STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

THOMAS SHERWOOD,

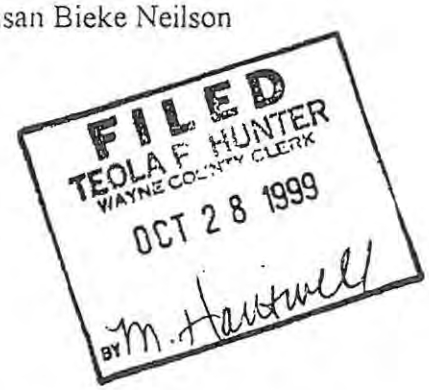
Appellant,

-v-

Case No. 99-914657 AE
Hon. Susan Bieke Neilson

MICHIGAN BELL TELEPHONE COMPANY and STATE OF MICHIGAN, UNEMPLOYMENT AGENCY, DEPARTMENT OF CONSUMER & INDUSTRY SERVICES,

Appellees.



OPINION ON APPEAL

Before the court is an appeal from a decision of Appellee Agency's Board of Review reversing the award of unemployment benefits by the hearing referee. Appellant was initially found to be eligible for unemployment benefits at the administrative level. The employer sought a hearing, following which, the hearing referee, as stated above, found that Appellant was eligible for benefits. The employer appealed to the board of review, which reversed the hearing referee and this appeal follows, filed by the claimant.

Appellant was an employee of Ameritech, working as an installer or customer service specialist. In August, 1997 he injured himself while on the job and was off work until January 1998 (R 53-55). Upon returning to work, Appellant was assigned to work in Toledo (a position was also available in Livonia, but his union recommended he take the Toledo assignment (R 57)), which he drove to from his home in Wyandotte, an undisputed distance of about 47 miles one way. During the time he was driving to Toledo, Appellant was also undergoing therapy for his back (R 64-65) and he was being tested in Detroit for alternate placement with the company to accommodate his work restrictions (R 67). Appellant found that driving to Toledo caused him back pain (R 64) and he obtained notes from several doctors limiting his driving distance and time (testified about throughout the record and photocopies in the record at pp. 94, 95). It was also undisputed that Appellant's work schedule was flexible such that he had no specific start time (R 12). On March 17 Appellant called his supervisor and told him that he (Appellant) would not be reporting to work due to his back problems (R 74-75) having previously given the doctors' reports to his supervisor (R 69). After not reporting to work for several days, Appellant was terminated.

A Board of Review decision must be affirmed if it is supported by competent, material, and substantial evidence on the record, and if it is not contrary to law. MCL 421.38(1). This court

cannot substitute its own judgment for that of the Board of Review if that judgment is supported by the record. *Smith v Employment Security Commission*, 410 Mich 231 (1981).

One of the issues before the court is the standard under which the claim was evaluated. The hearing referee evaluated the case as one involving misconduct, meaning that the burden of proof was on the employer to show such conduct. MCL 421.29(1)(b). The Board of Review considered the case under the voluntarily leaving provision, putting the burden on the employee to show that the absence was not voluntary and not without good cause attributable to the employer. MCL 421.29(1)(a). The notice of hearing sent to the claimant indicated that both issues were involved (R 96). The court agrees with the Board of Review that this case is more properly considered under subsection 29(1)(a) , which states

> (1) An individual is disqualified from receiving benefits if he or she:
>
> (a) Left work voluntarily without good cause attributable to the employer or employing unit.

The court finds that, for the reasons stated below, the decision of the Board of Review was not contrary to law and unsupported by competent, material, and substantial evidence on the record.

