STATE OF MICHIGAN

COURT OF APPEALS

BILLY J. OSBORN,

Plaintiff-Appellee,

v

SUPERIOR DATA CORPORATION,

Defendant-Appellant,

and

CONSUMER INDUSTRY SERVICES, f/k/a MICHIGAN EMPLOYMENT SECURITY COMMISSION,

Appellee.

UNPUBLISHED
November 30, 1999

No. 207997
Saginaw Circuit Court
LC No. 97-019895 AE

Before: Sawyer, P.J., and Hood and Whitbeck, JJ.

PER CURIAM.

The Michigan Employment Security Commission (MESC), through a hearing referee, denied unemployment compensation benefits to plaintiff Billy J. Osborn, Jr. on the ground of misconduct within the meaning of the Michigan Employment Security Act (MESA), MCL 421.29(1); MSA 17.531(1)(b). The MESC's Board of Review affirmed the hearing referee's decision. The circuit court reversed on the basis that the original denial of benefits was contrary to law. We reverse the decision of the circuit court.

I. Basic Facts And Procedural History

Osborn is a single father of four minor children. At the time Superior Data Corporation hired him as its sole, full-time printing press operator in late November 1994, Osborn indicated to Superior that he needed a flexible morning schedule to help his children go to school. Apparently, Superior agreed to give Osborn some latitude in reporting to work. From January 1996 until his termination in

March of that year, Osborn was absent, tardy or left work early a total of twenty-eight times. Osborn attributed his absences to his children's illnesses, a hair lice epidemic at his children's school, and a custody dispute with his ex-wife.

Osborn and his supervisor at Superior, David Comstock, disputed whether Osborn gave notice on the mornings that he was absent or late for work. However, the parties do not disagree that, in early February 1996, Osborn met with Comstock to discuss his absenteeism. The men discussed problems in Osborn's performance, such as Osborn's failure to complete a job for a client by a deadline, and Comstock informed Osborn that he would have to fix his attendance problem in a reasonable amount of time. Osborn agreed that Comstock told him that he had to remedy his work attendance problems in a timely fashion because the office would be becoming busier with new clients in the months ahead. Significantly, however, Osborn later claimed that he did *not* agree that he needed to improve his attendance.

Following this conversation, as company time sheets indicated, Osborn did not work a single forty-hour work week during the next month. In fact, according to Comstock, the week after their conversation about attendance, Osborn only worked fourteen and one-half hours and was absent without permission for nine and one-half hours. Comstock claimed that he spoke to Osborn about the seriousness of his absenteeism in subsequent weeks.

On March 1, 1996, Osborn asked to be excused from work for the afternoon in order to pick up his daughter from school because of an emergency. Osborn spoke with Comstock that evening, and Comstock asked him to develop a plan to find alternative ways to deal with problems at home to remedy his absences. Osborn refused to develop a plan; both men acknowledged that Osborn did not have a solution to his absenteeism. Superior subsequently discharged Osborn, precipitating his claim for unemployment benefits in this case.

The hearing before the MESC hearing referee commenced in early June 1996. After hearing the evidence, the hearing referee ruled that Osborn's absenteeism constituted misconduct and, therefore, Osborn was not entitled to unemployment compensation. Specifically, the hearing referee found that it was Osborn's "unwillingness to attempt to reach a plan, or set a plan, that would minimize his absences that is found to be an intentional disregard of the employer's interest." The hearing referee denied Osborn's request for rehearing and the Board of Review subsequently affirmed the hearing referee's decision, with one member of the Board of Review in dissent.

Osborn appealed the Board of review's decision to the circuit court. In mid-November 1997, the circuit court reversed the Board of Review's decision, ruling that the determination of misconduct was "contrary to law." The circuit court agreed with Osborn's assessment that his many absences were "due to the fact that he alone was raising four children and involved in a custody battle . . . . The court finds that claimant's absences were for good cause, and many times beyond his control." We granted Superior's application for leave to appeal to consider whether Osborn's actions at work constituted "misconduct," as MCL 421.29(1); MSA 17.531(1)(b) uses that term, so as to preclude unemployment compensation.

