

STATE OF MICHIGAN
COURT OF APPEALS

PURSUANT TO GCR 821.
THIS OPINION WILL
NOT BE PUBLISHED.

EDWARD G. HINGA,
PLAINTIFF-APPELLANT,

JAN 25 1980

v

No. 78-3585

BROWN COMPANY AND MICHIGAN
EMPLOYMENT SECURITY COMMISSION,
DEFENDANTS-APPELLEES.

H. EUGENE BENNETT (P10693)
ATTORNEY FOR PLAINTIFF-APPELLANT

FRANK J. KELLEY, ATTORNEY GENERAL OF THE STATE OF MICHIGAN
ROBERT A. DERENGOSKI, SOLICITOR GENERAL
E. J. SETLOCK (P20234)
ASSISTANT ATTORNEY GENERAL
ATTORNEYS FOR DEFENDANT-APPELLEE
MICHIGAN EMPLOYMENT SECURITY COMMISSION

BEFORE: T.M. BURNS, P.J., AND W.P. CYNAR AND A.M. BACH, JJ.

PER CURIAM

PLAINTIFF APPEALS AS OF RIGHT FROM THE DETERMINATION THAT HE IS INELIGIBLE FOR UNEMPLOYMENT BENEFITS BECAUSE HE WAS NOT AVAILABLE FOR WORK AS REQUIRED BY MCL 421.28(1) (c); MSA 17.530 (1) (c).

PLAINTIFF WAS EMPLOYED BY BROWN AS AN UNSKILLED LABORER AND, LATER, AS A SHIPPING SUPERVISOR, FROM 1958 THROUGH AUGUST 15, 1975, WHEN HE RESIGNED. IN A NOTICE MAILED ON NOVEMBER 24, 1975 THE MESC DETERMINED THAT PLAINTIFF WAS ELIGIBLE FOR BENEFITS BEGINNING SEPTEMBER 28, 1975. AFTER BROWN REQUESTED A REDETERMINATION, THE MESC AFFIRMED THE EARLIER DETERMINATION IN A NOTICE MAILED ON DECEMBER 20, 1975. BROWN APPEALED TO A REFEREE. AFTER A HEARING ON MARCH 11, 1976, THE REFEREE FOUND THAT PLAINTIFF WAS NOT AVAILABLE FOR WORK BECAUSE HIS APPLICATION TO FOUR PROSPECTIVE EMPLOYERS IN SEVEN MONTHS WAS NOT A SUFFICIENTLY ACTIVE SEARCH FOR WORK AND BECAUSE HE REMOVED HIMSELF FROM A SUBSTANTIAL PORTION OF THE LABOR MARKET BY, "FOR THE MOST PART SEEKING SUPERVISORY WORK ONLY WHEN HE IS QUALIFIED BY EXPERIENCE TO PERFORM NON-SUPERVISORY WORK." THE MESC APPEAL BOARD AND THE INGHAM COUNTY CIRCUIT COURT AFFIRMED THAT DECISION.

IN ACCORDANCE WITH THE LEGISLATIVE MANDATE OF MCL 421.38; MSA 17.540, WE ARE BOUND TO AFFIRM A FINDING OF FACT IF SUCH FINDING OF FACT IS SUPPORTED BY COMPETENT, MATERIAL AND SUBSTANTIAL EVIDENCE ON THE WHOLE RECORD.

WE HOLD, AFTER REVIEWING THE RECORD AS A WHOLE, THAT THE REFEREE'S CONCLUSION THAT PLAINTIFF REMOVED HIMSELF FROM THE LABOR MARKET IS NOT SUPPORTED BY COMPETENT, MATERIAL, AND SUBSTANTIAL EVIDENCE. THE UNDISPUTED EVIDENCE SHOWED THAT WHILE PLAINTIFF PREFERRED SUPERVISORY WORK, HE WOULD TAKE OTHER WORK AND WHILE HE PREFERRED NON-UNION WORK, HE WOULD ACCEPT UNION WORK. THE REFEREE ERRED WHEN HE HELD THAT THIS REMOVED PLAINTIFF FROM THE LABOR MARKET.

THE REFEREE ALSO HELD THAT PLAINTIFF WAS NOT GENUINELY ATTACHED TO THE LABOR MARKET BECAUSE HE DID NOT SUFFICIENTLY CONDUCT AN ACTIVE SEARCH FOR WORK.

WE HOLD THAT THE REFEREE MISAPPLIED Dwyer v Unemployment Comp Comm, 321 Mich 178; NW2d (1974), WHEN HE READ IT TO REQUIRE PLAINTIFF TO ACTIVELY SEARCH FOR WORK TO ESTABLISH AVAILABILITY. Dwyer STATED THAT THE EFFORTS OF A PERSON TO FIND WORK IS EVIDENCE INDICATIVE OF THE SUBJECTIVE MENTAL ATTITUDE (DESIROUS TO OBTAIN WORK, AND WILLING AND READY TO WORK) WHICH CONSTITUTES "AVAILABLE." 321 Mich at 188-189.

A REVIEW OF THE EMPLOYMENT SECURITY ACT AS IT RELATES TO THE PRESENT FACTS SHOWS THAT THE SEEKING WORK ASPECT OF Dwyer CANNOT JUSTLY BE APPLIED TO DENY PLAINTIFF BENEFITS:

NORMALLY, MCL 421.28(1); MSA 17.530(1) REQUIRES THAT A CLAIMANT REPORT AT AN EMPLOYMENT OFFICE, SEEK WORK, AND BE AVAILABLE TO PERFORM FULL TIME WORK. HOWEVER, MCL 421.28(1) (A); MSA 17.530(1) (A) PROVIDES THAT THE REQUIREMENT THAT AN INDIVIDUAL SEEK WORK MAY BE WAIVED BY THE COMMISSION WHERE IT FINDS THAT SUITABLE WORK IS UNAVAILABLE. PURSUANT TO THIS PROVISION, THE COMMISSION WAIVED THE SEEKING WORK REQUIREMENT AS TO ALL CLAIMANTS IN KALAMAZOO COUNTY FROM 5/25/75 TO 7/17/76. THUS, PLAINTIFF WAS ENTITLED TO RELY ON THE REPRESENTATION THAT HE NEED NOT SEEK WORK IN ORDER TO BE ELIGIBLE FOR BENEFITS. YET, BASED ON Dwyer, THE REFEREE RULED THAT IN ORDER TO MEET THE AVAILABLE FOR WORK REQUIREMENT, HE MUST ACTIVELY SEEK WORK. THIS CONTRADICTION IN TERMS REQUIRES THAT SEEKING OR NOT SEEKING WORK NOT BE USED AS A CRITERION OF AVAILABILITY WHEN THE SEEKING WORK REQUIREMENT IS WAIVED BY THE MESC.

AS THE RECORD, WHEN VIEWED IN LIGHT OF THE PROPER STANDARD, SHOWS THAT PLAINTIFF WAS DESIROUS TO OBTAIN EMPLOYMENT AND WAS WILLING AND READY TO WORK, WE HOLD THAT HE WAS AVAILABLE WITHIN THE MEANING OF MCL 421.28 (1) (c); MSA 17.530(1) (c).

REVERSED. COSTS TO PLAINTIFF.