

STATE OF MICHIGAN
COURT OF APPEALS

ARLENE A. RUSSELL,

Plaintiff-Appellant,

v

WHIRLPOOL FINANCIAL CORPORATION and
GALLAGHER BASSETT,

Defendants-Appellees.

UNPUBLISHED

December 19, 1997

No. 191892

WCAC

LC No. 94-0955

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

PER CURIAM.

Plaintiff appeals, by leave granted, the decision of the Worker's Compensation Appellate Commission, reversing the magistrate's open award of disability benefits. We affirm.

Plaintiff sought worker's compensation benefits due to bilateral carpal tunnel syndrome. Plaintiff began working for Whirlpool Financial in the customer services department on February 7, 1990. She later moved to the collections department, where her work required her to call customers and note the calls on a computer. In May, 1992, she moved to another department which required less typing. In September 1992, she returned to the collections department at management request.

Plaintiff began to have hand and wrist problems in October 1992, and she had surgery on her right hand in January, 1993. She returned to work in the collections department on March 22, 1993. Her supervisor testified that plaintiff's work was adjusted after her surgery and she was allowed to take breaks as needed. She requested a transfer due to her hands, but was unable to obtain one due to poor productivity.

On July 28, 1993, plaintiff left her work due to headaches, gastrointestinal problems and neck problems, which she never contended were work-related. She telephoned her employer the following day and was told to submit a doctor's excuse for her absence. Because her absence continued to be unexcused, she was told to give documentation why she was gone from work more than five days. When she visited her treating orthopedic surgeon on August 3, 1993, he did not supply her with an excuse, but instead wrote that she could return to work and continue with the restrictions that he had

already given her (i.e. take frequent breaks and to alternate other work with her keyboarding duties). She visited with her chiropractor on August 10, 1993, and his subsequent letter described the treatment she was receiving, but did not take her off work. She also had letters sent in August from Dr. Lischer (regarding her wrists) and Dr. Padla (regarding headaches), but no physician took her off work.

On August 31, 1993, Whirlpool wrote to plaintiff stating that she was fired for failing to provide documentation supporting her absence from work.

The magistrate found that plaintiff's carpal tunnel condition was causally related to her employment at Whirlpool Financial Corporation. The magistrate found that plaintiff discontinued working on July 28, 1993 for medical reasons which were both work-related and non work-related. Plaintiff was working under restrictions, but no doctor removed plaintiff from work for carpal tunnel symptoms as of July 28, 1993. Plaintiff was aware of Whirlpool Financial's policy of requiring medical documentation for absences in excess of five days, yet she failed to provide the documentation on request. The magistrate concluded that plaintiff was terminated for job abandonment. The magistrate also concluded that plaintiff's absence from work for more than five days without medical documentation was a refusal of favored work without good and reasonable cause pursuant to MCL 418.301(5)(a); MSA 17.237(301)(5)(a). After finding plaintiff disabled and entering an open award of benefits, the magistrate ordered benefits forfeited from July 29, 1993 through August 23, 1993, when plaintiff provided medical documentation for her inability to work.

Defendants appealed to the Worker's Compensation Appellate Commission. The commission reversed the magistrate's award based on a finding that plaintiff was fired from reasonable employment for good cause, and was not entitled to benefits. Chairperson Miller dissented, finding that the magistrate's decision that plaintiff's termination was not for wrongful conduct was supported by the evidence. This Court granted plaintiff's application for leave to appeal. We affirm the decision of the WCAC.

The magistrate and commission found that plaintiff was performing reasonable employment, or favored work, at the time of her termination. The common law concept of favored work has been partially codified in the statutory provision of reasonable employment. *Pulver v Dundee Cement Co*, 445 Mich 68, 74; 515 NW2d 728 (1994). Due to the similarities between the statute and the common law provisions, the Court used the common law to interpret the statute. *Id*, 76. MCL 418.301(5)(a); MSA 17.237(301)(5)(a) provides:

If an employee receives a bona fide offer of reasonable employment from the previous employer, another employer, or through the Michigan employment security commission and the employee refuses that employment without good and reasonable cause, the employee shall be considered to have voluntarily removed himself or herself from the work force and is no longer entitled to any wage loss benefits under this act during the period of such refusal.

The statute does not address an employee's continued entitlement to benefits when she has been terminated for misconduct. This Court and the Supreme Court have held that benefits may be terminated when the employee is fired for misconduct.

In *Nederhood v Cadillac Malleable Iron Co*, 445 Mich 234, 242 n 7; 518 NW2d 390 (1994), the Supreme Court observed that prior decisions appeared to hold that in discharges based on moral turpitude, it was implicit that a permanent forfeiture of benefits would result, citing *Garrett v Chrysler Corp*, 337 Mich 192; 59 NW2d 259 (1953) and *Todd v Hudson Motor Car Co*, 328 Mich 283; 43 NW2d 854 (1950). However, the Court found that neither case expressly stated that the forfeiture was permanent.

More explicitly, in *Porter v Ford Motor Co*, 109 Mich App 728, 732; 311 NW2d 458 (1981), we held that employee misconduct may bar receipt of benefits: “[i]f defendant can show that plaintiff was fired for violation of company rules which would normally result in termination of a nondisabled employee, and that the violation was not caused by plaintiff’s disability, then benefits may properly be denied.” This result was recently reaffirmed in *Brown v Contech, Div of Sealed Power Technologies*, 211 Mich App 256, 263; 535 NW2d 195 (1995), where the plaintiff sustained a back injury and was returned to light duty work with restrictions. After the plaintiff returned to work, the defendant received notice that the plaintiff tested positive for marijuana use, and terminated his employment. After the magistrate awarded benefits, the WCAC reversed. After interpreting the statutory definition of disability, we found that an employee can be terminated and his worker’s compensation benefits relinquished if he refuses reasonable employment without good cause. The Court remanded the case to determine pursuant to §301(5)(a) whether plaintiff was terminated from favored work for good cause.

The cases relied on by plaintiff are not controlling. *Nederhood, supra*, involved employees who were on strike, a protected activity under the National Labor Relations Act; thus, the employees could not be terminated. *NLRB v International Van Lines*, 409 US 48; 93 S Ct 74; 34 L Ed 2d 201 (1972). *Derr v Murphy Motor Freight Lines*, 452 Mich 375; 550 NW2d 759 (1996) concerned withdrawal of an offer of favored work when the employer went bankrupt and closed its operations. Neither *Derr* nor *Nederhood* involved misconduct on the part of the employee.

The WCAC properly reversed the magistrate who erred as a matter of law in ordering a temporary suspension of benefits after finding as a matter of fact that plaintiff was terminated for job abandonment. Plaintiff violated a rule which would result in termination of a nondisabled employee, and benefits were properly denied. *Porter, supra*.

Affirmed.

/s/ Henry William Saad

/s/ Maureen Pulte Reilly