STATE OF MICHIGAN

COURT OF APPEALS

RONALD G. BERGLUND,

Petitioner-Appellee,

v

INDUSTRIAL TECHNOLOGY INSTITUTE,

Respondent-Appellant,

and

DEPARTMENT OF ENERGY, LABOR & ECONOMIC GROWTH, UNEMPLOYMENT INSURANCE AGENCY,

Appellee.

UNPUBLISHED
July 21, 2011

No. 298227
Wayne Circuit Court
LC No. 08-119311-AE

Before: TALBOT, P.J., and HOEKSTRA and GLEICHER, JJ.

PER CURIAM.

Industrial Technology Institute, d/b/a Michigan Manufacturing and Technology Center (hereinafter "ITI"), appeals the circuit court order reversing the decision of the Employment Security Commission Board of Review, which upheld the denial of unemployment benefits to Ronald Berglund by the Unemployment Insurance Agency. We reverse.

This appeal arises from the termination of Berglund's employment for using ITI's equipment to print materials unrelated to his employment and for using his computer to access inappropriate websites. ITI argues that the circuit court erred in reversing the decisions of an administrative law judge (hereinafter "hearing referee") and the board of review because those decisions were supported by competent, material, and substantial evidence. We agree.

In its review of an administrative decision on a claim for unemployment benefits:

> The circuit court . . . may review questions of fact and law on the record made before the referee and the board of review . . . but the 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. . . .[1]

"'[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.'"[2]

"[A]n individual is disqualified from receiving benefits if he or she . . . [w]as suspended or discharged for misconduct connected with the individual's work. . . ."[3] "[P]rovisions regarding the disqualification from benefits are to be construed narrowly."[4] "[T]he employer bears the burden of proving misconduct."[5] Our Supreme Court has defined "misconduct" as follows:

> [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.[6]

The Court also specified what conduct does not comprise "misconduct" under the applicable statutory provision[7], stating:

> [M]ere 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.[8]

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[1] MCL 421.38(1).

[2] *Motycka v Gen Motors Corp*, 257 Mich App 578, 581; 669 NW2d 292 (2003), quoting *Boyd v Civil Serv Comm*, 220 Mich App 226, 234; 559 NW2d 342 (1996).

[3] MCL 421.29(1)(b).

[4] *Korzowski v Pollack Indus*, 213 Mich App 223, 228; 539 NW2d 741 (1995).

[5] *Id*.

[6] *Carter v Employment Security Comm*, 364 Mich 538, 541; 111 NW2d 817 (1961), quoting *Boynton Cab Co v Neubeck*, 237 Wis 249, 259-260; 296 NW 636 (1941).

[7] MCL 421.29(1)(b).

[8] *Carter*, 364 Mich at 541.

The hearing referee found that at the time Berglund was placed on work probation he was directed not to use ITI's resources or equipment to further his outside employment. This finding is supported by Human Resources Director Katrina Glowzinski's testimony that Berglund was told that he "was absolutely not to use our copiers, our printers, our computers to do his Central Michigan teaching." The hearing referee further found that Berglund downloaded materials associated with his outside employment on September 13, 2007. Berglund admitted that he printed a paper from a CMU student that had been emailed to him.

The hearing referee also found that on September 13, 2007, Berglund "visited a number of web sites that were totally inappropriate to be visited" and that these websites included "some that displayed nudity." These findings are supported by the testimony of Berglund's manager, Jim Rice, that he saw an image of scantily dressed teenage girls on Berglund's computer screen at a website with a title of or involving the words teenagecheerleaders.com. Glowzinski testified Berglund had accessed other websites including "[s]extelevision.net, swimsuit models, and Victoria's Secret." Information Technology Manager Eric Fisher testified that Rice and another ITI person examined the websites visited by Berglund's computer and found that several contained nudity and were considered pornographic. A Playboy website had been accessed on the days investigated by Fisher. Glowzinski deemed the "sexy model" and "sex television" websites as inappropriate. Although Berglund did not express an opinion about whether the websites he viewed on September 13 or 14 were inappropriate, he admitted receiving and keeping emails that he deemed inappropriate. He acknowledged that some of the emails he kept were pornographic and that he "might have" instructed his computer to access a site like sextv.com.

The hearing referee found that "in an eight hour day the records reflect some 3½ to 4 hours of visiting those types of sites," which was consistent with testimony elicited from Glowzinski, who stated that "inappropriate non-company" websites were open for 3½ to 4 hours. Thus, the hearing referee's finding is supported by competent, material, and substantial evidence.

From these findings, the hearing referee determined that Berglund was guilty of misconduct. The hearing referee stated:

> There is some diametrically opposed evidence from the respective parties, however, the evidence provided by the employer where it is at odds with that of the claimant, is deemed superior in weight, quality and credibility. Accordingly, it is concluded based upon the believable evidence, that the claimant was guilty of the violation of the probation and the violation of the directive as well as engaging in the inappropriate computer use and is considered guilty of misconduct connected with the employment for which he was discharged.

The board of review agreed.

The hearing referee and board of review did not err in determining that accessing websites displaying nudity using ITI's computer constituted "misconduct." Berglund's position was that whatever he did, it did not affect his work performance at ITI. He emphasizes that personal use of the work computer was allowed at ITI, and contends that his conduct did not amount to "willful or wanton disregard of an employer's interests as is found in deliberative

violations or disregard of standards of behavior."[9] Berglund did acknowledge when testifying that accessing websites of this nature leads to spam, pop ups, and cookies. He recalled "a big incident" in which "we had lots of cookies coming through" and ITI had to change its filter "to prevent these sorts of sites from being attached." An employer has an interest in maximizing the capability of its network. An employee who deliberately accesses websites that hinders the work network's capability harms the interests of the employer. Contrary to Berglund's position that his actions were immaterial, use of the employer's computer equipment to access websites with nudity is not the equivalent of keeping a magazine in a desk drawer.

The circuit court reversed the decisions of the hearing referee and board of review because it believed that proof that the websites were inappropriate was lacking. The court opined, "Although there was testimony regarding the alleged access of inappropriate sites, there were no documents or exhibits entered into the record to support the allegation that the sites were clearly or undoubtedly inappropriate. . . ." Contrary to the position of the circuit court, the testimony alone provided competent, material, and substantial evidence to support the hearing referee's finding that the websites were inappropriate.

The circuit court also noted that there was inadequate evidence that Berglund was "instructed not to access those sites." Although the court is correct that there was no evidence that Berglund was specifically warned not to access inappropriate websites, "misconduct" as defined by our Supreme Court, does not require a warning.[10]

Finally, the circuit court noted, "[T]here is little to support the employer's assertion that Appellant was instructed not to print or use the employer's resources for outside activities." Yet, Glowzinski testified that at a September 11 meeting Berglund was told that he "was absolutely not to use our copiers, our printers, our computers to do his Central Michigan teaching." Glowzinski's testimony provided competent, material, and substantial evidence to support the hearing referee's determination that Berglund had been directed not to use ITI's resources for his outside employment, and violated this directive when he printed his student's paper.

Because the hearing referee's findings, which were accepted by the board of review, are supported by the evidence and reflect a correct application of the law, the circuit court erred in overturning the board of review's decision affirming the hearing referee's denial of benefits.

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[9] *Id.*

[10] *Id.*

Accordingly, we reverse the circuit court's decision and reinstate the board of review's decision upholding the denial of unemployment benefits to Berglund.

Reversed.

/s/ Michael J. Talbot
/s/ Joel P. Hoekstra
/s/ Elizabeth L. Gleicher