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STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

HUMAN CAPABILITY CORPORATION,

Employer-Appellant,

-v- Case No. 03-331656-AE

BARBARA CARSON, Hon. Pamela R. Harwood

Claimant-Appellee,

and

STATE OF MICHIGAN, DEPARTMENT OF CONSUMER & INDUSTRY SERVICES, BUREAU OF WORKERS' & UNEMPLOYMENT COMPENSATION,

Appellee.

OPINION

The employer, Human Capability Corporation (employer), appeals from a decision of the Michigan Employment Security Board of Review (Board) affirming a Referee's decision granting unemployment benefits to claimant Barbara D. Carson.

In February, 1978, claimant began working for the employer, the sole provider of disability exams in Wayne County. She eventually became the office manager of the employer's Detroit office. In January, 2002, the employer's president, Jared Cohen, started updating the personnel policies and practices contained in the 1998 Employee Handbook. On July 18, 2002, Cohen distributed the 2002 Employee Handbook to all employees,

including claimant. The employees were instructed to review the 2002 Employee Handbook, and sign the receipt for it, which provided in pertinent part:

> I have this day received a copy of the Human Capability Corporation employee handbook, and I understand that I am responsible for reading the personnel policies and practices described within. I understand that this handbook replaces any and all prior handbooks, policies and practices of the corporation.
>
> I agree to abide by the policies and procedures contained therein. I understand that the policies and benefits contained in this employee handbook may be added to, deleted or changed by the President of the corporation, at any time.

Claimant refused to sign the receipt because she believed that the non-competition provision and the provision prohibiting outside employment in the 2002 Employee Handbook changed the terms and conditions of employment. Effective July 26, 2002, claimant was separated from employment for refusing to sign the receipt for the 2002 Employee Handbook.

Claimant subsequently filed a claim for unemployment benefits. On September 16, 2002, the Bureau of Workers' & Unemployment Compensation (Bureau) determined that claimant was fired for a deliberate disregard of the employer's interests and thus, was disqualified for unemployment benefits under the misconduct provisions of Section 29(1)(b) of the Michigan Employment Security Act (Act), MCL 421.29. Claimant requested a redetermination. On March 5, 2003, the Bureau issued a redetermination affirming the determination. Claimant appealed.

Hearings were held on April 22, 2003 and May 15, 2003 before Referee Lois H. Smith. The issues were whether claimant should be disqualified from receiving

unemployment benefits under Section 29(1)(b) of the Act because her separation from employment was for reasons amounting to misconduct, and whether claimant should be disqualified from receiving unemployment benefits under Section 29(1)(a) of the Act on the ground that she left work voluntarily without good cause attributable to the employer.

The Referee found that although claimant had the option of continuing employment subject to the 2002 Employee Handbook, she left work voluntarily. However, the Referee further found there was no credible evidence that claimant was subject to either a non-competition or outside employment agreement prior to July, 18, 2002. It was the opinion of the Referee that the 2002 Employee Handbook provisions relative to non-competition and outside employment were unilateral changes in the terms and conditions of employment which were substantial and material thereby establishing that claimant's voluntarily leaving was with good cause attributable to the employer. As a result, the Referee reversed the redetermination and granted claimant unemployment benefits. The employer appealed. On August 21, 2003, The Board affirmed the decision of the Referee. The instant appeal followed.

On appeal, the employer raises two arguments. First, the employer insists that the Court should conduct an independent review of the Referee's interpretation of the underlying facts. In support, the employer relies on Graham v Fred Sanders Company, 11 Mich App 361 (1968) and McAnallen v Employment Security Commission, 26 Mich App 621 (1970).

The courts in those cases recognized that although they were bound to accept the findings of fact made by the Board if supported by the great weight of the evidence, they were not otherwise precluded from making an independent evaluation of the undisputed

facts. Graham, supra, p 370; McAnallen, supra, pp 630-631. However, in those cases there was no dispute as to the underlying facts. Rather, the disagreements concerned the application and interpretation of the uncontroverted facts in determining the meaning of a particular term. Moreover, the courts applied the "great weight of the evidence" standard, which is no longer applicable.

Rather, the Board's decision may be reversed only where the decision is contrary to law or is not supported by competent, material and substantive evidence. Becotte v Gwinn Schools, 192 Mich App 682, 685 (1991). With respect to substantiality, "substantial evidence" is that which a reasonable mind would accept as adequate to support a decision. McBride v Pontiac School District (On Remand), 218 Mich App 113, 123 (1996). Under this test, it matters only whether the position adopted by the Board is supported by evidence from which legitimate and supportable inferences were drawn. Id.

Judicial review of a decision of the Board is limited. Saber v Capitol Reproductions, Inc, 28 Mich App 462, 464 (1970). When there is sufficient evidence, a reviewing court may not substitute its judgment for that of the Board, even if the court might have reached a different result. Black v Dep't of Social Services, 195 Mich App 27, 30 (1992). Great deference must be given to the Board's choice between two reasonable differing views as a reflection of the exercise of administrative expertise. Traverse Oil Company v Chairman, Natural Resources Commission, 153 Mich App 679, 691 (1986).

