STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF GRAND TRAVERSE

CANDICE DANA,

Claimant/Appellant,

v

File No. 01-21595-AE
HON. PHILIP E. RODGERS, JR.

AMERICAN YOUTH FOUNDATION,

Employer/Appellee,

and

UNEMPLOYMENT AGENCY, MICHIGAN DEPARTMENT OF CONSUMER AND INDUSTRY SERVICE,

Appellee.

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Attorney for Claimant/Appellant

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Attorney for Appellee

DECISION ON APPEAL

This is an appeal of an unemployment insurance case. Claimant Candice Dana was a participant in AmeriCorps and performed services for Appellee American Youth Foundation's Rural Strategic Action Initiative. She worked for this entity from October 30, 1995 through August 31, 1996 when her employer did not renew her contract.

Claimant attempted to secure unemployment compensation benefits under the Michigan Employment Security Act (the "Act"). Claimant filed a claim for unemployment compensation with the Michigan Employment Security Commission, now known as the State of Michigan, Unemployment Agency, Department of Consumer and Industry Services (the "Agency"). This case

has had a convoluted procedural history. It is sufficient to say that the Agency found the Claimant ineligible for benefits under pertinent provisions of the Act, MCL 421.42, because it found that the services she performed were not in "covered employment." The Claimant/Appellant requested an evidentiary hearing and proceedings were convened before the Referee who affirmed her ineligibility. The Board of Review initially reversed the Referee. The Agency moved for rehearing. On rehearing, the Board of Review affirmed the Referee. The Claimant/Appellant appealed that decision to this Court.

STANDARD OF REVIEW

This Court must follow the review methods prescribed in MCLA Const Art 6, § 28 which provides in pertinent part:

> All final decisions, findings, rulings and orders of any administrative officer or agency existing under the constitution or by law, which are judicial or quasi-judicial and affect private rights or licenses, shall be subject to direct review by the courts as provided by law. This review shall include, as a minimum, the determination whether such final decisions, findings, rulings and orders are authorized by law; and, in cases in which a hearing is required, whether the same are supported by competent, material and substantial evidence on the whole record.

All final decisions of administrative officers shall be subject to direct review by courts and this review shall include, at a minimum, the determination of whether such final decisions are authorized by law and, in cases in which hearing is required, whether the same are supported by competent and substantial evidence on the whole record. *Carleton Sportsman's Club v Exeter Township*, 217 Mich App 195, 199, 550 NW2d 867 (1996).

Generally, administrative decisions are to be affirmed if supported by material, competent, and substantial evidence on the record as a whole. *Nationwide Mut Ins Co v Commissioner of Ins,* 129 Mich App 610, 341 NW2d 841, (1983); *Ron's Last Chance, Inc v Liquor Control Comm* 124 Mich App 179, 333 NW2d 502 (1983); *Sponick v City of Detroit Police Dep't*, 49 Mich App 162 211 NW2d 674 (1973); *Application of First Michigan Bank & Trust Co, Zeeland*, 44 Mich App 83, 205 NW2d 54 (1972); *King v Calumet & Hecla Corp,* 204 Mich App 319, 43 NW2d 286 (1972); *Fisher-New Center Co v Michigan State Tax Comm,* 381 Mich 713, 167 NW2d 263 (1969). This Court cannot disturb an order or decision of the board of review unless the order or decision is

contrary to law or not supported by competent, material, and substantial evidence on the record as a whole. MCL § 421.38(1); MSA § 17.540(1), Const1963, art 6, § 28, *Allied Building Service Co v MESC*, 93 Mich App 500; 286 NW2d 895 (1979).

ISSUE

The issue presented is whether the Board of Review's determination that services performed by the Claimant/Appellant as a member of AmeriCorps for American Youth Foundation are not in "covered employment" under the Michigan Employment Security Act is supported by competent material and substantial evidence on the whole record.

FACTS

The facts surrounding the Claimant/Appellant's employment are established on the record. The Claimant/Appellant picked up an AmeriCorps application at the Mount Pleasant, Michigan, Employment Security Commission branch office when she was looking for employment. She filled it out and was later contacted by the American Youth Foundation (AYF). She signed an agreement entitled, "Agreement of Rural Strategic Action Initiative, Michigan's AmeriCorps Program," which covered the period of October 30, 1995 until August 31, 1996. The agreement was also signed by the Director of Operations of AYF. The agreement sets forth the Claimant/Appellant's duties and responsibilities, the minimum number of hours that may be spent in training and educational activities, and the compensation and benefits owed to the Claimant/Appellant. It also contains the Claimant/Appellant's promise that she will adhere to the program's policy and procedure manual.

