A.D. No. B76-19230-55251
S.S. No. [redacted]
B.O. No. 13

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

MEIJER THRIFTY ACRES,

EMPLOYER-APPELLANT,

VS.

CA No. 79 928-311 AE

CATHERINE BUCZEK,

CLAIMANT-APPELLEE,

AND

MICHIGAN EMPLOYMENT SECURITY COMMISSION,

APPELLEE

/

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AUTOMOBILE, AEROSPACE AND AGRICULTURAL
IMPLEMENT WORKERS OF AMERICA (UAW)

OPINION
AND
ORDER AFFIRMING BOARD OF REVIEW'S DECISION OF APRIL 4, 1979

AT A SESSION OF SAID COURT HELD
AT DETROIT, MICH. ON DEC 21 1979

PRESENT: HON. JOSEPH G. RASHID
CIRCUIT JUDGE

THIS CASE INVOLVES AN APPEAL BY MEIJER THRIFTY ACRES (MEIJER) FROM A DECISION OF THE MICHIGAN EMPLOYMENT SECURITY COMMISSION'S BOARD OF REVIEW'S (BOARD) DECISION OF AUGUST 6, 1979, WHICH DENIED A REHEARING FROM THE BOARD'S DECISION OF APRIL 4, 1979 AWARDING APPELLEE, CATHERINE BUCZEK, UNEMPLOYMENT BENEFITS.

THE BOARD FOUND THAT THE REFEREE'S STATEMENT OF FACTS WAS SUPPORTED BY THE TRANSCRIPT; HOWEVER, AFFIRMANCE OF THE REFEREE'S DECISION THAT CATHERINE BUCZEK DID NOT FALL WITHIN SECTION 48 OF THE MICHIGAN EMPLOYMENT SECURITY ACT (ACT) WAS BASED ON THE NARROW GROUND THAT THERE WAS NO WRITTEN REQUEST BY CLAIMANT BUCZEK FOR A MATERNITY LEAVE. (RECORD 73, HEREAFTER R. 73). A WRITTEN REQUEST WAS REQUIRED BY THE COLLECTIVE BARGAINING AGREEMENT ON PAGE 89, ARTICLE 12-6 AS A PRECONDITION FOR ANY MATERNITY LEAVE (SEE EXHIBIT 11, R.35). AS SUCH, CLAIMANT BUCZEK WAS AN UNEMPLOYED PERSON WITHIN THE MEANING OF SECTION 48 OF THE ACT ACCORDING TO THE BOARD.

FURTHERMORE, THE BOARD AFFIRMED SECTION 28 (1) (c), THE ELIGIBILITY DETERMINATION OF THE REFEREE.

WAS THE DECISION OF THE BOARD SUPPORTED BY COMPETENT, MATERIAL AND SUBSTANTIAL EVIDENCE ON THE WHOLE RECORD?

> MCLA 421.38 STATES THAT "THIS COURT MAY REVIEW QUESTIONS OF FACT AND LAW ON THE RECORD MADE BEFORE THE REFEREE AND THE BOARD OF REVIEW INVOLVED IN A FINAL ORDER OR DECISION OF THE BOARD, AND MAY MAKE FURTHER ORDERS IN RESPECT THERETO 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."
>
> MCLA 421.48 STATES IN PART:
>
> "LEAVES OF ABSENCE GRANTED. AN INDIVIDUAL SHALL NOT BE DEEMED TO BE UNEMPLOYED DURING ANY LEAVE OF ABSENCE FROM WORK GRANTED BY AN EMPLOYER EITHER AT THE REQUEST OF THE INDIVIDUAL OR PURSUANT TO AN ARGREEMENT WITH HIS DULY AUTHORIZED BARGAINING AGENT, OR IN ACCORDANCE WITH LAW."
>
> MCLA 421.4 STATES IN PART:
>
> "THE COMMISSION IS HEREBY AUTHORIZED AND EMPOWERED TO PROMULGATE SUCH RULES AND REGULATIONS, AS IT DEEMS NECESSARY, NOT INCONSISTENT WITH THE PROVISIONS OF THIS ACT, TO CARRY OUT THE PROVISIONS OF THIS ACT.

