

411 Mich. 670 (1981)

311 N.W.2d 712

DUEWEKE

v.

MORANG DRIVE GREENHOUSES, INCDocket No. 63973, (Calendar No. 11).**Supreme Court of Michigan.**

Argued November 17, 1980.

Decided November 2, 1981.

Wayne County Neighborhood Legal Services (by *Jeanne Mirer* and *Robert F. Gillett*) for plaintiff.*Frank J. Kelley*, Attorney General, *Robert A. Derengoski*, Solicitor General, and *David A. Voges* and *Edward Jan Setlock*, Assistants Attorney General, for defendant Michigan Employment Security Commission.

Amici Curiae:

Jordan Rossen, Associate General Counsel, and *Rothe, Mazey, Mazey & Hamburger, P.C.*, for International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America.Michigan Legal Services (by *Charlene Snow*).*Clark, Klein & Beaumont* (by *Dwight H. Vincent*, *J. Walker Henry*, and *John R. Spreitzer*) for Michigan Manufacturers Association and Employers Unemployment Compensation Council.

KAVANAGH, J.

676 This appeal involves the construction and application of § 29(1)(e)^[1] of the Michigan Employment Security Act (MESA) in a situation where a claimant refuses an offer of the same job he previously quit, having served a disqualification *676 under § 29(1)(a)^[2] of the MESA for such voluntary quit. The pertinent issues raised on appeal are (1) whether, as a matter of law, a claimant who has voluntarily separated from an employer, and has requalified under § 29(3) of the MESA, may be further disqualified under § 29(1)(e) for refusing to accept an offer of his former job under the same working conditions, and (2) assuming such an offer is suitable work, whether the claimant had good cause to refuse the offer.

We reverse and remand to the Michigan Employment Security Commission (MESC) for reconsideration in accordance with this opinion.

On May 16, 1975, the plaintiff-appellant, Eric Dueweke, voluntarily terminated his employment relationship with Morang Drive Greenhouses, Inc., and applied for benefits. The MESC determined that he had left his employment without good cause attributable to the employer and imposed a disqualification under § 29(1)(a) of the MESA.

After the plaintiff-appellant served a six-week requalification period, he refiled his application for benefits and was sent by the MESC to his former employer who had notified the commission that "[c]laimant's position with us is still open". Although there is a dispute as to what transpired between Mr. Dueweke and his former employer during their meetings, it is undisputed that the employer indicated on an MESC form that Mr. Dueweke was reoffered the job he had already quit and that he did not accept it.

677 The MESC then ruled that plaintiff-appellant was disqualified under § 29(1)(e) of the MESA for *677 refusing to accept suitable work without good cause. The referee and the appeal board affirmed.

On appeal to the Wayne Circuit Court, the appeal board's decision was reversed, but in turn the Court of Appeals reversed the circuit court.

The basic purpose of the MESA is to provide relief to the unemployed worker and his family from the burden of involuntary unemployment. MCL 421.8(2); MSA 17.508(2). As originally enacted, the MESA totally disqualified an individual who was voluntarily unemployed from receiving unemployment benefits. In 1965, the act was amended to provide for a penalty period and a reduction in benefits rather than total disqualification^[3] to individuals who were voluntarily unemployed so that such individuals might requalify and come within the purpose of the MESA.

The plaintiff-appellant asks us to hold that once a claimant has been disqualified under § 29(1)(a) and requalified, he or she cannot subsequently be disqualified under § 29(1)(e) for refusing to return to the same work. We refuse to do so.

The board must pass on the suitability of the work, and also (and separately) assay the reasonableness of a claimant's refusal of it. We decline to hold that the former work can never be suitable work, for in most instances the former work would probably meet the statutory criteria for suitable work. However, the reasons for refusing to return to the work, including the fact that claimant previously quit the job offered, go to the question of good cause for refusing the offer.

