STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF LEELANAU

AILEEN GOMERY,

Appellant,

v

Case No. 07-7416-AE
HON. PHILIP E. RODGERS, JR.

CREST FINANCIAL, INC., and STATE OF MICHIGAN, DLEG, UNEMPLOYMENT INSURANCE AGENCY,

Appellee.
/

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DECISION ON APPEAL

Appellant Aileen Gomery ("Claimant" or "Gomery") was employed as a mortgage loan originator/assistant with Crest Financial ("Crest") from October 29, 2000 through June 10, 2002. She was fired on June 10, 2002. A Leelanau County jury unanimously determined that Gomery was wrongfully discharged. See, *Gomery v Crest Financial*, Leelanau County Circuit Court File No. 02-5951-CZ.

Gomery applied for unemployment benefits. The matter was initially heard by an Administrative Law Judge ("ALJ") on December 8, 2004. The ALJ determined that Appellant was ineligible for benefits pursuant to Section 28(1)(c) of the Michigan Employment Security Act, MCL 421.28(1)(c) for the period of December 1, 2002 through March 8, 2003 because she was not available to work as she devoted her time to establishing her own business. The Employment Security Board of Review ("Board") affirmed.

Gomery appealed that decision and this Court remanded the matter for further proceedings before the ALJ by order dated December 9, 2005. Pursuant to that order, the ALJ was to allow the parties to reopen proofs on the issue of whether one or more of the witnesses

called to testify at the original hearing engaged in perjury and any new witnesses were to be questioned only with regard to whether one or more of the witnesses testified falsely at the earlier hearing. The witnesses were to be advised of their Fifth Amendment right and, if any witness asserted his or her Fifth Amendment right, the questioning of that witness was to cease. In issuing an opinion following the rehearing, the ALJ was to determine whether he relied on false testimony and whether it made a difference with regard to his opinion. If the ALJ believed that any witness may have engaged in perjury, he was to report his suspicions and basis thereof to the Leelanau County Prosecutor.

A second hearing was held on July 14, 2006. The two former employees of the law firm who testified at the initial hearing advised the ALJ that they were going to invoke their Fifth Amendment right not to testify and they were excused from the hearing.

Gomery called witnesses to refute the testimony given by these two witnesses at the initial hearing regarding the nature and meaning of Gomery's activities during her period of unemployment. The ALJ again found Gomery ineligible for benefits because he found "the claimant failed to demonstrate a genuine attachment to the labor market." The Board affirmed.

This is an appeal from the decision of the Board again finding Appellant ineligible for unemployment benefits pursuant to Section 28(1)(c) of the Employment Security Act for the period of December 1, 2002 through March 8, 2003.

STANDARD OF REVIEW

The Michigan Employment Security Act ("MESA") is a remedial act that was designed to "'safeguard the general welfare through the dispensation of benefits intended to ameliorate the disastrous effects of involuntary unemployment.'" *Korzowski v Pollack Industries*, 213 Mich App 223, 228-229; 539 NW2d 741 (1995), quoting *Tomei v Gen Motors Corp*, 194 Mich App 180, 184; 486 NW2d 100 (1992); see also MCL § 421.2. The MESA should be liberally construed to afford coverage and strictly construed to effect disqualification. *Empire Iron Mining Partnership v Orhanen*, 455 Mich 410, 416; 565 NW2d 844 (1997).

This Court's review of an administrative agency's decision is limited to determining whether the decision was contrary to law, was supported by competent, material, and substantial evidence on the whole record, was arbitrary or capricious, was clearly an abuse of discretion, or was otherwise affected by a substantial and material error of law. Const 1963, art 6, § 28; MCL 24.306; *Boyd v Civil Service Comm*, 220 Mich App 226, 232; 559 NW2d 342

(1996). "Substantial" evidence means evidence that a reasoning mind would accept as sufficient to support a conclusion. *Kotmar, Ltd v Liquor Control Comm*, 207 Mich App 687, 689; 525 NW2d 921 (1994). Courts should accord due deference to administrative expertise and not invade administrative fact finding by displacing an agency's choice between two reasonably differing views. *MERC v Detroit Symphony Orchestra*, 393 Mich 116, 124; 223 NW2d 283 (1974); *In re Kurzyniec Estate*, 207 Mich App 531, 537; 526 NW2d 191 (1994).

I.

