

A.D. NO. B90-09803-116335W
S.S. NO. 385-42-4830
B.O. NO. 13

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

ELLIS GENE G. GENTRIS

CASE NO. 91-129268-AE

Appellant,

v

MICHIGAN EMPLOYMENT
SECURITY COMMISSION
and CITY OF DETROIT,

Appellees.

Terri L. Hayles (P33276)
Attorney for Appellant

FRANK J. KELLEY, Attorney General
of the State of Michigan

By: LINDA PYTEL McDOWELL (P29274)
Assistant Attorney General

ORDER

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

ELLIS GENE GENTRIS

CASE NO. 91-129268-AE

Appellant,

HON. WILLIAM LEO CAHALAN

v

MICHIGAN EMPLOYMENT
SECURITY COMMISSION
and CITY OF DETROIT,

Appellees.

At a session of said Court
held in the City-County Building
on the 1st day of Sept 1992.

WILLIAM LEO CAHALAN

Present: Hon. _____

WILLIAM LEO CAHALAN
Circuit Court Judge

ORDER AFFIRMING THE BOARD OF REVIEW

This matter having come on to be heard on an appeal filed by the Appellant herein; and the court after reviewing the Briefs filed by the parties and granting oral argument on said Briefs, being otherwise fully advised in the premises;

IT IS HEREBY ORDERED AND AdJUDGED that the decision issued by the Board of Review is supported by material, competent and substantial evidence, and is hereby affirmed *and not*

Contrary to Law

WILLIAM LEO CAHALAN

Circuit Court Judge

A TRUE COPY
JAMES R. KILLAM
CLERK
[Signature]
CLERK

STATE OF MICHIGAN
EMPLOYMENT SECURITY BOARD OF REVIEW

In the Matter of the Claim of

ELLIS G. GENTRIS,

Appeal Docket No. B90-09803-116335W

Claimant

Social Security No. 385-42-4830

CITY OF DETROIT,

Employer

DECISION OF BOARD OF REVIEW

This matter is before the Board of Review on the claimant's appeal of a Referee's decision which held the claimant ineligible for benefits as well as ineligible to establish a benefit year pursuant to Section 28a(4) with respect to a claim filed on October 27, 1986.

Having reviewed the record of this matter, the Board of Review finds the facts to be:

The claimant worked for the employer from 1983 through January 7, 1985. On the latter date, the claimant ceased to work for medical reasons. However, the claimant did not properly document the need for a leave of absence. Therefore, the employer notified the claimant that she was regarded as having voluntarily left her employment, effective February 18, 1986. The notification that the employer was treating the claimant as a quit was mailed to the claimant on March 25, 1986.

The claimant filed an application for benefits on June 4, 1986. The claim was denied for insufficient credit weeks.

The claimant filed a subsequent claim for benefits on October 27, 1986. At that time, she filed a request to preserve her credit weeks pursuant to Section 28a. The Commission issued a determination finding that the claimant had properly preserved her credit weeks. No appeal of that ruling was taken.

The claimant remained disabled through May 22, 1989. On the latter date, her doctor released her to return to work.

Also, on May 22, 1989, the claimant filed another claim for benefits. The Commission issued a determination and later redetermination which held that the claimant had not acted timely to preserve her credit weeks pursuant to Section 28a of the Act.

In a separate proceeding, the claimant appealed that redetermination to the Referee. On December 27, 1989, the Referee issued a decision in that appeal, Docket No. B89-11105, in which he held that the earlier determination of

March 16, 1987, had become res judicata since it had not been protested. Therefore, the redetermination which was the subject matter of the appeal before him had been issued improperly by the Commission since it had no authority to do so. The Referee set aside that redetermination.

When the claimant took the Referee decision in Docket No. B89-11105 to the Commission and attempted to obtain the benefits of it, the Commission issued the redetermination which resulted in the present appeal. That redetermination has, in effect, found that the claimant is unable to collect any benefits as a result of preservation of credit weeks pursuant to the prior ruling in regard to Section 28a of the Act because Section 28a(4) prohibits the Commission from paying any benefits for preserved credit weeks more than 156 weeks after the first week of the benefit year.

The claimant argues that the Commission erred by establishing the beginning date of the claimant's benefit year as January 13, 1985. Instead, the claimant asserts that the benefit year beginning date for his claim should be May 22, 1989. The claimant asserts that Section 46 of the Act defines "benefit year" to commence with the week in which the application for benefits is filed. Furthermore, the claimant argues that Section 46 and Section 28a(6) are inconsistent. Since Section 46 specifically addresses the beginning date of a benefit year, the claimant argues that it and not Section 28a should prevail in this instance.

In reaching the decision which he did in this matter, the Referee stated as follows:

"The undersigned views Subsection 28(a)(6) (sic) as an exception to Subsection 46(a) of the Act. The employer argues and the undersigned believes correctly, that if the claimant is going to obtain the benefits of Subsection 28(a) (sic) of the Act, she must also be subject to whatever liabilities are contained in that section of the Act, and its subsections. It is also argued that the different criteria to establish a benefit year and when it shall begin, as found in Subsection 28(6) (sic) of the Act, is applicable here. The undersigned agrees...."

In effect, the Referee has, by the cited language of his decision, ruled that Section 28a(6) is a specific exception to the provisions of Section 46 of the Act.

Applying the law to the facts of this matter, the Board of Review finds:

The finding of the Referee that Section 28a(6) was a specific exception to Section 46 appears to the Board to be a correct conclusion. The preservation of credit weeks is a specific provision of the statute which allows a person who is unable to establish a benefit year in the normal course of events because he/she is unemployed and unable to work for medical reasons to establish a benefit year and preserve the credit weeks until he/she is

eligible to draw them. Section 28a is limited in its application to unemployment resulting from medical disability and does not encompass any other forms of unemployment. Therefore, it is logical to conclude that when the Legislature amended the Employment Security Act by adding Section 28a, it also intended specific exceptions to the remaining provisions of the Act which were in conflict therewith. Support for this finding exists in the decision of Kempf v Michigan Bell Telephone Company, 137 Mich App 574 (1984), which held that the term "unemployed" as set forth in Section 28a of the Act had a distinctly different meaning than the term "unemployed" as found in Section 48 of the Act. As the court stated in Kempf:

"Therefore, having concluded that it was the Legislature's intent to allow a person in claimant's position to come within the purview of section 28a(6), it must be assumed that section 48's provision, which deems a person on a leave of absence not to be unemployed, was not intended to qualify the terms 'unemployed' or 'unemployment' as used in subsection 6. Rather, it is the conclusion of this Court that subsection 6's reference to section 48 was intended to refer only to section 48's general provision which deems a person 'unemployed' with respect to any week during which he performs no services and with respect to which no remuneration is payable to him. According to this provision, claimant was 'unemployed' while on disability leave...."

The Board finds that Section 28a(6) may very well be inconsistent with Section 46 as the claimant argues. However, the Board finds that Section 28a(6) was intended as an exception only in those situations where the benefit year question revolved around unemployment due to disability and the preservation of credit weeks. Accordingly, the Board finds that such is the situation in this case, and Section 28a(6) is the appropriate Section to apply to this matter rather than Section 46.

The Referee's decision is affirmed.



Frank Salomone, Member



Morris W. B. Cohl, Member

MAILED AT DETROIT, MICHIGAN October 16, 1991

This order will become final unless a written appeal therefrom is RECEIVED by the clerk of the appropriate circuit court on or before

November 15, 1991

TO PROTECT YOUR RIGHTS, YOU MUST BE ON TIME.