678 *678 The MESA, as it read before the 1980 amendment, sets forth criteria for determining whether work is suitable in § 29(6): "[T]he commission shall consider the degree of risk involved to his health, safety, and morals, his physical fitness and prior training, his experience and prior earnings, his length of unemployment and prospects for securing local work in his customary occupation, and the distance of the available work from his residence." MCL 421.29(6); MSA 17.531(6).

The record does not show that these criteria were ever considered in determining whether Mr. Dueweke refused an offer of suitable work. Accordingly, we remand to the MESC to consider the express statutory criteria in determining the issue of suitability.

The plaintiff-appellant alleges that the offer of work contains conditions that would result in an overtime payment procedure which violates the Federal Fair Labor Standards Act, 29 USC 207(a)(1), and the Michigan Minimum Wage Law of 1964, as amended, MCL 408.384a; MSA 17.255(4a). We direct the MESC to consider the evidence regarding this allegation in arriving at its determination of suitability. We find it implicit in the statute that an offer of work involving working conditions which are illegal would render the work unsuitable.

The plaintiff-appellant contends that, assuming an offer of suitable work was made, he had good cause to refuse the offer and is therefore entitled to unemployment benefits.

The referee's opinion states

679 "that although claimant had good personal reasons for not wishing to return to the involved employer without an increase in pay, said reasons were not of such a nature as to show good cause for refusing to *679 accept suitable employment under [§§] 29(1)(e), 29(6) and 29(7)(b) of the act."

It further states "that the personality conflict between the claimant and the general manager of the employer and the question of additional pay, beyond \$180 per week, was not sufficient good cause for the claimant to refuse an offer of suitable work".

The Court of Appeals applied the rule in Losada v Chrysler Corp, 24 Mich App 656, 660; 180 NW2d 844 (1970), which held that personal reasons were not good cause under the statute. Losada was followed by a split decision in Keith v Chrysler Corp, 41 Mich App 708; 200 NW2d 764 (1972), in which the majority agreed with the Losada rule. The decision was affirmed by an equally divided Supreme Court. Keith v Chrysler Corp, 390 Mich 458; 213 NW2d 147 (1973).^[4]

We conclude that personal reasons may constitute good cause under § 29(1)(e) of the MESA. In doing so, we adopt the rationale and standard of good cause set forth in Justice (then Judge) LEVIN'S dissenting opinion in Keith, 41 Mich App 708, 712-715.^[5]

680 If the MESC finds the plaintiff-appellant's former job to be suitable according to the criteria set forth in the statute and in this opinion, it should evaluate Mr. Dueweke's reasons for refusing the work to determine whether his reasons for such *680 rejection would be deemed valid by reasonable men and women and not indicative of an unwillingness to work.

Reversed and remanded to the Michigan Employment Security Commission for reconsideration in accordance with this opinion.

WILLIAMS, LEVIN, and BLAIR MOODY, JR., JJ., concurred with KAVANAGH, J.

COLEMAN, C.J. (*to affirm*).

We disagree, in part, with the opinion of the Court and would affirm the decision of the Court of Appeals.^[1]

The central legal issue is whether an offer of the same employment to an employee who has voluntarily quit cannot, as a matter of law, constitute an offer of suitable work so as to disqualify the employee from unemployment benefits pursuant to MCL 421.29(1)(e); MSA 17.531(1)(e).

We agree that an offer of the same job as that voluntarily abandoned can qualify as "suitable work".

However, we would not remand to the Michigan Employment Security Commission (MESC) for reconsideration in light of statutory criteria and a standard adopted from a Court of Appeals dissent in *Keith v Chrysler Corp*, 41 Mich App 708, 714; 200 NW2d 764 (1972).

First, a reading of the transcript persuades us that the statutory criteria already have been considered. There is competent and material evidence to support the conclusion that plaintiff refused suitable work without good cause attributable to the employer.