II. Standard Of Review

A. The Board Of Review 's Review Of The Hearing Referee's Decision

Section 34 of MESA, sets out the process by which the Board of Review reviews the findings of facts and decisions of one of its hearing referees:

> The board of review, on the basis of evidence previously submitted and additional evidence as it requires, shall affirm, modify, set aside, or reverse the findings of fact and decision of the referee or a denial by the referee of a motion for rehearing or reopening. [MCL 421.34; MSA 17.536.]

Here, the Board of Review actually ruled on two separate questions. It first considered whether the hearing referee abused his discretion by denying rehearing. Citing § 33(1) of MESA, MCL 421.33(1): MSA 17.535(1), Rule 211 of the Board of Review's *Rules of Practice*, and *Spalding v Spalding*, 355 Mich 382, 384-385; 94 NW2d 810 (1959), the Board of Review ruled that the hearing referee did not abuse his discretion by denying a rehearing. The Board of Review then analyzed whether the hearing referee's decision should be affirmed and ruled that the hearing referee's decision conformed to the law and the facts of this case.

B. The Circuit Court's Review Of The Board Of Review's Decision

Subsection 38(1) of MESA, MCL 421.38(1); MSA 17.540(1), governs judicial review of an order or decision made by the Board of Review and provides in pertinent part:

> The circuit court . . . may review questions of fact and law on the record made before the referee and the board of review involved in the 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. . . .* [Emphasis added.]

C. This Court's Review Of The Circuit Court's Decision

Whether a circuit court complied with the proper scope of review is, in and of itself, an issue for appeal. Applying the second or third layer of review has been a particularly troubling one in Michigan jurisprudence. In 1993, Professor Don LeDuc stated the question as follows:

> Michigan has yet to discuss adequately the role of the courts in review of agency fact-finding. Most of the cases deal simply with the appropriate test to apply to the findings of agencies and ignore the related issue of the interrelationship of the courts in their review of the facts. The question is whether each succeeding reviewing court should apply the same standard of review to the agency fact-finding or should instead limit their review to the decisions of the previous court. [LeDuc, Michigan Administrative Law, § 949, ch 9, pp 67-68.[1]]

In *City of Detroit v Detroit Fire Fighters Ass'n, Local 344, IAFF*, 204 Mich App 541, 551 n 10; 517 NW2d 240 (1994), this Court associated itself in principle with Professor LeDuc's comments but held itself to be bound by the Supreme Court's interpretation of the statutory review of an Act 312 arbitration panel's decision. In *Boyd v Civil Service Comm*, 220 Mich App 226, 234 n 4; 559 NW2d 342 (1996), however, this Court noted that the Supreme Court has not addressed the relationship of higher and lower courts in the context of reviewing administrative agency decisions pursuant to Const 1963, art 6, § 28 where the initial court employs the substantial evidence standard rather than conducting review de novo. This Court went on to hold:

> We agree with Professor LeDuc's sensible comments regarding this seemingly intractable issue. Application of the *Universal Camera* [*Corp v NLRB*, 340 US 474; 71 S Ct 456; 95 L Ed 456 (1951)] standard will preserve scarce judicial resources, enhance the role of this Court as an intermediate appellate court, and discourage unnecessary appeals. We find further support for adoption of the clear-error standard in our Supreme Court's recent amendment of MCR 7.203(A)(1) to provide for appeals by leave granted, rather than as of right, of judgments of lower courts that have reviewed agency action. While the amendment may have had several objectives, one clear import was to return primary review of agency fact finding to the court of direct review. We therefore hold that when reviewing a lower court's review of agency action this Court must determine 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. This latter standard is indistinguishable from the clearly erroneous standard of review that has been widely adopted in Michigan jurisprudence. As defined in numerous other contexts, a finding is clearly erroneous when, on review of the whole record, this Court is left with the definite and firm conviction that a mistake has been made. [*Boyd, supra* at 234-235.]

