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STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF KENT

KENTWOOD SCHOOLS,

Employer/Appellant,

v

ESTHER D. MARKS and STATE OF MICHIGAN, UNEMPLOYMENT AGENCY, DEPARTMENT OF CONSUMER & INDUSTRY SERVICES, f/k/a Michigan Employment Security Agency & MESC,

Employer/Agency/Appellees.
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File No. 99-02921-AE

Hon. Paul J. Sullivan

OPINION & ORDER

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This is an appeal from a decision of the Employment Security Board of Review [hereafter "Board"] holding claimant-appellee school employee eligible for benefits during a summer recess in 1994. The decision reversed a referee's decision mailed November 15, 1994. The referee had determined that claimant-appellee was ineligible for benefits due to the school denial provisions of Section 27(i)(1) of the Michigan Employment Security Act. This section, in its relevant part, precludes benefits to a person unemployed during the period between 2 successive academic years if:

> "...the individual performs the service in the first of the academic years or terms and **if there is a contract or a reasonable assurance that the individual will perform service in an instructional, research, or principal administrative capacity** for an institution of higher education or an educational institution other than an institution of higher education in the second of the academic years or terms, whether or not the terms are successive." MCL 421.27(i)(1) [emphasis and underscoring added].

Claimant-appellee was laid off due to budget and personnel cutbacks. She was able to bid on a variety of different positions for which she was assured work given her seniority. Despite the many options available to her, with near equivalent pay, conditions and benefits, and for which she was deemed qualified by her employer, she ultimately chose a non-instructional position with significant decrease in hours and benefits. She explained that she personally did not feel qualified for such positions, even though her employer believed otherwise, and even though training would be provided.

Even where there exists a reasonable assurance of continued employment, benefits may not be denied unless the terms and conditions of such employment are reasonably similar to those of the previous year. *Paynes v Detroit Board of Education,* 150 Mich App 358 (1986). But this court agrees with the referee and the Board that the existence of a contract (as opposed to reasonable assurance) negates any requirement for such similar terms and conditions. The significance of having an actual contract as opposed to reasonable assurance was specifically noted in *Paynes:*

> "When a teacher actually contracts for a substantially inferior position, there may be no need to consider the terms of the unemployment [sic] for eligibility for unemployment benefits since the teacher is already employed....Thus, we do not consider the issue of whether the claimants actually **contracted** for work and might thus **be precluded from unemployment benefits.**" *Id.,* at 378, n.9 [emphasis added]. See *also, Id,* at 372-73, n.4.

The referee and Board each agreed that claimant had a contract for (as opposed to reasonable assurance of) employment for the following school term. They each apparently agreed that the differences in the terms and conditions of her employment were irrelevant on the issue of eligibility due to the existence of a contract for the coming year. The Board, however, held that the school denial provisions of the act did not apply because the claimant-appellee would no

longer be performing service "in an instructional, research, or principal administrative capacity." MCL 421.27(i)(1).

As above noted, the benefit disqualification provisions of Section 27(i)(1) of the Michigan Employment Security Act apply where there is:

1.) an actual contract for work, **or**

2.) reasonable assurance of such work, under similar terms and conditions, in an instructional, research, or principal administrative capacity.

Here, there is an actual contract for work. The Board held that the contract did not involve work in an instructional, research, or principal administrative capacity, however, and therefore held that the benefit denial provisions of the act did not apply. This court need not determine whether the instructional, research or principal administrative limitations apply to both actual contracts and reasonable assurance of work because even if a contract did not exist, the record is replete with evidence demonstrating the existence of reasonable assurances of continued work, under similar terms and conditions, and in instructional positions. Such evidence will not be restated in this opinion. Rather, the reader is referred to the lengthy counter statement of facts contained in the Reply Brief dated July 7, 1999 and filed by the Michigan Unemployment Agency with this court, and its numerous citations to the testimonial record before the referee.

This court may not and will not simply substitute its opinion for that of the Board. Rather, the decision below may be reversed only where it is not supported by competent, material and substantial evidence on the record, or where it is contrary to law. *Washington v Amway Grand Plaza,* 135 Mich A.P. 652 (1984). Here, the Board appears to have misapplied or misinterpreted the law by not considering the numerous and specific employment positions open to claimant-appellee, but rejected by her. Many of these positions involved similar terms and conditions, and were of an instructional nature. The Board's assessment solely of that position actually accepted by claimant-appellee, and its determination that the position was not instructional, failed to take into account the alternative grounds for denial of benefits, i.e., reasonable assurance of employment. A fair reading of the hearing transcript demonstrates the existence of such reasonable assurance, which is in addition to (not in substitution for) the fact that claimant-appellee had also entered into an actual contract.

For all of the above reasons, the decision of the Board of Review holding claimant-appellee eligible for benefits ought be and is hereby REVERSED.

DATED: April 7, 2000

Paul J. Sullivan, Circuit Judge (P24139)