681 Second, we cannot subscribe to the "good cause" *681 standard stated in the *Keith* dissent. Although *Keith* does not concern a case of voluntary quitting, it is argued that the standard set forth in the dissent should be adopted in this situation. The opinion quotes from *In the Matter of Watson*, 273 NC 629, 635; 161 SE2d 1 (1968), stating:

"[W]e conclude that an employee, having been separated from his job through no fault of his own, rejects other tendered employment for 'good cause' when his reason for such rejection would be deemed by reasonable men and women valid and not indicative of an unwillingness to work."

Although we disagree, the record supports the decision of the referee even under that standard stated in the dissent in *Keith*.

I

The history of the case, now six years after plaintiff quit voluntarily on May 16, 1975, after 10-1/2 months of work as a *full-time salaried supervisor* in Morang Drive Greenhouses, Inc., is revealing.

1. After quitting, plaintiff was disqualified from receiving unemployment benefits for six weeks, MCL 421.29(1)(a); MSA 17.531(1)(a).

682 2. Defendant then was notified by MESC and plaintiff presented a form for verification of availability to employers (MESC Form No. 1323) to the employer, who completed it, saying that there was work available consisting of the "same job he left", but that the employee "refused [the] job due to [a] personality conflict with [the] general manager after leaving". However, in the hearing on the claim, plaintiff said, "[L]et me state that I believe this whole question of personality conflict has been *682 a bit overblown". He said he never at any time had made a statement that he would not return for that reason. When asked by the referee, "Would you have gone back to Morang regardless of the conflict * * * in personality?", plaintiff answered "Yes".

3. On November 12, 1975, MESC determined that plaintiff had failed without good cause to accept suitable work when it was offered.

4. Plaintiff protested and MESC issued a redetermination. The result was the same.

5. Plaintiff appealed to a referee, who, after a full hearing, affirmed MESC.

6. Plaintiff appealed to the Employment Security Appeal Board, which affirmed on June 9, 1977.

7. Appeal then was taken to the Wayne Circuit Court which reversed the decision of MESC on May 25, 1978, finding in effect that the period of disqualification was a penalty to be served and that an offer of the same work after serving the penalty was not an offer of "suitable work".

8. Appeal was taken to the Court of Appeals, which reversed the circuit court on June 20, 1979, finding that plaintiff refused suitable work without good cause.

9. This Court would remand to MESC for reconsideration (again) in light of the statutory criteria and the newly added criteria.

This case should be ended and I see no reason to start once more the ascent from MESC.

II

MCL 421.29; MSA 17.531 provided in part:

"(1) An individual shall be disqualified for benefits in all cases in which he:

683 *683 * * *

"(e) Has failed without good cause to accept suitable work when offered him, or to return to his customary self employment, if any, when so directed by the employment office or the commission, * * *

* * *

"(6) In determining whether or not any work is suitable for an individual, the commission shall consider the degree of risk involved to his health, safety and morals, his physical fitness and prior training, his experience and prior earnings, his length of unemployment and prospects for securing local work in his customary occupation, and the distance of the available work from his residence.

"(7) Notwithstanding any other provisions of this act, no work shall be deemed suitable and benefits shall not be denied under this act to any otherwise eligible individual for refusing to accept new work under any of the following conditions: (a) If the position offered is vacant due directly to a strike, lockout or other labor dispute; (b) if the remuneration, hours or other conditions of the work offered are substantially less favorable to the individual than those prevailing for similar work in the locality; (c) if as a condition of being employed the individual would be required to join a company union or to resign from or refrain from joining any bona fide labor organization." 1965 PA 281.

III

We agree with the opinion of the Court that former work is not, as a matter of law, unsuitable work.

684 First, § 29(7) lists those factors which make work unsuitable as a matter of law and does not include "former work". The inclusion of express criteria in the statute implies the exclusion of other factors. *Alan v Wayne County*, 388 Mich 210; 200 NW2d 628 (1972). If the conditions listed in § 29(7) are to *684 be enlarged, the Legislature should make the adjustment.

