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Appeal Docket No. B2002-06554-164443
S.S. No. [redacted]
B.O. No. 043
Employer No. 1333097

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF KENT

AMERICHEM SALES CORPORATION,
Employer/Appellant,

v

JOHN D. ROBERTS and STATE OF MICHIGAN, DEPARTMENT OF CONSUMER & INDUSTRY SERVICES, BUREAU OF WORKERS' & UNEMPLOYMENT COMPENSATION,
Claimant/Bureau/Appellees.
_____/

Court No. 02-10788AV
HON. DENNIS C. KOLENDA

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OPINION AND ORDER

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF KENT

JOHN D. ROBERTS,

Claimant-Appellee,

vs

AMERICHEM SALES, CORPORATION,

Employer-Appellee.

Case No. 02-10788-AV

Agency Appeal Docket No. B-2002-06554-16443

ORDER

At a session of said Court, held in the Kent County Courthouse in the City of Grand Rapids, in said county on April 11, 2003

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 HEREBY ORDERED AND ADJUDGED that the determination made in this case by Bureau of Workers' & Unemployment Compensation that claimant is not disqualified from benefits be, and the same hereby is, **AFFIRMED**.

Claimant-appellee may tax costs.

Because it fully resolves this case, *this order closes this case.*

DENNIS C. KOLENDA

Dennis C. Kolenda, Circuit Judge

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF KENT

JOHN D. ROBERTS,

Claimant-Appellee,

vs

AMERICHEM SALES, CORPORATION,[1]

Employer-Appellant

/

Case No. 02-10788-AV

Agency Appeal Docket No. B-2002-06554-16443

OPINION

This case in an employer appeal from a determination by the Workers' Disability & Unemployment Compensation Agency that claimant-employee is entitled to, not disqualified from, unemployment benefits. Giving to that determination the deference to which it is entitled and the meaningful review to which the parties are constitutionally entitled,[2] this Court concludes that that determination is amply supported by the record and is also legally correct. Accordingly, it is being affirmed, as it must be.

Facts and Proceedings

Claimant worked as a sales representative for Americhem Sales Corporation (hereinafter "ASC") from June, 2001, through January 25, 2002. His tenure was troubled. He was warned and disciplined several times for poor job performance, failing to follow instructions, and/or insubordination, and by a letter dated January 14, 2002, he was told by the president of ASC that, because of that "continued pattern of behavior," he would have to submit to drug and alcohol testing, which he did. On January 17, claimant was told by ASC's general manager that he had passed the test, that the results were negative. That was the initial report from the testing laboratory. Four days later, however, claimant was told that he had tested positive for cocaine. In light of the disparate reports and his adamant denial

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[1]When filed by it, Americhem Sales Corporation incorrectly captioned this case *Americhem Sales Corp v Roberts*. In this State, an appeal retains the caption from the administrative agency or lower court. See, e.g., *Koontz v Ameritech Services, Inc., infra.*

[2]Michigan is one of a very few states to guarantee in its constitution judicial review of administrative determinations. *Viculin v Dept of Civil Service*, 386 Mich 375, 384, fn 10 (1971). Only thorough and meaningful review fulfills that guarantee. *MERC v Detroit Symphony Orchestra, infra.*

of drug use, claimant demanded a second test, but none was ever administered. Instead, he was notified on January 25, again by a letter form the company president, that his employment was "being terminated" because testing positive for cocaine was a "direct violation of our [e]mployee [h]andbook."

Claimant applied for unemployment benefits. When his application was denied, he appealed. A full evidentiary hearing took place on May 22. Both sides were represented by counsel. Three witnesses were called by ASC, and claimant testified on his own behalf. On May 24, the referee issued a decision. He found, first, that claimant had been discharged solely because of the drug test, not because of poor job performance or disciplinary problems. The employer had claimed otherwise, but the referee was not persuaded. He found the letter of January 25 to be persuasive proof to the contrary. The referee also found that claimant had demanded a confirmatory drug test. He had testified to such a demand, and the employer's witnesses did "not recall" whether he had asked for another test. Therefore, because ASC had conceded that no second test had been administered, the referee ruled that MCL 421.29(1)(m) barred disqualifying claimant from benefits. The Board of Review affirmed, finding that "the [r]eferee's decision is in conformity with the facts as developed at the hearing," and that he had "properly applied the law to the facts."

