneously.

FACTS: One of the partners of a co-partnership purchased the other partner's interest at dissolution and filed a report to determine liability. There were errors in the report regarding the number of weeks and number of employees which the business had during the period in issue. A determination was issued, but the employer did not contest it for more than 1 year. After 1 year the employer filed for a refund. A commission audit in the interim observed the obvious errors but did not bring about an adjustment of the rate.

DECISION: The employer was entitled to a refund pursuant to Section 16.

RATIONALE: "Section 32a also provides that the commission may reconsider a determination for good cause, provided it is made within one year from the date of mailing of the original determination of the disputed issue.

The words 'disputed issue'. as used in Section 32a, refer to a contested issue or a matter in dispute between the employer and the commission. In such disputed matters relief must be requested within 15 days or within one year for good cause shown. In our opinion matters not in dispute, such as payments voluntarily made and accepted, do not fall within the restrictions of Section 32a."

Section 32a, 62(b)

RESTITUTION, Time limits, One year limit, Fraud

CITE AS: Royster v Chrysler Corp, 366 Mich 415 (1962).

Appeal pending: No

Claimant: Turner Royster
Employer: Chrysler Corp
Docket No: B59 1749 23274

SUPREME COURT HOLDING: Section 32a does not bar a protest of claimant's eligibility made more than 1 year after the payment of benefits based upon fraud.

FACTS: Claimant was laid off January 10, 1958. On January 15, 1958 he filed a claim for benefits. Claimant was recalled and worked the week ending January 25, 1958. He received wages of $87.78. He was laid off again on January 25, 1958.

On January 29, 1958 the claimant appeared at an MESC office and reported he had not worked and had no earnings for the weeks ending January 18, and January 25, 1958. Based on his representation, the Commission paid him benefits for the week ending January 25, 1958.

Chrysler discovered the discrepancy on February 4, 1959. Chrysler sought a redetermination of ineligibility for that week - more than one year after the determination of eligibility.

DECISION: The Commission did have jurisdiction of the misrepresentation issue. The claimant was subject to the fraud provisions of Section 62(b).

RATIONALE: In contrast to the eligibility issues which were in question when the claimant was paid benefits in January, 1958, "the presently disputed issue is whether plaintiff intentionally concealed his earnings for the week in question, and ... it became the disputed issue only after defendant's protest on February 4, 1959." The employer's position is supported by Lee v ESC, 346 Mich 171. (See Digest 16.26)

Section 32a

PROCEDURE, Good cause for late protest, MESC Rule 270

CITE AS: Laycock (Chrysler Corp), 1978 BR 54055 (B76 15558).

Appeal pending: No

Claimant: Marilyn F. Laycock
Employer: Chrysler Corp
Docket No: B76 15558 54055

BOARD OF REVIEW HOLDING: Denial of receipt of a Commission document creates an issue of fact which must be decided by the trier of fact.

FACTS: Claimant's protest of determination was not received within 20 days after the determination was mailed. Claimant testified she did not receive the determination, but had received all other MESC mailings. She lived in a single family dwelling and had no known problem receiving her mail. The Referee, relying on an earlier Board decision Chasca (Detroit Edison), B76-3345-51196, held that claimant's testimony of non-receipt was inadequate as a matter of law to rebut the presumption of mailing.

DECISION: Remanded for hearing on whether the document was in fact received by the claimant or at her mailing address.

RATIONALE: Chascsa is at odds with higher court rulings to the effect that the presumption of receipt is rebuttable. Testimony of the party denying receipt is often the only testimony and is not weightless because it is "self-serving".

APPEALS, Scope of review, Issues before Board

CITE AS: Hoagland (Chrysler Corp), 1986 BR 96529W (B82 22052).

Appeal pending: No

Claimant: Connie Hoagland
Employer: Chrysler Corp
Docket No: B82 22052 RO1 96529W

BOARD OF REVIEW HOLDING: On protest or appeal of a ruling by the Commission covering multiple issues, only the issue or issues which were decided adversely to the appealing party are preserved by the appeal.

FACTS: A Commission determination held claimant ineligible under the able and available requirement of Section 28(1)(c) and subject to restitution under 62(a) but not subject to the penalty provisions of 62(b) for intentional misrepresentation. Employer protested, contending claimant shall be subject to the fraud penalty. The employer's protest was timely, but nevertheless a Notice of Denial was issued. Employer appealed. The Referee found good cause on the procedural issue, then proceeded to affirm the findings of the determination. Employer did not appeal further. Claimant, however, requested a rehearing. Her request was denied and she then appealed to the Board of Review.

DECISION: Claimant's appeal dismissed in a decision by the full Board.

RATIONALE: The full Board noted the claimant did not protest the original determination. Further, she was not the appealing party at the appeal heard by the Referee. In light of that, the only issue properly before the Referee was the matter of the misrepresentation penalty appealed by the employer. As the Referee's decision on that issue was not adverse to the claimant, there was no basis for her appeal to the Board.

The Board observed a party "choosing to appeal from a ruling which is adverse to it should not confronted with the risk that other issues in which it has prevailed might be reversed, to its detriment, by virtue of such appeal."

Section 34, 35

APPEALS, Scope of Review, Reason for disqualification, Commission determination not binding on Board

CITE AS: Persky v Woodhaven School District, No. 71462 (Mich App June 12, 1984).

Appeal pending: No

Claimant: Cynthia Persky
Employer: Woodhaven School District
Docket No: B80 17079 76383

COURT OF APPEALS HOLDING: The Board of Review is not bound by the Commission's basis for determining the disqualification of the claimant; but it may base disqualification on a different basis so long as the record contains sufficient evidence to support the decision.

FACTS: Claimant was a school teacher. Her union struck the employer. On April 2, 1980 a Circuit Court Judge ordered the teachers back to work. On April 4 and 14, 1980, the employer sent recall letters to the teachers notifying them to return by April 18, 1980. Claimant left for England on April 14, 1980 and did not return until April 22, 1980. Her father called her in England and told her the strike had ended. She requested he call the school. He called on April 18, 1980 and said she was ill.

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

RATIONALE: "The MESC Board of Review 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 ..."

"An employer's failure to assign a particular episode as reason for discharge does not affect the Board's finding of misconduct, so long as 'the testimonial record does actually contain evidence of such conduct.'"

APPEALS, Court of Appeals, Appeal of right

CITE AS: Blom v Thermotron Corp, 139 Mich App 50 (1984).

Appeal pending: No

Claimant: Sonia Blom
Employer: Thermotron Corp
Docket No: B82 02617 82905

COURT OF APPEALS HOLDING: Since the amendment of GCR 806.1, a party has an appeal by right from an adverse unemployment compensation decision of the Board of Review and the Circuit Court.

FACTS: The claimant lost an appeal of an adverse decision of the Board of Review at the circuit court. The claimant, in turn, appealed pursuant to GCR 806.1 to the Court of Appeals. The employer argued that Lasher v Mueller Brass Co., 392 Mich 221 (1974) did not grant the claimant the right to appeal.

DECISION: Claimant is entitled by right to appeal an adverse ruling of the Board of Review and circuit court to the Court of Appeals pursuant to GCR 1963, 806.1.

RATIONALE: "The Lasher decision, however, is now obsolete, because it was based on language which was formerly contained in GCR 1963, 806.2(4), but which was removed from the rule to avoid the result reached in Lasher. [Citations omitted] ... Under the current version of the rule GCR 1963, 801.1 allows an appeal by right to this court in the circumstances presented here ..."

Section 33, 34

APPEALS, Credibility, Board of Review, De novo fact finding

CITE AS: Chrysler Corp v Graziani, No. 78 813-213 AE, Wayne Circuit Court (September 21, 1978).

Appeal pending: No

Claimant: Carmine Graziani
Employer: Chrysler Corp
Docket No: B76 13435 55112

CIRCUIT COURT HOLDING: The Board of Review may not summarily discount a Referee's articulated credibility assessments.

FACTS: Claimant voluntarily retired at age 65. He was held eligible for benefits. At the Referee hearing, claimant, through an interpreter, claimed to have sought work, but could remember few specifics of his seeking work activities. At a second hearing, claimant presented a list of 56 locations where he sought work. The Referee found claimant's testimony not consistent and not credible in several respects and held him ineligible. The Board of Review reversed. It concluded that deficiencies in claimant's presentation were entirely due to his difficulty in reading or writing the English language.

DECISION: Referee decision reinstated. Claimant is ineligible.

RATIONALE: The court, after reviewing Section 34 and 35 of the MES Act concluded: "It is difficult to conceptualize what language the legislature could have employed which would more clearly express its intent to confer power upon the Board of Review to make findings of fact independently of the hearing referee ... [T]he manifest intent of the legislature ... [was] to confer independent, de novo fact finding powers upon that Board. These independent and de novo powers must necessarily include the power to assess weight and credibility if they are to have any meaning at all."

In this case, however, the Board erred because: "Where a hearing Referee's decision is founded upon either an evaluation of conflicting testimony of a subjective nature or upon articulated assessments of witness presence, sincerity, or demeanor, the Board of Review, while not bound by the Referee's assessment, must predicate disagreement with that decision upon evidence substantial enough to overcome the weight a reviewing court may ascribe to the Referee's 'unique opportunity' to view the witness."

Section 32a

PROCEDURE, Rule 270

CITE AS: Hoppe v City of Warren, No. 67671 (Mich App August 26, 1983); lv den 418 Mich 975 (1984).

Appeal pending: No

Claimant: Chester M. Hoppe
Employer: City of Warren
Docket No: SUA78 03015 60728

COURT OF APPEALS HOLDING: The enumerated examples of "good cause" in Rule 270 are not self-limiting. A good faith misunderstanding of agency procedures or reliance upon misinformation or incorrect instructions given a claimant by an MESC employee may constitute good cause; but did not in this case.

FACTS: Claimant retired involuntarily and filed for unemployment benefits. He was held ineligible in a Redetermination issued January 4, 1977. Claimant appealed untimely on December 19, 1977. At the Referee hearing, claimant testified that he failed to read the instructions on the Redetermination concerning the time limit for an appeal. Claimant asserted that he did not appeal timely because he had stopped reporting regularly to the MESC. Claimant relied on erroneous information from MESC personnel when he decided to stop reporting.

DECISION: Affirm Denial of Request for Redetermination or Reconsideration.

RATIONALE: Claimant's failure to appeal timely was not due to a good faith misunderstanding of agency procedures or reliance on erroneous information given by the MESC. The untimely appeal was due to claimant's negligence in failing to read the instructions on the Redetermination relative to preserving his right of appeal.

Section 36

APPEALS, Signature requirement, Board Rule 201

CITE AS: Jones (UPS), 1988 BR 104679 (B86 12382).

Appeal pending: No

Claimant: William R. Jones
Employer: United Parcel Service
Docket No: B86 12382 104679

BOARD OF REVIEW HOLDING: A typewritten name appearing below the text of an appeal document was the intended signature of its author for the purpose of authenticating such instrument.

FACTS: Throughout the Commission adjudications concerning claimant, the Frick Co. was employer's agent. Frick prepared the wage and separation information. On behalf of the employer, Frick appealed the Determination. Both the wage and separation information and the protest of the determination bore handwritten signatures of the preparer. The protest of the Redetermination was in the form of a MAILGRAM and bore the typewritten name of the preparer. The Referee held that the lack of a handwritten signature violated Rule 201 of the MES Board of Review Rules of Practice and dismissed the appeal.

DECISION: Remand to Referee for hearing on the merits.

RATIONALE: In a full Board decision, the Board reasoned the legal definition of the word "sign" encompasses any known means of impressing the name of the signer upon paper with the intention of signing the instrument, authenticating it, and giving effect to the contents.

Section 33, 36

PROCEDURE, Right to counsel, Board Rule 207

CITE AS: Langhart v Westside Automotive Technology, No. 71190 (Mich App April 26, 1984).

Appeal pending: No

Claimant: James L. Langhart
Employer: Westside Automotive Technology
Docket No: B81 127463 RO1 80896

COURT OF APPEALS HOLDING: The Referee's failure to advise claimant orally of his right to counsel, where the Notice of Hearing contained such information thereon, and claimant's failure to present evidence because of lack of counsel, did not constitute a good and valid reason for allowing a rehearing.

FACTS: The Referee sent the claimant a Notice of Hearing on which were printed instructions, including the claimant's right to representation by counsel if he chose to have counsel. The claimant appeared at the hearing without counsel. The Referee did not orally advise claimant of his right to be represented by an agent or attorney.

DECISION: Request for rehearing denied. The court affirmed claimant's disqualification for benefits pursuant to Section 29(1)(b) of the Act.

RATIONALE: "We do not interpret R421.1207(9) to require that the referee orally inform the claimant of his right to have an attorney present. The referee here explained the procedure to be used, informed plaintiff of his right to cross-examine witnesses and to present his own witnesses. The referee excluded certain hearsay testimony ... and questioned plaintiff and defense witnesses to clarify their testimony. We find that the referee complied fully with the promulgated rules."

Sections 14, 33, 34

APPEALS, Interested party, UA Rule 201

CITE AS: Riutta v Chrysler Corp, No. 47475, (Mich App July 30, 1980).

Appeal pending: No

Claimant: Wayne Riutta
Employer: Chrysler Corp
Docket No: B76 9910 52480

COURT OF APPEALS HOLDING: An employer's liability status and statutory rights and obligations are not directly affected by a determination to grant extended benefits. Employer's interest is insufficient for it to be deemed an interested party. As a result the employer is not entitled to protest or appeal the Commission's determination that claimant was eligible for extended benefits.

FACTS: In April, 1976, claimant was held to have no benefit entitlement changeable to the employer because the prorated weekly amount of his pension from employer exceeded his benefit rate. Employer appealed a redetermination holding claimant "eligible" but not specifying the period of eligibility. Based on MESC Rule 201 (R421.201), the Referee dismissed the appeal for lack of jurisdiction because the employer was not an "interested party" under the Rule. "Interested parties" have the right to receive copies of Commission determinations and may protest or appeal them as provided in the MES Act. Extended benefits are funded by a reserve account to which all employer's contribute. Though the employer was not chargeable for any benefits paid to the claimant, the employer was concerned that in the future, the amount of claimant's pension might drop below his benefit rate and he would become eligible to receive extended benefits.

DECISION: Affirm dismissal of employer's appeal. Employer not an interested party.

RATIONALE: Although any employer may claim an interest in ensuring that extended benefit claims are only paid when proper, every employer cannot be given standing to challenge every claim which might impinge on the solvency of the reserve account which funds extended benefits. To hold otherwise "would be illogical, would prove burdensome to the Commission, and would open the floodgates of litigation."

Section 33

PROCEDURE, Evidence, Hearsay, Admissible evidence

CITE AS: Shank v Kelly Health Care, No. 95069, (Mich App September 11, 1987).

Appeal pending: No

Claimant: Michael Shank
Employer: Kelly Health Care
Docket No: B84 06896 97086W

COURT OF APPEALS HOLDING: Hearsay evidence is admissible in an administrative contested case, particularly if the evidence is from records prepared for a business purpose.

FACTS: At the Referee hearing the employer had a witness testify from her summation of the employer's business records (claimant's personnel file) to establish the nature and reason for the claimant's termination. Also, the witness offered some direct testimony from personal knowledge of the events in issue.

