STATE OF MICHIGAN
UNEMPLOYMENT INSURANCE APPEALS COMMISSION

In the Matter of

[redacted]

Claimant,

[redacted]

Employer.

Appeal Docket No.: [redacted]260172

UIA Case No.: [redacted]

Matter of First Impression
Decided *En Banc*

DECISION OF UNEMPLOYMENT INSURANCE APPEALS COMMISSION

This case is before the Unemployment Insurance Appeals Commission (Commission), *en banc*, on the employer's timely appeal from an October 3, 2019 decision by an Administrative Law Judge (ALJ). The ALJ's decision modified an August 9, 2019 Unemployment Insurance Agency (Agency) redetermination and found the claimant not disqualified for benefits under both the illegal drug provision and the misconduct provision, Sections 29(1)(m) and 29(1)(b), respectively, of the Michigan Employment Security (MES) Act. After reviewing the entire record in this matter, we find the ALJ's decision must be affirmed. Our reasons are as follows.

This is a Matter of First Impression before the Commission involving the intersection of the controlled substance testing provision of the MES Act, Section 29(1)(m), and the Michigan Regulation and Taxation of Marihuana Act (MRTMA). In 2018, the MRTMA legalized the use of marihuana in Michigan for adults 21 years and older. MCL 333.27951 *et seq.*[1] The Commission faces two issues. First, we must consider whether a claimant is disqualified from receiving unemployment benefits if the termination from employment was based on a positive drug test result for marihuana. If not, we then consider whether the claimant's conduct at work amounts to misconduct under Section 29(1)(b).

Facts

Claimant worked as an HVAC installer and was involved in an accident with the company vehicle while leaving a job site. Pursuant to company policy, the claimant was sent for controlled substance testing. Claimant's urine-based test returned negative for controlled substances, but a hair test returned positive for THC metabolites. Claimant was discharged on June 18, 2019. The Agency found the claimant not disqualified for benefits under Section 29(1)(m) of the Act in both its determination and redetermination, on the grounds that the claimant did not test positive for a controlled substance. Following the employer's appeal of the redetermination, a hearing was held before the ALJ and a decision was issued on October 3, 2019, which modified the Agency's

[1] The MRTMA includes limited exceptions such as use or consumption while operating a motor vehicle. See MCL 333.27954.

redetermination and found the claimant not disqualified for benefits under both Sections 29(1)(m) and 29(1)(b) of the MES Act.

After a review of the record, we affirm the ALJ's decision on different grounds. Our reasons are as follows.

Section 29(1)(m): Relevant Law

We begin our review with Section 29(1)(m) of the MES Act, which disqualifies an individual from receiving benefits if the individual is discharged for testing positive for the *illegal use* of a controlled substance. The section reads in relevant part:

> (1) Except as provided in subsection (5), an individual is disqualified from receiving benefits if he or she:
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> (m) **Was discharged for** illegally ingesting, injecting, inhaling, or possessing a controlled substance on the premises of the employer; refusing to submit to a drug test that was required to be administered in a nondiscriminatory manner; or **testing positive on a drug test**, if the test was administered in a nondiscriminatory manner. If the worker disputes the result of the testing, and if a generally accepted confirmatory test has not been administered on the same sample previously tested, then a generally accepted confirmatory test must be administered on that sample. If the confirmatory test also indicates a positive result for the presence of a controlled substance, the worker who is discharged as a result of the test result will be disqualified under this subdivision. A report by a drug testing facility showing a positive result for the presence of a controlled substance is conclusive unless there is substantial evidence to the contrary. As used in this subdivision:
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> (ii) **"Drug test"** means a test designed to detect the ***illegal use*** **of a controlled substance.**
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> (Emphasis added.)

We observe that the MES Act does not define what makes an individual's use of a controlled substance -- in this case marihuana -- illegal. As such we must review the MRTMA which governs the use of marihuana in Michigan:

> Sec. 5. 1. Notwithstanding any other law or provision of this act, and except as otherwise provided in section 4 of this act, **the following acts *by a person 21 years of age or older* are not unlawful**, are not an offense, are not grounds for seizing or forfeiting property, are not grounds for arrest, prosecution, or penalty in any manner, are not grounds for search or inspection, and are not grounds to deny any other right or privilege:

1. except as permitted by subdivision (b), possessing, **using or consuming, internally possessing**, purchasing, transporting, or processing **2.5 ounces or less of marihuana**, except that not more than 15 grams of marihuana may be in the form of marihuana concentrate ….

