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A.D. No. B93-04852-128830W
S.S. No. [redacted]
B.O. No. 43

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF KENT

WAYNE E. SMITH,

Claimant/Appellant,

v

MICHIGAN DEPARTMENT OF CORRECTIONS, MICHIGAN TRAINING UNIT and MICHIGAN EMPLOYMENT SECURITY COMMISSION,

Appellee.
_____/

HON. PAUL J. SULLIVAN

Case No. 95-1797-AE

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_____/

OPINION

STATE OF MICHIGAN

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WAYNE E, SMITH,

Claimant/Appellant,

File No 95-1797-AE

v.

HON. PAUL J. SULLIVAN

MICHIGAN DEPARTMENT OF CORRECTIONS, MICHIGAN TRAINING UNIT AND MICHIGAN EMPLOYMENT SECURITY COMMISSION,

OPINION

Appellee.

_____/

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Claimant appeals from a decision of the Michigan Employment Security Commission Board of Review which affirmed the decision of a referee, further affirming determinations and redeterminations of the Commission disqualifying claimant for benefits for misconduct pursuant to MCL 421.29(1)(b). In its pertinent parts, this section states:

(1) An individual is disqualified for benefits if he or she:

* * *

> (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.

Claimant was a prison guard with a history of disciplinary counseling under Appellee's progressive disciplinary policy. His discharge was based upon two instances of alleged misconduct: sleeping on duty and insubordination to a supervisor (door slamming incident). Claimant later was reinstated.

The scope of review by this Court is limited to a determination as to whether the order appealed from is "contrary to law or is not supported by competent, material, and substantial evidence on the whole record." MCL 421.38(1). See also, Mich Const., Art 6, Sec 28.

Claimant first argues that due to his subsequent reinstatement, he qualifies for benefits because of the conditional language of MCL 421.29(1)(b) involving disqualification for misconduct or intoxication "unless the discharge was subsequently reduced to a disciplinary layoff or suspension." Claimant misreads and misinterprets this condition. A close reading of the language and punctuation clearly suggests that the conditional language applies to discharges for "intoxication" as opposed to general misconduct. This interpretation is further verified by reference to MCL 421.29(9) which specifically disqualifies claimants guilty of "misconduct" even where there is an eventual reinstatement:

> "An individual is disqualified for benefits for the duration of the individual's disciplinary layoff or suspension in all cases in which the individual becomes unemployed because of a disciplinary layoff or suspension based upon misconduct directly or indirectly connected with work ...."

Claimant also argues that the findings complained of lack material and competent evidence to support them. This argument appears to concede that absent a mistake of law, misapplication of law, or findings of fact clearly unsupported by material and competent evidence, a reviewing court must give due deference to discretionary findings of fact. See Peaden v. Employment Security Commission, 355 Mich 613 (1959).

This Court has reviewed the entire record submitted to it, and particularly the transcript of testimony taken before the referee on May 24, 1993. The testimony included several items where factual disputes existed, where determinations of credibility had to be made, and where the referee made said determinations favorable to the employer. The referee was in the best position to judge credibility, in that witnesses were present before him to present live testimony. There was more than adequate competent evidence to support such findings, and this Court should not and will not disturb same.

Claimant seems further to suggest that even given factual findings made by the referee, such do not support a finding of "misconduct". What constitutes "misconduct" for purposes of unemployment compensation claims is set forth in Carter v. Employment Security Commission, 364 Mich 538 (1961):

> "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 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 deemed to be 'misconduct/ within the meaning of the statute." Id. at 541.

It is arguable that conduct complained of in the instant case might not constitute misconduct in some employment environments. Sleeping on the job might not always equate to misconduct. Sleeping on the job by a prison guard in a prison environment and while supervising the movement of large numbers of prisoners is a whole different situation. It is akin to the situation in Bell v. Employment security Commission, 359 Mich 649 (1960) where a fireman in a boiler room was deemed to have a position of unusual responsibility, and where his sleeping on the job was determined to be disqualifying misconduct:

> "The job for which he was hired was one of great responsibility. The result of a boiler explosion, either to him, as he dozed nearby, or to his fellow workmen, or to the plant itself, we need not describe. Judged by any criteria his act was 'misconduct connected with his work'." Id. at 652-653.

Finally, as employer suggests, a finding of misconduct can be based upon a series of acts none of which by themselves would rise to the level of misconduct. Watson v. Holt Public Schools, 160 Mich App 218 (1987). While claimant's discharge was based upon sleeping on the job and insubordination, the record clearly establishes a series of other "infractions" which taken all together would more than justify a finding of misconduct. We find, however, that sleeping and insubordination by themselves, given the claimant's position as a prison guard, are quite enough to support such a finding. And as previously noted, there is more than adequate evidence in the record to support the referee's finding that claimant committed the infractions complained of.

Based on all the above, this Court AFFIRMS the decisions of the Board of Review dated January 11, 1995 and March 27, 1995 (denying rehearing) themselves affirming the referee decision rendered July 6, 1993 which held claimant/appellant disqualified for benefits due to

misconduct not attributable to the employer.

Mr. Kotula is requested to prepare and submit an ORDER consistent with the Court's findings, either approved for entry by Mr. Gibbons, or pursuant to the seven day rule.

Dated: April 1, 1996

Paul J. Sullivan

Circuit Judge

PS/s