A.D. No. B81-08232-78656
S.S. No. [illegible]
B.O. No. 25

STATE OF MICHIGAN

COURT OF APPEALS

NOT FOR PUBLICATION

ED M. PIZUNSKI,

Plaintiff-Appellant,

DEC 27 1984

No. 73255

-v-

MICHIGAN EMPLOYMENT SECURITY COMMISSION,

Defendant-Appellee,

and

FASTENING HOUSE,

Defendant.

_____/

GARY T. NEAL (P32033)
Attorney for Plaintiff-Appellant

FRANK J. KELLEY, Attorney General
of the State of Michigan
LOUIS J. CARUSO, Solicitor General
Counsel of Record
By: JACK BLUMENKOPF (P24042)
Assistant Attorney General
Attorneys for Defendant-Appellee
Michigan Employment Security Commission

BEFORE: V.J. Brennan, P.J., and T.M. Burns and C.M. Forster*, JJ.

PER CURIAM.

_____

*Circuit judge, sitting on the Court of Appeals by assignment.

This case presents a contested claim for unemployment benefits. The Employment Security Commission initially determined that plaintiff was ineligible for benefits because he left work voluntarily without good cause attributable to the employer, MCL 421.29(1)(a); MSA 17.531(1)(a). The commission affirmed its determination on redetermination pursuant to MCL 421.32a; MSA 17.534(1), and plaintiff appealed to a referee pursuant to MCL 421.33; MSA 17.535. The referee found plaintiff eligible for benefits, but the commission appealed the decision of the referee pursuant to MCL 421.34; MSA 17.536, and the Employment Security Board of Review reversed the decision of the referee. The decision of the Board of Review was affirmed by the circuit court on review pursuant to MCL 421.38; MSA 17.540, and plaintiff appeals by right.

The facts on which this case turns are not in dispute. Plaintiff, a Canadian citizen, was a member of the Muskegon Mohawk hockey team until January, 1981. In February, 1981, plaintiff's wife's employer temporarily transferred her to Ontario, Canada. Plaintiff accompanied his wife to Ontario and there accepted a job as a truck driver with defendant Fastening House. In March 1981, plaintiff's wife completed her assignment in Ontario and returned to Muskegon.

Plaintiff and his wife knew before going to Ontario that her assignment there would last only three to five weeks. The couple owned a home in the Muskegon area, and plaintiff had filed

the papers necessary to obtain a "green card" which would enable him to work in the United States. The couple never intended that they would stay in Canada.

In Laya v Cebar Construction Co, 101 Mich App 26, 300 NW2d 439 (1980), plaintiff, a laid-off plumber living in Warren, Michigan, accepted a job in Ohio 272 miles from his home. After 25 days of work, the plaintiff found the necessary travel and its consequences to his family life too burdensome and quit. The Court, relying on Lyons v Employment Security Comm, 363 Mich 201; 108 NW2d 849 (1961) (opinion of EDWARDS, J.), held, 101 Mich App at p 32:

"[A]s a matter of law, plaintiff did not leave his job 'voluntarily'. Plaintiff was not faced with a choice between alternatives that ordinary persons would consider reasonable. He could choose to remain in Ohio, hundreds of miles from home, attempting to return on weekends and watching his family deteriorate, or he could quit. Such a choice is the same as no choice at all."

Because Laya is distinguishable on its facts, we need not consider here whether the analysis in Laya is correct. The Laya panel emphasized that the plaintiff before it had made a good faith effort to find permanent employment but had failed for reasons beyond his control, 101 Mich App at p 35:

"Rather than remaining content with unemployment benefits, plaintiff chose to travel hundreds of miles to look for work--work he did not need to take in order to receive benefits. After this option proved unworkable, plaintiff abandoned his experiment and returned home. This is not a worker who is unemployed through his own fault. The fault is more directly assignable to the distance involved, and if there was any fault on the part of plaintiff, it lay only in his optimism.

"'Because our hardy optimist took a chance (along with a job) and soon found he "couldn't make it," he would be held to be a quitter of the "voluntary" variety. As to him (and his wife and children), his decision in the Indianapolis employment office is

to be made one of the sudden death variety.' Lyons, supra, 203 (EDWARDS, J., dissenting).

"We could not remain faithful to the policy of the Employment Security Act were we to hold that this plaintiff, who attempted a job he was not required to accept and found it unsuitable within a month, was disqualified because he quit 'voluntarily'."

Here, in contrast, plaintiff took the job in Canada knowing that his stay in Canada would be brief. Plaintiff here did not abandon as unworkable an experiment undertaken in good faith, but instead quit a job he never intended to be more than temporary. Under these circumstances, plaintiff's decision to quit cannot be characterized as involuntary. Plaintiff was properly found ineligible for benefits pursuant to MCL 421.29(1)(a); MSA 17.531(1)(a).

Plaintiff argues that restitution of benefits he received in accordance with the decision of the referee should be waived pursuant to MCL 421.62(a); MSA 17.566(a), which provides:

"If the commission determines that a person has obtained benefits to which the person is not entitled, the commission may recover a sum equal to the amount so received by 1 or both of the following methods: (1) deduction from benefits that may be or may become payable to the individual, or (2) payment by the individual to the commission in cash. Deduction from benefits that may be or may become payable to the individual shall be limited to not more than 20% of each weekly benefit check otherwise due the claimant. The commission shall not recover improperly paid benefits from an individual more than 3 years after the date of receipt of the improperly paid benefits unless: (1) a civil action is filed in a court by the commission within the 3-year period, (2) the individual has made an intentional false statement, misrepresentation, or concealment of material information to obtain the benefits, or (3) a determination requiring restitution has been issued by the commission within the 3-year period. Furthermore, except in a case of an intentional false statement, misrepresentation, or concealment of material information, the commission may waive recovery of an improperly paid benefit if the payment was not the fault of the individual and if repayment would be contrary to equity and good conscience."

This section clearly commits any decision to waive restitution to the discretion of the commission. Because there is no record that plaintiff ever invoked the commission's discretion, we have nothing to review. We therefore decline to address the question of restitution at this time, without prejudice to plaintiff raising the question in further proceedings before the commission. We note that no claim has been made that plaintiff made an intentional false statement, misrepresentation, or concealment of material information to obtain benefits and that there is no record of any determination requiring restitution or of the commencement of a civil action for restitution by the commission.

AFFIRMED.

/s/ Vincent J. Brennan
/s/ Thomas M. Burns
/s/ Charles M. Forster