THE COMMISSION SHALL CAUSE TO BE PRINTED FOR DISTRIBUTION TO THE PUBLIC THE TEXT OF THIS ACT, AND ALL RULES AND REGULATIONS OF THE COMMISSION, AND SHALL MAKE AVAILABLE TO THE PUBLIC UPON REQUEST STATEMENTS OF ANY AND ALL INFORMAL RULES OR CRITERIA OF DECISION, ADMINISTRATIVE POLICIES OR INTERPRETATIONS, AND THE LIKE, WHICH MAY BE UTILIZED BY THE COMMISSION OR ANY OF ITS AGENTS OR EMPLOYEES IN ANY MANNER."

THE MESC MANUAL STATES IN PART:

"A UNILATERAL LEAVE OF ABSENCE CANNOT BE IMPOSED BY THE EMPLOYER WITHOUT A SPECIFIC REQUEST BEING MADE BY THE INDIVIDUAL INVOLVED. IF NO SUCH REQUEST IS MADE, EVEN THOUGH THE EMPLOYER PLACED THE INDIVIDUAL IN 'LEAVE STATUS', SECTION 48 OF TH MES ACT SHOULD NOT BE APPLIED SO AS TO CONCLUDE THAT THE INDIVIDUAL IS NOT AN EMPLOYED INDIVIDUAL.

IF A CONTRACT PROVIDES THAT AN INDIVIDUAL SHALL BECOME ELIGIBLE FOR A MATERNITY LEAVE BY SUBMITTING MEDICAL EVIDENCE VERIFYING PREGNANCY, THE MERE SUBMISSION OF SUCH EVIDENCE IS NOT TO BE CONSIDERED AS A WRITTEN REQUEST FOR A LEAVE OF ABSENCE. THEREFORE, UNLESS A SPECIFIC REQUEST FOR A LEAVE OF ABSENCE IS MADE BY THE INDIVIDUAL, THE INDIVIDUAL SHOULD BE CONSIDERED AS UNEMPLOYED UNDER THE PROVISIONS OF SECTION 48 OF THE MES ACT. (R. 46)"

THE RECORD IS CLEAR THAT CATHERINE BUCZEK NEVER REQUESTED A LEAVE OF ABSENCE. THE ONLY THING SHE REQUESTED WAS AN OPPORTUNITY TO CONTINUE WORKING FOR A REDUCED NUMBER OF HOURS EQUAL TO THOSE HOURS SHE WOULD HAVE SPENT DOING OTHER ASSIGNED JOBS NOT REQUIRING HEAVY LIFTING. (SEE R. 5, LINES 21-28; R. 6, LINES 1-9, 16-28; R. 14, LINES 2-17, AND R. 22, LINES 5-26)

NOR WAS SHE PUT ON LEAVE OF ABSENCE PURSUANT TO THE COLLECTIVE BARGAINING AGREEMENT. ARTICLE 12.6 OF THAT AGREEMENT STATES IN PERTINENT PART:

"LEAVE OF ABSENCE SHALL BE GIVEN FOR PREGNANCY IF REQUESTED IN WRITING AND ACCOMPANIED BY A SIGNED STATEMENT FROM THE EMPLOYEE'S DOCTOR AS TO THE ANTICIPATED BIRTHDATE. NORMALLY, EMPLOYEES WILL BE EXPECTED TO GO ON MATERNITY LEAVE NO LATER THAN THE END OF THE SIXTH (6TH) MONTH OF PREGNANCY. APPROVAL TO WORK BEYOND SIX (6) MONTHS OF PREGNANCY MUST BE SUPPORTED BY A DOCTOR'S STATEMENT. IN THIS STATEMENT, THE DOCTOR MUST APPROVE THE EMPLOYEE'S SPECIFIC JOB AND STATE A SPECIFIC PERIOD OF TIME SHE CAN WORK.

THE EMPLOYEE WILL BE PERMITTED TO WORK DURING THE PERIOD APPROVED BY HER DOCTOR AS LONG AS HER CONDITION DOES NOT DETRACT FROM HER ABILITY TO PERFORM HER JOB RESPONSIBILITIES."

THE APPELLANTS CONTEND THAT MRS. BUCZEK WAS PLACED ON MATERNITY LEAVE PURSUANT TO THIS AGREEMENT. THIS ARGUMENT IS CLEARLY WITHOUT MERIT.

FIRST, IT IS UNSUPPORTED BY THE RECORD. THE TRUE REASON FOR HER SEPARATION IS FOUND IN THE TESTIMONY OF MRS. BUCZEK'S SUPERVISOR.

"REFEREE: Q: OKAY.

