DI PG 12.08

99 MICH APP 401 (1980)
Limbaugh 411 MICH 904 (1981)

STATE OF MICHIGAN

COURT OF APPEALS

JAMES W. DUNLAP,

Plaintiff-Appellee,

AUG 12 1980

-vs-

MICHIGAN EMPLOYMENT SECURITY COMMISSION,

Defendant,

and

No. 49195

TENNECO, INC., WALKER MANUFACTURING COMPANY,

Defendant-Appellant.

BEFORE: T.M. Burns, P.J.; Beasley and G.R. Deneweth, JJ.

BEASLEY, J.

Defendant-appellant, Walker Manufacturing Company, a division of Tenneco, Inc., appeals as of right from a circuit court judgment awarding plaintiff unemployment benefits. We affirm for the following reasons.

On August 29, 1974, plaintiff was hired by appellant after answering the following question on an employment application form and medical history questionnaire in the negative: "Have you ever had any back trouble or back injury?"

In October, 1975, plaintiff went on medical leave for approximately three months due to a back problem. In a medical report to defendant Walker Manufacturing Company, plaintiff's own doctor indicated plaintiff told him he had suffered a previous back injury in a swimming accident. As a result, on May 12, 1976, plaintiff was discharged by Walker Manufacturing on the basis of the answers he gave in the initial employment application and medical history questionnaire.

Plaintiff's application for unemployment compensation was denied for the reason his discharge was for misconduct connected with his work under MCL 421.29 (1)(b); MSA 17.531(1)(b), so as to disqualify him from benefits. The basis for the finding of misconduct was the misrepresentation in the personnel records. In a two-to-one decision, the MESC Board of Review affirmed the referee's decision. However, in a carefully prepared opinion, the circuit judge reversed and awarded benefits, finding that plaintiff's pre-employment statements were not, as a matter of law, misconduct within the meaning of MCL 421.29(1)(b); MSA 17.531(1)(b).

The evidentiary record indicates that while a swimming incident did, in fact, occur in 1968, plaintiff was not treated medically at that time for any medically determinable back injury, and any problem disappeared within a couple of months.

Plaintiff also testified that in spite of the swimming accident, he made many jumps while a paratrooper in the military, although shortly before the end of his hitch he removed himself from jump status because of some muscle problem in his general back area. However, subsequent to that, plaintiff was hired by another employer after passing a pre-employment physical examination that included back x-rays.

Plaintiff said that the reason that he gave the answers that he did on the employment application and medical questionnaire was that he was not experiencing any difficulty with his back at the time he sought employment, and that he had never really been medically treated for any back problem.

It also should be noted that plaintiff was subsequently reinstated by Walker Manufacturing after he underwent a complete physical examination, including a complete set of back x-rays which, apparently, turned out normal. (1)

The statute provides:

"Sec. 29. (1) Grounds. An individual shall be disqualified for benefits in all cases in which he: * * *

"(b) Has been discharged for misconduct connected with his work, whether or not the discharge has subsequently been reduced to a disciplinary layoff or suspension, or for intoxication while at work."

In this case, the act upon which the conclusion of misconduct was based occurred prior to employment. Every minor misstatement on an employment application does not constitute statutory misconduct of a level to justify denial of payment of unemployment compensation benefits.

At the time plaintiff was first employed, defendant did not choose to require him to submit to a physical examination and x-rays of his back. If they had known of the slight swimming accident, it does not seem it would have prevented his being employed.

Before rehiring plaintiff, defendant gave him a complete physical, including what they refer to as "pre-employment" x-rays, the results of which were normal. Since defendant then reinstated plaintiff, it seems likely defendant would not have initially denied employment to plaintiff if they had ascertained all the facts.

We would believe that plaintiff's failure to characterize his minor swimming accident of six years earlier as "back trouble" or "back injury" was more an error of judgment than a deliberate and intentional falsification of his medical history. Under these circumstances, we decline to find that the trial judge was clearly erroneous in holding that, on the facts of this case,[1] the so-called misrepresentation on the job application did not constitute such misconduct as to disqualify plaintiff from unemployment compensation benefits.[2]

AFFIRMED.

(3)