14.00

DISQUALIFICATIONS - OTHER

Section 29(1)(f)-(j)

Section 29(1)(h)

ASSAULT AND BATTERY, Dispute concerning back pay, Provocation by supervisor, Refusal of pass to first aid, Striking supervisor

CITE AS: Ashford v Motor Wheel, Inc. No. 74-9229 AE, Washtenaw Circuit Court (March 3, 1976).

Appeal pending: No

Claimant: William H Ashford
Employer: Motor Wheel, Inc.
Docket No: B74 493 45311

CIRCUIT COURT HOLDING: Provocation is not a defense to assault and battery.

FACTS: Two supervisors testified that the claimant struck one with his hand, and hit the other with his fist while jerking the victim by his necktie. The claimant testified that he was provoked by disputes regarding back pay and a pass to first aid.

DECISION: The claimant is disqualified under Section 29(1)(h) of the Act.

RATIONALE: "The MESC Appeal Board properly refused to remand this matter for more testimony concerning the issue of provocation because provocation, based upon the contentions of the appellant, is not a valid defense to assault. In Goucher v Jamieson, 124 Mich 21 (1900), the court upheld a judgement for the plaintiff in a suit to recover $65.00 for assault and battery. The defendant contended that he was provoked by the plaintiff's derogatory language to the defendant's sons, who appears to have picked some berries on the plaintiff's land. In reaching its decision, the court stated:

"The court instructed the jury that mere words, though insulting, do not justify an assault and battery, and that 'no assault is justified, unless by some assault performed by the other party.' ... The instructions given were, in our opinion, proper, under the circumstances of the case. 124 Mich at 22."

Section 29(1)(h)

ASSAULT AND BATTERY, Profanity by supervisor, Provocation, Reasonable person standard, Striking supervisor, Unreasonable anger

CITE AS: Caldwell v Chrysler Corp, No. 74-038-714 AE, Wayne Circuit Court (March 31, 1976).

Appeal pending: No

Claimant: Philip Caldwell
Employer: Chrysler Corp.
Docket No: B74 3703 45737

CIRCUIT COURT HOLDING: Provocation is not a defense to assault and battery.

FACTS: The claimant's testimony indicated that ... "Foreman Tomaszewski yelled profane words to claimant on four (4) different occasions in an effort to get claimant to work faster; that claimant then struck Foreman Tomaszewski with his fist, 'lost complete control' and started chasing the foreman and struck him again after he was 'on the ground.'"

DECISION: The claimant is disqualified under Section 29(1)(h) of the Act.

RATIONALE: "Provocation is not a defense to an assault, see People v McKay, 46 Mich 439 (1881); People v Pearl, 76 Mich 207 (1889)." "This Court also has reference to Welch v Weir, 32 Mich 77, p 86 (1875); 'The law in its application to this subject, takes full account of the infirmities of human nature, and holds no one to any impossible or unreasonable standard. But on the other hand, it cannot, for the safety of society, be tolerated that anyone can claim exception from responsibility by reason of excitement, when his anger is unreasonable, and results from a neglect to use ordinary self-control. No one has the right to allow his temper to become uncontrollable.'"

Section 29(1)(h)

ASSAULT AND BATTERY, Striking supervisor, Burden of proof, Preponderance of evidence, Standard of proof, Weight of the evidence

CITE AS: Waite v Chrysler Corp, No. 74-030301 AE, Wayne Circuit Court (November 14, 1975).

Appeal pending: No

Claimant: Lewis H. Waite
Employer: Chrysler Corp.
Docket No: B73 9378 45211

CIRCUIT COURT HOLDING: A disqualification for misconduct discharge or assault and battery does not require proof beyond a reasonable doubt, but it must "... be supported at least by a convincing preponderance of evidence."

FACTS: The claimant's supervisor testified, " ... that the claimant struck him with his palm over his left eye, causing his glasses to break." The claimant and his witness testified that no such incident occurred between the claimant and the supervisor.

DECISION: The claimant is not disqualified under Section 29(1) (h) of the Act.