AT THAT POINT IN TIME WERE THE LEAVE PAPERS FILLED OUT?

SUPERVISOR: A: RIGHT, THE LEAVE PAPERS WERE FILLED OUT ON THE 13TH WHICH WAS FRIDAY WHEN I WAS PRESENTED WITH THE NOTE FROM THE DOCTOR. I ADVISED CATHY AT THAT TIME THAT ACCORDING TO MY INTERPRETATION OF THE DOCTOR'S RECOMMENDATION, THAT SHE WAS UNABLE TO WORK AS A CASHIER. I ADVISED HER THAT IN THE CAPACITY, THAT SHE WAS CLASSIFIED AS A CASHIER EVEN THOUGH HER JOB ASSIGNMENT AT TIMES PUT HER INTO A DIFFERENT POSITION IN THE CASH OFFICE. IT WOULD POSSIBLY BE-- IT WOULD BE IMPOSSIBLE FOR ME TO GUARANTEE THAT SHE WOULD NOT BE ABLE--NOT HAVE TO RUN CENTRAL CHECK - OUT REGISTER BECAUSE OF ALL THE PEOPLE WHO WOULD BE WORKING THAT OFFICE, DO AT SOME TIME OR ANOTHER, WORK CENTRAL CHECK-OUT REGISTER. SHE AT THAT TIME, APPARENT TO ME, I FELT THAT SHE UNDERSTOOD THAT. AGAIN, IT WAS-I FELT MUTUAL AGREEMENT THAT THE FOLLOWING WEEK BECAUSE OF THE DOCTOR'S NOTE PRESENTED TO ME WE WOULD BEGIN THAT AS COMMENCEMENT OF THE MATERNITY LEAVE." (R. 20)

CLEARLY, THE DECISION TO PUT HER ON WHAT WAS TERMED MATERNITY LEAVE WAS UNILATERALLY MADE BY THE SUPERVISOR ON THE BASIS OF HIS INTERPRETATION OF THE DOCTOR'S NOTE.

SECOND, THE LANGUAGE OF THE AGREEMENT MAKES IT CLEAR THAT THERE MUST BE BOTH A REQUEST IN WRITING AND THIS REQUEST MUST BE ACCOMPANIED BY THE EMPLOYEE'S DOCTOR'S NOTE BEFORE A MATERNITY LEAVE OF ABSENCE SHALL BE GIVEN. THERE IS NOTHING IN THE RECORD TO SUBSTANTIATE THAT A WRITTEN REQUEST WAS MADE BY MRS. BUCZEK. HENCE, NO LEAVE COULD HAVE BEEN GIVEN PURSUANT TO THE BARGAINING AGREEMENT.

THIRD, IN LIGHT OF CLAIMANT BUCZEK'S OVERALL JOB RESPONSIBILITIES, THE SINGLE LIMITATION AS TO HEAVY LIFTING DID NOT DETRACT FROM HER ABILITY TO PERFORM HER JOB RESPONSIBILITIES. DUTIES SHE HAD PERFORMED INCLUDED WORK IN THE CASH OFFICE (R. 7); WORK ON THE CHECK-OUT LANE WHICH INCLUDED RUNNING THE REGISTER, BAGGING AND LIFTING LIGHT, MEDIUM OR HEAVY BAGS OF GROCERIES INTO THE SHOPPING CART (R. 7-8); WORK ON THE SWITCHBOARD (R. 7); STEWARD TYPE WORK (R. 8); AND CUSTOMER SERVICE/COURTESY DESK WORK (R. 8). ACCORDING TO HER BOSS, MRS. BUCZEK AS A "PART-TIME 0-5 CASHIER" (R. 17) COULD HAVE TECHNICALLY WORKED THE CHECK-OUT REGISTER; THE COURTESY DESK; LAY-AWAY; OR THE CASH OFFICE (R. 21). IN REALITY, THE COLLECTIVE BARGAINING AGREEMENT ALLOWED HER TO BE USED ANYWHERE SINCE SHE WAS A PART-TIME EMPLOYEE. (SEE, EXHIBIT 11 AT R. 35, ARTICLES 8S.3, 8S.5, 8S.20 AND APPELLANT'S BRIEF AT P. 7). BASED ON THE WHOLE RECORD, IT IS CLEAR THAT MRS. BUCZEK WAS WILLING AND ABLE TO PERFORM ANY OF THE MYRIAD RESPONSIBILITIES THAT SHE HAD DONE IN THE PAST, WAS CLASSIFIED TO PERFORM, OR COULD HAVE BEEN ASSIGNED TO PERFORM AS A PART-TIME EMPLOYEE.

