

STATE OF MICHIGAN
COURT OF APPEALS

JOANNE H. DUCHARME,

Plaintiff-Appellant,

v

PROVIDENCE HOSPITAL and
DEPARTMENT OF CONSUMER AND
INDUSTRY SERVICES, BUREAU OF
WORKERS' AND UNEMPLOYMENT
COMPENSATION,

Defendants-Appellees.

UNPUBLISHED

March 7, 2006

No. 257231

Oakland Circuit Court

LC No. 03-051271-AE

Before: Cooper, P.J., and Jansen and Markey, JJ.

PER CURIAM.

Plaintiff appeals by leave granted from the circuit court's order affirming the decision of the Michigan Employment Security Commission Board of Review ("Board") that plaintiff is not entitled to unemployment benefits because she was discharged for "misconduct" within the meaning of § 29(1)(b) of the Michigan Employment Security Act ("MESA"), MCL 421.1 *et seq.* We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff, who is slightly mentally retarded, had worked for defendant Providence Hospital¹ for 22 years when her employment was terminated in October 2002 for violations of defendant's attendance policy. Before her termination, in accordance with defendant's attendance and disciplinary policies, plaintiff received three written notices, about 26 unexcused absences during a five-month period. Defendant's representatives met with plaintiff and her family to discuss the ramifications of these attendance policy violations, including the fact that plaintiff would be discharged if she accumulated three more unexcused absences in a three-month period. Although plaintiff avoided discipline for several months and obtained two approved leaves of absence following this meeting, she was ultimately discharged after accumulating four more unexcused absences in August and September 2002. Plaintiff provided no explanation for her absences.

¹ Although the Bureau is also a defendant-appellee in this case, the term "defendant" as used in this opinion will refer solely to Providence Hospital.

Following the determination of the Michigan Bureau of Workers' and Unemployment Compensation ("Bureau") that plaintiff was not disqualified from receiving benefits under MCL 421.29(1)(b) based on "misconduct," an administrative hearing was held before an Michigan Employment Security Commission ("MESCC") administrative law judge.

Plaintiff's brother and legal guardian, Michael Ducharme, testified that plaintiff sometimes became confused about her work schedule, resulting in her appearing for work on unscheduled days and failing to appear on scheduled days. Ducharme further testified that most of plaintiff's absences resulting in discipline were due to breathing problems that she was experiencing from an incident in 2000 when she accidentally inhaled drain cleaner fumes; however, no medical evidence was presented. Defendant's relations specialist testified that defendant's disciplinary policy was not strictly enforced with plaintiff during the relevant time because the management was attempting to work with her to correct her attendance problem. In fact, defendant had taken the unusual step of contacting plaintiff's family because she was a long-time employee and defendant wanted to make sure that she fully understood the ramifications of the attendance policy.

The hearing referee reversed the decision of the Bureau, holding that defendant had sustained its burden of proving that plaintiff was discharged for misconduct within the meaning of § 29(1)(b) and that the evidence was insufficient to conclude that plaintiff's retardation was the cause of her attendance infractions. The Board, in a split decision, affirmed the decision of the hearing referee. One Board member dissented, opining that plaintiff's actions were due to "inability or incapacity" rather than "wanton or willful disregard" of defendant's interest and that, therefore, misconduct was not established. The circuit court affirmed, noting that, although it may have ruled in plaintiff's favor at the evidentiary stage, the Board's ruling was supported by substantial evidence and was not contrary to law.

A court conducting a direct review of an administrative decision must determine whether the action was authorized by law and whether the decision was supported by competent, material, and substantial record evidence. Const 1963, art 6, § 28; *Motycka v General Motors Corp*, 257 Mich App 578, 580-581; 669 NW2d 292 (2003); *Boyd v Civil Service Comm*, 220 Mich App 226, 232; 559 NW2d 342 (1996). A reviewing court may reverse a decision of the MESCC "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." MCL 421.38(1). "Substantial evidence is evidence that reasonable persons would accept as sufficient proof to support a decision." *Motycka, supra* at 581.