RATIONALE: The Court adopted the decision of the Referee, who held: "After thoughtful consideration of the entire record in this appeal, the Referee concludes that there is a lack of sufficient, persuasive and dominant evidence to support a proper finding that the claimant was discharged under circumstances which would subject him to disqualification under either Subsection 29(1)(b) or Subsection 29(1)(h) of the Act.. Since both of these provisions of the statute are in the nature of penalties, the Referee believes that there must be a high quality of proof in the record to warrant the application of either Subsection. By this, we do not mean to imply that the provisions of the Employment Security Act are subject to any of the criminal tests of the weight of evidence in that proofs must be 'beyond a reasonable doubt.' However, even in these proceedings, a disqualification should be supported at least by a convincing preponderance of evidence. The record, in this instance, lacks that quality."

Section 29(1(j)

THEFT, Discovered after discharge, Causal connection

CITE AS: Old Farm Shores v Borghese, No. 61554 (Mich App March 28, 1983).

Appeal pending: No

Claimant: Sally Borghese
Employer: Old Farm Shores
Docket No: B79 03563 R01 68880

COURT OF APPEALS HOLDING: There must be a direct causal connection between the act complained of and the decision to discharge before disqualification can be imposed as a result of that act.

FACTS: Claimant managed an apartment complex. The employer became dissatisfied with claimant's performance and gave her notice her employment would be terminated after two weeks with pay. During the notice period the claimant allegedlyembezzled $5,100 from the employer. The employer did not become aware of the theft until after claimant's employment ended.

DECISION: Claimant is not disqualified under Section 29(1)(j) for theft in connection with her work.

RATIONALE: "Because the alleged embezzlement did not occur until after notice of termination and was not discovered until after the employment ended it played no part in the discharge decision. In Section 29(1) the legislature has enumerated those limited circumstances wherein payment of unemployment benefit is to be disallowed or restricted. ... The disqualification provisions are not to be construed as a means of punishment or penalty for alleged violations of either contractual or statutory provisions concerning the employer-employee relationship, Peaden v Employment Security Commission, (Smith, dissenting), 355 Mich 613, 638-639; 96 NW2d 281 (1959); nor should they be used as a means of punishment or penalty for alleged civil or criminal tort.

Should the legislature have deemed it proper, as a matter of policy, to preclude payment of unemployment benefits in all instances of employment-related theft, it could have so provided. Where the legislature has clearly spoken, however, it is not for the courts or the administrative agencies of this state to substitute their notions of preferable policy under the guise of interpretation."

Editors Note: Also see Section 29(1)(m) which was added to the MES Act subsequent to the adjudication of Borghese.

11/90
7, 14, d3:NA

Section 29(1)(h)

ASSAULT & BATTERY, Name calling, Provocation, Connected with work

CITE AS: Harris v Ford Motor Company, No. 89184 (Mich App April 29, 1987).

Appeal pending: No

Claimant: Roy S. Harris
Employer: Ford Motor Company
Docket No: B83 09343 90901

COURT OF APPEALS HOLDING: Mere words, no matter how offensive, do not justify an assault. Further, a fight over union affairs between two employees, one of whom is off-duty can be work connected and disqualifying if it negatively affects the employer's interests.

FACTS: While an off-duty worker was soliciting signatures for a union matter the claimant, himself a union member, got involved in a dispute with the individual. This took place inside an employer plant. During the discussion the other person called claimant a "lying ass". Claimant responded by hitting him in the face. Both employees were terminated.

DECISION: Claimant is disqualified for benefits under Section 29(1)(h).

RATIONALE: "Mere words, however, do not justify an assault or constitute a defense to liability for assault, and it is the general rule that, apart from statute, no provocative acts, conduct, former insults, threats, or words, unless accompanied by an overt act of hostility, will justify an assault, no matter how offensive or exasperating, nor how much they may be calculated to excite or irritate."

In Banks v Ford Motor Company, 123 Mich App 250 (1983) "... this court focused on the location of the assault and its potential to harm the employer's interests.

More recently, this court has held that an employee's misconduct need not arise from his or her official work duties to disqualify him or her from unemployment compensation benefits, so long as the misconduct negatively affects the employer's interests. Bowns v Port Huron, 146 Mich App 69, 76; 379 NW2d 469 (1985), lv den, 424 Mich 898 (1986) . ... This case offers an even stronger example of a work-related assault than the Banks case, because the assault and battery occurred inside defendant's plant, as opposed to its parking lot. Therefore, plaintiff's assault and battery created a greater potential for disruption of defendant's interests than the assault in Banks. Also, as the circuit court pointed out, the dispute in the instant case was not entirely a personal matter between plaintiff and Jackson. It arose out of their affiliation with the union which represented defendant's employees."

