CIRCUIT COURT CERTIFICATION

Appeal Docket No: 176618

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29 (1)(a) Section of the Act

Date: 6/15, 2005

R. Douglas Daligga, Director
MES - Board of Review

PC
REP

Prepared by Stephine Gwin

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF KENT

TINA MASON,

Claimant-Appellant,

vs

GAINEY TRANSPORTATION, SERVICE, INC.,

Employer-Appellee.
/

Case No. 05-01669-AE
MESC Board of Review Appeal
Docket No. B-2004-15138-R01-176618

ORDER

At a session of said Court, held in the
Kent County Courthouse in the City of Grand Rapids,
in said county on June 9, 2005.

PRESENT: Hon. Dennis C. Kolenda
Circuit Judge

For the reasons stated by this Court in a written opinion being filed by it in this case simultaneously herewith:

IT IS ORDERED AND ADJUDGED that the decision on November 24, 2004, by the Michigan Employment Security Board of Review finding claimant disqualified from benefits be, and the same hereby is, **REVERSED.**

IT IS FURTHER ORDERED AND ADJUDGED that this case be, and the same hereby is, **REMANDED** to the Unemployment Insurance Agency for proceedings consistent with this order and the aforesaid opinion.

DENNIS C. KOLENDA

Dennis C. Kolenda, Circuit Judge

STATE OF MICHIGAN

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OPINION

This case is an employee's appeal of a decision by the Michigan Employment Security Board of Review finding her disqualified from entitlement to unemployment compensation. Reversing a contrary conclusion by an administrative law judge (ALJ), the Board of Review determined that the employee did not have good cause for quitting. Voluntarily quitting a job precludes collecting unemployment compensation, unless the employee left "for good cause attributable to the employer." For the reasons detailed below, this Court reinstates the decision of the ALJ. The employee is not disqualified.

Facts and Proceedings

Ms. Tina Mason began working as a truck driver for Gainey Transportation Service, Inc. (GTS) in October, 1999. GTS is headquartered in the City of Wyoming in this county. Ms. Mason lives in North Carolina and drove throughout the southeast. She was "dispatched," which, in the lingo of the trucking business, means that she received instructions where to go to pick up loads and where to take them, out of a GTS facility in Atlanta, Georgia. GTS does business in numerous states.

Ms. Mason was not paid an hourly wage or a salary, but $0.32 for each mile she drove a semi-tractor hauling a trailer loaded with goods to be transported elsewhere. She probably was also reimbursed for on-the-road expenses and probably received traditional benefits, such as healthcare. That is unclear, but it is immaterial to the issues at hand. When hired in 1999, Ms. Mason was told that she could expect to average 2,300 miles per week, which would translate into weekly take home pay of approximately $600.00. She was not paid when her trailer was empty or for time spent waiting for a load.

For the first years of her employment with GTS, Ms. Mason earned the expected amount.[1] For awhile, her weekly mileage average increased to 2,300-3,000 miles. However, in 2003, the miles remuneratively driven by her dwindled. For nearly half the time that year she worked for GTS (10 of 21 weeks), Ms. Mason was assigned only 1,200 to 1,500 miles. As a result, her take-home (net) pay was $400.00 or less for those weeks. For some weeks, her gross pay was only $400.00 or so. For most of the remaining weeks, her pay was on target, not better. Ms. Mason drove appreciably more than 2,300 miles in only a few weeks. Despite those good and on-target weeks, the low weeks reduced her average mileage and corresponding pay by 10.5 percent over the first 5 months of 2003.

On May 22, 2003, Ms. Mason was dispatched to Knoxville, Tennessee, to pick up a load of merchandise. Unfortunately, when she arrived on May 23, which was a Friday, she was informed that the load had been cancelled. She was instructed by the GTS dispatcher to wait in Tennessee until the following Tuesday for a possible replacement load. Another load was not guaranteed. Similar cancellations had occurred in the recent past. Because, principally, dissatisfied with her declining income, but also because annoyed at the prospect of losing Memorial Day Weekend, Ms. Mason telephoned in her resignation, dropped off the truck at a nearby GTS terminal, and went home.

