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A. D. No. FSC95-00061-136470W

Employer No. 0298148

S. S. No. ~~0298148~~

B. O. No. 16

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR COUNTY OF MACOMB

CLARE C. FLETCHER,
Plaintiff,

Case No. 96-7137-AE

v

COLOR CUSTOM COMPOUNDING,
INC., d/b/a, ATREX CORP.,
a MICHIGAN CORPORATION,
and MICHIGAN EMPLOYMENT
SECURITY AGENCY,
Defendants.

ANN CURRY THOMPSON (P27242)
Attorney for Plaintiff

FRANK J. KELLEY, Attorney General
for the State of Michigan
By: PETER T. KOTULA (P41629)
Assistant Attorney General
Attorneys for Unemployment Agency
Michigan Department of Consumer &
Industry Services, f/k/a, MESA, f/k/a,
MESC

OPINION AND ORDER

STATE OF MICHIGAN

MACOMB COUNTY CIRCUIT COURT

CLARE C. FLETCHER,
SS# 377-44-9461

Plaintiff,

vs.

File No. 96-7137-AE

COLOR CUSTOM COMPOUNDING,
INC., d/b/a ATREX CORP.,
a Michigan corporation, and
THE MICHIGAN EMPLOYMENT
SECURITY COMMISSION,

Defendants.

OPINION AND ORDER

Clare Fletcher claims an appeal from a decision by the Michigan Employment Security Commission, ("MESC") Board of Review issued on August 26, 1996.

Appellant was terminated from her employment at Color Custom Compounding, Inc. on July 18, 1990. She had been employed with that firm as a Human Resources and Payroll employee since November of 1971. On July 23, 1990, appellant applied for unemployment benefits and received such benefits from July 28, 1990 until she was involved in a serious automobile accident on May 3, 1991. Due to her injuries, appellant was not able to work and became ineligible to receive unemployment benefits. Appellant informed MESC of her changed conditions and unemployment benefits were suspended for the April 27, 1991 to January 18, 1992 benefit period. When appellant was certified by her physician as able to return to work, she resumed her job hunt, reapplied for unemployment benefits and began to receive unemployment benefits.

In May of 1992, appellant began performing services for Universal Plastics. According to testimony given by appellant during her April 13, 1995 Referee Hearing, appellant had offered her services in hope of securing employment with Universal Plastics in the future. At the time she initially approached Universal Plastics, the owner was unable to offer a paying job. On August 1, 1992, appellant was officially hired by Universal Plastics and MESC was informed of appellant's change in employment status.

During the months after she was placed on Universal Plastics' payroll, appellant was paid significant sums in addition to her regular pay. She was told that such payments were to compensate her for the services she performed from May through July of 1992. At some point, MESC became aware that appellant had received unemployment benefits during the same period.

On November 10, 1994, MESC issued a Determination indicating appellant was not eligible for benefits covering the May 3, 1992 to July 11, 1992 period. MESC held that appellant was an employed individual under § 48 of the Michigan Employment Security Act. Additionally, MESC determined that appellant concealed material information in order to receive unemployment benefits, as set forth by § 54(b) of the Michigan Employment Security Act. The November 10, 1994 Determination informed appellant that she was liable for \$2,750.00 in restitution and an \$8,250.00 penalty.

Through her attorney, appellant protested the November 10, 1994 Determination in a November 18, 1994 letter. MESC's March 2, 1995 Redetermination affirmed the prior Determination.

MESC received appellant's March 20, 1995 request for a Referee Hearing and the Hearing was scheduled before MESC Referee Michael Baldwin on April 13, 1995. In a decision issued by Referee Baldwin on May 11, 1995, the March 2, 1995 Redetermination by MESC was modified. Referee Baldwin held that appellant was not an unemployed individual for the May 3, 1992 through July 11, 1992 benefit period. Referee Baldwin held, however, that appellant was not subject to the penalty provision within § 54(b) of the Michigan Employment Security Act and would only be required to repay benefits pursuant to § 62(a) of the Act. On August 26, 1996 the MESC Board of Review affirmed Referee Baldwin's May 11, 1995 decision. The appeal to this Court was filed on September 25, 1996.

