STATE OF MICHIGAN

COURT OF APPEALS

PHILLIPS-JOHNSON, INC,

Plaintiff-Appellant,

v

CYNTHIA M. GALILEI and DEPARTMENT OF LABOR AND ECONOMIC GROWTH/UNEMPLOYMENT INSURANCE AGENCY,

Defendants-Appellees.

UNPUBLISHED
May 11, 2010

No. 291174
Ingham Circuit Court
LC No. 08-000341-AA

Before: BANDSTRA, P.J., and FORT HOOD and DAVIS, JJ.

PER CURIAM.

Plaintiff appeals by leave granted a decision affirming a decision of the Employment Security Board of Review finding that defendant/claimant Cynthia M. Galilei had not committed misconduct and was entitled to unemployment benefits under the Michigan Employment Security Act, MCL 421.1 *et seq*. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Claimant was discharged from her employment after failing to appear for work on November 3, 2006. She had requested that day off to attend her divorce proceeding. It was determined that the proceeding could have been rescheduled. Plaintiff denied her request for the day off, noting that claimant was the sole employee of an insurance office in which premium payments would be received on the day in question, and maintaining that no one was available to cover for claimant on the day in question. There was a dispute as to whether claimant was subsequently granted permission for the day off, but the hearing referee found that she was not. Claimant was apparently not advised that she would lose her job if she failed to report. Plaintiff ultimately was able to make arrangements to have the office covered on the subject day. After the divorce proceeding ended, claimant called her office, apparently to verify that someone was in fact there. She said she did not report for work because she was not told that she needed to do so, and she thought she had the whole day off.

Claimant appealed a determination by the Unemployment Insurance Agency, which concluded that claimant had been discharged from employment for misconduct based on her failure to report for work. A hearing referee agreed with the Agency's determination. Claimant

appealed to the Employment Security Board of Review, which reversed. In pertinent part, the Board concluded that there was no misconduct based on a determination that claimant's absence was beyond her control given the court hearing. Plaintiff then appealed to the circuit court, which concluded that deference should be given to the hearing referee's determination that claimant was not given permission to take the day off. However, the circuit court then held that, regardless, there was no misconduct since "[h]aving to appear in court is a compelling reason not to attend work"; plaintiff was put on notice approximately two months beforehand; claimant was not advised she would lose her job if she did not report for work on the day in question; and plaintiff got someone to cover the office, evincing that it knew that claimant would not report and that it could cover for her.

In *Boyd v Civil Serv Comm*, 220 Mich App 226, 234-235; 559 NW2d 342 (1996), this Court stated:

> [W]hen reviewing a lower court's review of agency action this Court must determine whether the lower court applied correct legal principles and whether it misapprehended or grossly misapplied the substantial evidence test to the agency's factual findings. This latter standard is indistinguishable from the clearly erroneous standard of review that has been widely adopted in Michigan jurisprudence. As defined in numerous other contexts, 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. [See also MCL 421.38(1).]

A circuit court "may reverse an order or decision [of the Board of Review] only if it finds that the order or decision is contrary to law or is not supported by competent, material, and substantial evidence on the whole record." MCL 421.38. "The scope of appellate review clearly includes the soundness of the board of review's interpretation of misconduct." *Broyles v Aeroquip Corp*, 176 Mich App 175, 177; 438 NW2d 888 (1989), quoting *Washington v Amway Grand Plaza*, 135 Mich App 652, 656-657; 354 NW2d 299 (1984). The Board of Review "is vested with independent duty as well as plenary authority to decide each plaintiff'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." *Miller v F W Woolworth Co*, 359 Mich 342, 350; 102 NW2d 728 (1960). However, deference is to be accorded to the findings of fact of the hearing referee. *Smith v Michigan Employment Security Comm*, 410 Mich 231, 260-261; 301 NW2d 285 (1981), quoting *Michigan Employment Relations Comm v Detroit Symphony Orchestra, Inc*, 393 Mich 116, 124; 223 NW2d 283 (1974).

Under MCL 421.29(1)(b), "an individual is disqualified from receiving [unemployment] benefits" if "suspended or discharged for misconduct connected with the individual's work." *Carter v Employment Security Comm*, 364 Mich 538, 541; 111 NW2d 817 (1961), sets forth the definition of "misconduct":

> [C]onduct evincing such willful or wanton disregard of an employer's interest 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. [364 Mich

at 541, quoting *Boynton Cab Co v Neubeck*, 237 Wis 237, 240, 259-260; 296 NW 636 (1941).]

However, there is no misconduct if there is simply

> 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. [*Id*.]

"[E]xcess absenteeism and tardiness *for reasons not beyond the employee's control* constitutes misconduct." *Hagenbuch v Plainwell Paper Co*, 153 Mich App 834, 837; 396 NW2d 556 (1986), citing *Washington*, 135 Mich App at 658 (emphasis added). More specifically,

> tardiness or absences cannot support a finding of statutory misconduct unless it is determined that they were without good cause, which could include personal reasons or other reasons beyond claimant's control. *As a matter of law, tardiness or absences 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*. . . . This interpretation is consistent with the Court's duty to narrowly construe the disqualification provisions of the act so as to further the remedial policy of the act, which is, in part, to provide benefits to persons unemployed through no fault of their own. [*Washington,* 135 Mich App at 658 (citations omitted; emphasis added).]

Preliminarily, the Board of Review's determination that claimant's absence from work was beyond her control was not supported by competent, material, and substantial evidence on the whole record. The uncontroverted evidence established that claimant could have rescheduled the court hearing. She acknowledged that she refused to pursue this alternative because she wanted her divorce to be final as soon as possible. Accordingly, she did have control over whether she had to be absent from work on the day in question.

However, the circuit court based its determination that there was no misconduct on a finding of good cause. Even if permission was not granted, the circuit court noted that claimant was only absent for one day, she timely sought permission, the reason for her absence was not frivolous, she was not advised that the infraction would be viewed as warranting dismissal, and arrangements were apparently made in advance for coverage of the office. While the failure to appear was "unsatisfactory conduct", her belief that the office would be covered and the fact that she called to ensure it was being covered demonstrate that there was no "willful or wanton disregard of an employer's interest". We are not left with a definite and firm conviction that the circuit court erred.

Affirmed.

/s/ Richard A. Bandstra
/s/ Karen M. Fort Hood
/s/ Alton T. Davis