Section 29 (1)(h)

ASSAULT AND BATTERY, Proof

CITE AS: Yount v Hoover Chemical Co, No. 61747 (Mich App July 13, 1983).

Appeal pending: No

Claimant: Bennie D. Yount
Employer: Hoover Chemical Co
Docket No: B76 12792 RM1 RO 69001

COURT OF APPEALS HOLDING: There is no requirement under the statute for a separate proceeding to determine if claimant committed an assault and battery in order for claimant to be disqualified under Section 29(1)(h).

FACTS: Claimant approached his chief steward concerning a grievance he wished to make against the employer. An argument ensued and claimant tweaked the steward on the cheek. She knocked his hand aside and he slapped her face; knocking her glasses off, spinning her around and nearly knocking her down. As a result the employer discharged claimant.

DECISION: Claimant is disqualified for assault and battery under Section 29(1)(h).

RATIONALE: The court found there was sufficient evidence for the referee to find claimant was guilty of assault and battery on his shop steward. Claimant had not previously preserved the issue of whether Section 29(1)(h) of the MES Act required a separate judicial determination. However, the court would not be inclined to interpret the statute to require a separate proceeding, presumably criminal, to determine whether claimant committed an assault and battery. Additionally, the fracas occurred on the employers premises during working hours and in front of other employees. This was disruptive and sufficiently work connected to find claimant disqualified under Section 29(1)(h).

14.07

Section 29(1)(f)

INCARCERATION, Disciplinary suspension

CITE AS: Alexander v MESC, 4 Mich App 378 (1966).

Appeal pending: No

Claimant: Ben Alexander, Jr.
Employer: Continental Motors Corp
Docket No: B64 1365 RM 32738

COURT OF APPEALS HOLDING: A discharge which results from absences due to an incarceration for a non-traffic related offense is absolutely disqualifying.

FACTS: The claimant was sentenced to sixty days in jail for a non-work related assault and battery. He served fifty days. While jailed the claimant was discharged for being a three day no-call no-show. After his release the claimant's union was able to get the claimant's discharge reduced to a disciplinary suspension and have the claimant reinstated.

DECISION: The claimant was disqualified for benefits.

RATIONALE: The incarceration provision is meant as an absolute bar to the receipt of benefits in all cases except traffic violations which result in less than ten (10) days of consecutive absence or sentences which provide for day parole and is "not something which the employer and union could later negate by agreement."

Section 29(1)(f)

INCARCERATION, Traffic violation

CITE AS: Ellis v Employment Security Commission, 380 Mich 11 (1968).

Appeal pending: No

Claimant: Esau Ellis
Employer: Campbell, Wyant & Cannon Foundry Company
Docket No: B64 686 32165

SUPREME COURT HOLDING: An employee who because of a traffic violation is incarcerated and absent from work less than ten full days cannot be disqualified for benefits.

FACTS: The claimant was incarcerated for a traffic violation, and as a result he was absent from work for nine consecutive days. The claimant also missed most of his shift on the tenth day. However, two or three hours before the end of his shift he did appear but was not allowed to work.

DECISION: The claimant was not disqualified for benefits by operation of the traffic violation provision contained in Section 29(1)(f).

RATIONALE: ALthough the claimant was not present at the start of the tenth day he was not absent for ten complete days. Therefore, since he was incarcerated as the result of a traffic violation he could not be disqualified for benefits. The court noted with approval the following from the circuit court opinion 'If our legislature intended ... to disqualify a claimant where his confinement resulted in his absence from work, for nine and a fraction consecutive days, it would have very readily so stated.'

14.09

Section 29(1)(f)

INCARCERATION, Day parole

CITE AS: Galaszewski v MESC, No. 64863 (Mich App July 15, 1983).

Appeal pending: No

Claimant: Terry Galaszewski
Employer: GMC Fisher Body Plant #1
Docket No: B79 03879 67143

COURT OF APPEALS HOLDING: Because an order of work release was never issued the claimant was not exempt from disqualification by operation of the day parole provision contained in Section 29(1)(f).

FACTS: The claimant was sentenced to jail for a non-work related offense. During sentencing the judge mentioned he might be amenable to day parole/work release if it was requested. While incarcerated the claimant did petition for and receive day parole so he could attend school. However, no such petition was filed relative to work release.

DECISION: The claimant was disqualified for benefits.

RATIONALE: It is the actuality of work release and not the possibility of it which exempts an incarcerated claimant from disqualification. There being no order granting work release the claimant was disqualified under Section 29(1)(f).

