

STATE OF MICHIGAN
COURT OF APPEALS

REMELLE WILLIAMS,

Claimant-Appellee,

v

DETROIT MACOMB HOSPITAL
CORPORATION,

Respondent-Appellant,

and

MICHIGAN EMPLOYMENT SECURITY
COMMISSION,

Appellee/Cross-Appellant.

UNPUBLISHED

August 1, 1997

No. 190504

LC No. 95-519016 AE

MESC No. B93-11160-
131514W

Before: Markey, P.J., and Jansen and White, JJ.

PER CURIAM.

Respondent appeals by leave from a circuit court order reversing the MESC board of review's decision disqualifying claimant from receiving unemployment benefits because she was discharged for misconduct. We reverse the circuit court and affirm the board of review.

Claimant filed for unemployment benefits after respondent discharged her from her employment as a phlebotomist on May 10, 1993. Respondent challenged claimant's entitlement to benefits by asserting that she was discharged for misconduct. The MESC issued a determination and redetermination holding that claimant was disqualified from receiving benefits. Claimant appealed the redetermination to a referee, who presided over a hearing at which claimant denied the substance of some of the alleged employment infractions, denied others in their entirety, denied receiving warnings about some activities, and maintained that her supervisor treated her different from other employees because of her sexual orientation. The referee, however, affirmed the redetermination, finding that

claimant engaged in a pattern of behavior that demonstrated an abuse of respondent's policies regarding absences from work and lack of attentiveness to respondent's expectation that she be at work during her scheduled hours. The referee concluded that claimant's actions amounted to misconduct and further noted that her disruptive conduct after she was on final notice demonstrated a wanton and willful disregard of her employer's interests.

Claimant appealed the referee's decision to the MESC board of review. The board affirmed the referee's decision, finding that claimant committed a number of infractions that were disruptive, including not following policies regarding absences from work and using rude and inappropriate language in the presence of patients and coworkers. The board noted that there was evidence suggesting that claimant's supervisor was prejudiced against her because of her sexual orientation but found that respondent did not discharge claimant for prejudicial reasons. Claimant then appealed the board's decision to the circuit court. The circuit court reversed the board, finding that claimant did not engage in misconduct and that respondent did not have cause to discharge her.

Respondent contends that the circuit court erred in reversing the board of review's decision disqualifying claimant from receiving benefits because she was discharged for misconduct. We agree. This Court reviews a decision of the MESC in the same manner as does the circuit court. See *Blue Water Isles Co v Dep't of Natural Resources*, 171 Mich App 526, 531; 431 NW2d 53 (1988). We review the board's decision to determine whether it is contrary to law or not supported by competent, material and substantial evidence. *Korzowski v Pollack Industries*, 213 Mich App 223, 228; 539 NW2d 741 (1995). "Substantial evidence is that evidence which reasonable minds would accept as adequate to support a decision. It is more than a mere scintilla but less than a preponderance of the evidence." *Id.*

An individual is disqualified from receiving benefits if he was "discharged for misconduct connected with the individual's work." MCL 421.29(1)(b); MSA 17.531(1)(b). In *Carter v Employment Security Comm*, 364 Mich 538, 541; 111 NW2d 817 (1961), the Court adopted the definition of misconduct set forth in *Boynton Cab Co v Neubeck*, 237 Wis 249, 259-260; 296 NW 636 (1941).

"The 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."

Both the use of vulgar language in the workplace and repeated absences from work without good cause and resulting from events within the employee's control may support a finding of misconduct. *Broyles v Aeroquip Corp*, 176 Mich App 175, 179; 438 NW2d 888 (1989); *Washington v Amway Grand Plaza*, 135 Mich App 652, 658; 354 NW2d 299 (1984).

In this case, respondent presented evidence at the referee hearing to establish that claimant repeatedly violated its policies regarding absences from work and used vulgar language in the workplace. Claimant's supervisor described claimant's absences from work and her failure to notify respondent that she would not be returning to work after leaving during the middle of the day. The supervisor also recited numerous disciplinary actions taken against claimant for loud talking and using profanity in the presence of patients and staff. Several of claimant's coworkers testified that she regularly spoke in a loud voice and used profanity that could be heard by patients. According to her supervisor, claimant was suspended three times before she was finally discharged. Claimant, by contrast, denied many of the instances of disciplinary action and maintained that she followed respondent's policies regarding the scheduling and reporting of absences. She maintained that her supervisor treated her different from other employees. In support of this assertion, several of claimant's coworkers testified that the supervisor commented on claimant's sexual orientation and referred to her by derogatory names. However, other coworkers stated that the supervisor did not engage in the alleged conduct.

Upon review of the record, we find that the board's decision was supported by competent, material and substantial evidence. Given the conflicting evidence, this case amounts to a credibility contest, and this Court may not resolve evidentiary conflicts or pass on witness credibility when reviewing the board's decision. See *Smith v Michigan Employment Security Comm*, 410 Mich 231, 260; 301 NW2d 285 (1981), and *Reed v Hurley Medical Center*, 153 Mich App 71, 76; 395 NW2d 12 (1986). When, as in this case, there are two reasonable views of the evidence, this Court must accord due deference to the board's administrative expertise and not invade its province as exclusive factfinder. *Smith, supra*, 410 Mich 260. In light of claimant's well documented history of disciplinary action and the conflicting testimony regarding her supervisor's alleged discriminatory motive, we find that substantial, competent and material evidence supports the board's finding that claimant demonstrated a willful and wanton disregard of respondent's interests by committing a series of infractions involving violations of respondent's policy regarding absences from work and the use of vulgar language in the presence of patients. Accordingly, the circuit court is reversed and the MESC's decision is reinstated.¹

Reversed.

/s/ Jane E. Markey

/s/ Kathleen Jansen

/s/ Helene N. White

¹ Claimant also suggests that the referee erred in considering evidence regarding disciplinary action that was not noted in her personnel record as is required by the Bullard-Plawecki Employee Right To Know Act, MCL 423.501 *et seq.*; MSA 17.62(1) *et seq.* However, claimant failed to preserve this issue by objecting to any evidence on this ground. See *Fresta v Miller*, 7 Mich App 58, 60; 151 NW2d 181 (1967). Given the lack of detail in the record and claimant's failure to identify which documents were not included in her personnel record, we decline to review this unpreserved issue because claimant's substantial rights were not affected by the error, if any. *Wischmeyer v Schanz*, 449 Mich 469, 483; 536 NW2d 760 (1995).