STATE OF MICHIGAN
UNEMPLOYMENT INSURANCE APPEALS COMMISSION

In the Matter of

[redacted]

Claimant,

Appeal Docket No.: [redacted]262736W

Agency Case No.: [redacted]

Matter of First Impression
Decided *En Banc*

[redacted]

Employer.

The Commission's December 29, 2021 decision did not include Commissioner Owczarski's dissent. This amended decision corrects that inadvertent omission.

AMENDED DECISION OF UNEMPLOYMENT INSURANCE APPEALS COMMISSION

This case is before the Unemployment Insurance Appeals Commission (Commission), *en banc*, on the claimant's timely appeal from a December 7, 2020 Administrative Law Judge (ALJ) decision. The ALJ's decision affirmed an October 7, 2020 Unemployment Insurance Agency (Agency) redetermination which found the claimant disqualified for benefits under the controlled substances provision, Section 29(1)(m), of the Michigan Employment Security Act (MES Act), MCL 421.1 *et seq*. After reviewing the entire record in this matter, we find the ALJ's decision must be reversed. 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 issue before the Commission is whether a claimant is disqualified from receiving unemployment benefits if the termination from employment was based solely on a positive test for marihuana.

Facts

Claimant, an individual over 21 years of age, worked as a stacker operator and was seriously injured at work on November 3, 2019, when he fell from the stacker. The claimant was

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

hospitalized for his injuries. The employer did not allege the claimant appeared to be under the influence of marihuana or any other substance at work. Pursuant to the employer's Drug and Alcohol Testing Policy (Policy), a test for controlled substances was administered at the hospital. It returned positive for marihuana. The claimant was discharged from his employment in March 2020 under the terms of the Policy based solely on this positive result.

Section 29(1)(m): Analysis

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 ....
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> (Emphasis added.)

"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 defined as "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 -- and no amount or type of testing can establish illegal use. 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 is over 21 years old. Therefore, his use of marihuana is not illegal under the MRTMA. Because his **use** of marihuana is 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.

Section 29(1)(b): Relevant Law

Next, we turn to the general misconduct provision of Section 29(1)(b). The first question we must address is whether we may even consider it at all under these circumstances. Because we are bound by the Court of Appeals holding in *Braska v. Challenge Mfg. Co.*, 307 Mich App 340 (2014), we must rule that Section 29(1)(b) is inapplicable.

In *Braska*, the Court considered the issue with respect to the *medical* use of marihuana which was legalized under the Michigan Medical Marihuana Act. There, the Unemployment Insurance Agency argued that disqualification could occur under either Section 29(1)(m) or (1)(b) in cases in which a claimant violated an employer's drug policy. The Court rejected that argument, ruling that only Section 29(1)(m) is applicable in cases where the *only* ground for discharge is a positive test:

> Contrary to the Department's argument, § 29(1)(b) is not applicable in the present cases. "[I]t is a settled rule of statutory construction that where a statute contains a specific statutory provision and a related, but more general, provision, the specific one controls." *In re Haley,* 476 Mich. 180, 198, 720 N.W.2d 246 (2006). In these cases, the MCAC found that each claimant was discharged for testing positive on a drug test. Other than testing positive for marijuana, there was no misconduct that led to any claimant being discharged. MCL 421.29 contains a specific provision regarding disqualification when an individual tests positive on a drug test. Accordingly, under the settled rule of statutory interpretation set forth in *In re Haley,* claimants' disqualification from receiving unemployment benefits is governed by § 29(1)(m), the specific provision concerning testing positive on a drug test, rather than § 29(1)(b), a related, but more general, provision regarding misconduct.
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> 307 Mich App 340, 364.

Likewise in this case, the employer asserted no other grounds for discharge than that the claimant violated its Policy by testing positive for marihuana. Accordingly, applying the rule in *Braska,* this Commission may not disqualify the claimant under Section 29(1)(b).

However, in the event further appellate review should reject this principal, we would find that the employer in the instant matter has failed to establish that it discharged the claimant for misconduct.

Section 29(1)(b) of the MES Act 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.
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> *Carter v. Employment Security Comm*, 364 Mich 538 (1961).

Misconduct exists when the actions that resulted in the claimant's discharge fall within the definition set forth in *Carter, supra.*

Section 29(1)(b): Analysis

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

In the instant case, the employer discharged the claimant for violation of its Policy which prohibits the on- and off-duty use of illegal drugs. At hearing, the employer testified that testing positive for marihuana is against company policy and is considered grounds for dismissal. The employer's witness specifically testified that the claimant was discharged solely due to the positive test result. The employer did not allege or demonstrate that the claimant was intoxicated or impaired by marihuana while at work or that his conduct was deficient in any way.

As the employer has failed to show that the claimant's lawful, off-duty conduct (the legal use of a controlled substance) was in any way work connected, the claimant's conduct cannot be considered misconduct under Section 29(1)(b) of the MES Act.

Conclusion

For the reasons stated above, where an individual age 21 and 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). Based on the foregoing, we find that the claimant is not disqualified for benefits under Section 29(1)(m) of the MES Act. We additionally find that Section 29(1)(b) is inapplicable to this case.

Therefore,

IT IS ORDERED that the ALJ's December 7, 2020 decision is REVERSED. The claimant is NOT DISQUALIFIED for benefits under Section 29(1)(m) 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.

Julie A. Petrik — Chairperson

Neal A. Young — Commissioner

Andrea C. Rossi — Commissioner

Alejandra Del Pino — Commissioner

William J. Runco — Commissioner

D. Lynn Morison — 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, the claimant is 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 Security Comm,* 343 Mich 380 (1955) stated:

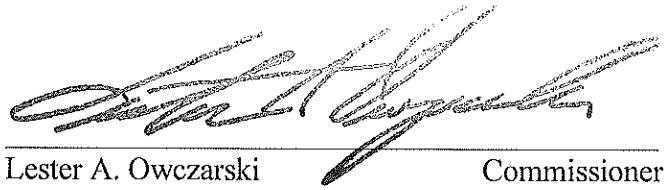
> The legislature has prescribed the terms and conditions under which unemployment benefits may be received and has imposed conditions with which plaintiffs have not complied. The right to benefits rests wholly on the statute.

Further, the Commission looks to the holding in *Braska* (albeit on other grounds), where the Court of Appeals concluded that disqualification for benefits amounts to a penalty under the law. I disagree with that interpretation. 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 JAN 05 2022

This **amended** 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:

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