

STATE OF MICHIGAN
COURT OF APPEALS

LINDA M. SHEPPARD,

Claimant-Appellant,

v

MEIJER GREAT LAKES LIMITED, and
DEPARTMENT OF ENERGY, LABOR &
ECONOMIC GROWTH, UNEMPLOYMENT
INSURANCE AGENCY,

Appellees.

UNPUBLISHED
December 20, 2012

No. 300681
Washtenaw Circuit Court
LC No. 10-000383-AE

Before: WHITBECK, P.J., and FITZGERALD and BECKERING, JJ.

PER CURIAM.

Claimant Linda Sheppard appeals as on leave granted the circuit court's order affirming the determination of the Michigan Employment Security Commission Board of Review (the Board of Review) that Sheppard is ineligible for unemployment benefits under the Michigan Employment Security Act because Sheppard voluntarily left her employment under MCL 421.29(1)(a). We vacate the orders of the circuit court and the Board of Review, and remand for reinstatement of Sheppard's unemployment benefits.

I. BACKGROUND FACTS

Sheppard worked as a full-time receptionist for Baseline T & E, Inc. (Baseline), and as a part-time clerk for Meijer Great Lakes Limited (Meijer). In February 2009, Baseline terminated Sheppard's employment because of its financial difficulties. Sheppard then requested a two month leave of absence from Meijer. Sheppard's last day of work was February 8, 2009.

Tom Milam, Sheppard's supervisor at Meijer, testified that he spoke with Sheppard and explained that she would need a formal written approval from the store director, Jason Hicks, for her leave of absence. Milam testified that he assumed that Sheppard requested and received formal approval. Sheppard testified that she believed Milam received the approval. Milam testified that Sheppard "left believing that she had a[n] approval to have a voluntary leave." Sheppard's employment file did not contain a written approval for a voluntarily leave of absence, and Hicks determined that Sheppard's leave was not properly authorized. Hicks terminated Sheppard's employment on March 29, 2009.

Sheppard began receiving unemployment benefits in April 2009. Meijer protested Sheppard's unemployment claim and requested a redetermination, claiming that Sheppard had voluntarily resigned. The Unemployment Insurance Agency determined that Sheppard was not qualified for unemployment benefits because of misconduct.¹ After a hearing, the hearing referee concluded that Sheppard "did not receive approval from [Meijer] for her 2 month vacation. As a result, [Sheppard] was discharged by [Meijer]." The hearing referee, too, determined that Sheppard was not qualified for employment benefits because of misconduct.

Sheppard appealed the hearing referee's decision to the Board of Review. In a 2 to 1 decision, the Board of Review affirmed the referee's determination because Sheppard "abandoned her employment when she left work without first securing proper approval for a leave of absence." The Board of Review thus modified the hearing referee's determination and determined that Sheppard was disqualified from unemployment benefits on a different basis, the voluntarily leaving provision,² and not because of misconduct.

Sheppard appealed the Board of Review's decision to the circuit court, arguing that Meijer actually discharged her, Meijer did not present any evidence that she left work voluntarily, and that her leave of absence did not qualify as "quitting work" under MCL 421.29(1)(a). The circuit court determined that

the undisputed facts show that [Sheppard] voluntarily left work on February 8, 2009 for a two-month leave of absence. Therefore, the remaining issue is whether [Sheppard's] voluntary leaving was "without good cause attributable to the employer."

Without determining whether Sheppard abandoned her employment or voluntarily quit work, the circuit court affirmed the Board of Review's decision that Sheppard was not eligible for unemployment benefits.

Sheppard applied for leave to appeal, primarily arguing that she did not voluntarily leave work under MCL 421.29(1)(a). A panel of this Court denied Sheppard's application for leave to appeal, but the Michigan Supreme Court remanded this case for our determination as on leave granted.³

¹ MCL 421.29(1)(b).

² MCL 421.29(1)(a).

³ *Sheppard v Meijer Great Lakes Ltd*, 490 Mich 1004; 807 NW2d 708 (2012).

