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Appeal Docket No: 181982-V

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R. Douglas Daligga, Director
MES - Board of Review

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Prepared by Stephine Gwin

STATE OF MICHIGAN JUDICIAL DISTRICT 16TH JUDICIAL CIRCUIT COUNTY PROBATE	CERTIFICATION OF RECORDS ATTESTATION OF EXEMPLIFIED COPIES	CASE NO. 05-4944-AE

Court address
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Plaintiff/Appellant		Defendant/Appellee
MICHAEL J. LAQUE	V	TRU TECH SYSTEMS, INC., ET AL.

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OPINION AND ORDER Dated May 25, 2006

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STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF MACOMB

MICHAEL J. LAQUE,

Claimant/Appellee,

Case No. 2005-4944-AE

vs.

TRU TECH SYSTEMS, INC.,

Employer-Appellant,

and

STATE OF MICHIGAN, DEPARTMENT
OF LABOR & ECONOMIC GROWTH,
UNEMPLOYMENT INSURANCE AGENCY,

Appellee.
_____/

OPINION AND ORDER

Appellant, Tru Tech Systems, Inc (Appellant) filed this appeal from a final decision of the Michigan Employment Security Board of Review. This matter first came before the Board of Review as a result of the employer's appeal from an Administrative Law Judge (ALJ) decision. The ALJ reversed the Unemployment Insurance Agency (Agency) redetermination and found Claimant LaQue (Claimant) was not disqualified for benefits under the voluntary leaving provision of the Michigan Employment Security Act (MESA), Section 29(1)(a). Upon review, the Board reversed the ALJ's decision and found Claimant disqualified for benefits. In response, Claimant submitted an application for rehearing. Upon further review, the Board found Claimant's application should be granted, the Board's previous decision set aside, and the ALJ's decision affirmed, thus concluding Claimant is not disqualified for benefits under MESA, Section 29(1)(a). As a result, Appellant appealed this decision.

I

An administrative agency decision is reviewed by the circuit court to determine whether the decision was authorized by law and supported by competent, material and substantial evidence on the whole record. MCL 421.38(1); *MEAPAC v Secretary of State*, 241 Mich App 432, 444; 616 NW2d 234 (2000). Substantial evidence is any evidence that reasonable minds would accept as adequate to support the decision; it is more than a mere scintilla of evidence but may be less than a preponderance of the evidence. *Id.* On review of unemployment benefit cases, the circuit court may reverse the appeal board's decision when and only when that decision is contrary to the great weight of the evidence. *Miller v FW Woolworth Co*, 359 Mich 342, 351; 102 NW2d 728 (1960). Because of the limited scope of review the [Board's] action must be upheld if it is supported "by such evidence as a reasonable mind would accept as adequate to support the decision"; a preponderance of the evidence is not required. *Tenbusch v Dept of Civil Service*, 172 Mich App 282, 292-293; 431 NW2d 485 (1988).

II

Under MCL 421.29(1)(a) of the Michigan Employment Security Act, an individual who voluntarily leaves his or her work is disqualified from receiving unemployment benefits unless the individual left such work with good cause attributable to the employer or employing unit. The claimant has the burden of proving that the leaving was with good cause attributable to the employer. *Cooper v University of Michigan*, 100 Mich App 99, 103; 298 NW2d 677 (1980). The question of whether the claimant's leaving constitutes "good cause attributable to the employer or employing unit" is a question of law. *Thomas v Employment Security Comm*, 356 Mich 665, 668; 97 NW2d 784 (1959). A claimant may avoid disqualification for voluntary leaving if the "employer's actions would cause a reasonable, average, and otherwise qualified

worker to give up his or her employment." *Carswell v Share House Inc*, 151 Mich App 392, 396-397; 390 NW2d 252 (1986).

III

During the hearing presided over by ALJ Douglas G. Wahl, on June 10, 2005, Claimant was not represented by legal counsel, as he claimed he was unaware that he could have an advocate counsel with him. The ALJ conducted direct examination of Claimant; Carl Beltz, attorney and witness for the employer, cross-examined him. The only other witness was Shari Michels, owner and vice president of Appellant Tru Tech. The facts elicited from this testimony are as follows.

