

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF GRAND TRAVERSE

STEVEN JOHN MICHALSKI,

Claimant/Appellant

v

Case No. 00-20634-AE
HON. PHILIP E. RODGERS, JR.

SHEFCO, INC.,

Employer/Appellee,

and

STATE OF MICHIGAN, UNEMPLOYMENT
AGENCY, DEPARTMENT OF CONSUMER &
INDUSTRY SERVICES (formerly MESA),

Appellee.

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DECISION AFFIRMING BOARD OF REVIEW DECISION

Steven J. Michalski ("Claimant"), a former employee of Shefco, Inc. ("Employer"), filed a claim for unemployment compensation benefits through the Michigan Employment Security Act ("Act") with the Unemployment Agency. By determination and redetermination, Claimant was found not disqualified for benefits under the misconduct provisions of the Act. MCL 421.29(1)(b); MSA 17.531(1)(b). The Employer requested a referee hearing. The referee reversed finding that the Claimant was disqualified for benefits. Claimant appealed. The Michigan Employment Security Board of Review affirmed the decision of the referee. This appeal followed.

STANDARD OF REVIEW

The Michigan Court of Appeals reiterated the standard of review in *Washington v Amway Grand Plaza*, 135 Mich App 652, 656-657; 354 NW2d 299 (1984):

The applicable standard of review was stated in *Chrysler Corp v Sellers*, 105 Mich App 715, 720; 307 NW2d 708 (1981):

On appeal from decisions of the Board of Review, we may review questions of law or fact, Const 1963, art 6, § 28; MCL 421.38; MSA 17.540, but we can reverse only if the order or decision is contrary to law or is unsupported by competent, material and substantial evidence on the record. If there is no dispute as to underlying facts, questions presented on appeal are to be treated as matters of law. *Laya v Cebar Construction Co*, 101 Mich App 26, 29; 300 NW2d 439 (1980).

I.

The issue presented is whether the Board of Review's determination that the Claimant is disqualified for benefits under the misconduct provisions of the Act is contrary to law or is not supported by competent, material and substantial evidence on the whole record.

The Claimant insists upon categorizing his conduct as "an isolated error in judgment." The Employer's witnesses, however, testified that the Claimant "often resorted to harsh and demeaning words" and "singled out particular persons . . . as targets for this profanity." They also testified that the Claimant "persisted in swearing" "in spite of warnings" and "created a hostile work environment."

Obviously, the Board of Review believed the Employer's witnesses. "It is not the function of this Court to resolve evidentiary conflicts or to pass on witnesses' credibility." *Reed v Hurley Medical Center*, 153 Mich App 71, 75-76; 395 NW2d 12 (1986).

II.

Whether the Board of Review's finding that the Claimant's conduct constituted "misconduct" is contrary to law or is not supported by competent, material and substantial evidence on the whole record.

There is little case law involving disqualification for misconduct. *Broyles v Aeroquip*, 176 Mich App 175; 438 NW2d 888 (1989), however, is one such case. In *Broyles*, the Board of Review

denied a former employee unemployment compensation benefits finding he was disqualified for misconduct. The employee appealed. The Court of Appeals held that: (1) the totality of the circumstances had to be examined to determine whether the use of vulgar or abusive language was misconduct precluding unemployment benefits, and (2) a former employee's use of vulgar language directed at his supervisor in a hostile confrontation was sufficiently supported by the record to allow the Board to determine that the former employee engaged in misconduct.

The Court stated in *Broyles* that "the scope of appellate review clearly includes the soundness of the board of review's interpretation of misconduct," citing *Helzer v Metzgar Conveyor Co*, 89 Mich App 695, 700; 282 NW2d 187 (1979), dissenting opinion of Judge (now Justice) Cavanagh. The Court also noted that the definition of "misconduct" as stated by the Court in *Washington*, *supra*, 135 Mich App at 657; 354 NW2d 299:

In *Carter v Employment Security Comm*, 364 Mich 538, 541; 111 NW2d 817 (1961), the Court adopted the classic definition of misconduct, quoting *Boynton Cab Co v Neubeck*, 237 Wis 249, 259-260; 296 NW 636 (1941):

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.

Broyles, *supra* at 177-178.

Misconduct may be based on a series of derelictions and infractions even though no one by itself rises to the level of misconduct. *Watson v Holt Public Schools*, 160 Mich App 218, 221-222; 407 NW2d 623 (1987); *Christophersen v Menominee*, 137 Mich App 776, 780-781; 359 NW2d 562 (1984).

[T]he totality of the circumstances of the case must be considered in determining if the use of vulgar or abusive language constitutes misconduct. Thus, we must look to the words used and the context in which the words are spoken in determining whether an employee has engaged in misconduct. In looking at the totality of the circumstances, various considerations should be taken into account. Whether the use of vulgar or abusive language constitutes misconduct depends upon a variety of factors, including considerations such as whether the words were directed at a fellow employee, a supervisor, or a customer, whether the tone and context suggests an abusive intent or friendly badgering, whether the comments were made in a private conversation or in the presence of others, and whether such conduct has been condoned in the past.

Broyles, supra at 179.

In the instant case, there is competent, material and substantial evidence that the Claimant engaged in misconduct. The Claimant admitted that he “blew up” at his subordinates. He admitted using profane language. Other employees threatened to quit because of Claimant’s abusive and demeaning language and behavior. The Employer’s witnesses testified that the Claimant targeted subordinates and subjected them to demeaning verbal abuse within ear shot of customers. They further testified that they were intimidated and humiliated and ready to quit. Despite warnings from his Employer, Claimant’s use of abusive, demeaning, profane language continued.


Most importantly, a careful review of the whole record substantiates that the Claimant’s behavior had “the triple effect of undermining the stability of the work force, injuring the employer’s reputation and diminishing the quality of service.”

The Board of Review’s finding that the Claimant’s conduct constituted “misconduct” is not contrary to law and is supported by competent, material and substantial evidence on the whole record.

CONCLUSION

The purpose of the Michigan Employment Security Act is to provide for the payment of unemployment benefits to “persons unemployed through no fault of their own.” MCL 421.2; MSA 17.502. Persons discharged for misconduct are disqualified from receiving benefits. MCL 421.29(1)(b); MSA 17.531(1)(b). Under the totality of the circumstances existing in this case, the Board of Review’s decision that the Claimant was disqualified from receiving benefits because of

misconduct is not contrary to law and is supported by competent, material and substantial evidence on the whole record. *Broyles, supra*. The Board of Review's decision is affirmed.



HONORABLE PHILIP E. RODGERS, JR.
Circuit Court Judge

Dated: 11/29/00