STATE OF MICHIGAN

COURT OF APPEALS

CAROL ANN RICCARDI,

Claimant-Appellant,

v

OAKLAND GENERAL HEALTH SYSTEMS and BUREAU OF WORKERS' AND UNEMPLOYMENT COMPENSATION,

Respondents-Appellees.

UNPUBLISHED
January 10, 2006

No. 256164
Saginaw Circuit Court
LC No. 04-050903-AE

Before: O'Connell, P.J., and Smolenski and Talbot, JJ.

PER CURIAM.

Appellant appeals by leave granted from the order of the circuit court affirming the decision of the Employment Security Board of Review that she was disqualified from receiving unemployment benefits on the ground that her excessive absenteeism constituted misconduct. We reverse and reinstate the initial determination that appellant is entitled to unemployment benefits. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Appellant worked at St. John Oakland Hospital, under the auspices of respondent Oakland General Health Systems, from May 1, 2001 until December 10, 2002. Respondent maintained a "no-fault" attendance system, which set forth a schedule detailing how escalating amounts of absenteeism within a twelve-month period would result in penalties escalating from warnings to suspensions to dismissal.

Appellant accumulated absences well exceeding the amounts triggering termination under respondent's policy. There is no documentation concerning the reasons for some absences, but the great majority were attributable to illness, doctor visits, car trouble, or problems at home. Respondent issued warnings and imposed a suspension in response to appellant's absenteeism, then discharged her for that reason on December 10, 2002.

Appellant sought unemployment benefits. The Bureau of Workers' and Unemployment Compensation initially concluded that appellant was entitled to benefits because she was not discharged for a deliberate disregard of her employer's interests. Respondent appealed, and the administrative law judge ruled that appellant was disqualified from receiving unemployment benefits because she engaged in misconduct connected with her work. See MCL 421.29(1)(b).

Appellant appealed to the Board of Review, asserting that her absences should not be considered misconduct because most were justified by medical or other legitimate excuses. With one member dissenting, the Board of Review affirmed the decision of the administrative law judge. Appellant unsuccessfully sought rehearing, then filed her appeal in the circuit court. The circuit court affirmed the decision of the Board of Review, and stated:

> [T]his Court finds competent and substantial evidence that Respondent-Employer established a prima facie case of excessive absences or tardies. The evidence also established that Claimant was well aware of her attendance problem but made very little effort to correct it. Since Respondent-Employer demonstrated Claimant's misconduct, the burden then shifts to her to provide a legitimate explanation for the absences.
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> Claimant argues that absences which result from events beyond the employee's control or which are otherwise with good cause cannot form a basis for a finding of misconduct. Further, the employer at the ALJ hearing below testified that it has a "no fault" attendance policy, but there was no testimony to establish what that policy was.
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> This argument is unpersuasive. [T]he facts clearly indicate that the claimant was aware of the policy with respect to the attendance, the manner and means by which the policy was enforced. Further, the ALJ . . . found that claimant was aware that her job was in jeopardy and that she failed to correct her attendance. Even in light of [exhibits explaining certain previously unexplained absences], this Court finds Claimant in violation of the attendance policy based on misconduct.
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> The Court finds Respondent has submitted competent material and sufficient evidence to support the findings of the ALJ. Further, the evidence and arguments presented by Claimant did not substantiate or justify a reversal of the decision of the ALJ.

We granted leave to appeal. Appellant's sole issue is whether the circuit court and the Board of Review erred in regarding absences for medical reasons or other good cause as misconduct disqualifying appellant from employment benefits. We conclude that they did.

Except where some other scope of review is expressly provided for by statute or constitution, judicial review of decisions of an administrative agency is limited to determining whether a party's rights have been prejudiced because the agency's decision misapplied substantive or procedural law, was arbitrary, capricious, or an abuse of discretion, or was not supported by competent, material, and substantial evidence on the whole record. MCL 24.306(1).

MCL 421.29(1)(b) provides that "[a]n individual is disqualified from receiving unemployment benefits if he or she . . . [w]as . . . discharged for misconduct connected with the individual's work . . . ." "Misconduct," for this purpose,

> "is limited to conduct evincing such wilful 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. 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' . . . ." [*Carter v Employment Security Comm'n*, 364 Mich 538, 541; 111 NW2d 817 (1961), quoting and adopting *Boynton Cab Co v Neubeck*, 237 Wis 249, 259, 260; 296 NW 636 (1941).]

"It is well established that excess absenteeism and tardiness for reasons not beyond the employee's control constitutes misconduct under MCL 421.29(1)(b) . . . ." *Hagenbuch v Plainwell Paper Co*, 153 Mich App 834, 837; 396 NW2d 556 (1986). However, "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 [the] claimant's control." *Washington v Amway Grand Plaza*, 135 Mich App 652, 658; 354 NW2d 299 (1984), citing *Carter, supra* at 541. The employer bears the burden of proving statutory misconduct. *Washington, supra* at 658.

The administrative law judge concluded that appellant was aware of respondent's attendance policy, but took no steps to correct the problems with her attendance. The administrative law judge issued no factual findings discrediting appellant's explanations, but concluded nonetheless that her persistent absenteeism constituted misconduct. The circuit court likewise acknowledged that appellant attributed her absences to good cause or reasons beyond her control, and made no factual findings discounting those explanations, but reiterated that because "appellant was aware that her job was in jeopardy" and failed to take corrective measures, a finding of misconduct was appropriate. We conclude that these tribunals failed to appreciate that absences for good cause, however persistent, cannot constitute misconduct for purposes of denying unemployment benefits. *Washington, supra* at 659 ("[I]t is well established that what may justify discharge from employment does not necessarily constitute statutory misconduct sufficient to disqualify the employee for unemployment benefits.").

Because appellant has put forward good reasons for the great majority of her absences, and because no tribunal below issued any findings to the contrary, the administrative law judge, the Board of Review, and the circuit court erred in concluding that appellant's absences constituted misconduct for purposes of disqualifying her for unemployment benefits.

For these reasons, we reverse the orders of those tribunals and reinstate the initial determination that appellant is entitled to unemployment benefits.

Reversed. We do not retain jurisdiction.

/s/ Peter D. O'Connell
/s/ Michael R. Smolenski
/s/ Michael J. Talbot