DECISION: Affirmed the Circuit Court decision holding claimant disqualified pursuant to Section 29(1)(a) of the Act.

RATIONALE: "The standard for admission of evidence in administrative proceedings is not the same as those in a court of law .... In an administrative contested case, any evidence may be admitted and given probative effect if it is of a type commonly relied upon by reasonably prudent men in the conduct of their affairs."

Section 31

APPEALS, Representation by non-attorney agent, Unauthorized practice of law.

CITE AS: State Bar of Michigan v Galloway; 422 Mich 188 (1985).

Appeal pending: No

Plaintiff: State Bar of Michigan
Defendant: James Galloway (Gates McDonald and Co.)
Docket No: NA

SUPREME COURT HOLDING: The last sentence of Section 31 allows non-attorney agents to represent employers in any proceeding before the MESC including representation before the Referees without engaging in the unauthorized practice of law.

FACTS: In 1963 the State Bar of Michigan obtained a permanent injunction enjoining Gates McDonald from representing employer clients at MESC hearings. In 1981 Defendants sought dissolution of the injunction. The circuit judge denied the motion but the Court of Appeals reversed.

In another case the Michigan Hospital Association brought an action to permit its non-attorney agents to represent member hospitals in MESC proceedings. The circuit court granted the relief requested but a panel of the Court of Appeals reversed.

Those conflicting Court of Appeals decisions were considered by the Supreme Court.

DECISION: Non-attorney agents are allowed to represent employers in hearings before MESC Referees and in any proceeding before the MES Commission without engaging in the unauthorized practice of law.

RATIONALE: The statute provides: "any employer may be represented in any proceeding before the Commission by counsel or other duly authorized agent." "Counsel" clearly means attorney. "Other duly authorized agent" provides for representation by non-attorney agents. This specific statutory enactment erected an exception to the to the older, more general statutes prohibiting the unauthorized practice of law.

Section 28(1)(a)

PROCEDURE, Notice of hearing, Adequacy of notice

CITE AS: Snyder v RAM Broadcasting, No. 82 23718 AE, Washtenaw Circuit Court (April 26, 1983).

Appeal pending: No

Claimant: Ann M. Snyder
Employer: RAM Broadcasting
Docket No: B81 02050 R01 78066

CIRCUIT COURT HOLDING: A Notice of Hearing which did not give a plain statement that claimant's eligibility pursuant to Section 28(1)(a) in regard to seeking work right be raised was not an adequate notice of the issue when it merely used the words "Ability/Availability/Seeking Work/Eligibility" in the Notice and did not specify that it was an issue for consideration at the Referee Hearing.

FACTS: Claimant worked for the employer from May 13, 1980 through August 1, 1980. She resigned and filed for unemployment. The Commission disqualified her pursuant to Section 29(1)(a). The redetermination stated: "Ability/Availability/Seeking Work/Eligibility Sections 28, 42, 46, 48 and 50. Last day of work thru date of hearing." The Referee merely reiterated that language in his Notice of Hearing in claimant's appeal of her disqualification pursuant to Section 29(1)(a). The Referee asked the claimant questions regarding her seeking work efforts and held the claimant ineligible under Section 28(1)(a).

DECISION: Claimant not ineligible for benefits pursuant to Section 28(1)(a) from August 1, 1980 through February 26, 1981 because she was not given adequate notice that her seeking work activities would be a matter for consideration.

RATIONAL: "This 'notice', as quoted alone, is inadequate for two reasons. First, it is not a plain statement of the matters asserted. These words and phrases divided by slashes and followed by a string citation to give sections of the Act do not provide a reasonably understandable notification that an issue will be considered, especially where the notification is intended for a lay person, and most especially where the notice is of an issue which was not addressed below. Second, this phrase, even if understandable, was not listed in the notice of hearing as an issue which would be presented before the referee. Instead, it was set forth as an issue which was included in the January 28, 1981 Redetermination."

Section 34, 29(1)(a)

PROCEDURES, Abuse of discretion defined

CITE AS: Tilles v Shaw College at Detroit, No. 79-17700-AE, Washtenaw Circuit Court (July 31, 1980).

Appeal pending: No

Claimant: Catherine A. Tilles
Employer: Shaw College of Detroit
Docket No: B77 7341 R0 58530

CIRCUIT COURT HOLDING: To show a Referee abused his discretion in denying a rehearing required a finding the Referee's decision evidenced a perversity of will, defiance of judgement or the exercise of passion or bias. Mere disagreement with the results is insufficient.

FACT: Claimant was a Physical Education instructor. She had a Master of Arts in teaching Social Studies. She quit citing health reasons. At the hearing she raised other issues but admitted the health matters were her primary concern. Claimant also conceded she was not medically prevented from teaching Social Studies. The Referee found claimant disqualified under Section 29(1)(a). Claimant requested a rehearing because Social Studies are not a college level discipline. The Referee denied a rehearing which was affirmed by the Board of Review and circuit court since claimant was not prevented from raising that information at the initial hearing.

DECISION: Claimant disqualified under Section 29(1)(a). Referee denial of rehearing was not an abuse of discretion.

RATIONALE: The court adopted the following from Spaulding v Spaulding, 355 Mich 382 (1959) as the standard for an abuse of discretion:

> "Where, as here, the exercise of discretion turns upon a factual determination made by the trier of the facts, an abuse of discretion involves more than a difference in judicial opinion between the trial and the appellate courts. The term discretion itself involves the idea of choice, of an exercise of will, for a determination made between competing considerations. In order to have an 'abuse' in reaching such determination, the result must be so palpably and grossly violative of fact and logic that it evidences not the exercise of will but the perversity of will, not the exercise of judgment but the defiance thereof, not the exercise of reason but rather of passion or bias ..."

Section 33

PROCEDURE, Adequacy of Referee hearing

CITE AS: Downtown Properties, Inc v Traylor, No. 93796 (Mich App August 26, 1987).

Appeal pending: No

Claimant: Jack Traylor
Employer: Downtown Properties, Inc
Docket No: B84 01336 95636

COURT OF APPEALS HOLDING: When the party having the burden of proof on a matter does not appear at a Referee Hearing but the appealing party does appear, the Referee is required as fact finder to take sworn testimony and evidence on the issue appealed.

FACTS: Claimant appealed a redetermination which held him disqualified for misconduct. At the Referee hearing the employer did not appear. The Referee took no substantive evidence from the claimant yet the Referee found claimant denied the allegations and reversed the redetermination, stating the employer had not carried its burden of proof.

DECISION: The Court of Appeals affirmed a circuit court remand for testimony on the merits and the assessment for the costs of the appeal against the MESC.

RATIONALE: The Referee did not inquire of claimant as to the reason for his discharge although prior statements to the Commission were part of the file before the Referee. The court found the Referee hearing was conducted in a totally inefficient manner since the record lacked any competent, material, and substantial evidence to support the Referee's findings.

16.42

Section 33, 36(1)

PROCEDURE, Evidence, Business records, Board Rule 207

CITE AS: Williams v Arnold Cleaners, 25 Mich App 672 (1970); lv den 384 Mich 788 (1970).

Appeal pending: No

Claimant: Louise V. Williams
Employer: Arnold Cleaners
Docket No: B67 5361 36096

COURT OF APPEALS HOLDING: If a proper foundation is established, it is permissible for a Referee to allow testimony regarding time records even if the records themselves are not introduced into evidence.

FACTS: Claimant was fired for allegedly failing to shut off a boiler before leaving work on a number of occasions. The Referee found claimant disqualified for misconduct. The claimant contended the Referee erred by, among other things, allowing testimony relating to the employer's time records without requiring they be introduced into evidence.

DECISION: The Referee conducted a proper hearing and there was sufficient evidence to support disqualification for misconduct.

RATIONALE: In reviewing the appeal the court interpreted an earlier version of current Board Rule 207. "Appellant contends that the failure to make the time records a part of the record was a dereliction of the referee's duty under the rule. However, in an administrative hearing, this procedure is acceptable if there is a foundation identifying such records and establishing that they are kept in the ordinary course of business. For the purposes of this hearing such a foundation was established. Giddens v Employment Security Commission (1966), 4 Mich App 526; District Unemployment Compensation Board v Wm. Hahn Co. (CADC, 1968), 399 F 2d 987."

Section 33

PROCEDURE, Reopening, Notice of issues

CITE AS: Selonke v Michigan National Bank, unpublished per curiam Court of Appeals March 19, 1999 (No. 201514).

Appeal pending: No

Claimant: Michael A. Selonke
Employer: Michigan National Bank
Docket No. B92-35032-RRR-132922W

COURT OF APPEALS HOLDING: Where the issue noticed was misconduct, the allegations of threats did not constitute a new issue, therefore good cause for reopening was not established.

FACTS: The employer discharged claimant for yelling vulgarities and obscenities at Jason Trautz, vice-president of technical services. Mr. Trautz testified the claimant made certain statements which he perceived as threats. Claimant admitted making some statements and denied others. The Referee found the claimant disqualified for misconduct. The Board dismissed claimant's untimely appeal for lack of jurisdiction.

Claimant then requested a reopening of the Referee decision claiming the allegation of threats against Mr. Trautz was a new issue he had not been aware of prior to the Referee hearing. The Referee denied the claimant's reopening request. On appeal, the Board affirmed the Referee. But, the circuit court agreed with claimant finding the allegation of threats constituted a new issue and the claimant should have had an opportunity for an adjournment. The court remanded.

DECISION: Circuit court reversed. Good cause for reopening not established.

RATIONALE: Rule 109 of the Rules of Practice defines the term "good cause." The claimant claimed he had a witness who could clear him of the allegations of threats. The claimant did not show he had newly discovered material evidence since there is no indication he was unaware of the alleged exculpatory witness at the time of the hearing. Claimant has not shown a legitimate inability to act sooner. The notice of hearing stated the issue was misconduct. Documentary evidence in the record stated the claimant verbally attacked Mr. Trautz. The claimant admitted making statements Mr. Trautz perceived as threats. The basic issue of whether the claimant was discharged for misconduct remained the same. A new issue did not arise at the Referee hearing, and the claimant did not establish good cause for reopening.

7/99
22, 24: K

Section 32a

PROCEDURE, Time limits, Proof of service, Board Rule 104

CITE AS: Alam v Brown AS Development Co., Oakland Circuit Court No. 96-535902-AE (January 21, 1998).

Appeal pending: No

Claimant: Joseph Alam
Employer: Brown A. S. Development Co.
Docket No. B95 02284-136203W

CIRCUIT COURT HOLDING: There must be evidence that the determination was served on the claimant for the appeal period to run. Service on the claimant's attorney without service on the claimant was insufficient.

FACTS: The claimant received regular unemployment insurance and federal supplemental benefits in 1990 and 1991. In 1993, the MESC determined the claimant had received benefits fraudulently and owed restitution of $8,250.00 and penalties of $2,000. Allegedly, the Commission mailed the determination to the claimant on April 15, 1993, and a copy to the claimant's attorney on November 21, 1994. The copy mailed to the claimant's attorney was incomplete. The claimant's attorney filed a protest of the determination December 28, 1994. The Commission found the protest was not timely and issued a Notice of Denial of Request for Reconsideration. On appeal by the claimant, the Notice of Denial was affirmed by the Referee. The Referee's decision was affirmed by the Board.

DECISION: Remanded for a Referee hearing on the merits of the determination.

RATIONALE: Under Rule 104 of the Rules of Practice, the claimant and his attorney were entitled to be served with the determination. There was no witness testimony that the determination had been served on the claimant. The evidence offered by the Commission was inadequate to conclude service had been properly effectuated. Moreover, the copy of the determination served on the claimant's attorney was incomplete. Therefore, the time period for protesting the determination had not run.

7/99
12, 21: L

Section 32a

PROCEDURE, Timeliness of request for reconsideration, One year limit, Benefit interpretation

CITE AS: Allen v GTE North, Muskegon Circuit Court, No. 96-3-35589-AE (May 29, 1997)

Appeal pending: No

Claimant: Bernie Allen, et al.
Employer: GTE North
Docket No. B96-02994-140610W

CIRCUIT COURT HOLDING: "One year after the mailing of the determination or redetermination in dispute, the Commission no longer has any jurisdiction to review its decision."

FACTS: Claimants applied for unemployment benefits after they accepted an early retirement package in 1993 and 1994. Claimants were found eligible for benefits subject to a pension reduction based on their prorated lump sum pension payment. The Commission issued determinations to each of the claimants holding them ineligible pursuant to the pension set-off provisions of Section 27(f)(5) of the Act. Sixteen of the claimants filed timely protests, and were issued redeterminations, but failed to appeal further. The other ten claimants did not protest the determinations. In November of 1995, the Commission issued a new Benefit Interpretation reversing its position on the treatment of lump sum pension payments subsequently rolled into an IRA account. In January 1996, based on the Commission's change in position, the claimants sought reconsideration of the determinations and redeterminations issued on their claims and contended that under the Commission's revised position, they would be entitled to receive unemployment insurance benefits. The claimants' requests for reconsideration were denied because they were filed more than a year after the issuance of the determinations and redeterminations claimants sought to have reconsidered.

DECISION: The claimants' requests for reconsideration were properly denied.

RATIONALE: The Commission lacks jurisdiction to reconsider a determination or redetermination after one year has passed since the mailing of the adjudication. Good cause for reconsideration is not a factor to be considered after the expiration of one year. "The Court further finds that the Commission's Benefit Interpretations lack the force of law. The fact that these Benefit Interpretations may have been revised following the initial determination does not change the current situation or afford the claimants additional rights."

7/99
22, 21: F

16.46

Section 32a

PROCEDURE, Good cause for reconsideration , Low intelligence

CITE AS: Powser v I.T.T. Automotive Baylock Division, Iosco Circuit Court No. 97-659-AE (June 11, 1998)

Appeal pending: No

Claimant: Robin S. Powser
Employer: I.T.T. Automotive Baylock Division
Docket No. B97-01212-143855

CIRCUIT COURT HOLDING: Although claimant's contention, that he had demonstrably low intelligence and was therefore unable to comprehend the significance of the 30 day limit within which to appeal, might have supported a finding of good cause for reconsideration had it been raised promptly following the initial denial of request for reconsideration, the claimant could not claim ignorance of the filing deadlines when he failed to appeal timely the second time.

FACTS: The Commission issued a determination holding the claimant ineligible for benefits. The claimant protested and the Commission issued a redetermination affirming the determination on September 10, 1996. The claimant did not appeal until November 7, 1996. The Commission issued a Notice of Denial of Request for Reconsideration on November 8, 1996. The claimant failed to protest the November 8, 1996 Notice of Denial until January 6, 1997. The Commission issued a second Notice of Denial on January 15,1997, which the claimant appealed to the Referee. Claimant contended he should be found to have good cause for reconsideration because he was of demonstrably below-average intelligence and was therefore unable to comprehend the significance of the 30 day time limit for filing an appeal.

DECISION: The claimant did not establish good cause for reconsideration.

RATIONALE: "[H]aving lost an appeal of the September 10th determination due to untimeliness without good cause, plaintiff can hardly argue ignorance of the 30 day limit as to his second tardy appeal -- that of the November 8th decision."

