

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

MATTHEW A. KENKEL,  
Appellant,

CASE NO. 94-476557 AE  
HON. FRED M. MESTER

v

TREMEC TRADING CO.  
and MICHIGAN EMPLOYMENT  
SECURITY COMMISSION,

Appellees.

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OPINION AND ORDER

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OPINION AND ORDER

This matter comes before the court on an appeal from the decision of the Michigan Employment Security Commission Board of Review issued on April 21, 1994.

Claimant worked for Tremec Trading as a controller until his position was eliminated in April 1992. At the time of his layoff, he purchased a 50% interest in ERA Bankers Realty, a real estate franchise. Claimant did not perform the basic day to day functions of the business but did provide assistance in planning long term organizational goals. Claimant did not receive wages for this work and testified that his intention was to improve the equity in his investment. After he was separated from his employer, claimant received unemployment compensation. However, his

employer objected because Claimant's services provided to ERA were identical to those provided to Tremec.

On June 22, 1993, the Referee found Claimant ineligible for benefits because he devoted his time to the practice of a profession. Claimant appealed to the Board of Review which affirmed the decision of the Referee.

In his argument, Appellant refers to the case of Phillips v Unemployment Compensation, 323 Mich 188 (1948), cited by the Referee. Appellant asserts that that case held that one who devotes his time to the practice of a profession cannot be said to be unemployed. Appellant distinguishes Phillips on a factual basis as Plaintiff in that case had established himself as a professional before he entered the work force as a wage earner. However, in this case, Appellant contends that he had no established credentials as a financial planner or real estate broker. Further, Appellant asserts that self employment of claimants does not exclude them from benefits and the test was one of "genuine attachment to the labor market." Bolles v. Employment Security Commission, 361 Mich 378 (1960). Appellant argues that like in Bolles, he had a genuine attachment to the labor market that was not temporary. He actively sought a return to employment and was available for employment. Further, he was only seeking to increase the equity of his holding. As to the letter sent by claimant to Appellee, Appellant asserts that it indicates only his expectation, as contrasted with his

uncontroverted testimony.

Appellee argues that the decision of the Board of Review is supported by competent, material and substantial evidence. Appellee contends that claimant was not truly attached to the labor market as he was operating or establishing a business and was voluntarily out of the work force during period claimant obtained benefits. Appellee cites three Circuit Court cases in which claimants were found ineligible for benefits when they were developing a business. Appellee also notes that where, as here, the referee found the claimant's version of the facts so incredible so as not to tip the scale in his favor, the finding should not be disturbed on appeal. Linski v Employment Security Commission, 358 Mich 239 (1959).

Finally, Appellee argues that the judicial function is to review the record to determine if the decision is supported by competent, material and substantial evidence on the whole record.

The issue before the court is whether Appellant is eligible for benefits under MCLA 421.48, which defines the term "unemployed." The standard of review for the court is limited to a determination of whether the decision is supported by competent, material and substantial evidence on the whole record. Further, the burden of proof is on the claimant.

The Referee found that the record established that

Appellant devoted his time to the practice of a profession, and thus, could not meet his burden of proof that he was unemployed. In Bolles v Employment Security Commission, the Michigan Supreme Court held that "...the test properly employed is that of genuine attachment to the labor market." The court stated that "...this test will serve to differentiate the business or professional man, who temporarily attaches himself to the industrial market, from the workman who seeks a temporary augmentation of funds in a period of layoff." Id at 385. Thus, in Bolles, the court found that Plaintiffs were "unemployed" where they attempted unsuccessfully to begin a watch repair business while they were actively seeking work in industry. Further, the Bolles court distinguishes Phillips, on which the referee relies, because it involved a professional (an attorney) who reopened his law office when he was laid off from industrial war work.

The testimony in the case at bar establishes that Appellant had a desk at ERA and kept regular office hours there. He testified that he was not employed there and did not receive salary, wages or any form of compensation. The benefit of his work to him would result only in an increase in his equity. Appellant did long term planning but was not involved in the day to day operations. He further testified that he looked for job opportunities in the Wall Street Journal daily.

This court is satisfied that the facts demonstrate that Claimant was "unemployed" as that term is used in MCL 421.48. Further, Claimant has established that he meets the eligibility requirements under the Act.

The court finds that claimant was truly attached to the labor market as he was available for work although he spent his time in a useful manner, by using his skills to improve the equity in his investment. In comparing this case to both the Bolles and Phillips cases, the court finds that it is more similar to Bolles, where the claimants continued seeking work and the court found that their "meager efforts to augment their unemployment checks did not break their genuine attachment to the labor market." Bolles, 361 Mich at 386. The facts are even stronger in the case at bar, where claimant received absolutely no remuneration from the franchise.

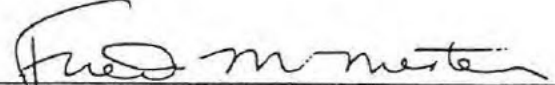
Further, this case is distinguishable from Phillips, where claimant was an attorney before the war, worked temporarily in industry during the war, and then went back to practice his profession after the war. In Phillips, the court found that Plaintiff had earned remuneration even though he had not collected his fees, and that was the dispositive test. However, in the case at bar, Claimant did not return to a profession in which he had worked previously and did not earn remuneration for his services.

As the court found in Bolles, the language of the Act and

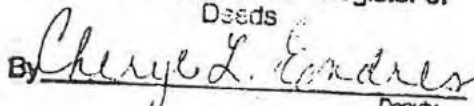
its intent "...foster and encourage industry and self help rather than idleness and inactivity." 361 Mich at 386. This court is satisfied that Mr. Kenkel's activities during the period in question do not disqualify him from unemployment benefits.

The decision of the Board of Review is reversed and the matter is remanded for a determination of any benefits due to Mr. Kenkel.

It is So Ordered.

  
FRED M. MESTER, CIRCUIT JUDGE  
(P17653)

Dated: January 30, 1995

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