"[W]hen reviewing a lower court's review of agency action this Court must determine whether the lower court applied correct legal principles and whether it misapprehended or grossly misapplied the substantial evidence test to the agency's factual findings." *Boyd, supra* at 234. Thus, this Court's review of the circuit court's decision is essentially a clearly erroneous standard of review. *Id.* at 234-235. A determination is clearly erroneous when, "on review of the whole record, this Court is left with the definite and firm conviction that a mistake has been made." *Id.* at 235.

Section 29(1)(b) of the MESA provides that "[a]n individual is disqualified from receiving benefits if he or she . . . [w]as suspended or discharged for misconduct connected with

the individual's work or for intoxication while at work." MCL 421.29(1)(b). The term "misconduct" as used in § 29(1)(b)

"is limited to conduct evincing such willful 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." [*Carter v Mich Employment Security Comm*, 364 Mich 538, 541; 111 NW2d 817 (1961), quoting *Boynton Cab Co v Neubeck*, 237 Wis 249, 259-260; 296 NW 636 (1941).]

Consistent with the principle that the disqualification provisions of the MESA are to be narrowly construed so as to further its remedial policy, "tardiness or absences resulting from events beyond the employee's control or which are otherwise with good cause cannot be considered conduct in wilful or wanton disregard of the employer's interests." *Washington v Amway Grand Plaza*, 135 Mich App 652, 658; 354 NW2d 299 (1984). Although the burden of proof is generally the employer's to demonstrate disqualification for benefits, when "the relevant facts are entirely in the hands of the former employee and, for all practical purposes, cannot be discovered by the employer[.]" the employee bears the burden "to provide a legitimate explanation for the absences." *Veterans Thrift Stores, Inc v Krause*, 146 Mich App 366, 368; 379 NW2d 495 (1985).

Applying these principles, we conclude that the circuit court did not clearly err in determining that the Board's decision was supported by the evidence and not contrary to law.

The finding that plaintiff's many unexcused absences constituted "misconduct" within the meaning of § 29(1)(b) is supported by substantial evidence and does not reflect an error of law. Plaintiff provided no explanation for the absences leading to her dismissal. Defendant went to considerable lengths to correct plaintiff's attendance problems, going so far as to have a "very uncommon" meeting with her guardian and another family member to emphasize the ramifications of defendant's attendance and disciplinary policies. Plaintiff was able to work for defendant for 22 years before her termination, suggesting that her incapacity did not render her unable to conform to the expectations of her employer. Although plaintiff's guardian testified that plaintiff periodically suffered confusion concerning her work schedule and that she required breathing treatments, this does not suffice as a legitimate explanation for the absences because no evidence was presented to link these facts with the particular absences resulting in plaintiff's termination. Plaintiff did not demonstrate that her unexcused absences during the relevant period were due to her retardation or to any breathing problems stemming from the chemical accident (which, it should be noted, occurred a full five months before any absence at issue in this case). Moreover, the evidence that defendant had relaxed its attendance and disciplinary policies to retain plaintiff, a longstanding employee with apparent special needs, does not, as plaintiff

suggests, establish that she did not act with wanton or willful disregard of her employer's interests.

Although reasonable minds might differ—and *have* differed, as demonstrated by the various opinions of the Bureau, the hearing referee, the Board members, and the circuit court—as to the proper outcome of this case, the applicable standards of review compel this Court to affirm the circuit court's decision. When any reasonable mind would accept as adequate the evidence supporting the Board's decision, that decision must be affirmed, irrespective of the fact that other reasonable minds might have reached a different conclusion. *Black v Dep't of Social Services*, 195 Mich App 27, 30; 489 NW2d 493 (1992).

We affirm.

/s/ Jessica R. Cooper
/s/ Kathleen Jansen
/s/ Jane E. Markey