

STATE OF MICHIGAN
MACOMB COUNTY CIRCUIT COURT

ROBERT P. KOWALSKI,

Appellant,

vs.

Case No. 2011-2690-AE

HENRY FORD MACOMB
HOSPITAL, and STATE OF
MICHIGAN, DEPT OF LICENSING
AND REGULATORY AFFAIRS,
UNEMPLOYMENT INSURANCE
AGENCY,

Appellees.

OPINION AND ORDER

Appellant, Robert P. Kowalski, appeals from the Board of Review's decision, dated June 13, 2011, which denied application for rehearing of the Board of Review's decision, dated October 29, 2010, reversing the decision of the Administrative Law Judge and disqualified Appellant for benefits under the misconduct provision of MCL 421.29(1)(b).

Appellant filed this appeal on June 20, 2011. After Appellant was terminated from appellee Henry Ford Macomb Hospital ("Employer"), he applied for unemployment benefits. On July 27, 2009, the Unemployment Insurance Agency ("Agency") issued a redetermination which held Appellant was not disqualified for benefits under the misconduct provision of MCL 421.29(1)(b). The Employer appealed this redetermination. Following a hearing on February 4, 2010, the Administrative Law Judge L.M. Tavoularis issued a written decision that affirmed the redetermination and found that Appellant was not disqualified for misconduct under MCL 421.29(1)(b).

The Employer appealed to the Board of Review. On October 29, 2010, in a written decision, the Board of Review reversed Judge Tavoularis and disqualified Appellant for misconduct under MCL 421.29(1)(b). Following Appellant's request for rehearing, the Board of Review issued a written decision, dated June 13, 2011, denying rehearing with one dissenting member. Appellant has now appealed to this Court.

Appellant argues the decision of the Board of Review is not supported by competent, material, and substantial evidence on the whole record. According to Appellant, the Board of Review decision erroneously gave improper weight to the evidence before the Administrative Law Judge. Appellant maintains his actions in this matter were good faith errors in judgment or discretion rather than misconduct under the statute.

In its response, appellee Agency argues that the record and law supports the decision that Appellant was disqualified from benefits due to work-related misconduct. The Agency asserts the record demonstrates Appellant knowingly violated his job responsibilities. Additionally, the Employer claims the Board of Review issued the correct decision by finding Appellant's actions constituted disqualifying misconduct due to Appellant's action of intentionally and deliberately entering a patient's medical chart without a legitimate business reason.

The Court's examination of the Board of Review's decision is governed by MCL 421.38. The Court will reverse a decision of the Board of Review where it is either contrary to law or not supported by competent, material, and substantial evidence on the whole record made before the referee and the board of review. MCL 421.38(1); *Vanderlaan v Tri-County Community Hosp*, 209 Mich App 328, 331; 530 NW2d 186 (1995). Substantial evidence regarding unemployment benefits is that evidence which reasonable minds would accept as adequate to support a decision, meaning more than a mere scintilla but less than a preponderance of evidence. *Korzowski v*

Pollack Industries, 213 Mich App 223, 228; 539 NW2d 741 (1995). The public policy of the Michigan Employment Security Act (“MESA”) requires liberal construction of unemployment benefits coverage and strict construction to effect disqualification. MCL 421.1 *et seq*; *Empire Iron Min Partnership v Orehanen*, 455 Mich 410, 416; 565 NW2d 844 (1997).

The Court has reviewed the record, the decision of Judge Tavoularis, and the decision of the Board of Review. The key determination by the Court is whether Appellant engaged in work-related misconduct to disqualify him from benefits. Under MCL 421.29(1)(b), an individual is disqualified from receiving benefits if he or she was suspended or discharged for misconduct connected with the individual's work. The Michigan Supreme Court, in *Carter v Employment Security Co*, 364 Mich 538, 541; 111 NW2d 817 (1961), has defined the type of misconduct sufficient to disqualify an employee from receiving unemployment benefits:

The term misconduct is limited to conduct evincing such willful or wanton disregard of an employer's interests as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee, or in carelessness or negligence of such degree or recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to his employer. On the other hand mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good-faith errors in judgment or discretion are not to be deemed “misconduct” within the meaning of the statute.

Misconduct for purposes of unemployment compensation may consist of a series of incidents as well as a single incident. *Giddens v Employment Security Commission*, 4 Mich App 526; 145 NW2d 294 (1966). An employee's continual violations of an employer's rules may amount to a substantial disregard of the employer's interests. *Booker v Employment Security Co*, 369 Mich 547; 120 NW2d 169 (1963). The employer bears the burden of proving disqualifying misconduct by a preponderance of the evidence. *Korzowski, supra*.