WHETHER THE BOARD ERRED BECAUSE THE ALJ DID NOT DRAW AN ADVERSE INFERENCE FROM THE WITNESSES INVOKING THEIR FIFTH AMENDMENT RIGHT NOT TO TESTIFY

Gomery claims that the Board erred as a matter of law in refusing to draw an adverse inference from the two former employees of her husband's law office invoking their Fifth Amendment right not to testify at the second hearing.

The self-incrimination prohibition in the constitution provides: "No person shall be compelled in any criminal case to be a witness against himself * * *." Const 1963, art 1, § 17. The privilege against self-incrimination under the Michigan Constitution is no more extensive than the privilege afforded by the Fifth Amendment of the United States Constitution. The constitutional protection is triggered when a person is "compelled" to testify.

A statutory immunity provision which substitutes for the constitutional protection is triggered when a person is "ordered" to testify. The statute is triggered by the witness's refusal to testify or invocation of the privilege against self-incrimination. Immunity statutes are not self-executing. *United States v Silkman*, 543 F2d 1218 (CA8, 1976), cert den 431 US 919; 97 S Ct 2185; 53 L Ed 2d 230. The privilege against self-incrimination is waived if it is not claimed. *Rogers v United States*, 340 US 367; 71 S Ct 438; 95 L Ed 344 (1951); *Matter of Stricklin*, 148 Mich App 659, 664; 384 NW2d 833(1986).

The privilege against self-incrimination not only permits a person to refuse to testify against himself at a criminal trial in which he is a defendant, but also permits him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings. *Allen v Illinois*, 478 US 364, 368; 106 S Ct 2988, 2991; 92 L Ed 2d 296 (1986); *Stricklin, supra* at 663.

The United States Supreme Court in *McCarthy v Arndstein*, 266 US 34, 40; 45 S Ct 16, 17; 69 L Ed 158, 161 (1924), said:

> The government insists, broadly, that the constitutional privilege against self-incrimination does not apply in any civil proceeding. The contrary must be accepted as settled. The privilege is not ordinarily dependent upon the nature of the proceeding in which the testimony is sought or is to be used. It applies alike to civil and criminal proceedings, wherever the answer might tend to subject to criminal responsibility him who gives it.

This principle has been codified in the Revised Judicature Act:

> Any competent witness in a cause shall not be excused from answering a question relevant to the matter in issue, on the ground merely that the answer to such question may establish, or tend to establish, that such witness owes a debt, or is otherwise subject to a civil suit; But this provision shall not be construed to require a witness to give any answer which will have a tendency to accuse himself of any crime or misdemeanor, or to expose him to Any penalty or forfeiture, nor in any respect to vary or alter any other rule respecting the examination of witnesses. MCL § 600.2154.

In *US v Maloney*, 262 F2d 535 (CA2 (NY) 1959), the Court held that refusal of a witness to answer a question on the ground that the answer might tend to incriminate him may not be used as a basis for inferring what the answer would have been. In fact, the only instance in which the Fifth Amendment does not forbid adverse inferences is when *parties* to a civil action refuse to testify in response to probative evidence offered against them. In other words, the amendment does not preclude the adverse inference where the privilege is claimed by a *party* to a civil cause. *Baxter v Palmigiano*, 425 US 308, 318; 96 S Ct 1551, 1557; 47 L Ed 2d 810 (1976), citing 8 Wigmore, Evidence, 439 (McNaughton rev, 1961). See also *Estate of Ellis*, 143 Mich App 456; 372 NW2d 592 (1985).

Section 9 of the MESA, MCL 421.9, contains an immunity provision:

> No person shall be excused from testifying or from producing any books, records or papers in any investigation, or upon any hearing, when ordered to do so by the commission, or its duly authorized agents, upon the ground that the testimony or evidence, documentary or otherwise, may tend to incriminate him or subject him to a criminal penalty; but no person shall be prosecuted or subjected to any criminal penalty for, or on account of, any transaction made or thing concerning which he is compelled, upon the claiming of his privilege to testify. No person so testifying shall be exempt from prosecution and punishment for perjury committed in so testifying.

In *People v Parsons*, 142 Mich App 751; 371 NW2d 440 (1985), the Court found it would be reasonable to construe a similarly-worded provision in the Taxation Code as preserving a person's state and federal constitutional privileges against self-incrimination, but at the same time allowing the Commissioner to gather testimony and information to carry out its duty to enforce the law.

In this case, the witnesses were not parties. They had an absolute right to invoke the Fifth Amendment and not testify. The ALJ was ordered by this Court to cease questioning of any witness who invoked the Fifth Amendment. The ALJ complied with that order.

