STATE OF MICHIGAN
EMPLOYMENT SECURITY BOARD OF REVIEW

In the Matter of the Claim of

BRIANA L. LUTZ, Appeal Docket No.: B 2010 18037 215694W

Claimant Social Security No.: 364-96-0395

HEALTH/TENNIS CORP OF AMERICA INC.,

Employer

DECISION OF BOARD OF REVIEW

This case is before the Board of Review pursuant to the claimant's September 15, 2010 appeal from an August 31, 2010 decision by an Administrative Law Judge (Referee). The Referee's decision affirmed a May 22, 2010 Unemployment Insurance Agency (Agency) redetermination and found the claimant disqualified for benefits under the voluntary leaving provision of the Michigan Employment Security Act (Act), Section 29(1)(a). After reviewing the record, I find the Referee's decision must be reversed. My reasons are as follows.

The Board of Review received a timely request from the claimant to present oral argument in this matter. I have read and considered the request and conclude oral hearing is not necessary for me to reach a decision. The request is hereby denied.

Section 29(1)(a) of the Act provides that:

> (1) Except as provided in subsection (5), an individual is disqualified from receiving benefits if he or she:
>
> (a) Left work voluntarily without good cause attributable to the employer or employing unit. An individual who left work is presumed to have left work voluntarily without good cause attributable to the employer or employing unit. An individual claiming benefits under this act has the burden of proof to establish that he or she left work involuntarily or for good cause that was attributable to the employer or employing unit. However, **if either of the following conditions is met, the leaving does not disqualify the individual:**
>
> **(i) The individual has an established benefit year in effect and during that benefit year leaves unsuitable work within 60 days after the beginning of that work.** (Emphasis added.)

I disagree with the Referee's finding that the claimant is disqualified under the voluntary leaving provision of the Act. The claimant had a benefit year in effect when she left unsuitable employment within 60 days of starting said employment. The Referee found that Section 29(1)(a)(i) only applies if the claimant had a benefit year in effect when she began employment. There is nothing in the statute or case law that requires the claimant to have a benefit year in effect when he or she starts employment. Rather, Section 29(1)(a)(i) clearly requires the claimant to have a benefit year in effect when he or she *leaves* employment within 60 days of starting the employment.

In the instant matter, the claimant left unsuitable part-time employment within 45 days. She had a benefit year in effect at the time she quit. Accordingly, the claimant is not disqualified for benefits under the trial period provision in Section 29(1)(a) of the Act.

It is my opinion that the Referee's decision should be reversed.

The Referee's decision is hereby reversed.

The claimant is not disqualified for benefits under the voluntary leaving provision of the Act, Section 29(1)(a).

The claimant may receive benefits if otherwise eligible and qualified.

This matter is referred to the Agency for action consistent with this decision.

Mark E. Kaufmann, Member

NEAL A. YOUNG (MEMBER), CONCURRING:

I agree with Member Kaufmann to deny the claimant's oral hearing request. I also agree with Member Kaufmann that the Referee's decision must be reversed. The Referee correctly found that the claimant's leaving was clearly voluntary; she was not discharged, but rather, she left this employer of her own accord. See *Copper Range Co v UCC*, 320 Mich 460 (1948), MES Board Digest 10.01. However, under Section 29(1)(a), there is no disqualification where the claimant leaves unsuitable work within 60 days when a benefit year is in effect.

The claimant's leaving work with this employer, on its face, would normally be considered disqualifying, but for a statutory exception designed to protect claimants from inherently inequitable circumstances. The public policy promoted by this exception is clear and valid – to allow for and encourage claimants during the course of an established benefit year to return to the active workforce in a position (or employer) different from the one they last held (or worked for), but with the option of leaving within 60 days, should the work prove unsuitable. This encourages the free movement of labor, as well as reducing the strain on the unemployment insurance system.

Here, the claimant took advantage of this exception[1]. However, it does not follow that this equitable exception created by the legislature could only be accomplished by placing an inequitable burden on the hiring employer. **The employer may return to the Agency and request a redetermination of charges under Section 29(3)(h), because the claimant, while not disqualified, left work under "disqualifying circumstances" (i.e., without good cause attributable to the employer). In such a case, the agency will transfer the charges for the claimant's benefits from the employer's account to the nonchargeable benefits account.**

It is my opinion that the Referee's decision should be reversed.

The Referee's decision is hereby reversed.

Neal A. Young, Member

MAILED FROM LANSING, MICHIGAN JUL 29 2011

This decision shall be final unless EITHER (1) the Board of Review RECEIVES a written request for rehearing on or before the deadline, OR (2) the appropriate circuit court RECEIVES an appeal on or before the deadline. The deadline is: AUG 29 2011

**TO PROTECT YOUR RIGHTS, YOU MUST BE ON TIME.**

[1] Notably, "unsuitable" is a lesser standard than that of "good cause." Thus, an employee who does not have a benefit year in effect and leaves unsuitable work within 60 days solely because the work is unsuitable, will be disqualified for leaving work voluntarily without good cause attributable to the employer.