THUS, THE NO HEAVY LIFTING LIMITATION AFFECTED ONLY ONE PORTION OF THE SINGLE JOB RESPONSIBILITY OF LIFTING AND DID NOT DETRACT FROM HER ABILITY TO PERFORM HER JOB RESPONSIBILITIES WITHIN THE MEANING OF THE AGREEMENT.

NOR IS THIS COURT AWARE OF ANY LAW THAT MANDATES A MATERNITY LEAVE OF ABSENCE.

THIS COURT NOTES THAT UNDER MCLA 421.48 A PERSON IS CONSIDERED EMPLOYED WITHIN THE MES WHEN THAT PERSON IS ON A LEAVE OF ABSENCE AT HER REQUEST, PURSUANT TO A COLLECTIVE BARGAINING AGREEMENT, OR IN ACCORDANCE WITH LAW. THIS MEANS THAT A PERSON PLACED ON A LEAVE OF ABSENCE FOR ANY OTHER REASON BY THE EMPLOYER IS CONSIDERED UNEMPLOYED WITHIN THE MESA. THUS, WHERE AN EMPLOYER DECIDES TO PLACE AN EMPLOYEE ON A MATERNITY LEAVE OF ABSENCE FOR A REASON OTHER THAN ONE CONTAINED IN MCLA 421.48, THE EMPLOYEE, THOUGH ON AN EMPLOYER IMPOSED LEAVE OF ABSENCE, IS NOT ON A SECTION 48 LEAVE OF ABSENCE FOR PURPOSES OF DETERMINING HER EMPLOYMENT STATUS UNDER THE ACT.

THUS, THIS COURT AFFIRMS THE DECISION BELOW THAT MRS. BUCZEK WAS AN UNEMPLOYED PERSON AS THE WHOLE RECORD ESTABLISHES BY COMPETENT, MATERIAL AND SUBSTANTIAL EVIDENCE:

> "...THAT THE SEPARATION ON AUGUST 12, 1976 WAS NOT AT THE REQUEST OF THE CLAIMANT. A REVIEW OF THE COLLECTIVE BARGAINING AGREEMENT PROVISIONS SET FORTH DISCLOSES THAT THE SEPARATION WAS NOT PURSUANT TO THE PROVISIONS OF A COLLECTIVE BARGAINING AGREEMENT. THE SEPARATION WAS ALSO NOT MANDATED BY LAW. IT FOLLOWS THAT THE CLAIMANT MUST BE CONSIDERED AN UNEMPLOYED PERSON UNDER THE PROVISIONS OF SECTION 48 OF THE MES ACT." (R. 73)

THIS COURT ALSO AFFIRMS THE MCLA 421.28(1) (c) ELIGIBILITY DETERMINATION.

AT ONE TIME MCLA 421.28(1) (c) EXPRESSED THE POLICY OF THIS STATE THAT:

> "A PREGNANT WOMAN SHALL BE INELIGIBLE TO RECEIVE BENEFITS FOR ANY WEEK WITHIN THE PERIOD BEGINNING WITH THE TENTH CALENDAR WEEK BEFORE EXPECTED CONFINEMENT, AS DETERMINED BY A PHYSICIAN, AND EXTENDING THROUGHOUT THE SIXTH CALENDAR WEEK FOLLOWING THE TERMINATION OF PREGNANCY "

HOWEVER, 1974 PA 104, 1 REPEALED THIS PROVISION; THEREBY EVINCING THE CLEAR LEGISLATIVE INTENT THAT NO LONGER WILL WOMEN IN AN ADVANCED STATE OF PREGNANCY BE AUTOMATICALLY INELIGIBLE FOR BENEFITS. NOW AN INDIVIDUALIZED ELIGIBILITY DETERMINATION IS ENVISIONED.

SUCH AN INDIVIDUALIZED DETERMINATION WAS MADE IN MRS. BUCZEK'S CASE. THERE IS COMPETENT, MATERIAL AND SUBSTANTIAL EVIDENCE ON THE WHOLE RECORD TO SUPPORT HER ELIGIBILITY DETERMINATION.