(Emphasis added.)

29(1)(m): Analysis

"The principal goal of statutory interpretation is to give effect to the Legislature's intent, and the most reliable evidence of that intent is the plain language of the statute." *South Dearborn Environmental Improvement Ass'n, Inc., v. Dep't of Environmental Quality,* 502 Mich 349, 360–61 (2018). Where the language of the statute is plain and unambiguous, interpretation is neither required nor permitted. *Sun Valley Foods Co. v. Ward*, 460 Mich 230 (1999).

Section 29(1)(m) disqualifies an individual from receiving benefits if that individual was discharged for testing positive on a "drug test." However, we observe the term "drug test" is uniquely defined for purposes of this section by subsection (ii).[2]

Under Subsection 29(1)(m)(ii) a drug test is "a test designed to detect the **illegal use** of a controlled substance."[3] (emphasis added). Thus, disqualification turns on whether the claimant illegally used a controlled substance.

Because the controlled substance in this case is marihuana, we turn to the MRTMA to determine whether the use was illegal. Under the MRTMA, marihuana use is legal for adults 21 years of age or older. Thus, applying MRTMA to Section 29(1)(m)(ii), where an individual is age 21 or over, a positive test for marihuana cannot be considered a "drug test" within the meaning of the MES Act, as use of marihuana by that individual is not illegal. Conversely, if an individual less than 21 years old tests positive for marihuana, the test would qualify as a "drug test" under Section 29(1)(a)(m)(ii), as the use of marihuana by that individual would reflect the **illegal use** of a controlled substance.[4] Stated another way, while a test for controlled substances is able to detect the presence of a controlled substance, it is unable to identify the legality of the use of the substance detected. Once a controlled substance has been identified, the legality of the **use** of the controlled substance must be determined by authority outside the MES Act. Where the controlled substance is marihuana, the MRTMA controls.

In the instant matter, the claimant was over 21 years old. Therefore, his use of marihuana was not illegal under the MRTMA. Because his **use** of marihuana was not illegal, the definition of "drug test" in Section 29(1)(m)(ii) cannot attach. Therefore, the claimant cannot be disqualified from receiving benefits under Section 29(1)(m) because he was not discharged for testing positive on a "drug test" as defined by Section 29(1)(m)(ii).

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[2] Where a statute sets forth its own definition, the terms must be applied as expressly defined. *Cherry Growers, Inc. v. Agricultural Marketing and Bargaining Bd.*, 240 Mich App 153, 169 (2000).

[3] Marihuana remains a controlled substance in Michigan. MCL 333.7104(3) and 333.7212(1)(c).

[4] Neither the MES Act nor the MRTMA prohibit an employer from enacting and enforcing policies related to marihuana for employees, regardless of their age.

The claimant is not disqualified for benefits under Section 29(1)(m) of the MES Act.

29(1)(b): Relevant Law

Having found the claimant not disqualified under Section 29(1)(m) of the MES Act, we next consider whether he engaged in misconduct. Section 29(1)(b) provides:

> (1) Except as provided in subsection (5), an individual is disqualified from receiving benefits if he or she:
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> (b) Was suspended or discharged for misconduct connected with the individual's work or for intoxication while at work.

Misconduct is defined as follows:

> Conduct evincing such willful 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."
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> *Carter v Employment Security Comm*, 364 Mich 538 (1961).

When the issue is misconduct, the employer bears the burden of proof. See *Bell v Employment Security Comm*, 359 Mich 649 (1960). To meet that burden, the employer must introduce evidence that establishes by a preponderance of the evidence that the claimant engaged in misconduct. See *Fresta v Miller*, 7 Mich App 58 (1967).

Violation of an employer's rule is not, *per se*, misconduct within the meaning of the statute. See *Reed v Employment Security Comm*, 364 Mich 395 (1961). The rule violation must have "some reasonable application and relation to the employee's task." *Id* at 397.

Section 29(1)(b): Analysis

In the instant case, the claimant was discharged for violating the drug test policy outlined in the employer handbook and the accident with the company vehicle - both violations considered "zero tolerance" violations by the employer.

We first address the violation of the drug testing policy. We analyze the issue under Section 29(1)(b) as the employer indicated it was covered by Department of Transportation (DOT)

Regulations. As such, the employer may be able to establish that the violation of the policy constitutes misconduct due to the impact of DOT regulations.

