

A. D. No. B94-10946-134361W et al
S. S. No. 367-46-7788
B. O. No. 17
Employer No. 0999000

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

CARL KOEHLER,
Appellant,

v

GENERAL MOTORS CORP and MICHIGAN
EMPLOYMENT SECURITY COMMISSION,
Appellees.

96-532329-AE



OAKLAND JUDGE HILDA R. GAGE
COUNTY KOEHLER, CARL, v GENERAL MOT

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OPINION AND ORDER

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

Carl Koehler

Appellant

-v-

File: 96-532329-AE

General Motors Corporation,

Appellees

and

Michigan Employment Security
Commission,

Interested Party

A TRUE COPY
LYNN D. ALLEN
Oakland County Clerk - Register of Deeds
By *[Signature]* Deputy

Present: HONORABLE JOAN E. YOUNG
Circuit Court Judge

Date of Order: 5/6/97

OPINION AND ORDER

This matter is before the court on a timely appeal of a Decision of the State of Michigan Employment Security Board of Review. The decision is AFFIRMED.

FACTS

Carl Koehler separated from his employment at General Motors Corporation in March of 1992. Mr. Koehler filed a claim for unemployment benefits and began receiving such benefits in April of 1992. Mr. Koehler received unemployment benefits until November 14, 1992.

The Michigan Employment Security Commission, hereafter MESC, investigated Mr. Koehler's benefits subsequent to a tip that he was employed full time while collecting unemployment benefits. Dan DeGroote, Mr. Koehler's business partner in Sprinkler Patterns provided the tip, after discovering that claimant wrote checks from an affiliated business, Oakland Irrigation, for personal use. (Record pgs. 68-69). Oakland Irrigation was registered as an assumed name for Sprinkler Patterns. Further, claimant and his wife registered the name of Oakland Irrigation as an assumed name. (Record pg. 90). Claimant owned Oakland Irrigation. Both Mr. Koehler and Mr. DeGroote were authorized to sign checks from Oakland Irrigation's account. (Record at pg. 70) The personal checks included, but are not limited to checks for the Koehler's mortgage, electricity, gas, and Oakland Community College. (Record pgs. 72-73 and 85-87, see also check copies at Record pgs. 161-171).

Mr. Koehler testified that he and his family loaned various amounts of money to Oakland Irrigation. The testimony regarding the exact amount is inconsistent, varying between \$20,000 and \$45,000. (Record pgs. 91 and 95). Mr. Koehler also testified that he invested monies in Oakland Irrigation. (Record pg. 92). Absent Mr. Koehler's self serving testimony, no credible evidence was presented regarding the amount or characterization of the transfer of funds as a loan.

Appellant's counsel represented to this court that the referee found that Mr. Koehler

loaned money to Oakland Irrigation. The referee's written decisions both provide: "The testimony is in dispute as to whether or not claimant and his wife and mother loaned Oakland Irrigation monies in the amount indicated at the hearing . . ." October 19, 1994 opinion's of Referee Sewell, Record at 183-192. The Court sees no ruling on the credibility of this testimony or a specific finding regarding the alleged loan.

Claimant Koehler further testified that Oakland Irrigation sustained a \$12,000 to \$13,000 loss in 1992. (Record pgs. 92 and 121). Alternatively, the MESC's investigation revealed that \$92,798 was deposited in Oakland Irrigation's account between March or April of 1992, and the end of that year. (Record pg. 112). Mr. DeGroot estimated the business had \$80,000 in gross receipts for 1992. (Record pg. 130). This is not consistent with Mr. Koehler's testimony, and appears to constitute receipts of the business. Oakland Irrigation employed two part-time employees, paid approximately \$10 per hour (Record pgs. 98-102), and owned a ditch witch valued at \$9,000 (Record pg. 93). The company had no other assets or liabilities. No tax returns were filed to corroborate this information.

Mr. Koehler testified that he worked only during the evening for Oakland Irrigation, and sometimes did not do anything during the day. (Record pg. 105). Alternatively, Mr. DeGroot testified that the claimant worked more than 40 hours per week. (Record pg. 81).

As noted *supra.*, the MESC investigated Mr. Koehler subsequent to a tip regarding his involvement with Oakland Irrigation. The investigation unit found Mr. Koehler unavailable for work within the meaning of MCL 421.28(1)(c), and not unemployed pursuant to MCL 421.48. Following the October 19, 1994 hearing, Referee Sewell issued a determination that Carl Koehler was not available for work, and not unemployed. Further, Referee Sewell assessed

penalties and required restitution. The Referee found that “claimant’s actions exhibited a willful intent to become unjustly enriched by giving or withholding information from the Michigan Employment Security Commission.” October 19, 1994 decision of Referee Sewell. Referee Sewell subsequently denied a motion for rehearing. The Board of Review affirmed the Referee’s decision on September 19, 1996. Mr. Koehler appeals to this court.

ANALYSIS

MCL 421.38 provides, in pertinent part:

(1) The circuit court of the county in which the claimant resides or the circuit court of the county in which the claimant’s place of employment is or was located, or, if a claimant is not a party to the case, the circuit court of the county in which the employer’s principal place of business in this state is located, 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 on order or decision only if it finds that the order or decision is contrary to the law or is not supported by competent, material, and substantial evidence on the whole record. . .

MCL 421.38(1)

The first question presented is whether the referee and the board of review’s decisions in finding that the claimant, Mr. Koehler was not unemployed for the purpose of receiving unemployment compensation and that he was not genuinely attached to the labor market are contrary to the law, or not supported by competent, material or substantial evidence, taking the record as a whole.