The conclusion that the Legislature did not intend former work to be unsuitable as a matter of law is consistent with decisions from this Court, courts in other jurisdictions, and the MESC.

In *Bingham v American Screw Products Co*, 398 Mich 546; 248 NW2d 537 (1976), this Court decided that former work may not be suitable if the distance from the individual's residence is too great. If former work was unsuitable as a matter of law, the Court would not have needed to address the individual factors listed in § 29(6) to resolve *Bingham*.

In *S S Kresge Co v Unemployment Compensation Comm*, 349 Mo 590, 595-596; 162 SW2d 838 (1942), the Court addressed 1939 Mo Rev Stat, § 9431,^[2] stating:

"We perceive nothing inconsistent between the provisions of Subsecs I and III [These subsections are the Missouri clauses on voluntary quitting and refusal to accept suitable work without good cause that are almost identical to the Michigan clauses]. * * * A myriad of reasons may be advanced by different employees and a given employee may have a number of reasons for quitting work. Some may be based on objections to the work. Others may be based on reasons not connected with the work. There is no provision in the law upon which to plant a ruling that the former work or that new work is or is not suitable. In given instances new work may be less suitable than the former work, and for employees, skilled in a particular

line of work, the former work may be the most acceptable or, in conceivable instances, the only acceptable available work for the given employee. Being less suitable does not make the work not suitable. The argument, advanced by the
 685 Commission, that a ruling that the former work may be *685 `suitable work' within the provisions of Subsec III permits the employer to arbitrarily wipe out the employee's benefit rights under the law begs the question, and the other extremity that it is the employee who determines the work is not suitable finds no support in the law. Arbitrary standards having no foundation in the specific provisions of law are not to be set up. Each individual case must rest upon its own facts."^[3]

Finally, the MESC has made a similar construction of the statute. Section 76.131 of the Precedent Manual issued by the MESC provides:

"Refusal Following a Prior Disqualification With Same Employer. Situations will occur where an employer will protest a claimant's right to benefits because the claimant has failed to apply for, accept, or report to a former employer concerning, available suitable work and where there has been a prior adjudication on a previous offer, or where there has been a prior adjudication under other disqualifying provisions of § 29 of the act, such as voluntary leaving.

"The Commission cannot refuse to impose a disqualification for a subsequent refusal of work merely because the claimant had already been disqualified for quitting, or for refusing a previous offer, with the same employer.

* * *

"It is recognized that adjudication of distinct acts, separations or discharges involving the same employer may result in the
 686 claimant being disqualified more than *686 once, e.g., under the voluntary leaving and suitable work provisions of the act. However, if the proper application requires a disqualification based on the issue at hand, then such disqualification must be made."

This construction of the statute by those charged with its administration is accorded great weight, *Magreta v Ambassador Steel Co.*, 380 Mich 513; 158 NW2d 473 (1968), and is consistent with the interpretation applied in many jurisdictions.

We hold that former work is not unsuitable work as a matter of law. Each case must be evaluated on the facts presented.

IV

However, we would affirm the decision of the MESC rather than remand. After reviewing the statutory criteria, the evidence presented, and the referee's opinion, we must conclude that the referee considered whatever evidence was presented and find that his opinion is not so inadequate as to preclude effective judicial review.

Plaintiff testified that he terminated his employment because of a personality conflict^[4] and because there was no room for advancement. Although plaintiff had worked at the same job previously, he did not mention any of the factors listed in § 29(6) as a reason for refusing the offered work. No testimony was introduced indicating that the work involved any risk to
 687 plaintiff's health, safety or morals or that it was not within his physical *687 ability or experience. Plaintiff was unemployed for over five months when he was offered his former job. He testified that he would not return to his old job unless he received a raise of \$20 per week.

Plaintiff's testimony and prior performance and experience while employed in the same capacity, plus his failure to claim or mention any of the factors listed in § 29(6) as a reason for refusing the offered work belie any contention that he refused the work because it was unsuitable under § 29(6).