SHE WAS ABLE AND WILLING TO WORK AS EVIDENCED BY THE RECORD. SEE, R. 6, 8, 11, 12, 14 AND 22.

IN ADDITION TO THE VARIOUS DUTIES SHE PERFORMED AT MEIJER'S, MRS. BUCZEK WAS QUALIFIED BY PAST EXPERIENCE AND TRAINING TO DO OFFICE WORK. (R. 9-10)

SHE WAS AVAILABLE FOR SUITABLE WORK FOR WHICH SHE WAS QUALIFIED EXCEPT FOR THE HEAVY LIFTING LIMITATION. THIS LIMITATION AFFECTED ONLY A PORTION OF ONE JOB DUTY, I.E., LIFTING GROCERIES INTO THE SHOPPING CART, AND NEITHER WOULD HAVE DETRACTED FROM HER ABILITY TO PERFORM HER OTHER JOB DUTIES AT MEIJER NOR THE OFFICE WORK SHE WAS QUALIFIED TO PERFORM BY PAST EXPERIENCE OR TRAINING AS THESE JOBS DID NOT REQUIRE HEAVY LIFTING WITHIN THE DOCTOR'S RESTRICTION. BASED ON THE SUBJECTIVE TEST OF GENUINE ATTACHMENT TO THE LABOR MARKET, MRS. BUCZEK WAS AVAILABLE FOR WORK. DWYER V UNEMPLOYMENT COMPENSATION COMMISSION, 321 MICH 178 (1948).

SHE ALSO SOUGHT WORK UNTIL IT BECAME OBVIOUS THAT NO EMPLOYER WANTED TO HIRE A WOMAN WHO WAS SEVERAL MONTHS PREGNANT. (R. 12-13)

THE COURT AFFIRMS THE ELIGIBILITY DETERMINATION WHICH STATED:

> "THE CLAIMANT WAS PHYSICALLY ABLE TO CONTINUE WORKING WITHIN HER LIMITATION ESTABLISHED BY HER PHYSICIAN. AS A RESULT, THE DECISION OF THE REFEREE FINDING HER ELIGIBLE UNDER SECTION 28(1)(C), IF OTHERWISE ELIGIBLE AND QUALIFIED, IS HEREBY AFFIRMED." (R. 73)

HAVING DISPOSED OF THIS CASE, THE COURT NOTES THAT ALTHOUGH HER COMPLAINT ABOUT THE PROSPECT OF DOING HEAVY LIFTING RESULTED IN A CHANGE OF SCHEDULED JOB ASSIGNMENTS FOR AUGUST 14TH AND 15TH. (R. 19), THE RECORD DOES NOT REVEAL A SINGLE INSTANCE WHERE MRS. BUCZEK ACTUALLY REFUSED TO DO WORK INVOLVING HEAVY LIFTING.

NOR WOULD THIS COURT HOLD, IF IT WERE PERTINENT TO THE DISPOSITION OF THIS APPEAL, THAT MEIJER ACTED REASONABLY IN PLACING CLAIMANT ON A NON-SECTION 48 LEAVE OF ABSENCE. THE EMPLOYER MADE NO ATTEMPT TO ACCOMODATE MRS. BUCZEK DESPITE HER WILLINGNESS TO WORK EVEN A REDUCED NUMBER OF HOURS AND IN SPITE OF THE FACT THAT IT HAD ACCOMODATED AT LEAST TWO OTHER EMPLOYEES WHO WERE UNDER DOCTOR IMPOSED JOB RESTRICTIONS (R. 14). NOR WAS THE POSSIBILITY OF A TRANSFER TO ANOTHER DEPARTMENT BASED ON HER 2-1/2 YEARS OF SENIORITY EXPLORED. (SEE, EXHIBIT 11 AT R. 35, ARTICLE 7S.13 OF THE BARGAINING AGREEMENT.) BASED ON ITS INCONSISTENT PRACTICES AND ITS UNWILLINGNESS TO EXPLORE OTHER MEANS OF ALLOWING CLAIMANT TO WORK, MEIJER DID NOT ACT REASONABLY GIVEN THE FACTS OF THIS CASE.

IT IS ORDERED THAT THE DECISION OF THE BOARD OF REVIEW OF APRIL 4, 1979 AWARDING CLAIMANT-APPELLE UNEMPLOYMENT BENEFITS IS AFFIRMED.

JOSEPH G. RASHID
CIRCUIT JUDGE