STATE OF MICHIGAN

SIXTEENTH JUDICIAL CIRCUIT COURT

LISA NELSON,

Claimant/Appellant,

vs. Case No. 17-0123-AE

ROBOT SUPPORT, INC.,

Employer/Appellee,

and

MICHIGAN DEPARTMENT OF LICENSING
AND REGULATORY AFFAIRS,
UNEMPLOYMENT INSURANCE AGENCY,

Agency/Appellee.
_____/

OPINION AND ORDER

This matter comes before the Court on employee-appellant Lisa Nelson's ("appellant") appeal of the decision of the Michigan Appellate Commission dated February 24, 2017.

I. Factual and Procedural Background

The parties do not dispute the essential facts of this case. Robot Support, Inc. ("Robot Support") employed appellant as a full-time office assistant. Appellant left work early on April 19, 2016 to care for her mother who was ill. Appellant also had illnesses of her own and she missed the next nineteen consecutive days of work. During this time, appellant sent occasional text messages to her supervisor to communicate that she would miss work and to address other work-related matters. She did not call her employer at any point during her absence. Appellant then sent a text message to her supervisor stating that she wanted to come in and talk. In

response, her employer asked her to return her keys. One week later, appellant met with her employer and her employment was terminated.

The Michigan Department of Licensing and Regulatory Affairs, Unemployment Insurance Agency ("Agency") initially found appellant "not disqualified" due to work-related misconduct. The Agency then reversed its prior decision and found appellant "disqualified" for work-related misconduct. Appellant appealed the Agency's disqualification determination and an administrative law judge ("ALJ") affirmed the Agency's redetermination. On February 24, 2017, the Michigan Compensation Appellate Commission ("MCAC") affirmed the ALJ's decision and denied appellants application for a rehearing and request to submit additional evidence. On March 30, 2017, appellant filed this appeal.

II. Standard of Review

This Court reviews "the factual findings of administrative agencies to determine whether they are supported by competent, material, and substantial evidence on the whole record." Const 1963, art 6, § 28; *Ansell v Dep't of Commerce (On Remand)*, 222 Mich App 347, 354; 564 NW2d 519 (1997). Substantial evidence is that which a reasonable mind would accept as adequate to support a decision, being more than a mere scintilla, but less than a preponderance of the evidence. *Lewis v Dep't of Corrections*, 232 Mich App 575, 577-578; 591 NW2d 379 (1998). The Court gives great deference to the hearing officer's factual findings and credibility determinations. *Id*. at 578. Courts may not substitute their own assessment of the severity of an employee's violation of an employer's rules for that of the MCAC. *Hodge v US Security Assoc, Inc*, 497 Mich 189, 193; 859 NW2d 683 (2015). The court will only set aside an administrative agency's legal ruling if it violates the constitution or a statute, or is affected by a "substantial

and material error of law." MCL 24.306(1)(a),(f); *O'Connor v Consumer & Industry Services*, 236 Mich App 665, 670; 601 NW2d 168 (1999).

III. Arguments

Appellant argues that the ALJ's decision is contrary to law because Appellant was fired for absences resulting from events beyond her control, because the ALJ accepted oral testimony contrary to the Michigan Rules of Evidence, and because Robot Support had previously condoned the supposed misconduct.

Appellee Agency argues that the Court should confirm the commission's decision that appellant is disqualified from receiving benefits because the decision is consistent with law and supported by competent, material, and substantial evidence on the record. According to Appellee, appellant's missing a significant number of days of work is misconduct and her failure to call her employer shows a substantial disregard of her employer's interests.

IV. Law and Analysis

An individual who is discharged for work-related misconduct is not eligible for unemployment benefits. MCL 421.29(1)(b). The Michigan Employment Security Act ("MES") does not define "misconduct," but in *Carter v Employment Security Commission*, 364 Mich 538, 541-542; 111 NW2d 817 (1961), the Michigan Supreme Court held that "misconduct" is limited to conduct evincing "willful or wanton disregard of an employer's interests." This may be shown by:

> "Deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee, or in carelessness or negligence of such degree or recurrence as to manifest equal culpability, wrongful intent or evil design, or…an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to his employer." *Id.* at 541.

The court distinguished "misconduct" from behavior demonstrating "mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good faith errors in judgment or discretion." *Id.* The burden of proof lies with the employer when it asserts that an employee was discharged for work-related misconduct. *Veterans Thrift Stores, Inc v Krause*, 146 Mich App 366, 368; 379 NW2d 495 (1985), citing *Cooper v Univ of Michigan*, 100 Mich App 99, 103; 298 NW2d 677 (1980). "[W]hile misconduct may justify an employee's discharge for breach of company rules, not every such breach rises to the level of misconduct sufficient to disqualify the employee for unemployment benefits." *Tuck v Ashcraft's Market, Inc*, 152 Mich App 579, 589; 394 NW2d 426 (1986).