Initially, Ms. Mason's application for unemployment benefits was granted, but that decision was reversed when GTS protested. An appeal was successful, however. After a full administrative hearing, an ALJ concluded that Ms. Mason was eligible for benefits. GTS claimed that she had quit her employment without good cause. The ALJ concluded that Ms. Mason had good cause to quit. He found that "the mileage available to her had decreased significantly," with the result that her average income "was not adequate." When GTS appealed, the Board of Review reversed the ALJ, finding that Ms. Mason had not established either that "the variance in miles was a breach of the conditions of [her] employment" or that her decreased earnings "made the work unsuitable."

Applicable Law Applied

Section 29 of the Michigan Employment Security Act (MESA) specifies several circumstances which disqualify an employee from receiving unemployment benefits. At issue in this case is subsection (1)(a), which disqualifies an individual who "[l]eft work voluntarily without good cause attributable to the employer ..." MCL 421.29(1)(a). In other words, "where there exists good cause attributable to the employer, an employee may

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[1]At oral argument, the Assistant Attorney General incorrectly insisted that the record did not address whether Ms. Mason ever achieved the expected weekly mileage of 2,300. That subject was fully discussed, without any contradiction, at pp 42-43 of the hearing transcript.

voluntarily leave his [or her] employment and yet remain eligible for unemployment compensation." *Johnides v St. Lawrence Hospital*, 184 Mich App 172, 175 (1990). The burden of proof is on the employee "to establish that he or she left work involuntarily or for good cause that was attributable to the employer." MCL 421.29(1)(a).

Some of the circumstances which work a disqualification are unambiguous. For example, subsection (1)(i) disqualifies an individual "discharged for theft connected with the individual's work." That plainly means that an employee fired for stealing cannot collect benefits. Subsection (1)(a) requires some interpretation, however. The words "voluntarily" and "good cause" are not self-defining, and the statute does not define them. All that is clear is that, because the subsection uses the word "and," "a two-part inquiry" is required. *Warren v Caro Community Hospital*, 457 Mich 361, 366 (1998). It must be determined, first, whether the employee "voluntarily left" his or her position. If the employee left "involuntarily," no further inquiry is necessary; he or she is entitled to unemployment compensation. If, however, the employee left voluntarily, it must, then, be determined whether he or she had "good cause attributable to the employer." *Id.*, at 366-367.

(a)

Fortunately, both of the inquires required by subsection (1)(a) have been the subject of defining appellate decisions, although, with regard to the issue of voluntariness, not without some confusion. In *Laya v Cebar Constr Co*, 101 Mich App 26, 32 (1980), the Court of Appeals held that "even though an employee leaves a job through some act directly traceable to his or her own choice, the leaving is not necessarily 'voluntary' under the Employment Security Act." An employee does not quit voluntarily, said the Court of Appeals, if "faced with a choice between alternatives that ordinary persons would not consider reasonable... Such a choice is the same as no choice at all." *Id.* That case is, however, incorrect; it not only ignored the text of MESA, it also ignored a longstanding, contrary Supreme Court decision. Hence, the confusion. Is *Laya* viable?

Laya conflates the separate inquiries required by the statute, and it ignores the plain meaning of the statute's phrase "left work voluntarily." Were *Laya* correct, the phrase "left work voluntarily" would mean left work for "good cause attributable to the employer," ignoring the word "and" in subsection (1)(a), rendering the word "voluntarily" surplusage, and reducing the pertinent inquiry to the single issue of good cause. Doing that ignores the statute's text, which states two inquiries, indistinguishably from the error by the Court of Appeals' corrected by the Supreme Court in *Alken-Zeigler, Inc v Waterbury Headers Corp*, 461 Mich 219 (1999). Most significantly, in *Copper Range Co v Unemployment Compensation Commission*, 320 Mich 460, 469 (1948), the Supreme Court had stated a contrary definition. It held that the phrase "left work voluntarily" means that an employee