7/99
12, 21:H

Section 38

PROCEDURE, Jurisdiction, Timeliness of appeal to circuit court

CITE AS: Gunderson v Rose Hill Realty, 136 Mich App 559 (1984)

Appeal pending: No

Claimant: Judy Gunderson
Employer: Rose Hill Realty
Docket No. B78-10356-62930

COURT OF APPEALS HOLDING: The circuit court has no jurisdiction over an appeal not filed within the statutory appeal period.

FACTS: The claimant was paid unemployment benefits. Later, the Commission issued a redetermination requiring her to make restitution of the benefits received and found her disqualified for refusing an offer of work. The claimant appealed to the Referee. The Referee affirmed the redetermination. The claimant appealed to the Board of Review. The Board reversed the Referee decision. The employer requested rehearing by the Board. The Board granted rehearing and reversed its prior decision. The claimant then requested rehearing but her request was denied. Subsequently, the claimant filed a motion for a delayed appeal with the circuit court. The circuit court granted the claimant's motion. The request for rehearing was denied. The Commission appealed to the Court of Appeals

DECISION: The claimant's appeal is dismissed. The circuit court lacked jurisdiction.

RATIONALE: The statutory appeal period cannot be extended by court rules. The trial court erred in granting the claimant's delayed leave to appeal by incorporating GCR 1963, 701.2(2)(c) into GCR 1963, 706.2. The circuit court could only obtain jurisdiction if the claimant filed her appeal within the time prescribed by Section 38 of the Michigan Employment Security Act.

7/99
N/A

Section 32a

PROCEDURE, Good cause for reconsideration, Administrative clerical error, Business address, Adverse impact

CITE AS: Cottage Inn v Katt, Muskegon Circuit Court No. 84-19223-AE (February 10, 1985)

Appeal pending: No

Claimant: Peggy J. Katt
Employer: Cottage Inn
Docket No. B83-12877-93637

CIRCUIT COURT HOLDING: "Although an administrative clerical error may constitute 'good cause' for a late appeal, it does not do so unless it adversely or materially prejudices an interested party."

FACTS: The employer protested the determination after expiration of the protest period. The employer, a seasonal business, had notified the Commission that mail should be sent to the owner's home address instead of the employer's business address. Although the determination had the employer's home address listed on it, the determination was mailed to the business address. The employer did not check the mail at the business address regularly and did not discover the determination had been received until after the protest period had expired. The employer contended there was good cause for reconsideration because the Commission erred by mailing the determination to the employer's business address.

DECISION: Good cause for reconsideration was not established.

RATIONALE: Since the employer did not take reasonable steps to ensure that business mail would be received timely, the employer has no cause to say that any clerical error in mailing the determination adversely or materially prejudiced her. It was the employer's responsibility to check the mail at her business address or have it forwarded to her home. The employer's failure to check the mail at her business address, not the Commission's error in mailing it to that address, was the reason the employer did not actually receive the determination on time.

7/99
1, 9:N/A

Section 32a

PROCEDURE, Good cause, Illiteracy

CITE AS: Kassawa v MESC, Wayne Circuit Court No. 84-417205 AE (November 4, 1985).

Appeal pending: No

Claimant: Issam Kassawa
Employer: Joy Safeway
Docket No. B83 17163-R01-94842W

CIRCUIT COURT HOLDING: If an individual has a language problem, he must seek an interpretation from the Commission (now Unemployment Agency) of his rights to the extent necessary for him to understand them. Seeking advice from someone other than Commission personnel is not sufficient if the person giving advice does not explain the whole document.

FACTS: On April 15, 1983, the claimant requested reconsideration of a redetermination. The Commission denied claimant's request for reconsideration the same day. The claimant failed to file a further protest until August 19, 1983. The Commission issued a Notice of Denial of Request for Reconsideration which the claimant appealed to the Referee. The claimant contended he failed to file a timely appeal of the April 15, 1983 Notice of Denial of Request for Reconsideration because he does not read or write English. The claimant took the adjudication to his brother. His brother read it and told the claimant it was "nothing." The claimant continued to report to the Commission but failed to ask for an explanation of his situation until August 19, 1983.

DECISION: The claimant did not establish good cause for reconsideration.

RATIONALE: The claimant's inability to read English is not a sufficient explanation for failing to protest the adjudication. The claimant should have sought an explanation of the adjudication and his status when he reported to the Commission.

7/99
14, 15:N/A

16.50

Section 33

PROCEDURE, Due Process, Fair hearing, Referee bias, Board Rule 207

CITE AS: Pellar v Foster Medical Corporation, Wayne Circuit Court, No. 86-616117-AE (February 10, 1987)

Appeal pending: No

Claimant: Sharon Pellar
Employer: Foster Medical Corporation
Docket No. B85-10837-101190W

CIRCUIT COURT HOLDING: "[T]he referee failed in his duty to develop the evidence and assist the claimant, and indeed conducted the hearing showing possible bias on the part of the referee against the claimant. "

FACTS: The claimant appeared at the hearing without a representative or witnesses. The employer was represented at the hearing by the claimant's former supervisor and the employer's attorney. The majority of the hearing, 36 of 44 transcript pages, consisted of the Referee's examination of the claimant. The claimant came prepared to the hearing with notes. However, the Referee refused to allow the claimant to use her notes to verify dates as to specific occurrences. Nevertheless, the Referee criticized the claimant's failure to testify about specific dates or persons. The Referee frequently interrupted the claimant to ask her about some area other than that to which she was testifying or to cut off an answer. The Referee forbade her from developing an area of inquiry that she thought important and directed her to only answer his questions. The Referee took an active role in attempting to impeach the claimant's testimony without giving similar treatment to the employer's witness. The Referee openly expressed his disbelief of the claimant's testimony to the claimant. The Referee affirmed the redetermination holding the claimant disqualified under Section 29(1)(a).

DECISION: Remanded to a different Referee for a new hearing and new decision.

RATIONALE: Administrative Rule 207 requires the Referee to secure such competent evidence as he deems necessary to arrive at a fair decision. "[I]n the situation of an unrepresented claimant, due process concerns impose an affirmative duty on the hearing examiner to develop evidence." The Referee has a "duty to develop facts which not only would tend to result in a denial of the claim but also those facts which are supportive of a claim for benefits." The Referee is required to be "unbiased and conduct the proceedings in an unbiased manner." And "in developing evidence the referee must maintain and give the appearance of maintaining a scrupulous neutrality."

7/99
11, 15: N/A

Section 29(1)(b)

APPEALS, Circuit court standard of review, Board standard of review, De novo fact finding, Insubordination

CITE AS: Neal v Light Corp., unpublished per curiam, Court of Appeals, December 1, 1998 (No. 202007).

Appeal Pending: No

Claimant: Shirley Neal
Employer: Light Corporation
Docket No. B94-18326-135365

COURT OF APPEALS HOLDING: Where employer contested claimant's application for unemployment benefits after she was fired for refusing a work assignment, Circuit Court used improper standard of review when it reversed the Board of Review.

FACTS: Claimant, a long term employee, was sent home after refusing a work assignment. Next day claimant said she refused due to medical condition. She was fired. Agency denied benefits. Referee reversed, granted benefits. Board of Review reversed, found claimant refused reasonable order without adequate justification (claimant had been released to work with restrictions). The Circuit Court reversed the Board and held claimant not disqualified. It determined the referee was the fact finder and applied the substantial evidence test to the referee decision. The court found the referee decision was supported by uncontested evidence of claimant's medical condition.

DECISION: Claimant disqualified. Board of Review decision reinstated.

RATIONALE: While Section 34 does not expressly state the standard of review the Board of Review is to apply to referee decisions, it is clear 1) such review is "beyond de novo" inasmuch as the Board is permitted to consider evidence not presented to the referee, and 2) the MES Act does not require the Board to give deference to the referee's fact finding.

As to the competent, material and substantial evidence standard contained in Section 38 which is to be used by circuit courts reviewing Board of Review decisions, three principles are significant: 1) A reviewing court is not to displace the Board's choice between two reasonably differing viewpoints. 2) Substantial evidence is that which a reasonable mind would accept as adequate to support a decision. 3) Where there is sufficient evidence to support the Board's findings, a reviewing court must not substitute its discretion for that of the Board, even if the court would have reached a different result. The circuit court violated each of these principles and also erred by applying the substantial evidence test to the referee decision rather than the Board decision.

Claimant's insubordination was complete after the first instance in which plaintiff refused the order to pack without offering a medical excuse.

7/99
24, 16, d22: K

Section 35

PROCEDURE, Jurisdiction, Timeliness of appeal to Board

CITE AS: Manosky v Freedom Adult Foster Care Corp, Oakland Circuit Court, No. 93-464323-AE (July 18, 1994)

Appeal pending: No

Claimant: Susan Manosky
Employer: Freedom Adult Foster Care Corp
Docket No. B92-24907-123547W

CIRCUIT COURT HOLDING: There is no good cause exception to the time limit for filing an appeal.

FACTS: The claimant was discharged for allegedly making derogatory statements about her manager. The MESC held the claimant not disqualified for benefits by determination and redetermination. The employer appealed to the Referee. The Referee decision issued August 26, 1992, reversed the redetermination and held the claimant disqualified. The Referee decision contained a notice that any appeal must be received on or before September 25, 1992. Claimant's attorney mailed an appeal, but because he neglected to put a stamp on the envelope, it was not delivered. On September 29, 1992, the claimant's attorney hand-delivered an appeal letter explaining the reason for the delay. The Board of Review dismissed the appeal for lack of jurisdiction.

DECISION: Claimant's appeal was properly dismissed by the Board for lack of jurisdiction.

RATIONALE: "The statutes governing MESC procedures set strict time limits, usually of 30 days, for taking actions permitted by law. The statutes which authorize an interested party to seek reconsideration of a decision at each level of review also authorize such action after the 30-day period for good cause shown. . . . They do not, however, make a good cause exception to the time limitations for filing appeals."

7/99
12, 19:B

Section 32a

PROCEDURE, Timeliness of appeal to Referee

CITE AS: Kunard v Hop In Food Stores, Inc., Allegan Circuit Court, No. 93-16229-AE (March 14, 1994)

Appeal pending: No

Claimant: Penny Kunard
Employer: Hop In Food Stores, Inc
Docket No. B92-20344-122464W

CIRCUIT COURT HOLDING: The record must contain evidence of a timely appeal to the Referee before the Referee may exercise jurisdiction. Subject matter jurisdiction may be raised at any stage of the proceedings.

FACTS: The employer appealed to the Referee on March 13, 1992, from a redetermination issued February 11, 1992. The deadline for a timely appeal was March 12, 1992. At the Referee hearing the employer showed a copy of a redetermination issued February 12, 1992, however no evidence of a redetermination issued that date was included in the record. The only copy of the redetermination in the record showed a mailing date of February 11, 1992. By the time the matter was heard by the Circuit Court more than a year had passed since the issuance of the redetermination. Therefore, it was too late for the Commission to reconsider the redetermination.

DECISION: The employer's appeal of the redetermination was untimely. Therefore the Referee had no jurisdiction over the merits of the appeal. The redetermination holding claimant not disqualified became final.

RATIONALE: There was no evidence in the record to support the Referee's conclusion that the redetermination was issued February 12, 1992. Although the Referee indicated during the hearing that the employer had presented a copy of the redetermination dated February 12, 1992, that copy was not included in the record. The evidence in the record does not support a finding that the employer filed a timely appeal to the Referee.

> "Therefore, the referee lacked jurisdiction and his reversal of the redetermination was without effect. Any right to appeal that Hop-In Food Store may have had was extinguished 30 days after the redetermination order was mailed by the MESC; therefore the redetermination order became final. Herman v Chrysler Corp, 106 Mich App 709, 719 (1981). Since lack of subject matter jurisdiction can be raised at any stage of the proceeding, this issue is properly before this court. Goodman v Bay Castings, 49 Mich App 611, 625 (1973)."

Section 34

PROCEDURE, Board Rule 306, Evidence

CITE AS: Ruge v Glassen, Rhead, McLean, Campbell & Bergamini, unpublished per curiam Court of Appeals January 12, 1996 (No. 172017)

Appeal pending: No

Claimant: John P. Ruge
Employer: Glassen, Rhead, McLean, Campbell & Bergamini
Docket No. B89-17343-113896

COURT OF APPEALS HOLDING: The Board of Review cannot consider documentary evidence that has not been properly admitted into the record.

FACTS: The claimant signed a statement to the MESC admitting he was working forty hours a week in self-employment. The statement was not included in the record considered by the Referee. The employer sought to have the statement entered into evidence. The Board considered the statement without remanding the matter or notifying the parties that the statement would be considered, or otherwise complying with Rule 306. The Board reversed the Referee's decision and held the claimant ineligible based on the statement. The Circuit Court reversed the Board because the statement had not been properly admitted into evidence.

DECISION: The matter was remanded for the Board to consider the statement after compliance within Rule 306.

RATIONALE: The Court of Appeals remanded for consideration of the statement in compliance with Rule 306 because the employer should not be adversely affected by the Board's failure to follow correct procedures.

7/99
19, 11: K

Section 32a

PROCEDURE, Appeal, Restitution

CITE AS: McNally v Stanford Brothers, unpublished per curiam Court of Appeals, January 12, 1996, (No. 166182).

Appeal pending: No

Claimant: Jerome McNally
Employer: Stanford Brothers, Inc.
Docket No. B91-04367-119700W

COURT OF APPEALS HOLDING: Where the claimant has not committed fraud, where there is no administrative clerical error, and where the employer failed to protest within the thirty day protest period, the claimant is not liable for restitution of benefits paid prior to the employer's protest

FACTS: The employer failed to timely protest a redetermination which held the claimant not disqualified. On appeal to the Referee, the employer established good cause for reconsideration of the redetermination because the MESC failed to send the redetermination to the employer's address of record. The claimant was not present at the Referee hearing. The Referee held the claimant disqualified for voluntarily leaving his employment without good cause attributable to the employer and ordered the claimant to pay restitution. The circuit court affirmed on the merits but held, pursuant to Section 32a(3) that claimant was not required to make restitution.

DECISION: The claimant is not liable for restitution for benefits paid to him prior to the Commission's receipt of the employer's untimely protest.

RATIONALE: The MESC may reconsider a prior determination or redetermination if good cause is shown. But where that reconsideration disqualifies an individual from receiving benefits, it does not apply to the period for which benefits were already paid. "The claimant had a right to believe the matter was concluded after the thirty-day appeal period had expired. To order him to repay the benefits, months later, would be unconscionable."

7/99
20, 19: J

Section 38

PROCEDURE, Circuit court review, Claim of Appeal, Proof of service

CITE AS: Stevens v Payless Shoes, Inc., Ottawa Circuit Court, No. 90-12969-AE (July 19, 1994)

Appeal pending: No

Claimant: John F. Stevens
Employer: Payless Shoes, Inc.
Docket No. B89-03026-111804W

CIRCUIT COURT HOLDING: Proof that the claim of appeal was served on the Board of Review, the MESC, and the other party must be filed by the appellant before the circuit court has jurisdiction over those parties.

FACTS: Claimant attempted to appeal to the circuit court from a Board of Review order which denied claimant's request for reopening of the Board's underlying decision. First, the claimant filed a document with the court entitled "notice of appeal." The claimant did not name the MESC on the notice of appeal. He subsequently filed another document entitled "designation of records." Neither the "notice of appeal" nor the " designation of records" asserted that service of the claim of appeal had been made on the Board of Review, the MESC or the employer. The court ordered the MESC to produce the certified record. An affidavit was filed on behalf of the MESC averring that the certified record had not been produced because the claimant had not served a claim of appeal on the Board of Review, therefore the file had been purged.