The Court in *Reed, supra,* set forth the analysis for determining what type of rule violation constitutes misconduct. In that case, the employer had an established rule authorizing discharge if a writ of garnishment for an employee's wages was served on the employer more than once. The employee broke that rule and was discharged. The Court was careful to distinguish between misconduct and *work connected* misconduct for purposes of the analysis:

> Misconduct is conduct that is wrong. Plaintiff's conduct here involved was the incurring of an indebtedness and failure to discharge it. By some standards it may have been wrong. **Whether or not, for the purpose of cases like this, it was disqualifying misconduct depends on the legislative intent and meaning of the statute and not merely on the promulgation of a company rule against garnishments**. Garnishment of plaintiff's wages may well have been a nuisance to defendant company. Many acts of an employee might meet with the displeasure of disapproval of an employer and be prohibited by rule by him. Breach of such rule might, in a sense, be considered misconduct warranting discharge from employment. **Unless the rule and its violation bear some reasonable application and relation to the employee's task, can the breach be said to be misconduct within the disqualifying language of section 29(1)(a)(2) of the statute?** The purpose of the act is to benefit unemployed in financial straits, not to penalize them for being in that condition. We do not believe that the language of the statute discloses or its purpose permits reading into it a legislative intent to stamp the conduct here involved as misconduct within the meaning of the cited section.
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> **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.

364 Mich 395, 397-398. (Emphasis added.)

Thus, under the rule set forth in *Reed*, we must analyze whether the claimant's rule violation in this case was work connected – in other words -- bears some reasonable application or relation to the employee's task. Under *Bell*, *supra,* it is the employer's burden to establish the violation was work connected.

As we show below, we agree that the claimant in this case violated the company policy regarding testing positive on a drug test. However, the employer failed to show a positive test within the meaning of the DOT regulations. Further, it failed to demonstrate that the violation of the rule was work connected.

The employer discharged the claimant under its zero tolerance drug testing policy. That policy mandates discharge for a positive post-accident drug test. In its appeal letter, the employer states that the claimant was in a DOT regulated commercial driving position. The employer also provided witness testimony that it must remain in compliance with DOT regulations. As such, the employer's witness testified that under *its rules*, a positive test triggers a variety of steps the employer must take to remain in compliance with regulations.[5] In this case, it maintained it was required to discharge the claimant because testing positive for marihuana is not an approved drug under the DOT Schedule 1 of Approved drugs *and* because the claimant violated company policy. The regulations cited by the employer at hearing, mandate certain actions upon evidence of a positive drug test.[6] Those regulations, however, provide that *only* urine-based tests can be used to establish a positive test result for DOT purposes. In this case, the claimant's urine test was negative. The positive hair test, while sufficient to justify discharge under the employer's policy, was insufficient to establish a positive test under DOT regulations[7] and any corresponding mandate to take employment action under those regulations. Thus, the employer failed to demonstrate work connected misconduct in relation to the DOT regulations.

Moreover, even if the employer had presented a positive test within the meaning of DOT regulations, we would be unable to find misconduct on this record. The record in this case was completely devoid of any evidence that the positive hair drug test had any reasonable application or relation to the claimant's task. It does not constitute proof of intoxication or impairment, [8] and there was no other evidence of such. Nor, as shown above, did it mandate that the employer take any action under DOT regulations.[9] Accordingly, the positive hair drug test, standing alone cannot be considered *per se* evidence of misconduct.

Finally, the claimant's accident with the employer's vehicle, while clearly work-connected, does not rise to the level of misconduct. The employer's witness testified that the accident only caused "minimal damage." Moreover, there is no evidence in the record that the claimant was impaired in any way at work, nor that the claimant's accident occurred because he was impaired or intoxicated. The accident, by all accounts, was an isolated incident caused by simple negligence.

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[5] While the employer is obligated to take action if an employee tests positive for a controlled substance, those actions can include removal from a safety sensitive function (49 CFR 382.501) and evaluation by a substance abuse professional through a process outlined in 49 CFR 40.281 – 40 CFR 40.313. Termination is mandated.

[6] 49 CFR 382.101 – 49 CFR 382.707

[7] 49 C.F.R. § 40.210.

[8] Hair analysis provides long-term information, from months to years, concerning both the severity and pattern of drug use. In contrast to this, urinalysis can indicate only drug use, and then generally only that which has occurred within the last 2-3 days. (Drug testing by urine and hair analysis: complementary features and scientific issues - PubMed (nih.gov). Last accessed 12/17/2021)

[9] If it did mandate action (See footnote 5), the Commission would be called upon to determine whether there was sufficient work connectedness to establish misconduct. That analysis must be conducted on a case-by-case basis.