Excess absenteeism and tardiness may constitute misconduct under MCL 421.29(1)(b). *Hagenbuch v Plainwell Paper Co*, 153 Mich App 834, 837; 396 NW2d 556 (1986). However, absences cannot support a finding of misconduct unless they were without good cause, which could include personal reasons or other reasons beyond the claimant's control. *Washington v Amway Grand Plaza*, 135 Mich App 652, 658; 354 NW2d 299 (1984).

Appellant argues that her absences do not amount to misconduct under the Michigan Employment Security Act because they were medical absences over which she had no control. The ALJ's made the following findings of fact:

-The Claimant was discharged for excessive absenteeism

-She never had a conversation with her Employer about the severity of the situation

-She never advised the Employer . . . when she would be able to return

-Her mother was in the ICU and the Claimant was also ill

-Every few days . . .Claimant sent a text to [her supervisor] with various updates

-Claimant never had a conversation with the Employer about any kind of leave

-Due to the lack of communication [her supervisor] assumed she had quit

As an initial matter, the Court concludes that material and competent evidence from the record supports each one of these uncontested factual findings. Appellant was an employee (R 6), she became ill (R14), she missed a long period of work during which time she only sent a few text messages to her supervisor (R54-56), she did not speak with her employer during this time (R17-18), and she eventually met with her supervisor and was fired. (R 54, 8-9, 11-12, 14).

While Appellant submitted medical documentation to show that her absences were beyond her control, and indeed the ALJ found that both appellant and her mother were ill, the ALJ based its determination on the lack of communication about the absences rather than the absences. In its "Reasoning and Conclusions of Law", the ALJ wrote,

> There was a significant breakdown in communication between the Claimant and her Employer. At some point, before missing 19 consecutive days of work, the Claimant had an obligation and a duty to discuss the gravity of the situation she was involved in with her Employer. Perhaps a leave of absence of some kind may have been available to the Claimant. But she never talked to the Employer. Sending text messages informing the Employer of absences every few days for this duration of time falls woefully short of the standards of conduct that the Employer has a right to expect from an Employee. The Claimant must be disqualified. The Employer demonstrated by a preponderance of the evidence that the Claimant acted in willful or wanton disregard of the Employer's interest. (R 133).

While the ALJ's findings of fact state that Appellant was discharged for "excessive absenteeism", The ALJ's reasoning and conclusions of law do not examine the issue of whether Appellant lost her job because she became sick and missed work for a long period of time. Rather, the ALJ determined that during her extended absence due to illness, Appellant failed to call her employer. It was that failure that the ALJ concluded "falls woefully short of the standards of conduct that an Employer has a right to expect from an Employee." This is an

erroneous application of the law to the facts. According to the ALJ's determination, Appellant was not terminated for her alleged misconduct. Consequently, the Court will now examine both questions—whether Appellant's extended absence constitutes misconduct or whether her failure to communicate with Robot Support rises to the level of statutory misconduct under the MES.

The ALJ found that Appellant was ill and her mother was in the ICU. The law is clear that excessive absences do not support a finding of misconduct when the absences are beyond the claimant's control. See *Washington*, 135 Mich App at 658. Further, not all conduct that justifies an employee's discharge for breach of company rules rises to the level of misconduct sufficient to disqualify an employee from unemployment benefits. *Tuck*, 152 Mich App at 589. Therefore, even though excessive absences may result in the termination of employment, they do not form the basis for the denial of unemployment benefits when beyond the claimant's control. Properly applying the law to the ALJ's finding that Appellant was ill compels the Court to conclude that the absences at issue here do not support the denial of benefits.

Turning to the question of whether the failure to communicate by telephone constitutes misconduct under the statute, the Court also finds no basis for that conclusion in the law. Robot Support produced no written policy indicating that it required employees to communicate by telephone when they were unable to report to work. Appellant's supervisor testified that when an employee missed a day of work, a text or phone call was acceptable. (R 8:20-9:3). Further, Appellant had communicated with her employer by text message in the past. Indeed Robot Support responded to Appellant by text message indicating that that method of communication was acceptable. Given that text messages are widely used as a form of efficient communication, the Court finds no basis in the record to support the ALJ's conclusion that Appellant deliberately

and substantially disregarded her employer's interests or otherwise demonstrated wrongful intent or evil design as statutory misconduct has been defined.

In sum, this Court concludes that the decision of the ALJ was contrary to law, and Appellant was improperly disqualified under the MES for work-related misconduct for excessive absenteeism combined with the failure to adequately communicate with her employer. Therefore, the decision of the MAC is hereby reversed.

V. Conclusion

For the reasons set forth above, Pursuant to MCR 2.602(A)(3), the Court REVERSES the decision of the Michigan Appellate Commission. This *Opinion and Order* resolves the last pending claim and closes this case.

IT IS SO ORDERED.

HON. JAMES M. MACERONI P61759
Circuit Court Judge

Date: October 3, 2017
JMM/aes