DECISION: Claimant's appeal was dismissed for lack of jurisdiction.

RATIONALE: MCR 7.104(B)(1)(b) requires that the appellant file a claim of appeal with the court and prove that a copy of the claim of appeal was served on the board of review and all interested parties. " 'Service of the notice of the claim of appeal is the means whereby the circuit court obtains jurisdiction over the parties to the appeal.' Cody v Wickman, Inc., 137 Mich App 560,566; 358 NW2d 372 (1984)." Since the claimant failed to file proof with the court that the claim of appeal had been served, the court never obtained jurisdiction over the Board, Payless, or the MESC.

7/99
14, 13: N/A

Section 38

PROCEDURE, Appeal, Circuit court review, Final order, Remand

CITE AS: General Motors Corporation v King, Macomb Circuit Court, No. 88-3915-AE (March 14, 1989).

Appeal pending: No

Claimant: Vernon King
Employer: General Motors Corporation
Docket No. B86-09631-104800W

CIRCUIT COURT HOLDING: The Board of Review order remanding the matter to the Referee for additional evidence and a new decision is not a final order and may not be appealed to the circuit court.

FACTS: Claimant appealed a Referee decision holding him disqualified to the Board of Review. The Board majority remanded for additional evidence. The employer sought rehearing of the remand order. The Board denied the request for rehearing. The employer appealed to the circuit court. The MESC moved for summary disposition on the grounds that the Board had not yet issued a final order from which an appeal could be taken.

DECISION: The employer's appeal was dismissed for lack of subject matter jurisdiction.

RATIONALE: "[I]t is clear that there must be a final order or decision of the Board before the Court may review the questions of fact and law presented on appeal. In the instant case the Board remanded the matter to the Referee for the taking of additional evidence. MCL 421.35 expressly provides that the Board is empowered to take such action. Since additional evidence is to be taken and a new decision issued it is obvious the Referee's May 3, 1987 opinion is not a final opinion. GMC's arguments that additional evidence is unnecessary and the Referee's decision should be considered final because it is 'correct as a matter of law' begs the question. The Court does not have authority to address the merits of the appeal and determine whether the decision is supported by competent, material, and substantial evidence or contrary to law until the decision is properly before the Court. It is not the function of the Court to usurp the authority of the Board and deem an opinion final."

7/99
13, 14, 4:C

16.58

Section 32a

PROCEDURE, Timeliness of protest, Good cause for redetermination, Estoppel

CITE AS: Guthaus v St. Joseph Mercy Hospital, Oakland Circuit Court, No. 95-492777-AE (August 25, 1995).

Appeal pending: No

Claimant: Martha Guthaus
Employer: St. Joseph Mercy Hospital
Docket No. B94 01685-129107W

CIRCUIT COURT HOLDING: Reliance on the intercession of a state senator or others, while failing to file a timely protest, is not good cause for reconsideration. The Agency is not estopped from denying reconsideration when the Agency did nothing to deter the claimant from protesting within the thirty day period.

FACTS: Claimant received benefits after being laid off by one of two employers. The claimant did not disclose her employment with the second employer. The second employer notified the Agency of the claimant's earnings. The Agency found the claimant had committed intentional misrepresentation by failing to disclose her earnings with the second employer. On December 29, 1992, the Agency issued a determination holding the claimant liable for restitution and a penalty. The claimant received the determination timely and called the UA. She was told to refer to the appeal rights on the back. She read her appeal rights but chose to contact her state senator instead of following UA procedures. The claimant's senator and her attorney contacted the UA on her behalf to question the basis for the determination, but neither filed a protest on claimant's behalf. The claimant failed to protest until November 1, 1993.

DECISION: The claimant did not establish good cause for reconsideration.

RATIONALE: The claimant was aware of the time limit for protesting the determination. She did not have any newly discovered material evidence nor was there a clerical error which would justify reconsideration. The claimant chose not to protest because of her frustration with the Agency. Although claimant contends she relied on her senator and her attorney and believed the matter would be reviewed, she was not told by Unemployment Agency officials that she did not need to appeal within the thirty day protest period. There is no evidence anyone from the Unemployment Agency did anything within the thirty day period which caused her to forgo filing a timely application for redetermination.

7/99
22, 24: F

16.59

Sections 29(1)(b), 33

EVIDENCE, Hearsay, Referee assistance, Unrepresented party, Adjournment of hearing, Board Rule 207.

CITE AS: Riddle v Chrysler Corp., Wayne Circuit Court, No. 86-612033-AE, (March 4, 1987).

Appeal pending: No

Claimant: Joe Riddle
Employer: Chrysler Corp.
Docket No. B85-10733-101268W

CIRCUIT COURT HOLDING: The Referee properly excluded hearsay written statements of alleged witnesses to an incident. The Referee did not err in not adjourning the hearing to subpoena two alleged witnesses.

FACTS: There was an argument between the claimant and the superintendent at the plant where claimant worked. The superintendent and a supervisor testified the claimant struck the superintendent during this altercation. The claimant denied he struck the superintendent. In support of his version of events the claimant, who was unrepresented, offered two written statements from alleged witnesses to the altercation which stated the claimant did not strike the superintendent. These two witnesses did not appear nor were they subpoenaed. The Referee did not allow the written statements into the record and did not adjourn the hearing to allow the claimant to subpoena the witnesses.

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

RATIONALE: While Rule 207 of the Rules of Practice before the Referees and the MES Board of Review imposes a duty on the Referee to assist an unrepresented party, that duty is qualified by the obligation to be impartial and to secure competent evidence. Consistent with that duty the Referee had no obligation to admit the written hearsay statements. Additionally Rule 207 does not require the Referee to adjourn a hearing to provide an unrepresented party the opportunity to subpoena two witnesses who allegedly saw the incident and offered written statements in favor of claimant's version of the events. It is the duty of the parties, not the Referee, to secure the attendance of necessary witnesses.

7/99
14, 3: I

16.60

Section 33

PROCEDURE, Voluntary leaving, Settlement agreement

CITE AS: Johnson v MESC, Berrien Circuit Court, No. 83-3682-AEG, (May 16, 1986).

Appeal pending: No

Claimant: Eleanor Johnson
Employer: Mercy Hospital
Docket No. B82 23292-88432W

CIRCUIT COURT HOLDING: A settlement agreement between the claimant and the employer is not binding on the Unemployment Agency as to claimant's entitlement to benefits.

FACTS: Claimant was discharged for refusing to work in the location ordered by her supervisor and left the workplace without permission. The Referee decision held the claimant disqualified under the misconduct provision of the Act. The claimant charged the employer with discrimination. The claimant and employer settled the discrimination claims. The settlement provided the claimant's separation would be considered a voluntary quit and the claimant would be allowed to collect unemployment insurance benefits. The MESC (now Unemployment Agency), was not a party to the agreement. The claimant contended she should receive benefits based on the settlement agreement.

DECISION: The claimant is disqualified for misconduct.

RATIONALE: The MESC was not a party to the settlement agreement, and the agreement did not change the findings of fact by the Referee.

7/99
1, 14: N/A

Section 32a

PROCEDURE, Jurisdiction, Notice of Denial

CITE AS: Kos (Credit Bureau Services), 1994 BR 125763 (B93-03670)
(Editor's Note: Full Board decision; 4-1)

Appeal pending: No

Claimant: Sharon Kos
Employer: Credit Bureau Services
Docket No. B93-03670 125763

BOARD OF REVIEW HOLDING: The Referee has jurisdiction over a timely appeal from a Notice of Denial of Request for Reconsideration despite the Commission's failure to articulate reasons for denying reconsideration.

FACTS: The employer appealed to the Referee from a Notice of Denial of Request for Reconsideration (DRR). The Notice of Denial did not articulate the reason the MESC found there was no good cause for reconsideration. Since the adjudication did not explain the reason for denying reconsideration, the Referee found the adjudication defective and dismissed the employer's appeal.

DECISION: Remanded to the Referee for the taking of evidence on the question of whether there is good cause for reconsideration. If there is good cause, the Referee is to take evidence and issue a decision on the underlying merits.

RATIONALE: When there is a timely appeal to an MESC Referee, it is the function of the Referee to hold a hearing, receive evidence and decide the substantive and procedural issues governing the rights of the parties under the MES Act, except with respect to matters which have become final. The Notice of Denial did not become final because the employer appealed it to the Referee within thirty days of the date the adjudication was mailed or personally served. The Referee had jurisdiction over the employer's appeal and should have held a hearing.

The most efficient way to correct the Commission's failure to investigate the employer's reason for filing an untimely protest to the determination would have been for the Referee to ask the employer the reason and to give the employer the opportunity to present evidence of good cause for reconsideration. A defect, such as the Commission's failure to investigate or to state reasons for its conclusions in the redetermination or in the Notice of Denial of Request for Reconsideration cannot impede the appeal process. Although the Commission may have erred, the Commission's error was in respect to a non-essential part of the administrative review process and therefore cannot impair the jurisdiction of the Referee.

7/99
21, 22, 12, 18, d 24: H

Section 34

PROCEDURE, Reopening, Good cause, Board Rule 109, Legitimate inability to act, Delay in receiving decision

CITE AS: Meeker v Neuens Timber Products, Delta Circuit Court, No. 96-13082-AE (February 14, 1997)

Appeal pending: No

Claimant: Charles C. Meeker
Employer: Neuens Timber Products
Docket No. B94-07515-132640

CIRCUIT COURT HOLDING: There are two prongs to the exercise of discretion when the Board is presented with a late request for review of its decision. The first prong is whether there is good cause for the delay in seeking review of the underlying decision under Rule 109. The second prong is whether there is good cause for further review of the merits . Good cause found here where the Board appeal had been pending for seventeen months, claimant was only home intermittently, no longer could be expected to be vigilant for receipt of the decision, acted promptly after it was delivered to him.

FACTS: After a favorable Referee decision, a Board decision adverse to the claimant was issued November 30, 1995. The deadline for a timely appeal was January 2, 1996. Claimant filed a request for reopening by the Board on January 8, 1996. Claimant was an over-the-road truck driver and was only home five days between the date the Board's decision was issued and the date he requested review. Though the decision had probably been at claimant's home most of that period, claimant did not actually receive the decision personally until his wife handed it to him unopened on January 5, 1996.

DECISION: Remanded to the Board of Review for a finding of whether there was good cause to review the underlying merits.

RATIONALE: Under Rule 109, good cause for an untimely protest is established if the party had a legitimate inability to act sooner. "Given the holiday season, given that he was gone from his home in pursuit of his occupation, and given further that more than 17 months had elapsed since the referee hearing after which time the claimant could not be reasonably expected to ask his spouse if a decision had been received while he was away, and given that others in the home actually received the mailing and did not present it to the claimant until January 5, 1996, the board abused its discretion in failing to find good cause to at least consider the underlying merits of claimant's request for reopening and review."

7/99
24, 12, 16: K

Section 33

PROCEDURE, Referee bias, Recusal

CITE AS: Executive Art Studio v Cromwell, Ingham Circuit Court, No. 88-62036-AA, (May 17, 1989).

Appeal pending: No

Claimant: James Cromwell
Employer: Executive Art Studio
Docket No. B86-03955 -R01-105973

CIRCUIT COURT HOLDING: Affirmed Board's order denying rehearing.

FACTS: In an unrelated unemployment matter, the employer sued the Referee in federal court. By letter dated April 7, 1986, the Referee informed parties of the pending federal lawsuit, and invited filing a motion for him to recuse himself. The Referee set the deadline for a recusal motion at April 21, 1986. The employer took no action until May 14, 1986. The hearing was scheduled for May 15, 1986. The Referee denied the recusal motion as untimely. The employer failed to appear at the hearing. The decision, based on the claimant's testimony, was adverse to the employer. Instead of requesting rehearing by the Referee or appealing to the Board of Review, the employer filed an action in Circuit Court. The Circuit Court dismissed the employer's petition. The employer then filed a request for reopening by the Referee. The Referee denied the reopening finding the employer had not established good cause. The employer appealed to the Board of Review. The Board affirmed the Referee's denial of reopening, then denied rehearing.

DECISION: The Referee's decision not to recuse himself was upheld.

RATIONALE: The employer's motion for recusal of the Referee was untimely. The procedure adopted by the Referee assured the parties the opportunity to challenge his participation in the matter and protected the parties' right to a full and fair hearing. Therefore, the Referee did not violate the employer's right to a full and fair hearing by denying the request for recusal. The employer's unsuccessful petition to Circuit Court is not good cause for reopening the Referee's decision.

7/99
3, 11: N/A

Section 33

PROCEDURE, Dismissal, Lack of prosecution, Disruptive behavior

CITE AS: Sielaff v Ameritech New Media Enterprises, Inc., Wayne Circuit Court No. 99-909348AE (October 14, 1999).

Appeal pending: No

Claimant: Kurt Sielaff
Employer: Ameritech New Media Enterprises Inc.
Docket No. B98-R01-11384-150482W

CIRCUIT COURT HOLDING: Referee did not abuse his discretion when he dismissed appeal for lack of prosecution based on appellant's persistent disruption of the proceedings.

FACTS: Claimant appealed redetermination holding him disqualified for benefits. Claimant obtained assistance of counsel, but no appearance was filed and attorney was not present at the Referee hearing. Claimant became upset when Referee proceeded to conduct the hearing without his attorney present. Claimant disrupted the proceedings and was warned four times to cease interrupting the hearing. When the claimant failed to stop, the Referee dismissed the appeal for failure to prosecute it in an orderly fashion.

DECISION: Affirm Board of Review decision which affirmed Referee rehearing denial and dismissal of appeal for lack of orderly prosecution.

RATIONALE: Board decision not contrary to law and said decision supported by competent, material, substantial evidence. Claimant's behavior was rude and disruptive. He refused to stop acting out even after repeated warnings. Consequently, the Referee acted properly when he dismissed the case and did not abuse his discretion when he denied claimant's rehearing request.

24, 16, d22: k

Sections 29(1)(b), 38

APPEAL, Circuit Court standard of review, Court of Appeals standard of review, Last straw doctrine

CITE AS: Osborn v Superior Data Corp, unpublished per curiam Court of Appeals, November 30, 1999 (No. 207997).

Appeal pending: No

Claimant: Billy J. Osborn
Employer: Superior Data Corporation
Docket No. B96-04777-R01-141178W

COURT OF APPEALS HOLDING: Circuit Court erred in its determination that a Board of Review decision disqualifying the claimant for benefits based on his terrible attendance record was contrary to law. While the claimant's numerous absences may have been largely due to valid reasons, his failure to adequately respond to the requirement that he attend work more regularly amounted to statutory misconduct.

FACTS: Claimant was a single parent of four minor children. Upon hiring the claimant, the employer agreed to be flexible to accommodate family and job responsibilities. The employer's tolerance waned after a year and demanded the claimant resolve his attendance problem because it was adversely affecting his ability to complete assignments. The claimant's poor attendance persisted and it became clear he was unwilling to take action to fix his attendance problem.