The referee's opinion underscores this conclusion. The opinion states:

"[A]lthough claimant had good personal reasons for not wishing to return to the involved employer *without an increase in pay*, said reasons were not of such a nature as to show good cause for refusing to accept *suitable employment* under [§§] 29(1)(e), 29(6) and 29(7)(b) of the act." (Emphasis added.)

The evidence supports this conclusion. Plaintiff testified that he believed defendant promised him a raise after six months but he never received the raise. The employer testified that he agreed to review plaintiff's rate of pay after six months. In this case, the failure to receive a pay increase did not make the work unsuitable and was not "good cause" to refuse suitable work.

The opinion of the Court also directs the MESC to consider evidence regarding allegations that the overtime wage scale may have violated federal and state laws.^[5] However, plaintiff testified that he was not aware of this possibility when he quit and failed to mention it either to his employer or at the hearing as one of his reasons for refusing the *688 offer of work. His testimony that he would return to work if he received a \$20 per week raise indicates that his refusal to accept the offered work was not based on any perception of illegality. Assuming, *arguendo*, that the law had been violated, plaintiff could have filed suit for back pay and other relief pursuant to 29 USC 216(b), MCL 408.393; MSA 17.255(13). The Commissioner of Labor or the courts provide a more appropriate forum for resolving these complex claims.

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No claim was made or evidence introduced showing that the work offered was on conditions substantially less favorable than those prevailing for similar work in the locality. The referee's conclusion that the work offered was suitable under § 29(6) is not reversible.

V

When considering the policy underlying the MESA, we cannot subscribe to the *Keith, supra*, standard adopted by the majority, that "good cause" is what reasonable persons believe it to be, although personal in nature and not attributable to the employer.

That standard is so broad as to be no standard within the concept of unemployment compensation. It focuses upon personal concerns of one party with no provision for balancing the obligations of the others governed by MESA.

The employer is required to pay benefits through contributions in situations over which it would have no control. In *Ohio Bureau of Employment Services v Hodory*, 431 US 471, 490; 97 S Ct 1898; 52 L Ed 2d 513 (1977), the United States Supreme Court stated:

689 "The unemployment compensation statute, however, *689 touches upon more than just the recipient. It provides for the creation of a fund produced by contributions from private employers. The rate of an employer's contribution to the fund varies according to benefits paid to that employer's eligible employees. Ohio Rev Code § 4141.25. Any action with regard to disbursements from the unemployment compensation fund thus will affect both the employer and the fiscal integrity of the fund. Appellee in effect urges that the Court consider only the needs of the employee seeking compensation. The decision of the weight to be given the various effects of the statute, however, is a legislative decision * * *."

We conclude that the Legislature did not intend such an extension of MESA.

VI

The holding in *Losada v Chrysler Corp*, 24 Mich App 656; 180 NW2d 844 (1970),^[6] is applicable to the facts of this case. The concerns about one's remuneration and failure to receive desired raises do not alone constitute good cause to refuse an offer of the same work so as to trigger benefits intended for "persons unemployed through no fault of their own". Although *Losada* should not be overruled, we do not reach the question of whether it would be subject to interpretation under more egregious circumstances.

690 Regardless of the standard ultimately adopted by the Court for determining good cause, there is *690 no need to remand this case for findings either as to the suitability of the work or as to good cause for refusing it.

Having found that an offer of the same employment as that which plaintiff voluntarily quit can be an offer of suitable work, the record reveals no viable attack on its suitability. The record also reveals no sound basis for finding that plaintiff had good cause to refuse his previous employment — regardless of the fate of *Losada* or *Keith*.^[7]

The findings of the referee and MESC are adequate on the record to support their conclusion.

This long legal journey should be concluded.

We would affirm.

FITZGERALD and RYAN, JJ., concurred with COLEMAN, C.J.