Therefore, since the employer failed to demonstrate that the claimant's lawful use of a controlled substance rose to the level of work connected misconduct and failed to show that the accident was anything other than an isolated incident of ordinary negligence, the claimant is not disqualified under Section 29(1)(b) of the MES Act.

Conclusion

For the reasons stated above, where an individual age 21 or over is discharged from employment solely for testing positive for marihuana, the individual is not disqualified because the test was not a "drug test" designed to detect the ***illegal use*** of a controlled substance under Section 29(1)(m)(ii). Therefore, the claimant is not disqualified for benefits under Section 29(1)(m) of the MES Act. Further, as the employer failed to prove misconduct connected to work, the claimant is not disqualified under Section 29(1)(b) of the MES Act.

Therefore,

IT IS ORDERED that the ALJ's October 3, 2019 decision is AFFIRMED. The claimant is NOT DISQUALIFIED for benefits under Sections 29(1)(m) or 29(1)(b) of the MES Act.

The claimant may receive benefits if otherwise eligible and qualified.

This matter is referred to the Agency for action consistent with this decision.

Alejandra Del Pino, Commissioner

Andrea C. Rossi, Commissioner

D. Lynn Morison, Commissioner

Julie A. Petrik, Chairperson

Neal A. Young, Commissioner

William J. Runco, Commissioner

LESTER A. OWCZARSKI, COMMISSIONER, DISSENTING:

I disagree with the Commission majority's ruling that the claimant should not be disqualified for benefits under Section 29(1)(m) of the MES Act. My reasons are as follows.

The MES Act sets out a specific procedure to collect unemployment benefits. Receipt of benefits is dependent upon a claimant meeting certain requirements which, if not met, result in a claimant being ineligible and/or disqualified for benefits.

The majority opinion finds that the MRTMA applies to this case. I disagree. Section 29(1)(m) states, in relevant part:

> Was discharged for illegally ingesting, injecting, inhaling, or possessing a controlled substance on the premises of the employer; refusing to submit to a drug test that was required to be administered in a nondiscriminatory manner; **or testing positive on a drug test….**

If the legislature had intended to define what testing positive on a drug test meant, they would have done so. In the absence of a statutory definition for a "positive drug test" within the MES Act, the Commission cannot insert a definition from another statute. Because an employer is entitled to a drug-free workplace, strict liability applies. If a claimant tests positive on a drug test, they are disqualified for benefits under the Act.

A dictionary definition is not the proper source when a Court is called to construe a specific word contained in the MES Act. The court must construe the word in the context of the MES Act as a whole. The Michigan Supreme Court in *Cassar v. Appeal Board of Mich. Employment. Sec. Comm'n.,* 343 Mich 380 (1955) stated:

> The legislature has prescribed the terms and conditions under which unemployment benefits may be received and has imposed conditions with which plaintiffs have not complied. The right to benefits rests wholly on the statute.

The claimant in this case did not qualify for benefits under the process outlined under the MES Act. A "penalty" is typically imposed after an action, while a "disqualification" is the procedural consequence of an action. Section 29(1)(m) of the MES Act does not contain the word "penalty," but instead uses the word "disqualification." The Commission is bound by the plain language of the statute and cannot insert a word that is not contained in that section of the MES Act. In *Cassar,* the court states:

> In each of these cases the workman's acts can be described by the words 'voluntary quit' and 'misconduct' if these words are taken out of the context and their meaning is sought, like that of some obscure word in a poem, in Noah Webster's Unabridged Dictionary. But this Court, like the Alabama court, is called upon to construe these words in the context of the Employment Security act.

Thus, the statutory provisions pertinent to this case must be construed and applied in accordance with the rules provided by the legislature of this State. Therefore, I would find the claimant disqualified under Section 29(1)(m) of the MES Act. Because the Commission majority has decided otherwise, I respectfully dissent.

Lester A. Owczarski, Commissioner

MAILED AT LANSING, MICHIGAN December 29, 2021

This decision shall be final unless EITHER (1) the Unemployment Insurance Appeals Commission RECEIVES a written request for rehearing on or before the deadline, OR (2) the appropriate circuit court RECEIVES an appeal on or before the deadline. The deadline is:

TO PROTECT YOUR RIGHTS, YOU MUST BE ON TIME. January 28, 2022

English

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