DECISION: Reverse circuit court decision and reinstate disqualification imposed by Board of Review.

RATIONALE: Circuit court applied incorrect standard of review. It may reverse a Board of Review decision only if it finds the Board decision to be contrary to law or is not supported by competent, material, substantial evidence. Here the circuit court erroneously focused on whether or not individual absences were for good cause. The key issue was claimant's failure to address his employer's demand that he find a solution to his child care issues and improve his attendance.

When a circuit court decision is in turn being reviewed by the Michigan Court of Appeals, the level of scrutiny to be applied is "the clearly erroneous standard of review" that is, "a finding is clearly erroneous when, on review of the whole record, this Court is left with the definite and firm conviction that a mistake has been made."

24, 16, d22:J

16.66

Sections 31,38

WAIVER OF BENEFITS, Scope of review, Voluntary leaving, Settlement agreement

CITE AS: Rousseau v St. Mary's Medical Center of Saginaw, unpublished per curiam Court of Appeals, June 27, 1997 (No. 191314).

Appeal pending: No
Claimant: Connie J. Rousseau
Employer: St. Mary's Medical Center of Saginaw
Docket No. B93-00440-126795

COURT OF APPEALS HOLDING: A settlement agreement between the claimant and the employer after the claimant's discharge providing the separation would be treated as a voluntary leaving does not change the nature of the separation for purposes of whether claimant is entitled to unemployment benefits. The claimant's leaving was not voluntary and to treat it as such would violate Section 31.

FACTS: The claimant was discharged for allegedly falsifying her time sheet on two occasions. Upon discharge claimant filed a complaint with the Michigan Department of Civil Rights. Subsequently, the parties entered into a settlement agreement of her claims which provided her employment record would be changed to indicate she left voluntarily. The employer contended that because the employment record was changed to indicate a voluntary resignation, the claimant was not entitled to unemployment benefits. The employer also contended Section 31 did not apply.

DECISION: The claimant is not disqualified for benefits as she was discharged for reasons other than misconduct.

RATIONALE: The court stated:

> [A]n agreement to voluntarily terminate employment that is entered into prior to the termination of employment does not constitute a waiver of rights to benefits such that the agreement is invalid. . . . However, . . . the parties' agreement here was not entered into prior to the termination of Rousseau's employment and did not provide that she would voluntarily resign. Rather, this agreement was entered into after she was discharged and provided that in exchange for her agreement not to bring certain claims, plaintiff would change her file to indicate that she had voluntarily resigned. This agreement did not change the fact that Rousseau was involuntarily discharged, thus §31 applies. Even if this agreement required Rousseau to waive her right to unemployment benefits, such a provision would be invalid under §31.

The court also observed that under §38 a circuit court may, as justice requires, review all issues considered by the Board of Review, not only those issues raised by the parties.

7/99
22,24: F

Sections 31, 38

APPEALS, Attorney fees, Assessment of costs

CITE AS: Winn v R K Tool, Wayne Circuit Court, No. 00-033312-AE (May 16, 2001)

Appeal pending: No

Claimant: Lisa M. Winn
Employer: R K Tool
Docket No. B2000-00943-155771

CIRCUIT COURT HOLDING: The MES Act does not authorize the awarding of costs and/or attorney fees, or sanctions, for the successful prosecution of an appeal in court of a Board or Referee decision or order.

FACTS: Claimant filed a motion for attorney fees, costs and sanctions after a successful appeal in circuit court of a Board decision.

DECISION: Claimant is not entitled to costs and/or attorney fees, or sanctions, under Sections 31 and 38. Motion for costs, attorney fees and sanctions dismissed.

RATIONALE: Costs are wholly statutory. Where there is no statutory authority to award costs, costs are not recoverable. Jeffrey v Hursh, 58 Mich 246, 258 (1885); Hester v Detroit Comm'rs of Parks & Boulevards, 84 Mich 450 (1891); Kuberski v Panfil, 275 Mich 495, 497 (1936); Gundersen v Village of Bingham Farms, 1 Mich App 647, 648-649 (1965).

Attorney fees may not be awarded absent statute or court rule. Nemeth v Abonmarche Development, 457 Mich 16 (1998); Davis v Koch, 118 Mich App 529(1982); State Farm Mutual Automobile Ins Co v Allen, 50 Mich App 71 (1973).

The court rule governing appeals under the MES Act, MCR 7.104, does not refer to attorney fees or costs. Section 31 of the MES Act, MCL 421.31, does not authorize costs or attorney fees; it is an "express limitation enjoining the charging of fees or the payment of attorney fees beyond what is approved by the Commission." Section 38 of the MES Act, MCL 421.38, provides for judicial review of unemployment benefit claim cases, and makes "no reference to exaction of costs or attorney fees." The claimant/appellant "has failed to establish a legally cognizable basis for an award of attorney fees or costs."

11/04

Section 38

APPEALS, Timeliness of appeal, Res judicata

CITE AS: Lewis v Oakwood Health Care Corp, Wayne Circuit Court, No. 02-243366-AE (April 29, 2003)

Appeal pending: No

Claimant: Donna M. Lewis
Employer: Oakwood Health Care Corp
Docket No. B2002-10089-RO1-165903W

CIRCUIT COURT HOLDING: An appeal to circuit court must be filed within 30 days of the mailing date of the Board's decision or order. Attempts to re-litigate an issue from an earlier appeal are barred under the doctrine of res judicata.

FACTS: Claimant appealed a November 15, 2002 Board decision to circuit court. The Board decision held claimant owed restitution under Section 62(a) of the MES Act. The claimant previously appealed the Board's June 2, 2000 decision holding her disqualified under Section 29(1)(a) to circuit court, and the court affirmed the Board in an order issued March 2, 2001. The claimant did not file a further appeal from that 29(1)(a) decision.

DECISION: The Board's November 15, 2002 decision is affirmed.

RATIONALE: The claimant's circuit court brief attempted to re-litigate the issue of her disqualification under 29(1)(a) and did not address the issue of restitution. The court lacked jurisdiction over the 29(1)(a) issue since the claimant had not filed her appeal within 30 days of the mailing date of the decision on that issue pursuant to Section 38(1). The court further noted that claimant's appeal was barred by the doctrine of res judicata since the issues were identical to her appeal to that court in 2000 and ruled on by the court in an order issued March 2, 2001. Res judicata applies where 1) the former suit was decided on the merits, 2) the issues in the second action were or could have been resolved in the former one, and 3) both actions involve the same parties. In Michigan res judicata is applied broadly. See Energy Reserves v Consumers Power Co, 221 Mich App 210, (1997); Pierson Sand and Gravel, Inc v Keeler Brass Co, 460 Mich 372 (1999); Sewell v Clean Cut Mgmt, Inc, 463 Mich 569 (2001); Dart v Dart, 460 Mich 573 (1999).

11/04

PROCEDURE, Good cause, Late protest, Personal reasons, UA Rule 270

CITE AS: Pool v R S Leasing, Inc, Wayne Circuit Court, No. 01-138871-AE (May 3, 2002)

Appeal pending: No

Claimant: Brinda J. Pool
Employer: R S Leasing, Inc
Docket No. B2001-08251-159781W

CIRCUIT COURT HOLDING: Where claimant's late protest was attributable to her parents' medical problems, good cause for reconsideration was established.

FACTS: On January 2, 2001 claimant received a determination holding her disqualified. The Agency received claimant's protest on March 12, 2001. The Agency requested an explanation for the untimely protest. Claimant disclosed that she had been out of town because her parents were ill. The Agency denied her request for redetermination. Claimant testified that after she received the determination, she left town to care for her parents, both seriously ill. She thought she would return before the 30-day appeal period expired, but did not return until February 28, 2001. She mailed her protest after the 30-day appeal period expired. She did not mail the protest before leaving town because her main concern was her parents' health. The Board found she failed to show good cause for her late protest.

DECISION: The claimant demonstrated good cause for her late appeal of the Agency's determination.

RATIONALE: The plain language of Rule 270(1) provides that the "Rule's [specific] list of grounds for finding good cause is not exclusive," and Rule 210(2)(e)(v) provides that "[g]ood cause for late filing of a new, additional, or reopened claim" includes "[p]ersonal physical incapacity or the physical incapacity or death of a relative . . .." Reading the two Rules together leads to the conclusion good cause was established.

11/04

PROCEDURE, Good cause, Late protest, Agency advice

CITE AS: Pinecrest Custom Homes v Meines, Kent Circuit Court, No. 02-03823-AE (October 8, 2002).

Appeal pending: No

Claimant: Janis Meines
Employer: Pinecrest Custom Homes
Docket No. B2001-14696-RM1-161795

CIRCUIT COURT HOLDING: Detrimental reliance on incorrect advice from a representative of the Agency constitutes "good cause" for filing a late protest.

FACTS: Claimant quit her job due to abusive conduct by the husband of the owner. Claimant filed for benefits. A determination held her disqualified for benefits under Section 29(1)(a). Claimant telephoned the claims examiner who issued the determination to ask what would be required to reverse the determination. Claimant testified the claims examiner told her (incorrectly) she would have to "prove with medical records or police reports that she had been 'physically injured.'" Claimant did not file a timely protest of the determination because she did not have such evidence. A few weeks later, claimant met the person who had replaced her. That person also quit due to abusive conduct from employer's husband and was seeking benefits. She told claimant other employees had quit for the same reason and had received benefits. Claimant then filed an untimely protest.

DECISION: The claimant established good cause for her late protest.

RATIONALE: "What justifies considering the late filing of a new, additional or reopened claim seems intuitively to justify considering the late protest of the initial determination of a claim." That definition of "good cause" is "a justifiable reason, determined in accordance with the standard of conduct expected of an individual acting as a reasonable person in light of all the circumstances, that prevented a timely filing or reporting to file...." The statement of a "representative of the Unemployment Agency that a protest could succeed only with evidence that one does not have compels the conclusion that there is no point to a protest; reasonable people do not do the futile. [I]t is not reasonable to expect lay-people to ignore whom the government holds out to be an expert." Claimant "had good cause for not protesting until she learned that she had been misled."

PROCEDURE, Substantial evidence

CITE AS: Ngo v Nabisco Inc/Lifesavers, Ottawa Circuit Court, No. 99-35034-AE (June 9, 2000)

Appeal pending: No

Claimant: Thiet Ngo
Employer: Nabisco Inc/Lifesavers
Docket No. B1999-03348-152225

CIRCUIT COURT HOLDING: Notwithstanding the opinion that evidence supporting a Board conclusion is less substantial when the Board disagrees with the Referee, the Board's decision must be affirmed if the record contains evidence a reasonable mind would accept as adequate to support a conclusion.

FACTS: Employer discharged claimant for violating rules prohibiting the removal of company property without written authorization. Security guards stopped claimant and found two 50-count boxes of lollipops under a Burger King bag in his lunch box. He did not have a receipt showing they were purchased at employer's company store and did not know when he bought them. The candy was not packaged like that for sale at the company store, and was not in a bag from the store. Claimant testified he unwrapped both boxes to snack on, but had not eaten any of the candy. The Referee found the claimant's testimony credible that he previously purchased the candy and had thrown the receipt away. The Board rejected the Referee's credibility finding and found claimant disqualified under Section 29(1)(b). The Board found the claimant not credible because he did not know when he bought the lollipops, bought them to snack on and removed the cellophane but did not eat any, then tried to remove them from the facility without a receipt.

DECISION: Claimant is disqualified for misconduct.

RATIONALE: Claimant argued that the Board did not give due deference to the Referee's credibility finding, citing Michigan Employment Relations Comm v Detroit Symphony Orchestra, Inc, 393 Mich 116, 127 (1974), for the proposition that "evidence supporting a review board's conclusion is less substantial when it disagrees with an experienced impartial examiner who has observed the witness," to argue that there was insufficient evidence to support the Board's conclusion. The court disagreed, observing that "less substantial" is not the same as "insubstantial" and that Section 34 authorizes the Board to "...reverse the findings of fact and decision of the referee."

11/04

Section 32a(2)

APPEALS, Timeliness of appeal, Fax, Definition of Day

CITE AS: Zuber (Ameritech Publishing Inc), 2002 BR 171048 (B2003-09495)

Appeal pending: No

Claimant: Kathy L. Zuber
Employer: Ameritech Publishing, Inc.
Docket No. B2003-09495-171048

BOARD OF REVIEW HOLDING: A protest or appeal is timely if RECEIVED before midnight of the deadline date.

FACTS: The determination was issued May 6, 2003. Employer faxed its appeal June 5, 2003 at 4:04 p.m. Central time. The Agency issued a redetermination August 27, 2003. Employer appealed the redetermination by fax on September 26, 2003 at 4:13 p.m. Central time. The Agency stamped employer's appeal as received on September 29, 2003; there was also a stamp indicating the fax was received September 26.

DECISION: The Agency timely received both the employer's protest of the determination and the employer's appeal of the redetermination.

RATIONALE: Claimant asserted the protests were untimely because they were submitted after the close of business. Section 32a states in relevant part that a protest of a determination or an appeal of a redetermination must be filed with the Agency "within 30 days after the mailing or personal service." The Act does not define the word "day." Rule 105(2) of the Rules of Practice states: "The calendar day on which compliance is required shall be included in the computation of time." Webster's Ninth New Collegiate Dictionary, defines "day" in relevant part: "the mean solar day of 24 hours beginning at mean midnight." We find the word should be given its ordinary meaning.

If the particular protest or appeal is in fact **received** on or before the date due, then the protest or appeal will be treated as timely. However, the Board is not mandating the Board or Agency to keep fax machines on 24 hours. Parties assume the risks associated with their choice of media. A party attempting a last minute appeal may find the fax number busy or turned off. Attempt does not equal receipt.

11/04

17.00

EMPLOYEE STATUS

Sections 42-44

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.

18.00

RESTITUTION, WAIVER, FRAUD

Sections 9, 54, 54a-54c, 62

Section 62(a)

RESTITUTION, Waiver of restitution, Retroactive amendment

CITE AS: Drayton v Showcase, No. 64272 (Mich App April 6, 1983).

Appeal pending: No

Claimant: Denise Drayton
Employer: Showcase
Docket No: B78 15173 67544

COURT OF APPEALS HOLDING: The 1980 amendment to Section 62(a) is to be given retroactive effect.

FACTS: The claimant was determined eligible for unemployment benefits and received $268.00. On November 7, 1978, "The MESC determined that claimant was, in fact, ineligible for such benefits and ordered her to repay the $268.00."

By virtue of the 1980 amendment in Section 62(a) effective January 1, 1981, the MESC was given discretion to waive restitution.

DECISION: The MESC must exercise "its discretion on the restitution issue ..."

RATIONALE: "The Michigan Employment Security Act is remedial. It's primary purpose is to relieve the stress of economic insecurity. Godsol v Unemployment Compensation Comm, 302 Mich 652; 5 NW2d 519; 142 ALR 910 (1942); Michigan Employment Security Comm v Wayne State University, 66 Mich App 26; 238 NW2d 191 (1975), lv den 396 Mich 857 (1976). Where an amendment is designed to correct an existing law, it is generally remedial and will be given retroactive effect. Lahti v Fosterling, 357 Mich 578.

"Because the amendment is to be construed retroactively, the MESC had the discretion to waive restitution. However, it has not exercised its discretion.