This time, ASC appealed. Although it "disputes that [c]laimant requested a confirmatory test," it concedes that the referee's finding to the contrary and the admitted lack of a second test preclude disqualifying claimant from benefits because of the drug test results. It insists, however, that claimant is disqualified from benefits, nonetheless, because of his poor history with the company. ASC bases that argument on the well-recognized principles of unemployment compensation jurisprudence, first, that a finding of misconduct may be based on a series of work-rule infractions, none of which need individually rise to the level of misconduct,[3] and, second, that, necessarily, the final infraction preceding a discharge need not itself be serious enough to constitute disqualifying misconduct.[4] As a result, both the referee and the Board of Review erred, contends ASC, because the finding that claimant had not been fired for repeated misconduct "completely ignored the evidence of the series of events leading to [c]laimant's discharge." ASC contends that an on-point Supreme Court case holds that an employer may support a disqualification from benefits with reasons not actually used to dismiss an employee, and that the record in this case contains indisputable evidence of other reasons for disqualifying claimant. Both claimant and the Bureau disagree.[5] So does this Court.

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[3] *Watson v Holt Public Schools,* 160 Mich App 218, 221-222 (1987).

[4] *Christophersen v Menominee,* 137 Mich App 776, 780 (1984), *lv app den* 422 Mich 876 (1985).

[5] The Assistant Attorney General's brief and argument were particularly helpful.

Applicable Law Applied

The standard of review for cases like this one is well known. A Court may reverse a determination that a former employee is or is not disqualified from unemployment benefits 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. Questions of law, which include issues of statutory interpretation, are reviewed de novo. *Koontz v Ameritech Services, Inc.*, 466 Mich 304, 309 (2002). Courts cannot, however, substitute their judgment on factual determinations for the referee's and the Board of Review's, no matter how convinced that their determinations are incorrect, so long as they are supported by evidence "which reasonable minds would accept as adequate ..." *Korzowski v Pollack Industries*, 213 Mich App 223, 228 (1995). "[M]ore then a mere scintilla" of evidentiary support is required, but it can be "less than a preponderance." *Id.* In sum, a court can come to its own legal conclusions, but it must accept a referee's and the Board of Review's factual determinations, unless they border on the irrational.

(1)

The record below contains considerable evidence to support the referee's decision, and the Board of Review's affirmance that claimant had been discharged solely because of a drug test. While the notice of termination from ASC's president refers to claimant's "pattern of behavior of not following instructions," it was certainly reasonable to read that notice as stating that pattern merely as the justification for having required claimant to submit to a drug test, not as a statement of reasons for his termination. The letter characterizes the positive drug test, and only that, as a "direct violation of our [E]mployee [H]andbook" which "will not be tolerated." Frankly, not only does this Court find no adequate basis to disagree with the referee's reading of that notice, the Court reads the letter as did he. That letter says that ASC had only one reason for firing claimant.

At the evidentiary hearing, a witness for ASC did, admittedly, testify that claimant had been discharged for unsatisfactory performance "in addition to" the positive drug test, but that testimony came only in response to a leading question by the employer's counsel. When asked earlier why claimant had been terminated, the witness's total answer had been, "Failure to pass a drug test." He added unsatisfactory job performance only when asked, "[A]ny other reasons?" Such leading questions are disfavored, MRE 611(c), because of the risk that they do not elicit accurate answers, but put an advocate's hoped-for answer into a witness's mouth. *People v McDunnah*, 21 Mich App 116, 117 (1970), *lv app den* 383 Mich 782 (1970). It was, therefore, certainly reasonable for the referee, who saw and heard the witness testify, which this Court has not, to find more persuasive the first of his answers.

Furthermore, the ASC witness conceded on cross-examination that it was the owner and president of the company who alone had made the decision to terminate the claimant. The witness claimed no hand in that decision, nor any personal knowledge of why claimant was terminated. There is no basis, therefore, to conclude that that witness was doing more than stating his understanding of company documents, most specifically, the letter of termination, not providing any first-hand information. Hence, it was reasonable for the referee to give no weight to that witness's testimony in light of his contrary reading of those same documents. In sum, this Court must accept the referee's determination that claimant was discharged solely because he supposedly failed a drug test.

This Court must also accept the referee's determination that claimant had asked for a second drug test. The claimant so testified without contradiction. Even if ASC had presented contradictory evidence, this Court would have to accept the referee's belief of claimant. Reviewing courts cannot make credibility assessments at odds with those made by the judge or hearing officer who saw and heard the witnesses testify. That is axiomatic. There was no contradictory testimony in this case, however. The executive of ASC to whom claimant said he made the demand for a second test did not deny that such a demand had been made. When asked on cross-examination if claimant had asked for a second test, that witness responded, "I do not recall." Another ASC witness, a fellow employee who had been with claimant when he says he demanded another test, could testify only, "I don't," when asked if he remembered anything being said about another test. It was, therefore, not unreasonable for the referee to believe claimant.

