Received for Filing Oakland County Clerk 2012 APR 12 PM 12:40

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

GEORGIANA VANHUSEN,

Claimant/Appellant,

Case No. 11-122549-AE
Hon. Phyllis C. McMillen

v

HENRY FORD HEALTH SYSTEM,

Employer/Appellee,

and

STATE OF MICHIGAN, DEPARTMENT OF LICENSING & REGULATORY AFFAIRS, UNEMPLOYMENT INSURANCE AGENCY,

Agency/Appellee.
_______________________________/

OPINION AND ORDER

At a session of Court
Held in Pontiac, Michigan
On

APR 11 2012

PRESENT: The Honorable Phyllis C. McMillen, Circuit Judge

This matter is before the Court on Claimant's appeal from a decision of the Michigan Compensation Appellate Commission (Commission). On September 30, 2011, the Commission found that Claimant is disqualified from receiving unemployment benefits under the Michigan Employment Security Act because Claimant was discharged from her employment for misconduct. MCL 421.29(1)(b).

Received for Filing Oakland County Clerk 2012 APR 12 PM 12:40

I. Facts

Claimant/Appellant, Georgiana VanHusen, was employed by Henry Ford Health System as a registered nurse in the emergency department at Henry Ford West Bloomfield Hospital. She worked in this position from January 2, 2007 until April 18, 2010, when she resigned in lieu of discharge.

Claimant's job duties were to provide nursing care to patients in the emergency department. Nursing care includes performing assessments, providing treatment based on acuity; documenting the assessment and treatment; communicating with patients and their families regarding the patient's plan of care; and communicating with other staff to ensure quality patient care.

The employer follows a progressive discipline procedure. Claimant was first disciplined on April 27, 2009, when she received a written warning for unprofessional conduct and demonstrating negative behavior to patients and customers. This discipline was the result of two complaints, received from patients and co-workers on March 30, 2009 and April 19, 2009. In addition to receiving a written warning, Claimant was placed on a Performance Improvement Plan ("PIP") and was referred to the hospital's Employee Assistance Program for counseling.[1]

The PIP addresses several areas, including interactions and conflict resolution with co-workers, patients, and family members; improving communication; team-building; treating staff more fairly and respectfully; and using positive reinforcement in interactions. As part of the PIP, Claimant met weekly for eight consecutive weeks with her supervisor, Amy Randall, the Nurse Administrative Manager. According to the

[1] Claimant met with a counselor once. Two other times the counselor failed to show up for scheduled sessions.

Received for Filing Oakland County Clerk 2012 APR 12 PM 12:40

employer, the Claimant successfully completed the PIP, i.e., she demonstrated an ability to improve her conflict resolution, communication, and team-building skills.

Despite her completion of the PIP, Claimant was disciplined again on September 24, 2009. She received a written warning as well as a one-day, unpaid suspension for unprofessional conduct, negative and uncompassionate behavior toward patients and family members, and a lack of initiative and urgency in caring for patients. The discipline was based a written complaint sent to the hospital's Chief Executive Officer by a patient's mother, which was forwarded to the Chief Nursing Officer and then to Deborah Spencer, the Director of Emergency Services at the hospital. In addition, there were complaints from co-workers. Ms. Spencer met with Claimant on September 24 to discuss the complaints and the resulting discipline. Claimant was told that the next step in the progressive discipline policy was termination.

Claimant was involved in additional incidents in February, March and April of 2010. These incidents again involved unprofessional conduct and negative and uncompassionate behavior toward patients and family members. On February 23, 2010 one of the hospital's suppliers, Baxter, was conducting in-service training. The training was mandatory, and lasted fifteen minutes. Claimant had just finished her shift and indicated she was tired and was going on vacation and did not want to attend the in-service. During the in-service, Claimant acted rudely toward the presenters and told them the in-service was "stupid". The representatives from Baxter filed a complaint with the hospital.

Received for Filing Oakland County Clerk 2012 APR 12 PM 12:40

On April 5, 2010, Claimant answered a telephone call from a patient's stepmother, who was inquiring about the status of the patient.[2] The caller had some slurring of speech, because of neurological issues. Claimant asked her whether she had been drinking or was on drugs and allegedly hung up on the caller. Claimant admits she asked the caller if she was on drugs or had been drinking. Claimant testified the caller was "very rude and demanding and aggressive", especially when Claimant refused to give her information about the patient.[3] The caller filed a complaint with the hospital.