Appellee AYF is a national organization based in St. Louis, Missouri, that has expertise in "service learning." It operates and provides training for other AmeriCorps programs. It is for the most part privately funded but it also receives federal and state grant moneys. The Claimant/Appellant testified that she worked full time for AYF on its Rural Strategic Action Initiative program which was funded by a grant for AmeriCorps projects. She was part of a team, had several different assignments and was supervised at every site. She worked as a model for and leader of volunteers, starting projects and recruiting and training volunteers to take over the projects.

The Claimant/Appellant received approximately $722 per month from AYF. According to the agreement, this money was a "living stipend." The money was disbursed to the Claimant/Appellant by AYF as payroll checks with taxes and social security payments deducted. The Claimant/Appellant testified that being an AmeriCorps member provided better benefits than any other Michigan job she had previously had. She further testified that she used the money she received for gas and food and that AYF reimbursed her for her expenses. At the end of her service she received an award in the amount of $4,725 for her education. AYF completed a 1996 W-2 tax statement for the Claimant/Appellant in which AYF was listed as Claimant/Appellant's "employer" and the compensation that she received was listed as "wages."

The AYF witness testified that AYF employees are eligible for unemployment benefits, but that AmeriCorps members assigned to AYF are not considered by AYF as employees of AYF. She further testified that the duties and responsibilities of the AYF employees and the AmeriCorps members are not interchangeable. She testified that an AmeriCorps member's stipend is not based on hours worked or performance of duties assigned and that there is no connection between the hours worked and the payment. However, she admitted there could be a reduction in the stipend for disciplinary purposes or if the member was ill a certain percentage of days. She further testified that as AYF Project Director, she was responsible for maintaining the records of the Claimant/Appellant's participation in the program.

LAW AND ANALYSIS

The Claimant/Appellant relies upon application of the economic reality test under the Michigan Employment Security Act to determine whether services of an AmeriCorps participant are covered employment for the purposes of the Act. Counsel for the Appellees argues that neither federal nor state law supports a finding that services as an AmeriCorps member are covered employment. This Court agrees with the Claimant/Appellant.

The Appellee's argument ignores the fact that nothing in the federal or state employment securities laws specifically excludes AmeriCorps participation from covered employment. In *Wimberly v Labor and Industrial Relations Comm of Missouri*, 479 US 511; 107 S Ct 821 (1987), the United States Supreme Court said:

The Federal Unemployment Tax Act (Act), 26 USC § 3301 et seq., enacted originally as Title IX of the Social Security Act in 1935, 49 Stat. 639, envisions a cooperative federal-state program of benefits to unemployed workers. See *St. Martin Evangelical Lutheran Church v South Dakota*, 451 US 772, 775; 101 S Ct 2142, 2144; 68 L Ed 2d 612 (1981). The Act establishes certain minimum federal standards that a State must satisfy in order for a State to participate in the program. See, 26 USC § 3304(a).

Apart from the minimum standards reflected in § 3304(a), the Act leaves to state discretion the rules governing the administration of unemployment compensation programs. See, *Steward Machine Co v Davis*, 301 US 548; 57 S Ct 883; 81 L Ed 1279 (1937). State programs, therefore, vary in their treatment of the distribution of unemployment benefits, although all require a claimant to satisfy some version of a three-part test. First, all States require claimants to earn a specified amount of wages or to work a specified number of weeks in covered employment during a 1-year base period in order to be entitled to receive benefits. Second, all States require claimants to be 'eligible' for benefits, that is, they must be able to work and available for work. Third, claimants who satisfy these requirements may be 'disqualified' for reasons set forth in state law. The most common reasons for disqualification under state unemployment compensation laws are voluntarily leaving the job without good cause, being discharged for misconduct, and refusing suitable work.

* * *

Each State has the power to make the policy choice authorized by Title IX of the Social Security Act regarding the particular type of unemployment compensation program they may provide.

The public policy provision of the Michigan Employment Security Act reads as follows:

> Sec. 2. DECLARATION OF POLICY. The legislature acting in the exercise of the police power of the state declares that the public policy of the state is as follows: Economic insecurity due to unemployment is a serious menace to the health, morals, and welfare of the people of this state. Involuntary unemployment is a subject of general interest and concern which requires action by the legislature to prevent its spread and to lighten its burden which so often falls with crushing force upon the unemployed worker and his family, to the detriment of the welfare of the people of this state. Social security requires protection against this hazard of our economic life. Employers should be encouraged to provide stable employment. The systematic accumulation of funds during periods of employment to provide benefits for periods of unemployment by the setting aside of unemployment reserves to be used for the benefit of persons

> unemployed through no fault of their own, thus maintaining purchasing power and limiting the serious social consequences of relief assistance, is for the public good, and the general welfare of the people of this state.