Claimant began his employment with Appellant Tru Tech in January, 2003. On November 10, 2004, Claimant met with Ms. Michels and the owner of the company, Steve Smarsh, because the employer had received a levy from the Internal Revenue Service (IRS), requiring the employer to withhold wages earned by Claimant. Claimant responded that the IRS was mistaken as he had paid all his back taxes and the issues had been resolved. Claimant was told to sign the levy which he refused to do, claiming he wanted time off for the opportunity to go to the IRS immediately to resolve the issue. The employer refused this request, and assigned Claimant to a job in Illinois immediately.

Claimant had an unusual pay schedule arrangement. He was normally paid at the first of the month and every Thursday. Claimant's first payless payday was November 11, 2004; he did not receive a paycheck on November 11, 18, or 25, 2004. Claimant was continually told his paychecks were being withheld on the instructions of the owner, who happened to be out of the country. Claimant spoke with Ms. Michels on November 29, 2004 who informed him that the employer had made direct deposits to his bank account on November 11 and 25, 2004, and at

that time, Ms. Michels paid him for the November 18, 2004 payday. On November 18, Claimant obtained a release of the levy and provided a copy of it to the employer, however this did not resolve the problem.

In December, 2004, Claimant was not paid on December 2, 9 or 16, 2004. Meanwhile, since November 10, 2004, he maintained his regular work schedule of working Monday through Saturday, starting at 7:30 AM and ending whenever the work was finished, which included travel time. Prior to the November 10, 2004 meeting, Claimant was paid a monthly salary of $2083.33 plus a weekly salary of $865.38. On December 18, 2004, Claimant met with his employer who proposed to change the Claimant's status from a salaried employee to an independent contractor at the rate of $23.50, representing a significant pay reduction.

On December 20, 2004, Claimant called Ms. Michels and informed her he was not returning to work, indicating he was quitting because of the payless paydays that he was still owed, and because of the proposed substantial changes in his working conditions. Claimant did not receive the payment he was owed for December until January 4, 2005, and he still believes he is due approximately $1500 of salary based on monthly payments. Claimant has complained to the Wage and Hour Division of the Department of Labor and Economic Growth; no decision has yet been tendered.

IV

The ALJ 's reasoning was sound and just in this situation. Claimant's employer admitted it was late paying Claimant. Claimant provided a release of the levy within 8 days after receipt of the IRS request for withholding of wages, which should have ended the difficulty then and there. Although there was disagreement about when the discussion of independent contracting work first arose, there are no written agreements, and no testimony that Claimant considered

himself an independent contractor; indeed, he continued his normal work schedule, and Claimant vehemently disputed the employer's testimony. The employer was duty-bound to pay its employee in a timely fashion, particularly given that the reason for not paying him was resolved in less than 10 days.

Keeping in mind that the standard used in determining whether a voluntary leaving with good cause attributable to the employer is that of the reasonable individual,[1] the Court is convinced the ALJ properly found that Claimant was qualified to receive benefits if otherwise eligible as determined by the Agency. To this end, Claimant has satisfied his burden of proving that he left his employment with good cause attributable to the employer.

V

Based on the foregoing, it is hereby

ORDERED the Employment Security Board of Review's decision that Claimant is not disqualified for benefits under the voluntary leaving provision of the MESA §29(1)(a) is AFFIRMED.

Under MCR 2.602(A)(3), the Court states this Opinion and Order resolves the last pending claim and the case is closed.

SO ORDERED.

DATED: MAY 25 2006

Peter J. Maceroni,
Circuit Judge

cc: H. Wallace Parker
David Foy
Shannon Wood

[1] "Good cause" compelling an employee to terminate his employment should be found where an employer's actions would cause a reasonable, average, and otherwise qualified worker to give up his or her employment, see *Carswell, supra.*