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CIRCUIT COURT ORDER/OPINION
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Appeal Docket No: 1029718

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Date: 12/3, 2009

R. Douglas Daligga, Director
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STATE OF MICHIGAN

MACOMB COUNTY CIRCUIT COURT

CHIPPEWA VALLEY SCHOOLS,

Employer-Appellant,

vs. Case No. 2009-2460-AE

SUSAN BOLLINGER,

Claimant-Appellee,

and

STATE OF MICHIGAN, DEPARTMENT OF ENERGY, LABOR & ECONOMIC GROWTH, UNEMPLOYMENT INSURANCE AGENCY,

Appellee.

_____/

OPINION AND ORDER

This matter is before the Court on appellant Chippewa Valley Schools' ("Chippewa Valley's") appeal of the decision of the Employment Security Board of Review ("the Board of Review" or "the Board").

Claimant Susan Bollinger ("claimant") worked as a long-term substitute teacher for Chippewa Valley from December 11, 2006 to June 21, 2007. Claimant was informed that the long-term assignment would not be available the following year, and filed for unemployment insurance benefits on June 2, 2007 with a benefit year beginning on July 1, 2007. Beginning on July 17, 2007, Chippewa Valley sent claimant three letters informing her that future substitute teaching assignments would only be available if she registered with Professional Educational Services Group ("PESG"). The letters essentially instructed substitute teachers to register with

PESG by September of 2007 in order to be eligible for substitute teaching positions. Claimant never registered with PESG as instructed. Claimant did procure a substitute teaching assignment with Grosse Pointe South from October 24, 2007 to December 7, 2007. Further, she procured employment on January 14, 2008, which is apparently ongoing.

The Unemployment Insurance Agency ("UIA") issued a redetermination finding that claimant was "available for work" within the meaning of the Employment Security Act. Chippewa Valley timely appealed this decision, and a hearing was held on March 28, 2008 before Administrative Law Judge ("Referee") Earl B. Ashford. Referee Ashford determined that claimant was available for work from July 1, 2007 through September 1, 2007. However, Referee Ashford found that claimant was not available for work from September 2, 2007 through January 12, 2008.

Claimant appealed Referee Ashford's decision to the Board of Review. The Board found that claimant had been available for work during the period from September 2, 2007 through October 20, 2007, and from December 9, 2007 through January 12, 2008. As such, the Board of Review reversed Referee Ashford in a decision issued on April 30, 2009.

Section 38 of the Michigan Employment Security Act provides, in part, that the circuit court "may reverse an order or decision [of the Board of Review] 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." MCL 421.38(1). In determining whether a decision is contrary to law, the reviewing court must be "able to point out, and then define, some controlling rule of law which, in its application to the findings of the given administrative agency, quite unfounds the conclusion such agency has reached." *Peaden v Employment Security Comm'n,* 355 Mich 613,

629; 96 NW2d 281 (1959). Otherwise, "it is the duty of the court to affirm that the agency has exercised its judgment within the area of discretion entrusted to it by legislative authority." *Id.*

Furthermore, the "court cannot substitute its own judgment for that of the administrative agency if there is substantial evidence which supports the agency." *Smith v Employment Security Comm'n*, 410 Mich 231, 256; 301 NW2d 285 (1981) (citations omitted). "Substantial evidence" is "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." *Russo v Dep't of Licensing and Regulation*, 119 Mich App 624, 631; 326 NW2d 583 (1982) (citations omitted). As such, "'[t]he judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body.'" *Dynamic Manufacturers, Inc v Employment Security Comm'n*, 369 Mich 556, 560; 120 NW2d 173 (1963), quoting *Mississippi Valley Barge Line Co v United States*, 292 US 282, 286-287; 54 S Ct 692; 78 L Ed 1260 (1934).

In support of this motion, Chippewa Valley argues that the Board of Review's decision is contrary to the law, and is unsupported by competent, material, and substantial evidence. Chippewa Valley notes that claimant was hired as a substitute teacher. However, Chippewa Valley contends that claimant did not make herself available for work as a substitute teacher in any Macomb County School district during the period that she seeks unemployment benefits. Rather, claimant attempted to gain full-time employment in the field. Chippewa Valley contends that the Board of Review failed to distinguish between making oneself available for work as a substitute teacher and seeking full-time employment as a teacher. Additionally, Chippewa Valley notes that even when claimant did register through PESG to teach in Wayne County

schools, she still marked numerous dates as being unavailable for work. Chippewa Valley contends that the Board of Review failed to recognize this self-imposed unavailability.

