Appeal Docket No. B54-749-15677
Social Security No. [redacted]
L. O. No. 04
DI PG 10.23

15677

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

EDGAR BORG,

Appellant,

-vs-

THE APPEAL BOARD OF THE MICHIGAN UNEMPLOYMENT COMPENSATION COMMISSION,

and the

MICHIGAN UNEMPLOYMENT COMPENSATION COMMISSION,

Appellees.

No. 277,192

Harold A. Cranefield
Winston L. Livingston
Kurt L. Hanslowe
Redmond H. Roche, Jr.
Attorneys for Appellant

Thomas M. Kavanagh, Attorney General
for the State of Michigan,
By: John J. Long
Attorneys for Michigan Employment
Security Commission

OPINION.

In this case an appeal has been filed, pursuant to Section 38 (Par. 17.540, M.S.A) of the Michigan Employment Security Act, from the decision of the Michigan Employment Security Appeal Board, upholding, without opinion, the decision of the Referee. Edgar Borg, the claimant-appellant, was held to be disqualified from receiving unemployment compensation benefits for the period

between November 25, and December 4, 1953. In addition, thirty benefit weeks were cancelled, and it was held that no benefit year had been established.

The principal question involved is whether Borg, the claimant and appellant, is eligible for unemployment compensation benefits on account of a lay-off through lack of work.

Borg started to work for the Ansaldi Tool & Engineering Company in October, 1952, and worked through April of 1953. At that time he was laid off. He returned to work in June of 1953. On November 25, 1953, his employment was suspended, the reason being the cause of the present dispute. He returned to work on December 4, 1953, and continued working intermittently until December 16 that year, at which time it appeared that he quit. His cessation of work on December 16, is not involved in the instant case. It was agreed by counsel that the period involved herein is the claimant's unemployment from November 25 to December 4, 1953.

The Referee, as upheld by the Appeal Board, held that the claimant left work voluntarily on November 25, 1953 and had failed to establish that the cause of leaving was attributable to the employer; and also held that the claimant was under an obligation to establish by a preponderance of the evidence that there was no disqualification from receiving benefits under Section 29 (1) (a) of the Act, (Para. 17.531 M.S.A.) In the words of the Referee:

> "Accepting the testimony of the claimant and of his witness, at face value, it is fair to say that the claimant has made out a case of leaving with good cause attributable to the employer; that is , to say, he has shown that he was not engaged full time, and that on November 25, he completed work in which he was then engaged and had reason to believe that there was no more work available for him. * * * Accepting the testimony by the employer, at face value, it is fair to state that the employer has also made out a case of a leaving of the work by claimant, but not for any reason for which the employer may be held responsible.
>
> "After a careful study of the record in this case, the Referee is of the opinion that the testimony submitted by the claimant and his witness is equally balanced with the testimony given by the employer. It does not appear logical to say that the claimant's testimony preponderates. It is therefore held, as a matter of law, that the claimant has failed to sustain the burden of proof in this case. Accordingly, claimant left said work without good cause attributable to the employer. It is so held as a matter of law."

It is difficult to see how the Referee reached the conclusion that Borg had quit work on November 25, 1953 and was ineligible for benefits, in view of the

testimony. His testimony is quoted as follows:

"Q All right. You filed an application for unemployment benefits on November 30, 1953, and you show your last day of work was November 25, 1953. Was that correct?

A That's right.

Q Why did you stop working on November 25?

A There was no work. I didn't stop. That was --

Q You say you didn't stop. You mean you continued working?

A Well, that was the last day I worked, that week, see, and that's all the work there was. There was no more work anyway. (R. p. 5)"

Q Did he (employer) tell you when to return?

A No; he didn't. He was supposed to call me by phone when he gets the material, the steel from his client or jobber.

Q What do you mean, did he promise to call you when he had more work?

A Yes sir. * * *" (R. p. 6)

Q Now, we will go over that letter a little more piece-meal, Mr. Borg. He states here that you wouldn't work more than five hours a day, six days a week, on account of having another job outside. Is that correct?

A No, sir.

Q Were you willing to work more than five hours a day?

A Yes sir.

Q Did you ever work more than five hours a day?

A Absolutely. I worked from October 10 to April 1st full time, and overtime along with it.

Q How about the period just preceding November 25, were you willing to work more than five hours a day?

A Yes sir.

Q Did he ask you to work six days a week?

A He never asked me to work six days a week. I worked six days a week, but part time each day. (R. p. 10)

Q On November 25 were you willing to work full time?

A Yes sir.

Q Regular eight hours a day?

A Yes sir.

Q Were you able to work full time?

A Yes sir. (R. pp 12, 13)

The claimant's uncontradicted testimony shows that he was actively engaged in seeking full-time work before and after November 25, 1953.

In view of this testimony, the court finds that the holding of the Referee, that Borg voluntarily left his employment on November 25, 1953, was erroneous, clearly being against the great weight of the evidence. The testimony of the employer, Ansaldi, was vague, contradictory and replete with instances of lack of recollection. His testimony does not impress the court.

It is well established that the burden of proof was upon the employer to establish disqualification under Section 29 for alleged misconduct. (Leonora Allen v. UCC, Para. 1970.03, CCH, UIR) On the question of disqualification for voluntarily leaving without good cause attributable to the employer, it appears to the court that the burden of proof is upon the employer to establish that voluntary leaving took place. This burden the employer has failed to sustain.

The ruling of the Appeal Board and of the Referee must, therefore, be set aside. An order may be entered allowing compensation for the period in question, reinstating plaintiff's thirty credit weeks, and establishing the full benefit year.

While the attorney general has requested that the matter be remanded for the purpose of taking additional testimony, the court does not consider it necessary, since the court is satisfied with the record as presented.

Theodore R. Bohn
Circuit Judge

February 28, 1955.