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STATE OF MICHIGAN
IN THE 38TH JUDICIAL CIRCUIT COURT

GAIL RICE,
Claimant-Appellant,
v

Case No. 95-3309-AE
Hon. DANIEL L. SULLIVAN

INTERNATIONAL HEALTH CARE MANAGEMENT, INC.,
Employer-Appellee,

and MICHIGAN EMPLOYMENT SECURITY AGENCY,
Appellee.
_____/

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ORDER REVERSING BOARD OF REVIEW DECISION

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF MONROE

GAIL RICE,

Appellant,

v. Case No. 95-3309 AE

INTERNATIONAL HEALTH CARE MANAGEMENT, INC.,

Employer-Appellee,

and

MICHIGAN EMPLOYMENT SECURITY COMMISSION,

Appellee.

DECISION AND ORDER OF THE COURT

This matter appears before the Court on appeal from a determination of the MESC Board of Review that Gail Rice was not eligible to receive unemployment benefits during a leave of absence from her employer, International Health Care Management, Inc.

Background

Claimant Gail Rice began working for International Health Care Management, Inc. (hereinafter International) in 1986. Claimant has worked as a housekeeper, nurses' aide and a launderer, while employed with International. In November 1992, Claimant learned that she was pregnant. She consulted an obstetrician, who advised precautionary work restrictions given her previous history of pregnancy complications. The restrictions required limited contact with chemicals, no heavy lifting and the use of protective gloves.

Claimant advised her Supervisor, Norma Knee, of the physician imposed work related restrictions. The two then consulted International's head of personnel, Nanette Knee, who determined that she could not permit the Claimant to work while under the restrictions. Claimant suggested that perhaps she could perform light duty work. Claimant contends that other employees, who for various health reasons were unable to do their regular work, were assigned light duty work. Claimant's request was denied. Claimant was then offered, and accepted, a voluntary leave of absence, as opposed to the alternative of termination.

Standards of Review

This Court's role in an appeal from a decision of the Board of

Review is controlled by the Constitution and Section 38 of the Michigan Employment Security Act, MCL 421.38, MSA 17.540. The Act provides:

> "(1) the circuit court may review questions of fact and law on the record made before the referee and the Board of Review involved in a final order or decision of the Board, and may make further orders in respect thereto as justice may require, but the court may reverse an order or decision only if it finds that the order or decision is contrary to law or is not supported by competent, material, and substantial evidence on the whole record."

Thus, this Court may reverse a decision of the Board of Review only if: (1) The decision is not supported by competent, material, and substantial evidence on the whole record; or (2) the decision is contrary to law.

Further, the scope of review in such matters is limited to the certified record provided by the MESC Board of Review. MCR 7.104(B)(4).

In Russo v. Dept. of Licensing and Regulation, 119 Mich App 624, 631 (1984) the Court defined the parameters of the substantial evidence test. The Court stated:

> "The 'substantial evidence test' has been defined as evidence which a reasoning mind would accept as sufficient to support a conclusion. While it consists of more than a mere scintilla of evidence it may be substantially less than preponderance of the evidence...."

This Court, in order to determine whether there is substantial evidence on the whole record, must determine whether or not a reasonable person would conclude that the evidence submitted was sufficient to justify that conclusion.

Analysis

In the case at bar, Claimant has been denied coverage on the basis that she was on a leave of absence. The Michigan Employment Security Act §48(3) provides:

> An individual shall not be deemed to be unemployed during any leave of absence from work granted by an employer either at the request of the individual or pursuant to an agreement with the individual's duly authorized bargaining agent, or in accordance with law.

On December 22, 1994 the Board of Review affirmed the referee's

determination that Claimant was ineligible for benefits under §48 of the MES Act.

The referee's decision of July 28, 1993 concluded that Claimant was not ineligible for benefits under §28(1)(c), the Ability provision. The referee further concluded that Claimant was ineligible under §48 of the Act because Claimant was on a leave of absence.

Claimant contends that the language of §48(3), "at the request of the individual," implies that an employee must take leave voluntarily. Claimant also contends that, given such an implication, the referee's finding of ineligibility was contrary to law and not supported by substantial evidence.

Claimant's arguments are well taken. There is no evidence in the record that Claimants leave was granted by International pursuant to a collective bargaining agreement, nor in accordance with any statute, ordinance or regulation; therefor the two other grounds for leave of absence governed by §48(3) are inapplicable here. Thus, it is clear that Claimant's leave of absence must be deemed to have been at Claimant's request.

It should be noted that the MESC did not specifically find that Claimant's leave was voluntary. Appellee's brief to this Court states "the record contains evidence that the claimant requested a leave of absence and it is uncontested that the claimant was thereby preserving her employment . . ." (Brief of Appellee p.9). This statement is not supported by the decision of the Board of Review, nor that of the referee. The Decision of Board of Review found that "The record revealed that the claimant was on a leave of absence due to her pregnancy." (R. 63). The referee's Decision found that claimant, "began a medical leave of absence caused by a pregnancy," and that, "claimant and the employer signed a written leave of absence." (R. 56).

In fact, the only specific mentions of Claimant's leave being voluntary appear in two letters from the Frick Company in response to inquiries by the MESC. Identical language appears in each letter which state, in pertinent part:

> "The claimant is on leave of absence. We wish to question the claimant's availability for work. The Claimant is on a maturnity [sic] leave of absence which was suggested by her doctor. She submitted the doctor's note and proper forms for the leave. She is to return to work 6 to 8 weeks after delivery. <u>Her leaving was voluntary</u>." (R. 30 and R. 31)(Emphasis added).

Aside from the fact that Claimant's doctor did not suggest a leave of absence at the time Claimant's leave began, the conclusion that "her leaving was voluntary" is in direct contradiction of Claimant's hearing testimony and later correspondence. (R. 6, L 13-17; R. 13, L 25 to R. 14, L 4; R. 19; R. 22). This record,

rendered by Claimant In Pro Per, clearly shows that she expected to be assigned light duty because of her doctor's restrictions and accepted a leave of absence only as an alternative to losing her employment with International.

MESC's determination that Claimant is ineligible to receive unemployment benefits under §48(3) must, under the facts of this case, be supported by substantial evidence that Claimant voluntarily took leave of absence. While there appears, concededly, at least a scintilla of evidence to support such a finding, there is far less than a preponderance. The test, therefor, is whether sufficient evidence appears which a reasoning mind would accept as sufficient to support such a conclusion.

While such a question is qualitative in nature rather than quantitative, this Court nevertheless concludes that the record does not reveal sufficient evidence to support the conclusion that Claimant's leave was voluntary. The record reveals unequivocal statements to the contrary by Claimant, an unsupported conclusion of voluntariness by the Frick Company, and the absence of a specific finding by the MESC that Claimant requested or volunteered for leave of absence. Absent such a showing MESC's determination that Claimant is ineligible for benefits under §48(3) is in error as a matter of law.

It should be noted that the instant record begs remand to the MESC and the referee for further development of the issues of voluntariness and the availability of light duty work Claimant might have performed at International. However, such an order is beyond the power of this Court.

Accordingly, the Court finds, and it is hereby ordered, that Claimant Gail Rice is eligible to receive unemployment benefits during the leave of absence in question.

DATED: December 30, 1996

DANIEL L. SULLIVAN
CIRCUIT JUDGE