MCL 421.28 delineates eligibility for unemployment benefits. It provides, in pertinent

part:

(1) **Registration for work; report at unemployment office; waiver.** An unemployed individual shall be eligible to receive benefits with respect to any week only if the commission finds that:

* * *

(c) **Ability and availability to perform full time work.** The individual is able and available to perform suitable full-time work of a character which the individual is qualified to perform by past experience or training, which is of a character generally similar to work for which the individual has previously received wages, and for which the individual is available, full-time, either at a locality which the individual earned wages for insured work during his or her base period or at a locality where it is found by the commission that such work is available.

MCL 421.28(1)(c)

MCL 421.48(1) provides, in pertinent part:

(1) An individual shall be deemed "unemployed" with respect to any week during which he or she performs no services and with respect to which remuneration is not payable to the individual, or with respect to any week of less than full-time work if the remuneration payable is less than his or her weekly benefit rate. . .

MCL 421.48(1)

The question presented relates to the referee and board's findings relating to Mr. Koehler's "availability" under MCL 421.28(1)(c).

Mr. Koehler testified that he performed work for Oakland Irrigation in the evenings. In light of the numerous inconsistencies in the testimony of claimant, the court finds this testimony

to be self-serving and incredible. The record as a whole reveals a consistency in Mr. DeGroote's testimony, frequently supported by corroborating evidence (the checks, for example). Although the referee stated that Mr. Koehler did not work forty hours per week, the Court finds that he performed a substantial amount of work while purportedly unemployed.

The MESFC, referee and Board of Review all found Mr. Koehler employed. Claimant asserts that he was unemployed during the time in question. The proper test to be applied is the genuine attachment to the labor market. Bolles v Employment Security Commission, 361 Mich 378; 105 NW2d 192 (1960).

Claimant argues that the facts at hand are analogous to Bolles, supra. Bolles involved two employees of Continental Motors who were laid off in 1955. Subsequent to their dismissal, the claimants opened Muskegon Jewelers, a watch repair shop. Each individual earned approximately \$1 per day, and reported a \$60 gain. The court questioned the "gain" due to outstanding expenses not included in the computation. During the time of unemployment, both men actively sought employment, applied for jobs referred to them by the Employment Security Commission, and drew unemployment. Id. The Michigan Supreme Court ultimately found both men to be attached to the labor market because they were "ready, willing, able and anxious to continue work in industry." Id. at 386. The court finds the facts at hand to be distinguishable from the facts presented in Bolles, supra.

The court has reviewed the record as a whole. The record provides ample competent, material and substantial evidence that Mr. Koehler was not available within the meaning of the statute. Mr. Koehler testified that on some days he did not do anything. (Record, p. 105). This militates against a finding of an attachment to the labor market. This court agrees with the Board

of Review that a person truly committed to the labor market would actively pursue employment options, rather than not doing anything during the day.

Mr. Koehler indicated that he looked for other employment, but failed to specify where, or how frequently.

In sum, the court finds that Mr. Koehler was not available within the meaning of the statute and not unemployed within the meaning of the statute. The decisions below are not contrary to the law, and the record provides competent, material and substantial evidence for the findings of employment and unavailability. The decision of the Board of Review is AFFIRMED.

The second question presented involves the Board of Reviews affirmance of the referee's assessment of penalties and sanctions pursuant to MCL 421.54, and MCL 421.62. In order to assess penalties it must be established that a person willfully or intentionally violated the provisions of the act, or that a person made an intentional misrepresentation. MCL 421.54, MCL 421.62. Mr. Koehler represented to the unemployment commission that he was not employed during the period in question, and failed to disclose his connection to or responsibilities with Oakland Irrigation.

As noted *supra.*, an individual is deemed unemployed: "with respect to any week during which he or she performs no services and with respect to which remuneration is not payable to the individual, or with respect to any week of less than full-time work if the remuneration payable is less than his or her weekly benefit rate. . ." MCL 421.48(1).

The testimony of both Mr. Koehler and Mr. DeGroote clearly establish that appellant worked a minimum of part time during the period in question. Appellant has consistently

maintained that he received no compensation for the period in question, and that any checks written for personal expenses during the period in question constitute re-payment of a loan. No credible evidence has been presented corroborating Mr. Koehler's testimony that he or a family member loaned Oakland Irrigation. The Court finds Mr. Koehler's testimony to be inconsistent, stating he loaned money to Oakland Irrigation, and later stating he invested monies in Oakland Irrigation. (Record pg. 92). Further, the Court finds his testimony self serving, and therefore unreliable.

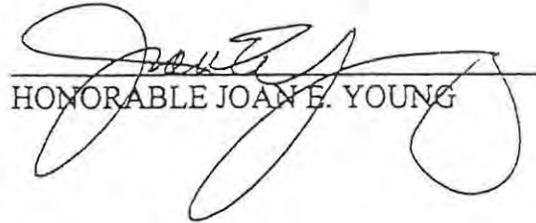
Mr. Koehler maintains that he received no compensation from Oakland Irrigation. While he may not have received compensation in the form of a pay-check, he paid personal expenses from the business account. The Court finds that the checks for Mr. Koehler and his family's personal expenses are tantamount to compensation for the time in question. Mr. Koehler knowingly and wilfully misrepresented his status as unemployed to the MESC.

The Court has considered all credible evidence before it, finds that ample evidence exists to support the conclusion the Mr. Koehler's actions constitute an intentional or willful failure to comply with the Employment Security Act, MCL 421.1 et seq. Further, it is evident to this court that Mr. Koehler was improperly paid benefits. The Board's decision is not contrary to the law and is supported by material, competent, and substantial evidence. The assessment of penalties and sanctions is AFFIRMED.

CONCLUSION

In sum, the decision is not contrary to the law and is supported by competent, material, and substantial evidence contained within the record. The decision of the Board of Review is AFFIRMED.

5/6/97
Date


HONORABLE JOANE E. YOUNG