"left of his [or her] own motion; [that] he [or she] was not discharged." The Supreme Court refused to apply "the doctrine of constructive voluntary leaving," which is what the Court of Appeals did in *Laya*. In sum, for purposes of MESA, an employee "left work voluntarily" if he or she resigned or quit, whatever the reason. For purposes of MESA, only employees who were fired, laid-off, etc., left involuntarily.[2]

But for *Copper Range Co*, this Court would likely be bound to the faulty holding in *Laya*. A trial court cannot correct a mistaken Court of Appeals opinion. When, however, a Court of Appeals opinion is flatly contrary to a prior Supreme Court decision and appears to have been issued in ignorance of that decision, this Court probably must honor the Supreme Court case. If the Court of Appeals incorrectly interprets or applies a Supreme Court decision, this Court must accept that interpretation. Then, there is at least a facade of consistency. When, however, a Court of Appeals panel is unaware of a contrary Supreme Court decision, there is not even a fig leaf of reconciliability, putting trial courts in the position of having to ignore either the Supreme Court or the Court of Appeals. Stating the choice would seem to resolve it, but, fortunately, no resolution is needed here.

(b)

However "left work voluntarily" is interpreted, the outcome of this case will be the same because Ms. Mason had good cause to quit her job. As a result, she is not disqualified from unemployment compensation benefits, even if she left work voluntarily, *Warren, supra*, which this Court believes she did. The requisite good cause exists when an "employer's activity would motivate the average able-bodied and qualified worker to give up his or her employment," *Degi v Varano Glass Co*, 158 Mich App 695, 699 (1987); and *Carswell v Share House, Inc*, 151 Mich App 392, 396-397 (1986). About that definition and its viability there is, fortunately, no uncertainty. It is fully compatible with the text of subsection (1)(a), is not at odds with any prior caselaw, and, despite being two decades old, has not subsequently been undermined by any court or altered by the Legislature.[3]

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[2]The recognition of "constructive discharge[s]" in other contexts, most notably civil rights cases, see, e.g., *Jacobson v Parda Federal Credit Union*, 457 Mich 318, 329 (1998), does not undermine *Cooper Range Co* and thereby sustain *Laya*. "Constructive involuntary leaving" in the unemployment context is incompatible with the text of the particular governing statute. Constructive discharge does not offend the civil rights statutes.

[3]The Legislature has actually confirmed the definition found in *Degi* and *Carswell* by re-enacting MCL 421.29(1)9a) with some other changes, but no alteration or redefinition of the phrase "for good cause attributable to the employer." The Supreme Court's recent rejection in *People v Hawkins*, 468 Mich 488 (2003), of the so-called "re-enactment rule" of statutory construction does

A classic example of conduct by an employer which justifies an employee quitting is a unilateral, substantial pay cut, *Warblow v The Kroger Co*, 156 Mich App 316, 319 (1986), which is what happened to Ms. Mason. Not only are most people's livelihoods dependent on their pay, income is a measure of self-worth for most. Hence, substantially cutting pay usually undermines both. Nearly half of Ms. Mason's 2003 paychecks were 33% or more below the wage she was told, when hired, to expect and had received for the bulk of her tenure with GTS. That history satisfies *Warblow*.

That a few paychecks had been more than expected and that some were on target does not take this case out of *Warblow*. Except for individuals receiving extraordinary compensation, such that they have a solid cushion to ride out a low paycheck, consistent pay is essential. For lack of a cushion, even a few significantly reduced checks are very disruptive; tight budgets can be easily derailed. Nearly half Ms. Mason's paychecks over nearly 6 months were significantly short. That number of reduced paychecks over so long a time period not only constituted a substantial pay cut, but predicted a poor future. In other words, a reasonable employee in Ms. Mason's position was justified in expecting many more substantially short paychecks, providing even more good cause to quit.