In his decision, the ALJ stated:

> The claimant has asserted that the ALJ may infer from the decision of [the witnesses] to assert their Fifth Amendment privilege that they have made a tacit admission of perjury. . .
>
> The ALJ finds no merit to that argument either. To accept the claimant's position would constitute a total disregard by the ALJ of the purpose of the Fifth Amendment privilege. The ALJ rejects that argument and will not infer anything regarding the issue of perjury by either [witness] because of their decision to assert their privilege against self-incrimination.

The ALJ did not err in failing to make an adverse inference. Rather, he did exactly what he should have done - "not infer anything."

II.

WHETHER THERE IS COMPETENT, MATERIAL AND SUBSTANTIAL EVIDENCE ON THE WHOLE RECORD TO SUPPORT THE BOARD'S DECISION

Gomery contends that the Board's decision to affirm the ALJ was not supported by competent, substantial and material evidence on the whole record because the ALJ gave controlling weight to the testimony of the two witnesses from the first hearing who did not testify at the second hearing and whose testimony at the first hearing was met with "undisputed, contradictory evidence" at the second hearing.

In this case, the ALJ was called upon to determine an issue of credibility. This is exactly the type of situation where this Court must defer to the fact finder.

> Such review must be undertaken with considerable sensitivity in order that the courts accord due deference to administrative expertise and not invade the province of exclusive administrative fact-finding by displacing an agency's choice between two reasonably differing views. *Michigan Employment Relations*

Comm v Detroit Symphony Orchestra, Inc, 393 Mich 116, 124; 223 NW2d 283 (1974).

The Court must adequately consider the finding of credibility made by the ALJ and upheld by the Board. This Court is not in a position to accurately assess the credibility of the persons who testified before the ALJ, and therefore is handicapped in according the testimony a fair weighted value. The ALJ--who observed the witnesses and their demeanor-- found that the Claimant presented "conflicting and ambiguous testimony" and gave "inconsistent, contradictory testimony several times in her deposition before trial in her civil suit, at the trial of that matter, and in her testimony in both hearings held in this matter." The ALJ concluded:

> However, the Administrative Law Judge takes note that the claimant's testimony throughout this matter, as well as at her depositions and civil trial remained consistently inconsistent and ambiguous. That fact, in large measure, caused the Administrative Law Judge to give it very little weight when reaching his initial Decision. Despite the inconsistencies and ambiguities, the Administrative Law Judge noted that her demeanor at the second unemployment hearing appeared sincere. Therefore, the Administrative Law Judge does not find that she perjured herself.

A refined scale-tipping analysis of the evidence in this case is obviated when the weight assigned to the Claimant's testimony is taken into consideration. This Court finds that the ALJ did not err in making a credibility determination that lead him to conclude that the Claimant's testimony was not credible and that she was not eligible for benefits.

III.

WHETHER THE FINDING THAT CLAIMANT WAS NOT AVAILABLE FOR SUITABLE, FULL-TIME WORK WAS SUPPORTED BY COMPETENT, MATERIAL AND SUBSTANTIAL EVIDENCE ON THE WHOLE RECORD

Gomery contends that the ALJ erred when he found that she was not available for full-time work during the period of unemployment. She believes that the ALJ's determination was based on the false testimony of two of the witnesses regarding the nature of her activities during the period of unemployment.

MCL 421.28(1) provides, in pertinent part, as follows:

> An unemployed individual shall be eligible to receive benefits with respect to any week only if the commission finds that:

* * *

(c) Ability and availability to perform full-time work. The individual is able and available to perform suitable full-time work of a character which the individual is qualified to perform by past experience or training, which is of a character generally similar to work for which the individual has previously received wages, and for which the individual is available, full time, either at a locality at which the individual earned wages for insured work during his or her base period or at a locality where it is found by the commission that such work is available.

A claimant is eligible under § 28(1) of the MESA when the claimant (1) is registered for work, has continued to report to the unemployment office as prescribed by the commission, and is seeking work, unless this requirement is waived by the commission, (2) makes a claim for benefits, and (3) is able and available to perform suitable full-time work of a character for which he is qualified by past experience or training. MCL § 421.28.

In determining whether the work is "suitable," the commission looks at criteria set out in § 29(6) which provides:

(6) In determining whether work is suitable for an individual, the commission shall consider the degree of risk involved to the individual's health, safety, and morals, the individual's physical fitness and prior training, the individual's length of unemployment and prospects for securing local work in the individual's customary occupation, and the distance of the available work from the individual's residence. Additionally, the commission shall consider the individual's experience and prior earnings, but an unemployed individual who refuses an offer of work determined to be suitable under this section shall be denied benefits if the pay rate for that work is at least 70% of the gross pay rate he or she received immediately before becoming unemployed.

