

S T A T E O F M I C H I G A N
C O U R T O F A P P E A L S

SEP 20 1983

PEGGY L. TROMBLEY, et al.,
Plaintiffs-Appellants,

v

Docket # 64505

ST. FRANCIS HOSPITAL and MICHIGAN
EMPLOYMENT SECURITY COMMISSION,
Defendants-Appellees.

Richard C. Clark
Attorney for Plaintiff-Appellant

Terry F. Burkhart (P30282)
Attorney for Employer-Appellee

Frank J. Kelley, Attorney General
Louis J. Caruso, Solicitor General
Catherine M. Fleming (P27050)
Assistant Attorney General
Attorneys for MESC

Before: Cynar, P.J., and J.H. Gillis and Wahls, JJ.

PER CURIAM

Plaintiffs, approximately 120 claimants, appeal as of right from a circuit court order partially affirming and partially reversing the decision of the Michigan Employment Security Commission (MESC) Board of Review.

The employees of St. Francis Hospital in Escanaba, Michigan, were organized by local 2653 of the American Federation of State, County and Municipal Employees (AFSCME),

and had a contract with the hospital which expired on February 28, 1978. Negotiations began in December, 1978, to reach a new contract. No new agreement was reached before the old contract expired, however, and the hospital refused to extend the existing contract.

On February 13 and March 1, 1979, local 2653 sent notices of the union's intention to strike to the employer. At approximately 7 a.m., on March 15, 1979, approximately 185 AFSCME employees commenced a strike against the hospital. On that date the hospital administrator sent each employee a letter stating:

"I wish to notify you that beginning Monday, March 19, 1979, St. Francis Hospital will hire temporary and permanent replacements of employees engaged in the work stoppage at our hospital.

"I regret that this action is necessary. However, in order to maintain our operations and continue to provide quality health care services for our community, I have authorized the hiring of replacements.

"If you have any questions concerning this action, please contact me or the personnel department."

The hospital also advertised in the daily newspaper for permanent replacements of striking workers.

Shortly thereafter, the hospital sent employees a form letter as they were being replaced, one by one:

"This letter is to advise you that you have been permanently replaced effective _____, in your position as _____ at St. Francis Hospital.

"If you have any questions about your status as a replaced employee, please contact the Personnel Department." Approximately 99 replaced employees, along with approximately 62 other striking employees who were not permanently replaced,

filed with the Michigan Employment Security Commission (MESC) for unemployment compensation benefits during the course of the strike.

The claimants were initially determined to be ineligible for MESC benefits, pursuant to MCL 421.29(8); MSA 17.531(8).¹ However, a "redetermination" was issued permitting compensation for those employees who received a notice stating they were permanently replaced.

On July 16, 1979, the union and hospital entered into a new contract, thereby ending the strike.

The claimants requested a hearing before a referee. On October 17, 1979, Referee Epps reversed the commission's redetermination and removed the disqualification for all striking employees, holding that no disqualifying labor dispute ever existed. The hospital appealed the referee's decision to the MESC Board of Review, which reversed the referee and reinstated the initial "redetermination".

The claimants appealed the Board of Review's decision to the Delta County Circuit Court. The circuit court affirmed the Board of Review's holding that the claimants were not eligible for unemployment compensation since they were engaged in a labor dispute which was a substantial, contributing cause of their unemployment. The circuit court reversed the holding of the Board of Review that the replaced employees had been discharged, and that that discharge removed the labor dispute disqualification and entitled them to receive unemployment benefits from the date of the receipt of the letter.

The standard of review for this type of case has been set out by our Supreme Court in Smith v Employment Security Comm, 410 Mich 231, 256; 301 NW2d 285 (1981):

"Our function as a reviewing court is limited to a determination of whether the findings of the MESC are supported by competent, material and substantial evidence on the whole record. MCL 421.38; MSA 17.540. This Court cannot substitute its own judgment for that of the administrative agency if there is substantial evidence which supports the agency. Michigan Employment Relations Comm v Detroit Symphony Orchestra, Inc, 393 Mich 116; 223 NW2d 283 (1974); Regents of the University of Michigan v Employment Relations Comm, 389 Mich 96; 204 NW2d 218 (1973).

The decision of the circuit court is affirmed.

Our review of the record indicates that the finding that a labor dispute was a substantial contributing cause of unemployment for all claimants is well supported. See Smith v Employment Security Comm, *supra*, pp 256-258.

Although we decline to fashion a per se rule that a permanent replacement letter, by itself, can never constitute a discharge, in the instant case, the record can not support a factual finding that those employees who received a permanent replacement letter were discharged as of the date of the letter. See Knight-Morley Corp v Employment Security Comm, 352 Mich 331; 89 NW2d 541 (1958).

Affirmed.

/s/ John H. Gillis
/s/ Myron H. Wahls

1

At the time the dispute arose, MCL 421.29(8); MSA 17.351(8) read, in pertinent part:

"An individual shall be disqualified for benefits for any week with respect to which his total or partial unemployment is due to a labor dispute in active progress, or to shutdown or start-up operations caused by that labor dispute, in the establishment in which he is or was last employed, or to a labor dispute, other than a lockout, in active progress, or to shut-down or start-up operations caused by that labor dispute, in any other establishment within the United States which is functionally integrated with the establishment and is operated by the same employing unit."

STATE OF MICHIGAN
COURT OF APPEALS

PEGGY L. TROMBLEY, et al.,

Plaintiffs-Appellants,

v

No. 64505

ST. FRANCIS HOSPITAL and
MICHIGAN EMPLOYMENT SECURITY
COMMISSION,

Defendants-Appellees.

Before: Cynar, P.J., J.H. Gillis and M.H. Wahls, JJ.
CYNAR, J. (concurring in part; dissenting in part)

I am in agreement with the majority to affirm the circuit court's affirmance of the board of review's holding that the claimants were not eligible for unemployment compensation since they were engaged in a labor dispute, which was a substantial contributory cause of their unemployment.

However, in disagreeing with the majority on the remaining issue, I would hold that the plaintiffs are entitled to collect MESC benefits. Under the circumstances of the present case, permanent replacement is equal to termination, thereby making the claimants eligible for unemployment benefits which prior thereto they were disqualified from receiving.

/s/ Walter P. Cynar