Appellant argues the Court should reverse the August 26, 1996 decision by the MESC Board of Review because she was "unemployed" within the meaning of § 48 of the Michigan Employment Security Act from May of 1992 until August of 1992. Appellant contends she was doing free volunteer work during this period and that the terms "employment" and "services" must be interpreted according to their

ordinary usage. Appellant asserts that Referee Baldwin's reasoning in his May 11, 1996 decision rests upon the faulty premise that engaging in activity for which someone might pay wages constitutes "employment" within the meaning of the Michigan Employment Security Act.

In response, appellee argues the Court should affirm the MESC's August 26, 1996 decision because the decision that appellant was not an unemployed person is supported by competent, material and substantial evidence on the whole record and is not contrary to law. Appellee also contends the scope of the Court's review is limited by the Michigan Constitution and § 38 of the Michigan Employment Security Act.

This Court reviews an administrative agency determination pursuant to the standards set forth in Const 1963, art 6 § 28. The proper standard of judicial review to be employed when reviewing an administrative decision is whether the decision is supported by competent, material and substantial evidence on the whole record. King v Calumet & Hecla Corp, 43 Mich App 319, 326; 204 NW2d 286 (1972). "Substantial evidence" has been defined as evidence which a reasoning mind would accept as sufficient to support a conclusion. While it consists of more than a mere scintilla of evidence, it may be substantially less than a preponderance of the evidence. Tompkins v Department of Social Services, 97 Mich App 218, 222; 293 NW2d 771 (1980). A reviewing court may reverse a decision of the Employment Security Commission only if the decision is contrary to law or if it is not supported by competent, material and substantial evidence on the whole record. Johnides v St Lawrence Hospital, 184 Mich App 172, 175-176; 457 NW2d 123 (1990).

Upon review of the certified record, the Court finds that the August 26, 1996 decision of the MESC Board of Review is supported by competent, material and substantial evidence on the whole record and not contrary to law. The May 11, 1996 Referee decision, which the MESC Board of Review affirmed, recognizes that an individual can be deemed unemployed if that individual is "not working full time or if working at all, not receiving remuneration equal to or in excess of the individual's unemployment benefit rate." The finding goes on to state,

In respect to the period of pertinence, the claimant was not receiving remuneration at that time and there was no certainty that she ever would receive remuneration. However, the claimant was expending significant time in the work activity to the degree that the claimant would not have been deemed an unemployed individual under Section 48 of the Act. The claimant was engaging in essentially full-time work in the period under review.

Referee Baldwin's finding does not dispute appellant's version of her work history during the benefit period from May 3, 1992 to July 11, 1992. Rather than find fault with appellant's credibility, Referee Baldwin concludes that appellant cannot be deemed unemployed if: (1) she expended significant time in the work activity; and (2) received remuneration related to her work activity. Although Referee Baldwin's findings are somewhat terse, the key to his decision involves the statutory definition for "remuneration". Pursuant to MCL 421.44(1); MSA 17.548(1), "remuneration" means all compensation paid for personal services, including commissions and bonuses, and except for agricultural and domestic services, the cash value of all compensation payable in a medium other than cash. Other subsections which define what is not considered remuneration make no exception for: (1) compensation made to the employee after the service was rendered to the employer; or (2) compensation not based upon an hourly, daily or weekly rate. See MCL 421.44(1)(a); MSA 17.548(1)(a) and MCL 421.44(1)(b); MSA 17.548(1)(b). There is no dispute that appellant's employer eventually paid her for services she performed during the May through July, 1992 period. Since the money paid to appellant for services performed during this period must be considered remuneration within the meaning § 44 of the Michigan Employment Security Act, appellant must repay the benefits received during the same benefit period. Accordingly, the Court will affirm the August 26, 1996 decision by the MESC Board of Review.

The August 26, 1996 decision by the Michigan Employment Security Commission Board of Review is AFFIRMED.

IT IS ORDERED.

JBB/kmv
DATED: October 22, 1997
cc: Ann Curry Thompson, Esq.
Peter T. Kotula, Esq.

JOHN B. BRUFF

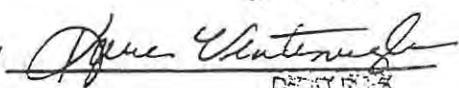
JOHN B. BRUFF, Circuit Judge

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CLERK

By


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