Here, citing *Dow Chemical Co v Curtis*, 158 Mich App 347, 352; 404 NW2d 737 (1987), rev'd on other grounds 431 Mich 471 (1988) and *Farrell v Auto Club of Michigan*, 148 Mich App 165, 168; 383 NW2d 623 (1986), the circuit court wrote, "It has been repeatedly stated that the court can reverse a decision of the Board of Review only if the order or decision is contrary to law and not supported by competent, material, and substantial evidence on the whole."[2] The circuit court thus correctly articulated the two-pronged standard set out in § 38(1) of MESA, MCL 421.38(1); MSA 17.540(1): a court may reverse an order or decision only if it finds (1) that the order or decision is contrary to law or (2) that the order or decision is not supported by competent, material, and substantial evidence on the whole record.

Neither party on appeal claims that the Board of Review's decision was unsupported by competent, material, and substantial evidence on the whole record in this case; thus, the second prong of the two-pronged standard is not involved. The only issue before us, therefore, is whether, *as a matter of law*, the Board of Review properly concluded that Osborn's actions constituted misconduct. In reversing the Board of Review's conclusion in this regard, the circuit court stated that it was "contrary to law," thus basing its decision on the first prong of the two-pronged standard. In

accordance with *Boyd, supra,* we review this decision for clear error, in the process deciding whether we have a definite and firm conviction that a mistake has been made.

III. Statement Of The Issue

Osborn argues that the relevant issue in this appeal is the justification or merit of his absenteeism from work and not, as Superior contends, his failure to propose a remedy for his attendance problems. Clearly, the hearing referee determined that Osborn's failure to develop a plan to counteract his excessive absences was the ultimate reason for his dismissal. The Board of Review affirmed that ruling. However, the circuit court determined that Osborn's excessive absenteeism caused his discharge. We disagree. Giving deference to the administrative agency's factual determination in this case, we conclude that the issue of misconduct centers on Osborn's inability to develop a remedy for his absenteeism and *not* the absenteeism itself.

IV. Unemployment Compensation And Employee Misconduct

A. Provisions Of MESA

Individuals who are involuntarily unemployed are generally entitled to unemployment benefits as long as the individual establishes eligibility under MESA, MCL 421.28; MSA 17.530. However, under certain circumstances, an individual may be denied payment of benefits even if he or she satisfies the requirements under MESA § 28. MESA § 29(1)(b) defines the circumstances under which an employee is disqualified for benefits, and provided in pertinent part at the time of Osborn's discharge:

> (1) An individual is disqualified for benefits if he or she:
>
> * * *
>
> (b) Was discharged for misconduct connected with the individual's work or for intoxication while at work unless the discharge was subsequently reduced to a disciplinary layoff or suspension. [MCL 421.29(1)(b); MSA 17.531(1)(b).[3]]

B. The Meaning Of "Misconduct"

The Michigan Supreme Court has defined "misconduct" in the following manner:

> The term 'misconduct' . . . is limited to conduct evincing such willful 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 Employment Security Comm*, 364 Mich 538, 541; 111 NW2d 817 (1961), quoting *Boynton Cab Co v Neubeck*, 237 Wis 249, 259-260; 296 N.W. 636 (1941).[4]]

The definitional sentence in *Carter* is rather intricate. We find it helpful to break it down into its components, which are:

> "Misconduct" . . . is limited to conduct evincing such willful or wanton disregard of an employer's interest as is found:
>
> (1) in deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee, or
>
> (2) in carelessness or negligence of such degree or recurrence as to
>
> (a) manifest culpability, wrongful intent or evil design, or
>
> (b) show an intentional and substantial disregard of
>
> (i) the employer's interests, or
>
> (ii) the employee's duties and obligations to his employer.

Therefore, an employee commits misconduct as defined by *Carter* if she or he engages in actions described above in component (1), (2)(a), (2)(b)(i), or (2)(b)(ii). To be clear, we read the *Carter* requirements in the disjunctive; acting in conformance with any single one of those descriptions of misconduct is sufficient to deny benefits under the statute.

C. The "Last Straw" Doctrine

This Court applied the *Carter* definition in establishing the so-called "last straw" doctrine, or a final act that, taken in context, demonstrates a substantial disregard of the employer's interests. *Giddens v Employment Security Comm*, 4 Mich App 526, 535; 145 NW2d 294 (1966). In *Giddens*, we affirmed a decision that an employee was disqualified from receiving unemployment benefits after he was discharged for an unexcused absence from work due to a personal dispute with his first wife. *Id.* at 528. We regarded this infraction, in the context of previous, unrelated infractions by the employee, as a final, conclusive demonstration of the employee's disregard for his employer. *Id.* at 535.

