

STATE OF MICHIGAN
COURT OF APPEALS

STEVEN B. GUEBARA,

Plaintiff–Appellant,

v

MUSKEGON ALUMINUM FOUNDRY,

Defendant–Appellee,

and

MESC,

Appellee.

UNPUBLISHED

September 27, 1996

No. 180648

LC No. 94-31295-AE

Before: Michael J. Kelly, P.J., and Hoekstra and E.A. Quinnell,*JJ.

PER CURIAM.

Plaintiff was granted leave to appeal an order of the trial court that affirmed the decision of the Michigan Employment Security Commission Board of Review (MESC) to disqualify plaintiff from receiving unemployment benefits for misconduct connected with plaintiff’s work, MCL 421.29; MSA 17.531. We reverse and remand.

Plaintiff was discharged from his employment at defendant foundry, pursuant to a clause in his employment contract, after being absent for three consecutive days without notifying the foundry. The reason for plaintiff’s absence was his incarceration in Muskegon County Jail as a result of his failure to post bond after his arrest for breaking and entering¹. After a hearing, an MESC referee found that because “there was no formal notice to the employer for three consecutive days as provided in the contract,” plaintiff’s actions amounted to misconduct connected with plaintiff’s work, and disqualified

* Circuit judge, sitting on the Court of Appeals by assignment.

plaintiff from receiving unemployment benefits. The referee's findings were adopted by the MESC Board of Review and affirmed by the circuit court.

Plaintiff argues that his conduct should have been evaluated objectively, and the fact that he violated his employment contract does not establish misconduct for the purpose of receiving unemployment benefits. We agree.

This Court may only reverse a determination of the MESC Board of Review if it finds that the order is contrary to law or is not supported by competent, material, and substantial evidence on the record. MCL 421.38; MSA 17.540; *Tomei v General Motors Corp*, 194 Mich App 180, 183-184; 486 NW2d 100 (1992). Wrongdoings which may justify termination of employment under a contract do not necessarily qualify as "misconduct" for purposes of the Employment Security Act. *Haganbuch v Plainwell Paper*, 153 Mich App 834, 838; 396 NW2d 556 (1986). An employee's behavior must be reviewed and evaluated objectively, independent from the terms of his employment contract, under the standard set forth by our Supreme Court in *Carter v Employment Comm*, 364 Mich 538, 541; 111 NW2d 817 (1961). *Id.* By evaluating plaintiff's conduct on the basis of the employment contract, and not in light of *Carter*, the MESC's determination was contrary to law.

Frequent and unexcused absences over a short period of time may constitute misconduct as contemplated by the Act, but such a determination should be made by the MESC. *Veterans Thrift v Krause*, 146 Mich App 366, 369 n 1; 379 NW2d 495 (1985). On remand, it will be necessary for the MESC to determine, first of all, if plaintiff's absence from work, due to his incarceration and inability to post bond, was beyond his control. (There are actually two considerations in this analysis: first, is incarceration an event beyond plaintiff's control, and second, is the fact that he could not post bond beyond his control.) If the MESC answers affirmatively, then, as a matter of law, plaintiff's absences cannot support a finding of statutory misconduct.² *Washington v Amway Grand Plaza*, 135 Mich App 652, 658; 354 NW2d 299 (1984). If the MESC answers in the negative, then it must apply the standard set forth in *Carter, supra* at 541, for an objective determination of whether plaintiff's actions amounted to "misconduct"

Because of our conclusion above, we need not address plaintiff's other issue on appeal.

Reversed and remanded to the MESC for proceedings consistent with this opinion.

We do not retain jurisdiction.

/s/ Michael J. Kelly

/s/ Joel P. Hoekstra

/s/ Edward A. Quinnell

¹ Plaintiff testified before the referee that he was incarcerated for eight days and was ultimately put on probation and ordered into alcohol therapy. His discharge was not predicated on criminal misconduct.

² The referee improperly shifted the burden of proof to claimant to establish that his employer was notified during the three day period provided for in the employment contract.