As a result of the incidents in February, March and April of 2010, the employer decided to terminate Claimant's employment. On April 18, 2010, Claimant resigned in lieu of discharge.

The State of Michigan Unemployment Insurance Agency (Agency) initially determined, on May 14, 2010, that Claimant was disqualified from benefits under Section 29(1)(b) of the Michigan Employment Security Act (the Act). Claimant challenged the determination, and the Agency issued a redetermination on June 7, 2010 finding that Claimant was not disqualified.[4] The employer appealed, and an administrative hearing was held via telephone on October 29, 2010 before Administrative Law Judge L.M. Tavoularis (Referee). The Referee concluded that Claimant was disqualified from benefits in a decision dated November 3, 2010. The Referee found that the Claimant

[2] Ms. Spencer testified that the caller was the patient's stepmother. Claimant testified the caller was the patient's "baby's daddy's mama". The exact nature of the relationship is immaterial to the Court's decision.

[3] The parties do not dispute that Claimant properly refused to give out information about the patient to the caller, as that could be a violation of HIPAA. Ms. Spencer testified that it is common for family members or others to call about patients who are in the emergency department. Claimant had several options, such as asking the patient for permission to disclose information or letting the patient speak to the caller directly.

[4] Neither determination by the Agency is included in the record. The Court relies on the information supplied by the parties in their briefs relating to these determinations.

exhibited "a recurring pattern of behavior which the employer had previously warned her about, that claimant took no action to correct this pattern of behavior, and subsequently was discharged for the same pattern of behavior after warnings." The Referee also cited two administrative decisions indicating that people working in the health care profession owe a higher duty of care in performance of their duties, to ensure the safety of patients.

Claimant requested a rehearing, arguing that her attorney failed to present evidence that was favorable to her case at the hearing, and that she should be allowed to re-argue the case without an attorney. The Referee denied the request for rehearing on December 6, 2010, and Claimant appealed to the Michigan Employment Security Board of Review, now known as the Michigan Compensation Appellate Commission (Commission). On September 30, 2011, the Commission affirmed the Referee's decision, concluding that the Referee's decision was not an abuse of discretion and was in conformity with the law and facts. Claimant then filed the instant appeal.

II. Standard of Review

The Michigan Employment Security Act, MCL 421.1 *et seq*. (the Act), sets forth the applicable 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).]

Also see *Taylor v United States Postal Service*, 163 Mich App 77, 83; 413 NW2d 736 (1987) (same). The substantial evidence test requires more than a scintilla of evidence,

Received for Filing Oakland County Clerk 2012 APR 12 PM 12:40

Received for Filing Oakland County Clerk 2012 APR 12 PM 12:40

but somewhat less than a preponderance. *Id.* (citing *Reed v Hurley Medical Ctr*, 153 Mich App 71, 75; 395 NW2d 12 (1986)).

In making such a review, reviewing courts have been cautioned to use "considerable sensitivity to accord due deference to administrative expertise and 'not invade the province of exclusive administrative fact-finding by displacing an agency's choice between two reasonably different views.'" *Taylor*, 163 Mich App at 83, 413 NW2d at 738 (quoting *Smith v MESC*, 410 Mich 231, 260-61, 301 NW2d 285 (1981)). "It is not a reviewing court's function to resolve conflicts in the evidence or to pass on the credibility of witnesses. Great deference is given to the findings of the hearing examiner because, as the trier of fact, he or she had the opportunity to hear the testimony and view the witnesses." *Arndt v Michigan Dep't of Licensing & Regulation*, 147 Mich App 97, 101; 383 NW2d 136 (1985) (internal citation omitted).

III. Law and Analysis

A. <u>Disqualification</u>

The Act is designed to "safeguard the general welfare through the dispensation of benefits intended to ameliorate the disastrous effects of involuntary unemployment." *Bureau of Worker's & Unemployment Compensation v Detroit Medical Ctr*, 267 Mich App 500, 504-505; 705 NW2d 524 (2005) (citations omitted). The Act should be liberally construed to afford coverage and strictly construed to effect disqualification. *Id.* at 505; *Empire Iron Mining Partnership v Orhanen*, 455 Mich 410, 416; 565 NW2d 844 (1997).