In *Bolles v Employment Security Commission*, 361 Mich 378, 385; 105 NW2d 192, 195 (1960), our Supreme Court declared:

Such * * * is the purpose of the requirement (for eligibility to benefits) that a claimant be 'able and available' to work, that he register for work, and seek work. These * * * are indicia of genuine attachment to the labor market.

In *Dwyer v Unemployment Compensation Commission*, 321 Mich 178, 188--189; 32 NW2d 434 (1948), the Court defined "availability" as follows:

The basic purpose of the requirement that a claimant must be available for work to be eligible for benefits is to provide a test by which it can be determined whether or not the claimant is actually and currently attached to the labor market. To be available for work within the meaning of the act, the claimant must be genuinely attached to the labor market, i.e., he must be desirous to obtain

employment, and must be willing and ready to work. 321 Mich 178, 188, 189; 32 NW2d 434, 438.

The requirement that a claimant for unemployment compensation, to be eligible for benefits, be "able and available" for work and "seeking work" means that he must be genuinely attached to the labor market, i.e., he must be desirous of obtaining employment and must be willing and ready to work." MCL § 421.28(1)(c); *Bingham v American Screw Products Co*, 398 Mich 546; 248 NW2d 537 (1976).

In his initial decision, the ALJ found that Gomery was not available for work because she was "engaged in a business of her own." In his most recent decision, the ALJ admits that he erred because "he misunderstood the testimony" of the two witnesses who testified regarding the Claimant's activities during the unemployment period. These witnesses offered testimony at the initial hearing, supported by documentation, that the Claimant engaged in activities that were indicative of preparations to start a business. The witnesses both testified about conclusions they drew from their observations, but they admitted under cross-examination that they could not be certain that the Claimant spent her time setting up a business. The ALJ did not find that these witnesses presented "deliberate falsehoods on material facts in order to mislead the ALJ" or that they "perjured themselves."

After the rehearing, the ALJ concluded that the Claimant was ineligible for benefits, not because she spent her time setting up a business, but because she was otherwise not available for work

The Court, having reviewed the whole record, agrees. In his most recent decision, the ALJ focused almost entirely on Gomery's testimony. Gomery admitted that even though she has previously worked as a paralegal, a commercial real estate leasing agent assistant, and manager of a real estate title insurance company office, she "never sought work as a paralegal, commercial real estate leasing agent assistant, or title company office manager during the period of her unemployment." In addition, she admitted that that she only "sought similar work as a mortgage loan originator."

The ALJ further noted that Gomery "made only four contacts with prospective employers" and "three of those contacts involved several months of negotiations." She entered into negotiations with one potential employer in November and subsequently received a letter from another potential employer that the ALJ reasonably interpreted as an offer of employment, if "you have interest in pursuing this position." Instead of pursuing that opportunity, she held

out for an offer from the employer with whom she had previously entered into negotiations. From all of this the ALJ reasonably concluded that "the claimant allowed the negotiations to drag out for such a long time in order to obtain an offer of a specific, preconceived level of income and benefits, while being unwilling to accept any lesser offer."

The ALJ concedes that a claimant may hold out for work similar in character and wages to that last performed for a "reasonable time" after the loss of employment, but after a reasonable time, it becomes incumbent on the claimant to lower her standards as to the type of work and level of remuneration. He found that Gomery, contrary to the requirements of Section 28(1)(c), "would not settle for any employment except as a mortgage originator" and he concluded that this was the reason that Gomery remained unemployed for eight months and, therefore, was not "attached to the labor market" and ineligible for benefits.

CONCLUSION

Based on the whole record, the Board's decision affirming the ALJ's decision should be affirmed. It was appropriate for the ALJ to refuse to make an adverse inference from the witnesses' invoking their Fifth Amendment rights and refusing to testify. Also, there is competent, material and substantial evidence on the whole record to support the ALJ's finding that the Claimant was not "available to perform suitable full-time work" because she only "sought similar work as a mortgage loan originator."

Counsel for the State of Michigan, DLEG, Unemployment Insurance Agency shall file and serve a proposed judgment, pursuant to MCR 2.602(B)(3), that is consistent with this decision.

IT IS SO ORDERED.

This decision resolves the last pending claim and closes the case.

HONORABLE PHILIP E. RODGERS, JR.
Circuit Court Judge

Dated: 6/12/04