

STATE OF MICHIGAN
COURT OF APPEALS

WAR MEMORIAL HOSPITAL,

Plaintiff-Appellant,

and

STATE OF MICHIGAN, DEPARTMENT OF
LICENSING AND REGULATORY AFFAIRS,
UNEMPLOYMENT INSURANCE AGENCY,

Defendant-Appellee/Cross-
Appellant,

V

BRIDGET NODURFT,

Defendant-Appellee/Cross-
Appellee.

UNPUBLISHED

June 3, 2014

No. 312205

Chippewa Circuit Court

LC No. 11-011983-AE

Before: BECKERING, P.J., and RONAYNE KRAUSE and BOONSTRA, JJ.

PER CURIAM.

In this unemployment compensation case, plaintiff War Memorial Hospital appeals by leave granted¹ the circuit court's order reversing the decision of the Michigan Compensation Appellate Commission (MCAC), which upheld the denial of unemployment benefits to defendant Bridget Nodurft on the basis that she was "discharged for misconduct connected with [her] work." MCL 421.29(1)(b). We reverse and reinstate the MCAC's decision.

I. FACTS AND PROCEDURAL HISTORY

Defendant is a registered nurse that plaintiff employed in its Behavioral Health Center from September 2007 to March 2009. The events that led to defendant's termination from plaintiff's employment occurred around 8 a.m. on March 12, 2009, when defendant refused to

¹ *War Memorial Hosp v Nodurft*, unpublished per curiam order of the Court of Appeals, entered June 12, 2013 (Docket No. 312205).

assist, at the direction of nurse manager Greg Wolf, other staff members in the restraint of an agitated and violent patient. When Wolf confronted defendant shortly after the incident, defendant told him it was his word over hers and pushed him out of the way. Defendant was escorted out of the building that day and, after plaintiff's further investigation, defendant's employment was terminated approximately one week later. Plaintiff cited violation of work rules as the reason for defendant's termination, including insubordination, incompetence, falsification of records, and abuse of a coworker.

Defendant filed a claim for unemployment benefits, which the Unemployment Insurance Agency denied under the misconduct provisions of the Michigan Employment Security Act (MESA), MCL 421.1 *et seq.* An Administrative Law Judge (ALJ) upheld the Agency's decision, finding "that the weight of the evidence supports a finding that Wolf ordered her to assist with the restraint and seclusion, but [defendant] refused to do so," and that defendant did not have a good-faith justification for failing to assist because "the patient had not been subdued by the time that Wolf ordered her to assist with the restraint." The MCAC upheld the ALJ's decision, incorporating the ALJ's decision in its entirety.

Defendant then filed a claim of appeal with the circuit court, which reversed the MCAC's decision upholding the denial of unemployment benefits. The circuit court did not disagree with the MCAC's findings of fact and acknowledged the appropriate standard of review. The circuit court, however, reversed the decision on the basis of its view that the evidence did not support plaintiff's decision to terminate defendant's employment on the basis of insubordination. Rather, according to the circuit court, the evidence at most justified some form of progressive discipline.

II. ANALYSIS

Plaintiff argues that the circuit court erred by considering whether plaintiff's termination decision was proper and by failing to apply the correct standard of review. We agree. On appeal from a circuit court's review of an agency determination, our review is limited to determining "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." *Dana v American Youth Foundation*, 257 Mich App 208, 211; 668 NW2d 174 (2003), quoting *Boyd v Civil Serv Comm*, 220 Mich App 226, 234; 559 NW2d 342 (1996).² In this regard we must be cognizant of the circuit court's standard of review, which is limited to "questions of fact and law on the record made before the administrative law judge and the Michigan compensation appellate commission." MCL 421.38(1). Specifically, "the [circuit] court may reverse an order or decision 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(1). "Substantial evidence is that evidence which reasonable minds would accept as adequate to

² This standard of review is the same as the "clearly erroneous" standard. *Dana*, 257 Mich App at 211. "[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." *Boyd*, 220 Mich App at 235.

support a decision. It is more than a mere scintilla but less than a preponderance of the evidence.” *Korzowski v Pollack Indus*, 213 Mich App 223, 228; 539 NW2d 741 (1995).

The MESA provides that an individual shall be disqualified for benefits if the individual “[w]as suspended or discharged for misconduct connected with the individual’s work or for intoxication while at work.” MCL 421.29(1)(b). As the parties note, the statute does not define the term “misconduct,” but the Michigan Supreme Court has interpreted “misconduct” to mean:

conduct evincing such wilful or wanton disregard of an employer’s interests as is found in [(1)] deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee, or [(2)] in carelessness or negligence of such degree or recurrence as to manifest equal culpability, wrongful intent or evil design, or [(3)] to show an intentional and substantial disregard of the employer’s interests or of the employee’s duties and obligations to his employer. [*Carter v Michigan Employment Security Comm*, 364 Mich 538, 541; 111 NW2d 817 (1961).]