The Act provides that an individual shall be disqualified for benefits if the individual "was discharged for misconduct connected with the individual's work or for

Received for Filing Oakland County Clerk 2012 APR 12 PM 12:40

intoxication while at work . . ." MCL 421.29(1)(b). The employer bears the burden of proving misconduct. *Korzowski v Pollack Industries*, 213 Mich App 223, 229; 539 NW2d 741 (1995). Although the Act does not define "misconduct", the Court in *Carter v Employment Security Comm*, 364 Mich 538, 541; 111 NW2d 817 (1961) held that misconduct is

> 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.

The Court should consider "all of the facts and particularly the degree of responsibility the claimant owes to the employer and what his infraction of the rules means as far as hardship or trouble to the employer." *Wickey v Employment Security Comm*, 369 Mich 487, 503; 120 NW2d 181 (1963). Under the "last straw doctrine," misconduct may consist of a series of incidents as well as a single incident. *Christophersen v City of Menominee*, 137 Mich App 776, 780-781; 359 NW2d 563 (1984), citing *Giddens v Employment Security Comm*, 4 Mich App 526; 145 NW2d 294 (1966).

The Court agrees with the Referee's finding that Claimant exhibited "a recurring pattern of behavior which the employer had previously warned her about" and that Claimant failed to correct the behavior despite the warnings. The hospital stresses to its employees the importance of treating patients, family members, co-workers, and others with dignity and respect; reminders are posted throughout the hospital and on each

Received for Filing Oakland County Clerk 2012 APR 12 PM 12:40

employee's badge. Claimant admitted knowing the hospital's rules concerning conduct and behavior and admitted that these issues were important to the hospital. Claimant's unprofessional and uncompassionate conduct toward patients, family members, co-workers and suppliers was the subject of numerous complaints during the relevant time frame. This conduct was undoubtedly detrimental to the hospital and its reputation. The record establishes that Claimant engaged in "deliberate violations or disregard of standards of behavior which the employer has the right to expect of [its] employee". *Carter*, *supra* at 541. The Referee justifiably concluded that Claimant's pattern of behavior amounted to misconduct.

On the entire record, this Court finds that the Commission was justified in finding that Claimant was discharged for misconduct and therefore disqualified from benefits. This portion of the decision was supported by competent, material, and substantial evidence.

B. Restitution

This Court also finds that Claimant is not required to pay restitution for benefits received prior to November 3, 2010. The Act allows the Agency to recover improperly paid benefits. MCL 421.32(d) states that the Agency may recover restitution under Section 62 if the benefits were paid "improperly as the result of administrative error, false statement, misrepresentation, or nondisclosure of a material fact." MCL 421.62(a) states, in part, "If the unemployment agency determines that a person has obtained benefits to which that person is not entitled, it may recover a sum equal to the amount received plus interest. . . ."

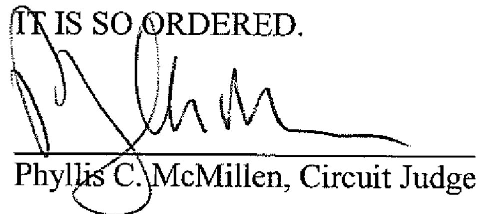
Received for Filing Oakland County Clerk 2012 APR 12 PM 12:40

Claimant received benefits as a result of the Agency's June 7, 2010 redetermination that she was not disqualified. This determination was ultimately reversed by the Referee's November 3, 2010 decision.[5] But the payments were not improperly made. The record contains no evidence of any "administrative error, false statement, misrepresentation, or nondisclosure of a material fact." Therefore, the Agency is not entitled to restitution for benefits Claimant received prior to the November 3, 2010 decision.

WHEREFORE, IT IS HEREBY ORDERED AND ADJUDGED that the decision of the Michigan Compensation Appellate Commission is AFFIRMED. It is further ordered that Claimant is not required to pay restitution for benefits received prior to November 3, 2010.

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

IT IS SO ORDERED.



Phyllis C. McMillen, Circuit Judge

[5] It should be noted that neither the Referee nor the Commission actually ordered the repayment of benefits. The Referee's November 3, 2010 decision states only that "The Agency shall adjudicate any repayment of benefits received during the period of disqualification." Neither the Agency nor the employer addressed the issue of restitution in its briefs. At oral argument, the Agency did not raise the issue and the employer stated it took no position on the issue.