STATE OF MICHIGAN

COURT OF APPEALS

ST. MARY'S MEDICAL CENTER,

Plaintiff-Appellee/Cross-Appellant,

v

CONNIE J. ROUSSEAU,

Defendant-Appellant/Cross-Appellee,

and

MICHIGAN EMPLOYMENT SECURITY COMMISSION,

Defendant/Cross-Appellee.

UNPUBLISHED
June 27, 1997

No. 191314
Saginaw Circuit
LC No. 95-006006-AE

Before: Saad, P.J., and Neff and Jansen, JJ.

PER CURIAM.

Defendant Connie Rousseau appeals by leave granted from a circuit court order reversing the Michigan Employment Security Commission (MESC) Board of Review's decision that she was entitled to unemployment benefits. Plaintiff cross-appeals from the same order, challenging a determination upholding the MESC's finding that Rousseau did not waive her right to unemployment benefits by entering into a settlement agreement with plaintiff. We affirm in part and reverse in part.

I. Underlying Facts

Defendant Rousseau was discharged from her employment as a nurse at St. Mary's Medical Center on September 16, 1992, for allegedly falsifying her time card on two separate occasions. Plaintiff's practice was for the nurses to write the date and time that they arrived for work on their time cards, which were kept in a notebook in the nursing unit. Although not in accordance with its policies, plaintiff allowed the nurses to complete their time cards several days after their shifts were completed.

Plaintiff also allowed the nurses ten minutes on the clock to change into their work clothes. Generally, the nurses put on their work clothes before going to their department to sign in.

Rousseau's time card for April 4, 1992, indicated that she arrived at work at 3:20 p.m. Jennifer Tunny, who was also a nurse at St. Mary's, believed that Rousseau actually arrived for work in street clothes at 3:30 p.m., left the unit and returned at 3:40 p.m. wearing her work clothes. However, Rousseau testified that she arrived at her unit at 3:20 p.m. and went to the pre-op room to answer the telephone, which rang while Tunny was in the recovery room. Rousseau said that she arrived in the recovery room wearing her scrub clothes at 3:30 p.m. and signed in.

On September 2, 1992, Rousseau indicated on her time card that she had worked until 10:00 p.m. when she actually left at 3:00 p.m. She explained that she usually worked from 9:30 a.m. to 10:00 p.m. but on this day she worked from 9:00 a.m. to 3:00 p.m. She testified that she did not sign out that day because she had been in a hurry to leave to meet her daughter, and that when she did enter the time on September 10, 1992, she mistakenly signed out as if she had worked her normal shift. She indicated that she had not intended to deceive her employer. Patricia Topham, who was defendant's supervisor, admitted that the error on defendant's time card could have been the result of such a mistake rather than an intentional falsification.

II. Appeal

Plaintiff's appeal to the circuit court was limited to the issue of whether defendant waived her entitlement to unemployment benefits by entering into a settlement agreement in November, 1992. Yet, the circuit court reversed the Board's decision based on the issue of misconduct. Defendant contends that because plaintiff did not raise the issue of *misconduct* in its appeal to the circuit court, that court could not properly consider the issue. According to MCL 421.38(1); MSA 17.540(1), the circuit court may review a decision of the MESC and may make further orders with respect to it as justice requires. It does not limit the circuit court to only those issues that are raised by the parties. *Id.*; see *Degi v Varano Glass Co*, 158 Mich App 695, 701; 405 NW2d 129 (1987). Thus, because the issue was considered by the MESC Board of Review, the circuit court could make further orders with respect to that issue as justice required.

Defendant also contends that the circuit court failed to apply the proper standard of review when it reversed the Board's decision. On appeal from a decision of the MESC Board of Review, a court may review questions of law or fact but may not reverse unless "the order or decision is contrary to law or is unsupported by competent, material and substantial evidence on the whole record." MCL 421.38(1); MSA 17.540(1); *Broyles v Aeroquip Corp*, 176 Mich App 175, 177; 438 NW2d 888 (1989). If the underlying facts are not disputed, the issues raised on appeal are treated as questions of law. *Broyles*, 176 Mich App at 177. The Board of Review determined that the hearing referee's decision accurately reflected the facts that were presented at the hearing, that the hearing referee properly applied the law to the facts and that therefore, the hearing referee's decision should be affirmed. The hearing referee found that plaintiff did not establish by a preponderance of the evidence that Rousseau had falsified her time cards. He weighed the credibility of the witnesses and determined