In support of its claim that Appellant left voluntarily, without good cause attributable to Appellee, Appellee argues that Appellant's problem with the Toledo job was one of getting to work -- not performing the work once he arrived (in other words, it was something that Appellant would have to deal with on his own time, rather than on company time). Appellee relies on the case of *Lyons v Employment Security Commission*, 363 Mich 201 (1961), a voluntary leaving case similar to the one at bar. In *Lyons*, the applicant for unemployment benefits lived in Trenton and worked at a Chrysler plant in Trenton. He was laid off from the plant and took a job with Chrysler in Indianapolis. After working in Indiana (about 270 miles from home) for 2 1/2 weeks, he quit, the drive being "too much", and applied for unemployment benefits. The court found that he was not entitled to the benefits because he had voluntarily left his employment; his reasons for leaving employment were entirely personal and not "impelled by the condition of his health or any other circumstances making it impossible or impracticable for him to continue employment in Indianapolis." *Lyons* at 226 (emphasis added). The court emphasized that the purpose of the act was for the benefit of persons who are out of work through no fault of their own and not for persons who leave work voluntarily. *Id.* 227.

In this case, the Board of Review found that the employer allowed the claimant to work flex time, had no actual starting time, and could stop for rest breaks during his 47 mile commute. While it is certainly true that if the claimant could not drive for more than 20 minutes at a time without a rest, his commute time would be drastically increased, it appears that the Board found that such a commute could not be considered to make it "impossible or impracticable" for Appellant to continue to work in Toledo. The court finds that such a finding is supported by competent, material, and substantial evidence in the record. *Smith, supra.*

More significant to this court, however, is the question of a leave of absence. Appellee argues that a leave of absence was an option available to Appellant which he did not make use of. Appellant argues to the contrary, that he submitted the doctors' notes and thought that was sufficient to request a leave of absence, without, apparently, ever making the request verbally or in writing. At oral argument, both sides relied on the same page of the hearing transcript in support of their position on this issue, page 87. At this point in the hearing, Appellant is being cross-examined by the attorney for the employer and the testimony reads as follows:

Q: And you knew that a possibility would be that instead of just stopping going to work, you could of (sic) asked for another disability leave of absence. Isn't that correct?

A: In presenting those documents to my supervisor, I believe that is requesting that.

Q: But your supervisor isn't the case worker in Occupational Medicine, who can approve or disapprove disability leaves of absence. Correct? You know that.

A: In the past, that documentation was always forwarded to the caseworker.

Q: You didn't do that though?

A: No.

Appellee also points to a letter which was sent to appellant, dated March 25, 1998, in effect warning him that his employment was being terminated. (R 107). This, argues Appellee, should have put Appellant on notice that if he thought he had applied for a leave of absence, the company was not aware of it. Appellant apparently never responded to the letter.

The court finds that the Board of Review was correct in reversing the determination by the hearing officer, but not entirely for correct reasons.[1] The Board of Review writes "[t]he record shows the claimant decided to stop commuting to the Toledo location after the employer denied his request for mileage reimbursement." (R 120). The court has been unable to find any connection in the record between the denial of the travel allowance and Appellant's decision not to report to work. He did testify that he thought he was entitled to the allowance (R 81), but he did not testify that the denial was the reason he stopped reporting. None of the witnesses for the employer testified about a connection between the denial of the travel allowance and Appellant's decision to stop commuting. There is no reference by Appellee to any transcript pages in support of this position.

Instead, the court finds that the Appellant voluntarily left his employment without good cause attributable to the employer because he did not apply for a leave of absence even after

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[1]A reviewing court may find that the Board of Review reached the right result, if for the wrong reason, as long as the record supports such a finding. *Buzza v Unemployment Compensation Commission*, 330 Mich 223, 236 (1951).

receiving a letter warning him that he was being terminated. If Appellant thought that by turning in doctors' notes to his supervisor without more was sufficient to request a leave, it should have been apparent with the letter (referred to above) that it was not. It was incumbent upon Appellant at that point to take action. Furthermore, neither side addressed below the availability of work at the Livonia location, so on review, this court cannot consider whether it was available or should have been pursued.

Therefore, the court finds that Appellant is not entitled to benefits for the reasons stated above and the decision of the Board of Review is affirmed.

IT IS SO ORDERED.

DATE: OCT 28 1999

Circuit Court Judge