At the hearing before Judge Tavoularis, on February 4, 2010, the testimony established that Appellant began employment as a regulatory documentation clerk on January 8, 2007. *See* Record on Appeal, p 6-7. Appellant continued this employment until on or about April 27, 2009. *Id.* at 47-48. Appellant was discharged for failure to meet professional expectations. *Id.* at 7, 48-49. The Employer stated he was primarily terminated due to his violation of the confidentiality of the HIPPA policy and the Employer policy. *Id.* at 17, 20, 30-31. However, Appellant testified he was not informed at the time of his termination that it was due to any confidentiality violation. *Id.* at 49.

Mary Beth Pace, Director of Case Management, testified that Appellant's primary duty was to use the computer to enter a second notice concerning Medicare forms of patients. *Id.* at 14-15. Ms. Pace stated that Appellant was qualified to access the computer system, but was only to use two steps, even though he had access to the complete Midas system. *Id.* at 27-30, 34. Appellant stated he was authorized to use the entire system, which was necessary for his job responsibilities when there was a possible appeal. *Id.* at 50, 56, 61-62, 64.

The Employer indicated Appellant was placed on a performance improvement plan ("PIP") on February 18, 2008 due to failures to meet expectations for quality and productivity. *Id.* at 17. On April 10, 2009, Ms. Pace testified that Appellant left her a copy of a message, which contained medical information she believed he did not need to know for his job. *Id.* at 20-22. Ms. Pace confronted Appellant, he denied accessing the patient's chart, he informed her that the patient was a relative, and he indicated he learned specific medical information about the patient from a relative. *Id.* at 23-24, 51-52, 60. Based on this information, Ms. Pace initiated an investigation regarding the confidential information and requested two computer audits. *Id.* at 26. The Midas audit discovered that Appellant opened focus studies not relative to his job

requirements. *Id.* at 29-30. According to Ms. Pace, Appellant should not have been in the first three screens of Midas. *Id.* at 34. However, Appellant testified that the additional screens were necessary in this case due to the possible appeal and he had a legitimate business reason to go beyond the first two screens. *Id.* at 56, 58, 61-62, 65.

The ALJ determined, in a written decision dated February 4, 2010, that the Employer failed to establish that Appellant willfully, wantonly, and intentionally did anything to establish a deliberate disregard of standards of behavior which the employer had the right to expect. The Board of Review reversed finding that Appellant consciously and deliberately accessed a file without authorization, which could not be characterized as a good faith error in judgment. Upon request for rehearing, the dissenting member found that the additional evidence provided by Appellant demonstrated he did not engage in misconduct because the Employer's system required him to go to the alleged inappropriate screens before reaching the appropriate screens. The Court agrees with the ALJ and dissenting member.

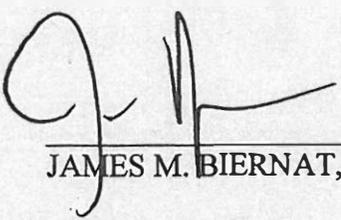
The record establishes that Appellant did not willfully or intentionally violate any confidentiality policy. Rather, Appellant had access to the entire Midas program and under particular circumstances, specifically when there is a possible appeal, he was required and authorized to access the entire program. The Employer did not provide any contradictory testimony or evidence. The Employer maintained that Appellant's use of the computer was on a "need to know" basis. The record indicates the policy regarding access to the particular screens is discretionary dependent on the status of the patient's case and the job requirements of the employee. Appellant testified he believed there was a possible appeal for this particular patient. Accordingly, under Appellant's belief, he was required and authorized to access all of the screens. Additionally, Appellant supplied the Board of Review documentation that upon

entering the program for this patient the first screen was an alleged unauthorized screen; therefore, it was unavoidable. Due to the vague and discretionary policy and evidence that his access was unavoidable, the only conclusion is that Appellant's action was not a willful disregard for the Employer's interest, but rather a good faith error in judgment.

Based on the record, the Employer failed to establish the claimant willfully, wantonly, intentionally, and deliberately disregarded the standards of behavior which the Employer had a right to expect. Accordingly, Appellant's separation is under a non-disqualifying circumstance. Therefore, the decision of the Board of Review is not supported by competent, material, and substantial evidence on the whole record.

For the reasons set forth above, the decision of the Board of Review, dated June 13, 2011, is REVERSED and the decision of ALJ Tavoularis, dated February 4, 2010 is AFFIRMED. This Court does not retain jurisdiction. Pursuant to MCR 2.602(A)(3), the Court states this Opinion and Order resolves the last claim and closes the case.

IT IS SO ORDERED.



JAMES M. BIERNAT, JR., Circuit Judge

JMB/kmv

DATED: January 27, 2012

cc: Michael J. Baughman, Jr., Attorney at Law

George G. Constance, Assistant Attorney General

✓ Steve Gray, Attorney at Law