STATE OF MICHIGAN 97069

IN THE COURT OF APPEALS

NOT FOR PUBLICATION

DEC 17 1986

ROBERT C. BROWN,
Plaintiff-Appellee

-v- NO. 85575

MICHIGAN EMPLOYMENT
SECURITY COMMISSION,
Defendant-Appellee

and

FORD MOTOR COMPANY,
Defendant-Appellant

BEFORE: Allen, PJ; Wahls and Meyer Warshawsky*, JJ.

PER CURIAM.

On April 5, 1984, the Michigan Employment Security Commission (MESC) determined that plaintiff was discharged for reasons constituting misconduct, and that he was therefore disqualified from receiving unemployment compensation benefits under MCL 421.29(1)(b); MSA 17.531(1)(b). The Commission issued a redetermination on May 3, 1984, in which it reached the same conclusion. Plaintiff appealed the redetermination and requested a hearing before a referee. In a decision dated May 21, 1984, the hearing referee found that plaintiff's actions constituted misconduct. The referee's decision was affirmed by the MESC Board of Review on October 22, 1984. However, by order dated March 20, 1985, the Wayne County Circuit Court found that plaintiff's actions did not amount to misconduct and reversed the MESC Board of Review.

* Circuit Judge sitting on the Court of Appeals by assignment.

Defendant Ford Motor Company appeals as of right.

There are no significant disputes with respect to the facts of this case. On March 1, 1984, plaintiff left his place of employment without notifying a supervisor or co-employee, and without obtaining permission He was suffering from diarrhea caused by an intestinal flu and had just defecated in his trousers. Although he knew proper procedure required that he inform a foreman that he was leaving, he could not find one. Procedure therefore required that he inform a co-worker but he did not do so. Moreover, he did not inform a security guard whom he passed as he was leaving the plant.

Plaintiff testified that he attempted to call his employer after arriving home in order to explain his circumstances but encountered a busy signal. He did not make any attempt to call thereafter, but explained that he could "hardly leave the toilet". Plaintiff went to his doctor that evening, and provided his employer with a doctor's excuse for his absence on the following day. However, he was discharged for leaving his place of employment without permission.

Between June 10, 1981 and June 9, 1983, plaintiff was written up and disciplined on five occasions for being absent from or leaving work without permission. The hearing referee found that on the fifth occasion, plaintiff was warned that another infraction would result in his discharge. There is no explanation of record from the employer concerning any of these prior incidents other than the fact that they occurred. In contrast, the plaintiff's explanation with respect to two incidents is unrefuted. He testified that on one occasion he was at the police station in regard to his car having been stolen. He notified his union representative, who was asked to relay the information to a supervisor. On another occasion, plaintiff allegedly left work due to a medical emergency. Although he did not see a doctor until two days later, he was apparently bleeding

internally, and was ultimately hospitalized.

In affirming the hearing referee, the MESC Board of Review incorporated his decision by reference and concluded that it was in conformity with the law and the facts. A decision of the Board should not be reversed on appeal unless it is contrary to law, or not supported by competent, material and substantial evidence on the whole record. Const 1963, art 6, § 28; MCL 421.38(1); MSA 17.540(1); Farrell v Auto Club of Michigan, 148 Mich App 165; NW2d (1986). Where there is no dispute with regard to the facts as in this case, the Board's determination as to misconduct will be treated as a question of law. The scope of appellate review extends to the soundness of the Board of Review's interpretation of misconduct. Washington v Amway Grand Plaza, 135 Mich App 652, 656-657; 354 NW2d 299 (1984).

In determining that plaintiff's actions constituted misconduct, the hearing referee focused on plaintiff's history of similar actions, and the fact that plaintiff had been warned that another infraction would result in his discharge. The referee also opined that even if plaintiff was ill and had to leave his job situs, he could have taken various measures to ensure that his employer was informed of the situation. For example, he could have informed a co-worker or the security guard, could have telephoned the foreman's office or the employer's labor relations department before leaving the plant, or could have telephoned his employer or union steward after he left the plant. The referee determined that plaintiff was not so incapacitated that he could not pursue these options. However, the referee indicated that he would not find a situation sufficiently incapacitating unless it was life-threatening. In reversing the Board of Review, the circuit court judge held that the failure to notify a foreman, co-worker, or the security guard was not

was not misconduct in this particular case, given the embarrassing nature of plaintiff's predicament.

Section 29(1)(b) provides:

"(1) An individual shall be disqualified for benefits in the following cases in which the individual:

* * *

"(b) Was discharged for misconduct connected with the individual's work, or for intoxication while at work unless the discharge was subsequently reduced to a disciplinary layoff or suspension."

In Carter v Employment Security Commission, 364 Mich 538, 541; 111 NW2d 817 (1961), the Supreme Court adopted the definition of "misconduct" originally articulated in Boynton Cab Co v Neubeck, 237 Wis 249, 259-260; 296 NW 636 (1941):

"The term 'misconduct' * * * is limited to conduct evincing such wilful or wanton disregard of an employer's interests as is found in 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 to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to his employer. On the other hand mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertancies or ordinary negligence in isolated instances, or good-faith errors in judgment or discretion are not to be deemed 'misconduct' within the meaning of the statute."

In the instant case, whether plaintiff's actions constituted statutory misconduct presents a close question. We note that absences, and by logical extension, leaving work early, cannot support a finding of misconduct unless the absence is without good cause. Washington, supra, 658. In the instant case, we believe that plaintiff's medical problems provided good cause to leave work.

Nonetheless, the aspect of plaintiff's behavior which sounds in misconduct is not that he left work after defecating in his trousers, but that he did so without obtaining permission and without notifying a supervisor or someone who would get word to the employer. We believe that plaintiff's previous infractions militate in favor of a finding that

this inaction bordered on a "wilful or wanton disregard for [the] employer's interests." However, we do not believe that the previous infractions are dispositive given the sensitive nature of plaintiff's circumstances on the particular day in question.

Given plaintiff's condition at the time he left the plant, we cannot conclude that his failure to inform a co-employee or security guard was a willful disregard of his employer's interests. At that time, his concern with self to the exclusion of his employer's interests is more appropriately characterized as a "good-faith error in judgment or discretion." Therefore, this failure to act was not misconduct under the statute.

The hearing referee identified another course of action which plaintiff could have taken to ensure that his employer was notified of his whereabouts. Plaintiff could have persisted in placing telephone calls to various parties until he reached some entity that could convey a message to his employer. We acknowledge that this course of action was open to plaintiff and would not have caused him the embarrassment which concerned the circuit court judge. However, given the fact that plaintiff did attempt to make one call and the fact that he was suffering from intestinal flu, again, we believe that the failure to pursue this course of action is more appropriately regarded as a good faith error in judgment, rather than misconduct. Accordingly, the judgment of the circuit court, reversing the MESC Board of Review, is affirmed.

/s/ Glenn S. Allen, Jr.
/s/ Myron H. Wahls
/s/ Meyer Warshawsky