108076
2B

108076

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

EARL MANN,

Appellant

Case No. 89-910064-AE
9-14-89

-v-

H & H WHOLESALE, INC and MICHIGAN EMPLOYMENT SECURITY COMMISSION

Hon. John H. Gillis, Jr. (P28527)

Appellees

OPINION AND ORDER AFFIRMING DECISION OF MESC REVIEW BOARD

FILED
JAMES ... WAYNE COUNTY CLERK
SEP 14 1989
BY

OPINION

This matter is before the court on claimant's appeal from the Michigan Employment Security Board of Review's determination denying claimant unemployment benefits.

Facts

Claimant had worked for his employer's predecessor since June, 1980. The involved employer purchased the business entity in June, 1986. Claimant continued his employment in the same capacity until October 2, 1987.

Claimant's final rate of pay was $8.00 per hour. Claimant worked for the involved employer an average of 47½ hours per week. Neither the predecessor employer nor the involved employer paid claimant a premium for overtime.

Near the end of claimant's employment, the involved employer learned that it was legally obligated to pay premium pay for overtime. During the last week of September, 1987, the involved employer advised claimant that it had learned

5/11 15% PAY CUT 29 U(c) 2/96

that it was required to pay premium pay for overtime, and that it was going to do so. Claimant was entitled to between $1,000.00 and $1,400.00 in back pay overtime. In order to eliminate its past indebtedness and not incur any more indebtedness for overtime, the employer advised claimant that his work hours would be reduced from 47½ hours to 40 hours a week. Claimant decided that he could not live on his earnings for a 40-hour week and on October 2, 1987 resigned his employment.

Claimant applied to the Michigan Employment Security Commission for unemployment benefits but was found disqualified for voluntarily quitting without good cause attributable to his employer. A redetermination affirmed this decision. Claimant requested a referee hearing and the referee reversed the Commission, stating that claimant had left his employment for good cause attributable to the employer.

This decision was reversed by the Board of Review which held that claimant could have continued to work at his then present employment at 40 hours per week, which, when supplemented by the past overtime due him, would have caused claimant to suffer no loss of earnings for some period of time. The Board further held that during this period of time claimant could have sought other employment while still working.

Claimant requested a rehearing from this decision but his request was denied. Claimant now appeals to this Court.

Discussion

Preliminary to discussing the issues raised by the claimant, this Court notes its review of the decisions of the Board is circumscribed. A Board's decision is reviewable for both questions of law or fact. However, it may be reversed only if contrary to law or unsupported by

competent, material and substantial evidence on the whole record. Const 1963, art 6 § 28 MCL 421.38. In this regard it is well settled that this Court's review of MESC Board decisions is not de novo and is confined to a review of the record established in the MESC proceedings. MCL 421.38; Grand Rapids Public Schools v Falkenstern, 168 Mich App 529, 539 (1988).

In connection with the scope of this Court's review of the decision of the Board, claimant argues that the Court should give special weight to the factual findings of the referee. Claimant notes that it was the referee, not the Board, who had a first hand opportunity to observe the witnesses and thus evaluate their credibility.

Under the structure of Michigan Employment Security Act, MCL 421.1 et seq, referees are empowered to make findings of fact and conclusions of law. MCL 421.33(1). If both parties agree, review of the referee's decision may be directly to the circuit court instead of to the Board. MCL 421.32(e).

Beyond the provisions of MCL 421.32(e), however, appeals from the decisions of referees are to the Board. However, unlike an appeal to circuit court, by statute, the Board is empowered to make its own findings of fact based on the record adduced before the referee or on evidence taken before the Board. MCL 421.34; 35. Under the statutory scheme, therefore, typically it is the Board which is the ultimate finder of fact, not the referee.

In the instant case, this Court's appellate jurisdiction was invoked only after the Board rendered its decision. It is the Board's findings of fact and conclusions of law which are now under review, not those of the referee. Given the statutory scheme set forth above, because it is the Board's findings which were appealed from, it is the Board's determination of the credibility of witnesses and

the like to which this Court must give appellate deference. That the referee might have reached different conclusions is thus now irrelevant.

The section under which claimant's application for unemployment benefits was denied is MCLA 421.29(1)(a), which states in pertinent part that -

> (1) An individual shall be disqualified for benefits in the following cases in which the individual:
>
> (a) Left work voluntarily without good cause attributable to the employer or employing unit.

On appeal, claimant does not dispute that his resignation from employment was voluntary. Rather, claimant contends that his resignation was for good cause attributable to his employer.

Specifically, claimant contends that the Board erred by not finding good cause for his resignation as a result of the employer's cutting claimant's work hours from 47½ to 40 hours per week, which resulted in a decrease in claimant's pay of 15% when calculated on the straight hourly rate that claimant had been receiving.[1/]

While one of first impression in this jurisdiction, the issue of whether good cause exists for one who voluntarily leaves employment after the overtime he has grown to rely on has been cut by his employer and his wages thereby reduced has been decided by the courts of other states. In these cases the courts have looked to the magnitude of the decrease in salary and have found that good cause exists where the decrease has been substantial. (See LaRose v Department of Employment Sec., 431 A2d 1240(Vt, 1981) finding a 40% cut

---

1/ While claimant seeks to introduce in this appeal new theories as to why he had good cause for leaving his employment, this Court will only consider his reasons as presented before the Board of Review under this Court's scope of review as previously discussed. In any event, claimant concedes that notwithstanding the presence of other factors, his reason for leaving employment was the reduction of his overtime hours.
(Claimant's Brief on Appeal, p. 8).

in salary to be substantial; Danielson Mobil, Inc. v Johnson, 394 NW2d 251(Minn App, 1986) finding a 19% wage reduction to be substantial). On the other hand, this Court has found no authority for the position that a wage reduction that amounts to only 15% of an employee's salary constitutes good cause for his terminating employment. This Court therefore finds as a matter of law that a reduction in salary of only 15% is not a substantial enough reduction of claimant's salary so as to constitute good cause for his leaving employment. This Court therefore finds that the Review Board's decision that claimant was not entitled to unemployment benefits for having voluntarily left his employment without good cause attributable to his employer was supported by competent, material and substantial evidence and not contrary to law.

Conclusion

Based on the foregoing, the decision of the Review Board is affirmed.

John H. Gillis, Jr.
Circuit Judge

John H. Gillis, Jr.

DATED: SEP 14 1989

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

EARL MANN,

Appellant

Case No. 89-910064-AE

-v-

H & H WHOLESALE, INC. and MICHIGAN EMPLOYMENT SECURITY COMMISSION

Hon. John H. Gillis, Jr. (P28527)

Appellees

/

ORDER

At a session of said Court held in the City-County Building, Detroit, Michigan on SEP 14 1989

PRESENT: HONORABLE JOHN H. GILLIS, JR.
Circuit Judge

This Court being advised in the premises and for the reasons stated in the foregoing Opinion,

IT IS HEREBY ORDERED that the decision of the Michigan Employment Security Commission Board of Review denying claimant's request for unemployment benefits be and the same is hereby AFFIRMED.

John H. Gillis, Jr.

Circuit Judge

John H. Gillis, Jr.