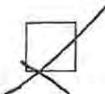


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CIRCUIT COURT ORDER/OPINION  
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Appeal Docket No: 192343H



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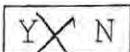
Board Member and assigned attorney to case (Individual Copies)



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*affirm*

29(1)(i) Section of the Act

Date: 1-21-09, 2008

R. Douglas Daligga, Director  
MES - Board of Review

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

JAMES R. ANDREWS,

Claimant-Appellant,

-v-

Case No. 08-103679-AE  
Hon. Isidore B. Torres

COD FOOD SERVICES, INC.,

Employer-Appellee,

and

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

Appellee.

OPINION AND ORDER

At a session of said Court,  
held in the City of Detroit,  
County of Wayne, State of Michigan  
on AUG 29 2008  
PRESENT: Hon. Isidore B. Torres  
Circuit Court Judge

Pending before the Court is James Andrews' appeal of an August 31, 2007 decision of the State of Michigan Employment Security Board of Review reversing a determination by Administrative Law Judge Carl T. Ratliff that Appellant was terminated under non-disqualifying circumstances. The Court, having heard oral argument, having reviewed the record and briefs on appeal, and otherwise being fully advised in the premises, issues the following opinion and order.

SEP. 4. 2000 4.02PM ATTORNEY GENERAL NO. 3191 1. 0/0

## Background

James Andrews ("Claimant") was hired by COD Food Services, Inc. ("Employer"), a vending machine company, in 1989 as a route driver. R at 7. Claimant eventually became a supervisor whose job duties included collecting cash from Employer's vending machines, supervising other drivers, and counting the money collected in Employer's "counting room." R at 8.

On June 3, 2006, Employer learned that \$150 in cash was missing from the counting room. Employer contacted Claimant, the supervisor on duty on June 2, 2006, and asked about the missing money. R at 17-18. Claimant admitted that he had taken the money. On the same day, June 3, 2006, Claimant returned the money to Employer. R at 18. Claimant also returned the key to Employer's counting room. R at 18. After June 3, 2006, Claimant no longer had access to the counting room. R at 18. Employer's owner, Christopher Peppo, testified that he did not fire Claimant when he learned of the theft on June 3, 2006, because Employer was extremely short-handed. R at 18. On August 2, 2006, Employer terminated Claimant's employment. R at 9. Mr. Peppo testified that Claimant was fired as a result of the theft that occurred on June 2, 2006. R at 9. However, in his communications to the Unemployment Insurance Agency, Claimant indicated that he was never given a reason for the termination of his employment. R at 40.

Claimant was eventually granted unemployment benefits. R at 47. Employer filed an appeal from the determination that Claimant was entitled to benefits. On April 11, 2007, a hearing was held before Administrative Law Judge Ratliff (the "Referee"). The Referee issued a decision in which he stated, in relevant part, as follows:

Claimant engaged in an act of theft in relationship to the employer's business activities on June 2, 2006. Claimant admitted to the employer that he had

engaged in the act of theft on June 3, 2006. However, the employer waited until August 2, 2006 to terminate claimant for the theft that occurred on June 2, 2006. The Employer did not fire claimant within a reasonable period of time because it was an economic benefit to the employer for the claimant to remain as an employee until August 2, 2006.

\*\*\*

The record clearly established predicated on the credible testimony of the claimant and the employer that the employer condoned the theft of claimant by waiting an unreasonable period of time to fire Mr. Andrews. Therefore, it is the finding of this Administrative Law Judge that claimant was terminated under non-disqualifying circumstances within the meaning of the Michigan Employment Security Act.

R at 54-55.

Employer appealed the decision of the Referee to the Employment Security Board of Review. On August 31, 2007, the Board of Review issued a 2-1 decision reversing the Referee's decision. Specifically, the majority of the Board of Review held:

We disagree with the Referee that it was unreasonable for the employer to wait two months as it was clear that the delay was due to the employer's financial interests. Finally, the Referee's conclusion that the employer condoned the theft is not supported by the evidence. Both parties agreed that after the theft, the claimant was immediately removed from his position as a closing supervisor. The closing supervisor's duties included bringing all the money collected into the counting room and the safe room. The claimant no longer had access to the counting room after the theft.

R at 58.

Claimant timely appealed the Board of Review's decision.

#### **Standard of Review**

The 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.

MCL 421.38(1).

The board has the unquestioned right to make binding findings of fact, when supported by competent, material, and substantial evidence. *Hoffman v SOS Consolidated, Inc*, 45 Mich App 163, 166; 206 NW2d 214 (1973). Substantial evidence is that which a reasoning mind accepts as sufficient to support a conclusion. *Russo v State Dep't of Licensing & Regulation*, 119 Mich App 624, 631; 326 NW2d 583 (1982). While it consists of more than a mere scintilla of evidence it may be substantially less than a preponderance of the evidence. *Id.*

### Discussion

For the reasons discussed below, the Court will affirm the decision of the Board of Review.

The Referee's conclusion that the Employer "condoned the behavior of claimant...by waiting an unreasonable period of time [two months] to fire claimant" was not supported by the evidence. Mr. Peppo testified that after Claimant stole money from the Employer, he was no longer given access to the counting room. R at 19, 27. Thus, there was evidence that Employer immediately punished Claimant for his conduct, as opposed to condoning the conduct.

Furthermore, under MCL 421.29(1)(i), an individual is disqualified from receiving benefits if he or she was discharged for theft connected with the individual's work. The statute does not require that the discharge for theft occur within a specific period of time in order for the employee to be disqualified from benefits. Of course, the longer the wait between the theft and the discharge, the more difficult it becomes for the employer to establish a causal connection between the events, but in this case, there was no evidence that Claimant was discharged for a reason other than theft. Moreover, the Employer provided a reasonable explanation for the two-month wait. Mr. Peppo testified that he waited two months before firing Claimant because of a legitimate economic interest.

During oral argument, Claimant's counsel stated that the Board of Review's decision was based on erroneous findings of fact. Specifically, Claimant's counsel disputed the Board of Review's statement that "claimant was immediately removed from his position as a closing supervisor." Claimant's counsel suggested that because Claimant willingly turned over the key to the counting room, he was never actually relieved of responsibility by the Employer.

Claimant's counsel's argument lacks merit. It is undisputed that prior to the theft, Claimant's duties as a supervisor included counting all of the money collected by the route drivers he supervised. R at 8. It is also undisputed that after the theft, Claimant was no longer permitted to enter the counting room and count money. R at 19, 27. Claimant makes much of the fact that he "gave" the key to the counting room to the Employer, but, as was indicated on the record, the Employer certainly did not refuse to take the key back from Claimant; instead, the Employer never again granted Claimant access to the counting room or permitted him to count money after the theft. R at 19, 27.

### Conclusion

The Board of Review's decision was not contrary to law, and was supported by competent, material, and substantial evidence on the whole record. Accordingly, IT IS HEREBY ORDERED that the decision of the Board of Review is AFFIRMED.

This order resolves the last pending claim and closes the case.

**ISIDORE B. TORRES**

Isidore B. Torres  
Circuit Court Judge

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BY *R. Arcilla*  
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