Besides, even if only the average over 2003 is used, Ms. Mason sustained a significant pay-cut. A 10.5 percent reduction is a substantial pay cut to any person who lives from modest paycheck to modest paycheck. To an executive earning a sizeable salary, a reduction of that size might be endurable; it might mean only somewhat less savings or a few less luxuries. Enough remains to readily fund the necessities of life and plenty of extras. A 10.5% reduction hits much harder on a person earning modest sums. For a person at Ms. Mason's income level, that kind of cut significantly affects what is purchased at the grocery store, if bills are paid, whether any extras are affordable, etc. And, exacerbating the reduction is the fact that it was on top of inflation totaling 8% for 2000-2002.[4] A pay cut of 10.5% on top of a diminution of 8% in purchasing power is far harder to endure than would

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not say otherwise. That case acknowledged that the re-enactment rule "can sometimes be a useful tool for determining Legislative intent where the statutory language is ambiguous. *Id.*, at 508. As noted earlier, the phrase "good cause attributable to the employer" is ambiguous. Furthermore, recent history debunks the central premise of *Hawkins*. The amendment in 2004 of MCL 750.530 overruling *People v Randolph*, 466 Mich 532 (2002), proves that the Legislature does keep abreast of judicial pronouncements and can act quickly to change those with which it disagrees, making persuasive of its acceptance both prolonged silence about decisions and re-enactment without change of interpreted terminology. Of course, however, this Court is not ignoring *Hawkins*, incorrect though it appears to be. It is simply following Court of Appeals precedent which has not been overruled or even modified.

[4]Federal Bureau of Labor Statistics.

be the former alone. A nearly 20% pay cut will sting even executives.[5]

Furthermore, what prompted Ms. Mason to quit was more than a cut in pay. Requiring her to spend a long weekend, a holiday weekend at that, away from home for the mere possibility of a paying load, especially, when that had happened before, is imposing a work condition which would prompt many a reasonable employee to look for another job. Such "dead time" made worse, because it involved no compensation, the pay cut already imposed and was also an unacceptable intrusion into Ms. Mason's personal life. Purely personal reasons for quitting a job probably are not the requisite good cause because not "attributable to the employer." However, a lost holiday weekend would have been at the direction of GTS for its benefit. That qualifies as attributable to it.[6]

Cooper v University of Michigan, 100 Mich App 99 (1980), does not require a different outcome, even though in that case the Court of Appeals disqualified from benefits, for having left work without good cause, an individual who quit "because she was dissatisfied with the amount of work assigned to her." *Id.*, at 103. At first, that sounds like this case, but it was not. The employee in *Cooper* continued to be employed full-time at full pay. *Id.*, at 105. At worst, she was bored, sometimes. In this case, the reduction in work for Ms. Mason cut her income, and also required her to be away from home, not just idle, for a prolonged period. That is an essentially different situation which renders *Cooper* totally inapposite here. *Breckon v Franklin Fuel Co*, 383 Mich 251, 269 (1970); and *Wilson Leasing Co v Seaway Pharmacal Corp*, 53 Mich App 359, 362 (1974).

(c)

This Court appreciates that the scope of the review in which it may engage is narrow. It may overturn a Board of Review determination "only if" that determination "is contrary to law or is not supported by competent, material, and substantial evidence on the whole record." MCL 421.38(1). That is even less review than is permissible for most other

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[5]Even if the testimony before the ALJ that Ms. Mason's mileage rate had been "adjusted to $0.32" from $0.29 means that it had been increased 10% over her tenure, inflation should still be considered because all the testimony about pay reductions made comparisons with her actual starting take-home wage, not her rate of pay.

[6]This Court disagrees with the Attorney General that the phrase "attributable to the employer" requires proof by Ms. Mason that the lack of a load on May 23 was instigated by GTS, not its customer. The word "attributable" is not so limited. It simply means "related to" or "associated with," *The American Heritage College Dictionary* (2d ed), p 89, which definition was satisfied, even if the lack of a load was not the fault of GTS.

administrative determinations. See, e.g., MCL 24.315(5). Nonetheless, Ms. Mason is still entitled to "thorough" and "meaningful" judicial review. *MERC v Detroit Symphony Orchestra Inc.*, 393 Mich 116, 124 (1974). With the adoption in 1962 of our current Constitution, Michigan became only the second state -- Missouri was the first -- to guarantee as a matter of constitutional right judicial review of administrative determinations. *Viculin v Dep't of Civil Service*, 386 Mich 375, 384, fn 10 (1971). Merely incanting the limitations on judicial review enroute to an inevitable affirmance would violate the Constitution. *Tireman-Joy-Chicago Improvement Ass'n v Chernick*, 361 Mich 211, 214 (1960).

