STATE OF MICHIGAN

COURT OF APPEALS

DALE GALLAGHER,

Plaintiff-Appellant,

v

MONTCALM COUNTY and MICHIGAN EMPLOYMENT SECURITY COMMISSION,

Defendants-Appellees.

UNPUBLISHED
August 17, 1999

No. 203429
Midland Circuit Court
LC No. 96-000348 AE

Before: Wilder, P.J., and Cavanagh and Zahra, JJ.

CAVANAGH, J. (*dissenting*).

I respectfully dissent. Because I believe that plaintiff was erroneously denied unemployment compensation benefits, I would reverse.

In reviewing an administrative agency decision that has already been reviewed by a lower court, this Court does not conduct a direct review of the agency's findings. Rather, this Court determines 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 v Civil Service Comm*, 220 Mich App 226, 232-234; 559 NW2d 342 (1996). In other words, this Court reviews the lower court's decision for clear error and will reverse the lower court only when it is left with the definite and firm conviction that a mistake has been made. *Id*. at 234-235.

MCL 421.29(1)(b); MSA 17.531(1)(b) provides that an individual is disqualified from receiving unemployment compensation benefits if he "was discharged for misconduct connected with the individual's work." For the purposes of the statute, the Supreme Court has defined "misconduct" as follows:

> The term 'misconduct' . . . is limited to 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. [*Carter v MESC*, 364 Mich 538, 541; 111 NW2d 817 (1961), quoting *Boynton Cab Co v Neubeck*, 237 Wis 249, 259, 260; 296 NW 636 (1941).]

In the present case, I find no evidence in the record of "conduct evincing . . . wilful or wanton disregard of [the] employer's interests" or "an intentional and substantial disregard . . .of the employee's duties and obligations to his employer." Rather, plaintiff's failure to personally contact his employer to account for his absence from work merely constitutes a "failure in good performance as the result of inability or incapacity" or a "good-faith error in judgment." See *id*.

The majority fails to mention that plaintiff does not have a telephone, and this fact was known to his supervisor, James Clark. It is, however, undisputed that plaintiff's daughter-in-law called his employer on December 9 and December 13, 1993, and explained that he was unwell and would not be back to work until December 27. During his absence, plaintiff continued to submit time slips indicating that his absence was due to illness.

While plaintiff did not submit medical verification of his illness at the commencement of his absence from work,[1] there is no testimony that defendant ever requested that he do so prior to terminating his employment on December 17, 1993.[2] Although an extended absence would require medical verification pursuant to the collective-bargaining agreement, plaintiff testified that it was common practice for employees to submit such verification when the employee returned to work.[3] Plaintiff stated, and Clark essentially confirmed, that on two previous occasions he had not provided medical verification of illness until the time of his return to work.

Moreover, while insubordination would be considered misconduct under the standard set forth in *Carter*, there is no evidence in the instant case that plaintiff ever violated a direct order. While Clark told plaintiff's daughter-in-law on December 13 that plaintiff should get in touch with him, there is no indication in the record that plaintiff's daughter-in-law informed him of this fact.

Finally, I reject defendants' contention that a finding of misconduct was appropriate on the basis of the "last straw" doctrine, which permits a finding of misconduct based on a combination of incidents, each of which would not individually constitute misconduct, but when considered together rise to the level of misconduct. See *Veterans Thrift Stores, Inc v Krause*, 146 Mich App 366, 368; 379 NW2d 495 (1985). Although plaintiff had received a disciplinary suspension for actions which might in and of themselves constitute misconduct, those incidents were not invoked as the reason for terminating plaintiff's employment in the December 17, 1993, letter or in the position taken by the County before the agency.

I would reverse.

/s/ Mark J. Cavanagh

[1] At the hearing before the referee, plaintiff provided evidence that he had been treated at the VA Outpatient Clinic in Grand Rapids on December 9, 1993.

[2] The trial court correctly determined that the Board of Review's finding that the employer requested that plaintiff provide medical verification of his illness is not supported in the record.

[3] Moreover, the mere failure to abide by a provision in a collective-bargaining agreement or other employer work rule does not constitute misconduct per se. See *Hagenbuch v Plainwell Paper Co, Inc*, 153 Mich App 834, 837-838; 396 NW2d 556 (1986).