[1] MCL 421.29(1)(e); MSA 17.531(1)(e), provided that an individual shall be disqualified in all cases in which he "[h]as failed without good cause to accept suitable work when offered him, or to return to his customary self-employment, if any, when so directed by the employment

office or the commission".

[2] MCL 421.29(1)(a); MSA 17.531(1)(a), provided that an individual shall be disqualified in all cases in which he "[h]as left work voluntarily without good cause attributable to the employer or employing unit".

[3] 1965 PA 281. A 1975 amendment to the act changed the requalifying period from 6 weeks to 13 weeks for claimants covered by § 29(1)(a). 1975 PA 110. 1980 PA 358 reinstates the total disqualification for a worker who has left work voluntarily without good cause attributable to the employer or employing unit with one exception. These amendments were enacted after the instant case arose.

[4] Justice LEVIN did not participate because he was a member of the Court of Appeals panel that originally decided the *Keith* case. As a member of that panel, he dissented from the majority's application of the rule of *Losada*.

[5] We recognize that *Keith* involved § 29(1)(d) (refusal without good cause to report within a reasonable time for an interview concerning available suitable work) and that the instant case is a § 29(1)(e) case. We do not find this distinction important for the purposes of our analysis.

[1] *Dewecke v Morang Drive Greenhouses, Inc.*, 91 Mich App 27; 282 NW2d 823 (1979).

[2] See Mo Rev Stat § 288.050.1, subds (1) and (2).

[3] Other jurisdictions have reached similar resolutions of this issue, see *California Appeal Board Benefit Decision No 4666*, 2 Unemployment Ins Rep (CCH), Cal ¶ 1965.933, *Stensvad v Industrial Comm.*, 167 Colo 140; 445 P2d 898 (1968), *Wilson v Review Board of Employment Security Division*, ___ Ind App ___; 369 NE2d 675 (1977), *vacated* ___ Ind App ___; 373 NE2d 331 (1978), *Massachusetts Board of Review Decision No 37*, 6 Unemployment Ins Rep (CCH), Mass ¶ 1965.581, *Lewis v Minneapolis Moline, Inc.*, 288 Minn 432; 181 NW2d 701 (1970), *Russell v Catherwood*, 33 AD2d 592; 304 NYS2d 415 (1969), *Unemployment Compensation Board of Review v Lowell*, 24 Pa Commw Ct 309; 355 A2d 616 (1976), *Allen-Bradley Co v Dep't of Industry, Labor & Human Relations*, 58 Wis 2d 1; 205 NW2d 129 (1973).

[4] Plaintiff said that the general manager's wife was more loyal to her husband than to him on the occasions she was under his supervision. She filled in for absentees or when extra help was needed in the various greenhouse components, sometimes working in defendant's area of responsibility. However, defendant denied that refusal of work was based on that "conflict".

[5] See Federal Fair Labor Standards Act, 29 USC 207(a)(1); Michigan Minimum Wage Law of 1964, as amended, MCL 408.384a; MSA 17.255(4a). See also 29 USC 213(a)(1).

[6] In *Losada v Chrysler Corp.*, 24 Mich App 656; 180 NW2d 844 (1970), the Court held that plaintiff's rejection of work which would take him out of "trim" and prevent his return to "trim", and at a slight reduction in pay, was a personal reason and did not comprise "good cause". It noted that the Employment Security Act provides for compensation "for the benefit of persons unemployed *through no fault of their own*". MCL 421.2; MSA 17.502.

[7] Any person can voluntarily quit a job but fairness and economic reality require that not all persons who quit shall be remunerated when doing so. In this case, it would have been wise had plaintiff sought another placement prior to relinquishing the "bird in hand". If the pay was not commensurate with his perceived abilities, certainly going with no pay for some months (at least) while trying to obtain unemployment compensation did not serve the alleged purpose of wanting more money. Plaintiff's concern about not being placed in one of the new stores was one never communicated to the employer, who said he would have so placed him had he known of plaintiff's interest.

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