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STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WASHTENAW

PURIFICACION O. GINEZ

Appellant,

v.

Case No. 98-10274-AE
Honorable Melinda Morris

UNIVERSITY OF MICHIGAN
MEDICAL CENTER,

Employer-Appellee,

and

STATE OF MICHIGAN,
UNEMPLOYMENT AGENCY,
DEPARTMENT OF CONSUMER
& INDUSTRY SERVICES
formerly known as the Michigan
Employment Security Agency and MESC,

Appellees.
_____/

FILED

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Employer-Appellee
_____/

OPINION AND ORDER REVERSING THE MICHIGAN EMPLOYMENT SECURITY BOARD OF REVIEW DECISION

At a session of said Court held in the
Washtenaw County Courthouse in the City
of Ann Arbor, on April 21, 1999

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Plaintiff filed this appeal from a decision of the Michigan Employment Security Board of Review denying her unemployment benefits. For the reasons stated below, the Court reverses the decision of the Michigan Employment Security Board of Review.

Factual Background

Purificacion O. Ginez was an employee of the University of Michigan Medical Center from March 30, 1979, through November 10, 1997. On November 7, 1997, she had an asthma attack. Ms. Ginez was nearing the end of her work shift at the University of Michigan Medical Center (UMMC) when she was afflicted. Ms. Ginez went to the "satellite pharmacy" near her ward in the UMMC for medication. The pharmacy was closed at the time but Ms. Ginez knew that there was an area where medicine was accessible when the pharmacy was closed. Ms. Ginez was preparing an asthma inhaler when her supervisor, John Price, asked her if what she was doing was appropriate. Ms. Ginez indicated that she felt that it was and that she had been allowed to use inhalers from the pharmacy in the past.

Mr. Price apparently did not know if Ms. Ginez was allowed to use the inhalant, so he left Ms. Ginez in the pharmacy and went to ask the nurse manager, Gary Bell. Mr. Bell told Mr. Price that it was not appropriate for Ms. Ginez to help herself to the inhalant, which was available by prescription only. While Mr. Price was gone, Ms. Ginez used the inhalant, replaced the unused portion, and then left when her shift ended. When Mr. Price returned, she was gone. Ms. Ginez was suspended on November 10, 1997. She was discharged for theft on November 13, 1997.

Ms. Ginez filed a claim for unemployment benefits with the State of Michigan Unemployment Agency (Agency). The Agency issued a decision holding that Ms. Ginez was disqualified from receiving benefits under MCL 421.29. After Ms. Ginez protested the disqualification, the agency held a redetermination on January 28, 1998, in which Ms. Ginez was again disqualified for benefits. Ms. Ginez requested and received a hearing before a referee. The referee concurred with the Agency decision on March 5, 1998, finding Ms. Ginez disqualified for "theft" under MCL 421.29 (1)(i). Ms. Ginez appealed to the MES Board of Review (MES Board), where the referee's decision was adopted. Ms. Ginez now brings her claim of appeal to this Court.

Standard of Review

This Court reviews an MES Board decision to determine if it is supported by competent, material, and substantial evidence, and is not contrary to law. MCL 421.38.

Although the decision adopted by the Board discusses "misconduct", which can be cause for disqualification under MCL 421.29(1)(b), the claimant was disqualified only for "theft" under MCL 421.29 (1)(i). Therefore, this Court will limit its review to whether the record supports the disqualification of claimant for "theft." MCL 421.29 (1)(i).

Theft is not defined in the Employment Securities Act. Black's Law Dictionary defines "theft" as a "popular name for 'larceny'." Larceny is prohibited by MCL 750.356 *et seq*. MCL 750.356, however, does not define larceny and the elements must be gleaned from common law. The elements of larceny are laid out in *People v Gimotty,*

216 Mich App 254, 257-58 (1996), as "the taking and carrying away of the property of another, done with felonious intent and without the owner's consent."

It is clear that Ms. Ginez took the property (the mist from the inhalant) with the intent to deprive the owner of at least some of the value, for her own benefit. The only issue regarding "theft" not agreed to by the parties is whether the owner consented to Ms. Ginez using the inhalant. If the owner consented, the act of using the inhaler was not "theft" and Ms. Ginez should not be disqualified for benefits under MCL 421.29 (1)(i).

The record shows that Ms. Ginez claims she was given permission to use the inhalant. Defendant rebuts this claim by pointing to an "employer policy" that directs employees in similar situations to seek treatment at the emergency room. There is evidence on the record that Ms. Ginez' supervisor, Mr. Price, was not aware of the policy. It is therefore an unresolved question of fact as to whether the defendant consented to let her use the inhalant and/or whether Ms. Ginez reasonably believed she was allowed to use it. The record below does not contain substantial and competent evidence of the elements of theft, nor is there an articulated finding on these questions.

The decision adopted by the Board states that "this matter would be viewed differently if the product taken were not prescription drugs and if the employment setting were not a hospital." This statement indicates that Ms. Ginez may have been treated more harshly because the alleged theft was of prescription drugs in a hospital setting. While there is a public policy against the unauthorized dispensation of prescription medications, this policy is implemented in statutes that provide penalties or other enforcement provisions for that purpose. The Board decision, however, was made pursuant to MCL 421 *et seq.*, the purpose of which is to "provide relief from the hardship

caused by involuntary unemployment." *Wohlert Special Products, Inc. v Michigan Employment Sec. Com'n*, 202 Mich App 419 (1993). The act in general is to be liberally construed to serve this purpose. *Id.* On the other hand, the disqualification provisions are to be narrowly construed to prevent frustrating the legislative purpose. This Court knows of no authority, nor is any cited below, or in the parties' briefs, supporting a broader construction of the disqualifying provision, MCL 421.29(l)(i). Therefore, the Board erred as a matter of law when it "viewed [the] matter differently [because] the product taken [was] prescription drugs" in a hospital setting.

The Court, therefore, finds that the decision of the MES Board disqualifying appellant from benefits is not supported by material, competent and substantial evidence and is contrary to law. The decision is reversed.

Melinda Morris

Melinda Morris
Circuit Court Judge