Hence, it necessarily follows from the findings by the referee, and from ASC's concession that no confirmatory drug test had been administered, that claimant cannot be disqualified from receiving benefits. "An individual is disqualified from receiving benefits if he or she: ... [w]as discharged for ... testing positive on a drug test, ...," only if, should the worker dispute that result, a confirmatory test is administered and is also positive. MCL 421.29(1)(m). Consequently, because it cannot reverse the findings that claimant "[w]as discharged for ... testing positive on a drug test," that he asked for a second test, and that no such test was administered, let alone was again positive, this Court cannot upset the conclusion that claimant cannot be disqualified from benefits. The referee's factual findings and MCL 421.29(1)(m) combine to dictate that latter conclusion.

(2)

That claimant had a history of work-rule infractions does not disqualify him from benefits, even though "[a]n individual is disqualified from receiving benefits if he or she: ... [w]as discharged for misconduct connected with the individual's work ...," MCL 421.29(1)(b), which can include a persistent history of work-rule infractions. The referee found that claimant was not discharged for any reason other than supposedly failing a drug

test, which means that he was not discharged because of his troubled work history, i.e., "for misconduct." Of course, illicit drug use, if proven, is misconduct; it is a crime, after all; but, because drug use is not necessarily connected with an individual's work, flunking a drug test, even a confirmatory test, does not itself constitute the kind of misconduct which MCL 421.29(1)(b) says is disqualifying. That the Legislature dealt separately with testing positive for illicit drugs confirms that it is different from "misconduct," i.e., is not misconduct. Hence, the referee's finding that the drug test was the only reason claimant was fired compels the conclusion that he was not fired for misconduct.

That claimant had a work history which, had he been discharged for it, might have constituted disqualifying misconduct under MCL 421.29(1)(b) is legally inconsequential, given the determination below that claimant was not discharged because of that work history. The statute makes dispositive why a claimant "was discharged." It says that a fired employee is disqualified from benefits "if he or she: ... was discharged for misconduct..." The plain meaning of those words is that the actual reason why an employee was discharged controls, that other reasons for which an employee could have been discharged are immaterial. *Woods v State Employees Retirement System*, 440 Mich 77, 81 (1992). Disqualification from benefits does not follow from why an employee could have been discharged, but from why he or she "was discharged."

"Because the proper role of the judiciary is to interpret and not write the law," *Koontz*, 466 Mich at 312, "[w]here the language [of a statute] is unambiguous, 'we presume that the Legislature intended the meaning clearly expressed -- ..., and the statute must be enforced as written.'" *Pohutski v Allen Park*, 465 Mich 675, 683 (2002), quoting *DiBenedetto v West Shore Hospital*, 461 Mich 394, 402 (2000). Because the former is the situation with MCL 421.29(1)(b), the latter is what must be done here. Confirming that disqualification depends on the actual reasons for a discharge is the need to rewrite the statute if it is to include conduct for which an employee could have been discharged, but was not. When the effect of an interpretation is to add words, the error of that interpretation is plain. Cf., *People v McIntire*, 461 Mich 147 (1999); and *People v Wager*, 460 Mich 118 (1999). Interpretations must have textual support. *People v Clark*, 463 Mich 459, 464 (2000).

(3)

Miller v FW Woolworth Co, 359 Mich 342 (1960), does not require a different result. While the Supreme Court did appear to say in that case that an employer, when defending a claim for unemployment benefits, can assign as a reason justifying the disqualification of an employee from benefits conduct other than that for which it actually discharged the employee, *Id.*, at 354-355, a careful reading of the opinions in that case -- there were four opinions, none of which were signed by more than three justices -- reveals that there was no such authoritative holding, whatever the Court's words may have said.

In *Miller*, the claimant had been fired for "using foul, profane, obnoxious language towards or about supervision, towards customers or in the presence of customers, ..." *Id.*, at 345. The referee found that the employer had proven misconduct. The Appeal Board, what is now called the Board of Review, affirmed, but, on appeal to the Circuit Court, the employee prevailed. The supervisor who had fired the claimant testified exclusively to what he had been told by others; he had no first-hand knowledge about the claimant's behavior. A fellow employee testified, however, to her own observation of comparable behavior by the claimant, but the supervisor had testified that he not fired claimant for that behavior. The court found the former to be inadmissible hearsay, and the latter to be immaterial since the supervisor had not relied upon it to fire the claimant.