Editor's Note: The Court of Appeals decision contains dicta to the effect that an employer's refusal to participate in work release would not subject a claimant to disqualification if such an order would have been otherwise issued.

Section 29(1)(f)

INCARCERATION, Civil contempt

CITE AS: Millege v Roofing Man, Inc., Saginaw Circuit Court No. 92-51067-AE-5 (March 30, 1993).

Appeal pending: No

Claimant: Jerry W. Millege
Employer: Roofing Man, Inc.
Docket No. B91-10727-119923W

CIRCUIT COURT HOLDING: Section 29(1)(f) of the MES Act does not apply to incarcerations resulting from civil contempt.

FACTS: Claimant was discharged after he was absent four days. The absence was the result of the claimant having been incarcerated because he had fallen behind in child support payments.

DECISION: Claimant is not subject to disqualification under Section 29(1)(f).

RATIONALE: Section 29(1)(f) of the MES Act provides for disqualification where a claimant is discharged as a result of absences caused by an incarceration stemming from a conviction for a violation of law. Contempt proceedings in child support cases are considered civil in nature. Sanctions for civil contempt are remedial in nature and are intended to compel compliance with the court's directives by imposing a conditional sanction until the contemptor complies or no longer has the ability to comply. The statute was never intended to be applicable to civil contempt for disobeying the orders of the court.

7/99
20, 19, d12: N/A

14.11

Section 29(1)(i)

THEFT, Definition of theft

CITE AS: Ginez v University of Michigan Medical Center, Washtenaw Circuit Court No. 98-10274-AE (April 21, 1999).

Appeal pending: No

Claimant: Purificacion O. Ginez
Employer: University of Michigan Medical Center
Docket No. B98-01381-147739W

CIRCUIT COURT HOLDING: Claimant is not subject to disqualification under Section 29(1)(i) unless the common law elements of theft are established.

FACTS: Claimant worked for the employer from 1979 to November 10, 1997. On November 7, 1997 at the end of her shift she experienced an asthma attack. Claimant went to a "satellite" pharmacy near her ward for medication. The pharmacy belonged to the employer. Though the pharmacy was closed, claimant knew where the medication was kept and prepared an inhaler for her use. Her supervisor approached and asked if she was acting appropriately. Claimant felt she was acting appropriately because she had been allowed to use inhalers from the pharmacy in the past. Her supervisor had no knowledge of that, and checked with a nurse manager. The employer's policy was that employees in similar situations should seek treatment in an emergency room. Claimant used the inhalant and left the unused portion. As a result, the employer suspended, then ultimately discharged her.

DECISION: Claimant is not disqualified from receiving benefits under Section 29(1)(i).

RATIONALE: Theft is not defined in the M.E.S. Act. Black's Law Dictionary defines "theft" as a "popular name for 'larceny'." Larceny is prohibited by MCL 750.356 et seq, but is not defined by that statute and the elements must be found in common law. The elements of larceny are laid out in People v Gimotty, 216 Mich App 254, 257-258 (1996), as the "taking and carrying away of the property of another, done with felonious intent and without the owner's consent." The court found the claimant took the inhaler with the intent to deprive the employer of some value. The issue was whether the employer consented to the claimant's use of the inhaler; if so, then her actions cannot be considered theft. While the employer had a policy disallowing such actions, the claimant's supervisor was not aware of that policy. The court concluded the "record does not contain substantial and competent evidence of the elements of theft, nor is there an articulated finding on these questions." The court rejected the Board's additional rationale that a disqualification was justified "because the product taken was a prescription drug in a hospital setting."

7/99
21, 16, d23: B

Section 29(1)(i)

THEFT, Burden of proof, Intent

CITE AS: Crawford v Capstar Management Co, LP, Washtenaw Circuit Court, No. 99-10866-AE (March 24, 2000)

Appeal pending: No

Claimant: Leon Crawford
Employer: Capstar Management Co, LP
Docket No. B1999-01951-RO1-151858W

CIRCUIT COURT HOLDING: Employer has the burden of proving a claimant actually committed a theft for the actions to be disqualifying. That means employer must establish all of the elements of theft; including establishing ownership of the involved property and that the taking was done with felonious intent.