"We are remanding this case to the MESC to exercise its discretion and to reevaluate its decision in the light of the amendment and this opinion. The MESC must consider [claimant's] indigence in this case in exercising its discretion."

Section 62(a)

RESTITUTION, Employer credit, Late information from employer, Finality of determination

CITE AS: Buxton v Chrysler Corporation, No. 68053 (Mich App June 1, 1984).

Appeal pending: No

Claimant: Clark W. Buxton
Employer: Chrysler Corporation
Docket No: B74 12158 49663

COURT OF APPEALS HOLDING: The provision of finality in Section 32(b) "applies only to whether the employer is entitled to a credit to its rating account and not to benefits paid to the claimant."

FACTS: The claimant was paid benefits as a result of the employer's late response to the Commission's request for information to determine the claimant's entitlement to unemployment benefits. The claimant was ordered to make restitution pursuant to Section 62(a) for the benefits paid prior to the employer's response.

DECISION: "The benefits paid claimant were properly subject to restitution pursuant to Section 62(a)."

RATIONALE: The Court affirmed the decision of the Circuit Court which held:

> "The language of Section 32(b) is specifically limited to the 'non-complying employer'. Had the legislature meant for this section to apply to benefits paid to a claimant, it would have so stated, as it has done in other sections of the act, i.e., Sections 62(a) and 32(d). The Court is of the opinion that Section 32(b) applies only to whether the employer is entitled to a credit to its rating account where benefits were paid as a result of its untimely submission of required information. Section 20(a) reinforces and compliments Section 32(b)."
>
> "Accordingly, the decision of the MESC Appeal Board ... is hereby AFFIRMED."

18.03

Section 62(a)

RESTITUTION, Waiver of restitution, Equity and good conscience

CITE AS: MESC v Miller, No. 82-004889 AE, Tuscola Circuit Court (June 13, 1983).

Appeal pending: No

Claimant: James Miller
Employer: Maiers Motor Freight
Docket No: B81 97417 80745

CIRCUIT COURT HOLDING: The Board of Review has no statutory authority to waiver restitution under Section 62(a).

FACTS: The claimant was paid benefits pursuant to a Referee's decision which held the claimant not disqualified under the labor dispute provisions of the Act. The Board of Review reversed the Referee's decision, but waived the repayment of benefits under Section 62(a).

DECISION: The case is remanded to the MESC to exercise its discretion concerning the waiver of restitution.

RATIONALE: "The Court having carefully reviewed the record and heard oral argument, is of the opinion that neither the Michigan Employment Security Act nor case law gives the Board of Review the right to waive restitution sua sponte and that therefore the decision of the Board of Review waiving restitution on its own initiative is contrary to law."

Section 62a

RESTITUTION, Back pay award, Recovery of benefits, Unjust enrichment

CITE AS: Knight v Holland Hitch Company, No. 77-4046 CZ, Ottawa Circuit Court (November 4, 1983).

Appeal pending: No

Claimant: Howard V. Knight
Employer: Holland Hitch Company
Docket No: B77 19822 68271

CIRCUIT COURT HOLDING: Where a claimant is awarded back pay by an arbitrator for a contested discharge and he is paid full back pay minus the unemployment insurance benefits he earlier received from the MESC, the employer is liable for restitution to the MESC.

FACTS: The claimant grieved his discharge. He received an arbitration award of full back pay for all lost time less unemployment compensation received.

DECISION: The employer is liable to MESC for the unemployment compensation deducted from the back pay awarded claimant.

RATIONALE: "A review of the language of the Michigan Employment Security Act makes it clear that the legislative purposes giving rise to the act did not include permitting double recovery by a claimant-employee (later determined to have been wrongfully discharged and entitled to back pay) by permitting him to retain unemployment benefits and full back pay for the same period. Neither do such legislative purposes support the enrichment of an employer who wrongfully discharges an employee, at the expense of the state fund and other employers, by permitting the employer to retain unemployment benefits deducted from back wages paid to the employee after reinstatement.

Section 62(a)

RESTITUTION, Good Cause, Administrative clerical error, Late protest

CITE AS: Garza v Hilltop Orchards & Nurseries Inc., No. 15-485, Van Buren Circuit Court (December 17, 1981).

Appeal pending: No

Claimant: Silvestra J. Garza
Employer: Hilltop Orchards & Nurseries, Inc.
Docket No: B79 13459 70571

CIRCUIT COURT HOLDING: An administrative clerical error is good cause for a reconsideration of a determination no longer subject to review due to expiration of the protest period.

FACTS: The Commission held that claimant was disqualified and must serve a 13 week requalification period. Claimant's benefit entitlement was shown reduced from 16 to 3 weeks. After claimant completed requalification requirements, a determination was issued which erroneously showed that claimant was entitled to 16 weeks of benefits rather than 3 weeks. Claimant thus received 16 benefit checks. Upon receipt of information from the employer that an error had been made in claimant's entitlement, the Commission issued a reconsideration holding that claimant must repay the excess benefits.

DECISION: The claimant must repay the excess benefits.

RATIONALE: "The evidence shows a reduction was contemplated by the Commission but was not consummated. There is no doubt that the Commission determined that [claimant] must wait 13 weeks for her benefits. When [claimant] became entitled to her benefits, the very document which granted 16 weeks of benefits recognized that she had requalified after 13 weeks, but failed to make the required reduction. That the benefits were not reduced according to MCLA 421.219(4); MSA 17.531 (4), can only be attributed to an administrative clerical error, since no new determination or redetermination was made that [claimant] should not have had to fulfill the 13 week requalification period, and it was, therefore, clear that the statutory formula should have been applied. Further, at the point at which the formula should have been applied to reduce the benefit entitlement, the act of reduction is a statutory requirement, not a discretionary decision."

18.06

Section 62(a), 32(a)

RESTITUTION, Credit weeks, Employer protest, Untimely wage and credit week information

CITE AS: Heckaman (H & R Block), 1979 BR 61223 (OPB78 50339).

Appeal pending: No

Claimant: Helen A. Heckaman
Employer: H & R Block
Docket No: O/P B78 50339 RO1 61223

BOARD OF REVIEW HOLDING: Where the employer submits new information concerning credit weeks after the monetary determination has become final and after the claimant has received benefits based on the prior information submitted by the employer, the claimant is not required to repay the benefits improperly paid.

FACTS: The employer submitted wage and credit week information to the Commission in early May, 1977. On May 12, 1977, the Commission issued determinations which established claimant's benefit year and listed weeks of benefit entitlement chargeable to each base period employer. In subsequent weeks, claimant was paid the full amount of benefit entitlement. On August 8, 1977, the employer submitted information indicating claimant had two fewer credit weeks than had been reported originally in May. A redetermination issued November 15, 1977 held the claimant was required to repay benefits received for the period from July 3, 1977 through July 16, 1977.

DECISION: Pursuant to Section 32a(3) of the Act, the claimant is not required to pay restitution.

RATIONALE: "The Commission issued a determination on May 12, 1977 granting the claimant fifteen credit weeks with the employer. The employer did not protest the determination within the twenty-day protest period.

"Under these circumstances, the Board is of the opinion that restitution is not required pursuant to Section 32a(3) of the Act. Claimant did not receive the benefits as a result of non-disclosure of a material fact or administrative clerical error."

11/90
3, 5:NA

Section 62(a)

RESTITUTION, Administrative clerical error, Credit to experience account, Insufficient credit weeks, Failure to appeal redetermination, Late information from employer, Restitution not required, Wages and credit weeks

CITE AS: Benczkowski (Ford Motor Co), 1980 BR 56917 (B77 14530).

Appeal pending: No

Claimant: Mary Benczkowski
Employer: Ford Motor Co.
Docket No: B77 14530 56917

BOARD OF REVIEW HOLDING: "[W]here the Commission could only rely on an 'administrative clerical error' to order restitution of benefits ...", such error must be specified.

FACTS: The claimant had insufficient credit weeks, but received two benefit checks through Commission error. Wage information from the employer was received late, at 11:30 a.m. on the day of the second benefit payment.

DECISION: No restitution is required; the employer is entitled to a credit for two of the four weeks of benefits.

RATIONALE: "[W]here the Commission could only rely on an 'administrative clerical error' to order restitution of benefits, it is the Commission's duty to explain with particularity what its 'administrative clerical error' is. The Commission failed to do so in this case ..."

"None of the three exceptions to non-restitution in regulation 205(6) applies to the present case." "Under Section 29(19) and Regulation 205 (6), avoidance of restitution ends with the receipt by the Commission of the employer's late information." "Without proof that the check was tendered to the claimant after the Commission's 11:30 a.m. receipt of the employer's submission, we conclude that the claimant received the check before 11:30 a.m. on June 9, 1977." The Commission's determination denied the employer credit for the first check and allowed credit for the second check. "The employer did not appeal the redetermination."

Section 62

RESTITUTION, Waiver of restitution, Administrative clerical error

CITE AS: Burch v Chapel Hill Cemetery Dev., No. 88-61881-AE, Ingham Circuit Court (November 26, 1990).

Appeal pending: No

Claimant: Ronald Burch
Employer: Chapel Hill Cemetery Dev.
Docket No: B87 10225 106685W

CIRCUIT COURT HOLDING: When a claimant knew or should have known he was not entitled to the benefits he was receiving the claimant cannot claim administrative clerical error as a basis for restitution waiver.

FACTS: The claimant had been issued a determination which indicated he was entitled to 26 weeks of unemployment benefits. Because of a computer error, the claimant received 45 weeks of benefits. When the Commission discovered claimant had received an additional 19 weeks worth of benefits it sought restitution. The claimant asserted he should be exempt from the restitution requirement because he had received the additional benefits as the result of an administrative clerical error.

DECISION: The claimant was required to make restitution.

RATIONALE: Section 62(a) of the MES Act provides that the Commission may waive restitution. As one of its internal guidelines the Commission provides that it will waive restitution for payment resulting from an administrative clerical error.

While in the instant matter a clerical error had been made it was found that the claimant had actual knowledge he was only supposed to receive 26 weeks of benefits and therefore could not claim to be exempt from the restitution requirement for the remaining 19 weeks.

18.09

Section 62(b)

FRAUD, Dependents, Availability, Attachment to labor market

CITE AS: Pardon v MESC, No. 82-219 979 AE, Wayne Circuit Court (November 8, 1984).

Appeal pending: No

Claimant: Larry A. Pardon
Employer: Imperial Cab
Docket No: B79 16525 77987

CIRCUIT COURT HOLDING: The claimant was not seeking work, was not available for work and wrongfully claimed his children as dependents for purposes of calculations. Consequently, he was subject to the fraud provision of the MES Act, Section 62(b).

FACTS: The claimant had owned a corporation which provided package transportation services. Ultimately the business went bankrupt. The assets of the claimant's corporation were sold to another corporation owned by his wife which also provided package delivery services. Thereafter, the claimant spent anywhere between 20 and 40 hours per week providing uncompensated services for his wife's corporation, and spent his free time at a health club.

During the period he was providing uncompensated services and spending a good deal of time at a health club the claimant was drawing unemployment benefits. For purposes of calculation of his benefit rate the claimant claimed his children as dependents. Although the claimant's four children were all under the age of 13, the wife's corporation paid them thousands of dollars per year for nominal services. Monies paid to the children were used for household purposes.

DECISION: The claimant was ineligible for benefits and subject to the penalty provision of MES Act Section 62(b) for intentional misrepresentation.

RATIONALE: Although he certified he was seeking work and available the claimant was not looking for a job but was providing uncompensated services to his wife and spending the bulk of his free time in athletic pursuits.

Section 62(b)

FRAUD, Duty to disclose earnings

CITE AS: Sallmen v Danti Tool & Die, Inc, No. 86-23988-AR-3, Saginaw Circuit Court (September 8, 1986).

Appeal pending: No

Claimant: Ermin Sallmen
Employer: Danti Tool & Die, Inc.
Docket No: B85 09103 100921W

CIRCUIT COURT HOLDING: Any and all earnings regardless of how small must be reported to the Commission when certifying for benefits.

FACTS: After becoming unemployed the claimant began to perform part time services for another employer. The services consisted of the claimant's participating in a sales training program. During this program the claimant received $90.00 per week against future commissions.

Although earning $90.00 per week, the claimant failed to disclose these earnings to the Commission when he certified for his weekly benefits. The claimant indicated he failed to do so because a Commission clerk had advised him that if he earned less than half of his weekly benefit rate he would still be entitled to his full weekly benefits. Therefore, he did not think it necessary to disclose he was working and earning $90.00 per week since that was less than half of his benefit rate.

DECISION: Board decision modified. Claimant must pay restitution, but intentional misrepresentation not established. No fraud penalty.

RATIONALE: It was clear that the claimant had accepted and performed services for the new employer for remuneration and therefore had earnings within the meaning of Section 48(1) of the MES Act.

The claimant had a legal duty to disclose to the Commission that he was working and receiving pay from another employer regardless of the impact on his benefit rate.

Section 9

FRAUD, Search Warrant

CITE AS: Stein v MESC, 219 Mich App 118 (1996)

Appeal pending: No

Claimant: N/A
Employer: Melvin Stein (Modern Roofing, Inc.)
Docket No. N/A

COURT OF APPEALS HOLDING: Employees of the Michigan Unemployment Agency may seek and execute search warrants when investigating fraud claims arising out of the Michigan Employment Security Act. That there is statutory authorization for the issuance of subpoenas does not bar the use of a search warrant in appropriate circumstances (e.g., fraud).

FACTS: An employee of the MESC obtained and executed a search warrant to secure employer business records to aid in an investigation of fraudulently obtained unemployment benefits by present and former employees. In response, the owners brought an action against the MESC in the Court of Claims. The employer argued the MESC employee acted outside the scope of her authority in obtaining a search warrant as the MES Act does not expressly authorize the use of search warrants. The employer asserted the MESC employee was limited to the subpoena process as provided in Section 9 as that is the only means of gathering information specifically set forth in the Act.

DECISION: Challenge to search warrant dismissed.

RATIONALE: The use of a subpoena is one way for the MESC to obtain the employer's records. The statutory provision for a subpoena does not foreclose the option of seeking a search warrant. Relying on Richter v Dep't of Natural Resources, 172 Mich App 658 (1988), the Court of Appeals observed: "One of the investigative duties contemplated by the act is the duty to investigate fraud." The court went on to say:

> "We believe that encompassed within this authority to conduct fraud investigations, which can lead, as in the instant case, to criminal prosecutions, is the ability to utilize the tools necessary to carry out such investigations, including search warrants. Accordingly, we hold that agents of the MESC are entitled to obtain and execute search warrants when investigating fraud claims arising pursuant to the MESA."

7/99
N/A

Section 62(b)

FRAUD, Burden of proof

CITE AS: Sanders v MESC, Wayne Circuit Court No. 287-132 (April 30, 1957).

Appeal pending: No

Claimant: Early Sanders
Employer: Chrysler Corporation
Docket No. B56-769-18197

CIRCUIT COURT HOLDING: The burden of establishing fraud by competent evidence rests with the MESC.

FACTS: The claimant received a telegram on Thursday to return to work that same day. Also that day he reported to an office of the Commission and obtained a benefit check for the previous week. The following week he again reported to the Commission and certified for benefits for the prior week despite having returned to work for part of that week.

DECISION: The finding of claimant fraud was upheld.

