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STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

IN THE MATTER OF THE CLAIM OF
JOANNE M. ILITCH,

Appellant,

-vs- Case No. 84-407788-AE

CITY OF LIVONIA and MICHIGAN
EMPLOYMENT SECURITY COMMISSION,

Appellees.

O P I N I O N

This is an appeal from the July 14, 1983 decision of the MESC Board of Review, affirming a Referee's decision of May 21, 1982, that Appellant was disqualified from benefits for the reason that she had voluntarily left her employment within the meaning of Section 69(2)(a) of the MES Act.

The Appellant was employed as a home delivery meals coordinator under a contract that was to expire on September 30, 1981 and contends that she was discharged by her supervisor one week before the contract was to end. The meeting from which Appellant gained the impression that she was fired was a brief one and there is a fundamental dispute about precisely what was said by Appellant's supervisor at the time; Appellant claiming that she was advised that her job was being terminated; the supervisor stating that due to administrative changes in the program Appellant's specific position would not be budgeted but that other opportunities for essentially the same work would be

available in the ensuing contract period.

Whatever the form of the exchange between Appellant and her supervisor, Appellant's impression was that her employment was thereupon terminated and, without any further discussion, she cleaned out her desk and left her place of employment. Apparently Appellant formed her impression on the basis of the manner in which the employment of a Project Director, Ms. Wynn Zurek, had been terminated at an earlier date.

Two fundamental issues are raised on this appeal. First, was there competent, material and substantial evidence to support the Referee's and the Board's decision that Appellant had voluntarily left her employment and, second, whether the Referee erred in declining to accept into evidence an Affidavit of Ms. Zurek which Appellant indicated she had available as additional evidence in her behalf.

In connection with the first issue there arises the ancillary question of who has the burden of proof in this matter. It is the Appellant's claim that she "...does not have the burden of proving discharge in a voluntary quit case."

The standard of review of a decision by the Appeal Board is clearly set forth in MCIA 421.38; MSA 17.540:

> "Sec. 38. The circuit court.....may review questions of fact and law on the record made before the referee and the appeal board involved in a final order or decision of the appeal board, and may make further orders in respect thereto as justice may require, 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."

The whole record in this case convinces this Court that neither the Referee nor the Board of Review erred in concluding that Appellant had voluntarily quit her employment and was thus disqualified from benefits. The only reasonable construction any finder of fact could make of the testimony presented before the Referee is that Appellant entered the meeting with her supervisor on September 23, 1981 subjectively preconditioned to the conclusion that she was about to be fired. There is nothing in her own testimony, or in any testimony on which she relies, that supports her conclusion that she was being peremptorily discharged. It can only be construed to be a perfectly reasonable approach on the part of a supervisor to call in a contract employee at a time when the term of the contract will soon be expiring and discuss with her the status of the program. On the other hand, it is entirely unreasonable for a contract employee, who has but one week left in the term of the contract under which she is working, to enter such a meeting and, without receiving any objective indication of immediate termination of her employment, to conclude entirely on the basis of her subjective convictions, that her employment was then and there being terminated. If ever there was competent, material and substantial evidence of simply "walking off the job", i.e., voluntary quit, the entire record in this case establishes that type of employment termination.

Moreover, just as clearly, the Appellant-employee had the burden of proof to show that she was not disqualified from benefits and, as has already been indicated, she failed to meet that burden of proof. The employer has the burden of proof in the three circumstances outlined in Cooper v University of

Michigan, 100 Mich App 99 (1980). These are, first, when the employer discharges for misconduct; second, when the employee fails to accept "suitable" work and, third, when there is a disqualification due to a labor dispute in progress. This is a voluntary quit case and the burden of proof cannot be shifted to the employer to prove the state of mind of the employee. The Cooper court said that where

> "...potential disqualification...requires inquiry into whether plaintiff's behavior in terminating employment was voluntary and plaintiff's reasons for doing so, the answers to these questions being within the exclusive knowledge of the claimant." (Page 103).

the burden of proof is the employee's. The earlier cases of Lasher v Mueller Brass Co., 62 Mich App 171 (1975), and Lyscas v Chrysler Corp. 76 Mich App 55, (1977), stand for the same proposition since they involved "suitable employment" and not "voluntary quit" situations.

Nor did the Referee or the Board of Review err in declining to rehear or redetermine this matter to receive in evidence the affidavit of Ms. Zurek. The record, at page 24 of the transcript of proceedings before the Referee, shows a perfunctory effort on the part of the Appellant to refer to such an affidavit. This came up in the context of Appellant's statement that her supervisor had told an Assistant Director that she had discussed some matter with Ms. Zurek and the affidavit would be offered for the purpose of showing that no such discussion had taken place. Aside from the obvious hearsay nature of such statement, as presented to the Referee the affidavit would seem to have no relevance to any issue bearing on the termination of Appellant's employment as it resulted directly from the discussion she had

with her supervisor on September 23, 1981. The refusal to admit this affidavit into evidence or to grant further hearing for the live testimony of the affiant did not violate either the Michigan Rules of Evidence or the Rules of practice before Referees and MES Board of Review.

This Court concludes that Appellant voluntarily left her work without good cause attributable to her employer and was therefore properly disqualified from benefits.

The decisions of the Referee and of the Board of Review are hereby affirmed.

HJS:dj

HENRY J. SZYMANSKI, CIRCUIT JUDGE

DATED: July 3, 1984

A TRUE COPY
JAMES R. KILLEEN
CLERK

DEPUTY CLERK