FACTS: Claimant worked in employer's hotel as a houseman. Employer discharged claimant for stealing a "Bic" lighter valued at $0.89. Claimant testified employer had a "finder-keeper" policy for items left by hotel guests. Under employer's policy, the employee would turn in an item left by a guest, employer would put the employee's name on the item, and employer would give the item to the employee if unclaimed after a waiting period. Claimant found a jacket and turned it in; after the waiting period expired it was unclaimed. Claimant discovered the jacket had not been marked with his name. He looked through the pockets for the owner's identification and found a "Bic" lighter. Claimant took the lighter, informed his supervisor, and she told him she was glad he found the lighter. Claimant testified he believed he was acting in accordance with employer's policy. Employer was not at the hearing.

DECISION: Claimant is not disqualified under 29(1)(i).

RATIONALE: Theft is not defined in the M.E.S. Act. Under common law, larceny is the "taking and carrying away of the property of another, done with felonious intent and without the owner's consent." People v Gimotty, 216 Mich App 254 (1996). The Referee described claimant's actions as "tantamount to theft," conceding that he did not actually commit theft. The record did not establish the legal "owner" of the property. It was not clear whether the owner consented to claimant's actions. Employer, "by virtue of its policy of allowing employees to keep item found, essentially disclaimed ownership rights to the property. Claimant lacked the required felonious intent because he believed employer was holding the item for him subject to a waiting period and claim by the rightful owner.

11/04

Section 29(1)(f)

INCARCERATION, Convicted and sentenced

CITE AS: Kalaher v Leprino Foods Company, Ottawa Circuit Court, No. 03-45769-AE (September 29, 2003)

Appeal pending: No

Claimant: Scott T. Kalaher
Employer: Leprino Foods Company
Docket No. B2002-17489-167407W

CIRCUIT COURT HOLDING: Where claimant is separated from employment while confined to jail for failure to post bond he has not lost his job for being "convicted and sentenced." Therefore Section 29(1)(f) is inapplicable and claimant is not disqualified.

FACTS: In May 2002 claimant was free on bond awaiting trial on a charge of driving while intoxicated. Claimant worked on May 14. On May 15, claimant had a mandatory court appearance, and the court increased the amount of his bond. Claimant chose not to post the higher bond and was remanded to jail. A week later the employer notified claimant he had been discharged effective May 16. On June 11 claimant was convicted of OUIL, second offense, and sentenced to 90 days in jail.

DECISION: Claimant is not disqualified under Section 29(1)(f).

RATIONALE: On the date the employer discharged the claimant, May 16, 2002, he was not absent from work because he had been convicted of a violation of the law and sentenced to jail. The claimant was not convicted and sentenced until June 11, 2002. Therefore Section 29(1)(f) is inapplicable.

11/04

Section 29(1)(i)

THEFT, Burden of proof, Intent

CITE AS: Livingston v Lac Vieux Desert Public, Gogebic Circuit Court, No. G-00-27-AV (January 26, 2001)

Appeal pending: No

Claimant: Bernard A. Livingston
Employer: Lac Vieux Desert Public Enterprise and Finance Committee
Docket No. B1999-08904-152992W

CIRCUIT COURT HOLDING: To meet its burden of proof under Section 29(1)(i), the employer must establish the elements of theft, including that the claimant had the "intent to steal."

FACTS: Employer discharged claimant from his position as a security guard for allegedly stealing $20.00 of a $30.00 tip he received. A security camera showed the claimant received a $30.00 tip, pocketed $20.00 and put $10.00 in the tip jar. Claimant knew he was being recorded; the money in question was returned before he left the premises. Claimant had been objecting to employer's policy on tips, specifically the failure of management to follow the tip policy. Employer did not appear at the Referee hearing. Claimant testified that he did not intend to keep the money or deprive the rightful owner of the money, rather it was his intent to incur disciplinary action to further object to management's failure to follow the policy on distribution of tip monies.

DECISION: Claimant is not disqualified under 29(1)(i).

RATIONALE: The elements of "theft" must be analyzed in the light of facts of the case. Section 29(1)(i) refers to "theft." In criminal law, civil law and common parlance the concept of theft or larceny "denotes not just the taking of property; but the taking of property fraudulently, with the intent to appropriate it to one's own use or benefit, and depriving the owner of such use or benefit." The definition of larceny includes 'intent to steal.' The absence of proof and findings on the required element of intent to steal is dispositive. The claimant's intent was not to use the $20.00 for his own purposes, but to be caught; his intent was to protest the employer's practices.

11/04