II. THE VOLUNTARY LEAVING PROVISION OF THE MICHIGAN EMPLOYMENT SECURITY ACT

A. STANDARD OF REVIEW

When this Court reviews a lower court’s review of an agency’s decision, we 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.”⁴ When reviewing an agency’s decision, a court’s review is limited to determining whether the agency’s action was authorized by law, and whether the agency’s findings of fact “are supported by competent, material, and substantial evidence on the whole record.”⁵ An agency’s decision is not authorized by law if it violates a statute or constitution, exceeds the statutory authority or jurisdiction of the agency, is made after unlawful procedures that result in material prejudice, or is arbitrary and capricious.⁶ An agency’s “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.”⁷

B. THE MICHIGAN EMPLOYMENT SECURITY ACT

The Michigan Employment Security Act governs unemployment benefits.⁸ The purpose of this Act is to “provide benefits for periods of unemployment . . . [to] persons unemployed through no fault of their own[.]”⁹ Unemployment benefits are not available to a person whose separation from employment is his or her own fault.¹⁰ An employee may be disqualified from unemployment benefits under the Act under a variety of circumstances, including if the employee “[l]eft work voluntarily without good cause attributable to the employer[.]”¹¹ Courts construe these exceptions narrowly.¹²

C. VOLUNTARY TERMINATION UNDER THE ACT

We conclude that the circuit court did not apply the correct legal principles when it determined that the Board of Review’s decision was authorized by law. The Board of Review

⁴ *Boyd v Civil Service Comm*, 220 Mich App 226, 234; 559 NW2d 342 (1996).

⁵ *Id.*; Const 1963, art 6, § 28.

⁶ *Ross v Blue Care Network*, 480 Mich 153, 183; 747 NW2d 828 (2008).

⁷ *Boyd*, 220 Mich App at 235.

⁸ MCL 421.2; *Jenkins v Employment Sec Comm*, 364 Mich 379, 391; 110 NW2d 899 (1961).

⁹ MCL 421.2(1).

¹⁰ *Jenkins*, 364 Mich at 391.

¹¹ MCL 421.29(1)(a).

¹² *Korzowski v Pollack Industries*, 213 Mich App 223, 229; 539 NW2d 741 (1995).

erred as a matter of law when it determined that Sheppard left work voluntarily and was thus disqualified for unemployment benefits under MCL 421.29(1)(a). When analyzing MCL 421.29(1)(a), the first step is to determine whether the employee voluntarily left work.¹³ If the employee did not voluntarily leave work, “the inquiry ends and [the employee] is entitled to unemployment compensation.”¹⁴

The Board of Review erred when it determined that Sheppard voluntarily *quit her job* when she took two-month leave of absence. “A voluntary departure is an intentional act.”¹⁵ When determining whether an employee voluntarily left work, “[t]he threshold question[is] whether the claimant voluntarily quit the job, or was discharged[.]”¹⁶ This Court has held that when an employee requests a leave of absence, and the employer actually terminates the employee’s employment, that employee has not voluntarily quit.¹⁷ In these circumstances, this Court has specifically “decline[d] to create a doctrine of constructive voluntary leaving applicable where, as here, the claimant was in fact discharged and the employer failed to sustain the discharge as one for misconduct connected with work.”¹⁸

Here, Meijer actually terminated Sheppard’s employment. Because Sheppard was discharged, her departure was not voluntary. Thus, we conclude that the Board of Review erred in applying MCL 421.29(1)(a) when it determined that Sheppard voluntarily quit her job.