Three justices would have reversed. They found the supervisor's testimony to be inadmissible hearsay, and they declined to consider the co-employee's testimony, noting that "when [a] discharge, ..., is grounded upon certain, specific conduct, it must be supported by evidence of that certain, specific conduct." *Id.*, at 360. Five justices, albeit in two separate opinions, found the disqualification to be sustained by the fellow employee's own observations. They agreed that the supervisor's testimony was inadmissible hearsay, but they rejected as a "technical failure" which "does not affect the [B]oard's finding of statutory misconduct," *Id.*, at 354-355, the employer's not assigning "as a reason for discharge 'a series of episodes,' rather than a 'particular incident.'" *Id.*, at 354.

What the majority said in *Miller* certainly appears to be dispositive of this case,[6] but appearances can be deceiving. Because judicial analysis is always molded by a case's facts, *Koschay v Barnett Pontiac, Inc*, 386 Mich 223, 230 (1971), what an opinion says "has legal significance only in respect of the material facts concerning which it was authored. It is law only as to those facts," *Fothergill v McKay Press*, 361 Mich 666, 674-675 (1960), or similar facts, *Micks v Mason*, 145 Mich 212, 214 (1906), not essentially different facts. *Breckon v Franklin Fuel Co*, 383 Mich 251, 269 (1970). This case presents the latter kind of facts, meaning that *Miller* does not control it.

In *Miller*, the Supreme Court was confronted only with a claim that the lower court had erred by not considering additional evidence of the very misconduct for which the employee had been discharged. She had been fired for "using foul, profane, obnoxious language" towards supervisors and customers. What the lower court had done was refuse to sustain a finding of that misconduct based upon another witness's testimony of identical

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[6]Although the statements quoted herein were in plurality opinions, they are holdings because five justices agreed with them. *People v Fabiano*, 192 Mich App 523 (1992), *lv app den* 439 Mich 995 (1992). Frankly, this Court believes that only opinions signed by a majority of justices should have precedential value. Having to search plurality opinions for overlap is fraught with a high risk of reading too much into what was said. That is not the rule in Michigan, however. *Id.*

conduct. In this case, the employer claims that it was error to not consider an entirely different basis for discharging claimant, namely: misconduct, not failing a drug test. That is so "essentially different" from *Miller* that that decision is "inapposite" here. *Wilson Leasing Co v Seaway Pharmacal Corp*, 53 Mich App 359, 362 (1974). In *Miller*, the rejected evidence was more of the same misconduct for which the claimant "was discharged." That the employer had not considered it did not change the fact that it was evidence of that very misconduct. In this case, the evidence on which the employer relies is of conduct for which the referee found claimant was not fired.

Of course, that a statement lacks precedential value in a subsequent case does not necessarily mean that it can or should be ignored. If a non-binding statement is accurate and applicable, it must be applied. *Lumbermen's Mutual Casualty Co v Bissell*, 220 Mich 352, 361 (1922). Similarly, if a trial court concludes that a non-binding statement will be authoritatively adopted later, it should be followed. *Fox v Detroit Plastic Molding and Corporate Service*, 106 Mich App 749, 755 (1981), *rev'd on other grounds*, 417 Mich 901 (1983).[7] A non-binding statement in an earlier opinion which a court believes will be eventually become the law is, for all practical purposes, a correct statement, so that ignoring it would be incorrect. Courts should always do what they believe to be legally correct.

This Court is not applying *Miller* to this case, not because it need not do so, but because it is convinced that its superior courts will not so apply *Miller*. To apply *Miller* to a case like this one requires departing from the ordinary meaning of the terms used in MCL 421.29(1)(b) and (1)(m) and rewriting, for all practical purposes, what those subsections say; they do not permit disqualifying an employee from benefits for conduct for which he or she was not discharged. Time after time, the Michigan appellate courts have said that such expansive construction is the judiciary arrogating to itself a power it does not have. *McIntire, supra.* If the Legislature did not mean what it said, or should have done something else, only the Legislature can make the correction.

Conclusion

An appropriate close to this opinion is a paraphrase of the observation by Justice Souris in *Wickey v Employment Security Commission*, 369 Mich 487, 492-493 (1963): "The task of reviewing administrative determinations is difficult because of the tightrope the courts must walk, [giving deference to such determinations, while also thoroughly and meaningfully

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[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).

reviewing them,] but faithful performance of the judicial function demands that the task be undertaken." Those who drafted our current constitution were adamant, not merely determined, but adamant, that there be "'full, fair, honest-to-goodness judicial review of administrative decisions.'" *MERC v Detroit Symphony Orchestra*, 393 Mich 116, 123 (1974). Occasionally, that kind of a review has led this Court to reverse a determination regarding eligibility for unemployment benefits. In this case, that kind of review leads to an affirmance of the determination being challenged.

Affirmed.[8]

Dated: April 11, 2003.

DENNIS C. KOLENDA

Dennis C. Kolenda, Circuit Judge

[8]An effectuating order accompanies this opinion.