that Rousseau could have been performing her duties between 3:20 and 3:30 p.m. on April 4, 1992 and could have mistakenly entered 10:00 p.m. as her departure time for September 2, 1992. The evidence that was presented at the hearing supported these conclusions. Although Tunny testified that Rousseau arrived at the nurses' desk at 3:30 p.m. on April 4, 1992 and was not wearing her work clothes, Rousseau testified that she had been in another room where Tunny could not see her since 3:20 p.m. and was wearing her work clothes when she arrived at the nurses' desk at 3:30 p.m. With respect to Rousseau's entry for September 2, 1992, she testified that she made a mistake and had not intended to deceive plaintiff. Moreover, Topham admitted that Rousseau could have mistakenly entered 10:00 p.m. on her time card with no intent to deceive plaintiff, and plaintiff presented no evidence that Rousseau made this entry with the intent to deceive plaintiff. Thus, the Board's decision was based on competent, material and substantial evidence on the whole record and should not have been reversed by the circuit court.

III. Cross-appeal

Upon discharge, Rousseau filed a complaint with the Michigan Department of Civil Rights, alleging that plaintiff's reason for firing her was pretextual. She asserted that the error on her time card was the result of a mistake that she had tried to correct, that plaintiff had allowed her coworkers to correct mistakes on their time cards with no penalty and that plaintiff actually fired her because she had previously filed a civil rights complaint against it alleging sex discrimination. Two months after her termination, the parties entered into a settlement agreement on November 25, 1992, that provided:

> The Charging Party considers this agreement to be an acceptable resolution of this matter, and agrees not to sue the Respondent with respect to any matters pertaining to the above numbered charge(s) which are the subject of relief outlined in Section II of the agreement. The agreement not to sue is subject to the performance by the parties of the actions provided in Section II below.

Other than the statement that the agreement did not constitute an admission by plaintiff that it had violated Michigan's civil rights laws or Title VII, the agreement did not contain any "above numbered charge(s)." Section II listed the following as actions that would be taken by plaintiff to provide relief:

> To change the claimant's employment record to reflect a voluntary resignation, and
>
> To continue to allow the claimant to retain her group medical and hospitalization insurance provided she pays her monthly premiums for 18 months, and
>
> To remove from the claimant's official personnel file all references to the disciplinary action dated April 8, 1992 and the termination letter dated September 16, 1992.

Plaintiff contends that because this settlement agreement provided that Rousseau's employment file would be altered to indicate a voluntary resignation, Rousseau was not entitled to unemployment

benefits and thus, § 31 of the Michigan Employment Security Act, MCL 421.31; MSA 17.533, did not apply. That section provides in pertinent part: "No agreement by an individual to wa[i]ve, release, or commute his rights to benefits or any other rights under this act from an employer shall be valid." (footnote omitted). As plaintiff indicates, an agreement to voluntarily terminate employment that is entered into prior to the termination of employment does not constitute a waiver of rights to benefits such that the agreement is invalid. *Applegate v Palladium Publishing Co*, 95 Mich App 299, 305-306; 290 NW2d 128 (1980). However, unlike the agreement in *Applegate*, *supra*, the parties' agreement here was not entered into prior to the termination of Rousseau's employment and did not provide that she would voluntarily resign. Rather, this agreement was entered into after she was discharged and provided that in exchange for her agreement not to bring certain claims, plaintiff would change her file to indicate that she had voluntarily resigned. This agreement did not change the fact that Rousseau was involuntarily discharged. Thus, § 31 applies. Even if this agreement required Rousseau to waive her right to unemployment benefits, such a provision would be invalid under § 31. MCL 421.31; MSA 17.533. Accordingly, the circuit court committed no error when it affirmed the Board's decision on this issue.

Affirmed in part and reversed in part. Remanded for proceedings consistent with this opinion. No taxable costs pursuant to MCR 7.219, neither party having prevailed in full.

/s/ Henry William Saad
/s/ Janet T. Neff
/s/ Kathleen Jansen