Meijer argues that this case is controlled by the Michigan Supreme Court’s decision *Jenkins*. We disagree. *Jenkins* concerned a plaintiff who was “disqualified because of misconduct connected with his work,” when he left work half a day early after his foreman denied his request to do so.¹⁹ The Michigan Supreme Court cited *Jenkins* when it held that applying the voluntary leaving provision to a case where an employee is absent from work is inappropriate, and that such a case is properly analyzed under the misconduct provision.²⁰

Further, the Board of Review here determined that Sheppard “abandoned her employment when she left work without first securing proper approval for a leave of absence.” However, the Board of Review did not analyze whether Sheppard abandoned her employment

¹³ *Warren v Caro Community Hosp*, 457 Mich 361, 366; 579 NW2d 343 (1998); *McArthur v Borman’s, Inc*, 200 Mich App 686, 690; 505 NW2d 32 (1993).

¹⁴ *Warren*, 457 Mich at 366-367.

¹⁵ *McArthur v Borman’s, Inc*, 200 Mich App 686, 690; 505 NW2d 32 (1993).

¹⁶ *Clarke v North Detroit General Hosp*, 437 Mich 280, 284; 470 NW2d 393 (1991); see *Warren*, 457 Mich at 366.

¹⁷ *Ackerberg v Grant Community Hosp*, 138 Mich App 295, 300; 360 NW2d 599 (1984).

¹⁸ *Id.*

¹⁹ *Jenkins*, 364 Mich at 379, 389.

²⁰ *Wickey v Appeal Board of Mich Employment Security Comm*, 369 Mich 487, 503-504; 120 NW2d 181 (1963).

under MCL 421.29(1)(a), and no factual findings support its determination that Sheppard abandoned her employment. The Act includes provision in which an individual who fails to report for work has voluntarily left that work:

An individual who is absent from work for a period of 3 consecutive work days or more without contacting the employer in a manner acceptable to the employer and of which the individual was informed at the time of hire shall be considered to have voluntarily left work without good cause attributable to the employer.^[21]

This statutory language is missing from the Board of Review's quotation of this statute in its opinion, and there is no analysis of this applicable statutory provision. Further, the record contains no findings that Sheppard was absent on any work day, and does not contain any evidence that Sheppard did not report for work on a day Meijer expected her to work.

We conclude that the circuit court erred when it determined that the Board of Review applied the correct legal principles. Under the law pertaining to MCL 421.29(1)(a) and the factual findings in the record, Sheppard did not voluntarily quit her job. Thus, "the inquiry ends and she is entitled to unemployment compensation."²²

D. MISCONDUCT UNDER THE ACT

Meijer argues that even if we conclude that the Board of Review improperly determined that Sheppard voluntarily left her employment, we should affirm her denial of unemployment benefits because she committed misconduct under MCL 421.29(1)(b). Generally we do not have jurisdiction to determine an issue on which a party has not exhausted its administrative remedies.²³ Here, the Board of Review determined that MCL 421.29(1)(b) did not apply and vacated the hearing referee's conclusion that Sheppard committed misconduct. Meijer did not appeal this decision to the circuit court, which has authority to review the decisions of the Board of Review,²⁴ and the circuit court did not consider this issue. Thus, Meijer has not exhausted its administrative remedies and we cannot consider this issue.

III. CONCLUSION

Because Meijer terminated Sheppard's employment, Sheppard did not voluntarily quit under MCL 421.29(1)(a). We therefore conclude that the circuit court did not apply the proper

²¹ MCL 421.29(1)(a).

²² *Warren*, 457 Mich at 366-367.

²³ *Citizens for Common Sense in Gov't v Attorney General*, 243 Mich App 43, 50; 620 NW2d 546 (2000); see *Ackerberg*, 138 Mich App at 299 ("Courts will not act in contravention of administrative agencies where the remedies available through the administrative channels have not been pursued to completion.")

²⁴ MCL 421.38.

legal standards to determine whether the Board of Review's denial of Sheppard's unemployment benefits was authorized by MCL 421.29(1)(a). We conclude that it was not. We vacate the decisions of the circuit court and Board of Review and remand for reinstatement of Sheppard's unemployment benefits. We do not retain jurisdiction.

/s/ William C. Whitbeck

/s/ E. Thomas Fitzgerald

/s/ Jane M. Beckering