The Employment Security Act, § 421.1 et seq., was intended primarily for the benefit of those involuntarily unemployed, in other words, those who, capable of working, are prevented from doing so other than by the results of their own acts. *Holland Motor Exp, Inc v Michigan Employment Sec Comm*, 42 Mich App 19; 201 NW2d 308 (1972); *I.M. Dach Underwear Co v Michigan Employment Sec Comm*, 347 Mich 465; 80 NW2d 193 (1959). The pertinent provisions of Employment Security Act must be read in light of purpose of legislature in enacting it. *Id.* Courts are without power to deprive those entitled to unemployment compensation benefits of those benefits unless they are expressly precluded therefrom by provisions of the Michigan Employment Security Act. *Copper Range Co v Michigan Unemployment Compensation Comm*, 320 Mich 460; 31 NW2d 692 (1948).

The Appellees argue that Claimant/Appellant's AmeriCorps services are excluded from unemployment insurance coverage under MCL 421.43(o)(v) of the Act which reads as follows:

> (o) For purposes of section 42 (8), (9), and (10), "employment" does not apply to service performed in any of the following situations:
>
> (v) As part of an unemployment work-relief or work-training program assisted or financed in whole or in part by a federal agency or an agency or a state or political subdivision of a state by an individual receiving the work relief or work training.

It is Appellees' position that as a participant in AmeriCorps, the Claimant/Appellant was engaged in an "unemployment work-relief or work-training program." The Appellees rely upon the language used in the National and Community Services Act (NSCA) which created the National and Community Services Corporation and funds AmeriCorps. However, according to the AmeriCorps website, AmeriCorps engages more than 40,000 Americans in "intensive, results-driven *service* each year." AmeriCorps provides "opportunities for Americans of all ages to *serve* their communities." AmeriCrops members "train volunteers, tutor and mentor at-risk youth, build housing, clean up rivers and streams, help seniors live independently, provide emergency and long-term assistance to victims of natural disasters, and meet other community needs." As an AmeriCorps member, one is

eligible for a variety of benefits, including money for college and, if you serve full-time, a modest living allowance - "You won't get rich from it, but other AmeriCorps members have found that it covers their basic expenses." Members also receive health insurance and may qualify for child care assistance and reimbursement of relocation expenses. As an AmeriCorps member, "you'll get a super career experience and job satisfaction."

This language does not describe a work-relief or work-training program. Instead, it describes an employment opportunity; an opportunity to provide services for compensation.

MCL §421.42; MSA § 17.545 provides in pertinent part as follows:

> (1) 'Employment' means service, including service in interstate commerce, performed for remuneration or under any contract of hire, written or oral, express or implied.

At common law a "right of control" test was used to determine whether or not an employer-employee relationship existed. *Powell v Employment Security Comm*, 345 Mich 455; 75 NW2d 874 (1956). In *Goodchild v Erickson*, 375 Mich 289, 293; 134 NW2d 191 (1965), a workers' compensation case, the Supreme Court declared that the "control" test had been abandoned as the "exclusive criterion by which the existence of an employee-employer relationship, for the purposes of remedial social legislation, is determined." In *Industro-Motive Corp v Wilke*, 6 Mich App 708, 712; 150 NW2d 544 (1967), the Court of Appeals held that based upon *Goodchild, supra*, the Supreme Court had abrogated the use of the common law "control" test in interpreting social legislation "which we hold includes employment security legislation as well as workmen's compensation legislation." Control is only one of the many factors to be considered. The test now is based on "economic reality." *McKissic v Bodine,* 42 Mich App 203; 201 NW2d 333 (1972).

Under the economic reality test, among the relevant factors to be considered are (1) control of a worker's duties, (2) the payment of wages, (3) the right to hire and fire and the right to discipline, and (4) the performance of the duties as an integral part of the employer's business towards the accomplishment of a common goal. *Askew v Macomber*, 398 Mich 212, 217-218; 247 NW2d 288 (1976). A more comprehensive set of eight criteria was delineated in *McKissic v Bodine*, 42 Mich App 203, 208-209; 201 NW2d 333 (1972) aff'd *Solakis v Roberts*, 395 Mich 13, 25 (1975). These criteria are:

First, what liability, if any, does the employer incur in the event of the termination of the relationship at will?

Second, is the work being performed an integral part of the employer's business which contributes to the accomplishment of a common objective?

Third, is the position or job of such a nature that the employee primarily depends upon the emolument for payment of his living expenses?

Fourth, does the employee furnish his own equipment and materials?

Fifth, does the individual seeking employment hold himself out to the public as one ready and able to perform tasks of a given nature?