However, there is no misconduct if there is “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.” *Id.*

Thus, in considering the propriety of the MCAC’s decision that defendant’s conduct constituted disqualifying misconduct under MCL 421.29(1)(b), the circuit court was required to focus on whether substantial evidence existed on the record to support the MCAC’s decision that defendant’s actions on March 12, 2009 evinced a willful or wanton disregard of plaintiff’s interests.

Here, the circuit court agreed with the ALJ’s and the MCAC’s findings of fact, i.e., that defendant had been insubordinate, and also acknowledged that reversal was appropriate only if the MCAC’s decision was contrary to law or not supported by the requisite evidence. The circuit court’s decision to reverse, however, is not based on a lack of substantial evidence regarding defendant’s actions, nor is there any clear indication that the circuit court found the MCAC’s decision to be contrary to law. Rather, the circuit court’s sole reason for reversing the MCAC’s decision is that the “evidence does not support [defendant’s] termination,” and instead plaintiff should have employed a system of “progressive discipline.” Whether a termination is proper, however, is irrelevant when considering whether work-related misconduct occurred under MCL 421.29(1)(b). Nowhere in the Supreme Court’s definition of “misconduct” is the propriety of the employer’s authority to terminate an employee taken into consideration. Rather, the focus of the misconduct analysis must be on the claimant’s misconduct, not whether the employer wrongfully discharged the claimant. *Hagenbuch v Plainwell Paper Co*, 153 Mich App 834, 837-838; 396 NW2d 556 (1986) (“[W]rongdoings which may justify termination of employment under a contract do not necessarily qualify as ‘misconduct’ for purposes of the act.”). Consequently, the circuit court committed clear legal error by premising its reversal on the rationale that the evidence did not support plaintiff’s termination decision.

The circuit court compounded this error by failing to apply the standard of review mandated by MCL 421.38(1) to the correct definition of “misconduct.” When the definition of

“misconduct” articulated by *Carter* is applied, it is clear that competent, material, and substantial evidence on the whole record supports the conclusion that disqualifying misconduct occurred. Here, the ALJ found that Wolf ordered defendant to assist in the restraint of the patient, but defendant refused to do so even though the patient had not been subdued at the time of the request. Substantial evidence supports this finding: Wolf and three other employees who were present testified that Wolf ordered defendant to assist in the restraint and that defendant refused, even though the patient continued to scream, kick, bite, and spit at the staff. The ALJ’s finding of misconduct was further based on the lack of a good-faith error in judgment, since defendant’s refusal to assist when the patient was not yet subdued put defendant’s coworkers and the patient in danger of injury. Indeed, the employees involved in the restraint testified that they were having difficulty restraining the patient and that the potential for injury to the staff, the patient, and other patients existed at the time that defendant refused to assist. Accordingly, the ALJ’s findings, which the MCAC adopted, are supported by competent, material, and substantial evidence on the record and demonstrate that defendant acted in “willful and wanton disregard” of her employer’s interests by deliberately refusing to assist, at the direction of her supervisor, in the restraint of an agitated and violent patient. See *Carter*, 364 Mich at 541.

Defendant, nonetheless, contends that the circuit court’s decision should be affirmed because the MCAC’s decision is not supported by substantial evidence. In so arguing, defendant adopts her version of the events that occurred on March 12, 2009, positing that she acted in good faith by exercising her professional judgment that she need not assist in the physical restraint of the patient. However, as is apparent from the ALJ’s findings, neither the ALJ nor the MCAC found defendant’s testimony credible in light of the multiple contrary testimonies of other employees. Certainly defendant’s testimony provides some evidence that she was exercising her professional judgment in good faith, but this Court is to accord deference to the ALJ, who is in a better position to make such credibility determinations. See *Smith v Michigan Employment Security Comm*, 410 Mich 231, 260-261; 301 NW2d 285 (1981).

Defendant also argues that substantial evidence of misconduct is lacking because the “best evidence” of the incident—a video without sound recording—was not admitted into evidence. However, that the video was not introduced does not mean that other evidence, in the form of witness testimony, cannot comprise material, competent, and substantial evidence of misconduct. Defendant cites no authority for the proposition that the requisite evidence must be comprised of the “best evidence.” Moreover, we note that neither party moved for the admission of the video and defendant should not be afforded relief on appeal for her own failure to request admission of the video.

In sum, the MCAC's decision is supported by competent, material, and substantial evidence on the record and is not contrary to law. The circuit court's opinion justified reversal premised on irrelevant considerations contrary to the definition of "misconduct" and failed to apply the standard of review to the proper definition of "misconduct." Thus, the circuit court failed to apply correct legal principles.³ Accordingly, we reverse and reinstate the MCAC's decision upholding the denial of unemployment benefits to defendant.

Reversed.

/s/ Jane M. Beckering
/s/ Amy Ronayne Krause
/s/ Mark T. Boonstra

³ Plaintiff additionally argues that reversal is required because the circuit court elicited information from defendant during oral argument. Because we have already decided that reversal is required, it is not necessary for us to consider whether reversal is also required on this basis.