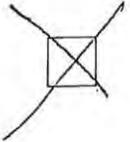


CIRCUIT COURT ORDER/OPINION
Stephine Gwin, Circuit Court CLERK

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Appeal Docket No: 203645 W



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Board Member and assigned attorney to case (Individual Copies)

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affirm

29 (1) (b) Section of the Act

Date: 3/12 ²⁰¹⁰ ~~2009~~

R. Douglas Daligga, Director
MES - Board of Review

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF KENT

JASON LONG,

Claimant-Appellant,

vs

Case No. 09-06869-AE

HON. MARK A. TRUSOCK

HUDSONVILLE BODY SHOP, INC.,

Employer-Appellee,

and

**COURT'S OPINION AND
ORDER IN RE CLAIMANT-
APPELLANT
JASON LONG'S APPEAL**

STATE OF MICHIGAN, Department
Of Labor and Economic Growth,
Unemployment Insurance Agency,

Agency-Appellee.

At a session of said Court, held in the Kent County Courthouse
in the City of Grand Rapids, in said county on November 20, 2009

Present: HON. MARK A. TRUSOCK
Circuit Judge

Upon the filing of briefs, arguments in open court, and the court being otherwise fully
informed, it is hereby ordered and adjudged as follows:

OPINION AND ORDER

Introduction

This case presents an appeal under the Michigan Employment Security Act ("the Act"),¹ pursuant to MCR 7.104(B). Claimant/Appellant Jason Long appeals the decision of the Michigan Employment Security Board of Review ("the Board"), denying him unemployment benefits. On November 21, 2008, Employer/Appellee Hudsonville Body Shop ("Hudsonville Body") fired Long for violating its policy regarding illegal drugs.

¹ MCL 421.1 *et seq.*

On November 15, 2008, Long was on his way to work when his car broke down. He called Hudsonville Body to let the manager know he would be late. The manager gave him the telephone number for a tow-truck driver from Hudsonville Towing Company ("Hudsonville Towing"), named Mike Zwak. Hudsonville Towing rents space from Hudsonville Body and both are located in the same building. The two refer business to one another.

Zwak picked up Long and towed his car. Zwak alleges that Long initiated a conversation about whether he ever smoked "the good stuff," and that he could get Zwak some. He understood this to mean that Long was offering to get him drugs if he was interested. Zwak rejected the offer. Robert Arnoldink ("Arnoldink"), President and Part-Owner of Hudsonville Body, learned of this incident and terminated Long's employment, pursuant to its policies. Specifically, Hudsonville Body's employee manual prohibits the use, sale, possession, or dispensing of illegal drugs on or off the premises during business hours.

Agency/Appellee, the Unemployment Insurance Agency ("the Agency") denied Long's application for unemployment benefits on January 26, 2009, finding he had been discharged for workplace misconduct. An administrative law judge affirmed the decision on March 4, 2009, which the Board, thereafter, affirmed on May 29, 2009.

Standard of Review

The standard of review applicable to an appeal of a decision by the Michigan Employment Security Board of Review is provided in MCL 421.38(1), which states:

[t]he circuit court...may review questions of fact and law on the record made before the referee and the board of review involved in a final order or decision of the board, and may make further orders in respect to that order or decision as justice may require, but the court may reverse an order or decision only if it finds that the order or decision is contrary to law or is not supported by competent, material, and substantial evidence on the whole record.

Substantial evidence is defined as "the amount of evidence that a reasonable mind would accept as sufficient to support a conclusion."² If there is substantial evidence, this Court "cannot substitute its own judgment for that of the administrative agency."³

Applicable Law

The Act disqualifies an individual from receiving unemployment benefits if, among other things, he is "suspended or discharged for misconduct connected with the

² *In re Payne*, 444 Mich 679, 692 (1994).

³ *Smith v Michigan Employment Security Comm*, 410 Mich 231, 256 (1981).

individual's work..."⁴ As to what constitutes "misconduct" for purposes of the Act, The Michigan Supreme Court adopted the following definition:

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, inadvertencies 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.⁵

Long's Arguments

Long argues that no misconduct has been proven. He denied offering to sell drugs to Zwak. According to Long, Zwak asked him if he had ever smoked, and Long responded that he had taken "a hit" at a party. Therefore, the testimony is evenly supported on both sides, and Hudsonville Body has the burden of proof.

Even if the conversation was as Zwak testified, Long argues that it does not violate Hudsonville Body's policy. The policy prohibits the use, sale, possession, or dispensing of illegal drugs on or off the premises during business hours. According to Zwak, Long said he could get some of "the good stuff." Long argues that there was no sale, nor even an actual offer made. Additionally, Long argues that the incident did not occur during business hours, as Hudsonville Body is not open to the public on Saturdays. Work is performed by special appointment, but this should not be considered business hours, according to Long.