In response, claimant avers that she was only required to demonstrate that she was actively seeking full time employment in her area of expertise. Claimant contends that she did not have to seek work with a specific employer or seek a specific type of work. Claimant contends that the decision of Referee Ashford was contrary to established law. Claimant further contends that the Board of Review's decision was supported by competent, material, and substantial evidence on the record.

The UIA has also filed a response in this matter. The UIA contends that Chippewa Valley's representatives did not know if there was available work matching claimant's experience and training. Further, the UIA contends that Chippewa Valley was only able to offer claimant day-to-day assignments at a reduced rate of pay. Finally, the UIA contends that there was no evidence that the day-to-day assignments available would have provided claimant with "full-time work." As such, the UIA contends that the Board of Review's decision should be affirmed.

In order to collect unemployment insurance benefits, a claimant must be available for full time work. To wit, the unemployment insurance commission must find that

> 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 at 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). "The basic purpose of the requirement that a claimant must be available for work to be eligible for benefits is to provide a test by which it can be determined whether or not

the claimant is actually and currently attached to the labor market." *Dwyer v MESC*, 321 Mich 178, 188; 32 NW2d 434 (1948). "[T]he claimant must be genuinely attached to the labor market, i.e. he must be desirous to obtain employment, and must be willing and ready to work." *Id.* The burden of proof is on the claimant to show that he or she is available for work. See *Dwyer v Unemployment Compensation Comm'n*, 321 Mich 178, 184; 32 NW2d 434 (1948) (citation omitted).

In the decision issued on April 30, 2009, the Board of Review reasoned that claimant "was looking for a full-time teaching position and did not want day-to-day assignments, which was her reason for not registering with PESG." Record on Appeal (Decision of the Board of Review) at 114. The Board noted that "claimant also testified that the pay she would have received through PESG for the day-to-day assignments was significantly less than the pay received from employer on the long term substitute teaching assignment." *Id.* Further, the Board opined that "claimant was seeking full-time work in school districts close to her residence, which employer did not dispute." *Id.* The Board thus found that "claimant met her burden of proof and . . . the Referee decision concerning the periods of ineligibility must be reversed." *Id.*

The Court disagrees with the reasoning of the Board of Review, and finds that the decision of the Board of Review was contrary to the law and unsupported by competent, material, and substantial evidence. It is clear from the record that claimant refused to make herself available for work as a substitute teacher with Chippewa Valley or with any Macomb County School District – long-term or otherwise. To wit, Chippewa Valley expressly informed claimant that she would have to register with PESG in order to be eligible for any substitute assignments in the 2007-2008 school year. See Record on Appeal (Transcript) at 50. Chippewa Valley sent three letters to claimant indicating the steps she would need to take to be eligible for

substitute teaching positions. *Id.* at 26 and 50. Claimant refused to register with PESG because she was not interested in regular substitute work; she only wanted full-time employment as a teacher. *Id.* at 28.

While a long-term substitute assignment *may* have been unavailable even if claimant had registered with PESG, claimant's failure to register with PESG altogether served to remove her entirely from the pool of available candidates for such work. Claimant thus made herself unavailable for the very type of work which she had previously been performing for Chippewa Valley. Under these circumstances, claimant clearly did not make herself "available to perform suitable full-time work" of the type which she had previously performed for Chippewa Valley. Therefore, the Court finds that the Board of Review's decision is properly reversed and Referee Ashford's decision is properly affirmed.

For the reasons set forth above, the decision of the Board of Review is REVERSED. The decision of Referee Ashford is REINSTATED. Pursuant to MCR 2.602(A)(3), this *Opinion and Order* resolves the last pending claim and closes this case.

IT IS SO ORDERED.

Dated: November 24, 2009

DONALD G. MILLER
Circuit Court Judge

CC: Timothy D. Tomlinson
Joel A. Harris
Shannon W. Husband

DONALD G. MILLER
CIRCUIT JUDGE

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