In the instant case, unlike the situations in Graham, supra and McAnallen, supra, the Referee was confronted with a dispute as to the underlying facts. Specifically, the parties did not agree about whether claimant was subject to either a non-competition or outside employment agreement prior to July 18, 2002, the effective date of the 2002

Employee Handbook. As indicated earlier, the Referee resolved the dispute in favor of claimant and the Referee's findings were affirmed by the Board. However, the employer contends that the Referee's findings do "not comport with" the evidence on the record (Employer's Brief, p 7). The Court disagrees.

The employer has failed to demonstrate that the 1998 Employee Handbook contained provisions regarding non-competition and outside employment that were substantially similar to the provisions in the 2002 Employee Handbook such that the non-competition and outside employment provisions in the 2002 Employee Handbook merely modified previously existing provisions. While the 1998 Employee Handbook did contain a provision with respect to "Trade Secrets and Proprietary Information," [1] the provision did not even mention non-competition. Yet, the 2002 Employee Handbook has an express provision entitled "Trade Secrets, and Non-Competition," addressing non-competition, which provides in pertinent part:

> MANAGERS AND ADMINISTRATORS ONLY agree that if they leave the employee [sic] of HCC, for any reason, that they will not directly or indirectly establish, consult or work, in any capacity, for a facility or operation that performs FIA/DDS exams within Wayne County for a period of three yeas after their last day of work at HCC. [2]

Although the employer claims that there was a provision in the 1998 Employee Handbook to the effect that employees could not work for any competitor of the employer for five years after leaving employment, the employer has failed to produce any such

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[1] Certified Record of Proceedings, p 297.

[2] Certified Record of Proceedings, p 134.

provision. The memo submitted by the employer dated December 20, 1998, purportedly regarding the alleged provision merely states in relevant part:

> . . . there are provisions now in place that address the confidential and proprietary nature of HCC's operation, forms, records and training. These apply to administration, Managers and special regular employees. They will be distributed when an applicable individual leaves HCC. [3]

On its face, the memo does not describe any non-competition provision. Further, the employer concedes that claimant denied the existence of any non-competition provision prior to July 18, 2002.

As to outside employment, the 1998 Employee Handbook states in relevant part that "[e]mployees may not conduct outside work . . . while on corporation time." [4] Significantly absent from this provision is any prohibition against outside employment. In the 2002 Employee Handbook, though, employees are precluded from conducting "outside work . . . while on corporation time, or not." [5] Thus, the 2002 Employee Handbook adds language which effectively prevents employees from engaging in outside employment.

When giving great deference to the Referee's choice between the two reasonable differing views, as it must, the Court finds that there was sufficient evidence to support the Referee's decision and therefore the decision of the Board. Indeed, based on claimant's denial that she was subject to non-competition or outside employment agreements prior

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[3] Certified Record of Proceedings, p 253.

[4] Certified Record of Proceedings, p 300.

[5] Certified Record of Proceedings, p 126.

to July 18, 2002, and the employer's lack of proof otherwise, the Court is satisfied that the Referee's findings are in conformity with the evidence and will consequently decline the employer's invitation to make an independent evaluation of the facts.

The employer also contends that the Board's decision is contrary to law. This contention is premised on MCL 421.29(1), which provides in pertinent part:

> 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. An individual who left work is presumed to have left work voluntarily without good cause attributable to the employer or employing unit.

Here, the employer does not dispute that claimant left work voluntarily. It is the employer's position that the leaving was not with good cause attributable to the employer because claimant was an at-will employee without an employment contract or any legitimate expectations that the employer would not alter the terms and conditions of employment.

The employer's argument is misplaced insofar as the employment status of claimant and the employer's right to alter the terms and conditions of employment would only be pertinent if the enforceability of a common law employment contract were at issue. See Toussaint v Blue Cross & Blue Shield of Michigan, 408 Mich 579 (1980). In this regard, Toussaint and its progeny do not govern administrative proceedings, notably a good cause determination under the voluntary leaving provision of the Act. Of significance, however, is the Referee's finding that the employer changed the terms and conditions of employment since it provided a basis for the Referee's determination of good cause attributable to the employer. Under the circumstances, the Court finds that the Board's

decision affirming the Referee's decision granting unemployment benefits is not contrary to law and is supported by competent, material and substantial evidence on the whole record. The decision of the Board is accordingly affirmed.

PAMELA R. HARWOOD
Circuit Judge

DATED: APR 0 6 2004

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ORDER

At a session of said Court held in the Coleman A. Young Municipal Center, Detroit, Wayne County, Michigan, on this: APR 06 2004

PRESENT: PAMELA R. HARWOOD
Circuit Judge

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

IT IS ORDERED that the decision of the Michigan Employment Security Board of Review is **AFFIRMED**.

A TRUE COPY
CATHY M. GARRETT
WAYNE COUNTY CLERK
BY DEPUTY CLERK

PAMELA R. HARWOOD
Circuit Judge