Finally, Long argues that even if there is substantial evidence to say that he offered illegal drugs to Zwak, and that such amounts to violating Hudsonville Body's policy, the misconduct was not in connection with his work, as required by the Act. Zwak worked for Hudsonville Towing, a tenant of Hudsonville Body. Long argues that there is no common ownership between the two companies, and that whatever happened was not on the premises.

Even though Hudsonville Body's policy regarding illegal drugs states that it applies on or off the premises during business hours, Long argues that it does not make the alleged misconduct in connection with his work. Under *Hagenbuch v Plainwell*

⁴ MCL 421.29(1)(b).

⁵ *Carter v Michigan Employment Security Comm*, 364 Mich 538, 541 (1961), quoting *Boynton Cab Co v Neubeck*, 237 Wis 249 (1941).

Paper Co, Inc.,⁶ Long argues that while an employer can fire an employee for actions while not working and not on the employer's premises, the actions are not misconduct in connection with the work. Long was off the premises at the time, in a truck owned by another company, with an employec who worked for another company, and he was not working at the time.

Agency's Response

The Agency argues that Long's claim that the conversation did not occur the way Zwak testified is a question of credibility that the administrative law judge resolved in favor of Hudsonville Body, finding that Long was "not a persuasive witness." The Agency argues that it is not the job of this Court to "redetermine the credibility of the witnesses."⁷

The Agency disputes Long's argument that his misconduct was not in connection with his work. First, whether Hudsonville Body was open to the public on Saturdays is irrelevant. Hudsonville Body conducts business on Saturdays, in that employees work on that day, although optionally. More importantly, the Agency argues that Long construes, "in connection with his work" too narrowly. There is no authority suggesting that it is restricted to on-premises conduct or occurring while the employec is actually working.

When Long was hired, in addition to Hudsonville Body's policy, Arnoldink communicated a "zero tolerance policy," given his termination at a previous job for allegedly soliciting drugs at work. Additionally, Arnoldink emphasized to Long that Hudsonville Body did a lot of work for the Michigan State Police Drug Enforcement Team. Zwak also testified that Hudsonville Towing performed a lot of work for the Michigan State Police Drug Enforcement Team, as well as the Ottawa County Sheriff's Office.

As stated above, in defining "misconduct," the Michigan Supreme Court has limited the term to willful, wanton disregard of an employer's interests, or such carelessness that it constitutes intentional and substantial disregard for the employer's interests.⁸ The Agency argues that Hudsonville Body demonstrated that its business was significantly tied to Hudsonville Towing, and that both businesses often performed work for the Michigan State Police Drug Enforcement Team. Therefore, Long's conduct jeopardized Hudsonville Body's business reputation and it was in connection with his work.

Court's Conclusions

The Board's decision that Long was "discharged for misconduct connected with...his work," was not contrary to law, and it was supported by competent, material, and substantial evidence. The evidence shows that Hudsonville Body strongly

⁶ 153 Mich App 834 (1986).

⁷ *Stephen's Nu-Ad, Inc v Green*, 168 Mich App 219, 221, fn 1 (1988).

⁸ *Carter, supra*.

emphasized to Long its policy regarding illegal drugs and its business relationship with law enforcement, and that Long willfully and intentionally disregarded Hudsonville Body's interests. While Hudsonville Towing was a separate business from Hudsonville Body, it operated out of the same building and both referred business to each other.

Although the Board's decision does not specifically address Long's argument that the misconduct was not in connection with his work, their decision to affirm the administrative law judge's decision shows that it did not construe the term as narrowly as Long suggests it should be. Moreover, *Hagenbuch* does not extend as far as Long argues. In that case, the Court of Appeals stated "that wrongdoings which may justify termination of employment under a contract do not necessarily qualify as 'misconduct' for purposes of the [A]ct."⁹ While this could mean in some cases that an employer's termination of an employee for conduct while not working or not at work is not misconduct connected with his work, *Hagenbuch* does not mandate such a finding in every case.

Judgment

Accordingly, the Michigan Employment Security Board of Review's decision of May 29, 2009, is **affirmed**.

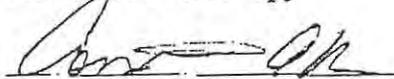
This order resolves the last pending claim in this court and closes the case.

Dated: November 20, 2009

MARK A. TRUSOCK

MARK A. TRUSOCK, Circuit Judge (P38156)

ATTEST: A true copy



Deputy Court Clerk

⁹ 153 Mich App 834, 837-838 (1986).