This Court had further opportunity to clarify the "last straw" theory in *Christophersen v Menominee*, 137 Mich App 776, 778-779; 359 NW2d 563 (1984). In that case, an employee was terminated after a series of infractions and reprimands regarding his work performance. *Id.* at 778. Although none of the infractions by themselves rose to a level of misconduct, we concluded that misconduct may be based on an employee's series of workplace infractions that, taken together,

"evinc[ed] a wilful disregard of the employer's interests." *Id.* at 780-781, quoting *Booker v Employment Security Comm*, 369 Mich 547, 551; 120 NW2d 169 (1963).

Superior seeks to apply this "last straw" theory to the present case, arguing that Osborn's repeated absences, even if not misconduct when viewed individually, created strife in the workplace and justified his discharge. Osborn counters, and the circuit court agreed, that Osborn's absences were for good cause, namely the care and maintenance of his minor children. Osborn argues that when he was hired, Superior was aware of his need for a flexible schedule to accommodate his children. Osborn puts great weight on decisions by this Court that absenteeism alone, if for good cause or beyond the employee's control, may not constitute misconduct without additional malfeasance. *Washington v Amway Grand Hotel*, 135 Mich App 652, 659; 354 NW2d 299 (1984). As we noted above, however, that Osborn's absenteeism alone, regardless of cause, is not the relevant issue in this appeal.

Applying *Giddens*, *supra*, and *Christophersen*, *supra*, to the case at hand, we find no error in the Board of Review's conclusion that Osborn's failure to remedy his absenteeism constituted misconduct. To a large extent, Superior accommodated Osborn's special circumstances by ignoring his numerous absences, providing him with an opportunity to improve his attendance, and finally warning him to improve or face discharge. Taken separately, Osborn's absences, as he argues, may not by themselves have reached the level of misconduct. However, it is reasonable to conclude, in light of the full record, that Osborn's failure to come up with a solution despite repeated requests to do so constituted a "last straw" after numerous infractions and revealed a complete indifference to the employer's interests. *Christophersen*, *supra* at 781; *Giddens*, *supra* at 535. Although Osborn now argues that he did endeavor to remedy his absences, the record establishes that Osborn responded to Superior's requests by not working a single forty hour week in the month following the last such request. Even on the day of Osborn's discharge, Osborn was again given an opportunity to devise a concrete plan to address his absenteeism. He did not do so.

The evidentiary record and case law justified a finding of misconduct by the hearing referee and Board of Review in this case. In the presence of such support for that ruling, we are left with a firm and definite conviction that the circuit court's reversal of the Board of Review's decision as a matter of law was clear error.

Reversed.

/s/ David H. Sawyer
/s/ Harold Hood
/s/ William C. Whitbeck

[1] See also LeDuc, *Michigan Administrative Law, October Term, 1991-92*, 10 Cooley L R 511, 589 (1993):

> While there clearly is precedent for the court's embracing of the approach [i.e. of the appellate court applying the same standard of judicial review as the circuit court],

> this wasteful practice is ill-advised since it is not conducive to good management of increasingly scarce judicial resources, undermines the judicial review function of the circuit courts, and encourages appeals. It should be stopped. The court of appeals should review the actions of the circuit court under the clearly erroneous standard, just as it would any other judgment of the circuit court, rather than review the agency action directly.

[2] See also *Vanderlaan v Tri-County Community Hospital*, 209 Mich App 328, 331; 530 NW2d 186 (1995).

[3] The current version of § 29(1)(b) of the MESA, MCL 421.29(1)(b); MSA 17.531(1)(b), is substantively the same.

[4] See also *Parks v Employment Security Comm*, 427 Mich 224, 237; 398 NW2d 275 (1986) (failure to abide by residency requirements is a willful disregard of employer's interest and is "work connected"; failure to pay union service fee was "work connected" misconduct and the willful disregard of the employer's interest was not excused by a "good faith" dispute concerning the union's ability to collect the fees).