Deference is always owed to finding of facts, but meaningful review requires a "qualitative and quantitative evaluation" of "the whole record -- that is, both sides of the record -- not just those portions ... supporting the findings [being appealed] ..." *Detroit Symphony Orchestra, supra.* And, because interpreting the statute it is charged with executing can implicate the unique expertise of an administrative agency, deference is owed to such interpretations, *Reinelt v Public School Employees' Retirement Board*, 87 Mich App 769, 773-774 (1979), *lv den* 407 Mich 855 (1979), but not to the point of endorsing an insistence that "black" means "white," *Macenas v Michiana*, 433 Mich 380, 396-398, 401-402 (1989), or tolerating agencies ignoring pertinent precedent. Courts "must walk the tightrope" of not substituting themselves for administrative authorities, but providing meaningful review. *Detroit Symphony Orchestra, supra.*

Because there is no factual dispute regarding them, the only question presented to this Court for review is, Do the circumstances under which Ms. Mason quit her job at GTS constitute good cause attributable to GTS? While, for want of a factual dispute, that is a question of law to which this Court owes less deference than it would owe to findings of disputed fact, *Laya, supra*, at 29; and *Dueweke v Morang Drive Greenhouses, Inc*, 91 Mich App 27, 39 (1979), *rev'd on other grounds* 411 Mich 670 (1981),[7] this Court cannot properly accept the Review Board's resolution of this case. The Board utilized an incorrect standard, which, by definition, tainted its ultimate conclusion. *Speaker-Hines & Thomas v Dept of Treasury*, 207 Mich App 84, 87 (1994); *Muskegon Cnty Professional Command Assn*, 186 Mich App 365, 369 (1990); and *Zaccola v Chrysler Corp*, 185 Mich App 720, 723 (1990), *lv den* 437 Mich 1048 (1991). The Board found that a decrease in miles was not a breach of a condition of employment. Nothing in the statutory phrase "good cause attributable to the

[7]"Just as the discovery of one rotten apple in a bushel is no reason to throw out the bushel, one overruled proposition in a case is no reason to ignore all other holdings appearing in that decision," *Rouch v Enquirer & News*, 137 Mich App 39, 54, fn 1 (1984), *aff'd* 427 Mich 157 (1986), *reh den* 428 Mich 1207 (1987). See also *People v Carson*, 220 Mich App 662, 672 (1996), *lv app den* 456 Mich 906 (1997).

employer" limits an acceptable ground for quitting to such a breach. As that phrase has long been interpreted, it includes any situation which would justify a reasonably prudent employee giving up a position. Many situations other than breach of an employment condition satisfy that situation.

Furthermore, the Board of Review's decision ignored that the Court of Appeals has held that a significant unilateral reduction in pay, which Ms. Mason did sustain, does constitute non-disqualifying good cause for quitting. That, plus more, is undisputed in this case. Therefore, sustaining the Board of Review's decision would sanction its improperly rewriting the language of MCL 421.29(1)(a) and ignoring the Court of Appeals' interpretation of that subsection. It is axiomatic that this Court cannot properly do either, nor, it inexorably follows, can any administrative board. Therefore, an affirmance of such a decision by this Court would mean that it has engaged in constitutionally deficient, because meaningless, judicial review.

Conclusion

Although MESA declares that its purpose is to lighten the burden of involuntary employment, MCL 421.2, that statute is a detailed enactment which reflects a legislative "compromise of various policy considerations affecting the nature and extent of benefits to be awarded ..." *Noblit v The Marmon Group*, 386 Mich 652, 654 (1972). Sometimes, under some circumstances, the Legislature has declared, benefits are to be paid, even when an employee quits. The Review Board cannot ignore that legislative determination, which is what it did, given the circumstances presented by this case.

Dated: June 9, 2005.

DENNIS C. KOLENDA

Dennis C. Kolenda
Circuit Judge