RATIONALE: The Commission's agent testified the claimant was asked about his earnings in the week in question. She said she did not require the claimant to fill in the day of the week and it is conceivable that had she so required, the claimant would have changed his entries. But that is conjecture. The fact remains that the dates the claimant entered were wrong and that he had returned to work on the day he had received his previous benefit check.

> The burden should be upon the Commission to establish that fraud was committed, and fraud should not be presumed but established by competent proof that persuades one that a proper inference may be drawn. For it must be conceded that the Commission could not be expected to secure an admission by a claimant that he had committed a fraud. So, to prove an intent to defraud an inference must be drawn from the facts themselves.

7/99
N/A

18.13

Section 62(a)

RESTITUTION, Civil action, Statute of limitations

CITE AS: MESC v Westphal, 214 Mich App 261 (1995)

Appeal pending: No

Claimants: Larry A. Westphal & Steve G. Bussell
Employer: Mueller Brass Co.
Docket No. B92-21862-122898W

HOLDING: Where the Agency has issued a determination requiring restitution within three years of the date of a claimant's receipt of improperly paid benefits, the Agency must file a civil suit to recover those benefits within three years of the date of the determination requiring restitution.

FACTS: Claimant Westphal received benefits through April 27, 1985. On January 29, 1986, the Agency determined those benefits were improperly paid. The claimant did not protest. The Agency filed its civil action for restitution on May 9, 1991. Because the Agency filed its claim more than three years after the date of the determination requiring restitution, the circuit court granted Westphal's motion for summary disposition. Claimant Bussell's experience was similar.

DECISION: The Agency could not recover restitution.

RATIONALE: The statute unambiguously states that the limitation period for the recovery of improperly paid unemployment benefits is three years from the date of receipt of benefits unless one of three exceptions exists. See Section 62(a). The third enumerated exception applied here since in each instance the MESC made formal determinations requiring restitution within three years of the claimant's receipt of benefits. In Section 62(a), the "last antecedent" before the three qualifying exceptions is the date of accrual of the cause of action. Accordingly, the qualifying exceptions refer solely to the date of accrual and leave the three year limitations period intact.

7/99
19, 17, d12: H

Section 54(b)

FRAUD, Duty to disclose earnings, Agency advice

CITE AS: Miltgen v DSC Marywood Co, Kent Circuit Court, No. 00-06060-AE (March 23, 2001)

Appeal pending: No

Claimant: Georgia Miltgen
Employer: DSC Marywood Company
Docket No. B95-06582-RRR-145902W/FSC95-00107-RRR-145903W

CIRCUIT COURT HOLDING: Being told by an Agency representative that monies received as "gifts" do not have to be reported as income is not a defense to fraud when claimant failed to disclose "significant particulars" as to the receipt of that money.

FACTS: While receiving unemployment benefits, claimant performed services and was being compensated. Claimant knew she was obligated to report income from work to the Agency, but failed to do so. Claimant spoke to a representative of the Agency about whether she had to report the monies. She asked whether personal monies from a friend had to be reported; she did not report the reasons for receiving the monies or why she received the monies. Claimant claimed the monies she received were "gifts," although she acknowledged the payments were at an hourly rate for the service she performed.

DECISION: Claimant knowingly and willfully failed to report the income and is subject to the fraud provision.

RATIONALE: Even if the payor told claimant that the monies were gifts, it was unreasonable for her to believe that she was receiving gifts, and not being paid for services rendered. "A purely subjective belief is not legally significant; the belief must also be objectively reasonable. A gift which happens to be in an amount which is a certain rate for actual hours of effort performed for the payor is compensation for work, not a gift . . .. [L]abels are of 'little importance.'" See Allied Market v Grocer's Dairy, 391 Mich 729, 735 (1974), Abbey Homes v Wilcox, 89 Mich App 574, 581 (1979), lv app den 407 Mich 875 (1979). Had claimant disclosed the nature of the particulars of the monies, being told that the monies did not need to be reported would probably have entitled her to act as she did, Woods v State Employees Retirement System, 440 Mich 77, 81-82 (1992). Since claimant admitted she did not provide those particulars, the answer she said she got does not provide her with a defense. United States v King, 560 F2d 122 (1977), and United States v Smith, 523 F2d 771 (1975).

11/04

Section 62(a)

RESTITUTION, Statute of limitations

CITE AS: DLEG Unemployment Insurance Agency v Darden, Oakland County Court, No. 04-059568-AE (October 22, 2004)

Appeal pending: No

Claimant: Yvonne Darden
Employer: Mastanuono & Assoc., Inc.
Docket No. FSC2004-00036-173164W

CIRCUIT COURT HOLDING: When adjudicating whether the Agency has jurisdiction to issue a determination or redetermination requiring restitution, the 3-year limitation provision of Section 62(a) is applicable, not the 1-year period contained in Section 32a(2).

FACTS: The Agency issued a redetermination November 25, 2003 requiring restitution for benefits improperly paid for 5 weeks ending in November 2002. The Board of Review held that under Section 32a(2) the Agency did not have jurisdiction to issue the redetermination on November 25, 2003 because more than one year had passed since the unemployment checks had been issued and there was no finding of fraud on claimant's part.

DECISION: The Agency may pursue the recovery of restitution.

RATIONALE: When two statutes cover the same general subject matter, the more specific statute must prevail over the more general statute. MESC v Westphal, 214 Mich App 261 (1995). The 3-year provision of Section 62(a) takes precedence over the 1-year provision of Section 32a(2) because Section 62(a) is more specific.

11/04

FEDERAL COURT DECISIONS AND TRA

This chapter of the Digest will be devoted to cases which share a federal focus. Most of the reported decisions will be from the Federal court system - U.S. District Courts, U.S. Courts of Appeals and the United States Supreme Court. There may or may not be a Michigan element to the case digested.

This chapter will also contain decisions from the Federal or Michigan courts which address issues concerning any of a variety of federal unemployment benefit programs. The Trade Readjustment Assistance (TRA) program is currently the prime example of such a program. The reader should keep in mind that not all federal program cases will be in this chapter, but may be found elsewhere in the Digest if the decision is significant for a reason unrelated to the specific federal program. Alasri v MESC, a TRA case found in Chapter 8, the "Filing For Benefits" chapter, is an example of such a case. The reader is encouraged to always consult the Subject Word Index.

FEDERAL COURT DECISIONS AND TRA

Section NA

TRA, Qualifying employment, Sick pay

CITE AS: U.A.W. v Brock, 816 F2nd 767 (D.C. Cir 1987).

Appeal pending: No

Plaintiff: International Union U.A.W. et al
Defendant: William Brock, Secretary U.S. Department of Labor
Docket No: NA

U.S. COURT OF APPEALS, DISTRICT OF COLUMBIA CIRCUIT HOLDING: For purposes of the TRA program, the term "employment" ordinarily includes weeks of paid vacation and sick leave.

FACTS: To qualify for TRA benefits a worker has to have "at least 26 weeks of employment at wages of $30 or more a week in adversely affected employment". The Department of Labor interpreted qualifying employment as weeks of actual physical labor, not including weeks when the worker received sick pay, workers compensation, holiday pay, back pay, etc.

DECISION: TRA claimants who were denied benefits because they were not credited for weeks prior to October, 1981 in which they received vacation pay, holiday pay, sick leave, workers compensation or other enumerated types of compensation during the 52 week period preceding their separation from adversely affected employment, may request reopening of their TRA claims. On November 17, 1987 the U.S.D.O.L. issued revised definitions for the terms "employment" and "wages" as used in Section 231(2) of the Trade Act of 1974, in conformity with the court order.

RATIONALE: "The actual language of the statute, the clear remedial purpose of the 1974 Congress, and the demonstrably unreasonable results that flow from the Secretary's definition of 'employment' make clear that his interpretation of section 231 of the Trade Act conflicts with congressional intent. Because the Secretary's interpretation can find no support in the statute or its legislative history, and because it is so thinly justified as to be unreasonable, we reject it as an invalid construction of the Trade Act."

TRA, Training benefits, 210-Day Rule, UA Rule 210

CITE AS: U.A.W. v Dole, No. 89-1922 (6th Cir August 21, 1990).

Appeal pending: No

Plaintiffs: International Union U.A.W. et al
Defendants: Elizabeth H. Dole, Secretary, U.S. Department of Labor
Docket No: NA

SIXTH CIRCUIT COURT OF APPEALS HOLDING: Application of Michigan's "waiver for good cause" rule is not inconsistent with the 210 day filing deadline contained in the Trade Act of 1974 related to training benefits.

FACTS: In addition to providing basic "TRA" benefits, the Trade Act of 1974 permits an additional 26 weeks of benefits to assist affected workers complete approved training. Workers must file a bona fide application for training within 210 days after the date of the worker's separation. Due to internal MESC practices these claimants were not instructed to file until just prior to exhaustion of their state unemployment benefits, which was often beyond the 210 day limit. The MESC sought approval from the U.S. Department of Labor to apply Michigan's "waiver for good cause" rule (MESC Rule 210). That request was denied.

DECISION: Remanded for further proceedings by the District Court, Secretary of Labor and MESC. Michigan's waiver for good cause rule may be applied to claimants denied additional weeks of TRA benefits after January 1, 1988 due to operation of the 210 day rule if the MESC's determination of good cause includes findings of genuine interest in training and the absence of dilatory conduct on the part of the certified worker.

RATIONALE: "Despite the Secretary's admission that the rule was designed to facilitate workers' access to additional TRA benefits, she nevertheless argues that because neither the statute nor the parallel regulation provide for any waiver, workers who fail to comply with the 210-day rule are absolutely barred from obtaining additional benefits. Since the Act is silent on the issue of waiver, however, and may, therefore, leave room for more than one interpretation, it should be construed in such a way as to give effect to the general intent of the legislature....

When a cooperating state agency determines that no dilatory conduct has occurred, however, and, instead, concludes that application of the 210-day rule does nothing to further the Act's remedial purpose and everything to frustrate it, we are hard-pressed to conclude that the Secretary's interpretation is consistent with Congress' intent."

REFUSAL OF WORK, Freedom of Religion, U.S. Constitution, First Amendment

CITE AS: Frazee v Illinois Department of Employment Security, et al, 450 US 707 (1989).

Appeal pending: No

Claimant: William A. Frazee
Employer: Kelly Services
Docket No: U.S. Supreme Court No. 87-1945

UNITED STATES SUPREME COURT HOLDING: Where a claimant has a sincere belief that religion required him or her to refrain from the work in question they may invoke the protections of the First Amendment. It is not required that the claimant belong to an established religious sect for the claimant's religious beliefs to be protected.

FACTS: Claimant refused a temporary position offered him by Kelly Services because the job required Sunday work. Claimant told Kelly that, as a Christian, he could not work on "the Lord's day." Claimant applied for unemployment benefits and was denied for his refusal to accept work on Sunday. Claimant was denied at every stage of the appeal process until the U.S. Supreme Court. The lower courts recognized the sincerity of his professed religious belief but found it was not entitled to First Amendment protection as he was not a member of an established sect or church and did not claim his refusal of work was based on a tenet of an established religious sect.

DECISION: Claimant's refusal to work was based on a sincerely held religious belief. As such he was entitled to invoke the First Amendment protection and should not be denied benefits.

RATIONALE: In earlier cases the Court held where a claimant was forced to choose between fidelity to religious belief and employment, the forfeiture of unemployment benefits for choosing the former over the latter brings unlawful coercion to bear on the employee's choice. In each case the Court concluded the denial of unemployment benefits violated the 1st and 14th Amendments. Though those claimants were members of a particular religious sect, none of those decisions turned on that fact, or on any tenet that forbade the work the claimants refused. The claimants' judgments in those cases rested on the fact each had a sincere belief religion required him or her to refrain from the work he or she refused to perform.

MISCONDUCT, Freedom of religion, Refusal to work on Saturday, Seventh Day Adventist

CITE AS: Hobbie v Unemployment Appeals Com'n of Florida, 480 U.S. 136 (1987).

Appeal pending: No

Claimant: Paula Hobbie
Employer: Lawton and Company
Docket No: S.Ct. No. 85 993

UNITED STATES SUPREME COURT HOLDING: When a State denies receipt of a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and violate his beliefs, that denial must be subjected to strict scrutiny and can be justified only by proof of a compelling state interest. The First Amendment protects the free exercise rights of employees who adopt religious beliefs or convert from one faith to another after being hired.

FACTS: Claimant worked for the employer for 2.5 years before her religious conversion and baptism into the Seventh Day Adventist Church. At that point she informed her supervisor that she could no longer work on her sabbath - sundown Friday to sundown Saturday. Although her supervisor agreed to substitute for her whenever she was scheduled on her sabbath, the supervisors' supervisor would not agree to that arrangement and instructed claimant to work as scheduled or resign. When claimant refused to do either she was discharged.

DECISION: Florida's refusal to award unemployment compensation benefits to claimant violated the Free Exercise Clause of the First Amendment.

RATIONALE: The timing of claimant's conversion in immaterial to the question of whether her free exercise rights have been burdened. Claimant was forced to choose between fidelity to her religious belief and continued employment. The forfeiture of unemployment benefits for choosing the former over the latter brings unlawful coercion to bear on the employee's choice.

Section NA

SOCIAL SECURITY ACT, Payment of Benefits when due

CITE AS: California Human Resources Department v Java, 402 U.S. 121 (1971).

Appeal pending: No

Claimant: Judith Java
Employer: NA
Docket No: U.S. S.Ct. 507 (1970)

UNITED STATES SUPREME COURT HOLDING: Benefits due a claimant after an initial finding of eligibility may not be held in abeyance pending the employer's appeal.

FACTS: Claimants were discharged from employment. They applied for benefits. They were given an eligibility interview which the employer could have, but did not, attend. As a result of the interview both claimants were found eligible for benefits and received benefits. The employer then appealed. At that point payments automatically stopped in accordance with California law and practice. At the Referee level, Hudson was ruled eligible but Java was found to be ineligible.

The procedure used by California in stopping payment of benefits upon employer protest resulted in a median 7 week delay in payments to eligible claimants. Employers were successful in less than 50% of appeals.

DECISION: Procedure used by California was not in compliance with the Social Security Acts' directive to pay unemployment compensation "when due".

RATIONALE: The Social Security Act requires administration of the Unemployment Compensation Fund in a manner reasonably calculated to insure full payment of benefits when due. The objective of Congress was to provide for benefit payments on the nearest pay day following the termination of employment to the extent administratively possible in order to provide the unemployed worker with cash at a time when he/she would otherwise have nothing to spend. "When due" as contained in Section 303(a)(1) of the Social Security Act is construed to mean when benefits are allowed after a hearing of which both parties have notice and have an opportunity to present their respective positions.

MISCONDUCT, Freedom of religion, Peyote

CITE AS: Employment Div, Oregon Dept. of Human Res. v Smith, 110 S.Ct. 1595 (1990).

Appeal pending: No

Claimant: Alfred Smith and Galen Black
Employer: NA
Docket No: S.Ct. 88-1213

UNITED STATES SUPREME COURT HOLDING: Claimants discharged for using illegal drugs as part of a religious sacrament may be disqualified from receipt of unemployment compensation benefits without violation of First Amendment protections of the free exercise of religion.