Sixth, is the work or the undertaking in question customarily performed by an individual as an independent contractor?

Seventh, control, although abandoned as an exclusive criterion upon which the relationship can be determined, is a factor to be considered along with payment of wages, maintenance of discipline and the right to engage or discharge employees.

Eighth, weight should be given to those factors which will most favorably effectuate the objectives of the statute.

Keeping in mind the purposes of the statute, the foregoing rules should be applied as a whole and on a basis of common sense. No one can be singled out as controlling. By way of illustration, an automobile mechanic usually furnishes his own tools, but if hired to work in a public garage would undoubtedly be classified as an employee. *Id.*

In the instant case, the Board of Review found that the Claimant/Appellant did not establish she performed any services in "covered employment" for AYF. This was based upon the Board's findings that the factors set forth in *Askew, supra,* weighed against finding that an employment relationship existed between the Claimant/Appellant and Appellee AYF. The Board specifically found that even though AYF paid the Claimant/Appellant, the Claimant/Appellant failed to establish that (1) AYF directed and controlled her activities; (2) she performed duties under the direction of AYF; and that (3) AYF hired, fired and had the right to discipline her.

These findings are not, however, supported by competent, material and substantial evidence on the record. Looking at the totality of the circumstances in this case, the economic reality is that the Claimant/Appellant provided services to AYF that constitute "covered employment."

First, the record establishes that the Claimant/Appellant filled out and submitted an AmeriCorps application and was contacted by AYF. The Claimant/Appellant and AYF entered into an agreement whereby Claimant/Appellant was to perform certain full time duties and have certain responsibilities and AYF was to pay her a monthly amount that would cover her living expenses. The Claimant/Appellant worked on AYF's Rural Strategic Action Initiative. The Initiative was funded by AmeriCorps grant money which was applied for by AYF. As a full time worker for AYF, the Claimant/Appellant was not available to perform tasks of a comparable nature for others.

Second, AYF controlled the Claimant/Appellant's duties. Their agreement spelled out her duties and responsibilities. The Claimant/Appellant had various assignments, but was supervised at every site by AYF staff. Her schedule varied depending on the assignment. AYF maintained Claimant/Appellant's records in the program.

Third, AYF paid the Claimant/Appellant wages. AYF disbursed payroll checks to the Claimant/Appellant, withheld taxes and social security and issued a 1996 W-2 in which AYF is listed as "employer" and the compensation is reported as "wages." The Claimant/Appellant did not provide her own equipment or materials. Instead, AYF reimbursed her for her expenses. Claimant/Appellant testified that the benefits she received were the best she had received for any employment in Michigan. She relied upon the payments to meet her living expenses.

Fourth, AYF had the right to hire and fire and discipline the Claimant/Appellant. AYF's witness testified that the Claimant/Appellant's compensation was not based on hours worked, but nonetheless could be reduced for disciplinary purposes or if she was ill for a certain percentage of days.

Fifth, the performance of her duties was an integral part of AYF's business, to-wit: providing services to the community. AYF is a national organization that operates and provides training for other AmeriCorps programs. The Claimant/Appellant's duties included starting community service projects and then being a model for, recruiting and training volunteers to take over and run the

projects. These duties were an integral part of AYF's Rural Strategic Action Initiative that was designed to implement the AmeriCorps program in three Michigan counties.

And finally, the public policy of this State supports a finding of an employment relationship. The Employment Security Act, § 421.1 et seq., was intended primarily for the benefit of those involuntarily unemployed. *Holland Motor Exp, Inc v Michigan Employment Sec Comm, supra*; *I.M. Dach Underwear Co v Michigan Employment Sec Comm, supra*. The Legislature did not expressly exclude those who work for grant-funded service organization programs from those entitled to unemployment compensation benefits. If the Legislature had wanted to do so, it certainly could have written a precise exclusion. Instead, it defines "employment" to include those who, like the Claimant/Appellant, work full time for an organization that defines and controls their duties and responsibilities and compensates them for their time and effort. When their contract expires, they are unemployed through no fault of their own and, pursuant to the public policy of this State, they are entitled to unemployment compensation benefits. This Court is without the power to deprive Claimant/Appellant of unemployment compensation benefits. *Copper Range Co v Michigan Unemployment Compensation Comm, supra.*

CONCLUSION

Based on a thorough review of the record and the proper application of the economic reality test to the totality of the circumstances in this case, the Court concludes that the Claimant/Appellant performed services that constitute "covered employment" under the Michigan Employment Security Act and is, therefore, entitled to unemployment compensation benefits.

The decision of the Board of Review is reversed.

HONORABLE PHILIP E. RODGERS, JR.
Circuit Court Judge

Dated: 11/01/01