FACTS: Claimant's were discharged from their jobs at a private drug rehabilitation organization because they ingested peyote for sacramental purposes at a ceremony of the Native American Church of which both are members. They were determined to be disqualified for benefits because their discharge was for work related misconduct.

DECISION: Claimants are disqualified for unemployment compensation benefits when their discharge results from the use of illegal drugs even though the drug is part of a religious sacrament.

RATIONALE: If a State has prohibited through its criminal laws certain kinds of religiously motivated conduct without violating the First Amendment it follows that the State may impose the lesser burden of denying unemployment compensation benefits to persons who engage in that conduct. The right of free exercise of religion does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability.

19.07

Section: N/A

CONSTITUTIONAL RIGHTS, Substantive due process, Equal protection, Refusal to rehire

CITE AS: Valot v Southeast Local School Dist. Board Of Education, 107 F.3d 1220 (6th Cir. 1997)

Appeal pending: No

Claimant: Sally Ann Valot
Employer: Southeast Local School District (Ohio)
Docket No. N/A

U.S. COURT OF APPEALS HOLDING: School board did not violate drivers' substantive due process or equal protection rights by refusing to rehire them.

FACTS: Plaintiffs were substitute bus drivers with nine month contracts with a school district in Ohio. They applied for and were paid unemployment compensation. As the employer did not have a practice of providing "reasonable assurance" to such employees, they were not ineligible for benefits by means of the Ohio school denial period provision. In the fall, the employer refused to rehire drivers who had collected benefits. Plaintiff drivers argued their constitutional rights were violated in that seeking and obtaining unemployment benefits is protected by the constitutional right of access and the right to petition for redress of a grievance.

DECISION: Affirmed dismissal of all federal claims.

RATIONALE: Employer's interest in promoting efficiency of public service and protecting public funds is legitimate and outweighs claimants' interest in seeking unemployment compensation. Employer's action was related to legitimate state interest. No substantive due process rights violated. Nor was there a violation of equal protection. Employer's decision not to rehire claimants was rationally related to a legitimate state interest.

7/99
N/A

20.00

MISCELLANEOUS

Chapter 20 contains cases which do not fit comfortably into the categories addressed in the other chapters. Some of these are unemployment compensation cases which address issues and sections of the MES Act other than those specified for Chapters 1-18 or the federal issues in Chapter 19.

In addition, this chapter also contains cases which did not arise under the MES Act at all, but have had an impact on Unemployment Insurance (U.I.) decisions or reflect broad principles of law which are applicable in a variety of legal situations. Again, the reader is encouraged to consult the Subject Word Index.

20.00

MISCELLANEOUS

Section 28(1)(c)

WORKER'S COMPENSATION, Eligibility, Ability

CITE AS: Henry v Ford Motor Co., 291 Mich 535 (1939).

Appeal pending: No

Claimant: Lee Henry
Employer: Ford Motor Co
Docket No: NA

SUPREME COURT HOLDING: A finding of disability for purposes of worker's compensation does not necessarily mean a claimant is disabled and ineligible for U.I. under Section 28(1)(c).

FACTS: Claimant suffered a work related injury. He filed for and received worker's compensation. After some time he returned but could only perform favored work because of a restriction associated with the injury. Ultimately he was laid off and filed for unemployment benefits.

The employer contested the claimant's eligibility. It asserted that because the claimant had been found disabled by the worker's compensation board he couldn't be fully able and available and had to be found ineligible pursuant to Section 28(1)(c) of the Employment Security Act.

DECISION: A finding that an employee is totally disabled so far as returning to pre-injury work is not necessarily inconsistent with a finding that he is able to, and is available for, work within his restrictions.

RATIONALE: An employee permanently disabled to continue the work that he was engaged in when the accident occurred may nevertheless be able to do some light work of a different nature than that in which he was previously engaged.

Section 30 and 31

INALIENABILITY OF BENEFITS, Waiver of benefits, Public Employment Relations Act, Statutory construction

CITE AS: Oak Park Education Association, MEA/NEA v Oak Park Board of Education, 132 Mich App 680 (1984).

Appeal pending: No

Claimant: NA
Employer: Oak Park Board of Education
Docket No: NA

COURT OF APPEALS HOLDING: The Public Employment Relations Act is the dominant law regulating public employee labor relations and where there is a conflict between it and another statute the Public Employment Relations Act prevails diminishing the conflicting statute pro tanto.

FACTS: Oak Park Education Association and Oak Park School District negotiated a labor contract containing a salary provision which provided that the salary of a teacher recalled from summer layoff would be offset by the amount of unemployment benefits received during the summer layoff. When the district sought to enforce this provision, the Association sought to have the provision excised from the contract asserting that it was in violation of Section 30 of the MES Act which makes unemployment benefits inalienable by any assignment and Section 31 of the Act which makes invalid any agreement to waive, release, or commute an individual's right to benefits.

DECISION: The trial court's summary judgment for the District was affirmed.

RATIONALE: The Public Employment Relations Act requires parties to those contracts within its preview to bargain collectively with respect to wages. The provision in question concerns wages and was the subject of bargaining between the parties. The teachers were allowed to collect benefits when unemployed. The provision provides for a partial waiver of salary rather than a waiver of unemployment benefits. It did not require the teachers to waive, or in any way restrict, their rights under the MES Act.

20.03

Section 44(2)

WAGES, Compensation, Free lodging, Convenience of employer

CITE AS: Seligman & Associates v MESC, No. 85110 (Mich App May 6, 1987).

Appeal pending: No

Claimant: NA
Employer: Seligman & Associates
Docket No: NA

COURT OF APPEALS HOLDING: The value of lodging provided to resident caretakers for the convenience of the employer is not considered wages under the Act.

FACTS: The employer operates numerous apartment complexes. The employer provides rent-free apartments to the apartment caretakers and requires them to live on the premises to be available to handle tenant complaints that may arise.

DECISION: The employer is entitled to a refund of contributions paid based on inclusion of the value of the lodging in calculation of wages.

RATIONALE: The reasonable cash value of lodging is to be considered wages only if it is extended as full or partial remuneration for the services rendered. There is no showing that the lodging was intended as partial compensation for the employees.

"This interpretation of the definition of wages is consistent with the United States Supreme Court's interpretation of the definition of wages under the Federal Unemployment Tax Act (FUTA) in Rowan Co, Inc v United States, 452 US 247, 101 S Ct 2288, 68 L Ed 2d 814 (1981). In Rowan the Supreme Court held that for the purposes of FUTA wages do not include the value of meals and lodging provided for the convenience of the employer."

12/91
NA

Section 42

EMPLOYEE STATUS, Economic reality test, Independent contractor, Worker's Compensation

CITE AS: McKissic v Bodine, 42 Mich App 203 (1972); lv den 388 Mich 780 (1972).

Appeal pending: No

Claimant: John S. McKissic
Employer: Harold Bodine
Docket No: NA (This case arose under the Worker's Comp Act.)

COURT OF APPEALS HOLDING: The test to determine whether an employee-employer relationship exists for purposes of the Worker's Compensation Act is the "economic reality test", and the factors used to apply the test are whether: (1) the employer will incur liability if the relationship terminates at will; (2) the work performed is an integral part of the employer's business; (3) the employee primarily depends upon the wages for living expenses; (4) the employee furnishes equipment and material; (5) the employee holds himself out to the public as able to perform certain tasks; (6) the work involved is customarily performed by an independent contractor. Along with (7) the factors of control, payment of wages, maintenance of discipline, and the right to engage or discharge employees; and (8) weighing those factors which will most favorably effectuate the purposes of the Act.
FACTS: Claimant worked full-time at a Fisher Body plant. During the period in issue he was off work recovering from an injury. He advertised as a handy man and painted a sign "McKissic Contracting" on his truck. He furnished his own materials, engaged his own workers and worked on his own schedule. He did repairs and general maintenance and while doing such work for Bodine claimant fell and injured himself.

DECISION: Claimant was primarily employed by Fisher Body, and his relationship to Bodine was one of an independent contractor.

RATIONALE: "The plaintiff was primarily employed by another. The doing of odd jobs was a method of securing extra cash for his own enjoyment. He furnished his own tools. He worked for Bodine only when he was available. He contracted each job for a given price, and held himself out to the public as a handyman.... If he desired protection while acting as an independent contractor, he could have made arrangements for accident insurance...."

Section 42

EMPLOYEE STATUS, Independent contractor, Economic reality test, Worker's Compensation

CITE AS: Askew v Macomber, 398 Mich 212 (1976)

Appeal pending: No

Claimant: Carrie Askew
Employer: Alicia Macomber
Docket No. N/A (This case arose under the Workers' Compensation Act.)

SUPREME COURT HOLDING: The test of whether a person or business is liable for workers' compensation benefits as the employer of a claimant is not a matter of terminology, oral or written, but of the realities of the work performed; control of the claimant is a factor, as is payment of wages, hiring and firing, and the responsibility for the maintenance of discipline, but the test of economic reality views these elements as a whole, assigning primacy to no single one.

FACTS: Carrie Askew claimed worker's compensation benefits against defendants M. Alicia Macomber, the Second National Bank of Saginaw, and Michigan Mutual Liability Company. Mrs. Macomber, because of her advanced age, had entered into an agency agreement with the bank for the management of her property which authorized the bank to pay for Mrs. Macomber's care. The bank hired the plaintiff as a practical nurse for Mrs. Macomber and the plaintiff was injured in the course of that employment.

DECISION: Alicia Macomber, not the bank, was the employer of Carrie Askew.

RATIONALE: The bank was operating pursuant to an express agency agreement. The employment of nurses was not an integral part of the bank's business. The bank was not operating as a labor broker. Although the bank drafted the check for Carrie Askew's wages, the funds came from the Macomber estate, a separate account. Although the bank discussed wages and hours with Carrie Askew and arranged the hiring of her for Mrs. Macomber, it took no part in the day-to-day control or supervision of Ms. Askew's duties. There was no evidence of any intent by the bank to supervise or discipline Ms. Askew. The bank's actions on behalf of Ms. Macomber were those of an agent on behalf of a principal.

7/99
N/A

Section N/A

Evidence, Guilty Plea

CITE AS: Waknin v Chamberlain, 467 Mich 329 (2002)

Appeal pending: No

Claimant: N/A
Employer: N/A
Docket No. N/A

SUPREME COURT HOLDING: A criminal conviction after trial is admissible as substantive evidence of conduct at issue in a civil case arising out of the same occurrence.

FACTS: Plaintiff Waknin brought a civil action against defendant Chamberlain for assault and battery. Defendant had been previously convicted of the assault and battery of plaintiff. The circuit court excluded evidence of defendant's criminal conviction from the civil case on the basis of Wheelock v Eyl, 393 Mich 74 (1974), and MRE 403.

DECISION: The trial court abused its discretion in barring the admission of evidence of the defendant's conviction by a jury.

RATIONALE: The rule of Wheelock, as it pertains to the use of evidence of a criminal conviction in subsequent civil cases, did not survive the adoption of the Michigan Rules of Evidence. MRE 403 provides that relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. Evidence is not inadmissible simply because it is prejudicial. * In every case, each party attempts to introduce evidence that causes prejudice to the other party. It is only when unfair prejudice substantially outweighs the probative value of the evidence that the evidence is excluded. In this case, defendant had an opportunity and an incentive to defend himself in the criminal proceeding. That the defendant was found guilty beyond a reasonable doubt, a standard of proof greater than the preponderance of the evidence in the civil case, is highly probative evidence. Accordingly, the probative value of the evidence of the defendant's conviction was not substantially outweighed by the danger of unfair prejudice.

The Court expressed no opinion regarding whether pleas of nolo contendere are admissible as substantive evidence in subsequent civil proceedings.

Editor's Note: Also see Section 14 of the MES Act which indicates, in part, that decisions of a court of record which have become final "may be introduced into any proceeding involving a claim for benefits and the facts therein found and the . . .decisions therein made shall be conclusive unless substantial evidence to the contrary is introduced by or on behalf of the claimant."

11/04

MILITARY PERSONNEL, Honorable discharge, Medically unfit

CITE AS: Krauseneck v Department of the Army, Tuscola Circuit Court, No. 03-21657-AE (February 3, 2004)

Appeal pending: No

Claimant: Kyle J. Krauseneck
Employer: Department of the Army
Docket No. B2002-15115-RO1-166448W

CIRCUIT COURT HOLDING: When a person is honorably discharged from military service before completing 365 days or more of continuous service, and that individual was discharged for being medically unfit, he or she is eligible for benefits. But if the reason for the honorable early discharge had been failure to meet physical standards, i.e. height, weight or physical fitness, then the person would be ineligible for benefits.

FACTS: Claimant was honorably discharged from the Army after serving six months of active duty. The Army discharged claimant for failing to meet "procurement medical fitness standards." Claimant filed for benefits.

DECISION: Claimant was discharged because of a medical disqualification pursuant to 20 CFR 614.2(2)(ii)(B).

RATIONALE: In cases involving individuals whose credit weeks are based on service in the military, the military determines who is and who is not eligible pursuant to Section 11(h). Pursuant to 20 CFR 614.2(2)(ii)(**D**) an honorably discharged service member is eligible for benefits for "inaptitude" if the service was continuous for 365 days or more. Pursuant to 20 CFR 614.2(2)(ii)(**B**), a service member discharged for completing his terms of active service because of "medical disqualification" is eligible for benefits without having to have served 365 days or more. In this case, the claimant underwent a medical examination by a physician, and the physician determined that claimant was medically unfit for further service under the Army's medical fitness standards. This case does not involve the claimant's failure to meet the Army's physical fitness standards or failing to meet the physical height and weight standards. The term 'Physical Standards' under 5 USC 8521(a)(1)(B)(ii)(IV) refers to the "basic height, weight and fully bodied entrance requirements plus the basic physical fitness requirements as measured by the Army's bi-annual APFT and not to the findings by Army medical personnel as to whether [a service member] is medically unfit for continued service."

11/04

Section 41

EMPLOYER, Employee leasing company, UA Rule 190

CITE AS: C & L Leasing Company v State of Michigan, BW&UC, Macomb Circuit Court, No. 02-4341-AE (March 11, 2003)

Appeal pending: No

Claimant: N/A
Employer: C & L Leasing Company
Docket No. L2001-00056-RO1-2795

CIRCUIT COURT HOLDING: An employer will not be considered to be an "employee leasing company" unless the employer satisfies **all** of the requirements of UA Rule 190.

FACTS: Employer's (C & L) secretary/treasurer testified that employer performed payroll services and provided employees to two other companies, Michigan Awning and Panel Laminations. Ownership of the three companies was intertwined among various family members and in-laws. Employer's business and Michigan Awning operated out of employer's secretary/treasurer's residence. Employer's secretary/treasurer's husband and his parents had supervisory control over the employees.

DECISION: Employer is not an employee leasing company. Payroll of workers at the "client" companies is reassigned to the individual companies.

RATIONALE: To be eligible for employee leasing company status, an employer must satisfy **all** of the requirements of Rule 190. Employer failed to show it met the requirements of Rule 190(2). Employer did not "in fact" hire, promote, reassign, discipline and terminate the leased employees, as required by Rule 190(2)(b). Employer did not hold itself out to the general public as available to provide leasing services, as required by Rule 190(2)(f). Employer's solicitation letter represented employer as in the business of providing payroll and administrative services.

11/04